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Discovery & Stipulations Process

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Discovery:

- ▶ What are the motivations for discovery?
- ▶ What are the problems in discovery?
- ▶ What are the Court's expectations of the parties during discovery?
- ▶ When should Judges get involved in discovery?

Motivations for Discovery:

- ▶ Learn favorable facts
- ▶ Rebut strategies and factual theories
- ▶ Expose technical flaws
- ▶ Narrow issues
- ▶ Learn of potential witnesses
- ▶ Occupy opponent and affect their preparation
- ▶ Avoid conflicting administrative positions (respondent)

Issues in Discovery:

- ▶ Going behind the notice: relevancy
- ▶ Discovery regarding IRS audit expert reports: boundaries
- ▶ Discovery regarding treatment of unrelated taxpayers
- ▶ Interrogatory limit of 25
- ▶ Identifying potential witnesses
- ▶ Protecting secrets
- ▶ Disclosing legal authority
- ▶ Notification to taxpayers of third-party subpoenas

What does Branerton mean?

- ▶ Is Branerton still an effective tool?
- ▶ Should Judges require parties to exchange affirmative evidence early in the litigation similar to “initial disclosures” under Fed.R.Civ.P. 26(a)(1)(A)?
- ▶ Should an actual face to face Branerton meeting be required?
 - ▶ What should be discussed?
- ▶ How does Branerton apply to electronic discovery?
- ▶ Does every discovery request need to be preceded by a Branerton question?
- ▶ How can Branerton conferences be a precursor to effective stipulations?
- ▶ Does Branerton preclude serving admissions prior to seeking stipulations?
- ▶ When are subpoenas an end run around discovery rules or a court's pre-trial scheduling order setting the close of discovery?

What are the problems created by electronic discovery?

- ▶ Increases time necessary for trial preparation
- ▶ New problem is how to narrow the discovery; electronic discovery can be a document dump and is always overwhelming
- ▶ How do parties identify information responsive to specific requests; protective coding
- ▶ Duplicate problems; draft problems
- ▶ When do you get a Judge involved?
 - ▶ After you narrow the issues or before?

Are procedural requirements to protect privilege fair and effective?

- ▶ Respondent's side:
 - ▶ Impossible to figure out what documents to challenge with electronic discovery without depositions
- ▶ Petitioner's side:
 - ▶ Are privilege logs harassment tools?
- ▶ Court's side:
 - ▶ Does every large case require burdensome in camera review?

In Camera:

- ▶ How to narrow the burden on the Court, i.e. sampling or categories?
- ▶ Use of other Judges?

Protective Orders:

- ▶ How can they be expedited?
- ▶ Can a time suck for all concerned be avoided?
- ▶ Should the standard for a protective order covering trial testimony and evidence be different than that for the standard for discovery?

Tax Court rules on depositions:

- ▶ What does Branerton mean in the context of depositions?
- ▶ Westreco/Mary Kay Ash issues: audit interviews v. depositions
- ▶ Are informal witness interviews a thing of the past?
- ▶ Does transcribed testimony help both parties?
- ▶ How many depositions are appropriate?
- ▶ When are depositions of IRS employees appropriate?
- ▶ When are subpoenas an end run around party/third-party discovery rules?

Tax Court expert discovery:

- ▶ How does Tax Court expert discovery compare to other tax forums?
 - ▶ District Court divides it into fact and expert discovery
- ▶ Expensive and time consuming to conduct expert discovery
- ▶ Tax Court practice is to submit expert reports 30 days prior to trial
- ▶ Rebuttal experts
- ▶ Hot tubbing v. expert depositions
 - ▶ Are the lawyers just in the way?
 - ▶ Should the Court reconsider its practice that an expert report serves as the expert's direct testimony?

How to encourage effective stipulations:

Are stipulations a lost art?

- ▶ How does electronic discovery affect the stipulation process?
- ▶ What are the difficulties in filing a motion to compel stipulation (other than for documents)?
- ▶ Incentives to encourage stipulations?
- ▶ Should Judges require stipulations earlier in the process?
- ▶ Witness interviews/depositions- do they encourage stipulations?

Can procedural motions and summary judgment be used as discovery tools?

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- ▶ Gets Judge involved early on substantive issues
- ▶ Is it the best use of everyone's time?