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UNITED STATES TAX COURT

WASHINGTON, D.C.

AMENDMENTS TO THE TAX COURT RULES OF PRACTICE AND PROCEDURE ARE ON PAGES 577–690 OF THIS REPORT

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JOSEFA CASTILLO, PETITIONER *v*. COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 18336-19L. Filed June 5, 2023.

P late filed her Petition for review of a collection due process (CDP) determination. R moved to dismiss the case for lack of jurisdiction, arguing that the I.R.C. § 6330(d)(1) 30-day deadline to file a petition for review of a CDP determination was jurisdictional. The Court granted that Motion. P appealed the Order of Dismissal to the U.S. Court of Appeals for the Second Circuit. The appeal was held in abeyance pending the Supreme Court's decision in *Boechler, P.C. v. Commissioner*, 142 S. Ct. 1493 (2022). The Supreme Court held that the I.R.C. § 6330(d)(1) 30-day deadline was nonjurisdictional. In the light of that holding, the Second Circuit vacated this Court's Order of Dismissal and remanded the case for further consideration. On remand R conceded the case in full. P moved for an award of costs pursuant to I.R.C. § 7430. R opposed the Motion, arguing that R was substantially justified in R's legal position that this Court lacked jurisdiction to hear the matter at the time the Petition was filed. *Held*: R was substantially

justified in R's legal position that the Court lacked jurisdiction to hear the case because at the time the Petition was filed, the caselaw was clear that the I.R.C. § 6330(d)(1) 30-day deadline was jurisdictional and not subject to equitable tolling. For that reason, P was not treated as the prevailing party for purposes of I.R.C. § 7430. P's Motion for Reasonable Litigation Costs will be denied.

Elizabeth A. Maresca, for petitioner.

Kevin R. Oveisi, *Francesca M. Ugolini*, *Thomas A. Deamus*, and *Mimi M. Wong*, for respondent.

OPINION

KERRIGAN, *Chief Judge*: This case is before the Court on petitioner's Motion for Reasonable Litigation or Administrative Costs. The U.S. Court of Appeals for the Second Circuit vacated this Court's Order of Dismissal in this case and remanded it for further proceedings in the light of the Supreme Court's decision in *Boechler, P.C. v. Commissioner*, 142 S. Ct. 1493 (2022). Mandate, *Castillo v. Commissioner*, No. 20-1635 (2d Cir. Sept. 23, 2022).

On remand respondent conceded the case in full. The issue remaining for consideration is petitioner's Motion in which she requests administrative and litigation costs of $5,601 and $129,750, respectively, pursuant to section 7430(a).[1] Respondent has conceded the administrative costs. We will consider only whether petitioner is entitled to litigation costs of $129,750.

Background

The following facts are derived from the parties' pleadings and Motion papers, including the Declarations and the Exhibits attached thereto. Petitioner resided in New York when she filed her Petition.

On November 28, 2016, respondent issued petitioner a notice of deficiency for 2014. The notice determined that petitioner had income of $139,274 from payment card and

[1] Unless otherwise indicated, all statutory references are to the Internal Revenue Code, Title 26 U.S.C., in effect at all relevant times, all regulation references are to the Code of Federal Regulations, Title 26 (Treas. Reg.), in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure. We round all monetary amounts to the nearest dollar.

third-party network transactions. Since petitioner reported $11,900, respondent determined that she had unreported income of approximately $127,374 and a deficiency of $44,427. Respondent also determined that petitioner was liable for a section 6662(a) and (b)(2) accuracy-related penalty of $8,885 for an underpayment attributable to a substantial understatement of income tax.

The deficiency notice was mailed to petitioner's last known address. The United States Postal Service attempted delivery of the notice once, but the correspondence was unclaimed and returned to respondent. On April 17, 2017, respondent assessed the deficiency and the penalty. On February 13, 2018, respondent issued petitioner a Notice of Federal Tax Lien (NFTL) Filing and Your Right to a Hearing Under Section 6320. On March 2, 2018, petitioner filed a request for a collection due process (CDP) hearing.

At the CDP hearing, petitioner argued that she had not received the deficiency notice and was not liable for the deficiency, interest, or penalty. She argued that the income attributed to her in the deficiency notice was instead attributable to Castillo Seafood, a business she allegedly sold in 2009.

The settlement officer informed petitioner that because the notice of deficiency was properly mailed but unclaimed, the underlying liability could not be disputed unless petitioner could demonstrate that she was out of the country during that time. Petitioner did not make that showing but maintained that the determination was incorrect.

On December 11, 2018, respondent issued petitioner a notice of determination for the 2014 taxable year, which sustained the filing of the NFTL. It was mailed to petitioner's last known address. The 30-day period for filing a petition with the Tax Court expired on January 10, 2019. Petitioner filed her Petition on October 8, 2019. Respondent stated in the Answer that "respondent intends on filing a motion to dismiss for lack of jurisdiction."

On January 6, 2020, respondent moved to dismiss petitioner's case for lack of jurisdiction on the ground that the Petition was not timely filed. On March 25, 2020, we granted that Motion. On May 19, 2020, petitioner filed a Notice of Appeal with the Second Circuit. That case was held in abeyance pending the Supreme Court's decision in *Boechler*.

On April 21, 2022, the Supreme Court decided *Boechler*, holding that the section 6330(d)(1) 30-day deadline to file a petition for review of a CDP determination is nonjurisdictional and subject to equitable tolling. *Boechler, P.C. v. Commissioner*, 142 S. Ct. at 1501. On August 2, 2022, the Second Circuit vacated the Tax Court's Order of Dismissal in this case and remanded it for further proceedings in accord with the Supreme Court's decision in *Boechler*. On November 8, 2022, the parties filed a Stipulation of Settled Issues, stating that petitioner was not liable for the unreported income, penalty, or interest determined in the deficiency notice. On January 5, 2023, petitioner filed the Motion now at issue.

Discussion

Section 7430(a) provides that the prevailing party may be awarded reasonable administrative or litigation costs for any proceedings brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty. To recover costs, the taxpayer must establish that (1) the taxpayer is the prevailing party, (2) he or she did not unreasonably protract the proceedings, (3) the amount of the costs requested is reasonable, and (4) he or she exhausted the administrative remedies available. *Friends of Benedictines in the Holy Land, Inc. v. Commissioner*, 150 T.C. 107, 111–12 (2018).

The section 7430 requirements are conjunctive, and the failure to satisfy any one of them will preclude an award of costs. *See Minahan v. Commissioner*, 88 T.C. 492, 497 (1987). As the moving party, petitioner has the burden of proving that she satisfies each requirement of section 7430. *See* Rule 232(e). The fact that respondent ultimately conceded the case in full is not determinative as to whether petitioner is entitled to an award of reasonable litigation costs. *See Sokol v. Commissioner*, 92 T.C. 760, 767 (1989).

Respondent conceded that petitioner has satisfied three of the section 7430 requirements: She did not unreasonably protract the proceedings, the amount of the costs requested is reasonable, and she exhausted the administrative remedies available. The parties disagree as to whether petitioner should be treated as the prevailing party.

To be the prevailing party, petitioner must have substantially prevailed with respect to the amount in controversy or have substantially prevailed with respect to the most significant issue or set of issues presented. *See* § 7430(c)(4)(A)(i). The parties filed a Stipulation of Settled Issues agreeing that the notice of determination is not sustained, and petitioner is not liable for the deficiency, interest, or penalty determined in the deficiency notice. Petitioner has prevailed with respect to the amount in controversy.

The parties dispute the "most significant issue" on which petitioner prevailed. *See* § 7430(c)(4)(A)(i)(II). Since petitioner was the prevailing party as to the amount in controversy, we do not need to decide this issue. Instead we must consider the exception provided in section 7430(c)(4)(B). A party is not treated as the prevailing party if the United States establishes that its position was "substantially justified." § 7430(c)(4)(B)(i). Respondent contends that the exception is applicable here.

Respondent bears the burden of showing that respondent's position was substantially justified. *See* § 7430(c)(4)(B)(i); Rule 232(e). Generally, the Government's position is substantially justified when its position is based on supportable interpretations of federal tax statutes and caselaw. *TKB Int'l, Inc. v. United States*, 995 F.2d 1460, 1468 (9th Cir. 1993). The litigation position of the United States is generally established at the time the Government files its answer in the judicial proceeding. *See* § 7430(c)(7)(A); *Huffman v. Commissioner*, 978 F.2d 1139, 1148 (9th Cir. 1992), *aff'g in part, rev'g in part, and remanding* T.C. Memo. 1991-144; *Maggie Mgmt. Co. v. Commissioner*, 108 T.C. 430, 442 (1997). To be substantially justified respondent's position must have a reasonable basis in both fact and law. *See Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

Respondent's litigation position—which was first raised in the Answer—was that the Court lacked jurisdiction because the Petition was not timely filed. There is no dispute that the Petition was filed late. Respondent argues that because the law was clear then that a timely filing was necessary to establish the Court's jurisdiction, the Commissioner was substantially justified in asserting that the Court lacked jurisdiction. We agree with respondent.

The notice of determination was mailed by certified mail in accordance with Treasury Regulation § 301.6330-1(e)(3), Q&A-E8 and sufficient to start the 30-day period for appeal under section 6330(d). *See Weber v. Commissioner*, 122 T.C. 258, 261–62 (2004). Until the Supreme Court's recent decision in *Boechler*, it was well established that the 30-day period to file a petition for review of a collection due process determination was jurisdictional. *See Kaplan v. Commissioner*, 552 F. App'x 77, 78 (2d Cir. 2014); *Guralnik v. Commissioner*, 146 T.C. 230, 235–36 (2016).

Before the Supreme Court's decision in *Boechler* neither the Tax Court nor the federal courts of appeals had held the 30-day period in section 6330(d)(1) to be nonjurisdictional. Because *Boechler* was a matter of first impression for the Supreme Court, respondent's position was substantially justified. *See Bontrager v. Commissioner*, T.C. Memo. 2019-45, at *6 ("The Commissioner generally is not subject to an award of litigation costs under section 7430 where the underlying issue is one of first impression." (quoting *Rowe v. Commissioner*, T.C. Memo. 2002-136, 2002 WL 1150776, at *11)). Petitioner then should not be treated as the prevailing party.

Petitioner argues that respondent's position should be presumed not to be substantially justified because respondent did not follow guidance provided in the Internal Revenue Manual (IRM). *See* § 7430(c)(4)(B)(ii). The presumption in section 7430(c)(4)(B)(ii) does not arise here because the IRM is not "applicable published guidance" within the meaning of the statute. Section 7430(c)(4)(B)(iv) defines "applicable published guidance" exhaustively as "regulations, revenue rulings, revenue procedures, information releases, notices, and announcements, and . . . any of the following which are issued to the taxpayer: private letter rulings, technical advice memoranda, and determination letters." Since the IRM is not included in this list, the presumption does not arise.

We conclude that petitioner is not entitled to an award of litigation costs. We have considered all of petitioner's arguments, and to the extent not discussed above, we find them to be irrelevant, moot, or without merit.

To reflect the foregoing,

An appropriate order will be entered.

ANTAWN JAMAL SANDERS, PETITIONER *v*. COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 25868-22. Filed June 20, 2023.

P electronically filed a Petition through the Court's electronic filing system (DAWSON) at 12:00:11 a.m. on the morning after it was due. P alleges that he encountered problems when electronically filing his Petition and that those problems caused the Petition to be untimely. *Held*: DAWSON is a "filing location" for purposes of I.R.C. § 7451. *Held, further*, because DAWSON was not inaccessible or otherwise unavailable to the general public on P's last day to file, and P filed his Petition after the due date, we must dismiss this case as untimely.

Antawn Jamal Sanders, pro se.[1]
Clifford E. Howie and *Tammie A. Geier*, for respondent.

OPINION

BUCH, *Judge*: The Commissioner mailed a notice of deficiency to Antawn Jamal Sanders, and the deadline to file a petition to seek redetermination of the deficiency was December 12, 2022. Mr. Sanders electronically filed his Petition 11 seconds after midnight on December 13, 2022.

A timely filed petition is a prerequisite to our jurisdiction in a deficiency case. An electronically filed petition is timely if it is filed by 11:59 p.m. eastern time on the last day for filing. But if the Court's electronic filing system is inaccessible on the last day, the period for filing is extended. Because the Court's electronic filing system was accessible on Mr. Sanders's last day for filing, and he filed his Petition after the last day had ended, we must dismiss this case for lack of jurisdiction.

Background

The Commissioner mailed a notice of deficiency to Mr. Sanders on September 8, 2022. Notwithstanding the

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[1] Brief amicus curiae was filed by *Audrey A. Patten* as attorney for the Center for Taxpayer Rights.

actual mailing date, the notice was dated September 12, 2022, and stated that the last day to file a petition with this Court was December 12, 2022.

Mr. Sanders prepared to file his Petition electronically. Before December 12, 2022, Mr. Sanders set up an account to electronically file a petition through DAWSON, the Court's electronic filing system. On the evening of December 12, 2022, Mr. Sanders began the process of electronically filing his Petition. At 9:59 p.m. EDT, he downloaded the necessary PDF forms to his Android mobile phone, but he was unable to fill out the forms on his phone.

Shortly after 11 p.m. on December 12, 2022, Mr. Sanders tried to file his Petition from his phone. At 23:03:07.442 (11:03 p.m.), he logged into DAWSON.[2] At 23:42:53.728 (11:42 p.m.), he logged in again. Between 11:03 p.m., when Mr. Sanders first logged in, and 11:44 p.m., when he was logged out from his Android device for the rest of the evening, he states that he attempted to upload documents, but DAWSON "would not even allow [him] to click the button to upload the documents from [his] android device even after several times of login in and logging out."

After trying to file the Petition from his phone, Mr. Sanders was "finally able to switch" to his Windows computer shortly before midnight. He was slowed down by "having to send the filled out forms" from his phone to his email to be downloaded to his computer.[3] At 23:56:15.888 (11:56 p.m.), Mr. Sanders unsuccessfully attempted to log in to DAWSON on his computer. However, within one second, another Windows user successfully logged into DAWSON. Likewise at 23:57:21.379 (11:57 p.m.), Mr. Sanders successfully logged in as well. After he logged in and started the filing process, Mr. Sanders was slowed down by having "to do 3 other steps" before he could

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[2] By Order dated March 21, 2023, the Court provided the parties with records showing DAWSON activity through Mr. Sanders's account, DAWSON activity from Mr. Sanders's Internet protocol address, and DAWSON activity near the time Mr. Sanders filed his Petition. The Court stated its intent to take judicial notice of those records, and neither party objected.

[3] This statement is inconsistent with Mr. Sanders's statement that he could not fill out the forms on his phone. But because neither statement is material to the outcome, we will accept both of these conflicting statements as true.

actually file his Petition.[4] Additionally, he had to refer to the instructions several times. Throughout this process and at all relevant times, DAWSON remained fully operational.[5]

While residing in North Carolina, Mr. Sanders filed the Petition from his computer after midnight on December 13, 2022. At 00:00:09.493, he began the upload of the Petition, and at 00:00:11.693 (i.e., 11 seconds after midnight), it was filed. At the time of filing, DAWSON automatically applied a cover sheet to the Petition that states that the Petition was electronically filed and received at "12/13/22 12:00 am."

The Commissioner filed a Motion to Dismiss for Lack of Jurisdiction on January 25, 2023. The Commissioner argues that Mr. Sanders's case must be dismissed because his Petition was not timely filed. The Commissioner contends that the period for timely filing ended at 11:59 p.m. on Monday, December 12, 2022. The Commissioner further contends that because Mr. Sanders initiated upload of the Petition after 12 a.m. on December 13, 2022, the Petition was not in the Court's possession and cannot be considered to have been filed until after the deadline. Additionally, the Commissioner contends that DAWSON logs show that DAWSON was accessible throughout the day on December 12, 2022, such that DAWSON, "as a filing location, cannot be considered as having been inaccessible or unavailable to the general public for purposes of section 7451(b)."[6]

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[4] Electronically filing a petition is a multistep process. A taxpayer must log in to DAWSON, select documents to be uploaded, enter biographical information, and make various selections such as case type and place of trial, before uploading and submitting the petition. *See* United States Tax Court, *Self-Represented (Pro Se) User Guide DAWSON Case Management System* 12–19 (Apr. 2023), https://ustaxcourt.gov/resources/dawson/DAWSON_Petitioner_Training_Guide.pdf.

[5] The Court maintains a log of any DAWSON outages, and that log is publicly available at United States Tax Court, https://status.ustaxcourt.gov/uptime/726t4kw06kfh (last visited May 16, 2023). The log identifies both full and partial outages and describes the nature and duration of any outages.

[6] Unless otherwise indicated, statutory references are to the Internal Revenue Code, Title 26 U.S.C. (I.R.C.), in effect at all relevant times, regulation references are to the Code of Federal Regulations, Title 26 (Treas. Reg.), in effect at all relevant times, and Rule references are to the Tax Court Rules of Practice and Procedure.

Mr. Sanders filed an Objection to the Commissioner's Motion to Dismiss for Lack of Jurisdiction on February 21, 2023. He states as follows:

> I object to this motion due to the fact that I logged in and uploaded documents on time. On December 12, 2022 I attempted several times to upload documents well before midnight. Finally I was able to get it uploaded and it literally did not finish the upload until exactly 12a.
>
> I am sure it can be proven that the system had errors and that my upload was loading before cut off time.

The Court invited briefs from amici curiae. The Center for Taxpayer Rights, represented by the Tax Clinic at the Legal Services Center of Harvard Law School, submitted an amicus brief. The amicus principally offers two arguments. First, the amicus argues that Mr. Sanders's Petition should be treated as filed at the time that he relinquished control of it. In making this argument, the amicus urges the Court to adopt a position akin to the timely mailing rule of section 7502. Although the amicus does not ask the Court to apply equitable tolling, it urges the Court to view the timeliness of an electronically filed petition "through the lens of equitable tolling."

Discussion

I. *A Petition Must Be Timely Filed.*

Like other federal courts, we are a Court of limited jurisdiction, and we may exercise our jurisdiction only to the extent authorized by Congress. I.R.C. § 7442; *Guralnik v. Commissioner*, 146 T.C. 230, 235 (2016); *Naftel v. Commissioner*, 85 T.C. 527, 529 (1985). Our jurisdiction in deficiency cases is predicated on a valid notice of deficiency and a timely petition. I.R.C. §§ 6213, 7442; Rules 13, 20; *Dees v. Commissioner*, 148 T.C. 1, 3–4 (2017). The Court cannot extend the deadline for filing a petition, and we must dismiss a case for lack of jurisdiction if the petition is not filed within the statutorily prescribed time. *Hallmark Rsch. Collective v. Commissioner*, 159 T.C. 126, 166–67 (2022); *Blum v. Commissioner*, 86 T.C. 1128, 1131 (1986).

Section 6213(a) prescribes the time for filing a petition in deficiency cases. Under section 6213(a), a petition must be filed within 90 days after the notice of deficiency is mailed (not counting Saturday, Sunday, or a legal holiday in the

District of Columbia as the last day). *See* I.R.C. § 7503. If the notice of deficiency specifies a last day for filing that is later than the 90th day, then the deadline by which to file a petition is extended to the date specified. I.R.C. § 6213(a); *Rochelle v. Commissioner*, 116 T.C. 356 (2001), *aff'd*, 293 F.3d 740 (5th Cir. 2002).

A. *A Petition Is Generally Filed when Received.*

A petition is ordinarily considered to have been filed when it is received by the Tax Court. *See, e.g.*, *Leventis v. Commissioner*, 49 T.C. 353, 354 (1968). Under Rule 22(d), an electronically filed petition "will be considered timely filed if it is electronically filed at or before 11:59 p.m., eastern time, on the last day of the applicable period for filing." Because electronic filing is not limited to the Court's business hours, electronic filing systems may extend the number of hours available for filing, but not the number of days. *State Bank of S. Utah v. Beal (In re Beal)*, No. 21-4124, 2022 WL 17661140, at *2 (10th Cir. Dec. 14, 2022), *aff'g State Bank of S. Utah v. Beal*, 633 B.R. 398 (D. Utah 2021), *aff'g State Bank of S. Utah v. Beal (In re Beal)*, 616 B.R. 140 (Bankr. D. Utah 2020); *Justice v. Town of Cicero, Ill.*, 682 F.3d 662, 664 (7th Cir. 2012); *Nutt v. Commissioner*, 160 T.C. 470, 475 (2023); *see* Rule 22(a).

Electronic filing is not accomplished merely by logging into the system or beginning the filing process. *See In re Sands*, 328 B.R. 614, 619 (Bankr. N.D.N.Y. 2005). In *In re Sands*, 328 B.R. at 617–18, the bankruptcy court addressed the issue of precisely when an electronic filing occurs. In that case, a debtor's attorney began the process of electronically filing a petition shortly before it was due but did not upload the petition until minutes after the deadline. *Id.* at 615–16. The debtor contended that commencing the electronic filing process is equivalent to "physically handing" the clerk a petition. *Id.* at 616. The court disagreed, holding that an electronic petition is placed in the clerk's possession, and is thus "filed," when the "server receives the transmission." *Id.* at 619. Likewise in *Nutt*, 160 T.C. at 473, we held that an electronically filed petition is filed with this Court at the time it is received.

