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NEW RULES OF PRACTICE AND PROCEDURE OF THE UNITED STATES TAX COURT: HOW ARE THEY WORKING?

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In 1973 the U.S. Tax Court adopted completely new rules of practice and procedure, which became effective January 1, 1974. This article first discusses briefly the historical background of the rules and then examines generally how the new rules are working in practice, and discusses the opinions and Memoranda Sur Orders issued by the court during its first 15 months of experience applying the rules.

For almost 50 years proceedings in the Tax Court and its predecessor, the Board of Tax Appeals, were conducted under rules of practice and procedure that were first adopted soon after the creation of the Board of Tax Appeals in 1924. Those rules were rather limited in scope but were flexible, designed for use in a centralized court having nationwide jurisdiction in tax matters only, with headquarters in Washington, D.C., and with individual judges conducting trial sessions throughout the country without juries. The Federal Rules of Civil Procedure (FRCP) were not adopted by the court because many of them were not adaptable to proceedings in the Tax Court. Few basic changes were made in these rules until 1963 when several alterations were made to comply with suggestions made by the tax bar.

The most fundamental rule upon which the court has always had to rely to avoid excessive trial work is the rule requiring the parties, prior to trial and without the assistance of the court, to stipulate evidence to the fullest extent to which complete or qualified agreement can be reached, including all material facts that are not or fairly should not be in dispute. Prior to adoption of the new rules, the Tax Court rules made no provision for discovery or other procedures for obtaining evidence in advance of trial from the opposing party or third parties. Fortunately, under the stipulation procedure, there was a rather free exchange of information between the parties without the aid of discovery.

At the annual meeting of the Section of Taxation of the American Bar Association in San Francisco in 1962, there was a spirited floor debate over whether the Section should adopt a proposal recommending that the United States district courts be given concurrent jurisdiction with the Tax Court in deficiency tax cases.[1] Some of the principal arguments advanced by the pro-

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1. The Board of Tax Appeals was established to provide a forum wherein taxpayers could obtain a judicial determination of their tax liabilities without first having to pay

ponents of the proposal were that the rules of the Tax Court differed from the FRCP, thus requiring practitioners to be familiar with two different sets of rules; that the Tax Court rules did not provide for discovery or pre-trial procedures, thus hampering litigants in preparing for trial; and that the stipulation rule of the Tax Court had no teeth in it providing for enforcement in the event the opposing party refused to stipulate. While the writer believes these arguments were made not so much in a desire to obtain discovery in Tax Court cases as to obtain the right to forum shop in all tax cases, they nevertheless caused some concern to the Tax Court. Subsequent to that meeting the Tax Court gave consideration to amending its rules to bring them more nearly into line with the federal rules, but the court concluded that because it was a centralized court with nationwide jurisdiction, it would be very difficult for it to properly administer and enforce discovery if provision was made therefor. However, the court found validity in the argument that the stipulation rule contained no specific procedure for enforcement and also that some form of pre-trial procedure would be helpful.[2]

As a result of this impetus the Tax Court did amend its rules in 1963 to provide for pre-trial conferences (Rule 28) and to provide a procedure for having facts deemed admitted for purposes of the trial if the opposing party refused to stipulate facts which reasonably should have been stipulated (Rule 31(b)(5)). While these rules were of some benefit, many practitioners thought the procedures were too cumbersome and were completed too late in the preparation for trial to be utilized to any great extent.

The next impetus for changing the Tax Court rules was provided at the hearings before Senator Joseph M. Tydings' Subcommittee on Improvements in Judicial Machinery in 1967 and 1968. Consideration was being given to judicial procedures for handling federal tax matters, and the Department of Justice was directed to make a survey of the present system and recommend any changes that it thought might improve the system. The Department of Justice study was submitted to the subcommittee in the spring of 1968. It pointed out the differences in procedure in the district courts, the Court of Claims, and the Tax Court and the fact that there was no provision for discovery in the Tax Court rules, which made it more difficult for litigants in deficiency cases to prepare for trial. The report suggested various alternatives for improving the federal judicial system for handling tax matters, several of which involved removing the Tax Court from its status as an independent agency in the executive branch of the government and making it a constitutional court under Article III, and then granting all three courts concurrent jurisdiction in both refund and deficiency tax cases.

Subsequently, Senator Tydings introduced seven separate bills in the Senate, each containing alternative proposals for improving the federal judicial

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the deficiency determined by the Internal Revenue Service and suing for a refund in the district court or the Court of Claims. To date, the Tax Court has only deficiency jurisdiction and the district courts and the Court of Claims have only refund jurisdiction.

2. In the earlier days of travel by railroad the judges of the Tax Court were not as readily available to conduct pre-trial proceedings in the field as they are now with the speedier air transportation.

machinery for handling tax cases in accordance with the suggestions contained in the Justice Department report. The bills, however, were never considered by the Senate Judiciary Committee and died when Senator Tydings failed of reelection. But in the following session of Congress, rather sweeping changes were made with regard to the status of the Tax Court by the Tax Reform Act of 1969. While the Act did not in any way change the jurisdiction of any of the three federal courts in tax litigation, it did remove the Tax Court from the executive branch and established it as a legislative court under Article 1 of the Constitution.

