REPORT #623

TAX SECTION

New York State Bar Association

Report on Proposed Amendments to Rules of Practice and Procedure of United States Tax Court

August 31, 1989

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FEDERAL EXPRESS

The Honorable Herbert L. Chabot
United States Tax Court
400 Second Street N.W.
Washington, D.C. 20217

Dear Judge Chabot:

Enclosed is a Report by our Committee on Practices and Procedures on the Proposed Amendments to Rules of Practice and Procedure of the Tax Court. The principal draftsman of this report was Sydney R. Rubin.

The Report commends the drafting and substantive implementation of the statutory changes in recent revenue acts and generally applauds the accompanying notes for the understanding they contribute. The principal modification suggested is to emphasize more strongly that the right to depose expert witnesses will be granted only very rarely, so that the Court is not unduly burdened with procedural motion from counsel who feel they must vigorously pursue the representation of their client's interests.

Sincerely,

Wm. L. Burke

Enclosures

August 31, 1989

NEW YORK STATE BAR ASSOCIATION
TAX SECTION

Report on Proposed Amendments to Rules of Practice and Procedure of United States Tax Court

This report comments on a number of the proposed amendments to the Rules of Practice & Procedure of the United States Tax Court.

Many of the proposed changes are merely stylistic, clarifying, or are made to reflect gender neutrality. Some, such as new Rule 124 dealing with voluntary binding arbitration, formalize a practice which has been available for some time but which may not be widely known. Other amendments are apparently intended to embody what the Court views as desirable changes whose time has come. But most of the substantive changes are made to implement statutory changes made by recent revenue acts -- the 1986 Tax Reform Act, the Revenue Act of 1987, and the Technical and Miscellaneous Revenue Act of 1988 (TAMRA). Each change is accompanied by a note describing the change and, usually, the reason for it. These notes will undoubtedly be helpful as a kind of “legislative history” in the future. In our view, all of the amendments are well drafted. Those intended to implement the statutory changes all appear to do so in a manner consonant with the language and purpose of the underlying statute. Our comments, therefore, will be limited to a few of the proposed Rules or portions thereof in which we believe that further clarification

or implementation might be appropriate.

RULE 12. COURT RECORDS
RULE 103. PROTECTIVE ORDERS

These Rules will be discussed together. Rule 12(b) provides that after the Court renders its decision, a copy of any "document, record, entry, or other paper, pertaining to the case and still in the custody of the Court, may be obtained upon application* * *." The proposed change simply provides that application is to be made to the Court's Copywork Office, rather than to the Clerk. Rule 103, dealing with protective orders, provides in paragraph (a)(7) that the Court may order that "a trade secret or other information not be disclosed or be disclosed only in a designated way." The statutory authority for Rule 103 is sec. 7461(b)(1) of the Code, [1]which provides that the Court may make any provision necessary to prevent disclosure of trade secrets or other confidential information, including placing documents or information under seal. The proposed amendment to Rule 103 would simply require that the moving party attach as an exhibit to a motion for a Protective Order "a copy of any document in respect of which the motion is filed." The Court's views on protective orders and sealing of records are set forth at length in Willie Nelson Music Company v. Commissioner, 85 T.C. 914 (1985). See also Estate of Louis Yaeger v. Commissioner, 92 T.C. 180 (1989).

While there is no real conflict between Rule 12(b) and Rule 103(a)(7), the unqualified language of Rule 12(b) results in

[1] All Code references are to the Internal Revenue Code of 1986, as amended, unless otherwise indicated.

what might be regarded as a superficial inconsistency with Rule 103(a)(7). Since minor amendments are being made to the two Rules, it might be appropriate to amend Rule 12(b) further simply to call attention to the fact that a protective order might nevertheless be issued, or records sealed, pursuant to sec. 7461(b)(1) of the Code and Rule 103(a)(7). Or a simple cross reference to Rule 103(a)(7) might suffice.

RULE 24. APPEARANCE AND REPRESENTATION

A new paragraph (f) would be added to this Rule which the explanatory note says “is designed to insure that the bar of this Court disclose or rectify conflicts of interest.” Paragraph (f) provides:

> (f) Conflict of Interest: If any counsel of record (i) was involved in planning or promoting a transaction or operating an entity that is connected to any issue in a case, (ii) represents more than one person with differing interests. with respect to any issue in a case, or (iii) is a potential witness in a case, such counsel must either secure the informed consent of the client, withdraw from the case, or take whatever other steps are necessary to obviate a conflict of interest or other violation of the ABA Model Rules of Professional Conduct, and particularly Rules 1.7, 1.8, and 3.7 thereof. The Court may inquire into the circumstances of counsel's employment in order to deter such violations. See Rule 201.

