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**THE FUTURE STATE OF TAX COURT PRACTICE AND LITIGATION:
AN EXPLORATION OF CURRENT AND FUTURE ISSUES THAT COULD
AFFECT THE WAY THE COURT DOES BUSINESS**

PANELISTS

**Chief Judge L. Paige Marvel, Moderator
United State Tax Court**

**Chief Justice Eugene Rossiter
Tax Court of Canada**

**Miriam L. Fisher, Esquire
Latham & Watkins**

**Nina Olson
National Taxpayer Advocate
Internal Revenue Service**

**Drita Tonuzi
Deputy Chief Counsel (Operations)
Office of Chief Counsel, IRS**

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I. Introduction

- A. This panel will examine some of the issues that the Tax Court and those who litigate before it have identified as important issues that are affecting and will continue to affect the way that the Court does business.
- B. The United States Tax Court had its origin in 1924, with the establishment of the Board of Tax Appeals, “an independent agency in the executive branch of the Government.”
- C. In 1942, the name of the Board was changed to the Tax Court of the United States but its status as an agency of the executive branch remained unchanged.
- D. In 1969, the Court was established as a “court of record” under Article I of the U.S. Constitution, and its name was changed to the “United States Tax Court.”
- E. In 2015, Congress amended section 7441 to provide that “The Tax Court is not an agency of, and shall be independent of, the executive branch of the Government.”
- F. Much has changed since 1969, when the Tax Court was established as a “court of record.” It is the primary tax litigation forum in the Federal system, hearing over 90% of all Federal civil tax cases. It provides an opportunity for taxpayers to resolve tax disputes with their government without first having to pay the tax liability allegedly due. The Court has a well-established tradition and history of accommodating taxpayers who are representing themselves without the benefit of counsel.

- G. The Tax Court’s unique position within the Federal tax system presents ongoing challenges regarding its litigation process and offers opportunities for the Court to assist litigants and/or their counsel in obtaining prompt, efficient, and cost-effective resolutions of their cases.
- H. Using a figurative “crystal ball”, this panel will explore some of the issues facing the Tax Court and its litigants that could affect and perhaps even improve the way the Court does business presently and in the future.

II. Communication, “Privacy”, and Transparency

A. Electronic Filing and Electronic Access

- 1. In December 2017, a commentator, in an article entitled “Tax Court IRS and Secret Law”, wrote as follows:

The Tax Court is letting us down when it comes to electronic transparency. Public documents, such as briefs and petitions, that are readily available from other federal courts are effectively inaccessible to those of us who don’t live or work in the nation’s capital. And maybe the IRS and even some law firms like it that way.

- 2. The commentator made the following additional points:

- a. It is easy to get the decision/opinion in a case thanks to the Tax Court’s electronic case management system, which anyone can access without registration, and which permits a person to obtain access to certain specified documents without incurring any cost.
- b. It is harder to get a decision/opinion/judgment

through the electronic case management system of the Article III Federal courts [PACER (Public Access to Court Electronic Records)] because the person seeking the document must first register to obtain electronic access and then must pay for the privilege.

- c. In PACER, almost all docket entries are accessible electronically. In the Tax Court, most of the documents that are filed in a case and recorded on the case's docket are not accessible electronically unless the person seeking access is one of the litigants or counsel for a litigant.
- d. In a 2008 press release [which announced the finalization of new and/or amended rules dealing with privacy and public access to electronic case files], the Tax Court stated as follow:

The Court has considered the privacy and security issues raised by providing public online access to electronic records in the particular context of a Court whose docket consists solely of Federal tax cases and approximately 75 percent of whose petitioners are pro se individuals, and whether it is unrealistic to expect those pro se individuals to file case documents in a manner that adequately protects their privacy and security interests. Court documents can include a great deal of personal information in addition to Social Security numbers and tax information, such as financial account numbers, property descriptions and addresses, names and birth dates of minor children, employment information, medical and health information, and original signatures. The information most often will relate to petitioners but can also relate to witnesses and other third parties.

