Designated Orders Panel Outline

I. Lessons From Designated Orders: Summary Judgment

- Know the Record! (Johnson & Roberson v. C.I.R., Dkt. # 22224-17L, Post here: https://proceduralltaxing.com/putting-irs-records-at-issue-proving-supervisory-approval-and-receipt-of-notice-of-deficiency-designated-orders-9-10-28-9-14-18/)

One requirement of summary judgment is that the pertinent facts are not "subject to genuine dispute." If you're moving for summary judgment you should know (a) what facts are pertinent, and (b) should be able to show that they are not in genuine dispute.

In Johnson & Roberson the taxpayer wanted to argue against the underlying liability in a CDP hearing, which is only available if the taxpayer did not receive any statutory notice of deficiency or otherwise have an opportunity to dispute the tax. IRC 6330(c)(2)(B).

Accordingly, to prevail the IRS would need to show that the taxpayer was precluded from raising the underlying liability because they either received a Notice of Deficiency or had another opportunity to dispute the tax. The IRS moved for summary judgment on those grounds.

The problem? The administrative record the IRS was relying on to show facts "not subject to genuine dispute" specifically said that the taxpayer did NOT receive a Notice of Deficiency…

The consequence? Motion denied. And Judge Gustafson used the opportunity to remind IRS Counsel of Tax Court Rule 33(b) (that is, the effect of a signature in pleadings -that the signatory is asserting that their position is grounded in fact after reasonable inquiry)

- Don't Assume the Tax Court Knows the Facts You Are Relying On (Lamprecht v. C.I.R., Dkt. # 14410-15, Post here: https://proceduralltaxing.com/evidence-s-cases-and-collection-due-process-review-designated-orders-4-23-2018-4-27-2018/)

In Lamprecht v. C.I.R., one of the pro se petitioners filed a motion for summary judgment that explicitly said it assumed "the Court is familiar with the facts in this action that are relevant to this motion."

Judge Gustafson denied the motion (for multiple reasons), but specifically provided that it is the responsibility of the moving party to show the facts in the record that would lead to summary judgment, rather than putting it to the Court (or opposing party) to extract them on their own.

- Put the Right Issues Before the Court: If Framed as a Matter of Law, Summary Judgment Can Be Appropriate Even in Highly Factual Issues Like Valuation (H R B-Delaware, Inc. & Subsidiaries v. C.I.R., Dkt. # 28129-12, Post here: https://proceduralltaxing.com/getting-to-summary-judgment-the-art-of-framing-the-issue-as-a-matter-of-law-january-28-february-1-designated-orders-part-one/)

As discussed previously, one component of summary judgment is that there is no reasonable dispute on the pertinent facts. The other component is that judgment as a matter of law flows from those (pertinent, undisputed) facts.

In H R B-Delaware, the petitioner moved for partial summary judgment on the "Built in Gains" (BIG) tax resulting from the value of franchise rights.

The value of franchise rights would seem to be a highly factual issue, not well suited to summary judgment (but requiring the fact-finding of trial). However, the petitioner argued that the value based on the facts that were not disputed *had* to be $0 as a matter of law, and prevailed.

- Conversely, You Are Setting Yourself Up for Summary Judgment if the Facts You Dispute Are Irrelevant to the Issues Before the Court (Fowler v. C.I.R., Dkt. No. 28935-14L, https://proceduralltaxing.com/making-the-wrong-argument-how-to-avoid-raising-issues-that-dont-actually-matter-designated-orders-december-3-december-7-2018/)

It is important to note that summary judgment only cares about when "pertinent" facts are not in dispute. If there are facts in dispute but they wouldn't touch on the outcome of the case, they don't really matter to a summary judgment motion. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

In Fowler, the IRS moved for summary judgment in a CDP case where the taxpayer's installment agreement was rejected for being far below what the IRS believed to be a reasonable amount. The IRS's primary position was that the taxpayer didn't provide information (when asked) that would support their proposed installment agreement amount. Ergo, no abuse of discretion.