Mr. Sanders's Petition was not received within the time prescribed by section 6213(a). Notwithstanding that the notice of deficiency was mailed on September 8, 2022, Mr. Sanders's

last day to file his petition was Monday, December 12, 2022, because section 6213(a) allows him to rely on the last day for filing that was specified in the notice. Although he logged into DAWSON on December 12, 2022, Mr. Sanders did not file his Petition until the next day. He initiated the upload of the Petition 9 seconds after midnight on December 13, 2022, and his Petition was received and filed at 11 seconds after midnight. Because the Petition was not received by the Court until 11 seconds after midnight, it was not timely under section 6213(a).

B. *The Timely Mailing Rule Does Not Apply to Electronically Filed Petitions.*

The timely mailing rule is an exception to the general rule that documents are filed when received. Under that rule, a document that is properly mailed before the due date but received after the due date is deemed to have been filed on the date it was postmarked. I.R.C. § 7502(a). The amicus urges that we find Mr. Sanders's Petition timely because he relinquished control over his Petition before the filing deadline, a position that is analogous to the timely mailing rule of section 7502. But we have previously held that the timely mailing rule does not apply to an electronically filed petition. *Nutt*, 160 T.C. at 473.[7]

Although section 7502 also contains a provision relating to electronic filing, that provision does not apply to the electronic filing of Tax Court petitions. When applicable, section 7502 relies on a postmark or similar recorded date as evidence of mailing. I.R.C. § 7502(a)(1), (f)(2)(C). Section 7502(c)(2) authorizes the Secretary to provide regulations to apply this postmark rule to electronic filing. The Secretary adopted regulations providing that an electronically filed document is considered filed when the recipient "receives the transmission of a taxpayer's electronically filed document on its host system." Treas. Reg. § 301.7502-1(d)(3)(ii).

But the regulations are inapplicable to the filing of a Tax Court petition. The Secretary's regulations require the use of an authorized electronic return transmitter. *Id.* subdiv. (i). None is involved in the filing of a Tax Court petition.

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[7] The Court issued its opinion in *Nutt* after the amicus mailed its brief to the Court in this case.

Mr. Sanders's Petition would be untimely even if we applied these regulations or the amicus's "relinquished control" argument. The regulations would deem an electronically filed document to be filed when the electronic record shows it was received. The electronic record shows that Mr. Sanders's Petition was received 11 seconds after midnight; thus it would be untimely under the regulations that apply in the case of an electronic return transmitter. And the Petition is untimely under the amicus's relinquished control argument. Mr. Sanders did not relinquish control of his Petition until he initiated the upload 9 seconds after midnight. In short, the narrow exceptions that might deem a petition to be filed before the Court receives it are both legally and factually inapplicable to this case.

II. *An Otherwise Untimely Petition May Be Timely if the Clerk's Office or a Filing Location Is Inaccessible.*

In circumstances where the Clerk's office or a filing location is inaccessible or otherwise unavailable to the general public, a taxpayer may have additional time to file a petition. *See* I.R.C. § 7451(b); *Guralnik*, 146 T.C. at 247. Mr. Sanders alleges that DAWSON system errors prevented him from filing his Petition at or before 11:59 p.m. on December 12, 2022. However, the Commissioner contends that DAWSON, as a filing location, was not inaccessible or otherwise unavailable to the general public on December 12, 2022.

A. *The Tax Court Previously Held that Rule 6(a) of the Federal Rules of Civil Procedure Applies if the Clerk's Office Is Inaccessible.*

In *Guralnik*, we held that if the Tax Court Clerk's office is inaccessible on the last day for filing a petition, then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday. *Guralnik*, 146 T.C. at 232–33 (applying Fed. R. Civ. P. 6(a)). In that case, the Tax Court was closed because of a winter storm on the taxpayer's last day to file a petition. *Id*. The taxpayer mailed his petition, but the closure prevented the petition from being delivered on the due date. It was delivered the following day when the Court reopened. *Id.* at 233–34. We found that although Mr. Guralnik mailed his petition to the Court, he could not take advantage

of section 7502 (the "timely mailing rule") because he did not use the U.S. Postal Service or a designated delivery service. *Guralnik*, 146 T.C. at 242; *see* I.R.C. § 7502. But by applying the principles of Rule 6(a) of the Federal Rules of Civil Procedure (Fed. R. Civ. P.), we concluded that the Clerk's office was inaccessible because of the snow day closure and held that the petition was timely. *Guralnik*, 146 T.C. at 232–33.

B. *Section 7451(b) Codifies* Guralnik *and Extends It to Electronic Filing.*

Although the timely mailing rule does not apply to electronically filed petitions, Congress created a remedy for situations where a snow day (as in *Guralnik*), a lapse in appropriations, or an electronic filing system outage might interfere with timely filing a petition. *See* I.R.C. § 7451(b).

In late 2020, the Tax Court established an online portal for filing petitions. The Tax Court made Congress aware of the development of its new case management system in budget reports submitted in February 2020 and April 2021 for fiscal years 2021 and 2022, respectively.[8] The former report stated that the Court was developing "a new electronic filing and case management system" that would "provide operational efficiencies and a user-friendly application for taxpayers and other external users." *Congressional Budget Justification Fiscal Year 2021*, at 15. The Court anticipated deploying that system in fiscal year 2020, *id.* at 14, and the latter report informed Congress that DAWSON has been deployed:

> [O]n December 28, 2020, the Court successfully launched DAWSON . . . providing base functionality for the Court and parties to file and manage cases. DAWSON is an open-source, web-based, and mobile-friendly application with the ability to electronically file a petition to start a new case, functionality not previously available. These features make the Court more accessible for taxpayers and practitioners.

[8] United States Tax Court, *Congressional Budget Justification Fiscal Year 2021*, at 15 (Feb. 10, 2020), https://ustaxcourt.gov/resources/budget_justification/FY_2021_Congressional_Budget_Justification.pdf; United States Tax Court, *Congressional Budget Justification Fiscal Year 2022*, at 17 (Apr. 5, 2021), https://ustaxcourt.gov/resources/budget_justification/FY_2022_Congressional_Budget_Justification.pdf.

Congressional Budget Justification Fiscal Year 2022, at 17. Notably, the Court expressly highlighted that electronic filing of petitions was a "functionality not previously available."

Within a year after the Tax Court deployed DAWSON, Congress enacted section 7451(b), which provides a special rule for tolling the period for filing a petition. *See* Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 80503, 135 Stat. 429, 1336 (2021). Section 7451(b)(1) provides:

> Notwithstanding any other provision of this title, in any case (including by reason of a lapse in appropriations) in which a filing location is inaccessible or otherwise unavailable to the general public on the date a petition is due, the relevant time period for filing such petition shall be tolled for the number of days within the period of inaccessibility plus an additional 14 days.

Section 7451(b)(2) defines "filing location" as "(A) the office of the clerk of the Tax Court, or (B) any on-line portal made available by the Tax Court for electronic filing of petitions." DAWSON is a "filing location" because it is an online portal the Tax Court has made available for the electronic filing of petitions. *See* I.R.C. § 7451(b)(2)(B). Thus, the newly enacted statute applies to situations of physical inaccessibility (such as the snow day in *Guralnik*) and electronic inaccessibility of a system such as DAWSON.

The parties disagree about whether DAWSON was inaccessible or otherwise unavailable to the general public on the last day for Mr. Sanders to file a petition. The statute does not define "inaccessible or otherwise unavailable to the general public," but we can look to other courts and court rules to help us define that phrase. In the context of Fed. R. Civ. P. 6(a)(3) and Rule 9006(a)(3) of the Federal Rules of Bankruptcy Procedure (Fed. R. Bankr. P.), "inaccessibility" traditionally refers to physical inaccessibility—that is, a courthouse closure caused by "weather or other conditions." *In re Beal*, 616 B.R. at 153; *see Guralnik*, 146 T.C. at 245, 249. "The definition of inaccessibility broadened with the advent of electronic filing." *In re Beal*, 616 B.R. at 153. Thus, in the 2009 amendments to Fed. R. Civ. P. 6(a)(3) and Fed. R. Bankr. P. 9006(a)(3), "[t]he reference to 'weather' was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system." Fed. R. Bankr. P. 9006 advisory committee's note to 2009 amendment; Fed.

R. Civ. P. 6 advisory committee's note to 2009 amendment; *see In re Beal*, 616 B.R. at 154.

Although inaccessibility can include an outage of an electronic filing system, federal courts have consistently held that inaccessibility does not include user error or technical difficulties on the user's side. *See, e.g.*, *In re Beal*, 616 B.R. 140. In *In re Beal*, 616 B.R. at 143, 147, a bank's attorney logged onto the electronic filing system at 11:40 p.m. on the last day to file a complaint and filed the complaint 16 minutes after midnight (i.e., the following day). The bank, relying on the attorney's testimony about perceived malfunctions with the electronic filing system, argued that the complaint would have been timely but for those malfunctions. *Id.* at 142, 150. But the attorney's testimony was inconsistent and sometimes unsupported, and court records showed that the filing system was operational. *Id.* at 150–51, 155. For example, the attorney logged in, experienced no technical difficulties until multiple steps into the process, received error messages the system was designed to produce, and filed a complaint about 36 minutes after logging into the system. *Id.* at 143–44, 147, 151, 155. The district court explained that the bankruptcy court found it "very unlikely for the system to be rapidly toggling between short periods of functionality and error" and concluded that any errors that occurred were on the user's side. *Beal*, 633 B.R. at 405. The bankruptcy court held that the electronic filing system was accessible, and the district court and the U.S. Court of Appeals for the Tenth Circuit affirmed. *In re Beal*, 616 B.R. at 155; *Beal*, 633 B.R. at 409–10; *In re Beal*, 2022 WL 17661140, at *5.

To determine whether section 7451 applies, we must distinguish between the availability of the Court's system and user-specific issues. This approach is consistent whether looking to electronic or physical inaccessibility. For example, in *In re Sizemore*, 341 B.R. 658, 660 (Bankr. N.D. Ind. 2006), an attorney who filed an untimely petition on behalf of a debtor asked the bankruptcy court to deem the petition to have been timely filed. The attorney was unable to timely file because of problems with his own software. *Id.* at 659. Looking to Fed. R. Civ. P. 6(a) and Fed. R. Bankr. P. 9006(a), the court acknowledged that filing deadlines may be suspended if a weather-related court closure or other local conditions render the clerk's

office physically inaccessible. *In re Sizemore*, 341 B.R. at 660. But the court found no authority that would deem the clerk's office to be inaccessible to an individual filer who was unable to timely file for reasons that were unique to that individual filer. *Id.*; *see also In re Bicoastal Corp*., 136 B.R. 288, 289 (Bankr. M.D. Fla. 1990) (finding inclement weather in another part of the country that caused a delay in the delivery of documents did not render the clerk's office, which was open, inaccessible). The bankruptcy court analogized problems that are unique to a user to a situation where a person gets stuck in traffic on the way to filing a document with the court. *In re Sizemore*, 341 B.R. at 660.

In the context of electronic filing, user problems, such as entering an incorrect password, a Wi-Fi outage, or problems with the user's device, are analogous to traffic jams or car problems that occur on the way to an open courthouse; they do not render the system inaccessible or otherwise unavailable to the general public. Although traffic jams and Wi-Fi outages involve different complications, the underlying principle is the same: inaccessibility does not encompass problems that are unique to an individual. *Id*. Similarly, for purposes of section 7451, a DAWSON outage that affects the public's ability to file petitions renders DAWSON inaccessible or otherwise unavailable to the general public, whereas problems that an individual filer experiences while DAWSON is operational do not.

The difficulties Mr. Sanders experienced confirm that DAWSON was accessible and available to the general public. His inability to fill out PDF forms on his phone is irrelevant because the forms are completed separately and are not part of DAWSON's filing portal. *See* United States Tax Court, *How to e-File a Petition*, https://ustaxcourt.gov/resources/dawson/how_to_efile_a_petition.pdf (last visited Apr. 19, 2023).[9] And although a taxpayer must complete multiple steps to file a petition, these are realities of filing whether filing electronically, by mail, or in person. *See also In re Beal*, 616 B.R. at 154 n.74, 155 (finding that inaccessibility does not include "a lack of

[9] These instructions state: "Before You Electronically File a Petition[:] There are two documents that must be completed and submitted when you create a case with the US Tax Court. These can be prepared in advance, before you start the process of creating a new case in DAWSON."

familiarity with [the electronic filing system] that causes a filer to make missteps in the filing process or simply to progress through it more slowly than anticipated"); *In re Sands*, 328 B.R. at 619.[10] Finally, Mr. Sanders's failed login at 11:56 p.m., which occurred between successful logins, does not show a problem with DAWSON. It shows a failed attempt by the user to log into an operational system.

The Court's own records show the system was operational at all relevant times. The Court's website allows users to view DAWSON's system status. *See* United States Tax Court, https://status.ustaxcourt.gov/. The system recorded no downtime on December 12, 2022. *See id.* And DAWSON logs show that Mr. Sanders logged in multiple times in the final hour of the day. The logs also show that his failed login at 11:56:15 p.m. was followed by successful logins by another Windows user within one second of his failed attempt and by Mr. Sanders himself within one minute of his failed attempt. These successful logins show that DAWSON was working properly.

In sum, section 7451 does not apply to this case. DAWSON was operational at all relevant times. To the extent that Mr. Sanders experienced difficulties in filing his Petition, they were unique to him and not the result of the system's being inaccessible or otherwise unavailable to the general public.

Mr. Sanders's case exemplifies the risk in last-minute electronic filing. Filing close to the deadline leaves "little margin for error." *Beal*, 633 B.R. at 410. As the U.S. Court of Appeals for the Seventh Circuit has noted:

> Courts used to say that a single day's delay can cost a litigant valuable rights. . . . With e-filing, one hour's or even a minute's delay can cost a litigant valuable rights. A prudent litigant or lawyer must allow time for difficulties on the filer's end. A crash of the lawyer's computer, or a power outage at 11:50 PM, does not extend the deadline, even though unavailability of the court's computer can do so . . . .

Justice, 682 F.3d at 665.

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[10] In *In re Sands*, 328 B.R. at 616, 619, the court found no evidence that a technical problem in the clerk's office caused an untimely filing, despite the attorney's assertions that the electronic filing system was operating at an "excruciatingly slow" pace. The court noted that "[p]roblems occurring in counsel's office, such as a poor Internet connection or a hardware problem, will not excuse . . . untimely filing." *Id.* at 619.

C. *Equitable Tolling Does Not Apply.*

We are unable to apply the doctrine of equitable tolling to the deadline to file a petition in a deficiency case. The deadline to file a petition in a deficiency case is jurisdictional. I.R.C. § 6213(a); *Hallmark Rsch. Collective*, 159 T.C. at 166. Equitable tolling has the effect of extending a limitations period set by Congress when a litigant has diligently pursued his rights "but some extraordinary circumstance" nevertheless prevents him from meeting a deadline. *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014). But if a federal court's subject-matter jurisdiction depends on a timely pleading, the filing deadline cannot be equitably tolled. *United States v. Wong*, 575 U.S. 402, 408–09 (2015); *Hallmark Rsch. Collective*, 159 T.C. at 131. Where Congress "clearly states" that a deadline is jurisdictional, we must enforce it regardless of equitable considerations. *Wong*, 575 U.S. at 409; *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515–16 (2006); *Hallmark Rsch. Collective*, 159 T.C. at 132–33. As we held in *Hallmark Research Collective*, 159 T.C. at 166–67:

> Section 6213(a) clearly states that its 90-day deadline is jurisdictional, as indicated by its text, context, and uniform treatment during its long history. Congress has limited the Tax Court's deficiency jurisdiction to only those cases in which a petition is timely filed, and we do not have authority to extend the deadline in section 6213(a) by equitable tolling.

Indeed, Congress reinforced the notion that section 6213(a) is jurisdictional in 2021 when it enacted section 7451(b), which extends the deadline for filing a petition when a filing location is inaccessible or otherwise unavailable to the general public. When adding this provision, Congress clearly viewed the *timely* filing of a petition as a prerequisite to the Court's jurisdiction, stating in the effective date provision: "The amendments made by this section shall apply to petitions *required* to be timely filed (determined without regard to the amendments made by this section) after the date of enactment of this Act." Infrastructure Investment and Jobs Act § 80503(c) (emphasis added). Notably, Congress made this provision applicable only to petitions, and not to documents that lack the jurisdictional significance of petitions.

Because the filing deadline is jurisdictional, we cannot apply equitable tolling.

III. *Conclusion*

Mr. Sanders did not file his Petition within the time prescribed by section 6213(a). Although section 7451 may extend the period for filing a petition if a filing location is inaccessible or otherwise unavailable to the general public, problems unique to a user do not constitute inaccessibility or unavailability. And equitable tolling cannot apply to an untimely petition in a deficiency case. Because DAWSON was accessible on December 12, 2022, section 7451 is inapplicable. Mr. Sanders's Petition was untimely, and we must dismiss this case for lack of jurisdiction.

An order of dismissal for lack of jurisdiction will be entered.

AMENDMENTS
TO THE
RULES OF PRACTICE AND PROCEDURE
OF THE
UNITED STATES TAX COURT

Rules 1, 3, 10, 20, 21, 23, 25, 26, 27, 31, 32, 33, 34, 35, 36, 41, 61, 62, 63, 64, 70, 74, 81, 90, 91, 92, 93, 103, 110, 121, 133, 140, 141, 147, 151, 151.1, 152, 161, 170, 171, 180, 182, 210, 213, 217, 231, and 233 of the Rules of Practice and Procedure (Rules) of the United States Tax Court are amended. The effective dates of the amendments are stated in Notes to the Rules.

The Notes accompanying these amendments were prepared by the Rules Committee and are included herein for the convenience of the public and the Bar. They are not officially part of the Rules and are not included in the printed publication prepared for general distribution.

RULE 1. RULEMAKING AUTHORITY, SCOPE OF RULES, PUBLICATION OF RULES AND AMENDMENTS, CONSTRUCTION

(a) Rulemaking Authority: The United States Tax Court, after giving appropriate public notice and an opportunity for comment, may make and amend rules governing its practice and procedure.

(b) Scope of Rules: These Rules govern the practice and procedure in all actions and proceedings before the Court. If the Rules provide no governing 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.

(c) Publication of Rules and Amendments: When the Court proposes new rules or amendments to these Rules, the Court will provide notice of those proposals on its website and provide the Bar and the general public an opportunity for comment. If the Court determines that there is an immediate need for a particular rule or amendment to an existing rule, the Court may proceed without providing a prior opportunity for comment, but will promptly provide public notice and opportunity for comment after the adoption of the rule or amendment.

(d) Construction: The Court's Rules should be construed, administered, and employed by the Court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

Note

Rule 1 is amended stylistically.

Paragraphs (b) and (d) of Rule 1 are amended to conform more closely to Rule 1 of the Federal Rules of Civil Procedure. There has been no substantive change.

The amendments are effective March 20, 2023.

RULE 3. TERMS AND DEFINITIONS

(a) Clerk: Reference to the Clerk is to the Clerk of the United States Tax Court.

(b) Code: Any reference or citation to the Code is to the Internal Revenue Code of 1986, as in effect for the relevant period or the relevant time.

(c) Commissioner: Reference to the Commissioner is to the Commissioner of Internal Revenue.

(d) Division: The Chief Judge may from time to time divide the Court into Divisions of one or more Judges and, in case of a Division of more than one Judge, designate the chief thereof.

(e) Paper: Unless the context indicates otherwise, the term "paper" means a pleading, motion, brief, entry of appearance, or any other document that these Rules require or permit to be filed. A paper filed electronically in compliance with the Court's electronic filing procedures is a written paper for purposes of these Rules.

(f) Party: With respect to a common matter in cases consolidated for trial, the references to a "party" in Titles VII, VIII, IX, and X mean any party to any of the consolidated cases involving the common matter.

(g) Special Trial Judge: Reference to a Special Trial Judge is to a judicial officer appointed pursuant to Code section 7443A(a). See Rule 180.

(h) Time: As provided in these Rules and in orders and notices of the Court, time means standard time in the location mentioned except when advanced time is substituted therefor by law. For computation of time, see Rule 25.

(i) Website: Any reference to the Court's website is to the website at www.ustaxcourt.gov.

Note

The title of Rule 3 is amended to clarify that the Rule sets forth commonly used terms and definitions. The terms and definitions are organized in alphabetical order.

Existing paragraph (f) of Rule 3, defining the term "business hours," is deleted as unnecessary.

Existing paragraph (g) of Rule 3, defining the term "filing," is deleted as unnecessary.

A new definition of the term "website" is added.

The provisions of existing Rules 70(a)(3) and 92 are combined and added to Rule 3 as new paragraph (f) defining the term "party" in the context of consolidated cases. The text of existing Rule 92 is deleted and labeled "RESERVED" to eliminate a redundancy in the Rules.

The amendments are effective March 20, 2023.

RULE 10. NAME, OFFICE, AND SESSIONS

(a) Name: The Court's name is the United States Tax Court.

(b) Office of the Court: The Court's principal office is in the District of Columbia, but the Court or any of its Divisions may sit at any place within the United States. See Code secs. 7445, 7701(a)(9).

(c) Sessions: The Chief Judge prescribes the times and places of the Court's sessions.

(d) Business Hours: The Clerk's office in Washington, D.C., is open from 8 a.m. to 4:30 p.m. on all days, except Saturdays, Sundays, and legal holidays, for the purpose of receiving any papers. For the definition of the term "legal holiday," see Rule 25(a)(5).

(e) Mailing Address: Mail to the Court must be addressed to the United States Tax Court, 400 Second Street, N.W., Washington, D.C. 20217. Other addresses, such as locations at which the Court may be in session, should not be used, unless the Court orders otherwise.

