Appendix G

FOREIGN EVIDENCE IN TAX LITIGATION

THE FUTURE STATE OF TAX COURT PRACTICE AND LITIGATION

United States Tax Court Judicial Conference

March 24-26, 2018

Chicago, Illinois

Moderator:
Chief Judge L. Paige Marvel, US Tax Court

Panelists:
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Foreign Evidence in Tax Litigation[1]

I. Selected Internal Revenue Code Sections and Treasury Regulations Relating to Foreign Information

A. Section 6038A-D[2] requirements to furnish and maintain records related to foreign ownership and transactions

1. Section 6038A – 25% foreign-owned domestic corporations required to furnish to the IRS and maintain certain records relating to foreign ownership and foreign transactions.

2. Section 6038B – U.S. persons who transfer property to foreign companies or make certain distributions to foreign persons required to furnish information on these transactions to the IRS.

3. Section 6038C – Certain foreign corporations engaged in U.S. trade or business must furnish to the IRS and maintain certain records relating to foreign ownership and transactions.

4. Section 6038D – Certain individuals required to furnish banking information to the IRS.

B. Section 6048 information with respect to certain foreign trusts

1. Under Section 6048(b)(2), a U.S. person who acts as the agent of a foreign trust with a U.S. beneficiary shall not be subject (or have records produced by such agent) to "legal process for any purpose other than determining" the amounts includable by the U.S. beneficiary of the foreign trust.

C. Section 7602(a) authority to summon, etc.

1. The Secretary is authorized to "examine ***any*** books, papers, records, or other data which may be relevant or material" to a tax inquiry, "to summon … ***any*** [] person the Secretary may deem proper" and "to take such testimony of the person concerned, under oath, as may be relevant or material to" a tax inquiry. (Emphasis added.)

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[1] The primary focus of this outline is proceedings in the U.S. Tax Court, although reference is also made to tax litigation in U.S. federal courts. The Court and the panelists gratefully acknowledge the assistance of Patrick Sharma, Gaston Soler and David Marx, all of Latham & Watkins, for their able assistance in the preparation of these materials.

[2] All references to "Section" are to sections of the Internal Revenue Code of 1986, as amended (the "Code"), unless otherwise indicated.

D. Section 7456(b) – Production of records in the case of foreign corporations, foreign trusts or estates and nonresident alien individuals

1. "The Tax Court or any division thereof, upon motion and notice by the Secretary, and upon good cause shown therefor, shall order any foreign corporation, foreign trust or estate, or nonresident alien individual, who has filed a petition with the Tax Court, to produce, or, upon satisfactory proof to the Tax Court or any of its divisions, that the petitioner is unable to produce, to make available to the Secretary, and, in either case, to permit the inspection, copying, or photographing of such books, records, documents, memoranda, correspondence and other papers, wherever situated, as the Tax Court or any division thereof, may deem relevant to the proceedings and which are in the possession, custody or control of the petitioner, or of any person directly or indirectly under his control or having control over him or subject to the same common control. If the petitioner fails or refuses to comply with any of the provisions of such order, after reasonable time for compliance has been afforded to him, the Tax Court or any division thereof, upon motion, shall make an order striking out pleadings or parts thereof, or dismissing the proceeding or any part thereof, or rendering a judgment by default against the petitioner. For the purpose of this subsection, the term 'foreign trust or estate' includes an estate or trust, any fiduciary of which is a foreign corporation or nonresident alien individual; and the term 'control' is not limited to legal control."

E. Foreign Account Tax Compliance Act ("FATCA")

1. Under Sections 1471-1474, foreign financial institutions and certain other non-financial foreign entities are generally required to report to the U.S. government information regarding the foreign assets held by their U.S. account holders or be subject to withholding on certain payments.

2. FATCA is similar to the Common Reporting Standard ("CRS"), an OECD initiative that calls on jurisdictions to obtain information from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis. The CRS draws on earlier OECD work in the area of automatic exchange of information. The U.S. is not party to the CRS regime.

F. Country-by-Country ("CbC") Reporting

1. Under Treas. Reg. § 1.6038-4, the ultimate parent entity of a U.S. multinational enterprise group with annual revenue equal to or greater than $850M must provide to the IRS on Form 8975 basic information about the group's operations on a country-by-country basis.

2. CbC is an outgrowth of the OECD's BEPS project.

II. **Prohibition on Use in Litigation of Foreign Documents Not Timely Produced on Audit**

A. Generally, a taxpayer may not introduce foreign-based documentation in litigation if the taxpayer did not produce such documentation to the IRS on audit.

1. "If the taxpayer fails to substantially comply with any formal document request arising out of the examination of the tax treatment of any item ... before the 90th day after the date of the mailing of such request on motion by the Secretary, any court having jurisdiction of a civil proceeding in which the tax treatment of the examined item is an issue shall prohibit the introduction by the taxpayer of any foreign-based documentation covered by such request." Section 982(a).

2. The purpose of the statute is "to discourage taxpayers from delaying or refusing disclosure of certain foreign based information to the Internal Revenue Service." Conf. Rept. 97–760, to accompany H.R. 4961, 97th Cong., 2d Sess. (1982) ("Conference Report").

3. A formal document request is a "request (made after the normal request procedures have failed to produce the requested documentation) for the production of foreign-based documentation." Section 982(c).

4. Foreign-based documentation is "any documentation which is outside the United States and which may be relevant or material to the tax treatment of the examined item." Section 982(d)(1).

5. "Substantially comply" is not defined in the statute but depends on the particular facts and circumstances.

a) "Whether a taxpayer has substantially complied with a formal document request will depend on all the facts and circumstances. For instance, if the Internal Revenue Service presents a taxpayer with a formal document request for 10 items and the taxpayer produces 9 of them but fails (without reasonable cause) to produce the one requested document that appears to a court to be the most significant item, a court may decide that there has not been substantial compliance and exclude all of the items. However, when the Service issues multiple requests in the course of an audit, and when, for example, the taxpayer fails to comply with one particular request for only one document, the taxpayer's timely satisfaction of other requests is one factor (but not the only factor) to be considered in determining whether his overall compliance has been substantial. If overall compliance in such a situation has been substantial, the document requested but not supplied could be admissible." Conference Report.

B. Reasonable cause exception

1. Section 982(b)(1) states that the general rule of Section 982(a) "shall not apply with respect to any documentation if the taxpayer establishes that the failure to provide the documentation as requested by the Secretary is due to reasonable cause."

a) Foreign nondisclosure laws are not "reasonable cause."

(1) "[T]he fact that a foreign jurisdiction would impose a civil or criminal penalty on the taxpayer (or any other person) for disclosing the requested documentation is not reasonable cause." Section 982(b)(2).

b) Taxpayer's control over foreign records may be determinative

(1) Lack of control over a foreign entity may constitute reasonable cause if supported by the facts and circumstances.

(a) "The conferees recognize that minority status can prevent a taxpayer from being able to produce certain records held by a foreign entity. However, the conferees also recognize that taxpayers may seek to hide behind minority status to avoid production of records. Accordingly, a determination of whether minority status is reasonable cause will be determined by the facts and circumstances of the case." Conference Report.

(2) Practical control over foreign documents may negate reasonable cause exception.