As a result of the change in its status, the judges of the Tax Court believed it was a propitious time to reexamine its rules of practice and procedure, and its Rules Committee, under the chairmanship of Judge Arnold Raum, undertook the task. Basically the court believed that its rules should parallel as nearly as feasible the FRCP and efforts were directed along that line. Advice and recommendations were sought and received from the Chief Counsel of the Internal Revenue Service, the Section of Taxation of the American Bar Association, and various tax bar groups and individual practitioners. While the recommendations varied from A to Z, it seemed to be the consensus that the rules should contain provisions for discovery and other pre-trial procedures for obtaining evidence prior to trial. With some misgivings the court decided to include in its new rules some limited procedures for discovery, admissions, and other pre-trial procedures. The reason for the court's reluctance to provide for discovery was twofold. First and foremost, it was feared that discovery would undermine and tend to become a substitute for the stipulation procedure, which had for so long been the backbone of the Tax Court procedures and without which it could not operate efficiently. Second, it was feared that the court's dockets and the judges might become mired in proceedings to administer and enforce discovery proceedings. Nevertheless, the court felt that if there was a demand for some of the more modern tools for aid in preparation for trial, such tools should be provided. Therefore, the new rules contained provisions for (limited) discovery by written interrogatories and by motions to produce documents and things. Provision was also made for requesting admissions, which is not a form of discovery but is an aid in preparation for trial. However, these procedures were made available only with the strong admonition that the court continued to expect full stipulations of fact; that the discovery procedures were to be used, not as a substitute for stipulations, but as an aid thereto; and that if discovery was used by the parties to harass an opponent or to delay readiness for trial, or if the court became involved in too much monitoring of discovery to the point that it interfered with its handling and disposition of cases on their merits, it might reconsider the use of discovery and eliminate provision therefor from the rules.

The new rules were adopted by the court in June of 1973, to become effective January 1, 1974, and have been in use about 15 months as of the date of this writing. These rules are much more complete than the previous rules and conform insofar as practicable with the Federal Rules of Civil Procedure used in the district courts and with the Rules of the United States

Court of Claims. Of course, many of the federal rules, such as the rules relating to juries, are not applicable to Tax Court proceedings. Thus the Tax Court rules are probably more similar to the rules of the Court of Claims than to the federal rules. However, where feasible the new rules were conformed to the federal rules so that decisions interpreting and applying those rules could be used as precedents in interpreting and applying the Tax Court rules.

The most important and controversial of the rather sweeping changes in the Tax Court rules appear in the area of discovery and other pre-trial procedures. Provisions for discovery are contained in Title VII; provisions for taking nondiscovery depositions are contained in Title VIII; rules relating to admissions and stipulations are contained in Title IX; provisions for enforcement and administration of discovery, depositions and admissions appear in Title X; and pre-trial conference procedures are provided for in Title XI. Other changes of note are contained in Title VI, which, for the first time, makes provision for permissive joinder of parties and misjoinder of parties, and in Title XII, which, for the first time, specifically provides for judgment on the pleadings, summary judgment, defaults, and dismissals. In some of these areas, the Court had acted without specific rules, but the rules clarify the procedures.

Before examining the various opinions and memoranda interpreting and applying the new rules during the first 15 months of their use, this article will briefly discuss the use of the discovery procedures from the standpoint of the judges of the Tax Court. The discovery tools provided in Title IX should be used without the involvement of the court. Such has been the experience of some of the judges. Other judges have not been so fortunate; time and again they have been called upon to rule on motions either for enforcement of discovery or for protective orders. The Chief Judge, who hears most of the motions calendars, reports that an alarming number of such motions are being filed and that some litigants on both sides of the cases are overusing or abusing the discovery procedures to such an extent that the opposing parties are unable properly to prepare for trial. This is most unfortunate because, while the court has the power to intervene in these disputes once they are brought to its attention, such intervention involves a burdensome waste of time and expense that interferes with the speedy and orderly disposition of cases brought before the court. There have been rumblings of late by some Tax Court judges that the court should delete the discovery rules. The writer, for one, believes that this is an alarmist position and that it will take three or four years for the court to issue a sufficient number of rulings on the rules to provide guidelines for their proper use. If the discovery tools are helpful to litigants in the Tax Court, the court should provide those tools even though their use may place a heavier burden on the judges of the court. But if they are misused for purposes of harassment and delay, their effectiveness will be undermined and the court will probably write discovery out of its rules. Even this writer feels that if discovery procedures are shown to be interfering with the stipulation procedure, which is so vital to the functioning of this court, the discovery procedures should be eliminated. Only time will tell, but the warning flags are beginning to fly.