Note

Rule 10 is amended stylistically.

Paragraph (d) of the Rule is amended by adding a cross-reference to the definition of "legal holiday" in Rule 25.

The amendments are effective March 20, 2023.

RULE 20. COMMENCEMENT OF CASE

(a) General: A case is commenced by filing a petition with the Court. See Rule 13.

(b) Statement of Taxpayer Identification Number: The petitioner must submit with the petition a statement of the petitioner's taxpayer identification number (e.g., Social Security number or employer identification number) or lack thereof. The statement must be substantially in accordance with Form 4 (Statement of Taxpayer Identification Number) shown in the Appendix.

(c) Disclosure Statement:

(1) *Who Must File; Contents.* A nongovernmental corporate party or a nongovernmental corporation that seeks to intervene must file a disclosure statement that:

(A) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock, or

(B) states that there is no such corporation.

(2) *Time to File; Supplemental Filing*. A party or proposed intervenor must:

(A) file the disclosure statement with its first appearance, pleading, motion, response, or other request addressed to the Court; and

(B) promptly file a supplemental statement if any required information changes.

For the form of a disclosure statement, see Form 6 (Corporate Disclosure Statement) shown in the Appendix.

(d) Filing Fee: A fee of $60 must be paid at the time of filing a petition. The payment of any fee under this paragraph may be waived if the petitioner establishes to the satisfaction of the Court by an affidavit or a declaration containing specific financial information the inability to make the payment.

Note

Rule 20 is amended stylistically.

Paragraph (c) of Rule 20 is amended to conform more closely to Rule 7.1 of the Federal Rules of Civil Procedure. The broad scope of existing paragraph (c) of Rule 20 is confusing to petitioners and cumbersome in application. In this regard, the Advisory Committee Notes to Rule 7.1 of the Federal Rules of Civil Procedure explain that while the scope of the disclosures required by that Rule may seem limited, "they are calculated to reach a majority of circumstances that are likely to call for [a judge's] disqualification on the basis of financial information that a judge may not know or recollect." The amendment eliminates unnecessary burdens on the parties and on the Court, while supporting properly informed disqualification decisions. Paragraph (c) of Rule 20 is further amended to require a nongovernmental corporation that seeks to intervene to file a disclosure statement as described in paragraph (c).

Conforming changes are also made to Form 2 (Petition) and accompanying instructions, and Form 6 (Corporate Disclosure Statement).

The amendments are effective March 20, 2023.

RULE 21. SERVICE OF PAPERS

(a) When Required: Unless the Court orders otherwise, any paper relating to a case, including a disciplinary matter under Rule 202, must be served on every party

and other person involved in the matter to which the paper relates.

(b) Manner of Service:

(1) *General:*

(A) *Service by the Clerk:* The Clerk will serve all petitions. Unless a paper is served through the Court's electronic filing and case management system as provided in paragraph (b)(2)(A) of this Rule, the Clerk will serve any paper on a person whose address is sealed or protected due to privacy or security reasons.

(B) *Service by a Party:* Unless these Rules provide otherwise or the Court orders otherwise, all other papers required to be served on a party must be served by the party filing the paper. Unless a paper is served through the Court's electronic filing and case management system, the original paper must be filed with a certificate by a party or a party's counsel that service of that paper has been made on the party to be served or the party's counsel. See Form 9 (Certificate of Service) shown in the Appendix.

(2) *Service Methods:* A paper is served under this Rule by:

(A) sending it to a registered user by filing it with the Court's electronic filing and case management system or sending it by other electronic means that the person to be served consented to in writing—in either of which events service is complete upon filing or sending, but is not effective if the serving party learns that it did not reach the person to be served;

(B) mailing it to a party or a party's counsel at the person's address of record. Service by mail is complete when the paper is mailed,

and the date of mailing will be the date of service;

(C) delivering it to a party, or a party's counsel or authorized representative in the case of a party other than an individual (see Rule 24(b)); or

(D) mailing or delivering it to the Commissioner's counsel at the office address shown in the Commissioner's answer filed in the case or a motion filed in lieu of an answer. If no answer or motion in lieu of an answer has been filed, mail must be directed or delivered to the Chief Counsel, Internal Revenue Service, Washington, D.C. 20224.

(3) *Service on Nonparty:* The rules for service on a party also apply to service on a person who is not a party, unless these Rules provide or the Court orders otherwise.

(4) *Consolidated Cases:* In cases consolidated pursuant to Rule 141, unless a paper is served through the Court's electronic filing and case management system, a party making service of a paper must serve each of the other parties or counsel for each of the other parties, and the original of each paper required to be filed with the Court must have a certificate of service attached

(5) *Counsel of Record:* Whenever these Rules require or permit service to be made on a party represented by counsel who has entered an appearance, service must be made on that counsel unless the Court orders service on the party. In the case of paper service, if more than one counsel appears for a party, service ordinarily is required to be made only on that counsel whose appearance was first entered of record. If that counsel files a designation of counsel to receive service, however, and notifies the Court that other counsel is to receive service, service is required to be made only on the person so designated.

(6) *Writs and Process:* Service and execution of writs, process, or similar directives of the Court may be made by a United States marshal, by a deputy marshal, or by a person specially appointed by the Court for that purpose, except that a subpoena may be served as provided in Rule 147(b). The person making service must make proof thereof to the Court promptly and in any event within the time in which the person served must respond. Failure to make proof of service does not affect the validity of the service.

(c) Change of Mailing Address or Email Address: A party, party's counsel, or party's duly authorized representative in the case of a party other than an individual (see Rule 24(e)) whose mailing address or email address has changed must promptly notify the Court by a notice of change of address. A separate notice of change of address must be filed for each docket number. For the form of such notice, see Form 10 (Notice of Change of Address) shown in the Appendix.

Note

Rule 21 is amended stylistically, reorganized, and amended to conform more closely to Rule 5(b) of the Federal Rules of Civil Procedure.

Paragraph (a) of Rule 21 is amended by replacing "or" with "and" to clarify that service of papers is required on every party and other person involved in the matter.

Paragraph (b)(1) of Rule 21 is amended to provide that, unless the serving party sends a paper to a registered user by filing it through the Court's electronic filing and case management system, the Clerk will make service on a person whose address is sealed or protected. Any paper that is served through any means other than sending it to a registered user by filing it with the Court's electronic filing and case management system must be accompanied by a certificate of service.

Existing paragraph (b)(1)(D) of Rule 21 is relettered as paragraph (b)(2)(A) and is amended to provide that a paper

may be served by sending it to a registered user by filing it with the Court's electronic filing and case management system or sending it by other electronic means that the person consented to in writing—in either of which events service is complete upon filing or sending, but is not effective if the serving party learns that it did not reach the person to be served. Consent can be limited to service at a prescribed address or in a specified form and can be limited by other conditions.

Existing paragraph (b)(1)(A) of Rule 21 refers to service by mail at a person's last known address. New paragraph (b)(2)(B) of Rule 21 substitutes the term "address of record" for "last known address." This amendment clarifies that papers must be served at a party's or party's counsel's address of record with the Court and to eliminate any confusion that might arise from the reference in existing Rule 21 to "last known address"—a term of art used in the Internal Revenue Code regarding mailing of notices of deficiency and similar documents. The term "transmission facilities" in existing Rule 21 is replaced with a reference to the Court's "electronic filing and case management system."

Paragraph (c) of Rule 21 is amended to include new language requiring a party, party's counsel, or party's duly authorized representative to inform the Court if the person's email address has changed. Form 10 (Notice of Change of Address) is also amended to provide a new line for reporting a change in email address.

The amendments are effective March 20, 2023.

RULE 23. FORM AND STYLE OF PAPERS

(a) Caption, Date, Signature, and Contact Information Required: Any paper filed with the Court must include the following:

(1) *Caption:* All papers filed with the Court must include a proper caption and must comply with the requirements of Rule 32(a). The caption must include the full name and surname of each individual petitioner, omitting all prefixes and

titles such as "Mr.", "Ms.", or "Dr." The name of an estate or trust or other person for whom a fiduciary acts must precede the fiduciary's name and title, as for example "Estate of Mary Doe, Deceased, Richard Roe, Executor."

(2) *Date:* The date of signature must be placed on all papers filed with the Court.

(3) *Signature and Contact Information:* A person's name on a signature block on a paper that the person authorized to be filed electronically, and that is so filed, constitutes the person's signature. Any other paper to be filed with the Court must bear the original signature of the party's counsel, or of the party personally if the party is self-represented, unless these Rules provide otherwise. An individual rather than a firm name must be used, except that the signature of a petitioner corporation or unincorporated association must be in the name of the corporation or association by one of its active and authorized officers or members, as for example "Mary Doe, Inc., by Richard Roe, President." Except as Rule 23(a)(4) provides, the name, mailing address, email address, and telephone number of the party or the party's counsel, as well as counsel's Tax Court bar number, must be typed or printed immediately beneath the signature. The mailing address of a signatory must include a firm name if it is an essential part of the accurate mailing address.

(4) *Decision Documents:* A decision document, including a proposed decision document, must omit a party's mailing address, email address, and telephone number.

(b) Number Filed: Unless these Rules provide otherwise, a party filing a document in paper form must file a signed original with any attachments. Only one transmission of an electronically filed document is required. As to stipulations, see Rule 91(b).

(c) Legible Papers Required: A paper filed with the Court may be prepared by any process, as long as the paper is clear and legible.

(d) Size and Style:

(1) *Papers:* A paper, including a paper that is filed electronically, must be prepared on a page that is 8½ inches wide by 11 inches long, with side margins on each page that are no less than 1 inch wide, and margins on the top and bottom of each page that are no less than ¾ inch wide. A typewritten or printed paper must be typed or printed only on one side on opaque, unglazed paper.

(2) *Text, Footnotes, and Quotations:* Text and footnotes must appear in consistent typeface no smaller than 12 characters per inch produced by a typewriting element, 12-point type produced by a nonproportional print font (e.g., Courier), or 14-point type produced by a proportional print font (e.g., Times New Roman or Century Schoolbook), with double spacing between each line of text and single spacing between each line of indented quotations and footnotes. Quotations in excess of five lines must be set off from the surrounding text and indented.

(3) *Lines:* Double-spaced lines must be no more than three lines to the vertical inch, and single-spaced lines must be no more than six lines to the vertical inch.

(e) Binding and Covers: A paper filed with the Court in paper form should not have a back or cover and may only be bound using a removable fastener.

(f) Citations: All citations of case names must be underscored or in italics.

(g) Acceptance by the Clerk: Except as otherwise directed by the Court, the Clerk must not refuse to file

a paper solely because it is not in the form prescribed by these Rules.

Note

Rule 23 is amended stylistically and to address certain procedural matters as to the form and style of papers and the transmission of papers to the Court.

Paragraph (a)(3) of Rule 23 is amended (1) to state that a person's name entered by that person on a signature block on a paper that the person authorized to be filed electronically, and that is so filed, constitutes the person's signature, and (2) to eliminate the requirement that a paper filed with the Court electronically include the original signature of the party or the party's counsel. Rule 23 now conforms more closely to Rules 5(d)(3)(C) and 11(a) of the Federal Rules of Civil Procedure, which address signature requirements for papers filed with a court.

New paragraph (a)(4) provides that a party's mailing address, email address, and telephone number must be omitted from a decision document or a proposed decision document. This amendment balances the need to protect the personal information of petitioners with the public's interest in electronic access to the Court's decisions.

Paragraph (b) of Rule 23 is amended to provide that (1) if a paper is filed with the Court in paper form, only a single copy with any attachments should be filed, and (2) only a single transmission is required when a paper is filed electronically.

Paragraph (d) of Rule 23 is reorganized, and Century Schoolbook is added as an acceptable font for papers filed with the Court.

Paragraph (e) of Rule 23 is amended to provide that papers filed with the Court in paper form may only be bound using a removable fastener.

The amendments are effective March 20, 2023.

RULE 25. COMPUTATION OF TIME

(a) Computing Time: The following Rules apply in computing any time period specified in these Rules, in any Court order, or in any statute that does not specify a method of computing time.

(1) *Period Stated in Days:* If a period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) *Inaccessibility of the Clerk's Office:* Unless the Court orders otherwise, if the Clerk's Office is inaccessible on the last day of a filing period, the time for filing any paper other than a petition is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday. For the circumstances under which the period for filing a petition is tolled when a filing location is inaccessible, see Code section 7451(b).

(3) *"Last Day" Defined:* Unless a different time is set by a statute or Court order, the last day ends:

(A) for electronic filing, at 11:59 p.m. Eastern Time; and

(B) for filing by other means, when the Clerk's Office is scheduled to close.

(4) *"Next Day" Defined:* The "next day" is determined by continuing to count forward if the period is measured after an event and backward if the period is measured before an event.

(5) *"Legal Holiday" Defined:* "Legal holiday" means:

(A) the day set aside by statute for observation of New Year's Day, Martin Luther King Jr.'s Birthday, Inauguration Day, Washington's Birthday, Memorial Day, Juneteenth National Independence Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) any other day that the District of Columbia has declared a holiday, including District of Columbia Emancipation Day–April 16.

(b) Extending Time:

(1) *In General:* Unless precluded by statute, if an act may or must be done within a specified time, the Court may, for good cause, extend the time:

(A) with or without motion or notice if the Court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

As to continuances, see Rule 133.

(2) *Special Rules:*

(A) If a motion is made concerning jurisdiction or the sufficiency of a pleading, the time for filing a responsive pleading to that pleading begins to run from the date of service of the Court's order disposing of the motion, unless the Court orders otherwise.

(B) If the Court has issued an order directing the filing of an amendment, supplement, or ratification of any pleading, the time for filing a responsive pleading begins to run

from the date of service of the amendment, supplement, or ratification, unless the Court orders otherwise.

(C) The period fixed by statute, within which to file a petition with the Court, cannot be extended by the Court.

(D) After the dates for filing briefs are fixed, an extension of time for filing a brief or the granting of leave to file a brief after the due date correspondingly extends the time for filing any other brief due at the same time and for filing succeeding briefs, unless the Court orders otherwise.

(c) Reducing Time: The Court in its discretion may shorten any period provided by these Rules.

Note

Rule 25 is amended stylistically and reorganized to conform more closely to Rule 6(a) and (b) of the Federal Rules of Civil Procedure.

New paragraph (a)(2) is added to Rule 25 to address situations in which the Clerk's Office is inaccessible on the last day of a filing period and includes a reference to Code section 7451(b), which tolls the period of filing a petition when a filing location is inaccessible.

The definition of "legal holiday" in paragraph (a)(5) of Rule 25 now includes Juneteenth National Independence Day.

Paragraph (b)(2) of Rule 25 is amended to provide special rules for computing the time for filing a responsive pleading if the Court has directed the filing of an amendment, supplement, or ratification of a pleading.

New paragraph (c) is added to Rule 25 in connection with the reorganization of the Rule.

The amendments are effective March 20, 2023.

RULE 26. ELECTRONIC FILING

(a) General: Unless the Court orders otherwise, the Court will accept for filing by a party any papers submitted, signed, or verified by electronic means that comply with procedures established by the Court. See Rule 3(e) (defining the term "Paper") and Rule 23, Form and Style of Papers.

(b) Electronic Filing Requirement:

(1) *Parties Represented by Counsel:*

(A) *General Rule:* Electronic filing is required for all papers filed by a party represented by counsel, unless the Court orders otherwise.

(B) *Exceptions:* Mandatory electronic filing does not apply to:

(i) any papers not eligible for electronic filing (for a complete list of those papers, see the Court's electronic filing instructions on the Court's website); and

(ii) any counsel in a case who for good cause shown is granted an exemption from the electronic filing requirement.

(2) *Self-Represented Petitioners:* A self-represented petitioner, including a petitioner assisted by a low-income taxpayer clinic or Bar-sponsored pro bono program, is not subject to mandatory electronic filing requirements.

Note

Rule 26 is amended stylistically. There has been no substantive change.

Paragraph (a) of Rule 26 is amended to eliminate a redundancy and to include cross-references to Rule 3 and Rule 23.

Existing paragraph (b) of Rule 26 is reorganized.

The amendments are effective March 20, 2023.

RULE 27. PRIVACY PROTECTION FOR FILINGS MADE WITH THE COURT

(a) Redacted Filings: Unless these Rules provide otherwise or the Court orders otherwise, in an electronic or paper filing with the Court, a party or nonparty making the filing must refrain from including or must take appropriate steps to redact the following information:

(1) *Taxpayer Identification Numbers:* These include, for example, Social Security numbers and employer identification numbers.

(2) *Dates of Birth:* If a date of birth is provided, only the year should appear.

(3) *Names of Minor Children:* If a minor child is identified, only the minor child's initials should appear.

(4) *Financial Account Numbers:* If a financial account number is provided, only the last four digits of the number should appear.

(b) Limitations on Remote Access to Electronic Files: Unless the Court orders otherwise, access to electronic files is authorized as follows:

(1) The parties and their counsel may have remote electronic access to any part of the case file maintained by the Court in electronic form; and

(2) any other person may have electronic access at the courthouse to the public record maintained by the Court in electronic form, but may have remote electronic access only to:

(A) the docket record maintained by the Court; and

(B) any opinion, order, or decision of the Court, but not any other part of the case file.

(c) Filings Made Under Seal: The Court may order that a filing containing any of the information described in paragraph (a) of this Rule be made under seal without redaction. The Court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(d) Protective Orders: For good cause, the Court may by order:

(1) require redaction of additional information; or

(2) issue a protective order as provided by Rule 103(a).

(e) Option for Additional Unredacted Filing Under Seal: A person making a redacted filing may also file an unredacted copy under seal. The Court will retain the unredacted copy as part of the record.

(f) Option for Filing a Reference List: A document that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed with a motion to seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(g) Waiver of Protection of Identifiers: A person waives the protection of this Rule as to the person's own information by filing it without redaction and not under seal. The Clerk is not required to review documents filed with the Court for compliance with this Rule. The responsibility to redact a filing rests with the person making the filing.

(h) Inadvertent Disclosure: A person may correct an inadvertent disclosure of identifying information in a prior filing by submitting a properly redacted duplicate filing (complete with attachments) within 60 days of the original filing without leave of Court, and thereafter only by leave of Court.

(i) Service on a Party Whose Address Is Subject to a Protective Order: For service of papers on a party whose address is sealed or protected due to privacy or security reasons, see Rule 21(b)(1).

Note

Rule 27 is amended stylistically.

Paragraph (h) of Rule 27 is amended to describe more accurately the procedure to correct an inadvertent disclosure of identifying information.

Paragraph (i) of Rule 27 is added to provide a cross-reference to Rule 21(b)(1), which concerns the Clerk's role in serving papers on a party whose address is sealed or protected.

The amendments are effective March 20, 2023.

RULE 31. GENERAL RULES OF PLEADING

(a) Purpose: The purpose of a pleading is to give the parties and the Court fair notice of the matters in controversy and the basis for the parties' respective positions.

(b) Pleading To Be Concise and Direct: Each allegation in a pleading must be simple, concise, and direct. No technical form is required.

(c) Consistency: A party may set forth two or more statements of a claim or defense alternatively or hypothetically. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient. A party may state as many separate claims or defenses as the party has regardless of consistency or the grounds on which based. All statements are subject to the signature requirements of Rules 23(a)(3) and 33.

(d) Construction of Pleadings: A pleading must be construed so as to do justice.

Note

Rule 31 is amended stylistically to conform more closely to paragraphs (d) and (e) of Rule 8 of the Federal Rules of Civil Procedure. There has been no substantive change.

Paragraph (c) of Rule 31 is amended to eliminate a redundancy.

The amendments are effective March 20, 2023.

RULE 32. FORM OF PLEADINGS

(a) Caption; Names of Parties: Every pleading must have a caption that includes the Court's name (United States Tax Court), the names of the parties (the title of the case), and the docket number after it becomes available (see Rule 35), and must designate the type of pleading under Rule 30. The title of a petition must name all the parties and persons on whose behalf the petition is filed. The title of other pleadings, after naming the first party on each side, may refer generally to other parties.

(b) Paragraphs; Separate Statements: A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. Each claim and defense must be stated separately whenever a separation facilitates the clear presentation of the matters set forth.

(c) Adoption by Reference; Exhibits: A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of any notice that is an exhibit to a pleading is a part of the pleading for all purposes. No other exhibit may be attached to a pleading.

(d) Other Provisions: With respect to other provisions relating to the form and style of papers filed with the Court, see Rules 23, 56(a), 57(a), 210(d), 220(d), 240(d), 300(d), and 320(c).

Note

Rule 32 is amended stylistically.

Paragraph (b) of Rule 32 is amended to conform more closely to Rule 10(b) of the Federal Rules of Civil Procedure.

Paragraph (c) of Rule 32 is amended to clarify that, other than a notice (e.g., a notice of deficiency or notice of determination), no exhibit may be attached to a pleading.

The amendments are effective March 20, 2023.

RULE 33. SIGNING OF PLEADINGS

(a) Signature: Each pleading must be signed in the manner provided in Rule 23. If there is more than one counsel of record, the signature of only one is required.

(b) Effect of Signature: Counsel or a party signing a pleading certifies that the signer has read the pleading; that, to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; and that it is not presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation. Counsel's signature also serves as a representation that counsel is authorized to represent the party or parties on whose behalf the pleading is filed. The Court may strike an unsigned pleading, unless it is signed promptly after the omission is called to the counsel's or party's attention. If, after notice and a reasonable opportunity to respond, the Court determines that a pleading has been signed in violation of this Rule, the Court may impose on the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the reasonable expenses incurred because of the filing of the pleading, including reasonable counsel's fees.