(a) Reasonable cause does not exist where taxpayers had "practical control over the records sought by the IRS." *Yujuico v. United States*, 818 F. Supp. 285, 288 (N.D. Cal. 1993) ("Examples of petitioner['s] [] practical control include the following: divesting stock in a foreign corporation after receiving the government's first request for documents, guaranteeing loans of corporations he claimed he did not own and making loans to and receiving loans from family members who purportedly owned corporations whose records petitioners claimed they could not produce.").

C. Motion to quash

1. Section 982(c)(2) affords a taxpayer to whom a formal document request has been made the right to bring an action in district court to quash the request. Such request must be made no later than the 90th day after the date the request was mailed.

III. **Foreign Documents**

A. Requests for production

1. Tax Court allows discovery of "any" relevant document.

a) "Any party may, without leave of the Court, serve on any other party a request to: Produce and permit the party making the request, or someone acting on such party's behalf, to inspect and copy, test, or sample any designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data compilations stored in any medium from which information can be obtained, either directly or translated, if necessary, by the responding party into a reasonably usable form), or to inspect and copy, test, or sample any tangible thing, to the extent that any of the foregoing items are in the possession, custody, or control of the party on whom the request is served." Rule 72(a)(1).[3]

2. Production by foreign petitioners

a) Section 7456(b) governs production of records by foreign petitioners. Rule 72(c).

b) Section 7456(b), noted above, states that the Tax Court may order production of documents "wherever situated."

B. Letters of request under the Hague Convention

1. In noncriminal cases, a court may also obtain foreign documents via a "letter of request" under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, March 18, 1970, 23 U.S.T. 2555 (the "Hague Convention").

a) "In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or perform some other judicial act." Hague Convention, Art. 1.

b) Both countries must be parties to the Hague Convention ("Contracting States").

[3] All references to "Rule" are to the United States Tax Court Rules of Practice & Procedure, unless otherwise indicated.

(1) Contracting States are listed here: https://www.hcch.net/en/instruments/conventions/status-table/?cid=82.

(2) The United States is a Contracting State.

2. Procedure

a) Party moves that court transmit a letter of request to a court in the foreign country in which the evidence is located.

(1) Courts may deny a motion for a letter of request.

(a) In *Perrigo Co. v. United States*, No. 1:17-CV-737 (W.D. Mich., Feb. 21, 2018), the district court denied the government's request Motion for Issuance of Letters Rogatory, which requested that the court issue a Letter of Request to courts in Israel under the Hague Evidence Convention for documents and information from an Israeli company, Dexcel Pharma Technologies Ltd. ("Dexcel") and from four of Dexcel's current or former officers, including the company's CEO. The court concluded that the proportionality factors of Fed. R. Civ. P. 26 weighed against issuing a Letter of Request to the courts in Israel because of the added delay and cost that will follow from a Letter of Request.

b) Under Article 3 of the Hague Convention, the letter of request must contain information including the identity of the authority issuing the request, the nature of the proceeding for which the evidence is requested, and details regarding the evidence.

c) If the court in the requesting jurisdiction grants the request, the letter of request is sent directly to a "Central Authority" designated by the foreign jurisdiction to receive such letters. The Central Authority forwards the request to the "competent authority" of the jurisdiction, i.e., the judicial body that executes such requests.

d) The competent authority then executes the letter of request in accordance with local law, although it may conduct evidentiary procedures according to the procedure requested by the requesting court in the letter of request. See Articles 9-11 of the Hague Convention.

C. Letters rogatory

1. Similar to a letter of request under the Hague Convention, a party may seek production of foreign documents via a "letter rogatory."

a) A letter rogatory is "a formal request from a court in which an action is pending, to a foreign court to perform some judicial act. Examples are requests for the taking of evidence, the serving of a summons, subpoena, or other legal notice, or the execution of a civil judgment." 22 C.F.R. § 92.54.

b) "A court has inherent authority to issue letters rogatory." See *Perrigo* at 2 (citing *United States v. Reagan*, 353 F.2d 165, 172 (6th Cir. 1971).

2. Similar to a letter of request under the Hague Convention, U.S. courts have discretion to deny a motion to issue a letter rogatory.

a) "A court [] maintains discretion over whether to issue such a letter." See *Perrigo* at 2 (citing *Abraxis BioScience, LLC v. Actavis, LLC*, No. 16-1924 WL 2293347, at *2 (D.N.J. May 25, 2017).

3. Unlike a letter of request under the Hague Convention, letters rogatory are not governed by an international convention. Accordingly, the decision of a foreign court to grant a request under a letter rogatory is discretionary and based on principles of comity and reciprocity.

a) "In United States usage, letters rogatory have been commonly utilized only for the purpose of obtaining evidence. Requests rest entirely upon the comity of courts toward each other, and customarily embody a promise of reciprocity. The legal sufficiency of documents executed in foreign countries for use in judicial proceedings in the United States, and the validity of the execution, are matters for determination by the competent judicial authorities of the American jurisdiction where the proceedings are held, subject to the applicable laws of that jurisdiction." 22 C.F.R. § 92.54.

b) "Because letters rogatory are not transmitted under an international convention, but are based on general principles of comity between nations, they typically are more difficult to pursue effectively. A foreign country receiving a letter rogatory is not obligated to execute the request." Philip R. West, et al., *International Tax Controveries: A Practical Guide* (PLI, 2018), § 10-7.

4. Letters rogatory may be transmitted through the Department of State or directly to the foreign country. 28 U.S.C. § 1781.

IV. Foreign Depositions

A. Rule 81(e)(2) authorizes depositions in a foreign country in three situations.

1. "Before a person authorized to administer oaths or affirmations in the place in which the examination is held, either by the law thereof or by the law of the United States." Rule 81(e)(2).

2. "[B]efore a person commissioned by the Court, and a person so commissioned shall have the power, by virtue of the commission, to administer any necessary oath and take testimony." Rule 81(e)(2).

3. "[P]ursuant to a letter rogatory or a letter of request issued in accordance with the provisions of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. (Part 3) 2555." Rule 81(e)(2).

B. Moving party must consult with State Department

1. "The party seeking to take a foreign deposition shall contact the United States Department of State to ascertain any requirements imposed by it or by the foreign country in which the deposition is to be taken, including any required foreign language translations and any fees or costs, and shall submit to the Court, along with the application, any such foreign language translations, fees, costs, or other materials required." Rule 81(e)(2).

C. Courts have discretion to approve or deny issuances of commissions, letters rogatory, and letters of request under the Hague Convention.

1. "A commission, a letter rogatory, or a letter of request shall be issued on application and notice and on terms that are just and appropriate." Rule 81(e)(2).

2. "It is not requisite to the issuance of a commission, a letter rogatory, or a letter of request that the taking of the deposition in any other manner be impracticable or inconvenient; and both a commission and a letter rogatory, or both a commission and a letter of request, may be issued in proper cases." Rule 81(e)(2).

D. Foreign depositions generally respected

1. "Evidence obtained by [foreign] deposition or in response to a letter rogatory or a letter of request need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions within the United States under these Rules." Rule 81(e)(2).

E. The Hague Convention allows diplomatic officers, consular agents, and persons so commissioned to "take evidence" in foreign countries and of foreign nationals .

1. "In a civil or commercial matter, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion

of nationals of a State which he represents in aid of proceedings commenced in the courts of a State which he represents. A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State." Article 15 of the Hague Convention.

