25 May 2022

Stephanie A. Servoss
Clerk of the Court
United States Tax Court
400 Second Street, NW
Washington DC 20217

Re: Comments on Proposed Changes to Tax Court Rules Announced on March 23, 2022

The Center for Taxpayer Rights and the undersigned individuals, all affiliated with Low Income Taxpayer Clinics, submit this letter in response to proposed Rules changes issued in a press release from the Tax Court on March 23, 2022. We commend the Court for its efforts to update and clarify its rules, and generally support the changes. We provide comments below on certain provisions, informed by our experience working with low income and self-represented taxpayers and founded on the fundamental taxpayer right to appeal an IRS decision to an independent forum.

Rule 13: Jurisdiction

We concur with the comments submitted by the Legal Services Center of Harvard Law School that paragraph 13(c) should be deleted to avoid confusion about the present uncertain state of law regarding the impact of late filing on the Court's jurisdiction.

Rule 27: Privacy Protections for Filings Made With the Court

We concur with the comments submitted by the Legal Services Center of Harvard Law School and note that it is possible to obtain software that can be trained to identify information that should be redacted and is not. We support the suggestion that the Court provide a simple online form for requesting documents; such form could go to a dedicated email box, which would send an acknowledgement email to the requester.

Rule 36: Answer

We believe that the Court should continue to require answers in all cases, including small tax cases. At present, answers are minimally helpful because the IRS must have some form of the

administrative file in order to give meaningful answers to petitioner's material allegations. The current practice of responding "no knowledge" can be confusing to pro se taxpayers and does nothing to advance the case.

We find it difficult to believe that the IRS cannot create and staff a small, dedicated unit whose sole job is to locate and transmit administrative files to insure that Chief Counsel is able to provide a meaningful answer in Tax Court cases. Entities such as the Social Security Administration, which handles over a million formal administrative adjudications for disability and Medicare each year, manage to prepare and timely transmit such files to their Administrative Law Judges. It is no longer reasonable to accept the status quo.

As we explain in our discussion of Rule 92 below, we suggest that Rule 36 contain a requirement that the answer be submitted following a review of the administrative record. Such a requirement will force Chief Counsel and the IRS to establish a procedure whereby such record is promptly located and transmitted.

Further, we recommend that Rule 36 require the answer to include name and contact information of the assigned Appeals Officer in those cases it intends to forward to Appeals. This approach conforms with the recently released memorandum from the IRS Chief, Appeals, which states that Appeals officers should promptly call petitioners upon assignment of the case. Such requirements are small steps that will move the cases toward earlier settlement, may reduce the default rate in small or pro se cases, and will ensure communication between the parties while the dispute is fresh.

Rule 92: Identification and Certification of Administrative Record in Certain Actions

We are very concerned that the administrative record, as maintained by the IRS in certain actions, including collection due process hearings and IRC § 6015 relief cases, is inadequate to provide a complete picture of what was submitted in the administrative procedures and what IRS personnel considered in exercising their discretion to provide relief. The record as proposed by Respondent may not be complete. Additionally, in certain circumstances a party may supplement the administrative record. We therefore applaud the Court's proposal to promulgate rules that allow for supplementing and completing the administrative record, and we urge the Court to expand upon the proposed rules. Such rules should recognize the distinct struggles that low income and pro se taxpayers face in trying to navigate IRS processes, including the inability to reach the IRS by telephone and confusing IRS correspondence and automated responses. Taxpayers may not know what information is required of them and also may not understand the significance of the administrative record for judicial review.

With respect to proposed Rule 92(a), we acknowledge the challenge of arriving at a stipulated record that can then be certified. However, we believe that requiring the Commissioner to file the certified administrative record no later than 30 days after the notice setting the case for trial is too late for advancing the case toward early settlement or resolution of at least some

issues. Disputes regarding the record and the scope of permissible supplements to the record are less likely to require continuances if the record is produced earlier in the process. As noted in our above discussion of Rule 36, the Commissioner must have some access to some form of the administrative record in order to meaningfully answer the petitioner's allegations.