Note

Rule 33 is amended stylistically and to conform more closely to paragraphs (a) and (b) of Rule 11 of the Federal Rules of Civil Procedure. There has been no substantive change.

The amendments are effective March 20, 2023.

RULE 34. PETITION

(a) General: A petition must contain the information required by these Rules and must identify the issues presented. If the petition does not comply with these Rules, the case may be dismissed.

(b) Deficiency or Liability Action:

(1) *Content of Petition:* A petition in a deficiency or liability action must be substantially in accordance with Form 1 (Petition) shown in the Appendix and must contain the following:

(A) If the petitioner is an individual, the petitioner's name and State of legal residence.

(B) If the petitioner is not an individual, the petitioner's name and principal place of business or principal office or agency.

(C) The petitioner's mailing address and the office of the Internal Revenue Service with which the tax return for the period in controversy was filed.

(D) The date of the notice and the City and State of the Internal Revenue Office that issued the notice, or other allegations, establishing the Court's jurisdiction.

(E) If the petitioner's name differs from the name on the notice, a statement of the reasons for the difference.

(F) The amount of the deficiency or liability determined by the Commissioner, the nature of the tax, and the year or years or

other periods for which the Commissioner determined the deficiency or liability. If only part of the determination is disputed, the petition must state and identify the approximate amount of taxes in dispute.

(G) In separately lettered paragraphs, clear and concise assignments of each and every error, including any assignments of error as to which the burden of proof is on the Commissioner, that the petitioner alleges the Commissioner made in the determination of the deficiency or liability. Any issue not raised in the assignments of error will be deemed conceded.

(G) In separately lettered paragraphs, clear and concise statements of the facts on which the petitioner relies to establish the errors alleged in the petition, except for those assignments of error as to which the burden of proof is on the Commissioner.

(I) Any special matters as required by Rule 39.

(J) A request for the relief that the petitioner seeks.

(K) The signature, mailing address, email address, and telephone number of each petitioner or each petitioner's counsel, as well as counsel's Tax Court bar number.

(2) *Copy of Notice:* A copy of the notice of deficiency or notice of liability must be attached to the petition.

(3) *Separate Petition; Permissive Joinder; Severance:*

(A) *Separate Petition:* Ordinarily a separate petition must be filed with respect to each notice of deficiency or notice of liability.

(B) *Permissive Joinder of Parties and Claims:* A single petition may be filed with respect to

all notices of deficiency or notices of liability issued—

(i) to the same person; or

(ii) to more than one person, such as two spouses, and each person contests the notice or notices. If the notice of deficiency or notice of liability is issued to more than one person, each person wishing to contest the notice must file either a separate petition or a joint petition, and each person must satisfy all the requirements of this Rule in order for the petition to be treated as filed by or for that person.

(C) *Severance:* The Court may issue orders, including an order for separate trials, to protect a party against embarrassment, delay, undue expense, or other prejudice resulting from the joinder of parties or claims.

(c) Petitions in Other Actions:

(1) *Content of Petition:* See the following Rules for the requirements applicable to petitions in other actions: Rule 173(a) (small tax cases); Rules 211(b)–(g) and 311(b) (declaratory judgment actions); Rule 221(b)–(e) (disclosure actions); Rules 241(b)–(e), 255.2(b), 301(b)–(e) (partnership actions); Rule 271(b) (administrative costs actions); Rule 281(b) (abatement of interest actions); Rule 291(b) (redetermination of employment status actions); Rule 321(b) (actions for determination of relief from joint and several liability on a joint return); Rule 331(b) (lien and levy actions); Rule 341(b) (whistleblower actions); and Rule 351(b) (certification actions with respect to passports).

(2) *Joinder of Parties:* See the following Rules with respect to the joinder of parties in other actions: Rule 215 (declaratory judgment actions); Rule 226

(disclosure actions); and Rules 241(h), 255.2(c), and 301(f) (partnership actions).

(d) Use of Form 2 (Petition): The use of a properly completed Form 2 (Petition) shown in the Appendix satisfies the requirements of this Rule.

(e) Filing of Original: Only the signed original of each petition must be filed. For the signature requirement of petitions filed electronically, see Rule 23(a)(3) and the Court's electronic filing instructions on the Court's website.

(f) Claim for Reasonable Litigation or Administrative Costs: A claim for reasonable litigation or administrative costs must not be included in the petition. Such a claim may only be made in accordance with Rule 231. See Title XXVI for the rules that govern actions for administrative costs.

Note

Rule 34 is reorganized and amended stylistically.

Paragraph (b) of Rule 34 is revised to direct a party or a party's counsel to provide an email address in the petition.

The provisions of existing Rule 61(a) and (b) have been incorporated in amendments to paragraphs (b)(3)(B) and (C) of Rule 34, respectively. The text of existing Rule 61 is deleted to eliminate a redundancy in the Rules.

The amendments are effective March 20, 2023.

RULE 35. ENTRY ON DOCKET

On the Clerk's receipt of the petition, the case will be entered on the docket and assigned a number. The Clerk will notify the parties of the docket number. The parties must include the docket number on all papers thereafter filed in the case and in any correspondence with the Court.

Note

Rule 35 is amended stylistically. There has been no substantive change.

The amendments are effective March 20, 2023.

RULE 36. ANSWER

(a) Time To Answer or Move: The Commissioner has 60 days from the date of service of the petition within which to file an answer, or 45 days from that date within which to move with respect to the petition. With respect to an amended petition or amendments to the petition, the Commissioner has like periods from the date of service of those papers within which to answer or move in response thereto, unless the Court orders otherwise.

(b) Form and Content: The answer must be written so that it will advise the petitioner and the Court fully of the nature of the defense. It must include a specific admission or denial of each material allegation in the petition; however, if the Commissioner is without knowledge or information sufficient to form a belief as to the truth of an allegation, the Commissioner must so state, and that statement will have the effect of a denial. If the Commissioner intends to qualify or to deny only a part of an allegation, the Commissioner must specify so much of it as is true and must qualify or deny only the remainder. In addition, the answer must contain a clear and concise statement of every ground, together with the facts in support thereof, on which the Commissioner relies and has the burden of proof, as well as any special matters as required by Rule 39. Paragraphs of the answer must be designated to correspond to those of the petition to which they relate. If the petition does not include a copy of the notice of deficiency or other relevant jurisdictional document, the answer must include a copy of the notice of deficiency or other relevant jurisdictional document, state that the jurisdictional document is not available at the time, or state that no such document was

issued. If the jurisdictional document is not available when the answer is filed, and is not otherwise part of the docket record, the Commissioner must provide a copy of the document, whenever it becomes available, by filing (without leave of the Court) an amendment to the answer.

(c) Effect of Answer: Every material allegation set out in the petition and not expressly admitted or denied in the answer is deemed to be admitted.

(d) Declaratory Judgment, Disclosure, and Administrative Costs Actions: For the requirements applicable to the answer in other actions, see Rules 213(a) (declaratory judgments), 223(a) (disclosure actions), and 272(a) (administrative costs), respectively.

Note

Rule 36 is amended stylistically.

Paragraph (b) of Rule 36 is amended to (1) include a cross-reference to Rule 39, Pleading Special Matters, and (2) provide that if a copy of the notice of deficiency or other relevant jurisdictional document is not attached as an exhibit to the petition, the Commissioner will include a copy of such document with the answer, state that the document is not available at the time the answer is filed, or state that no such document was issued. If the relevant jurisdictional document is not available when the answer is filed, and is not otherwise part of the docket record, the Commissioner must file an amendment to the answer (without leave of the Court), providing a copy of the jurisdictional document once it becomes available.

The amendments are effective March 20, 2023.

RULE 41. AMENDED AND SUPPLEMENTAL PLEADINGS

(a) Amendments: A party may amend a pleading once as a matter of course at any time before a responsive

pleading is served. If the pleading is one to which no responsive pleading is permitted and the case has not been placed on a trial calendar, a party may so amend it at any time within 30 days after it is served. Otherwise a party may amend a pleading only by leave of Court or by written consent of the adverse party, and leave will be given freely when justice so requires. No amendment will be allowed after expiration of the time for filing the petition, however, which would involve conferring jurisdiction on the Court over a matter which otherwise would not come within its jurisdiction under the petition as then on file. A motion for leave to amend a pleading must state the reasons for the amendment and must be accompanied by the proposed amendment. The proposed amendment to the pleading must be separately set forth and must comply with the requirements of Rule 23 regarding form and style of papers filed with the Court. See Rules 36(a) and 37(a) for time for responding to amended pleadings.

(b) Amendments To Conform to the Evidence:

(1) *Issues Tried by Consent:* Issues not raised by the pleadings but tried by express or implied consent of the parties are treated in all respects as if raised in the pleadings. The Court, on motion of any party at any time, may allow any amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues, but failure to amend does not affect the result of the trial of these issues.

(2) *Other Evidence:* If a party objects to evidence on the ground that it is not within the issues raised by the pleadings, the Court may receive the evidence and at any time allow the pleadings to be amended to conform to the proof. The Court will do so freely when justice so requires and the objecting party fails to satisfy the Court that the admission of the evidence will prejudice that party's position on the merits.

(3) Filing: The amendment or amended pleadings permitted under this paragraph (b) may be filed

with the Court at the trial or as otherwise ordered by the Court.

(c) Supplemental Pleadings: On motion, the Court may, on just terms, permit a party to file a supplemental pleading setting out any transaction, occurrences, or event that happened after the date of the pleading to be supplemented. The Court may permit supplementation even though the original pleading is defective in stating a claim or defense. The Court may order that the opposing party respond to the supplemental pleading within a specified time.

(d) Relation Back of Amendments: An amendment to a pleading relates back to the date of the original pleading, unless the Court orders otherwise either on motion or on its own.

Note

Rule 41 is amended stylistically. Paragraph (b)(2) of Rule 41 is amended to clarify that a party is not limited to objecting to evidence at trial and may raise an objection to any form of evidence before trial.

The amendments are effective March 20, 2023.

RULE 61. [RESERVED]

Note

The text of existing Rule 61 is deleted to eliminate a redundancy in the Rules, and Rule 61 is reserved. The provisions and concepts of Rule 61 are now set forth in Rule 34.

The amendments are effective March 20, 2023.

RULE 62. MISJOINDER OF PARTIES

Misjoinder of parties is not ground for dismissal of a case. The Court may order a severance on such terms as are just. See Rule 34(b)(3).

Note

Rule 62 is amended to conform to the deletion of the text of existing Rule 61 and now includes a cross-reference to Rule 34(b)(3).

The amendments are effective March 20, 2023.

RULE 63. SUBSTITUTION OF PARTIES; CHANGE OR CORRECTION IN NAME

(a) Death: If a petitioner dies, the Court, on its own or on motion of a party or the decedent's successor or representative, may order substitution of the proper parties.

(b) Incompetency: If a party becomes incompetent, the Court, on its own or on motion of a party or the party's representative, may order the representative to proceed with the case.

(c) Successor Fiduciaries or Representatives: The Court, on its own or on motion of a party, may order substitution of the proper successors where a fiduciary or representative is changed.

(d) Other Cause: The Court, on its own or on motion of a party, may order the substitution of proper parties for other cause.

(e) Change or Correction in Name: The Court, on its own or on motion of a party, may order a change of or correction in the name or title of a party.

Note

Rule 63 is amended stylistically. There has been no substantive change.

The amendments are effective March 20, 2023.

RULE 64. INTERVENTION

(a) Intervention of Right:

(1) *In General:* On timely motion, the Court must permit anyone to intervene who is given an unconditional right to intervene by a Federal statute.

(2) *Existing Rules:* For the requirements relating to intervention in certain actions, see Rules 216, 225, 245, and 325(b).

(b) Permissive Intervention:

(1) *In General:* On timely motion, the Court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a Federal statute; or

(B) has a stake in the outcome of the litigation before the Court that may not be adequately protected by the existing parties, if the Court determines in its discretion that permitting the intervention (i) may contribute to a more complete presentation of the legal issues to be decided and (ii) is in the interest of justice.

(2) *By a Government Officer or Agency:* On timely motion, the Court may permit a Federal or State governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) *Delay or Prejudice:* In exercising its discretion, the Court must consider whether the intervention will unduly delay or prejudice the adjudication of the issues raised by the existing parties.

(c) Notice Required: A motion to intervene must be served on the parties as provided in Rule 21 and must comply with the requirements of Rules 50 and 54. The motion must state the grounds for intervention and the reasons why intervention should be permitted.

(d) Intervenor's Role: The Court, in its discretion, will determine the extent to which an intervenor may participate in the proceedings.

Note

New Rule 64 is adopted to provide general rules governing the filing of a motion to intervene in Tax Court proceedings. New Rule 64 reflects the Tax Court's historical practice with respect to intervention and accounts for differences between the Tax Court's jurisdiction and that of the Federal district courts. The new Rule does not supersede or otherwise impact the Court's specialized intervention rules. See, e.g., Rules 216 (retirement plan actions), 225 (disclosure actions), 245 (partnership actions), and 325 (spousal relief actions).

The Tax Court traditionally has permitted intervention in the exercise of its discretion and when justice requires. For example, the Court has permitted intervention when doing so may contribute to the disposition of an issue or the resolution of an evidentiary problem. See *La. Naval Stores, Inc. v. Commissioner*, 18 B.T.A. 533, 536 (1929) (intervention permitted to help resolve an evidentiary objection by the Commissioner); see also *Cincinnati Transit, Inc. v. Commissioner*, 455 F.2d 220, 220 (6th Cir. 1972) (denying party petitioner status to a subsidiary of a corporation that received a deficiency notice, while suggesting that the subsidiary could intervene in the proceeding to protect its interest), *aff'g* 55 T.C. 879 (1971); *Cent. Union Tr. Co. v. Commissioner*, 18 B.T.A. 300, 302–03 (1929) (individual who claimed that an alleged debt owed to an estate had no value was permitted to intervene in the estate tax case because (1) he had an interest in the estate, (2) he had agreed to pay the estate tax resulting from the inclusion of the claim in the estate, and (3) the executors would not protect his interest in the litigation); *Estate of Proctor v. Commissioner*, T.C. Memo. 1994-208, 1994 WL 184400, at *9 (three intervenors with adverse interests in an estate tax case

were permitted to intervene because their interests were not adequately protected by the existing parties and permitting the interventions would lead to a more complete presentation of certain of the legal issues to be decided).

In cases not involving an unconditional statutory right to intervene, the Tax Court has evaluated motions to intervene, taking into account the limited scope of its jurisdiction. See *Estate of Smith v. Commissioner*, 77 T.C. 326, 329–30 (1981) (surveying the Court's caselaw and denying a motion to intervene filed by a decedent's surviving spouse). Unlike in other Federal courts, the Commissioner of Internal Revenue is uniformly the respondent in Tax Court proceedings, while the petitioner usually is challenging a notice of a deficiency or notice of determination. The Court normally lacks jurisdiction to adjudicate the rights of persons to whom the Commissioner has not issued an appropriate notice. See, e.g., *Estate of Siegel v. Commissioner*, 67 T.C. 1033, 1040–41 (1977) (denying a motion to intervene filed by the beneficiary of an estate).

In the absence of a general intervention rule and following the directive of Rule 1(b) of these Rules, both the Tax Court and courts of appeals have looked to Rule 24 of the Federal Rules of Civil Procedure in deciding whether intervention should be permitted. The practice has not proven satisfactory, however, because courts of appeals have reached different conclusions on how Rule 24 of the Federal Rules of Civil Procedure should be applied in the context of a Tax Court proceeding. See *Huff v. Commissioner*, 743 F.3d 790, 801 (11th Cir. 2014) (permitting the Virgin Islands Government to intervene in a Tax Court case under Fed. R. Civ. P. 24(a)(2)), *rev'g and remanding* 138 T.C. 258 (2012); *McHenry v. Commissioner*, 677 F.3d 214 (4th Cir. 2012) (affirming the Tax Court's order denying intervention of the Virgin Islands Government because Rule 1(b) gives the Tax Court broad discretion to decide whether and to what extent to follow Fed. R. Civ. P. 24 and because Fed. R. Civ. P. 24 itself confers broad discretion on a trial court); *Appleton v. Commissioner*, 430 F. App'x 135, 136, 139 (3d Cir. 2011) (permitting the Virgin Islands Government to intervene pursuant to Fed. R. Civ. P. 24(b)(2)), *rev'g and remanding* 135 T.C. 461 (2010); *Coffey v. Commissioner*, 663 F.3d 947, 949, 951 (8th Cir. 2011) (permitting the Virgin Islands Government to intervene pursuant to Fed. R. Civ. P. 24(b)(2)); *Sampson v.*

Commissioner, 710 F.2d 262, 264 (6th Cir. 1983) (the Tax Court has the authority to permit persons or entities who have not been issued a deficiency notice to intervene in a deficiency case pursuant to Fed. R. Civ. P. 24(b)).

The Court adopts new Rule 64 as a general intervention rule tailored to its specialized jurisdiction. Doing so is consistent with Code section 7453, which authorizes the Tax Court to prescribe its own rules of practice and procedure. See, e.g., *McHenry v. Commissioner*, 677 F.3d at 226 (citing Code section 7453 and noting that the authority "to mandate Tax Court procedure to govern intervention . . . is left exclusively to the Tax Court").

Paragraph (a) of Rule 64 provides that anyone who is given an unconditional right to intervene by a Federal statute may intervene as a matter of right. See, e.g., Code sec. 6015.

Paragraph (b) of Rule 64 provides that permissive intervention may be allowed if a person has been given a conditional right to intervene by a Federal statute. Permissive intervention may also be allowed if a person has a stake in the outcome of the litigation that cannot be adequately protected by the parties, if the Court determines that permitting the intervention may contribute to a more complete presentation of the legal issues and is in the interest of justice. A person's generalized interest in tax matters (for example, tax policy or tax administration) or status as a taxpayer or tax practitioner, standing alone, does not constitute a stake in the outcome of a case that would justify permissive intervention. Federal or State governmental officers or agencies may also be permitted to intervene in appropriate circumstances. The provisions of paragraph (b) of Rule 64 are informed by the standard set forth in *Estate of Proctor v. Commissioner*, T.C. Memo. 1994-208.

An intervenor must move to intervene and state the grounds for intervention and the reasons why intervention should be permitted. The Court in its discretion will determine the extent to which an intervenor is permitted to participate in the litigation.

The amendments are effective March 20, 2023.

RULE 70. GENERAL PROVISIONS

(a) General:

(1) *Methods and Limitations of Discovery:* A party may obtain discovery by written interrogatories (Rule 71), by production of documents, electronically stored information, or things (Rules 72 and 73), by depositions on consent of the parties (Rule 74(b)), or by depositions without consent of the parties in certain cases (Rule 74(c)). However, the Court expects the parties to attempt to attain the objectives of discovery through informal consultation or communication before utilizing the discovery procedures provided in these Rules. Discovery is not available under these Rules through depositions except to the limited extent provided in Rule 74. See Rules 91(a) and 100 regarding the relationship of discovery to stipulations.

(2) *Time for Discovery:* Discovery may not be commenced, without leave of Court, before the expiration of 30 days after joinder of issue. See Rule 38. Discovery must be completed and any motion to compel or any other motion with respect to that discovery must be filed, unless the Court orders otherwise, no later than 45 days before the date set for call of the case from a trial calendar. Discovery by a deposition under Rule 74(c) may not be commenced before a notice of trial has been issued or the case has been assigned to a Judge or Special Trial Judge and any motion to compel or any other motion with respect to that discovery must be filed within the time provided by the preceding sentence. Discovery of matters that are relevant only to the issue of a party's entitlement to reasonable litigation or administrative costs may not be commenced, without leave of Court, before a motion for reasonable litigation or administrative costs has been noticed for a hearing, and discovery must be completed and any motion

to compel or any other motion with respect to that discovery must be filed, unless the Court orders otherwise, no later than 45 days before the date set for hearing.

(3) *Cases Consolidated for Trial:* With respect to a common matter in cases consolidated for trial, discovery may be had by any party to the consolidated case to the extent provided by these Rules.

(b) Scope of Discovery:

(1) Discovery may concern any matter not privileged that is relevant to the subject matter involved in the pending case. Discovery must be proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

(2) It is not ground for objection that the information or response sought will be inadmissible at the trial, if that information or response appears reasonably calculated to lead to discovery of admissible evidence, regardless of the burden of proof involved.

(3) If the information or response sought is otherwise proper, it is not objectionable merely because the information or response involves an opinion or contention that relates to fact or to the application of law to fact. But the Court may order that the information or response sought need not be furnished or made until some designated time or a particular stage has been reached in the case or until a specified step has been taken by a party.

(c) Limitations on Discovery:

(1) *General:* The Court may limit the frequency or extent of use of the discovery methods set forth in paragraph (a) if it determines that:

(A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(C) the proposed discovery is outside the scope of Rule 70(b)(1).

The Court may act on its own after reasonable notice or pursuant to a motion under Rule 103.

(2) *Electronically Stored Information:* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the Court may nonetheless order discovery from those sources if the requesting party shows good cause, considering the limitations of Rule 70(c)(1). The Court may specify conditions for the discovery.

(3) *Documents and Tangible Things:*

(A) A party generally may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent), unless, subject to Rule 70(c)(4),

(i) they are otherwise discoverable under Rule 70(b); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) If the Court orders discovery of those materials, it must protect against disclosure of mental impressions, conclusions, opinions, or legal theories of a party's counsel or other representative concerning the litigation.