Rule 201(a) already provides that, “Practitioners before the Court shall carry on their practice in accordance with the letter and spirit of the Rules of Professional Conduct of the American Bar Association,” and attorneys are subject to various other codes of

ethics. While we recognize the desirability of the Court's making clear its position on conflicts and its ability to deal with them, we question whether that is not already the case. And we suggest that the additional reference to the ABA Rules may be superfluous or even confusing -- at least without some explanation in the Rule or the note as to why the Court feels that this amendment is necessary.

RULE 56. MOTION FOR REVIEW OF JEOPARDY ASSESSMENT OR JEOPARDY LEVY

RULE 57. MOTION FOR REVIEW OF PROPOSED SALE OF SEIZED PROPERTY

Proposed Rules 56 and 57 are new, implementing Code sections 7429, as amended, and 6863(b)(3)(C). The amendment to sec. 7429 conferred jurisdiction on the Court to review jeopardy assessments and jeopardy levies if a timely petition for redetermination of a deficiency had been filed. And Code sec. 6863(b)(3)(C) conferred jurisdiction on the Court to review the Commissioner's determination that seized property be sold. Both of these statutes were part of the Taxpayer Bill of Rights, included in TAMRA.

Both kinds of review are obtainable only if a petition is already pending before the Court. Accordingly, review is obtained by motion, and the Rules appropriately set forth in detail both what the movant's motion and the Commissioner's response must contain.

As the related notes point out, judicial review in these matters must be completed within a very short period of time.

Rule 56(d)(2) and Rule 57(d)(2) require that the Commissioner's response to the motion “be received by the Court not later than 10 days after the date on which the movant's motion is received by the Court.” In both cases the proposed Rule provides that the petitioner shall serve the motion on counsel for the Commissioner “in such manner as may reasonably be expected to reach the Commissioner’s counsel not later than the day on which the motion is received by the Court.” Rule 56(b); Rule 57(b)(1).

Of course there can be no certainty that these documents will be received on the precise day expected. And there may be other circumstances justifying short extensions in some cases. The Court's present Rule 25(c) provides that, unless precluded by statute, “the Court in its discretion may make longer or shorter any period provided by these Rules.” It might be comforting to parties and their counsel if the explanatory notes to these amendments would indicate that although the prescribed time periods are unqualified and must necessarily be short, the Court may exercise its discretion in appropriate circumstances to grant reasonable extensions under Rule 25(c).

Rule 57(a)(2) provides that the taxpayer's motion for review of proposed sale of seized property must be filed not less than 15 days before the date of the proposed sale nor more than 20 days after receipt of the notice of sale. If the movant's motion is not filed within the required time, it is considered “dilatory” unless the movant files a statement showing good reason for the late filing. Rule 57(a)(2)(ii). And paragraph (g)(4) says that, “The fact that a motion filed pursuant to this Rule is dilatory* * * shall be considered by the Court in

disposing of the motion." If the purpose of paragraph (g)(4) is to help insure that motions are timely made, we certainly agree. But a sanction which would deny an otherwise meritorious motion, resulting in the property being sold, could be unduly harsh on the taxpayer and disproportionate to his counsel's infraction. We assume that the Court would apply the sanction sparingly.

The Note discussing Rule 56 observes that, "the taxpayer may seek review in the Tax Court of all taxes and taxable periods included in the written statement required to be furnished to the taxpayer by the Commissioner under Code sec. 7429(a)(1)[2] if one or more of those taxes and taxable periods are in issue before the Court* * *. See Code sec. 7429(b)(2)(B)." If the petitioner does not file a motion relating to all of the pending actions before the Court for which the motion could have been filed, paragraph (c)(5) of the Rule requires that he identify the other dockets for which the motion could have been filed. The accompanying note says that this information would enable the Court to shift or transfer the motion to another docket in which it could have been filed "if, for example, the docket in which the motion is filed is dismissed for lack of jurisdiction because the notice of deficiency was invalid, or the petition in that docket was not timely filed." Since the

[2] This section requires the Secretary to provide the taxpayer promptly "with a written statement of the information upon which the Secretary relies in making such assessment or levy."

note or commentary might not come to the attention of all affected petitioners or their-counsel, we suggest that the Rule itself could say what the note now does -- that a taxpayer may seek review of all taxes and periods included in the sec. 7429(a)(1) statement if one or more of those taxes and periods are before the Court in a timely-filed action for redetermination of a deficiency. Indeed, it appears that the Court might require by its Rules that all such taxes which the taxpayer wishes to contest be included in the petitioner's motion for review. It would seem that this would promote the economy of time of all concerned.