In some areas of the country the discovery procedures are apparently little used; in other areas they are overused. Of course, resort to discovery depends to a large extent on the spirit of cooperation existing between the litigants and between their counsel. When the court has issued sufficient guideline opinions on what is discoverable and what is not, voluntary disclosure during the stipulation process should be the standard procedure and resort to discovery should seldom be necessary.

All of the judges of the Tax Court have had occasion to issue rulings interpreting and applying the new rules, although the Chief Judge, who hears most of the motions calendars in Washington, has had the occasion to do so most frequently. When a judge encounters such motions on trial calendars, he may rule on them orally from the bench, in which event he will not write a memorandum stating his reasons. Or he may take motions under advisement and rule on them after he has had an opportunity to consider them in the light of the arguments presented by the parties, either orally or on brief. Again, he may either grant or deny a motion without stating his reasons. More frequently, however, he will write either an opinion or a Memorandum Sur Order, which is simply attached to the order and placed in the file of that particular case, stating the reasons for his ruling. His writing must be reviewed by either the Chief Judge or one other judge of the court before it is released. These writings become memorials of the court's rulings interpreting and applying the new rules.

If the ruling is contained in a regular opinion of the Tax Court, it is published by the court in the Tax Court Reports and is readily available to anyone interested. If it is contained in a memorandum opinion of the court, it will ordinarily be published by one of the tax services and is also readily available to anyone interested. If, however, it is contained in a Memorandum Sur Order that is simply attached to an order in a particular case, it will not be officially published by anyone, and it will be difficult for anyone researching the rule to find it.

All of these unpublished rulings are available to Chief Counsel of the Internal Revenue Service and his attorneys because they are involved in all litigation in the Tax Court. The private practitioner, however, seldom knows of such rulings and may feel some embarrassment if counsel for respondent makes reference to such a ruling concerning which petitioner's counsel has no knowledge. Furthermore, if they are readily available, such unpublished rulings, as well as the published opinions, can serve as guidelines to other judges and the litigants. Accordingly, the Chief Judge intends to publish more of these rulings and has instructed the clerk of the court to keep a file of all unpublished rulings, which will be available to the public on request.

With respect to the rulings that have been issued in one form or another during the first 15 months that the rules have been effective, the majority of them, and naturally those of most interest, involve discovery. However, other rules have come under scrutiny and a brief resume of them might help practitioners read the court's pulse in applying the new rules. The writer believes the discussion that follows either cites or makes reference to all rulings pertaining to the new rules that have been issued from the time

the new rules became effective to April 1, 1975, whether the ruling was issued in the form of a published opinion, a Memorandum Opinion, or a Memorandum Sur Order, except for a few that simply duplicate prior rulings. The writer hopes this discussion will give all parties and practitioners in this court knowledge of the rulings that have been made and at least a reference to the files in which they can be found.

It seems apparent from the rulings issued to date that the judges of the Tax Court will interpret and apply the new rules broadly if the ends of justice are served thereby and that discovery will be permitted of almost any matter that is relevant and not privileged, but that they expect the parties to make a serious and determined effort to consult toward stipulating facts and settling issues before involving the court in discovery procedures.

RULES DECISIONS

Pleadings and Parties

Rule 22 provides that any pleadings or papers to be filed with the court must be filed with the clerk in Washington, D.C., except as otherwise directed by a presiding judge or the court. It is basically the same as old Rule 5. In what was originally issued as a Memorandum Sur Order, but has since been issued as a published opinion in *Abbott & Anita Hoffman*, 63 T.C. No. 60 (Mar. 12, 1975), the court dismissed the petition for lack of jurisdiction because it was not timely filed. The petition had apparently been timely mailed in an envelope addressed to the Tax Court at its court room facilities in New York City at a time when the court was not sitting in New York and was not forwarded to the clerk in Washington until after the 90th day. Relying on Rule 22, the court held that the timely mailing – timely filing provision of section 7502(a)(1) of the Internal Revenue Code was not applicable because the envelope was not properly addressed to the Tax Court as required by that section; and since it was not received in Washington until after the 90th day, the court had no jurisdiction.

As an aside, the rather numerous late filing cases cause the court considerable concern. Although the judges will do whatever they feel they may do to avoid dismissing cases for late filing, since timely filing is a jurisdictional matter, under the law they are frequently unable to afford the late filer any relief.

Rule 34(a) contains new general provisions relative to petitions filed to initiate cases. It provides that where a notice of deficiency is directed to more than one person, each person desiring to contest it may file a separate or joint petition, but each person in a joint petition must individually satisfy all the requirements of the rule, which requires that each joint petitioner or his counsel sign the petition. New Rule 41(a) provides that after expiration of the time allowed for filing the petition, no amendment of the petition will be allowed that 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. In a Memorandum Sur Order entered July 15, 1974, in *Frank E. & Yolanda Curry*, Docket No. 1073-74S, the court dismissed

the petition as to Yolanda under the following circumstances. A letter was timely received, signed by Frank alone, challenging the proposed adjustments. Yolanda's name did not appear anywhere in the letter and the singular pronoun was used throughout. An amended petition, signed by both Frank and Yolanda, was filed after the 90th day. In prior cases where the spouse's name appeared in the caption but where she did not sign the petition, the court had permitted the non-signing spouse to adopt the original petition by filing an amended petition which was late, relating the amendment back to the date the original petition was filed to acquire jurisdiction of the non-signing spouse. In the order entered in *Curry*, the court held it could no longer do this under the new rules unless it was quite clear that the original petition had been intended as a petition for both spouses.