(4) *Experts:*

(A) Rule 70(c)(3) protects drafts of any expert witness report required under Rule 143(g), regardless of the form in which the draft is recorded.

(B) Rule 70(c)(3) protects communications between a party's counsel and any witness required to provide a report under Rule 143(g), regardless of the form of the communications, except to the extent the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's counsel provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's counsel provided and that the expert relied on in forming the opinions to be expressed.

(C) A party generally may not, by interrogatories or depositions, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare

for trial and who is not expected to be called as a witness at trial, except on a showing of exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(d) Claiming Privilege or Protecting Trial-Preparation Materials:

(1) *Information Withheld:* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(A) expressly make the claim; and

(B) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(2) *Information Produced:* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party who received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the Court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(e) Party's Statements: On request to the other party and without any showing except the assertion in writing that the requester lacks and has no convenient

means of obtaining a copy of a statement made by the requester, a party is entitled to obtain a copy of any statement that has a bearing on the subject matter of the case and is in the possession or control of another party to the case.

(f) Use In Case: The answers to interrogatories, things produced in response to a request, or other information or responses obtained under Rules 71, 72, 73, and 74 may be used at trial or in any proceeding in the case before or after trial to the extent permitted by the rules of evidence. The answers or information or responses will not be considered as evidence until offered and received as evidence. No objections to interrogatories or the answers thereto, or to a request to produce or the response thereto, will be considered unless made within the time prescribed, except that the objection that an interrogatory or answer would be inadmissible at trial is preserved even though not made before trial.

(g) Signing of Discovery Requests, Responses, and Objections:

(1) Every request for discovery or response or objection thereto made by a party represented by counsel must be signed by at least one counsel of record. A party who is not represented by counsel must sign the request, response, or objection. The signature must conform to the requirements of Rule 23(a)(3). The signature of counsel or a party constitutes a certification that the signer has read the request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry, it is:

(A) consistent with these Rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law,

(B) not presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, and

(C) within the scope of Rule 70(b)(1).

The Court may strike a request, response, or objection that is not signed, unless the paper is signed promptly after the omission is called to the attention of the party making the request, response, or objection. The time within which a party is obligated to take action with respect to a request, response, or objection does not begin to run until the paper is signed.

(2) If a certification is made in violation of this Rule, the Court on motion or on its own, may impose on the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including reasonable counsel's fees.

(h) Other Applicable Rules: For Rules concerning the frequency and timing of discovery in relation to other procedures, supplementation of answers, protective orders, the effect of evasive or incomplete answers or responses, and sanctions and enforcement action, see Title X.

Note

Rule 70 is amended stylistically.

Language is deleted from existing paragraph (a)(3) of Rule 70, combined with similar language from existing Rule 92, and added as new paragraph (f) of Rule 3.

Paragraph (b) of Rule 70 is reorganized. Paragraph (b)(1) includes new language adopting principles of proportionality in the use of discovery in accordance with Rule 26(b)(1) of the Federal Rules of Civil Procedure.

Paragraph (d) is added to Rule 70 to conform to Rule 26(b)(5) of the Federal Rules of Civil Procedure, which provides a procedure under which a party may claim that information requested in the course of discovery is privileged.

The remaining paragraphs of Rule 70 are relettered.

The amendments are effective March 20, 2023.

RULE 74. DEPOSITIONS FOR DISCOVERY PURPOSES

(a) General: A party may obtain discovery by depositions with the consent of the parties under paragraph (b) and without the consent of the parties under paragraph (c). Paragraph (d) describes additional uses for depositions of expert witnesses, and paragraphs (e) and (f) set forth general provisions governing the taking of all depositions for discovery purposes.

(b) Depositions with the Consent of the Parties:

(1) *When Deposition May Be Taken:* With the consent of all the parties to a case, and within the time limits provided in Rule 70(a)(2), a deposition for discovery purposes may be taken of a party, a nonparty witness, or an expert witness. A party's consent must be set forth in a stipulation filed with the Court. The stipulation is subject to the procedure provided in Rule 81(d).

(2) *Notice to Nonparty Witness or Expert Witness:* A party desiring to take a deposition of a nonparty witness or an expert witness must serve a notice of deposition on that nonparty witness or expert witness. The notice must state that the deposition is to be taken under Rule 74(b) and must set forth the name of the party or parties seeking the deposition; the name and address of the person to be deposed; the time and place proposed for the deposition; the name of the officer or reporting company before whom the deposition is to be taken; a statement describing any books, papers, documents, electronically stored information, or tangible things to be produced at the deposition; and a statement of the issues in controversy to which the expected testimony of the witness, or the document, electronically stored information,

or thing relates, and the reasons for deposing the witness. With respect to the deposition of an organization described in Rule 81(c), the notice must also set forth the information required under that Rule, and the organization must make the designation authorized by that Rule.

(3) *Objection by Nonparty Witness or Expert Witness:* Within 15 days after service of the notice of deposition, a nonparty witness or expert witness must serve on the parties seeking the deposition any objections to the deposition. The burden is on a party seeking the deposition to move for an order with respect to any objection or other failure of the nonparty witness or expert witness, and that party must annex to the motion the notice of deposition with proof of service thereof, together with a copy of the response and objections, if any. Before a motion for an order is filed, neither the notice nor the responses are filed with the Court.

(c) Depositions Without the Consent of the Parties:

(1) *In General:*

(A) *When Depositions May Be Taken:* After a notice of trial has been issued or after a case has been assigned to a Judge or Special Trial Judge of the Court, and within the time for completion of discovery under Rule 70(a)(2), any party may take a deposition for discovery purposes of a party, a nonparty witness, or an expert witness in the circumstances described in this paragraph.

(B) *Availability:* The taking of a deposition of a party, a nonparty witness, or an expert witness under this paragraph is an extraordinary method of discovery and may be used only if a party, a nonparty witness, or an expert witness can give testimony or possesses documents, electronically stored information, or things which are discoverable within the meaning of

Rule 70(b) and if the testimony, documents, electronically stored information, or things practicably cannot be obtained through informal consultation or communication (Rule 70(a)(1)), interrogatories (Rule 71), a request for production of documents, electronically stored information, or things (Rule 72), or by a deposition taken with the consent of the parties (Rule 74(b)). If these requirements are satisfied, a deposition of a witness may be taken under this paragraph.

(2) *Nonparty Witnesses:* A party may take the deposition of a nonparty witness without leave of court and without the consent of all the parties as follows:

(A) *Notice:* A party desiring to take a deposition under this subparagraph must give notice in writing to every other party to the case and to the nonparty witness to be deposed. The notice must state that the deposition is to be taken under Rule 74(c)(2) and must include the same type of information required under Rule 74(b)(2).

(B) *Objections:* Within 15 days after service of the notice of deposition, a party or a nonparty witness must serve on the party seeking the deposition any objections to the deposition. The procedures set forth in Rule 74(b)(3) otherwise apply.

(3) *Party Witnesses:* A party may take the deposition of another party without the consent of all the parties as follows:

(A) *Motion:* A party desiring to depose another party must file a written motion stating that the deposition is to be taken under Rule 74(c)(3) and setting forth the name of the person to be deposed, the time and place of the deposition, and the name of the officer or reporting company before whom the

deposition is to be taken. With respect to the deposition of an organization described in Rule 81(c), the motion must also set forth the information required under that Rule, and the organization must make the designation authorized by that Rule.

(B) *Objection:* On the filing of a motion to take the deposition of a party, the Court will issue an order directing each non-moving party to file a written objection or response thereto.

(C) *Action by the Court:* In the exercise of its discretion the Court may order the taking of a deposition of a party witness and may in its order allocate the cost therefor as it deems appropriate.

(4) *Expert Witnesses:* A party may take the deposition of an expert witness without the consent of all the parties as follows:

(A) *Scope of Deposition:* The deposition of an expert witness under this subparagraph is limited to:

(i) the knowledge, skill, experience, training, or education that qualifies the witness to testify as an expert in respect of the issue or issues in dispute;

(ii) the opinion of the witness in respect of which the witness's expert testimony is relevant to the issue or issues in dispute;

(iii) the facts or data that underlie that opinion; and

(iv) the witness's analysis, showing how the witness proceeded from the facts or data to draw the conclusion that represents the opinion of the witness.

(B) *Procedure:*

(i) *In General*: A party desiring to depose an expert witness under this subparagraph (4) must file a written motion and set forth therein the matters specified below:

(*a*) The name and address of the witness to be examined;

(*b*) a statement describing any books, papers, documents, electronically stored information, or tangible things to be produced at the deposition of the witness to be examined;

(*c*) a statement of issues in controversy to which the expected testimony of the expert witness, or the document, electronically stored information, or thing relates, and the reasons for deposing the witness;

(*d*) the time and place proposed for the deposition;

(*e*) the name of the officer or reporting company before whom the deposition is to be taken;

(*f*) any provision desired with respect to the payment of the costs, expenses, fees, and charges relating to the deposition (see paragraph (c)(4)(D)); and

(*g*) if the movant proposes to video record the deposition, a statement to that effect and the name and address of the video recorder operator and the operator's employer. (The video recorder operator and the officer

before whom the deposition is to be taken may be the same person.)

The movant must also show that prior notice of the motion has been given to the expert witness whose deposition is sought and to each other party, or counsel for each other party, and must state the position of each of these persons with respect to the motion, in accordance with Rule 50(a).

(ii) *Disposition of Motion:* Any objection or other response to the motion for order to depose an expert witness under this subparagraph must be filed with the Court within 15 days after service of the motion. If the Court approves the taking of a deposition, it will issue an order as described in paragraph (e)(4) of this Rule. If the deposition is to be video recorded, the Court's order will so state.

(C) *Action by the Court:* In the exercise of its discretion the Court may order the taking of a deposition of an expert witness and may in its order allocate the cost therefor as it deems appropriate.

(D) *Expenses:*

(i) *In General*: By stipulation among the parties and the expert witness to be deposed, or on order of the Court, provision may be made for any costs, expenses, fees, or charges relating to the deposition. If there is no stipulation or order, the costs, expenses, fees, and charges relating to the deposition will be borne by the parties as set forth in paragraph (c)(4)(D)(ii).

(ii) *Allocation of Costs, etc.:* The party taking the deposition will pay the following costs, expenses, fees, and charges:

(*a*) A reasonable fee for the expert witness, with regard to the usual and customary charge of the witness, for the time spent in preparing for and attending the deposition;

(*b*) reasonable charges of the expert witness for models, samples, or other like matters that may be required in the deposition of the witness;

(*c*) amounts as are allowable under Rule 148(a) for transportation and subsistence for the expert witness;

(*d*) any charges of the officer presiding at or recording the deposition (other than for copies of the deposition transcript);

(*e*) any expenses involved in providing a place for the deposition; and

(*f*) the cost for the original of the deposition transcript as well as for any copies thereof that the party taking the deposition might order.

The other parties and the expert witness must pay the cost for any copies of the deposition transcript that they might order.

(iii) *Failure To Attend:* If the party authorized to take the deposition of the expert witness fails to attend or to proceed therewith, the Court may order that party to pay the witness any fees, charges, and expenses that the witness would otherwise be entitled to under

paragraph (c)(4)(D)(ii) and to pay any other party's expenses, including attorney's fees, that the Court deems reasonable under the circumstances.

(d) Use of Deposition of an Expert Witness for Other Than Discovery Purposes:

(1) *Use as Expert Witness Report:* On written motion by the proponent of the expert witness and in appropriate cases, the Court may order that the deposition transcript serve as the expert witness report required by Rule 143(g)(1). Unless the Court determines otherwise for good cause shown, the taking of a deposition of an expert witness will not serve to extend the date under Rule 143(g)(1) by which a party is required to furnish to each other party and to submit to the Court a copy of all expert witness reports prepared pursuant to that Rule.

(2) *Other Use:* Any other use of a deposition of an expert witness is governed by the provisions of Rule 81(i).

(e) General Provisions: Depositions taken under this Rule are subject to the following provisions.

(1) *Transcript:* A transcript must be made of every deposition on oral examination taken under this Rule, but the transcript and exhibits introduced in connection with the deposition generally should not be filed with the Court. See Rule 81(h)(3).

(2) *Depositions on Written Questions:* Depositions under this Rule may be taken on written questions rather than on oral examination. If the deposition is to be taken on written questions, a copy of the written questions must be annexed to the notice of deposition or motion to take deposition. The use of written questions is not favored, and the deposition should not be taken in this manner in the absence of a special reason. See Rule 84(a). There will be an opportunity for cross-questions

and redirect questions to the same extent and within the same time periods as provided in Rule 84(b) (starting with service of a notice of or motion to take deposition rather than service of an application). With respect to taking the deposition, the procedure of Rule 84(c) will apply.

(3) *Hearing:* A hearing on a motion for an order regarding a deposition under this Rule will be held only if the Court directs. The Court may grant a motion for an order regarding a deposition to the extent consistent with Rule 70(c)(1).

(4) *Orders:* If the Court approves the taking of a deposition under this Rule, it will issue an order including the name of the person to be examined, the time and place of the deposition, and the name of the officer or reporting company before whom it is to be taken.

(5) *Continuances:* Unless the Court determines otherwise for good cause shown, the taking of a deposition under this Rule will not be regarded as sufficient ground for granting a continuance from a date or place of trial theretofore set.

(f) Other Applicable Rules: Unless otherwise provided in this Rule, the depositions described in this Rule generally are governed by the provisions of the following Rules with respect to the matters to which they apply: Rule 81(c) (designation of person to testify), 81(e) (person before whom deposition taken), 81(f) (taking of deposition), 81(g) (expenses), 81(h) (execution, form, and return of deposition), 81(i) (use of deposition), and Rule 85 (objections, errors, and irregularities). For Rules concerned with the timing and frequency of depositions, supplementation of answers, protective orders, effect of evasive or incomplete answers or responses, and sanctions and enforcement action, see Title X. For provisions governing the issuance of subpoenas, see Rule 147.

Note

Rule 74 is amended stylistically and to eliminate unnecessary language and redundancies.

Rule 74 is amended to provide that a notice of deposition under paragraph (b) and a motion to take a deposition under paragraph (c) must include either the name of the officer or the reporting company before whom a deposition is to be taken.

Paragraph (e) of Rule 74 is amended to provide that the Court's order approving the taking of a deposition under the Rule will include the name of the officer or reporting company before whom the deposition is to be taken.

The amendments are effective March 20, 2023.

RULE 81. DEPOSITIONS IN PENDING CASE

(a) Depositions To Perpetuate Testimony: A party to a case pending in the Court who desires to perpetuate testimony or to preserve any document, electronically stored information, or thing must file an application pursuant to these Rules for an order of the Court authorizing the party to take a deposition for such purpose. Such depositions may be taken only where there is a substantial risk that the person or document, electronically stored information, or thing involved will not be available at the trial of the case, and must relate only to portions of the testimony or document, electronically stored information, or thing that are not privileged and are material to a matter in controversy.

(b) The Application:

(1) *Content of Application:* The application to take a deposition pursuant to paragraph (a) of this Rule must be signed by the party seeking the deposition or the party's counsel, and must show the following:

(A) The names and addresses of the persons to be examined;

(B) the reasons for deposing those persons rather than waiting to call them as witnesses at the trial;

(C) the substance of the testimony that the party expects to elicit from each of those persons;

(D) a statement showing how the proposed testimony or document, electronically stored information, or thing is material to a matter in controversy;

(E) a statement describing any books, papers, documents, electronically stored information, or tangible things to be produced at the deposition by the persons to be examined;

(F) the time and place proposed for the deposition;

(G) the name of the officer or reporting company before whom the deposition is to be taken;

(H) the date on which the petition was filed with the Court, and whether the pleadings have been closed and the case placed on a trial calendar;

(I) any provision desired with respect to payment of expenses, fees, and charges relating to the deposition (see paragraph (g) of this Rule, and Rule 103); and

(J) if the applicant proposes to video record the deposition, the application must so state, and must show the name and address of the video recorder operator and of the operator's employer. (The video recorder operator and the officer before whom the deposition is to be taken may be the same person. See subparagraph (2) of paragraph (j) of this Rule.)

The application must also have annexed to it a copy of the questions to be propounded, if the deposition is to be taken on written questions. See

Form 15 (Application for Order To Take Deposition To Perpetuate Evidence) shown in the Appendix.

(2) *Filing and Disposition of Application:* The application may be filed with the Court at any time after the case is docketed in the Court, but must be filed at least 45 days prior to the date set for the trial of the case. In addition to serving each of the other parties to the case, the applicant must serve a copy of the application on the persons who are to be examined pursuant to the application, and must file with the Clerk a certificate showing such service. The other parties or persons must file their objections or other response, with the same number of copies and with a certificate of service thereof on the other parties and the other persons, within 15 days after service of the application. A hearing on the application will be held only if directed by the Court. Unless the Court determines otherwise for good cause shown, an application to take a deposition will not be regarded as sufficient ground for granting a continuance from a date or place of trial theretofore set. If the Court approves the taking of a deposition, it will issue an order including the name of the person to be examined, the time and place of the deposition, and the name of the officer or reporting company before whom it is to be taken. If the deposition is to be video recorded, the Court's order will so state.

(c) Designation of Person To Testify: The party seeking to take a deposition may name, as the deponent in the application, a public or private corporation or a partnership or association or governmental agency, and must designate with reasonable particularity the matters on which examination is requested. The organization so named must designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which such person will testify. The persons so designated must

testify as to matters known or reasonably available to the organization.

(d) Use of Stipulation: The parties or their counsel may execute and file a stipulation to take a deposition by agreement instead of filing an application. Such a stipulation must be filed with the Court, and must include the same information as is required in items (A), (F), (G), (I), and (J) of Rule 81(b)(1), but does not require the approval or an order of the Court unless the effect is to delay the trial of the case. A deposition taken pursuant to a stipulation must in all respects conform to the requirements of these Rules.

(e) Person Before Whom Deposition Taken:

(1) *Domestic Depositions:* Within the United States or a territory or insular possession subject to the dominion of the United States, depositions must be taken before an officer authorized to administer oaths by the laws of the United States (see Code section 7622) or of the place where the examination is held, or before a person appointed by the Court. A person so appointed has power to administer oaths and to take such testimony.

(2) *Foreign Depositions:* In a foreign country, depositions may be taken:

(A) before a person authorized to administer oaths or affirmations in the place in which the examination is held, either by the law thereof or by the law of the United States;

(B) before a person commissioned by the Court, and a person so commissioned will have the power, by virtue of the commission, to administer any necessary oath and take testimony; or

(C) pursuant to a letter rogatory or a letter of request issued in accordance with the provisions of the Hague Convention of 18 March 1970 on the Taking of Evidence

Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. (Part 3) 2555.

A commission, a letter rogatory, or a letter of request must be issued on application and notice and on terms that are just and appropriate. The party seeking to take a foreign deposition must contact the United States Department of State to ascertain any requirements imposed by it or by the foreign country in which the deposition is to be taken, including any required foreign language translations and any fees or costs, and must submit to the Court, along with the application, any foreign language translations, fees, costs, or other materials required. It is not requisite to the issuance of a commission, a letter rogatory, or a letter of request that the taking of the deposition in any other manner be impracticable or inconvenient; and both a commission and a letter rogatory, or both a commission and a letter of request, may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]." A letter of request is addressed to the central authority of the requested State. The model recommended for letters of request is set forth in the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. Evidence obtained by deposition or in response to a letter rogatory or a letter of request need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions within the United States under these Rules.

(3) *Disqualification for Interest:* No deposition may be taken before a person who is a relative or employee or counsel of any party, or is a relative or employee or associate of such counsel, or is

financially interested in the action. However, with the consent of all the parties or their counsel, a deposition may be taken before such a person, but only if the relationship of that person and the waiver are set forth in the certificate of return to the Court.

(f) Taking of Deposition:

(1) *Arrangements:* All arrangements necessary for taking of the deposition must be made by the party filing the application or, in the case of a stipulation, by such other persons as may be agreed upon by the parties.

(2) *Procedure:* Attendance by the persons to be examined may be compelled by the issuance of a subpoena, and production likewise may be compelled of exhibits required in connection with the testimony being taken. The officer before whom the deposition is taken must first put the witness on oath (or affirmation) and must personally, or by someone acting under the officer's direction and in the officer's presence, record accurately and verbatim the questions asked, the answers given, the objections made, and all matters transpiring at the taking of the deposition which bear on the testimony involved. Examination and cross-examination of witnesses, and the marking of exhibits, will proceed as permitted at trial. All objections made at the time of examination must be noted by the officer on the deposition. Evidence objected to, unless privileged, must be taken subject to the objections made. If an answer is improperly refused and as a result a further deposition is taken by the interrogating party, the objecting party or deponent may be required to pay all costs, charges, and expenses of that deposition to the same extent as is provided in paragraph (g) of this Rule where a party seeking to take a deposition fails to appear at the taking of the deposition. At the request of either party, a prospective witness at the deposition, other than

a person acting in an expert or advisory capacity for a party, will be excluded from the room in which, and during the time that, the testimony of another witness is being taken; and if the person remains in the room or within hearing of the examination after such request has been made, the person will not thereafter be permitted to testify, except with the consent of the party who requested the person's exclusion or by permission of the Court.

