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May 20, 2022

Honorable Maurice B. Foley
Chief Judge
United States Tax court
400 Second Street, N.W.
Washington, D.C. 20217

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

Dear Chief Judge Foley:

The Tax Clinic at the Legal Services Center of Harvard Law School (the Clinic) submits this letter in response to proposed Rules changes issued in a press release from the Tax Court dated March 23, 2022. The Clinic provides comments on selected provisions of the proposed rule changes and one comment on a rule it believes should change in light of the Supreme Court's decision in Boechler v. Commissioner.

The Clinic generally supports the proposed rule changes and applauds the effort to clear up language used in the rules. It provides comments only on selected provisions as noted by the headings.

Rule 13(c)

The Clinic recommends removing this rule as it provides confusion. The rule is inaccurate with respect to at least three areas of the Court's jurisdiction. The rule states a legal conclusion rather than providing guidance on practice before the Court. Given the ongoing uncertainty regarding the timing of filing a case and the impact of late filing on jurisdiction, at this time it would seem preferable to let the law control rather than creating confusion by stating a legal conclusion in a rule that is, at least, partially incorrect.

Rule 20(d)

The proposed rule provides that the filing fee should be paid at the time of the filing of the petition. For parties filing the petition electronically, the payment of the filing fee requires a second step. They must either go to pay.gov or mail into the Court a check for $60 dollars after filing the petition. Would it be more accurate or preferred to state that the filing fee should be paid "in conjunction with" the filing of the petition since mailing in the petition with an attached check is no longer the only way to file a petition.

In this regard, it might be helpful to change the instructions in the form petition package. Currently the instructions there provide:

> Enclosures
>
> To help ensure that your case is properly processed, please enclose the following items when you mail your petition to the Tax Court:
>
> 1. A copy of any Notice of Deficiency, Notice of Determination, or Final Determination the IRS sent you;
> 2. Your Statement of Taxpayer Identification Number (Form 4);
> 3. The Request for Place of Trial (Form 5); and
> 4. The $60 filing fee, payable by check, money order, or other draft, to the "Clerk, United States Tax Court"; or, if applicable, the fee waiver form.

Would it be better to guide petitioners to pay.gov and the process of paying electronically as an alternative to sending the check by mail? Is this section of the instructions an opportunity to guide more petitioners to the electronic filing portal in general? With a high percentage of pro se petitioners, the more guidance provided to assist them in filing electronically, the more likely they will do so correctly.

Rule 25(a)(2)

The Clinic has concerns about the operation of this rule if one or both of the methods of filing a petition become inaccessible.

How does the ability to electronically file petitions interact with physical accessibility to the Clerk's office? What if a petitioner seeks to file their petition by an unauthorized delivery service or the person sends the petition by courier and the Court is closed due to snow requiring delay of delivery until after the last date to file. Does the fact that the petitioner could have filed electronically mean

that the petition is filed late? Does accessibility now turn solely on electronic access?

What if the Court's electronic access goes down for a portion of a day? How does lost access for a portion of a day impact the determination of accessibility? Does it only matter if the electronic access becomes unavailable at the end of the day leading up to and including 11:59 p.m. Eastern Time?

Perhaps these comments provide only hypothetical problems discussed at a law school, but the introduction of electronic filing theoretically available to everyone all the time changes the nature of the timely filing discussion.

Rule 27

The Clinic believes that the Court practice unnecessarily restricts access to public documents.

The rule continues a practice that makes it unnecessarily difficulty to access public information. Documents should be available electronically absent a good reason for preventing electronic access. The Court should provide a statement of its policy reasons for preventing the public access to public documents in a reasonable manner.

Rule 27(b)(2) describes public access at the courthouse. This access has been essentially unavailable for over two years but even when available is not something available to 99% of the populace. The rule does not explain the alternate method for obtaining records by calling the Court and ordering documents from the clerk's office leaving anyone who reads the rule to think that the only way to obtain documents is by a person visit which, at this time, is impossible.

The Court could adopt practices that would open most of its documents to easy public access over the internet. The Court's failure to open most documents to access over the internet is difficult to explain solely based on privacy concerns as long as it declines to allow electronically access to entity documents which do not implicate privacy concerns. For a further discussion of concerns on this topic please see https://procedurallytaxing.com/what-information-should-the-tax-court-make-available-electronically-to-non-parties/ and the article cited therein entitled "Nonparty Remote Electronic Access to Tax Court Records."

The pandemic has changed the way even persons in DC can access Tax Court records. The current system for calling and obtaining records contains some improvements over the prior system but is still somewhat clunky. In addition to making more documents electronically available, the Court might consider allowing requesters to fax in the request. That would avoid calling and leaving a VM message only to have someone from the clerk's office respond to the call and leave a VM message with the requester and so on. A dedicated fax line or email address could make the intake process go smoother and avoid he problems inherent in relying on phones for communication.

Rule 32

The Clinic believes that the Court's rule and the Court's instructions for filing a petition could be better coordinated.