In *John L. & Susanne L. Brooks*, Docket No. 8929-74, 63 T.C. No. 69 (March 24, 1975), however, the court indicated that while it will generally not favor amendments to a petition out of time attempting to alter either the tax in issue or the years in dispute, it will continue to interpret the rules liberally to retain jurisdiction of a proper party if the original petition and the circumstances make it reasonably clear that it was intended to be a petition for that party and the party ratifies the action of the party who signed the petition by an amendment, even if filed late. The court relies rather heavily on cases applying the old rules and on Rule 60(a) to make this distinction. Rule 41(a) refers to amendments conferring jurisdiction over "a matter" while Rule 60 is concerned with proper parties. Respondent argued that in the new rules the court had substituted a "mechanical test" for the "intent test" used under the old rules and that for administrative purposes a "mechanical test" would be better. The court rejected this argument insofar as it applies to ratification of a petition by a proper party.

Rule 51 provides that if a pleading to which a responsive pleading is permitted or required is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement. Except for minor changes in language, this rule is the counterpart of the old Rule 17(c)(1). However, the availability of discovery in the new rules may have an effect on the application of this rule, as indicated in *Frank Ryskiewicz*, 63 T.C. 83 (1974). In that case, petitioner moved for a more definite statement of respondent's allegations of fraud in his answer. Concluding that, while petitioner might be entitled to more information regarding respondent's allegations of fraud, the answer met the "fair notice" requirements of Rule 31(a) and the required form and content of an answer under Rule 36(b), the court denied the motion for a more definite statement in the pleading. The court suggested that discovery procedures of Rules 70 and 71 were available to petitioner under which he might obtain the information sought.

There is also an interesting discussion of Rule 51 in a Memorandum Sur Order issued in *Herman M. & Barbara J. Greenspan*, Docket No. 4602-73 (April 15, 1974). In that case respondent determined that a purported loan received by petitioner from Hughes Tool Co. was taxable as ordinary income. In response to petitioner's allegation that the amount received was a loan,

respondent's answer alleged in rather vague terms that it was recompense for petitioner's past, present, and future services to Hughes Tool Co. Petitioners filed a motion for a more definite statement, to which respondent objected on the following grounds: (1) That no responsive pleading to the answer was required; (2) That the pleading was not vague and ambiguous; (3) That the facts involved were peculiarly within the knowledge of petitioner; and (4) That the motion was an attempt to shift the burden of proof to respondent. The presiding judge denied the motion, agreeing with respondent that, since petitioners had the burden of proof, a reply to respondent's answer was not required by Rule 37 and, hence, one requirement of Rule 51 was not met; that respondent's answer was sufficiently definitive to give petitioner fair notice of respondent's position; and that numerous cases interpreting Rule 12(e) of the FRCP, upon which Rule 51 is based, have denied motions for a more definite statement when the facts were peculiarly within the knowledge of the other party.

This memorandum is interesting in several respects. It implies that a motion for a more definite statement is not permitted unless a responsive pleading is required, but it is doubtful that such was intended. It again points out that "the specific details and reasons for the respondent's position are more properly flushed out under our rules dealing with discovery and admissions," which would not have been the case under the old rules. The court utilizes cases interpreting a similar rule of the FRCP in upholding respondent's third objection. With regard to respondent's fourth objection, it emphasizes a point that counsel for the parties often fail to understand: the granting of a motion for a more definite statement does not shift a legally imposed burden of proof.

Rule 60 deals with the proper parties to bring a case. The first part of paragraph (a) is derived from old Rule 6, but the second sentence is adopted from FRCP 17(a). The latter provides that a case timely brought shall not be dismissed on the ground that it is not properly brought in behalf of a party until a reasonable time has been allowed, after objection, for ratification by such party of the bringing of the case, which ratification shall then relate back to the time the petition was filed. A Memorandum Sur Order entered in *Estate of Herman J. Adelmann, Deceased, Mrs. Mabel E. Adelmann, the former Administratrix Cum Testamento Annexo,* Docket No. 558-74 (Sept. 17, 1974), highlights the importance of the latter provision of Rule 60 in cases where the petition is not filed until after an estate has been closed, as was the situation in that case. While the notice of deficiency was addressed to Mrs. Adelmann as administratrix of the estate, the petition was captioned as shown above because the petitioner did not want to go on record as still being the fiduciary for the estate when she had, in fact, been discharged. Respondent moved to dismiss on the ground that the petition was not filed by the proper party. Pointing out that the Tax Court has maintained a rather liberal policy concerning the wording of captions on petitions filed by discharged fiduciaries of closed estates, the presiding judge denied respondent's motion because it was clear from the petition that it was filed on behalf of the closed estate rather than on behalf of the former fiduciaries in their individual

capacities. This rule as presently written provides a solution for the discharged fiduciary to make his or her point but then ratify the timely filed petition even after the 90 days have expired. However, practitioners should keep in mind Rule 41(a), discussed in the *Curry* case above.