- e. The author stated that he had some sympathy for the Court's explanation, which he characterized as "that argument", but stated that "the Tax Court takes the argument further than it should."
- 3. This is not the first time that the Tax Court has encountered complaints about its electronic access policy and related rules. But complaints about electronic access distract from the real issue - **is it time for the Tax Court to engage in a constructive dialogue with those involved in or affected by the Tax Court's policy, as currently embodied in the Court's Rules of Practice and Procedure, regarding the expansion of electronic access to documents filed in the Tax Court? And, if the answer is yes, to what extent should the Court's electronic access policy be expanded?**
 - 4. "Just the facts, Ma'am!": The Reality of E-Access in the Tax Court and through PACER
 - a. **PACER does not permit unlimited e-access.** The PACER system excludes certain categories of cases, such as social security cases and immigration cases, from the electronic access program because those cases contain substantial amounts of personal, sensitive and private data that are not likely to be adequately protected by the redaction protocol incorporated into the Federal Rules of Civil Procedure.
 - b. Although PACER does not exclude tax cases per se from its electronic access system, there is no evidence that the Tax Court has been able to locate to date to suggest that anyone involved in the design of PACER considered whether civil tax cases should be treated like social security and immigration cases.

- c. The CM/ECF User's Guide for Attorneys restricts access to tax information in bankruptcy cases. Unless a motion for access to tax information is filed and granted, tax information filed with the Bankruptcy courts "has restricted access and can only be viewed online by court staff."
- d. The Administrative Office of the United States Courts (AOUSC) monitors the degree to which litigants fail to properly redact and quantifies in periodic reports to Congress the amount of sensitive and private data that is subject to the redaction rules but nevertheless is available through the PACER system.
- e. In contrast to the approach used by the AOUSC, the Tax Court has not completely excluded any categories of its cases from electronic access.
 - (1) Although the E-Government Act of 2002, sec. 205, 116 Stat. 2913, which requires Federal courts to establish and maintain internet web sites containing specified information does not expressly apply to the Tax Court, the Tax Court decided to voluntarily comply with the provisions of the Act.
 - (2) The Tax Court developed and currently maintains a website that satisfies the requirements of the Act relating to the provision of the location and contact information for the courthouse, the Court's Rules of Practice and Procedure, docket information for each case, and access to all written opinions of the Court. But, "because of

privacy and security concerns and the nature of the parties and issue in cases before the Court”, the Court in 2008 adopted rules that limited electronic access to documents filed in a case to the parties and counsel for the parties in that case.

- (3) Relevant portions of the press release formalizing the amendments after the notice and comment period had ended, which explain some of the history and the Court’s rationale for limiting electronic access, are attached as Appendix A.
- f. Since 2008, when the Court promulgated its rules regarding privacy and public access to electronic case files, the Court has continued to monitor whether those rules are appropriate and/or should be modified to reflect the experience of the Court, the litigants, practitioners and others interested in the Court’s operations. In the decade since the rules were promulgated, the following reality has emerged:
- (1) Pro se taxpayers continue to represent over 70% of the Court’s litigants.
 - (2) Redaction is rarely, if ever, done properly in pro se cases. The result is that cases filed by pro se litigants continue to contain sensitive and private information that could be used by domestic and foreign hackers engaging in identity theft, especially if that data could be mined anonymously.
 - (3) Although the Court expects the parties to protect sensitive personal and financial data by

redacting as required by the Court's rules and disclaims any responsibility for correcting redaction mistakes, the reality - that redaction in the hands of pro se taxpayers is seriously flawed - cannot be ignored in the face of ever-increasing attempts by domestic and foreign sources to steal identities through electronic means.

- (4) Even in the hands of skilled and knowledgeable counsel, careful redaction practices sometimes miss the social security numbers hiding in various parts of a document.