In order to early identify deficiencies in the administrative record and advance early resolution of the case, we suggest Rule 92 require the Commissioner to provide the petitioner with an uncertified copy of the administrative record within 14 days of filing answer. This requirement will ensure that Commissioner has some version of the administrative record in hand when it is answering the petition, and both parties will have early opportunity to ascertain the sufficiency and completeness of the record.

We commend the Court for recognizing there will be times when the certified administrative record will need to be supplemented or completed. We recommend that proposed Rule 92(b) be divided into two separate sections of the rule. Rule 92(b) should address Motions to Supplement the Administrative Record, and Rule 92(c) should address Motions to Complete the Administrative Record. The following discussion from a recent law review article addresses the distinction between the two motions.

> *First, the plaintiff could bring a "motion to complete" the administrative record with certain materials or categories of materials. This would involve arguing that the materials in question were properly a part of the administrative record—i.e., that the materials were a part of the record on which the agency based its decision. To be successful, the plaintiff would need to overcome the presumption of regularity, which requires a showing of "clear evidence to the contrary." Such proof would include direct evidence that an agency decisionmaker considered the material question or a showing that the agency relied on an erroneous definition of the administrative record in compiling it. A successful motion to complete the administrative record results in a court order that the agency certify a new record including specified materials or categories of materials.*
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> *Second, the plaintiff could bring a "motion to supplement" the administrative record.80 This would involve arguing that even if the materials in question are not properly considered part of the administrative record (i.e., because they were not before the agency during the decision-making process), the materials fall within a recognized exception to the record rule such that the lower court should consider them.81 Courts have recognized various exceptions to the record rule where informal agency action is at issue, including where: (1) the plaintiff makes a showing of bad faith or improper behavior; (2) the agency failed to consider relevant factors; (3) background information is necessary to help the court understand a technical issue; and (4) the record is so incomplete as to frustrate judicial review. These circumstances may also justify discovery. As a rule, the exceptions to the record rule are narrowly applied.*
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> *The completion/supplementation dichotomy is a straightforward way of characterizing disputes over an administrative record's contents. It allows for a distinction between materials that should be considered because they were properly*

a part of the administrative record from the beginning (in the case of completion) and materials that are not properly part of the record but may be considered nonetheless (in the case of supplementation). However, I should note that although the mechanisms and process for disputing an administrative record are generally consistent, this vernacular is not consistently used, as some courts and commentators have lamented. This terminological inconsistency serves as a bit of an appetizer for the broader confusion regarding what an agency is obliged to include in the administrative record for informal agency action.[1]

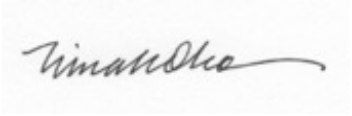
In current paragraph 92(c) (renumbered 92(d) if the preceding recommendation is adopted), we suggest a parenthetical be added to make clear that the administrative record includes material recorded in electronic case management systems. This could be accomplished by adding "(including electronic case management system records)" after the words "all materials." Finally, we suggest the prefatory clause in paragraph 92(e) is unnecessary. It is clear from the remaining language that the purpose of this paragraph is to provide the Court with discretion to apply the procedure to deficiency cases.

Rule 152: Brief of an Amicus Curiae

We applaud the Court's recognition of the important role amicus curiae briefs may play, especially where cases involve pro se litigants that may result in precedential rulings. We concur with the Legal Services Center of Harvard Law School's comments in this regard. We also suggest that the Court consider establishing some method of making the request for an amicus public. This could entail maintaining a panel of representatives available for such assignments, or maintaining a page on the Court's website where designated orders requesting amicus briefs in a case could be separately posted and reviewed. The LITC Support Center, a project of the Center for Taxpayer Rights, has established a pro bono panel of volunteers throughout the country, and some have signed up to assist on amicus briefs.

Thank you for affording us the opportunity to comment on these important changes. We are grateful for the Court's continued efforts toward making its doors open and accessible to all taxpayers.

Sincerely,



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[1] Peter Constable Alter, A Record of What? The Proper Scope of a Administrative Record for Informal Agency Action, 10 U.C. Irvine L. Rev. 1045, 1057-1058 (2020) (footnotes omitted) at https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1447&context=ucilr.

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