2. "A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the evidence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if – a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and b) he complies with the conditions which the competent authority has specified in the permission. A Contracting State may declare that evidence may be taken under this Article without its prior permission." Article 16 of the Hague Convention.

3. "In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if – a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and b) he complies with the conditions which the competent authority has specified in the permission. A Contracting State may declare that evidence may be taken under this Article without its prior permission." Article 17 of the Hague Convention.

F. Letters rogatory

1. As discussed in Part III.C. above, a court may issue a letter rogatory to a court in another country to obtain evidence, including deposition evidence.

2. Letters rogatory are useful if a party seeks discovery in a country that is not a Contracting State under the Hague Convention, although as noted above the foreign country is under no obligation to execute the request.

3. 22 C.F.R 92.66 provides rules for transmitting and receiving letters rogatory when the letter concerns depositions taken before foreign officials or other persons in a foreign country.

a) "Letters rogatory may often be sent direct from court to court. However, some foreign governments require that these requests for judicial aid be submitted through the diplomatic channel (i.e., that they be submitted to the Ministry for Foreign Affairs by the American diplomatic representative). A usual requirement is that the letters rogatory as well as the interrogatories and other papers included with them be accompanied

by a complete translation into the language (or into one of the languages) of the country of execution. Another requirement is that provision be made for the payment of fees and expenses. Inquiries from interested parties or their attorneys, or from American courts, as to customary procedural requirements in given countries, may be addressed direct to the respective American embassies and legations in foreign capitals, or to the Department of State, Washington, DC 20520." 22 C.F.R. 92.66(b).

b) "Letters rogatory executed by foreign officials are returned through the same channel by which they were initially transmitted." 22. C.F.R. 92.66(c)(1).

V. **Information Obtained from Foreign Governments**

A. The U.S. government may collect foreign information that could be used in tax litigation through exchange of information ("EOI") agreements.

B. EOI agreements are found in bilateral income tax treaties, tax information exchange agreements ("TIEAs"), and mutual legal assistance treaties ("MLATs").

1. All of the U.S. EOI agreements allow for the exchange of information absent a domestic tax interest. EOI is also permitted in both criminal and civil tax matters.

2. Information protected from disclosure under *Kovel v. United States*, 296 F.2d 918 (2nd Cir. 1961), may be protected from disclosure under an EOI request. See U.S.-Cayman Islands and U.S. BVI TIEAs.

C. Income Tax Treaties

1. U.S. has bilateral income tax treaties with 67 countries.

2. Article 26 of the United States Model Income Tax Convention (February 17, 2016) ("Model Treaty") governs exchange of information and administrative assistance.

a) "The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or the domestic laws of the Contracting States concerning taxes of every kind imposed by a Contracting State to the extent the taxation thereunder is not contrary to the convention, including information relating to the assessment or collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, such taxes." Art. 26, Par. 1 of the Model Treaty.

(1) Reference to "may be relevant" is derived from *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984), which analyzed IRS's summons authority.

3. Information obtained via treaty protected from disclosure

a) "Any information received under this Article by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic law of that Contracting State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment, collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes referred to in paragraph 1 of this Article, or the oversight of such functions. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the preceding sentences of this paragraph, the competent authority of the Contracting State that receives information under the provisions of this Article may, with the written consent of the Contracting State that provided the information, also make available that information for other purposes allowed under the provisions of a mutual legal assistance treaty in force between the Contracting States that allows for the exchange of tax information." Art. 26, Par. 2 of the Model Treaty.

b) "In no case shall the provisions of paragraph 3 of this Article be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person." Art. 26, Par. 5 of the Model Treaty.

4. Information obtained via treaty limited to information obtainable under U.S. law or in the normal course of U.S. tax administration

a) "In no case shall the provisions of paragraphs 1 and 2 of this Article be construed so as to impose on a Contracting State the obligation: a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State; b) to supply information that is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State; or c) to supply information that would disclose any trade, business, industrial, commercial, or professional secret or trade process, or information the disclosure of which would be contrary to public policy." Art. 26, Par. 3 of the Model Treaty.

5. Additional provisions of Article 26 require contracting states to obtain information regardless of its tax interest (Paragraph 4), to provide information in

the form of depositions or documents (Paragraph 6), to ensure the limitation of benefits of the treaty to those entitled to treaty protection (Paragraph 7) and to allow for officials to conduct consensual interviews and examinations in the other country (Paragraph 8).

D. Tax Information Exchange Agreements ("TIEAs")

1. TIEAs typically require competent authorities to provide assistance through exchange of information that is "foreseeably relevant" to the administration and enforcement of the domestic laws of contracting parties concerning taxes covered by the TIEA.

a) "The competent authorities of the Contracting Parties shall provide assistance to each other through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes covered by this Agreement." Art. 1 of the Agreement between the Government of the United States of America and the Government of the Argentine Republic for the Exchange of Information Relating to Taxes, December 23, 2016 ("U.S.-Argentina TIEA").

2. Typically, a requested party must provide obtainable information regardless of residence or nationality of person holding the information or to whom the information relates.

a) "With respect to information held by its authorities or in the possession or control of persons who are within its territorial jurisdiction, however, the requested Party shall provide information in accordance with this Agreement regardless of whether the person to whom the information relates is, or whether the information is held by, a resident or national of a Contracting Party." Art. 2 of the U.S.-Argentina TIEA.

3. Typically applies to federal taxes only.

a) "This Agreement shall apply to the following taxes imposed by the Contracting Parties: (a) in the case of the United States, all federal taxes; and (b) in the case of Argentina, all national taxes administered by the Federal Administration of Public Revenue." Art. 3, Par. 1 of the U.S.-Argentina TIEA.

4. Typically requires contracting state to obtain information regardless of its own domestic tax interest.

a) "Such information shall be exchanged without regard to whether the requested Party needs such information for its own tax purposes." Art. 5, Par. 1 of the U.S.-Argentina TIEA.

5. Typically provides for automatic exchange of information, spontaneous exchange of information and tax examinations abroad.

a) "The competent authorities may automatically transmit information to each other for the purposes referred to in Article 1 (Object and Scope of this Agreement). The competent authorities shall determine the items of information to be exchanged pursuant to this Article and the procedures to be used to exchange such items of information." Art. 6 of the U.S.-Argentina TIEA.

b) "The competent authority of a Contracting Party may spontaneously transmit to the competent authority of the other Contracting Party information that has come to the attention of the first-mentioned competent authority and that the first-mentioned competent authority supposes to be foreseeably relevant to the accomplishment of the purposes referred to in Article 1 (Object and Scope of this Agreement). The competent authorities shall determine the procedures to be used to exchange such information." Art. 7 of the U.S.-Argentina TIEA.

c) "For the purposes referred to in Article 1 (Object and Scope of this Agreement), a Contracting Party may allow representatives of the other Contracting Party to interview individuals and examine records in the territory of the first-mentioned Party with the written consent of the persons concerned. The competent authority of the second-mentioned Party shall notify the competent authority of the first-mentioned Party of the time and place of the meeting with the individuals concerned." Art. 8, Par. 1 of the U.S.-Argentina TIEA.