Returning to our discussion of Rule 57, sec. 6853(b)(3)(C) of the Code which confers jurisdiction on the Court to review the Secretary's determination that property be sold where a timely petition for redetermination has been filed, also provides that the Tax Court's order in response to the taxpayer's motion “shall be reviewable in the same manner as a decision of the Tax Court.” So it appears that the Tax Court’s order, although otherwise interlocutory, is treated for this purpose as an appealable decision, and proposed new paragraph (b) of Rule 190 so provides.

But what happens if the Tax Court denies the taxpayer’s motion to bar the sale, and the taxpayer appeals? Neither the statute nor the proposed Rule addresses the question of a stay in these circumstances. Sec. 7485(a) provides that filing a notice of appeal shall not operate as a stay of assessment or collection of any deficiency which the Tax Court determines unless the

taxpayer files an appropriate bond.[3] But that section does not appear to apply where a deficiency has not yet been determined. To permit the Commissioner to proceed with the sale where the taxpayer has appealed from the Tax Court's order would render the appeal moot and could cause the taxpayer to incur a substantial loss. It appears that the Court could if it chose stay its order denying the motion upon appropriate terms, including the filing of a bond. Or the Court could grant a stay for a very short time, allowing the taxpayer to seek a stay from the Court of Appeals. We suggest that Rule 57 or the commentary might include reference to these or other possible forms of relief in this situation.

RULE 76. DEPOSITION OF EXPERT WITNESSES

Rule 76 is new. It authorizes the deposition of an expert witness upon consent of all of the parties, or upon order of the Court. The accompanying note says that, "The deposition of an expert witness under Rule 76 is an extraordinary method of discovery," and it is solely within the discretion of the Judge or Special Trial Judge whether to order it upon motion of a party. Further, paragraph (f) of the Rule provides that the Court may in its discretion order the taking of an expert's deposition on its own motion.

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[3] Reg. sec. 301.6863-2(b) provides that in any event, seized property may be sold if the District Director determines that the expenses. of conservation and maintenance will greatly reduce the net proceeds from sale, or if the property is perishable.

Rule 76 sets out at length provisions governing the scope of the deposition, the procedure, and the permissible use of the deposition transcript (including its use as an expert witness report if the Court so orders).

Rule 76 would authorize a new method of discovery. Principal purposes would be to help promote settlements and to "enhance trial preparation." It represents an important departure from existing practice, for the Court has refused to permit the deposition of expert witnesses without the consent of the parties. Estate of Van Loben Sels v. Commissioner, 82 T.C. 64, 67-69 (1984).

As the accompanying note says, "An expert witness may be deposed under Rule 76 before the witness has prepared a written report," although not "before either a notice of trial has been issued" or the case has been assigned to a Judge or a Special Trial Judge of the Court." We have some concern that, as a matter of strategy, counsel may move to depose the experts for the other side in almost every case. Indeed they might feel an obligation to do so, and the Court could be deluged with such motions. Also, an expert may not be as fully prepared when his deposition is taken as he would be after preparing his report or at the time of trial, which could lead to possibly unfair use of the deposition to try to impugn the report or trial testimony. The note indicates that the Court will exercise its discretion to order a deposition sua sponte sparingly. We suggest that the same should apply to motions to take experts' depositions, and that practitioners accordingly be discouraged from making such motions rather than encouraged to do so.

RULE 124. VOLUNTARY BINDING ARBITRATION

Rule 124(a) provides that the parties may move to have any factual issue resolved through voluntary binding arbitration at any time after a case is at issue. The procedure requires a stipulation reciting the issues to be resolved, the identity of the arbitrator, prohibition against ex parte communication with the arbitrator, and other matters as the parties deem appropriate. The Court will then appoint an arbitrator whose findings, including any written report, the parties will then report to the Court.

As the note states, Rule 124 is new but the use of this procedure is not. The note observes that voluntary binding arbitration is particularly appropriate in valuation cases, and the Court encourages its use.

In our view, this Rule which apparently formalizes existing practice in some cases is useful and appropriate. It provides another and good vehicle for possible disposition of many cases. We point out only that the procedure should be truly voluntary. If a party prefers to have his case heard by a judge or a special trial judge, that should be his prerogative. The note implicitly so recognizes for it states that the Rule is not intended “to preclude voluntary non-binding arbitration.”

Other Drafting Suggestions for
Proposed Tax Court Rules

Rule 260(c) - Delete “the petitioner now seeks to enforce” and substitute “the petitioner seeks to enforce by such motion”.

Rule 260(e) - Delete “without an evidentiary hearing” and substitute “without such a hearing”.

Rule 260(g) - Delete “of the petitioner” and substitute “by the petitioner”. Same change in Rules 261(d) and 262(d).

Rule 260(e) - Delete “without a hearing” and substitute “without such a hearing”.