5. Query - What Steps Might the Tax Court Consider to Broaden Electronic Access Without Putting Sensitive Information at Risk?

a. Some possibilities could be considered:

- (1) Expanding the types of documents that can be accessed electronically by the general public (e.g., briefs, dispositive motions and/or orders, etc.);
- (2) Limit expanded electronic access to cases in which all parties are represented by counsel;
- (3) Restrict electronic access only to those individuals who register for electronic access privileges, have an address in the United States, maintain a current email address, and provide reliable information that they are who they claim to be;

- (4) In an effort to address the concerns of the LITC and calendar call volunteers, who would benefit from the ability to access the electronic case files of pro se taxpayers on a particular trial calendar, make a computer available at calendar call to the volunteers for use in accessing the files of taxpayers they are assisting [with appropriate Court supervision].
- (5) Find a way to give counsel in a case convenient access to sealed documents.

b. The Court is actively considering expanding access to its electronic case management system. A constructive conversation among those interested in finding an appropriate balance between expanded electronic access and the Court's concern about protecting sensitive data from electronic theft would benefit the Court as it considers expanding electronic access.

B. Reimagining the Tax Court Rules of Practice and Procedure - Is It Time to Restate The Rules?

1. The Tax Court Rules of Practice and Procedure in their present form were first promulgated in 1974 and have been amended and restated periodically since then.¹

¹In Dubroff and Hellwig, The United States Tax Court - An Historical Analysis (2nd ed. 2014), the authors state as follows:

In 1974, the Tax Court adopted a comprehensive rules revision which substantially modified many of its rules of practice and procedure. Since then, the court has undertaken substantial revisions to its procedural rules, once in 2003, and, not long thereafter, in 2008. [Footnote references omitted.]

2. The current Rules [the table of contents are attached as Appendix B] have the following characteristics:
 - a. Rule 1(b), which describes the scope of the Rules, states that the Rules “govern the practice and procedure in all cases and proceedings before the Court” but contains a fail-safe provision:

Where in any instance there is no applicable rule of procedure, the Court or the Judge before whom the matter is pending may prescribe the procedure, giving particular weight to the Federal Rules of Civil Procedure to the extent that they are suitably adaptable to govern the matter at hand.

- b. The Rules are divided into titles. The current Rules have 33 titles. It has been the Court’s practice to create a new title whenever the Court is granted new jurisdiction by Congress. See, e.g., Titles XXI through XXXIII.
- c. Attached as Appendix C is a document entitled “Topical Grouping of Tax Court Rules.” Because of the Court’s tradition of adding a new title for each new area of jurisdiction, there are multiple Rules dealing with the commencement of a case, and the pleadings [petition, answer and reply] and requests for place of trial that the Court requires or permits the parties to file. Five separate rules deal with intervention, but the current Rules do not contain a comprehensive intervention rule.
- d. Many of the Rules are difficult to parse and present challenges to both counsel and pro se litigants.

- e. The current Rules do not contain specific rules that reflect the Court's current practice. For example, although the Court has permitted the filing of briefs by amicus curiae on occasion, the Court has not promulgated a rule with respect to such briefs and has relied instead on the fail-safe provision of Rule 1(b) and the Court's inherent authority to manage its litigation.
3. During the last 25 years or so, the Judicial Conference of the United States Courts has engaged in a major overhaul of the rules applicable to courts under the umbrella of the AOUSC. This effort led to the release of substantially revised, restructured, and restated Federal Rules of Civil Procedure (effective 2007), Federal Rules of Criminal Procedure (effective 2002), and Federal Rules of Appellate Procedure (effective 1998). The restatement project utilized guidelines for drafting and editing Court Rules prepared by Bryan A. Garner, a copy of which is attached as Appendix D.
4. Robert E. Keeton, who became Chair of the Judicial Conference Committee on Rules in 1990, writes in the Preface to the Guidelines as follows:

Federal Rules of Practice and Procedure ought to be user-friendly. This is the prime characteristic of good rules of procedure. They should be easy to read and understand -- as clear in content and meaning as it is possible to make them, and as crisp and readable as clarity permits.