6. Typically require that information received by a requesting party be treated as confidential and disclosed only to persons or authorities involved in tax administration and enforcement.

a) "Any information received by a Contracting Party under this Agreement shall be treated as confidential and may be disclosed only to persons or authorities (including courts and administrative bodies) in the jurisdiction of the Contracting Party concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Agreement, or the oversight of such functions. Such persons or authorities shall use such information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. The information may not be disclosed to any other person, entity, authority or jurisdiction." Art. 10, Par. 1 of the U.S.-Argentina TIEA.

E. Mutual Legal Assistance Treaties ("MLATs")

1. MLATs allow for "mutual legal assistance" in criminal proceeding (i.e., their scope covers more than criminal tax matters).

a) "The Parties shall provide mutual assistance, in accordance with the provisions of this Treaty, for the purpose of proceedings as defined in Article 19 of this Treaty." Art. 1, Par. 1 of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland on Mutual Legal Assistance in Criminal Matters ("U.S.-U.K. MLAT").

b) "Assistance shall include: (a) taking the testimony or statements of persons; (b) providing documents, records, and evidence; (c) serving documents; (d) locating or identifying persons; (e) transferring persons in custody for testimony (or other purposes); (f) executing requests for searches and seizures; (g) identifying, tracing, freezing, seizing, and forfeiting the proceeds and instrumentalities of crime and assistance in related proceedings; and (h) such other assistance as may be agreed between Central Authorities." Art. 1, Par. 2 of the U.S.-U.K. MLAT.

c) "For the purposes of this Treaty, 'proceedings' means proceedings related to criminal matters and includes any measure or step taken in connection with the investigation or prosecution of criminal offences, including the freezing, seizure or forfeiture of the proceeds and instrumentalities of crime, and the imposition of fines related to a criminal prosecution." Art. 19 of the U.S.-U.K. MLAT.

2. Negotiated by the Department of State in cooperation with the Department of Justice.

3. The U.S. has MLATs (and similar agreements) with over 50 countries.

VI. Authentication of Foreign Documents

A. Foreign Public Documents

1. Two authentication methods exist. One is the method set forth in the 1961 Hague Convention Abolishing the Requirements for Legalization of Foreign Public Documents ("Hague Document Convention"). The second method is used when documents are destined for or coming from a country which is not a party to the convention and is described in Fed. R. Evid. 902(3).

2. Hague Document Convention. The 1961 Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents simplifies the certification of documents originating in foreign countries to entitle them to recognition in the United States. Documents intended for use in one or more of the countries party to the Hague Document Convention will be certified by use of a standardize form called an apostile, which does not require authentication by the Department of State or subsequent legalization by the embassy or consulate of the country of intended use before it is entitled to recognition in that country. Rather, the completed apostile recognizes the document as certified in any of the other countries party to the Hague Document Convention.

3. Federal Rule of Evidence 902: Evidence That Is Self-Authenticating. (3) Foreign Public Documents: A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester — or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

a) order that it be treated as presumptively authentic without final certification; or

b) allow it to be evidenced by an attested summary with or without final certification.

B. Foreign Business Records

1. This is more challenging. It is often easier to obtain copies of the records than it is to obtain the records in admissible form, owing principally to the inability of the U.S. to compel the custodian of the records to provide authenticating testimony. Where authentication of business records is necessary, it may be accomplished by: stipulation, voluntary testimony of the record custodian, deposition, and via the exception for self-authenticating documents.

2. U.S. authorities may obtain a foreign certification for foreign business records through a treaty or TIEA request, a letter rogatory, or a letter of request.

3. Commercial paper:

a) Under Fed. R. Evid. 902(9) commercial paper and related documents are considered self-authenticating to the extent provided by general commercial law.

4. Affidavit

a) In *United States v. Leal*, 509 F.2d 122 (9th Cir. 1975), the court admitted certain business records into evidence under the Federal Business Records Act, 28 U.S.C. § 1732 (1970), where the foundation was laid, over the objections of the defendant, by an affidavit of the custodian of the records. The records in Leal were hotel registration records required to be maintained by the laws of the Crown Colony of Hong Kong. The court found that many of the guarantees of trustworthiness underlying the official documents and business records exceptions to the hearsay rule were inherent in the documents.

5. Authentication by Testimony from Foreign Government Official

a) If the foreign business records were obtained by operation of law by foreign officials, it may be possible to obtain the necessary authenticating testimony from a knowledgeable foreign official who is willing to testify in this country.

6. Letters Rogatory

a) If the authenticating witness declines to give his/her testimony or statement voluntarily, and if jurisdiction cannot be obtained by use of 28 U.S.C. § 1783, it may be possible to proceed by means of letter rogatory and have the requested court propound appropriate questions to the witness which will establish the authenticity of the business records.

C. Privilege:

1. As noted in Part V.C. above, the United States has negotiated bilateral income tax treaties with many foreign countries. Each treaty is unique, although the subjects covered by treaties are similar. Often the tax treaty will specify the procedures necessary to obtain information and documents from that country. Where the treaty is specific regarding procedures for receipt of foreign documents and information, the treaty provisions must be followed. The United States Competent Authority has exclusive authority for making and receiving exchange of information and administrative assistance requests under all tax treaties. Information and documents obtained pursuant to a tax treaty are privileged and secret and may not be divulged except as specified in the treaty or by written consent of the foreign government.

2. Section 6105 generally prohibits the disclosure of tax convention information except to the extent authorized by that section.

VII. Evidence of Foreign Law

A. The Tax Court may consider any relevant material or source in determining foreign law.

1. "A party who intends to raise an issue concerning the law of a foreign country shall give notice in the pleadings or other reasonable written notice. The Court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or otherwise admissible. The Court's determination shall be treated as a ruling on a question of law." Rule 146.

2. Rule 146 is nearly verbatim to Fed. R. Civ. P. Rule 44.1.

B. Expert testimony is one of the main such sources.

1. Expert testimony or affidavits, accompanied by extracts from foreign legal materials, "ha[ve] been and will likely continue to be the basic mode of proving foreign law." *Universe Sales Co. v. Silver Castle, Ltd.*, 182 F.3d 1036, 1038 (9th Cir. 1999) (citing 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil, sec. 2444 (2d ed. 1995)); *Eshel v. C.I.R.*, 142 T.C. 197, 200 (2014), rev'd sub nom. *Eshel v. C.I.R.*, 831 F.3d 512 (D.C. Cir. 2016).

2. See *Angerhofer v. Comm'r*, 87 T.C. 814, 819-20 (1986) for an example of the Tax Court considering expert testimony on foreign law (there, the German Civil Code together with English translations thereof). See also, *PepsiCo Puerto Rico, Inc. v. Comm'r*, T.C. Memo 2012-269, fn. 73 (citing to *Angerhofer*).

C. Expert testimony is not required to determine foreign law.

1. *Benichou v. C.I.R.*, 29 T.C.M. (CCH) 1156 (T.C. 1970), acq. recommended by *In re: Chantoub Benichou*, 1971 WL 29122 (IRS AOD Mar. 26, 1971) ("It is true that such expert testimony is admissable [sic] to throw light on ambiguous decrees; however, we can find no authority which indicates that such evidence is required.").

D. Evidence regarding textual sources such as foreign law should constitute "reliable expressions of either textual construction or … intent."