(g) Expenses:

(1) *General:* The party taking the deposition must pay all the expenses, fees, and charges of the witness whose deposition is taken by that party, any charges of the officer presiding at or recording the deposition other than for copies of the deposition, and any expenses involved in providing a place for the deposition. The party taking the deposition must pay for the original of the deposition; and, upon payment of reasonable charges therefor, the officer must also furnish a copy of the deposition to any party or the deponent. By stipulation between the parties or on order of the Court, provision may be made for any costs, charges, or expenses relating to the deposition.

(2) *Failure To Attend or To Serve Subpoena:* If the party authorized to take a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the arrangements made, the Court may order the former party to pay to the other party the reasonable expenses incurred by the other party and the other party's attorney in attending, including reasonable attorney's fees. If the party authorized to take a deposition of a witness fails to serve a subpoena upon the witness and the witness does not attend because of that failure, and if another party attends in person or by attorney because that party expects the deposition

of that witness to be taken, the Court may order the former party to pay to the other party the reasonable expenses incurred by the other party and the other party's attorney attending, including reasonable attorney's fees.

(h) Execution and Return of Deposition:

(1) *Submission to Witness; Changes; Signing:* When the testimony is fully transcribed, the deposition must be submitted to the witness for examination and must be read to or by the witness, unless the examination and reading are waived by the witness and by the parties. Any changes in form or substance that the witness desires to make, must be entered on the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition must then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to the witness, the officer must sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless the Court determines that the reasons given for the refusal to sign require rejection of the deposition in whole or in part. As to correction of errors, see Rules 85 and 143(d).

(2) *Form:* The deposition must show the docket number and caption of the case as they appear in the Court's records, the place and date of taking the deposition, the name of the witness, the party by whom called, and the names of counsel present and whom they represent. The pages of the deposition must be bound using a removable fastener. Exhibits must be carefully marked, and when practicable annexed to, and in any event returned with, the deposition, unless,

on motion to the Court, a copy may be permitted as a substitute after an opportunity is given to all interested parties to examine and compare the original and the copy. The officer must execute and attach to the deposition a certificate in accordance with Form 16 (Certificate on Return) shown in the Appendix.

(3) *Return of Deposition:* The deposition and exhibits should not be filed with the Court. Unless the Court orders otherwise, the officer must deliver the original deposition and exhibits to the party taking the deposition or that party's counsel, who must take custody of and be responsible for the safeguarding of the original deposition and exhibits. Upon payment of reasonable charges therefor, the officer also must deliver a copy of the deposition and exhibits to any party or the deponent, or to counsel for any party or for the deponent. As to use of a deposition at the trial or in any other proceeding in the case, see paragraph (i) of this Rule. As to introduction of a deposition in evidence, see Rule 143(d).

(4) *Electronic Records:* On the agreement of the parties, the requirements of paragraph (h)(2) and (3) may be satisfied by retaining a copy of a deposition and any exhibits in electronic form.

(i) Use of Deposition: At the trial or in any other proceeding in the case, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) The deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

(2) The deposition of a party may be used by an adverse party for any purpose.

(3) The deposition may be used for any purpose if the Court finds:

(A) that the witness is dead;

(B) that the witness is at such distance from the place of trial that it is not practicable for the witness to attend, unless it appears that the absence of the witness was procured by the party seeking to use the deposition;

(C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment;

(D) that the party offering the deposition has been unable to obtain attendance of the witness at the trial, as to make it desirable, in the interest of justice, to allow the deposition to be used; or

(E) that such exceptional circumstances exist, in regard to the absence of the witness at the trial, as to make it desirable, in the interest of justice, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the party offering the deposition to introduce any other part that ought in fairness to be considered with the part introduced, and any party may introduce any other parts. As to introduction of a deposition in evidence, see Rule 143(d).

(j) Video Recorded Depositions:

(1) *General:* By stipulation of the parties or on the Court's order, a deposition to perpetuate testimony to be taken upon oral examination may be video recorded. Except as otherwise provided by this paragraph, all other provisions of these Rules governing the practice and procedure in depositions apply.

(2) *Procedure:* The deposition must begin by the operator stating on camera: (A) the operator's name and address; (B) the name and address of the operator's employer; (C) the date, time, and place of the deposition; (D) the caption and docket number of the case; (E) the name of the witness; and (F) the party on whose behalf the deposition is being taken. The officer before whom the deposition is taken must then identify himself or herself and swear the witness on camera. At the conclusion of the deposition, the operator must state on camera that the deposition is concluded. The officer before whom the deposition is taken and the operator may be the same person. When the deposition spans multiple units of video storage medium (tape, disc, etc.), the end of each unit and the beginning of each succeeding unit must be announced on camera by the operator. The deposition must be timed by a digital clock on camera which must show continually each hour, minute, and second of the deposition.

(3) *Transcript:* If requested by one of the parties, the testimony must be transcribed at the cost of such party; but no signature of the witness is required, and the transcript should not be filed with the Court.

(4) *Custody:* The party taking the deposition or the party's counsel must take custody of and be responsible for the safeguarding of the video recording together with any exhibits, and the party must permit the viewing of or must provide a copy of the video recording and any exhibits on the request and at the cost of any other party.

(5) *Use:* A video recorded deposition may be used at a trial or hearing in the manner and to the extent provided in paragraph (i) of this Rule. The party who offers the video recording in evidence must provide all necessary equipment for viewing the video recording and personnel to operate the equipment. At a trial or hearing, that part of

the audio portion of a video recorded deposition that is offered in evidence and admitted, or that is excluded on objection, must be transcribed in the same manner as the testimony of other witnesses. The video recording shall be marked as an exhibit and, subject to the provisions of Rule 143(e)(2), will remain in the custody of the Court.

Note

Rule 81 is amended stylistically.

Paragraph (b)(1)(G) of Rule 81 is amended to allow a party filing an application to take a deposition to identify the name of the officer or the reporting company before whom a deposition is to be taken. Paragraph (b)(2) of Rule 81 is similarly amended to provide that the Court's order approving the taking of a deposition under the Rule will include the name of the officer or reporting company before whom the deposition is to be taken.

In accordance with an amendment to paragraph (b) of Rule 23 governing the filing of papers with the Court, paragraph (b)(2) of Rule 81 is amended by deleting the requirement that a party must file conformed copies of an application to take a deposition.

New paragraph (h)(4) of Rule 81 permits the parties to agree to satisfy the requirements of paragraph (h)(2) and (3) of the Rule by retaining a copy of a deposition and any exhibits in electronic form.

The amendments are effective March 20, 2023.

TITLE IX. ADMISSIONS, STIPULATIONS, AND ADMINISTRATIVE RECORD.

Note

The heading of Title IX is amended to conform to the addition of new Rule 92, Identification and Certification of Administrative Record in Certain Actions.

The amendments are effective March 20, 2023.

RULE 90. REQUESTS FOR ADMISSIONS

(a) Scope and Time of Request: A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 70(b)(1), but only if those matters are set forth in the request and relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. However, the Court expects the parties to attempt to attain the objectives of such a request through informal consultation or communication before utilizing the procedures provided in this Rule. Requests for admission may not be commenced, without leave of Court, until 31 days after joinder issue. See Rule 38.

(b) The Request: A request must separately set forth each matter of which an admission is requested and must advise the party to whom the request is directed of the consequences of failing to respond as provided by paragraph (c). Copies of documents must be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The party making the request must simultaneously serve a copy thereof on the other party and file the request with proof of service with the Court.

(c) Response to Request: Each matter is deemed admitted unless, within 30 days after service of the request or within a shorter or longer time as the Court may allow, the party to whom the request is directed serves on the requesting party:

(1) a written answer specifically admitting or denying the matter involved in whole or in part, or asserting that it cannot be truthfully admitted or denied and setting forth in detail the reasons why this is so; or

(2) an objection, stating in detail the reasons therefor.

The response must be signed by the party or the party's counsel, and the response, with proof of service on the

other party, must be filed with the Court. A denial must meet the substance of the requested admission, and, if good faith requires that a party qualify an answer or deny only a part of a matter, that party must specify so much of it as is true and deny or qualify the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter, of which an admission has been requested, presents a genuine issue for trial may not, on that ground alone, object to the request; that party may, subject to the provisions of paragraph (g) of this Rule, deny the matter or set forth reasons why that party cannot admit or deny it. An objection on the ground of relevance may be noted by any party but it is not to be regarded as just cause for refusal to admit or deny.

(d) Effect of Signature:

(1) The signature of counsel or a party constitutes a certification that the signer has read the request for admission or response or objection, and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry, it is:

(A) consistent with these Rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) is within the scope of Rule 70(b)(1).

The Court may strike an unsigned request, response, or objection unless the paper is signed promptly after the omission is called to the attention of the party making the request,

response, or objection. The time within which a party is obligated to take action with respect to an unsigned request, response, or objection does not begin to run until the paper is signed.

(2) If a certification is made in violation of this Rule, the Court, on motion or on its own, may impose on the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including reasonable counsel's fees.

(e) Motion To Review: The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Any motion to review under this paragraph must be filed no later than 45 days before the date set for call of the case from a trial calendar, unless the Court orders otherwise. Unless the Court determines that an objection is justified, it will order that an answer be served. If the Court determines that an answer does not comply with the requirements of this Rule, it may order either that the matter is admitted or that an amended answer be served. In lieu of an order, the Court may determine that final disposition of the request will be made at some later time that may be more appropriate for disposing of the question involved.

(f) Effect of Admission: Any matter admitted under this Rule is conclusively established unless the Court on motion permits withdrawal or modification of the admission. Subject to any other Court orders, withdrawal or modification may be permitted if the presentation of the merits of the case will be promoted thereby, and the party who obtained the admission fails to satisfy the Court that the withdrawal or modification will prejudice that party in prosecuting the case or defending on the merits. Any admission made by a party under this Rule is for the purpose of the pending action only and is not an admission by

that party for any other purpose, nor may it be used against that party in any other proceeding.

(g) Sanctions: If any party unjustifiably fails to admit the genuineness of any document or the truth of any matter as requested in accordance with this Rule, the party requesting the admission may apply to the Court for an order imposing any sanction on the other party or the other party's counsel as the Court may find appropriate in the circumstances, including but not limited to the sanctions provided in Title X. The failure to admit may be found unjustifiable unless the Court finds that:

(1) the request was held objectionable pursuant to this Rule,

(2) the admission sought was of no substantial importance,

(3) the party failing to admit had reasonable ground to doubt the truth of the matter or the genuineness of the document in respect of which the admission was sought, or

(4) there was other good reason for failure to admit.

(h) Other Applicable Rules: For Rules concerned with frequency and timing of requests for admission in relation to other procedures, supplementation of answers, effect of evasive or incomplete answers or responses, protective orders, and sanctions and enforcement action, see Title X.

Note

Rule 90 is amended stylistically and to eliminate redundancies. There has been no substantive change.

The amendments are effective March 20, 2023.

RULE 91. STIPULATIONS FOR TRIAL

(a) Stipulations Required:

(1) *General:* The parties are required to stipulate, to the fullest extent to which complete or qualified agreement can or fairly should be reached, all matters not privileged that are relevant to the pending case, regardless of whether those matters involve fact or opinion or the application of law to fact. Included in matters required to be stipulated are all facts, all documents and papers or contents or aspects thereof, and all evidence that fairly should not be in dispute. If the truth or authenticity of facts or evidence claimed to be relevant by one party is not disputed, an objection on the ground of materiality or relevance may be noted by any other party but is not to be regarded as just cause for refusal to stipulate. The requirement of stipulation applies under this Rule without regard to where the burden of proof may lie with respect to the matters involved. Documents or papers or other exhibits annexed to or filed with the stipulation will be considered to be part of the stipulation.

(2) *Stipulations To Be Comprehensive:* The fact that any matter may have been obtained through discovery or requests for admission or through any other authorized procedure is not grounds for omitting the matter from the stipulation. Such procedures should be regarded as aids to stipulation, and matter obtained through them that is within the scope of subparagraph (1) must be set forth comprehensively in the stipulation, in logical order in the context of all other provisions of the stipulation. A failure to include in the stipulation a matter admitted under Rule 90(f) does not affect the Court's ability to consider the admitted matter.

(b) Form: Stipulations required under this Rule must be in writing, signed by the parties thereto or by their

counsel, and must observe the requirements of Rule 23 as to form and style of papers, except that a stipulation filed in paper in open Court must be filed with the Court in duplicate and only one set of exhibits is required. Documents or other papers that are the subject of stipulation in any respect and that the parties intend to place before the Court must be annexed to or filed with the stipulation. The stipulation must be clear and concise. Separate items must be stated in separate paragraphs and must be appropriately lettered or numbered. Exhibits attached to a stipulation must be numbered serially; i.e., 1, 2, 3, etc. The exhibit number must be followed by "P" if offered by the petitioner, e.g., 1-P; "R" if offered by the respondent, e.g., 2-R; or "J" if joint, e.g., 3-J.

(c) Filing: Executed stipulations prepared pursuant to this Rule, and related exhibits, must be filed by the parties at or before commencement of the trial of the case, unless the Court orders otherwise. A stipulation that has been filed need not be offered formally to be considered in evidence.

(d) Objections: Any objection to all or any part of a stipulation should be noted in the stipulation, but the Court will consider any objection to a stipulated matter made at the commencement of the trial or for good cause shown made during the trial.

(e) Binding Effect: A stipulation will be treated, to the extent of its terms, as a conclusive admission by the parties to the stipulation, unless otherwise permitted by the Court or as agreed by those parties. The Court will not permit a party to a stipulation to qualify, change, or contradict a stipulation in whole or in part, except that it may do so if justice requires. A stipulation and the admissions therein are binding and have effect only in the pending case and not for any other purpose, and cannot be used against any of the parties thereto in any other case or proceeding.

(f) Noncompliance by a Party:

(1) *Motion To Compel Stipulation:* If, after the date the notice setting the case for trial is served, a party has refused or failed to confer with an opposing party with respect to entering into a stipulation in accordance with this Rule, or a party has refused or failed to stipulate to any matter within the terms of this Rule, the party proposing to stipulate may, at a time not later than 45 days before the date set for call of the case from a trial calendar, file a motion with the Court for an order directing the delinquent party to show cause why the matters covered in the motion should not be deemed admitted for the purposes of the case. The motion must:

(A) identify with particularity and by separately numbered paragraphs each matter that is claimed for stipulation;

(B) set forth in express language the specific stipulation that the moving party proposes with respect to each matter and annex thereto or make available to the Court and the other parties each document or other paper as to which the moving party desires a stipulation;

(C) set forth the sources, reasons, and basis for claiming, with respect to each such matter, that it should be stipulated; and

(D) show that opposing counsel or the other parties have had reasonable access to those sources or basis for stipulation and have been informed of the reasons for stipulation.

(2) *Procedure:* On the filing of a motion, an order to show cause as moved will be issued forthwith, unless the Court orders otherwise. The order to show cause will be served by the Clerk, with a copy thereof sent to the moving party. Within 20 days of the service of the order to show cause, the party

to whom the order is directed must file a response with the Court, with proof of service of a copy thereof on opposing counsel or the other parties, showing why the matters set forth in the motion papers should not be deemed admitted for purposes of the pending case. The response must list each matter involved on which there is no dispute, referring specifically to the numbered paragraphs in the motion to which the admissions relate. If a matter is disputed only in part, the response must show the part admitted and the part disputed. If the responding party is willing to stipulate in whole or in part with respect to any matter in the motion by varying or qualifying a matter in the proposed stipulation, the response must set forth the variance or qualification and the admission that the responding party is willing to make. If the response claims that there is a dispute as to any matter in part or in whole, or if the response presents a variance or qualification with respect to any matter in the motion, the response must show the sources, reasons, and basis on which the responding party relies for that purpose. The Court may set the order to show cause for a hearing or conference at any time.

(3) *Failure of Response:* If no response is filed within the period specified with respect to any matter or portion thereof, or if the response is evasive or not fairly directed to the proposed stipulation or portion thereof, that matter or portion thereof will be deemed stipulated for purposes of the pending case, and an order will be issued accordingly.

(4) *Matters Considered:* Opposing claims of evidence will not be weighed under this Rule unless the evidence is patently incredible. Nor will a genuinely controverted or doubtful issue of fact be determined in advance of trial. The Court will determine whether a genuine dispute exists or

whether in the interest of justice a matter ought not be deemed stipulated.

Note

Rule 91 is amended stylistically. There has been no substantive change.

The amendments are effective March 20, 2023.

RULE 92. [RESERVED]

Note

The text of existing Rule 92 is deleted to eliminate a redundancy in the Rules, and Rule 92 is reserved. The language of Rule 92 is combined with similar language from Rule 70(a)(3) and is added as new paragraph (f) of Rule 3.

The amendments are effective March 20, 2023.

RULE 93. IDENTIFICATION AND CERTIFICATION OF ADMINISTRATIVE RECORD IN CERTAIN ACTIONS

(a) General: Except as otherwise provided in this Rule or as ordered by the Court, if judicial review of the Commissioner's determination ordinarily would be based solely or partly on the administrative record, the parties must file with the Court, no later than 45 days after the notice setting the case for trial is served, the entire administrative record (or so much of that record as either party may deem necessary for a complete disposition of the issue or issues in dispute) stipulated as to its genuineness. If, however, the parties are unable to file a stipulated administrative record, the Commissioner must file with the Court, no later than 45 days after the notice setting the case for trial is served, the entire administrative record, appropriately certified as to its genuineness by the Commissioner or by an official authorized to act for the Commissioner in such situation.

(b) Motion To Complete or Supplement: If a party contends that the administrative record is incomplete or should be supplemented, that party may move to complete or supplement the administrative record no later than 60 days after the notice setting the case for trial is served, unless the Court orders otherwise. The motion must state in detail why the party contends that the administrative record is incomplete or should be supplemented, and the party must attach any documents or other information that the party alleges is or should be part of the administrative record.

(c) Administrative Record: The term "administrative record" generally refers to all documents and materials received, developed, considered, or exchanged in connection with the administrative determination.

(d) Declaratory Judgment Actions: This Rule does not apply to declaratory judgment actions. For Rules governing the filing of the administrative record in declaratory judgment actions, see Title XXI of these Rules.

(e) Other Cases: The Court may direct the parties to follow the procedures set forth in this Rule in any case where identification and certification of the administrative record may contribute to a prompt resolution of the case.

Note

New Rule 93 is adopted to fill a gap in the Court's Rules of Practice and Procedure and provides procedures for identification and certification of the administrative record in certain actions. New Rule 93 does not supersede the Court's longstanding Rules governing the submission of the administrative record in declaratory judgment cases. See Title XXI (Declaratory Judgments).

Rule 93 provides a uniform process governing the submission of the administrative record to the Court in certain actions where judicial review is normally limited to the administrative record or where judicial review requires an examination of the administrative record and other relevant

evidence, as appropriate. Examples of the types of cases that are covered by new Rule 93 include whistleblower actions, collection review actions, and spousal relief disputes. The new Rule normally is not applicable in other actions, such as deficiency cases and interest abatement cases arising under Code section 6404, although in appropriate circumstances the Court may invoke the procedure in its discretion.

Under paragraph (a), the parties must file the administrative record, stipulated as to its genuineness, no later than 45 days after service of the notice setting the case for trial. If the parties are unable to stipulate, the Commissioner is expected to file the administrative record, certified as to its genuineness, within the same 45-day period.

Paragraph (b) of Rule 93 provides that an opposing party may move to complete or supplement the administrative record no later than 60 days after service of the notice setting the case for trial, unless the Court orders otherwise. Paragraph (b) of Rule 93 also describes the contents of such a motion.

The composition of the administrative record will vary depending on the type of action subject to review. The Court therefore adopts a general definition of the term "administrative record" to include "all documents and materials received, developed, considered, and exchanged in connection with the administrative determination."

Paragraph (e) of Rule 93 provides that the Court may direct the parties to follow the procedures set forth in the Rule in any case where identification and certification of the administrative record may contribute to a prompt resolution of the case. The Court does not contemplate that Rule 93 will apply to cases in which Treasury Department regulations and related administrative guidance are challenged and subject to review pursuant to the Administrative Procedure Act, 5 U.S.C. secs. 551–559. Nevertheless, the Court has the discretion to invoke the Rule if deemed expedient to the prompt resolution of the case, and any such determination would be explained in any Court order issued pursuant to paragraph (e).

The amendments are effective for cases with respect to which the notice setting the case for trial is issued on or after March 20, 2023.

RULE 103. PROTECTIVE ORDERS

(a) Authorized Orders: On motion by a party or any other affected person, or on the Court's own, and for good cause, the Court may make any order that justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, including but not limited to one or more of the following:

(1) That the particular method or procedure not be used.

(2) That the method or procedure be used only on specified terms and conditions, including a designation of the time or place.

(3) That a method or procedure be used other than the one selected by the party.

(4) That certain matters not be inquired into or that the method be limited to certain matters or to any other extent.

(5) That the method or procedure be conducted with no one present except persons designated by the Court.

(6) That a deposition or other written materials, after being sealed, be opened only by order of the Court.

(7) That a trade secret or other information not be disclosed or be disclosed only in a designated way.

(8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Court.

(9) That expense involved in a method or procedure be borne in a particular manner or by specified person or persons.

(10) That documents or records (including electronically stored information) be impounded by the Court to ensure their availability for the purpose of review by the parties before trial and for use at the trial.

If a discovery request has been made, the movant must attach as an exhibit to a motion for a protective order under this Rule a copy of any discovery request in respect of which the motion is filed.

(b) Denials: If a motion for a protective order is denied in whole or in part, the Court may, on such terms or conditions it deems just, order any party or person to comply or to respond in accordance with the procedure involved.

Note

Rule 103 is amended stylistically.