Even superbly drafted rules are at risk of becoming less consistent, clear, and readable as they are amended. And the need for amendments is

inevitable. The only effective remedy for the risks incident to amendment is twofold -- eternal vigilance and a commitment to excellence in style as well as content. Fortunately, good style and good content reinforce each other.

5. **QUERY: Is it time to restate the Tax Court Rules to make them easier to read and understand, and to eliminate duplication?**

III. Reducing the Cost and Inefficiency of Litigation

A. Using Courtroom Technology To Reduce Cost and Time

1. Increased use of remote testimony/hearings/video conferencing
 - a. Some judges have been experimenting with remote testimony and video conferencing.
 - b. What are the technological and legal limitations to the use of remote testimony techniques?
 - c. Do litigants want an in-person hearing or trial? If so, how should the Court balance disagreements between the parties regarding remote testimony and/or a demand for in-person proceedings?
2. Electronic Courtrooms - An Update
 - a. The Court has embarked on a project to upgrade and/or replace the video teleconferencing (VTC) infrastructure in the Court's three courtrooms in its main courthouse in Washington, D.C.

- b. The Court hopes and expects the project to be completed on or before September 31, 2018.
 - 3. Expanded E-Filing of petitions, decisions, etc.
- B. Innovative Procedures/Issues that Could Affect How the Court Does Business
 - 1. Electronically Stored Information (ESI) and Discovery
 - a. How will the proportionality principle be applied to large quantities of ESI?
 - b. Should the Court participate in identifying search terms with respect to predictive coding? See, Dynamo Holdings Ltd. v. Commissioner, 143 T.C. 183 (2014)?
 - c. One suggestion - enlist the special trial judges to assert early control over ESI discovery and to encourage the parties to agree to applicable terms, etc.
 - d. See article titled "6 E-Discovery Predictions For 2018", which is attached as Appendix E.
 - 2. Expert Testimony
 - a. How can the parties and the Court better manage the expert testimony phase of large case litigation?
 - b. Can there be too many experts in a case?

c. Possible Ways to Improve the Expert Witness Process:

- (1) Require the early submission of discovery plans that identify areas where expert testimony will be needed;
- (2) Make greater use of Court-appointed experts;
- (3) Require/encourage the parties in appropriate cases to vet expert witness disagreement through concurrent depositions, etc.;
- (4) Require/encourage the parties to provide pretrial identification of the areas (factual and legal) where the experts disagree;
- (5) Other Ideas

C. Pressures Placed on the Litigation Process by the Way Cases Are Audited

1. There is an ongoing need to review and evaluate procedures used by the IRS to select and process cases through correspondence exams and other automated-type reviews to insure that limited resources are used appropriately and achieve meaningful results.
2. See Study of Tax Court Cases In Which The IRS Conceded The Taxpayer Was Entitled To Earned Income Tax Credit (EITC) conducted by the TAS, attached as Appendix F.

IV. Globalization and Its Effect on Current and Future Tax Court Litigation

A. Introduction

1. The recent release of the Panama Papers and the Paradise Papers raises the very real prospect that information obtained from those documents will be used by domestic and foreign law enforcement agencies to pursue taxpayers who appear to be engaging in significant tax evasion and tax avoidance activities.
2. In addition, international cooperation among law enforcement agencies including tax agencies is putting increased pressure on those hiding assets and income overseas and is increasing the likelihood that alleged unlawful behavior will be identified and challenged.
3. The OECD's base erosion project has also turned a bright light on the efforts of international corporations to move assets and income to no tax or lower tax jurisdictions.
4. Cases involving taxpayers with international operations and assets overseas are likely to increase. They likely will present challenging issues of foreign law and foreign evidence.
5. An outline covering statutory and rule provisions regarding the application of foreign law and the challenges of obtaining foreign evidence is attached as Appendix G.