1. In *Eshel*, 831 F.3d at 512-22, the D.C. Circuit held that the Tax Court committed reversible error when it used only American dictionary definitions to ascertain the meaning of terms needed to determine whether certain French taxes entered into after the United States-France Totalization Agreement amended or supplemented the French social security laws covered by that agreement.

2. In explaining its decision, the D.C. Circuit stated that the Tax Court's failure to consider additional sources "pretermitted the critical inquiry into the Agreement's text and the signatory countries' shared understanding of the Agreement. … Instead of [inquiring into the content and meaning of the French laws at issue], the tax court consulted outside sources that were not reliable expressions of either textual construction or the signatories' intent." *Eshel*, 831 F.3d at 522.

E. Otherwise inadmissible evidence, such as inadmissible hearsay, may be allowed as evidence of foreign law.

1. *Exxon Corp. & Affiliated Companies v. C.I.R.*, 63 T.C.M. (CCH) 2067 (T.C. 1992) (Allowing as evidence of foreign law otherwise inadmissible hearsay because "the scope of Rule 146 is extremely broad" and contains no requirements that the evidence be admissible at trial.).

F. Issues not addressed or developed by the parties are deemed waived.

1. *Barnes Grp., Inc. v. C.I.R.*, 105 T.C.M. (CCH) 1654 (T.C. 2013), aff'd sub nom. *Barnes Grp., Inc. & Subsidiaries v. C.I.R.*, 593 F. App'x 7 (2d Cir. 2014) (Tax Court "will not attempt to do petitioners' research or make their argument for them.").

G. However, the Tax Court may consider any relevant material or source whether or not submitted by a party.

1. *Reese v. Comm.*, 64 TC 395 (1975); *Afshar v. C.I.R.*, T.C. Memo. 1981-241, T.C.M. (P-H) ¶ 81241, 41 T.C.M. (CCH) 1489, 1981 WL 10547 (1981), aff'd, 692 F.2d 751 (4th Cir. 1982).

H. The Tax Court does not have an obligation to take judicial notice of foreign law since this would impose a burden on the Court in many cases.

1. *Reese*, 64 T.C. at 398 (1975), acq. in result only recommended by In re: John N. Reese, 1975 WL 38099 (IRS AOD Sept. 2, 1975) ("In this Court the rule relating to establishing a matter of foreign law is that judicial notice by a court cannot be taken of foreign law. *Georges Simenon*, 44 T.C. 820, 835(1965).").

2. See also Committee Note of 1966 to Fed. R. Civ. P. 44.1 ("The new rule refrains from imposing an obligation on the court to take "judicial notice" of foreign law because this would put an extreme burden on the court in many cases; and it avoids use of the concept of "judicial notice" in any form because of the uncertain meaning of that concept as applied to foreign law. See, e.g., Stern, Foreign Law in the Courts: Judicial Notice and Proof, 45 Calif. L. Rev. 23, 43 (1957).").

I. Evidence of foreign law is within the scope of discovery under Rule 70(b) to the extent it is not privileged, relevant to the subject matter of the case, and, if the evidence would be inadmissible at trial, is reasonably calculated to lead to the discovery of admissible evidence.

VIII. Use of Illegally Obtained Information

A. Recent proliferation of stolen tax information

1. Generally

a) Technology has increased access to remotely stored data, making it easier for individuals and organizations to steal private tax information and share it with others.[4] Recent leaks of corporate records have exposed the beneficial ownership of offshore investment and holdings structures put in place for legitimate and illegitimate purposes. As the size and frequency of leaks continues to increase, so does the potential for such information to be used in tax litigation.

2. Major incidents

a) 2013 – "Secrecy for Sale" Leak

(1) International Consortium of Investigative Journalist ("ICIJ") reviewed and reported on 2.5 million files relating to 70,000 taxpayers and over 120,000 offshore companies and trusts. [5] The leak consisted of 260 gigabytes of information, more than 160 times larger than the leak of U.S. State Department documents by WikiLeaks in 2010.[6] The source of the files is unknown.

b) 2015 – "Swiss Bank" Leaks

(1) IT worker at HSBC stole 60,000 files that contained details on over 100,000 HSBC clients and tried to sell the information to banks in Lebanon. French authorities arrested the former HSBC employee and shared the data with other countries. The French newspaper Le Monde obtained the data as well, and shared it with the International Consortium of Investigative Journalists who then reported on the information.[7]

c) 2016 – "Panama Papers" Leak

(1) ICIJ releases report on 11.5 million files originally provided to German newspaper Süddeutsche Zeitung by an

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[4] *See* Cockfield, Arthur J., Big Data and Tax Haven Secrecy (October 6, 2015). Florida Tax Review, Forthcoming; Queen's University Legal Research Paper No. 062. Available at SSRN: https://ssrn.com/abstract=2670156

[5] Gerard Ryle et al., Secret Files Expose Offshore's Global Impact, International Consortium of Investigative Journalists (Apr. 3, 2013), http://www.icij.org/offshore/secret-files-exposeoffshores-global-impact.

[6] Id.

[7] Martha Hamilton, Whistleblower? Thief? Hero? Introducing the Source of the Data that Shook HSBC, International Consortium of Investigative Journalists (Feb. 8, 2015), https://www.icij.org/investigations/swiss-leaks/whistleblower-thief-hero-introducing-source-data-shook-hsbc/.

unknown ("John Doe") source. Files stolen from Panamanian law firm Mossack Fonseca.

(2) DOJ launched an investigation into tax crime related to the Panama Papers.[8] Preet Bharara, the U.S. Attorney for Manhattan, said he had "opened a criminal investigation regarding matters to which the Panama Papers are relevant". Status of investigation unknown.

(3) The Danish government paid $1.3 million for data from the Panama Papers relating to about 320 cases involving 500 to 600 Danes.[9] Germany paid approximately $5.7 million for the files.[10]

d) 2016 – "Bahamas Papers" Leak

(1) A cache of 1.3 million files from the Bahama's corporate registry provided names of directors and some owners of more than 175,000 Bahamian companies, trusts and foundations registered between 1990 and early 2016.[11]

e) 2017 – "Paradise Papers" Leak

(1) ICIJ analyzed and reported on 13.5 million files provided to Süddeutsche Zeitung by anonymous source. Documents taken from law firm Appleby.[12] Documents from Paradise Papers, Panama Papers and Bahamas Papers uploaded by ICIJ to one

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[8] Rupert Neat, Panama Papers: US launches criminal inquiry into tax avoidance claims, The Guardian (Apr. 19, 2016) https://www.theguardian.com/business/2016/apr/19/panama-papers-us-justice-department-investigation-tax-avoidance.

[9] Glyn Moody, Panama Papers: Denmark to pay $1.3M-plus for leaked data to probe tax evasion, Ars Technica (Sept. 9, 2016) https://arstechnica.com/tech-policy/2016/09/panama-papers-denmark-payout-data-tax-evasion-probe/.

[10] Panama Papers: Germany 'pays millions' for leaked data, BBC News (Jul. 5, 2017) http://www.bbc.com/news/world-latin-america-40505300.

[11] Will Fitzgibbon & Emilia Diaz-Struck, Bahamas Leaks prompts swift reaction, outrage in Europe, International Consortium of Investigative Journalists (Sept. 22, 2016), https://www.icij.org/blog/2016/09/bahamas-leaks-prompts-swift-reaction-outrage-europe/.