The taxpayer, in responding to the motion for summary judgment, did not contest the material fact (i.e. that they didn't provide the information the IRS requested) but only argued about the amount of time given to provide the information (roughly 3 months).

Because the Tax Court has frequently held that there is no set amount of time the IRS must allow a taxpayer to provide such information (and 3 months isn't manifestly unfair), there was no dispute on the material facts (i.e. that the taxpayer didn't provide the needed information) and summary judgment was awarded.

- Don't Wait to File Summary Judgment Motions! (American Limousines, Inc. v. C.I.R., Dkt. # 4795-18L, post here: https://proceduralltaxing.com/the-perils-of-waiting-on-a-summary-judgment-motion-designated-orders-october-7-11-2019/)

The Tax Court rules provide that summary judgment motions must be made no later than 60 days before trial. However, if you wait until the last second (i.e. 61 days before trial) you run the serious risk of having the motion rejected since it is unlikely to fulfill a core purpose of summary judgment: avoiding trial. The Judge may very well find that additional items need to be sorted out, and that trial would be the best way to do that.

The IRS frequently relies on summary judgment motions in CDP cases (particularly since the Tax Court is often largely bound to the administrative record), and IRS internal guidance recommends filing such motions as quickly as possible to dispose of such cases. See esp. IRM 35.3.23.1(1) and IRM 35.3.23.8.3

In American Limousines, for reasons that aren't particularly clear, the IRS waited until 60 days before trial to file a motion for summary judgment. The opposing party objected and raised issues in the objection that, though perhaps could have been disposed of in summary judgment, would need further explanation from the IRS… and with a trial date looming, the Court decided it made more sense just to sort it out then.

II. Lessons from Designated Orders: Best (Motion) Practices

- Try to (Genuinely) Work it Out with the Other Party: Communication is Key (Murfam Enterprises LLC, et.al v. C.I.R., Dkt. # 8039-16, post here: https://proceduralltaxing.com/designated-orders-june-18-22-mailing-issues/)

Tax Court is built on informal discovery and stipulation, and the parties are expected (to some degree, required) to work with each other before asking the Court to step in.

In Murfam Enterprises, LLC the petitioner filed a motion to compel the IRS to respond to interrogatories and a motion to compel production of documents. The parties had agreed to a general schedule for the conclusion of informal and formal discovery, but the petitioner's timelines were less "generous" for the IRS to respond. Petitioner made voluminous requests and filed motions to compel essentially a day after the deadlines passed.

Judge Gustafson denies the motion, and essentially tells the parties to try a little harder to work it out, and notes that "communication during the discovery process and prior to the filing of the subject motions has been inadequate." As one fact that might lead to such a conclusion, it appeared that the petitioner did not put much effort into reaching out to the IRS to see if they would object to the motion to compel in the first place (note that Tax Court rules require such notification: see Tax Court Rule 50(a)). The IRS alleged that the only call they received prior to the motion being filed was a single call received outside of business hours without a message being left.

- Don't Play Hardball (Too Much) – (Cross Refined Coal, LLC v. C.I.R., Dkt. # 19502-17, post here: https://proceduralltaxing.com/a-tale-of-two-types-of-taxpayers-designated-orders-may-20-24/)

These orders also involved a motion to compel discovery (as well as a motion to strike), but dealt less with the issue of exhausting informal discovery than it did sticking to a timeline that was complicated by the government shutdown from December 22, 2018 through January 25, 2019.

The original deadline for the parties to serve discovery requests was January 30, 2019. The IRS, however, recognized it was going to have difficulties meeting that deadline because of factors well outside of its control (that is, the offices being locked up during the shutdown). The IRS asked for a continuance on the deadlines, though technically the request came slightly after the deadline had already passed.

Petitioner took the position that they did not have to respond to the IRS discovery requests that followed thereafter, since they were (arguably) untimely. The IRS characterized the Petitioners position as "hardline" and questioned their acting in good faith during the process. Petitioners took some umbrage at this characterization, and filed a motion to strike.