Paragraph (a) of Rule 103 is amended to clarify that the Court may issue a protective order on its own. There has been no substantive change.

The amendments are effective March 20, 2023.

RULE 110. PRETRIAL CONFERENCES

(a) General: In appropriate cases, the Court will confer with the parties in pretrial conferences with a view to narrowing issues, stipulating facts, simplifying the presentation of evidence, or otherwise assisting in the preparation for trial or possible disposition of the case in whole or in part without trial.

(b) Cases Calendared: Either party in a case listed on any trial calendar may request of the Court, or the Court on its own may order, a pretrial conference. The Court may, in its discretion, set the case for a pretrial conference during the trial session. If sufficient reason appears therefor, a pretrial conference will be scheduled before the call of the calendar at a time and place as may be practicable and appropriate.

(c) Cases Not Calendared: If a case is not listed on a trial calendar, the Court on motion or on its own may list the case for a pretrial conference on a calendar in the place requested for trial, or may set the case for

a pretrial conference either in Washington, D.C., or in any other convenient place.

(d) Conditions: A request or motion for a pretrial conference must include a statement of the reasons therefor. Pretrial conferences will in no circumstances be held as a substitute for the conferences required between the parties in order to comply with the provisions of Rule 91. The Court may hold a pretrial conference for the purpose of assisting the parties in entering into the stipulations called for by Rule 91 if the party requesting a pretrial conference has in good faith attempted without success to obtain stipulations from an opposing party. The Court will not hold a pretrial conference if the Court is satisfied that the request therefor is frivolous or is made for purposes of delay.

(e) Order: The Court may, in its discretion, issue appropriate pretrial orders.

Note

Rule 110 is amended stylistically.

Paragraph (c) of Rule 110 is amended to clarify that, in the event that a case has been assigned to a Judge or Special Trial Judge, but the case has not been set on a trial calendar, the Court, on the order of the Chief Judge or of the Judge or Special Trial Judge assigned to the case, may set the case for a pretrial conference.

The amendments are effective March 20, 2023.

RULE 121. SUMMARY JUDGMENT

(a) Motion for Summary Judgment or Partial Summary Judgment:

(1) A party may move for summary judgment on all or any part of the legal issues in controversy.

(2) The Court shall grant summary judgment if the movant shows that there is no genuine dispute as

to any material fact and the movant is entitled to judgment as a matter of law.

(3) The Court should state on the record the reasons for granting or denying the motion.

(b) Time To File a Motion and Response in Opposition:

(1) Unless the Court orders otherwise, a party may file a motion for summary judgment at any time beginning 30 days after the pleadings are closed but within such time as not to delay the trial and, in any event, no later than 60 days before the first day of the Court's session at which the case is calendared for trial.

(2) Any response in opposition to the motion must be filed within such period as the Court directs.

(c) Procedures:

(1) *Supporting Factual Positions:* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence:* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited:* The Court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations:* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) Nonmovant Must Respond or Risk Adverse Ruling: When a motion for summary judgment is made and supported as set forth in this Rule, the nonmovant may not rest on the allegations or denials in that party's pleading. The nonmovant must respond, setting forth specific facts and supporting those facts as required by Rule 121(c), to show that there is a genuine dispute of fact for trial. If the nonmovant does not so respond, a decision may be entered against that party.

(e) When Facts Are Unavailable to the Nonmovant: If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the Court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(f) Failing To Properly Support or Address a Fact: If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 121(c), the Court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials (including the facts considered undisputed) show that the movant is entitled to it; or

(4) issue any other appropriate order.

(g) Judgment Independent of the Motion: After giving notice and a reasonable time to respond, the Court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(h) Declining To Grant All the Requested Relief: If the Court does not grant all the relief requested by the motion, it may issue an order stating any material fact that is not genuinely in dispute and treating the fact as established in the case.

(i) Affidavit or Declaration Submitted in Bad Faith: If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the Court, after notice and a reasonable time to respond, may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

(j) Review Based Solely on Administrative Record: In cases in which judicial review is based solely on the administrative record, paragraphs (a)(2) and (c)(1) through (4) are not applicable. In such cases, a motion for summary judgment and any response in opposition to a motion for summary judgment must include a statement of facts with references to the administrative record. For procedures governing

the identification, certification, and filing of the administrative record, see Rule 93.

Note

Rule 121 is amended stylistically and reorganized to conform more closely to Rule 56 of the Federal Rules of Civil Procedure. Although most of the amendments are stylistic and are not substantive, a few of the amendments incorporate concepts that are not explicitly set forth in existing Rule 121 but inform the Court's summary judgment procedure.

In accordance with Rule 56(a) of the Federal Rules of Civil Procedure, paragraph (a)(3) of Rule 121 provides that the Court should state on the record the reasons for granting or denying a motion for summary judgment.

In accordance with Rule 56(c) of the Federal Rules of Civil Procedure, paragraph (c)(2) of Rule 121 provides that a party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

Paragraphs (c), (e), and (f) of Rule 121, which conform in substance to paragraphs (c), (d), and (e) of Rule 56 of the Federal Rules of Civil Procedure, set forth the procedures for properly supporting and opposing or disputing factual positions relevant to a motion for summary judgment, including the use of affidavits or declarations.

Paragraph (g) of Rule 121 conforms to Rule 56(f) of the Federal Rules of Civil Procedure and provides that the Court may grant summary judgment for a nonmovant, grant a motion on grounds not raised by a party, or consider summary judgment on its own under specified circumstances.

Paragraph (j) of Rule 121 sets forth the procedure applicable to motions for summary judgment in cases where judicial review is based solely on the administrative record. See, e.g., *Lissack v. Commissioner*, 157 T.C. 63 (2021).

The amendments are effective March 20, 2023.

RULE 133. CONTINUANCES

The Court may continue a case or matter scheduled on a calendar on motion or on its own. A motion for continuance must inform the Court of the position of the other parties with respect to the motion, either by endorsement by the other parties or by a representation of the moving party. A motion for continuance based on the pendency in a court of a related case or cases must include the name and docket number, the names of counsel for the parties, and the status of any related case or cases, and must identify all issues common to the related case or cases. Continuances will be granted only in exceptional circumstances. Conflicting engagements of counsel or employment of new counsel ordinarily will not be regarded as ground for continuance. A motion for continuance filed 30 days or less before the date to which it is directed may be set for hearing on that date, but ordinarily will be deemed dilatory and will be denied unless the ground therefor arose during that period or there was good reason for not making the motion sooner. As to extensions of time, see Rule 25(b).

Note

Rule 133 is amended stylistically and to conform to amendments to Rule 25. There has been no substantive change.

The amendments are effective March 20, 2023.

RULE 140. PLACE OF TRIAL

(a) Request for Place of Trial: When filing a petition, the petitioner must also file a separate paper requesting the place of trial. See Form 5 (Request for Place of Trial) shown in the Appendix. If the petitioner fails to file a request, then no later than the date for filing the answer, the Commissioner must file a request showing the Commissioner's preferred place of trial. The Court will make reasonable efforts to conduct the trial at the location most convenient to that requested if suitable facilities are available and will notify the parties of the place at which the trial will be held.

(b) Motion To Change Place of Trial: A party seeking a change in the place of trial must file a motion stating fully the reasons therefor. A motion made after the notice setting the case for trial is served may be deemed dilatory and may be denied unless the ground therefor arose during that period or there was good reason for not making the motion sooner.

Note

Rule 140 is amended stylistically and is reorganized. There has been no substantive change.

The text of existing paragraph (b) of Rule 140 is incorporated into paragraph (a).

Existing paragraph (c) of Rule 140 is relettered as paragraph (b).

The amendments are effective March 20, 2023.

RULE 141. CONSOLIDATION; SEPARATE TRIALS

(a) Consolidation: When cases involving a common question of law or fact are pending before the Court, it may order a joint hearing or trial of any or all the matters in issue, it may order all the cases consolidated, and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs, delay, or duplication. Similar action may be taken where cases involve different tax liabilities of the same parties, notwithstanding the absence of a common issue. Unless otherwise permitted by the Court for good cause shown, a motion to consolidate cases may be filed only after all the cases sought to be consolidated have become at issue. The caption of a motion to consolidate shall include all of the names and docket numbers of the cases sought to be consolidated arranged in chronological order (i.e., the oldest case first). Unless otherwise ordered, the caption of all documents subsequently filed in consolidated cases shall include all of the docket numbers arranged in chronological order, but may include only the name of

the oldest case with an appropriate indication of other parties.

(b) Separate Trials: The Court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition or economy, may order a separate trial of any one or more claims, defenses, or issues, or of the tax liability of any party or parties. The Court may enter appropriate orders or decisions with respect to any such claims, defenses, issues, or parties that are tried separately. As to severance of parties or claims, see Rule 34(b)(3).

Note

Paragraph (b) of Rule 141 is amended to conform to the deletion of the existing text of Rule 61 and related amendments to Rule 34. There has been no substantive change.

The amendments are effective March 20, 2023.

RULE 147. SUBPOENAS

(a) In General:

(1) *Form and Contents:*

(A) *Requirements—In General:* Every subpoena must:

(i) state the name of the Court;

(ii) state the title of the action and the docket number;

(iii) command each person to whom it is directed to do one or more of the following at a specified time and place; attend and testify or produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; and

(iv) set out the text of Rule 147(d) and (e).

(B) *Command To Produce; Specifying the Form for Electronically Stored Information:* Any command to produce documents, electronically stored information, or tangible things must be included in a subpoena commanding attendance at a deposition, hearing, or trial. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(C) *Command To Produce; Included Obligations:* A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding person to permit inspection, copying, testing, or sampling of the materials.

(2) *Issued by Whom:* The Clerk or a duly authorized representative must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. A subpoena can be downloaded from the Court's website. See Form 14 (Subpoena) shown in the Appendix.

(3) *Notice to Other Parties Before Service:* If the subpoena commands the production of documents, electronically stored information, or tangible things, then before it is served on the person to whom it is directed, a notice and a copy of the subpoena must be served on each party.

(b) Service:

(1) *By Whom and How; Tendering Fees:* Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and tendering to that person the fees for one day's attendance and the mileage allowed by law. See Rule 148 for fees and mileage payable. Fees and mileage need not be tendered when the subpoena issues on behalf of the Commissioner.

(2) *Service in the United States:* A subpoena may be served at any place within the United States.

(3) *Proof of Service:* Proving service, when necessary, requires filing with the Court the completed return of service appearing on the subpoena or a certified statement by the server showing the date and manner of service and the names of the persons served.

(c) Place of Compliance: A subpoena may command a person to attend a trial, hearing, or deposition as provided in Code section 7456.

(d) Protecting a Person Subject to a Subpoena; Enforcement:

(1) *Avoiding Undue Burden or Expense; Sanctions:* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The Court will enforce this duty and impose an appropriate sanction, which may include an award of lost earnings and reasonable attorney's fees, against a party or attorney who fails to comply.

(2) *Command To Produce Materials:*

(A) *Release from Attendance:* If a person has complied with a command in a subpoena to produce documents, electronically stored information, or tangible things, the serving party may excuse the person from attending and giving testimony at the time and place specified in the subpoena.

(B) *Objections:* A person commanded to produce documents or tangible things may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials, or to producing electronically stored information in the form or forms requested. The objection must be served

within 15 days after the subpoena is served or within the time specified for compliance, if earlier. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the Court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena:*

(A) *When Required:* On timely motion, the Court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iii) subjects a person to undue burden.

(B) *When Permitted:* To protect a person subject to or affected by a subpoena, the Court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative:* In the circumstances described in Rule 147(d)(3)(B), the Court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena:

(1) *Producing Documents or Electronically Stored Information:* These procedures apply to producing documents or electronically stored information:

(A) *Documents:* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified:* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form:* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information:* The person responding need not provide discovery of electronically stored information from sources that the person

identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the Court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 70(c)(1). The Court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection: Information Withheld:*

(A) A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced:* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party who received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information

under seal to the Court for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(f) Contempt: The Court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

Note

Rule 147 is amended to conform more closely to Rule 45 of the Federal Rules of Civil Procedure.

Paragraph (a)(3) of Rule 147 is new and provides that a notice and a copy of a subpoena commanding the production of documents, electronically stored information, or tangible things must be served on each party before it is served on the person to whom it is directed. The paragraph conforms in substantial part to Rule 45(a)(4) of the Federal Rules of Civil Procedure.

Existing paragraph (d) of Rule 147 (subpoena for taking a deposition) has been deleted to eliminate a redundancy in the Rules. The subject of subpoenas issued in connection with depositions is adequately covered in Title VII (Discovery) and Title VIII (Depositions to Perpetuate Evidence).

New paragraph (d) of Rule 147 is amended to conform in substantial part to paragraph (d) of Rule 45 of the Federal Rules of Civil Procedure, which sets forth various protections for persons subject to a subpoena.

Existing paragraph (e) is relettered as paragraph (f). New paragraph (e) of Rule 147 conforms in substantial part to paragraph (e) of Rule 45 of the Federal Rules of Civil Procedure, which outlines a person's duties in responding to a subpoena.

The amendments are effective March 20, 2023.

RULE 151. BRIEFS

(a) General: Briefs must be filed after trial or submission of a case, except as otherwise directed by the presiding

Judge or Special Trial Judge. The presiding Judge or Special Trial Judge may permit or direct the parties to make oral argument or file memoranda of points and authorities, in addition to or in lieu of briefs. The Court may strike any brief that does not conform to the requirements of this Rule.

(b) Time for Filing Briefs: Briefs may be filed simultaneously or seriatim, as the presiding Judge or Special Trial Judge directs. The following deadlines for filing briefs apply unless the presiding Judge or Special Trial Judge orders otherwise:

(1) *Simultaneous Briefs:* Opening briefs must be filed within 75 days after the conclusion of the trial and answering briefs within 45 days after the due date of the opening brief.

(2) *Seriatim Briefs:* Opening briefs must be filed within 75 days after the conclusion of the trial, answering briefs within 45 days after the due date of the opening brief, and reply briefs within 30 days after the due date of the answering briefs.

A party who is required to file an opening brief but fails to do so is not permitted to file an answering or reply brief unless the Court grants leave. A motion for extension of time for filing any brief must be made before the due date and must recite that the moving party has advised each other party and state whether there is an objection to the motion. As to the effect of extensions of time, see Rule 25(b).

(c) Service:

(1) Each seriatim brief must be served on each opposing party when filed.

(2) Simultaneous briefs will be served by the Clerk after each corresponding brief of all other parties has been filed, unless the Court orders otherwise.

(3) Delinquent briefs must be accompanied by a motion for leave to file setting forth the reasons for the delay. In the case of simultaneous briefs, the Court may strike a brief that is filed by a

party after the opposing party's brief has been served on that party.

(d) Number of Copies: A party filing a brief in paper form must file a signed original plus an additional copy for each person to be served. Only one transmission of an electronically filed brief is required.

(e) Form and Content: All briefs must conform to the requirements of Rule 23 and must contain the following in the order indicated:

(1) On the first page, a table of contents with page references, followed by a list of all citations arranged alphabetically as to cited cases and stating the pages in the brief at which cited.

(2) A statement of the nature of the controversy, the tax involved, and the issues to be decided.

(3) Proposed findings of fact (in the opening brief or briefs), based on the evidence, in the form of numbered statements, each of which must be complete and must consist of a concise statement of essential fact and not a recital of testimony nor a discussion or argument relating to the evidence or the law. Each numbered statement must include references to the pages of the transcript or the exhibits or other sources relied on to support the statement. In an answering or reply brief, the party must set forth any objections, together with the reasons therefor, to any proposed findings of any other party, showing the numbers of the statements to which the objections are directed; in addition, the party may set forth alternative proposed findings of fact.

(4) A concise statement of the points on which the party relies.

(5) The argument, which sets forth and discusses the points of law involved and any disputed questions of fact.

(6) The signature of counsel or the party submitting the brief. As to signature, see Rule 23(a)(3).

Note

Rule 151 is amended stylistically.

In accordance with the Court's practices, paragraphs (a) and (c) of Rule 151 are amended by replacing the phrase "return without filing" with the word "strike."

For clarity, subparagraphs (1) and (2) of Rule 151(b) are amended by replacing the word "thereafter" with the phrase "after the due date of the opening brief" in both places that term is used.

Paragraph (d) of Rule 151 is amended to provide that a party filing a brief in paper form must file a signed original and an additional copy for each person to be served and that only one transmission of an electronically filed brief is required.

The amendments are effective March 20, 2023.

RULE 151.1. BRIEF OF AN AMICUS CURIAE

(a) When Permitted: The Court may direct an amicus curiae to file a brief or an amicus curiae may file with the Court a motion for leave to file a brief.

(b) Motion for Leave To File: The motion for leave to file must comply with the requirements of Rule 23, be accompanied by the proposed brief, and state:

(1) the movant's interest; and

(2) why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

(c) Contents and Form: An amicus brief must comply with Rules 23 and 151(e), indicate the party or parties supported, if any, and must include the following:

(1) if the amicus is a nongovernmental corporate entity, a disclosure statement like that required by Rule 20(c);

(2) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(3) a statement that indicates whether:

(A) a party's counsel authored the brief in whole or in part;

(B) a party or a party's counsel contributed money that was intended to fund the preparation or submission of the brief; and

(C) a person (other than the amicus curiae, its members, or its counsel) contributed money that was intended to fund the preparation or submission of the brief and, if so, identifies each such person.

(d) Length: Generally, an amicus brief may be no more than 25 pages (excluding the cover page, the disclosure statement, the table of contents, the table of citations, the signature block, and the certificate of service), unless the motion for leave to file establishes good cause for including a proposed brief longer than 25 pages.

(e) Time for Filing: Unless the Court directs the filing of an amicus brief, an amicus curiae supporting a party must file a motion for leave to file, accompanied by its brief, no later than 14 days after the first brief of the party being supported is filed. An amicus curiae that does not support either party must file a motion for leave to file, accompanied by its brief, no later than 14 days after the first opening brief is filed. The Court may grant leave for later filing, specifying the time within which an opposing party may answer.

(f) Reply Brief: Except by the Court's permission, an amicus curiae may not file a reply brief.

(g) Objection by Party: Any party may file an opposition to a motion for leave to file an amicus brief, concisely stating the reasons for such opposition, within 14 days after service of the motion or as ordered by the Court.

Note

The Court adopts new Rule 151.1 to provide procedures under which the Court may direct an amicus curiae to file a brief or an amicus curiae may file with the Court a motion for leave to file a brief. New Rule 151.1 is drawn largely from Rule 29 of the Federal Rules of Appellate Procedure and Rule 7(o) of the local rules of the U.S. District Court for the District of Columbia.

Paragraph (b) of Rule 151.1 provides that a motion for leave to file a brief must state the movant's interest, why an amicus brief is desirable, and why the matters asserted are relevant to the disposition of the case.

Paragraph (c) of Rule 151.1 provides that an amicus brief must comply with Rules 23 and 151(e) governing form and style of papers and form and content of briefs, respectively. Paragraph (c) further provides that an amicus brief must indicate the party or parties supported and provide various disclosures including the identity of the amicus curiae, its interest in the case, and the source of its authority to file a brief.

Paragraph (d) of Rule 151.1 provides that an amicus brief generally may be no more than 25 pages, excluding the cover page, the disclosure statement, the table of contents, the table of citations, the signature block, and the certificate of service. Any motion for leave to file must establish good cause for including a proposed brief longer than 25 pages.

Paragraph (e) of Rule 151.1 provides that an amicus curiae filing a brief in support of a party must file a motion to leave to file, accompanied by its brief, no later than 14 days after the first brief of the party being supported is filed. An amicus curiae that does not support either party must file a motion for leave to file, accompanied by its brief, no later than 14 days after the first opening brief is filed.

The amendments are effective March 20, 2023.

RULE 152. ORAL FINDINGS OF FACT OR OPINION

(a) General: Except in actions for declaratory judgment or for disclosure (see Titles XXI and XXII), the Judge, or the Special Trial Judge in any case in which the Special Trial Judge is authorized to make the decision of the Court pursuant to Code section 7436(c) or 7443A(b)(2), (3), (4), (5), or (6), and (c), may, in the exercise of discretion, orally state the findings of fact or opinion if the Judge or Special Trial Judge is satisfied as to the factual conclusions to be reached in the case and that the law to be applied thereto is clear.

(b) Transcript: Oral findings of fact or opinion will be recorded in the transcript of the hearing or trial. The pages of the transcript that contain findings of fact or opinion (or a written summary thereof) will be served by the Clerk on all parties.

(c) Nonprecedential Effect: Opinions stated orally in accordance with paragraph (a) of this Rule may not be relied upon as precedent, except as may be relevant for purposes of establishing the law of the case, res judicata, collateral estoppel, or other similar doctrine.

Note

Paragraph (a) of Rule 152 is amended to clarify that a Special Trial Judge may dispose of a whistleblower case brought pursuant to Code section 7623(b) by way of oral findings of fact or opinion.

The amendments are effective March 20, 2023.

RULE 161. MOTION FOR RECONSIDERATION OF FINDINGS OR OPINION

Any motion for reconsideration of an opinion or findings of fact, with or without a new or further trial, must be filed within 30 days after a written opinion or the pages of the transcript that contain findings of fact or opinion stated orally pursuant to Rule 152 (or a written summary thereof) have been served, unless the Court orders otherwise.

Note

Rule 161 is amended stylistically. There has been no substantive change.

The amendments are effective March 20, 2023.