[12] Will Fitzgibbon & Dean Starkman, The 'Paradise Papers' and the Long Twilight Struggle Against Offshore Secrecy, International Consortium of Investigative Journalists (Dec. 27, 2017), https://www.icij.org/investigations/paradise-papers/paradise-papers-long-twilight-struggle-offshore-secrecy/.

publically accessible online database for purpose of analyzing relationships between entities and individuals contained in documents.[13]

B. Use of illegally obtained documents in court

1. Fourth Amendment issue?

a) Scope of the Fourth Amendment: "The Fourth Amendment limits searches conducted by the government, not by a private party, unless the private party acts as an 'instrument or agent' of the government." *United States v. Young*, 153 F.3d 1079, 1080 (9th Cir. 1998) (per curiam).

2. Outside of the hacking context:

a) *Burdeau v. McDowell*, 256 U.S. 465, (1921) evidence illegally obtained by employer during fraud investigation and subsequently turned over to DOJ was admissible because the Fourth Amendment is "an intended restraint upon the activities of sovereign authority, and was not intended to be limitation upon other than governmental agencies."

b) *United States v. Goldberg*, 330 F.2d 30, 35 (1964) (noting that the government had no part or knowledge in the conduct and holding the evidence admissible by directly relying on Burdeau).

c) *People v. Horman*, 22 N.Y.2d 378, 381 (1968) (upholding a conviction for possession of a pistol where the defendant was apprehended by two department store employees, the court held that it was long settled that prohibitions against unlawful searches and seizures do not require exclusion of evidence because a private individual has gathered it by unlawful means).

3. As applied to hacking cases where the initial evidence of a crime is obtained by a hacker who provides such evidence to the police who subsequently obtain evidence with a warrant or use hacker's evidence in prosecution:

a) *United States v. Kline*, 112 F. App'x 562, 564 (9th Cir. 2004) (private individual searched defendant's computer using a "Trojan Horse" computer virus to illegally download files from the infected computer);
b) *United States v. Jarrett*, 338 F.3d 339 (4th Cir. 2003) (child pornography recovered via hacker's actions on computer was not subject to suppression);

[13] Offshore Leaks Database, International Consortium of Investigative Journalists, https://offshoreleaks.icij.org/ (last visited Feb. 28, 2018).

c) *United States v. Steiger*, 318 F.3d 1039 (11th Cir. 2003) (individual's access to a computer by hacking not subject to the Fourth Amendment); see also Walter v. United States, 447 U.S. 649, 656 (1980) ("[A] wrongful search or seizure conducted by a private party does not violate the Fourth Amendment and . . . such private wrongdoing does not deprive the government of the right to use evidence that it has acquired lawfully.") (plurality opinion).

4. Even if leaked documents are not allowed as evidence in court, law enforcement is still able to obtain warrants based on probable cause.[14]

C. In suppression of evidence in civil litigation

1. Mixed case law with respect to suppression of evidence:

a) Some courts have suppressed illegally obtained evidence - *O'Brien v. O'Brien*, 899 So. 2d 1133 (Fla. Dist. Ct. App. 2005)(court suppressed evidence obtained by wife using spyware during a divorce proceeding because it violated Florida Wiretap Ac –even though Wiretap Act did not contain statutory suppression remedy); *In re Shell Oil Refinery*, 143 F.R.D. 105, 109 (E.D. La. 1992) (stating that the plaintiffs could not make use of documents provided by one of the defendant's employees without authorization "unless the documents are publicly available or were previously produced by [Defendant]").

b) Others have not - *Madanes v. Madanes*, 186 F.R.D. 279, 292 (S.D.N.Y. 1999) ("Such a sanction would have no deterrent value since the punishment would fall on the blameless party rather than on the wrongdoer who may have no interest in the litigation. Moreover, the passive recipient of non-privileged material would be deprived of information to which she would otherwise be entitled through the discovery process.").

2. Is there a statutory suppression remedy?

a) Congress has enacted legislation proscribing various forms of accessing, intercepting and procuring electronically store information and communications. *See* Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030, the Stored Communications Act, 18 U.S.C. § 2701, the Identity

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[14] *See* Computer Crime & Intellectual Prop. Section, Criminal Division, U.S. Dep't of Justice, Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations 12-13 (3rd ed. 2009), http:// www.justice.gov/criminal/cybercrime/ssmanual/ssmanual2009.pdf at 12 ("Even if courts follow the more restrictive approach [of Barth], the information gleaned from the private search will often provide the probable cause needed to obtain a warrant for a further search.").

Theft and Assumption Deterrence Act, 18 U.S.C. § 1028, the Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2510, and certain provisions of the USA PATRIOT Act of 2001, Public Law 107-56.

b) While the preceding laws provide for civil damages, they do not provide a suppression remedy for unlawfully obtained electronic communications or documents.

c) Seems likely that foreign jurisdiction law that was violated would similarly not require suppression of evidence.

3. Use of "equitable powers" to suppress illegally obtained evidence in absence of statutory suppression remedy.

a) Trial courts have relied on "equitable powers" to exclude evidence wrongfully obtained: "a court must be able to sanction a party that seeks to introduce improperly obtained evidence; otherwise the court, by allowing the wrongdoer to utilize the information in litigation before it, becomes complicit in the misconduct." *Fayemi v. Hambrecht & Quist, Inc.*, 174 F.R.D. 319, 326 (S.D.N.Y. 1997) (precluding party's use of information improperly removed from his supervisor's computer in employment discrimination action pursuant to its inherent equitable power over its own process "to prevent abuses, oppression and injustices").

b) *Comco Mngmt. Corp.*, No. SACV 08–0668, 2009 WL 4609595, at *4-5 (C.D. Cal. Dec. 1, 2009)(ordering Government to return all of the defendants' privileged documents it had obtained from a whistleblower pursuant to the court's "inherent authority to grant defendants appropriate relief to remedy the Government's circumvention of the normal discovery process").

c) *Castano v. American Tobacco Co.*, 896 F. Supp. 590 (E.D. La. 1995), supports the proposition that once confidential material is published on the internet, it becomes part of the public domain. In *Castano*, a paralegal employed by a tobacco company's law firm allegedly took privileged documents without authorization. The company moved for a protective order to have the documents declared privileged under either the attorney client privilege or the work product doctrine and to prohibit the plaintiffs from using the documents. The Eastern District of Louisiana denied the motion because all of the documents were in the public domain by the time of the motion. 896 F. Supp. at 595. The documents had already been disseminated to the University of California at San Francisco Medical School where they were available for copying through the university library, published on the internet, and soon to be available on CD-ROM.

d) The cases listed above seem inapplicable to situation where the U.S. government does not illegally obtain the evidence that it would be presenting in court.