The Tax Court appeared to take a dim view of the inability of the parties to sort things out amongst themselves, and the use of judicial resources on these matters, particularly with regards to the motion to strike: "[w]e think that the pending motion to strike was not a good expenditure of petitioner's counsel's time and that it required from the Court attention that would have been better spent on the remaining motions to compel." Accordingly, the motion was denied.

- Be Clear in Asking the Court To Do Something (Langdon & Fuller v. C.I.R. (Dkt. No. 22414-15) and York v. C.I.R. (Dkt. No. 2122-17), covered here: https://proceduralltaxing.com/designated-orders-post-week-of-2-26-3-2-estate-of-michael-jackson-a-new-graev-issue-and-more/)

In these cases, the IRS and the petitioners were on the verge of settlement and explained as much to the Court in their status report. However, they also wanted more time to do so (avoiding trial), and asked the Court for more time in the status report.

The Court explained that such requests should be done in the form of a motion, so that an order can properly ensue. This is particularly important because (as noted before) a motion must indicate whether the other party objects. It also simply makes it easier for the Tax Court to discern exactly what it is you want them to do (usually the title of the motion itself is a good indicator), which text in the body of a status report is less likely to do.

- Be Sure the Tax Court is the Right Audience for the Thing You Are Asking For: Imposing Injunctions (Crawford v. C.I.R., Dkt. # 4318-18L, covered here: https://procedurallytaxing.com/lazy-mid-summer-tips-and-traps-designated-orders-august-12-16-2019/)

In this case, the petitioner was unrepresented before the Tax Court (that is, no entry of appearance), but receiving informal assistance from someone. The problem is the "someone helping" had raised the ire of the IRS previously, to the point that there was a district court injunction against that person representing people before the IRS.

However, the injunction was through the federal district court, and related to representation before the IRS, not the Tax Court. The IRS was essentially asking the Tax Court to enforce a district court injunction while also finding that such practice was "before the IRS." The Tax Court said if the injunction was indeed being violated, the district court was the proper audience, and declined the motion.

- Be Sure the Tax Court is the Right Audience for the Thing You Are Asking For: Discovery Through FOIA (Cross Refined Coal, LLC v. C.I.R., Dkt. # 19502-17, post here: https://procedurallytaxing.com/a-tale-of-two-types-of-taxpayers-designated-orders-may-20-24/)

This case has already been discussed above in the context of petitioners failing to "play nice" with the IRS and work out issues without the Court's involvement. The designated orders also dealt with a motion to compel discovery filed by the petitioner, with an objection that it requested information that was either privileged or unlikely to result in relevant information.

Apparently, petitioners had a simultaneous FOIA dispute and hoped to have the Tax Court work it out through discovery. The Tax Court declined to do so, saying they would not "in effect, become a proxy for a district court" and that they would not "use the resources and authority of the Tax Court to compel disclosures extraneous to our proper business."

III. Emerging Issues Covered in Designated Orders

- Graev Matters… Introducing Evidence of Supervisory Approval (Weaver v. C.I.R., Dkt. # 262-15S and Collins v. C.I.R., Dkt. # 9650-14), covered here: https://procedurallytaxing.com/evidence-s-cases-and-collection-due-process-review-designated-orders-4-23-2018-4-27-2018/)

A line of designated orders came out after the Graev III decision (Graev v. C.I.R., 149 T.C. No. 23, (2017)), many of which dealt with the procedural issues of the IRS in introducing the (now required) evidence of written managerial approval of penalties. The two orders above highlight two frequently recurring issues: reopening the record to introduce the evidence, and objections to the written managerial approval on hearsay grounds.

The Court regularly found no issue with reopening the record under the circumstances, noting their wide discretion to do so. As to hearsay objections on the managerial approval, the IRS quickly found a winning exception under the "business records rule." (FRE 803(6)). Query, however, whether that exception is even needed, or if the written managerial approval forms necessary for IRC 6751 compliance may be admissible as non-hearsay because it has "independent legal significance" (much like a contract in a contract dispute).