Discovery and Other Pre-Trial Procedures

The next cases discussed are concerned with the discovery rules and other rules providing pre-trial procedures for obtaining and presenting to the court evidentiary facts and with the enforcement of those rules.

First, a few general statements regarding the approach of the Tax Court in adopting rules authorizing discovery and other pre-trial procedures might be helpful in understanding the court's interpretation and application of those rules. As heretofore mentioned, the judges of the court were somewhat reluctant to provide for discovery because of the fear that it would disrupt the stipulation procedure, which had worked so well in the past, and that the enforcement of discovery procedures would, because of the court's extensive geographical jurisdiction, require so much of the judges' time that they would not be able to make timely disposition of cases on their merits. Consequently, only limited discovery procedures were provided, by written interrogatories and by motions to produce documents and things, which could be implemented without permission of the court and should not involve the judges to any great extent. Discovery by oral deposition was not provided because it was felt that such procedure would place an undue and unnecessary burden on the court. Requests for admissions, which, of course, are not discovery devices, were permitted and the requirement for stipulation of facts was emphasized. No particular sequence for use of the pre-trial information-seeking devices was specified and the scope of discovery permitted was quite broad, being authorized in Rule 70(b) with respect to "any matter not privileged and which is relevant to the subject matter involved in the pending case." Rule 70(b) also provides that if the information or response sought is otherwise proper, it is not objectionable merely because it involves an opinion or contention that relates to fact or to the application of law to fact. Timing for commencement and completion of discovery had to be rather strictly circumscribed to avoid having cases called for trial before the parties had completed discovery and had had time to prepare for trial.

Rule 70 contains the general provisions relative to discovery, describing the methods provided for, and the scope of, discovery. It emphasizes that the court expects the parties to attempt to attain the objectives of discovery through informal consultation prior to utilizing the discovery procedures, and that information or evidence obtained through discovery or other pre-trial procedures will not be considered as evidence in a case until either incorporated in a stipulation or offered in evidence at the trial.

The court quickly indicated in its opinion in *Branerton Corp.*, 61 T.C. 691 (1974), that the above admonitions contained in Rule 70 mean what they say. The pleadings in that case had been completed about four months before the new rules became effective January 1, 1974, but the parties had had no

conferences to exchange information and stipulate facts for trial. On January 2, 1974, petitioner served numerous interrogatories on respondent, and respondent sought a protective order. The court granted a protective order for a reasonable period of time and directed the parties to confer informally for exchange of information before using discovery. The opinion pointed out that the stipulation process had been for many years, and still is, the bedrock of Tax Court practice, that essential to this process is the voluntary exchange of necessary facts, that discovery was not intended to weaken the stipulation process, and that the attempted use of interrogatories at this stage of the proceedings sharply conflicted with the intent and purpose of Rule 70(a) and constituted an abuse of the court's procedures.

In *John T. & Katherine J. Gauthier,* 62 T.C. 245 (1974), the court denied an application to take pre-trial deposition because Rule 81(a) limits the use of pre-trial depositions to the perpetuation of testimony and because a deposition for the purpose of discovery is specifically disallowed by Rule 70(a). It also held that the failure of the rules to provide for discovery by deposition did not constitute a denial of "due process" because the rules are procedural, not substantive, in nature, and section 7453 of the Internal Revenue Code provides that the Tax Court may prescribe its own rules of practice and procedure.

Howard C. Phelps, 62 T.C. 513 (1974), involved the question of whether a statement prepared by revenue agents during the course of and after an interview with the petitioner but not signed by petitioner qualified as a statement that must be produced under Rule 70(c). Rule 70(c) was derived from Rule 26(b)(3), FRCP, wherein "statement" is defined as either a signed statement or a "recording . . . which is a substantially verbatim recital of an oral statement . . . contemporaneously recorded." The court relied on this definition to conclude that the document prepared by the agents qualified as a statement made by petitioner and should be produced.