RULE 170. GENERAL

The Rules of this Title XVII, referred to as the "Small Tax Case Rules," set forth the special provisions applicable to small tax cases. The term "small tax case" means a case in which (1) the amount in dispute is $50,000 or less (within the meaning of the Code), (2) the petitioner has made a request under Rule 171, and (3) the Court has concurred in the petitioner's request. See Code secs. 7436(c), 7463. Except as otherwise provided in these Small Tax Case Rules, the Rules of Practice and Procedure apply to small tax cases.

Note

Rule 170 is amended stylistically and to conform to the amendment to Rule 171.

The amendments are effective March 20, 2023.

RULE 171. REQUEST FOR SMALL TAX CASE PROCEDURE

(a) Request in Petition: A petitioner may request in the petition to have the proceedings in the case conducted as a small tax case. See Rule 173.

(b) Motion Opposing Request: If the Commissioner opposes the petitioner's request, the Commissioner must file with the answer a motion that the proceedings not be conducted as a small tax case.

(c) Request After Petition Is Filed: A petitioner may, at any time after the petition is filed and before the trial commences, request that the proceedings be conducted as a small tax case. If the request is made after the answer is filed, the Commissioner may move

without leave of the Court that the proceedings not be conducted as a small tax case.

(d) Small Tax Case Designation; Procedure for Removing Small Tax Case Designation: If a petitioner makes a request in accordance with the provisions of this Rule, the case will be docketed as a small tax case. The Court, on its own or on motion made at any time before the trial commences, may issue an order directing that the small tax case designation be removed and that the proceedings not be conducted as a small tax case.

Note

Rule 171 is amended stylistically. There has been no substantive change.

The amendments are effective March 20, 2023.

RULE 180. ASSIGNMENT

The Chief Judge may from time to time designate a Special Trial Judge (see Rule 3(g)) to deal with any matter pending before the Court in accordance with these Rules and such directions as may be prescribed by the Chief Judge.

Note

Rule 180 is amended to conform to amendments to Rule 3. There has been no substantive change.

The amendments are effective March 20, 2023.

RULE 182. CASES IN WHICH THE SPECIAL TRIAL JUDGE IS AUTHORIZED TO MAKE THE DECISION

Except as otherwise directed by the Chief Judge, the following procedure will be observed in small tax cases (as defined in Rule 170); in cases where neither the amount of the deficiency placed in dispute (within the meaning of Code section 7463), nor the amount of any claimed overpayment,

exceeds $50,000; in declaratory judgment actions; in lien and levy actions; and in whistleblower actions:

(a) Small Tax Cases: Except in cases where findings of fact or opinion are stated orally pursuant to Rule 152, a Special Trial Judge who conducts the trial of a small tax case will, as soon after trial as is practicable, prepare a summary of the facts and reasons for the proposed disposition of the case, which will be submitted promptly to the Chief Judge, or, if the Chief Judge directs, to a Judge or Division of the Court.

(b) Cases Involving $50,000 or Less: Except in cases where findings of fact or opinion are stated orally pursuant to Rule 152, a Special Trial Judge who conducts the trial of a case (other than a small tax case) where neither the amount of the deficiency placed in dispute (within the meaning of Code section 7463), nor the amount of any claimed overpayment, exceeds $50,000 will, as soon after trial as is practicable, prepare proposed findings of fact and opinion, which will be submitted promptly to the Chief Judge.

(c) Declaratory Judgment, Lien and Levy, and Whistleblower Actions: A Special Trial Judge who conducts the trial of a declaratory judgment action or, except in cases where findings of fact or opinion are stated orally pursuant to Rule 152, a lien or levy or a whistleblower action, or to whom such a case is submitted for decision, will, as soon after trial or submission as is practicable, prepare proposed findings of fact and opinion, which will be submitted promptly to the Chief Judge.

(d) Decision: The Chief Judge may authorize the Special Trial Judge to make the decision of the Court in any small tax case (as defined in Rule 170); in any case where neither the amount of the deficiency placed in dispute (within the meaning of Code section 7463), nor the amount of any claimed overpayment, exceeds $50,000; in any declaratory judgment action; in any lien or levy action; and in any whistleblower action, subject to such conditions and review as the Chief Judge may provide.

(e) Procedure in Event of Assignment to a Judge: In the event the Chief Judge assigns a case (other than a small tax case) to a Judge to prepare a report in accordance with Code section 7460 and to make the decision of the Court, the proposed findings of fact and opinion previously submitted to the Chief Judge will be filed as the Special Trial Judge's recommended findings of fact and conclusions of law. Thereafter, the procedures of Rule 183(b), (c), and (d) apply.

Note

Rule 182 is amended stylistically. There has been no substantive change.

The amendments are effective March 20, 2023.

RULE 210. GENERAL

(a) Applicability: The Rules of this Title XXI set forth the special provisions that apply to declaratory judgment actions relating to the qualification of certain retirement plans, the value of certain gifts, the status of certain governmental obligations, the eligibility of an estate with respect to installment payments under Code section 6166, and the initial or continuing qualification of certain exempt organizations or the initial or continuing classification of certain private foundations. For the Rules that apply to declaratory judgment actions relating to treatment of items other than partnership items with respect to an oversheltered return, see the Rules contained in Title XXX. Except as otherwise provided in this Title, the other Rules of Practice and Procedure of the Court, to the extent pertinent, are applicable to actions for declaratory judgment.

(b) Definitions: As used in the Rules in this Title—

(1) "Retirement plan" has the meaning provided by Code section 7476(c).

(2) A "gift" is any transfer of property that was shown on the return of tax imposed by Chapter 12 of the Code or disclosed on that return or in any statement attached to that return.

(3) "Governmental obligation" means an obligation the status of which under Code section 103(a) is in issue.

(4) An "estate" is any estate whose initial or continuing eligibility with respect to the deferral and installment payment election under Code section 6166 is in issue.

(5) An "exempt organization" is an organization described in Code section 501(c) or (d) and exempt from tax under Code section 501(a) or is an organization described in Code section 170(c)(2).

(6) A "private foundation" is an organization described in Code section 509(a).

(7) A "private operating foundation" is an organization described in Code section 4942(j)(3).

(8) An "organization" is any organization whose qualification as an exempt organization, or whose classification as a private foundation or a private operating foundation, is in issue.

(9) A "determination" means—

(A) a determination with respect to the initial or continuing qualification of a retirement plan;

(B) a determination of the value of any gift;

(C) a determination as to whether prospective governmental obligations are described in Code section 103(a);

(D) a determination as to whether, with respect to an estate, an election may be made under Code section 6166 or whether the extension of time for payment of estate tax provided in Code section 6166 has ceased to apply; or

(E) a determination with respect to the initial or continuing qualification of an organization as an exempt organization, or with respect to the initial or continuing classification of an organization as a private foundation or a private operating foundation.

(10) A "revocation" is a determination that a retirement plan is no longer qualified, or that an organization, previously qualified or classified as an exempt organization or as a private foundation or private operating foundation, is no longer qualified or classified as such an organization.

(11) An "action for declaratory judgment" is either a retirement plan action, a gift valuation action, a governmental obligation action, an estate tax installment payment action, or an exempt organization action, as follows:

(A) A "retirement plan action" means an action for declaratory judgment provided for in Code section 7476 relating to the initial or continuing qualification of a retirement plan.

(B) A "gift valuation action" means an action for declaratory judgment provided for in Code section 7477 relating to the valuation of a gift.

(C) A "governmental obligation action" means an action for declaratory judgment provided for in Code section 7478 relating to the status of certain prospective governmental obligations.

(D) An "estate tax installment payment action" means an action for declaratory judgment provided for in Code section 7479 relating to the eligibility of an estate with respect

to installment payments under Code section 6166.

(E) An "exempt organization action" means a declaratory judgment action provided for in Code section 7428 relating to the initial or continuing qualification of an organization as an exempt organization, or relating to the initial or continuing classification of an organization as a private foundation or a private operating foundation.

(12) "Administrative record" generally refers to all documents and materials received, developed, considered, or exchanged in connection with the administrative determination.

(13) "Party" includes a petitioner and the respondent Commissioner of Internal Revenue. In a retirement plan action, an intervenor is also a party. In a gift valuation action, only the donor may be a petitioner. In a governmental obligation action, only the prospective issuer may be a petitioner. In an estate tax installment payment action, a person joined pursuant to Code section 7479(b)(1)(B) is also a party. In an exempt organization action, only the organization may be a petitioner.

(14) "Declaratory judgment" is the decision of the Court in a retirement plan action, a gift valuation action, a governmental obligation action, an estate tax installment payment action, or an exempt organization action.

(c) Jurisdictional Requirements: The Court does not have jurisdiction of an action for declaratory judgment under this Title unless the following conditions are satisfied:

(1) The Commissioner has issued a notice of determination, or has been requested to make a determination and failed to do so for a period of at least 270 days (180 days in the case of either a request for determination as to the status of prospective governmental obligations or a request

for determination as to the initial or continuing eligibility of an estate with respect to installment payments under Code section 6166) after the request for determination was made. In the case of a retirement plan action, the Court has jurisdiction over an action brought because of the Commissioner's failure to make a determination with respect to the continuing qualification of the plan only if the controversy arises as a result of an amendment or termination of the plan. See Code sec. 7476(a)(2)(B). In the case of a gift valuation action, the Court has jurisdiction if the Commissioner has issued a notice of determination. See Code sec. 7477(a).

(2) There is an actual controversy. In particular—

(A) In the case of a retirement plan action, the retirement plan or amendment thereto in issue has been put into effect before commencement of the action.

(B) In the case of a governmental obligation action, the prospective issuer has, before commencement of the action, adopted an appropriate resolution in accordance with State or local law authorizing the issuance of such obligations.

(C) In the case of an exempt organization action, the organization must be in existence before commencement of the action.

(3) A petition for declaratory judgment is filed with the Court within the period specified in Code section 7476(b)(5) with respect to a retirement plan action, or the period specified in Code section 7477(b)(3) with respect to a gift valuation action, or the period specified in Code section 7478(b)(3) with respect to a governmental obligation action, or the period specified in Code section 7479(b)(3) with respect to an estate tax installment payment action, or the period specified in Code section

7428(b)(3) with respect to an exempt organization action. See Code sec. 7502.

(4) The petitioner has exhausted all administrative remedies available to the petitioner within the Internal Revenue Service.

(d) Form and Style of Papers: All papers filed in an action for declaratory judgment, with the exception of documents included in the administrative record, must be prepared in the form and style set forth in Rule 23.

Note

Rule 210 is amended stylistically.

To account for a 2015 amendment to Code section 7428(a)(1)(E), paragraph (b)(5) of Rule 210 is amended by replacing "section 501(c)(3)" with "section 501(c) or (d)." The effect of this amendment is to bring a declaratory judgment action authorized under Code section 7428(a)(1)(E) within the definition of an "exempt organization action" under existing Rule 210(b)(11)(E).

Paragraph (b)(12) of Rule 210 is amended to conform the definition of the term "Administrative Record" to that set forth in paragraph (c) of new Rule 93 (Identification and Certification of Administrative Record in Certain Actions).

Paragraph (d) of Rule 210 is amended to eliminate the filing of an additional copy of a paper when joinder or intervention is permitted.

The amendments are effective March 20, 2023.

RULE 213. OTHER PLEADINGS

(a) Answer:

(1) *Time To Answer or Move:* The Commissioner has 60 days from the date of service of the petition within which to file an answer, or 45 days from that date within which to move with respect to the petition. With respect to an amended petition or amendments to the petition, the Commissioner

will have like time periods from the date of service of those papers within which to answer or move in response thereto, except as the Court may otherwise direct.

(2) *Form and Content:* The answer must be drawn so that it will advise the petitioner and the Court fully of the nature of the defense. It must contain a specific admission or denial of each material allegation of the petition. If the Commissioner lacks knowledge or information sufficient to form a belief as to the truth of an allegation as to jurisdictional facts or as to inferences or conclusions that may be drawn from materials in the administrative record or as to facts involved in a revocation, the Commissioner may so state, and that statement will have the effect of a denial. Facts other than jurisdictional facts, and other than facts involved in a revocation or in a governmental obligation action, may be admitted only for purposes of the pending action for declaratory judgment. If the Commissioner intends to clarify or to deny only a part of an allegation, the Commissioner must specify so much of it as is true and must qualify or deny only the remainder. In addition, the answer must contain a clear and concise statement of every ground, together with the facts in support thereof, on which the Commissioner relies and has the burden of proof. Paragraphs of the answer must be designated to correspond to those of the petition to which they relate.

(3) *Index to Administrative Record:* In addition, the answer must include as an attachment a complete index of the contents of the administrative record to be filed with the Court and the answer must contain an affirmative allegation that the index is attached thereto. See Rule 217(b).

(4) *Effect of Answer:* Every material allegation set out in the petition and not expressly admitted or denied in the answer is deemed to be admitted.

(b) Reply: Each petitioner must file a reply in every action for declaratory judgment.

(1) *Time To Reply or Move:* The petitioner has 60 days from the date of service of the answer within which to file a reply, or 30 days from that date within which to move with respect to the answer. With respect to an amended answer or amendments to the answer, the petitioner will have like periods from the date of service of those papers within which to reply or move in response thereto, unless the Court orders otherwise.

(2) *Form and Content:* In response to each material allegation in the answer and the facts in support thereof on which the Commissioner has the burden of proof, the reply must contain a specific admission or denial; however, if the petitioner lacks knowledge or information sufficient to form a belief as to the truth of an allegation, the petitioner must so state, and that statement will have the effect of a denial. If the petitioner denies the affirmative allegation in the answer that a complete index of the contents of the administrative record is attached to the answer, the petitioner must specify the reasons for that denial. In addition, the reply must contain a clear and concise statement of every ground, together with the facts in support thereof, on which the petitioner relies affirmatively or in avoidance of any matter in the answer on which the Commissioner has the burden of proof. In other respects, the requirements of pleading applicable to the answer provided in paragraph (a)(2) of this Rule apply to the reply. The paragraphs of the reply must be designated to correspond to those of the answer to which they relate.

(3) *Effect of Reply or Failure Thereof:* If a reply is filed, every affirmative allegation set out in the answer and not expressly admitted or denied in the reply will be deemed to be admitted. If a

reply is not filed, the affirmative allegations in the answer will be deemed admitted.

(4) *New Material:* Any new material contained in the reply will be deemed to be denied.

Note

Rule 213 is amended stylistically. There has been no substantive change.

The amendments are effective March 20, 2023.

RULE 217. DISPOSITION OF ACTIONS FOR DECLARATORY JUDGMENT

(a) General: Disposition of an action for declaratory judgment that involves the initial qualification of a retirement plan or the initial qualification or classification of an exempt organization, a private foundation, or a private operating foundation will ordinarily be made on the basis of the administrative record, as defined in Rule 210(b)(12). Only with the permission of the Court, on good cause shown, will any party be permitted to introduce before the Court any evidence other than that presented before the Internal Revenue Service and contained in the administrative record as so defined. Disposition of an action for declaratory judgment involving a revocation, a gift valuation, or the eligibility of an estate with respect to installment payments under Code section 6166 may be made on the basis of the administrative record alone only if the parties agree that the administrative record contains all the relevant facts and those facts are not in dispute. Disposition of a governmental obligation action will be made on the basis of the administrative record, augmented by additional evidence to the extent that the Court may direct.

(b) Procedure:

(1) *Disposition on the Administrative Record:* Within 30 days after service of the answer, the parties

must file with the Court the entire administrative record (or so much thereof as either party may deem necessary for a complete disposition of the action for declaratory judgment), stipulated as to its genuineness. If, however, the parties are unable to file a stipulated administrative record, not sooner than 30 days nor later than 45 days after service of the answer, the Commissioner must file with the Court the entire administrative record, as defined in Rule 210(b)(12), appropriately certified as to its genuineness by the Commissioner or by an official authorized to act for the Commissioner in such situation. See Rule 212 as to the time and place for submission of the action to the Court. The Court will thereafter issue an opinion and declaratory judgment in the action. In an action involving the initial qualification of a retirement plan or the initial qualification or classification of an exempt organization, a private foundation, or a private operating foundation, the Court's decision will be based on the assumption that the facts as represented in the administrative record as so stipulated or so certified are true and on any additional facts as found by the Court if the Court deems that a trial is necessary. In an action involving a gift valuation, the eligibility of an estate with respect to installment payments under Code section 6166, a revocation, or the status of a governmental obligation, the Court may, on the basis of the evidence presented, make findings of fact that differ from the administrative record.

(2) *Other Dispositions Without Trial:* In addition, an action for declaratory judgment may be decided on a motion for a judgment on the pleadings under Rule 120 or on a motion for summary judgment under Rule 121 or the action may be submitted at any time by motion of the parties filed with the Court in accordance with Rule 122.

(3) *Disposition If Trial Is Required:* Whenever a trial is required in an action for declaratory

judgment, the trial will be conducted in accordance with the Rules contained in Title XIV, except as otherwise provided in this Title.

Note

Rule 217 is amended stylistically.

Paragraph (b)(2) of Rule 217 is amended to clarify that the parties may submit a declaratory judgment action for decision by filing a motion in accordance with Rule 122. There has been no substantive change.

The amendments are effective March 20, 2023.

RULE 231. CLAIMS FOR LITIGATION AND ADMINISTRATIVE COSTS

(a) Time and Manner of Claim:

(1) *Agreed Cases:* If the parties have reached a settlement disposing of all issues in the case including litigation and administrative costs, an award of reasonable litigation and administrative costs, if any, must be included in the stipulated decision submitted by the parties for entry by the Court.

(2) *Unagreed Cases:* If a party has substantially prevailed, or is treated as the prevailing party in the case of a qualified offer made as described in Code section 7430(g), and wishes to claim reasonable litigation or administrative costs, and there is no agreement as to that party's entitlement to those costs, a claim must be made by motion filed—

(A) within 30 days after the service of a written opinion determining the issues in the case;

(B) within 30 days after the service of the pages of the transcript that contain findings of fact or opinion stated orally pursuant to Rule 152 (or a written summary thereof); or

(C) after the parties have settled all issues in the case other than litigation and administrative costs. See paragraphs (b)(3) and (c) of this Rule regarding the filing of a stipulation of settlement with the motion in such cases.

(b) Content of Motion: A motion for an award of reasonable litigation or administrative costs must be in writing and contain the following:

(1) A statement that the moving party is a party to a Court proceeding that was commenced after February 28, 1983;

(2) if the claim includes a claim for administrative costs, a statement that the administrative proceeding was commenced after November 10, 1988;

(3) a statement sufficient to demonstrate that the moving party has substantially prevailed with respect to either the amount in controversy or the most significant issue or set of issues presented, or is treated as the prevailing party in the case of a qualified offer made as described in Code section 7430(g), either in the Court proceeding or, if the claim includes a claim for administrative costs, in the administrative proceeding, including a stipulation in the form prescribed by paragraph (c) of this Rule as to any settled issues;

(4) a statement that the moving party meets the net worth requirements, if applicable, of section 2412(d)(2)(B) of title 28, United States Code (as in effect on October 22, 1986), which statement must be supported by an affidavit or a declaration executed by the moving party and not by counsel for the moving party;

(5) a statement that the moving party has exhausted the administrative remedies available within the Internal Revenue Service;

(6) a statement that the moving party has not unreasonably protracted the Court proceeding and,

if the claim includes a claim for administrative costs, the administrative proceeding;

(7) a statement of the specific litigation and administrative costs for which the moving party claims an award, supported by an affidavit or a declaration in the form prescribed in paragraph (d) of this Rule;

(8) if the moving party requests a hearing on the motion, a statement of the reasons why the motion cannot be disposed of by the Court without a hearing (see Rule 232(a)(2) regarding the circumstances in which the Court will direct a hearing); and

(9) an appropriate prayer for relief.

(c) Stipulation as to Settled Issues: If some or all of the issues in a case (other than litigation and administrative costs) have been settled by the parties, a motion for an award of reasonable litigation or administrative costs must be accompanied by a stipulation, signed by the parties or by their counsel, setting forth the terms of the settlement as to each such issue (including the amount of tax involved). A stipulation of settlement is binding on the parties unless the Court orders otherwise or the parties agree otherwise.

(d) Affidavit or Declaration in Support of Costs Claimed: A motion for an award of reasonable litigation or administrative costs must be accompanied by a detailed affidavit or declaration by the moving party or counsel for the moving party setting forth distinctly the nature and amount of each item of costs for which an award is claimed.

(e) Qualified Offer: If a qualified offer was made by the moving party as described in Code section 7430(g), a motion for award of reasonable litigation or administrative costs must be accompanied by a copy of the offer.

Note

Rule 231 is amended stylistically. There has been no substantive change.

The amendments are effective March 20, 2023.

RULE 233. MISCELLANEOUS

For provisions prohibiting the inclusion of a claim for reasonable litigation and administrative costs in the petition, see Rule 34(f) (claim for reasonable litigation or administrative costs), Rule 211(b) (petition in a declaratory judgment action), Rules 241(c), 255.2(b), and 301(c) (petition in a partnership action), Rule 291(c) (petition in an employment status action), Rule 321(b) (petition in an action for determination of relief from joint and several liability on a joint return), and Rule 331(b) (petition in a lien or levy action). For provisions regarding discovery, see Rule 70(a)(2). For provisions prohibiting the introduction of evidence regarding a claim for reasonable litigation or administrative costs at the trial of the case, see Rule 143(a).

Note

Rule 233 is amended to conform to amendments to Rule 34. There has been no substantive change.

The amendments are effective March 20, 2023.