- Graev Matters… Supervisory Approval for Each "Reason" for a Penalty (Rajagopalan & Kumar, et al. v. C.I.R., Dkt. # 21394-11, 21575-11, covered here: https://procedurallytaxing.com/designated-orders-january-29-february-2-holmes-continues-plumbing-the-depths-of-graev/)

Many of the potential issues post-Graev that would need to be figured out in litigation were raised in designated orders. One that was raised, but not immediately addressed, was whether supervisory approval was required for all of the rationales listed on the approval form. Because there are multiple reasons the IRS could assert an IRC 6662 penalty (for example, negligence or substantial understatement) and because the supervisory approval form lists out the different rationales, it is possible that only one may be "approved" and leaving the others deficient under IRC 6751. That was precisely the potential issue that Judge Holmes raises (without addressing here).

- Graev Matters… Many, many more… (just a few examples, https://procedurallytaxing.com/designated-orders-week-of-1-1-2018-1-5-2018-aka-new-year-new-graev-iii/ and https://procedurallytaxing.com/designated-orders-7-16-7-20/). Designated orders were frequently the "testing grounds" for procedural issues post-Graev.

- Whistleblowers: Limitations on Discovery. Finding out if your Tip Actually Worked (Goldstein v. C.I.R., Dkt. # 361-18W, covered here: https://procedurallytaxing.com/designated-orders-discovery-issues-delinquent-petitioners-and-determination-letters-and-some-chenery-august-13-17/)

One of the requirements of recovering in a whistleblower case is that your tip led not only to additional tax being asserted by the IRS, but to additional tax collected. In Goldstein, the whistleblower gave a tip that resulted in an audit, but eventually a "no change" on hazards of litigation grounds. The whistleblower, however, brought suit hoping to use discovery to show (1) that there actually were proceeds from the tip or, (2) in the alternative that there *should* have been proceeds from the tip.

In the order the Tax Court dismisses the case for lack of jurisdiction. The court found that there was no jurisdiction (and discovery would be inappropriate) for the second rationale (trying to determine if proceeds *could* have resulted). The Court only reviews an award determination from collected proceeds, and does not review the underlying tax return to determine more tax may have been appropriate. The Court also denied the petitioner the ability to show that there "were" (hidden) proceeds. Although other whistleblower cases had allowed for discovery to determine how much proceeds were recovered, those cases were distinguishable because it was undisputed that there were at least some proceeds recovered. In this case, there was no such assertion, and in the absence of clearly collected proceeds (and records that generally showed to the contrary), the case could not stand.

- Whistleblowers: Limitations on Discovery. Inherent Tension of IRC 6103 in Whistleblower Cases (Whistleblower 6388-17W v. C.I.R., https://procedurallytaxing.com/the-benefits-of-tax-court-designated-orders-april-22-26-2019/)

With tax return information, the general rule is that it is confidential. While that general rule is littered with exceptions, the tension of the general rule and the whistleblower's need for certain taxpayer information is always present.

In this order, the Tax Court talks about that tension in the context of numerous highly redacted documents produced by the IRS. The Tax Court directs the parties to produce separate memoranda addressing the issues, and specifically the applicability of the exceptions to confidentiality in IRC 6103(h)(4)(A), (B) and (C).

IV. Designated Orders: A Font of Tax Lessons!

- Which Time Zone Controls Timeliness? NCA Argyle LP, et. al. v. C.I.R., Dkt. # 3272-18 (here: https://proceduralltaxing.com/lazy-mid-summer-tips-and-traps-designated-orders-august-12-16-2019/)

When the Tax Court sets a deadline of, say, "March 29" for a document to be filed, would it be timely if you electronically click "submit" at 11:59 p.m. in California on that very day? Is that just before the buzzer, or does another time-zone control leaving you a day late? The Tax Court rules (specifically, Rule 22) now makes clear that the time-zone to be concerned with is Eastern Time, but it wasn't always this way. In the above designated order, the Tax Court recognizes that the new rule change was not immediately reflected in the Practitioner's E-Access Guide for filing with the Tax Court, which provided that electronic filing was timely if it was transmitted by 6 a.m. Eastern the day *after* the day specified. This order not only brought up an interesting issue, but resulted in the Tax Court making the appropriate changes to the E-Access Guide.