The opinion in *P. T. & L. Construction Co.,* 63 T.C. No. 36 (1974), contains an exhaustive discussion of the availability through discovery of various documents prepared by agents of the Internal Revenue Service prior to issuance of the notice of deficiency, including the special agent's report, the report of the appellate conferee, and a witness's statement taken by the special agent during the course of his fraud investigation. Respondent objected to the production of these documents on various grounds, including (1) the work product rule,[3] (2) executive privilege, (3) lack of relevance, and (4) the fact that the witness's statement was to be used for impeachment purposes and thus should not be produced until after cross-examination of witnesses. Space does not permit a detailed discussion of this opinion. Briefly, it held that the conferee's report and the special agent's report were not protected by the "work product" rule because they were not prepared in anticipation of litigation. However, certain parts of the special agent's report were protected by the claim of *qualified executive privilege,* which involves

3. The Tax Court rules do not require disclosure of "work product" as does Rule 26(b)(3), FRCP, which was adopted as a result of *Hickman v. Taylor,* 329 U.S. 495 (1947).

statements of advice, deliberation, and recommendations, which might be embarrassing to the government officials if made public. Since the conferee's report contained no new facts and was a part of the IRS decisional process, there was no need to produce it. As there was no showing of prior inconsistent statements of a witness that might be impeached by use of the third party statement, which respondent appeared to want to withhold for purposes of surprise only, it was ordered produced. The final paragraph of the opinion states:

> [T]he basic purpose of discovery is to reduce surprise by providing a means for the parties to obtain knowledge of all the *relevant facts*. What is relevant is the *factual information* which may either reveal evidence that will be admissible at the trial or lead to the discovery of such evidence. Mental impressions, legal analysis, conclusions, and recommendations are generally not relevant.

Rule 71 provides for discovery by written interrogatories, which can be served only on another party to the action, not on third parties. This differs from old Rule 46 in that the questions are in writing and the answers are in writing, whereas the interrogatories permitted under old Rule 46 contemplated written questions orally propounded to the witness, whose answers were stenographically reported. A Memorandum Sur Order entered November 12, 1974, in *Samuel Shapiro*, Docket No. 178-74, involved Rule 71 interrogatories served by petitioner on respondent seeking detailed information on how respondent arrived at his determination of the gross income of a purported seller of narcotics and whether the determination was based on illegally obtained evidence. Respondent answered some of the questions, refused to answer others on the grounds that the information sought was irrelevant and that it was impeaching evidence, and stated that insofar as his records revealed, there was no evidence of electronic eavesdropping. The court accepted respondent's denial of eavesdropping evidence for the present. But since respondent admitted that some of the information sought supported his determination, the court reasoned that it should be produced even though it might also be used for impeachment, because its primary purpose was not for impeachment. The judge ordered respondent to furnish him with answers to the questions seeking the sources of the information upon which the claim of unreported narcotics income was based, for *in camera* inspection first if respondent so requested.

This memorandum also discusses at some length whether the court will go behind the deficiency notice to examine the evidence upon which it is based or respondent's motives and administrative policies. The judge concluded that while normally the court will not look behind the deficiency notice, the protective shield of the notice of deficiency is not absolute, and under limited circumstances the court will inquire into the factual foundations upon which the notice rests — for instance, whether it is based on constitutionally obtained evidence and whether it is arbitrary and capricious. A finding that it is arbitrary would not invalidate the notice of deficiency; it would simply affect the burden of proof.

A Memorandum Sur Order entered in *Rose Morgan*, Docket No. 1251-74 (March 4, 1975), also illustrates the court's insistence that the parties cooperate in exchanging information, through either informal conferences or voluntary discovery, before involving the court. While it does not appear on the record, counsel for the opposing parties were taking more of the judge's time arguing about whether petitioner's numerous interrogatories should be answered than it would have taken the judge to try the case. The judge finally made an exhaustive review of each of the 45 interrogatories and ruled on which should be answered and which should not, but in doing so made the comment that this was a "striking illustration of how the discovery rules of the Court should *not* be used."

Rule 72 covers the second method of discovery provided by the rules, requests for production of documents and things, served on the opposing party without leave of court. In *Kazuko S. Marsh,* 62 T.C. 256 (1974), the question arose as to whether, in response to petitioner's request, respondent was required to produce various documents relative to petitioner's entry into and departure from the United States and her residential citizenship status therein, which respondent did not have in its possession but which were obtainable from other agencies of the government, either by respondent or by petitioner upon direct request to those agencies. The court held that since the documents pertained to petitioner and were available to her from agencies which actually had possession thereof, petitioner could best specify those she sought from the various agencies, and respondent was not required to produce them for her.

In a Memorandum Sur Order entered in *First Federal Savings & Loan Association of Lincoln,* Docket No. 7690-73 (Dec. 27, 1974), petitioner's motion to produce, filed after respondent refused its request for certain information, was denied because the information sought was not shown to be relevant, which, while not mentioned in Rule 72, is a requirement for anything sought to be discovered under Rule 70. See *P.T. & L. Construction Co., supra.* The court avoided having to rule on petitioner's motion to require respondent to produce the reports and supporting memoranda of the revenue agent and the appellate conferee when respondent agreed, at the hearing on the motion, to produce the documents sought, as discussed in a Memorandum Sur Order in *Matson Navigation Co.* and *Alexander & Baldwin, Inc.,* Docket Nos. 1925-74 and 1926-74 (Feb. 27, 1975). See also *Malcolm D. Murphy,* T.C. Memo. 1975-88 (Mar. 31, 1975), which discusses what parts of various IRS instructions to its agents about giving *Miranda* warnings must be produced in response to a motion under Rule 72.