D. Ethical issues for government attorneys?

1. American Bar Association ("ABA") Model Rule 4.4(b) governs attorney conduct when in receipt of documents sent inadvertently, it is silent on attorneys in receipt of documents obtained illegally.

a) In 2011, the ABA Committee on Ethics explained that Model Rule 4.4(b) and its notice requirement apply only to inadvertent disclosures from opposing counsel.[15] While the ABA Committee on Ethics acknowledged that there might be laws that preclude a receiving attorney from retaining files sent without authorization, it stated explicitly that the issue was "a matter of law beyond the scope of Rule 4.4(b)."[16]

E. Are documents protected by privilege?

1. The "Panama Papers" and "Paradise Papers" leaks were comprised of documents obtained from a law firm, calling into question whether documents are protected by attorney client privilege.[17]

2. Under the Federal Rules of Evidence, the privileged nature of the documents would likely not be waived by the theft of the documents.[18] Typically, government uses "taint teams" of attorneys to review potentially privileged documents to make an initial decision regarding whether the documents should be provided to the investigation team.

a) Privilege may be attacked based on whether Mossack Fonseca or Appleby took reasonable steps to ensure that the documents were

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[15] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-460 (2011) ("[T]his Committee found that Rule 4.4(b) *does not obligate a lawyer to notify a lawyer to notify opposing counsel that the lawyer* has received privileged or otherwise confidential materials of the adverse party from someone who was not authorized to provide the materials, if the materials were not provided as 'the result of the sender's inadvertence.'" (emphasis added) (citing ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-442 (2006))).

[16] Id.

[17] Josh Gerstein, Panama Papers Pose Ethics Issues for U.S. Prosecutors, POLITICO (Apr. 6, 2016), http://www.politico.com/story/2016/04/panama-papers-ethics-issues-prosecutors-221609#ixzz45RD5dfLs [https://perma.cc/8PRK-D3NL].

[18] *See* F.R.E. 502(b). Since the attorney-client privilege is a creation of common law, some states have handled the waiver question differently regarding inadvertently disclosed documents.

protected. Some indications that Mossack Fonseca's security was lacking.[19]

b) Privilege may be destroyed once a document is made public via leak. For example, if a taxpayer publicly comments on the leaked documents a court could find that they waived the privilege.

c) Privilege may be defeated if client was using attorney in furtherance of a crime (money laundering, tax evasion etc.) under the crime-fraud exception.[20]

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[19] Matt Burgess & James Temperton, The Security Flaws at the Heart of the Panama Papers, WIRED (Apr. 6, 2016), http://www.wired.co.uk/article/panama-papers-mossack-fonseca-website-security-problems [https://perma.cc/GPP6- HBLR] ("The front-end computer systems of Mossack Fonseca are outdated and riddled with security flaws, analysis has revealed.").

[20] See *In re. Grand Jury*, 705 F.2d 133, 151 (3d Cir. 2012).

APPENDIX: SELECTED TREATY, STATUTORY, AND PROCEDURAL AUTHORITIES

Tax Court Rules of Practice & Procedure

I. RULE 72. PRODUCTION OF DOCUMENTS, ELECTRONICALLY STORED INFORMATION, AND THINGS

(c) Foreign Petitioners: For production of records by foreign petitioners, see Code Section 7456(b). [See below.]

II. RULE 74. DEPOSITIONS FOR DISCOVERY PURPOSES

(e) General Provisions

(2) *Depositions Upon Written Questions*: Depositions under this Rule may be taken upon written questions rather than upon oral examination. If the deposition is to be taken on written questions, a copy of the written questions shall be annexed to the notice of deposition or motion to take deposition. The use of such written questions is not favored, and the deposition should not be taken in this manner in the absence of a special reason. See Rule 84(a). There shall be an opportunity for cross-questions and redirect questions to the same extent and within the same time periods as provided in Rule 84(b) (starting with service of a notice of or motion to take deposition rather than service of an application). With respect to taking the deposition, the procedure of Rule 84(c) shall apply.

III. RULE 81. DEPOSITIONS IN PENDING CASE

(e) Person Before Whom Deposition Taken

(2) *Foreign Depositions*: In a foreign country, depositions may be taken: (A) Before a person authorized to administer oaths or affirmations in the place in which the examination is held, either by the law thereof or by the law of the United States; (B) before a person commissioned by the Court, and a person so commissioned shall have the power, by virtue of the commission, to administer any necessary oath and take testimony; or (C) pursuant to a letter rogatory or a letter of request issued in accordance with the provisions of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. (Part 3) 2555. A commission, a letter rogatory, or a letter of request shall be issued on application and notice and on terms that are just and appropriate. The party seeking to take a foreign deposition shall contact the United States Department of State to ascertain any requirements imposed by it or by the foreign country in which the deposition is to be taken, including any required foreign language translations and any fees or costs, and shall submit to the Court, along with the application, any such foreign language translations, fees, costs, or other materials required. It is not requisite to the issuance of a commission, a letter rogatory, or a letter of request that the taking of the deposition in any other manner be impracticable or inconvenient; and both a commission and a letter rogatory, or both a commission and a letter of request, may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]." A letter of request is addressed to the central authority of the requested State. The model recommended for letters of request is set forth in the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. Evidence obtained by deposition or in response to a letter rogatory or a letter of request need not be excluded merely for the reason that it is not a verbatim

transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions within the United States under these Rules.

IV. RULE 84. DEPOSITIONS UPON WRITTEN QUESTIONS

(a) Use of Written Questions: A party may make an application to the Court to take a deposition, otherwise authorized under Rule 81, 82, or 83, upon written questions rather than oral examination. The provisions of those Rules shall apply in all respects to such a deposition except to the extent clearly inapplicable or otherwise provided in this Rule. Unless there is special reason for taking the deposition on written questions rather than oral examination, the Court will deny the application, without prejudice to seeking approval of the deposition upon oral examination. ***The taking of depositions upon written questions is not favored, except when the deposition is to be taken in a foreign country, in which event the deposition must be taken on written questions unless otherwise directed by the Court for good cause shown.*** *[emphasis added]*

> *"The Tax Court discourages foreign depositions and prefers that depositions 'be taken within the United States whenever possible.'" Discovery in Int'l Tax Cases, 10:5.*

V. RULE 143. EVIDENCE

(a) [21]**General:** Trials before the Court will be conducted in accordance with the Federal Rules of Evidence ~~applicable in trials without a jury in the United States District Court for the District of Columbia~~. See Code sec. 7453. ~~To the extent applicable to such trials, those rules include the rules of evidence in the Federal Rules of Civil Procedure and any rules of evidence generally applicable in the Federal courts (including the United States District Court for the District of Columbia)~~. Evidence which is relevant only to the issue of a party's entitlement to reasonable litigation or administrative costs shall not be introduced during the trial of the case (other than a case commenced under Title XXVI of these Rules, relating to actions for administrative costs). As to claims for reasonable litigation or administrative costs and their disposition, see Rules 231 and 232. As to evidence in an action for administrative costs, see Rule 274 (and that Rule's incorporation of the provisions of Rule 174(b)).

(b) Testimony: The testimony of a witness generally must be taken in open court except as otherwise provided by the Court or these Rules. For good cause in compelling circumstances and with appropriate safeguards, the Court may permit testimony in open court by contemporaneous transmission from a different location.

(c) Ex Parte Statements: Ex parte affidavits or declarations, statements in briefs, and unadmitted allegations in pleadings do not constitute evidence. As to allegations in pleadings not denied, see Rules 36(c) and 37(c) and (d).

(d) Depositions: Testimony taken by deposition shall not be treated as evidence in a case until offered and received in evidence. Error in the transcript of a deposition may be corrected by agreement of the parties, or by the Court on proof it deems satisfactory to show an error exists and the correction to be made, subject to the requirements of Rules 81(h)(1) and 85(e). As to the use of a deposition, see Rule 81(i).