- Law of the Case Doctrine: Zajac III v. C.I.R., Dkt. # 1886-15 (here: https://proceduralltaxing.com/things-that-happen-to-your-tax-court-case-when-you-file-bankruptcy-or-your-judge-retires-designated-orders-june-17-21/)

It's easy to forget some of the lessons crammed into your first year of law school, when you are new to the whole enterprise and mostly learning how to properly read a case. It's easier still to forget those lessons when you don't frequently see them in your practice. So it may be with the "law of the case doctrine," which generally stands for the proposition that "when a court decides on a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case." Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988).

Usually, this comes into play on cases on Appeal, but it can also arise in the trial court if the original presiding judge leaves (e.g. by retirement). So it was in the above case with the recently retired Judge Chiechi leaving before rendering a final decision, but after already having ruled on many, many motions. The new Tax Court Judge (Gale) explains in this circumstance that the law of the case doctrine means that "a successor judge generally should not, in the absence of exceptional circumstances, overrule a ruling or decision of the initial judge." In other words, the decisions that were reached by Judge Chiechi up to this point are unlikely to be overturned, even if Judge Gale may have reached different conclusions.

- Duty of Consistency: On Facts vs. On Law. Deluca v. C.I.R., Dkt. # 584-18 (here: https://proceduralltaxing.com/getting-to-summary-judgment-the-art-of-framing-the-issue-as-a-matter-of-law-january-28-february-1-designated-orders-part-one/)

Generally, a taxpayer cannot take a certain position to avoid tax and then, later (especially if the applicable statute of limitations has passed) take an inconsistent position with regard to that same item in a way that now benefits them. Where taxpayers attempt to do this, they typically run up against the judge-made "duty of consistency." That duty looks at whether the taxpayer (1) made a representation or

reported an item for tax purposes in one year, (2) the IRS relied on that representation (or just let it be), and (3) after that statute of limitations on that year has passed, the taxpayer wants to change their earlier representation. See Cluck v. C.I.R., 105 T.C. 324 (1995).

In some circuits, however, there is something of a distinction between inconsistency on the facts as opposed to inconsistency on the law. In the above designated order, the taxpayer engaged in a prohibited transaction with their Roth IRA, effectively causing it to cease to exist in 2010. However, the taxpayer consistently treated the Roth IRA as if it did exist (was consistent in their treatment of that "fact" though wrong on the law) for the years thereafter. When the IRS finally discovered the prohibited transaction for tax year 2014, the taxpayer was allowed to argue that the prohibited transaction actually took place earlier (2010), and so could not have occurred in 2014. The taxpayer had been consistent in their treatment of the facts, and under an opinion by Judge Hand (Bennet v. Helvering, 137 F.2d 537 (2nd Cir. 1943) the duty of consistency only applies to facts, not law.

- How to Stipulate Facts, and How to Properly Object to Them: Siemer Milling Company v. C.I.R., Dkt. # 21655-15 (here: https://procedurallytaxing.com/judge-buch-offers-a-primer-on-stipulations/)

Stipulations are key part of the litigation process with the Tax Court. When a party refuses (unreasonably) to stipulate, a party may compel the other to stipulate through a court order. Such a motion brought about the designated order above.

The question arises as to what an unreasonable refusal to stipulate entails. Often the parties will not perfectly agree on the facts, or may have evidentiary objections to some of the stipulations. So it was in the above order, where the IRS has a laundry list of objections (10 total) for rejecting the stipulations. Judge Buch walks through the different rationales provided by the IRS for rejecting the stipulations. Those that object on the grounds of the source of the fact (e.g. hearsay) are not properly rejected: the evidentiary objection should be retained and noted in the stipulation, but that alone is not enough to reject the stipulation in whole. Conversely, where the IRS objected not to the source of the fact, but the substance (i.e. that the fact was "fairly in dispute") the Judge Buch allowed the objections to being compelled to stipulate. The order provided an excellent discussion on what legal bases parties should provide (and how to present their argument) when objecting to facts during the stipulation process.