Title VIII, including Rules 80-85, permits the taking of depositions, upon application to and approval by the court, for the purpose of making testimony or any document or thing available as evidence, in the circumstances therein authorized. It is specifically stated that depositions are not to be taken for discovery purposes. These rules provide the procedure for taking both domestic and foreign depositions and for the use thereof.

In a Memorandum Sur Order entered in *Laurence J. & Joan C. Hoch,* Docket No. 6262-73 (Apr. 9, 1974), it is made clear that depositions may be

taken only if "there is a substantial risk that the person . . . involved will not be available at the trial of the case," Rule 81(a), even though many of the witnesses petitioner intended to use in this case lived more than 700 miles from the place of trial. An order entered in *Edwin F. Gordon*, Docket No. 4825-71 (Jan. 15, 1975), granted an application to take foreign depositions and directed the procedure to be followed in connection therewith.

Title IX provides for requests for admissions and stipulations for trial, Rule 90 being concerned with admissions and Rule 91 with stipulations and the procedures to be followed if the opposing party refuses to stipulate. Those procedures are similar to the procedure authorized in old Rule 31(b)(5), but the time schedule is moved forward somewhat. Except for the frequent references to stipulations in rulings specifically concerned with other rules, there have been no opinions or memoranda dealing directly with Rule 91.

Rule 90, dealing with requests for admissions, is taken from FRCP 36, the purpose of which is to establish matters which are not in dispute and thereby to avoid the time and effort needed to prove them at trial. Requests for admissions may be served only on the opposing party and may be served without leave of the court, but the original of the request must be filed with the court. Each matter is deemed admitted unless, within 30 days after the service of the request, the party upon whom it is served serves upon the requesting party a written answer or an objection.

In *John W. Pearsall*, 62 T.C. 94 (1974), petitioner served a request for admissions on respondent and respondent filed a motion for a protective order without first serving either written answers admitting or denying the requested admissions or objections thereto. The court denied respondent's motion for a protective order as being premature, pointing out that unlike Rule 70(a), there is no requirement in Rule 90 that the parties confer informally before requesting admissions.

Title X contains general provisions relating to discovery, depositions and requests for admissions. Rule 101 makes clear that no particular sequence is required in the use of these procedures nor are there limitations on the frequency of their use, provided they do not delay progress of the case toward trial. Rule 102 requires supplementation of responses with information thereafter acquired; Rule 103 authorizes issuance of protective orders; and Rule 104 provides enforcement action and sanctions.

Rule 103 authorizes the court to make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, including but not limited to a list of 10 specific types of protective orders. In *Greenberg's Express, Inc.*, 62 T.C. 324 (1974), petitioners sought an order under Rule 103(a)(10) impounding various categories of documents in the possession, custody, or control of respondent or other government agencies to prevent their possible destruction and to enable petitioners to obtain evidence to prove their allegation that respondent discriminatorily selected their tax returns for a second examination because of their purported connection with organized crime. The court denied petitioner's motion to impound because petitioner had not shown a need therefor, the documents were probably obtainable by use of discovery, and impound-

ment is not customarily used to compel production of documents, but rather as a means of retaining documents in the court's custody after they have been properly produced by other means.

In a Memorandum Sur Order entered in *Paul & Mamie Patz,* Docket Nos. 4711-72 through 4725-72 (July 23, 1974), respondent sought to introduce in evidence the tax returns of a corporate competitor of petitioners through its president, whom petitioners had called as a witness in a section 482 case. The court sustained petitioners' objection, pointing out, *inter alia,* that until it was clearly established that the competitor's returns were relevant and necessary for respondent's case, the court would protect the confidentiality the returns were granted under the law.

In another recent case in which it has not yet become necessary to enter an order, both parties served extensive interrogatories on the other and both sought protective orders. The court granted a continuance of the hearing on the motions requested by both parties but instructed the clerk to advise counsel for both parties that unless they made a sincere effort to stipulate the facts sought through voluntary communications, the court would be inclined to grant protective orders to both parties, to deny the right of either party to utilize any further discovery procedures, and to direct the parties to submit a comprehensive stipulation of facts before trial.

Under Rule 104, if a party fails to appear for the taking of his deposition or fails to answer or respond to discovery procedures, the aggrieved party may move for an order compelling compliance with the request. If the party against whom the order is issued fails to obey the order, the court may enter such sanctioning orders as are just, including those set forth in the four subparagraphs of Rule 104(c), which include contempt of court.