Rule 32(c) provides in part that no documents other than the notice giving rise to the case should be attached to the petition. The instructions provided with the petition kit do not advise petitioners not to attach additional material except by reference to the web site. It might be worth considering a brief mention of this rule as part of the Enclosures section of the explanation in the instructions. Otherwise, it is difficult for pro se petitioners to know not to send additional materials.

Rule 36

The Clinic believes the rule should contain a statement requiring review of the administrative file prior to filing the answer in order to avoid the practice of blanket denials even of information contained in the administrative file. Requiring review of the administrative file would narrow the issues in the case and avoid frustration.

The rule should consider the possibility that answers need not be filed in small tax cases and adopt a practice that provides more meaningful information to the Court and to the petitioner. The Clinic believes that answers generally provide little assistance in narrowing the issues because Respondent's counsel routinely denies or denies for lack of knowledge all factual pleadings without making an appropriate effort to review the file for facts. Whether or not the Clinic's view of the majority of answers is correct, the Clinic views answers as unnecessary and unhelpful in cases filed using the small case procedure and believes that a better system could be found.

A better procedure in small cases might focus on having respondent notify the Court and the petitioner in a short time after the filing of the petition of the attorney assigned to the case including the contact information for the attorney. The notification might also include the name and contact information of the assigned Appeals Officer in those cases respondent intends to forward to Appeals. The response should also include a statement regarding the timeliness of the petition and a copy of the document giving rise to the Court's jurisdiction if the document was not attached to the petition. A discussion of a procedure recently adopted in another federal court with a high volume of pro se petitioners can be found at https://proceduralltaxing.com/eliminating-answers-in-certain-district-court-cases/. A study of best practices for the Tax Court might benefit the parties and the Court.

Rule 92

The Clinic believes this rule will impact a high number of unrepresented petitioners who will struggle to supplement the record within the time period proposed. Unless there is some need to have the administrative record submitted three months before the date of the calendar call, perhaps the time to supplement could be moved to 30 days prior to calendar call with some mention of the ability for the Court to liberally grant a motion to supplement the record should an unrepresented party obtain representation after that date.

The Commissioner has recently objected to material in the record on the grounds of hearsay. Such an objection should occur at the time of the submission of the administrative record in order to give petitioners the opportunity to supplement the administrative record. The Court might consider the recommendation of the Administrative Conference of the United States regarding judicial review of an administrative record. The recommendation may be found at https://www.acus.gov/recommendation/administrative-record-informal-rulemaking

Rule 152

The Clinic believes that this rule advances the opportunity for better outcomes in cases by providing the Court with additional resources in evaluating a case. In addition to providing structure for amicus briefs, the Court might also consider a procedure for appointing pro bono counsel in appropriate cases.

Some judges reach out to clinics or other practitioners on occasion to solicit pro bono representation for a party. Formalizing this process could make judges more comfortable in seeking assistance for a party in need and could foster the development within the bar of more formal lists of individuals willing to assist. Attached are orders used by the Ninth Circuit regarding the appointment of pro bono counsel in a tax case pending before it. Also attached is a letter sent by the Fourth Circuit to a pro se appellant before it in a tax matter where that court felt appointment of counsel would benefit the case.

The Clinic believes that appointment of amicus or pro bono counsel is appropriate in any pro se case in which the Court is considering the possibility of issuing a precedential opinion, including any case in which the Chief Judge decides to send a case to be reviewed by the full court, or is considering removal of the small case designation. The Congressional thinking behind the removal of the small case designation provides some guidance here:

> [R]emoval of the case from the small case category may be appropriate where a decision in the case will provide a precedent for the disposition of a substantial number of other cases or where an appellate court decision is needed on a significant issue. H. Rept. 95-1800 (1978), 1978-1 C.B. (Vol. 1) 521, 611-612.

Sometimes the judge authoring an opinion in a pro se case may not realize that an amicus brief would assist until a draft is prepared. The rules might include a provision for releasing a copy of the draft opinion in order to assist amicus and respondent in addressing the concerns of the Court. In cases initially heard by a Special Trial Judge, such as Guralnik v. Commissioner and Tilden v. Commissioner, a draft opinion was issued. It was only upon reading the draft opinion in Guralnik that the Clinic appreciated the need for an amicus brief and knew the basis for focusing the amicus brief.

As with the suggestion regarding answers, the establishment of a pro bono panel of attorneys who might be appointed to represent pro se petitioners or to write an amicus brief is something that might benefit from a dialogue between the Court and interested parties.

Thank you for this opportunity to comment on the Court's rules. The Clinic appreciates the Court's continued attention to the needs of the pro se individuals on its docket.

Sincerely,

Keith Fogg

Keith Fogg, Director
Tax Clinic at the Legal Services Center of Harvard Law School

Attachments:

Order regarding appointment of pro bono counsel in Volpicelli v. United States, No. 12-15029 (9th Cir. Sept. 5, 2013)

Order appointing pro bono counsel in Volpicelli v. United States, No. 12-15029 (9th Cir. Dec. 13, 2013)

Letter dated October 30, 2020 from Patricia S. Connor, Clerk of the Fourth Circuit, to Brian H. McLane, Appellant in 4th Cir. Dk. No. 20-1074 a case on appeal from the Tax Court (Dk. No. 20317-13L)