(e) Documentary Evidence:

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[21] Per "INTERIM" text (effective 3/28/16), as it appears within the "Rules" section of the U.S. Tax Court's website.

(1) *Copies:* A copy is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original or in the circumstances it would be unfair to admit the copy in lieu of the original. Where the original is admitted in evidence, a clearly legible copy may be substituted later for the original or such part thereof as may be material or relevant, upon leave granted in the discretion of the Court.

(2) *Return of Exhibits:* Exhibits may be disposed of as the Court deems advisable. A party desiring the return at such party's expense of any exhibit belonging to such party, shall, within 90 days after the decision of the case by the Court has become final, make written application to the Clerk, suggesting a practical manner of delivery. If such application is not timely made, the exhibits in the case will be destroyed.

(f) Interpreters: The parties ordinarily will be expected to make their own arrangements for obtaining and compensating interpreters. However, the Court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation, which compensation shall be paid by one or more of the parties or otherwise as the Court may direct.

(g) Expert Witness Reports:

(1) Unless otherwise permitted by the Court upon timely request, any party who calls an expert witness shall cause that witness to prepare a written report for submission to the Court and to the opposing party if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report, prepared and signed by the witness, shall contain:

(A) a complete statement of all opinions the witness expresses and the basis and reasons for them;
(B) the facts or data considered by the witness in forming them;
(C) any exhibits used to summarize or support them;
(D) the witness's qualifications, including a list of all publications authored in the previous 10 years;
(E) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
(F) a statement of the compensation to be paid for the study and testimony in the case.

(2) The report will be marked as an exhibit, identified by the witness, and received in evidence as the direct testimony of the expert witness, unless the Court determines that the witness is not qualified as an expert. Additional direct testimony with respect to the report may be allowed to clarify or emphasize matters in the report, to cover matters arising after the preparation of the report, or otherwise at the discretion of the Court. After the case is calendared for trial or assigned to a Judge or Special Trial Judge, each party who calls any expert witness shall serve on each other party, and shall submit to the Court, not later than 30 days before the call of the trial calendar on which the case shall appear, a copy of all expert witness reports prepared pursuant to this subparagraph. An expert witness's testimony will be excluded altogether for failure to comply with the provisions of this paragraph, unless the failure is shown to be due to good cause and unless the failure does not unduly prejudice the opposing party, such as by significantly impairing the opposing party's ability to cross-examine the expert witness or by denying the opposing party the reasonable opportunity to obtain evidence in rebuttal to the expert witness's testimony.

(3) The Court ordinarily will not grant a request to permit an expert witness to testify without a written report where the expert witness's testimony is based on third-party contacts, comparable sales, statistical data, or other detailed, technical information. The Court may grant such a request, for

example, where the expert witness testifies only with respect to industry practice or only in rebuttal to another expert witness.

(4) For circumstances under which the transcript of the deposition of an expert witness may serve as the written report required by subparagraph (1), see Rule 74(d).

IRC

I. SECTION 7456 – Administration of oaths and procurement of testimony

(b) **Production of records in the case of foreign corporations, foreign trusts or estates and nonresident alien individuals**

The Tax Court or any division thereof, upon motion and notice by the Secretary, and upon good cause shown therefor, shall order any foreign corporation, foreign trust or estate, or nonresident alien individual, who has filed a petition with the Tax Court, to produce, or, upon satisfactory proof to the Tax Court or any of its divisions, that the petitioner is unable to produce, to make available to the Secretary, and, in either case, to permit the inspection, copying, or photographing of, such books, records, documents, memoranda, correspondence and other papers, ***wherever situated*** *[emphasis added]*, as the Tax Court or any division thereof, may deem relevant to the proceedings and which are in the possession, custody or control of the petitioner, or of any person directly or indirectly under his control or having control over him or subject to the same common control. If the petitioner fails or refuses to comply with any of the provisions of such order, after reasonable time for compliance has been afforded to him, the Tax Court or any division thereof, upon motion, shall make an order striking out pleadings or parts thereof, or dismissing the proceeding or any part thereof, or rendering a judgment by default against the petitioner. For the purpose of this subsection, the term "foreign trust or estate" includes an estate or trust, any fiduciary of which is a foreign corporation or nonresident alien individual; and the term "control" is not limited to legal control.

United States Model Income Tax Convention (2016)

I. Article 25. MUTUAL AGREEMENT PROCEDURE

9. For the purposes of arbitrations under this Article, the following rules shall apply:

> c) All material received by a competent authority of a Contracting State in the course of, or relating to, an arbitration proceeding (including the arbitration panel's determination) shall be considered to be information exchanged between the Contracting States. Accordingly, no such information relating to an arbitration proceeding may be disclosed by the competent authorities of the Contracting States, except as permitted under Article 26 (Exchange of Information and Administrative Assistance). The competent authorities of the Contracting States shall ensure that members of the arbitration panel and their staff agree in writing to treat any information relating to the arbitration proceeding consistent with the confidentiality and nondisclosure provisions of Article 26 (Exchange of Information and Administrative Assistance) of this Convention and the applicable domestic laws of the Contracting States.

II. Article 26. EXCHANGE OF INFORMATION AND ADMINISTRATIVE ASSISTANCE

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or the domestic laws of the Contracting States concerning taxes of every kind imposed by a Contracting State to the extent that the taxation thereunder is not contrary to the Convention, including information relating to the assessment or collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, such taxes. The exchange of information is not restricted by paragraph 1 of Article 1 (General Scope) or Article 2 (Taxes Covered).

2. Any information received under this Article by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic law of that Contracting State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment, collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes referred to in paragraph 1 of this Article, or the oversight of such functions. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the preceding sentences of this paragraph, the competent authority of the Contracting State that receives information under the provisions of this Article may, with the written consent of the Contracting State that provided the information, also make available that information for other purposes allowed under the provisions of a mutual legal assistance treaty in force between the Contracting States that allows for the exchange of tax information.

3. In no case shall the provisions of paragraphs 1 and 2 of this Article be construed so as to impose on a Contracting State the obligation:

a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
b) to supply information that is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State; or
c) to supply information that would disclose any trade, business, industrial, commercial, or professional secret or trade process, or information the disclosure of which would be contrary to public policy.

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other Contracting State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 of this Article but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 of this Article be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

6. If specifically requested by the competent authority of a Contracting State, the competent authority of the other Contracting State shall provide information under this Article in the form of depositions of witnesses and authenticated copies of unedited

original documents (including books, papers, statements, records, accounts, and writings).

7. Each of the Contracting States shall endeavor to collect on behalf of the other Contracting State such amounts as may be necessary to ensure that relief granted by the Convention from taxation imposed by that other Contracting State does not inure to the benefit of persons not entitled thereto. This paragraph shall not impose upon either of the Contracting States the obligation to carry out administrative measures that would be contrary to its sovereignty, security, or public policy.

8. The requested Contracting State shall allow representatives of the requesting Contracting State to interview individuals and examine books and records in the requested Contracting State with the consent of the persons subject to examination.

9. The competent authorities of the Contracting States may develop an agreement upon the mode of application of this Article, including agreement to ensure comparable levels of assistance to each of the Contracting States, but in no case will the lack of such agreement relieve a Contracting State of its obligations under this Article.