In a Memorandum Sur Order entered September 27, 1974, in *Elizabeth Taylor Burton,* Docket Nos. 8382-72 and 8383-72, respondent moved for an order compelling petitioner to produce all her income tax returns filed with other jurisdictions for the years involved, or for sanctions if she failed to do so, to attempt to prove under section 877 of the Code that petitioner had renounced her United States citizenship to save taxes. The judge denied respondent's motion for various reasons, including the fact that, although they might be helpful, respondent did not need the documents to carry his burden of proof.

In a Memorandum Sur Order entered March 3, 1975, in *Milton F. Meisner,* Docket No. 7365-74, petitioner served interrogatories on respondent in order to obtain factual information that petitioner was under criminal investigation, arguing that, if such were the case, to fully plead facts in support of his allegations of error in the notice of deficiency would tend to incriminate him. Despite respondent's admission that petitioner was under criminal investigation and his agreement to a stay of the civil proceedings, petitioner moved for an order to compel answers to the interrogatories. The judge denied the motion on the grounds that the answers were unnecessary and beyond the scope of the discovery rules, which do not permit petitioner to inquire into the nature and scope of the criminal investigation by the use of interrogatories. A 12-month stay was granted.

Procedures for Decision Without Trial

Title XII of the rules provides four means of proceeding to a decision without trial: Rule 120 — judgment on the pleadings; Rule 121 — summary judgment; Rule 122 — submission on fully stipulated facts; and Rule 123 — default and dismissal. All except Rule 122 are new in the Tax Court rules, although the court has at times reached the result accomplished by the other three rules. The new rules are derived from the FRCP. A motion for *judgment on the pleadings* is appropriate only when the pleadings do not raise a genuine issue of fact, but only issues of law. A *summary judgment* may be granted as to all or any part of the legal issues involved where, although there is a dispute as to facts under the pleadings, it can be shown through materials outside the pleadings that there is no genuine issue of fact. In a submission under Rule 122 all the material facts are stipulated by the parties. When a party has failed to plead or otherwise proceed as provided by the rules of the court, he may be held in *default* and the court may enter a decision against the defaulting party; or if the petitioner *fails properly to prosecute* the case, the court may dismiss the case and decide any or all issues against petitioner or the party having the burden of proof on the issue. A decision rendered on default or dismissal, other than dismissal for lack of jurisdiction, operates as an adjudication on the merits.

An illustration of the use of a motion for judgment on the pleadings under Rule 120 is found in *Thomas A. Shaheen, Jr.*, 62 T.C. 359 (1974). In his amended answer respondent alleged that a default judgment entered by a United States district court on petitioner's tax liability for the years involved in the Tax Court proceeding was res judicata. Since the pleadings did not raise any issues of fact relative to this legal question and the court agreed with respondent on the legal issue that disposed of the case, the motion for judgment on the pleadings was granted.

In *Paul A. Leatherman*, T.C. Memo. 1975-41 (Feb. 27, 1975), and *Ruth Fales*, T.C. Memo. 1975-52 (Mar. 10, 1975), the only issues raised by the pleadings were whether the payment of "war taxes" violated petitioner's constitutional rights. The court found that motions for judgment on the pleadings were appropriate.

Several cases decided by the Tax Court in 1974 involved motions for summary judgment under Rule 121. In *James T. Shiosaki*, 61 T.C. 861 (1974), respondent relied on collateral estoppel of a prior case involving the same issue in petitioner's tax liability for preceding years to move for summary judgment. The court concluded that since petitioner's intent (to make a profit) was an issue in the case, collateral estoppel would not apply and the motion for summary judgment was denied. The burden is on the movant to establish absence of a factual issue, and when respondent failed to establish this, there was no burden on petitioner to establish existence of a a factual issue. But in *Stewart Gammill, III*, 62 T.C. 607 (1974), the court granted summary judgment on respondent's plea of collateral estoppel, because no issue of intent was involved and because respondent was able to establish that there was no genuine dispute as to any material facts.

In a Memorandum Sur Order entered in *J. Ray McDermott & Co.*, Docket No. 5301-73 (July 9, 1974), petitioner's motion for a partial summary judgment on a section 482 issue was denied. The judge noted that the granting of a summary judgment that is opposed by one of the parties is the exception in federal practice, and the existence of any reasonable doubt as to the facts at issue must result in a denial of the motion. The judge also noted that it is inappropriate for the court to make findings of fact under a motion for summary judgment, as requested by respondent. See also *Julius E. Hoeme*, 63 T.C. No. 3 (Oct. 15, 1974), wherein the court stated that the summary judgment rule does not contemplate judgment on evidentiary matters such as burden of proof.

In *William F. Henry*, 62 T.C. 605 (1974), the court granted respondent's motion for partial summary judgment on the issue of whether a money judgment petitioner received in a lawsuit for breach of his employment contract was taxable as ordinary income or not taxable at all. Respondent attached to his motion copies of the pleadings in the breach of contract suit which showed there was no genuine issue of fact in this proceeding. The opinion in this case is also notable because it concluded that in a case heard by a commissioner of the court, where there is no material issue of fact involved, the post-trial procedure prescribed by Rule 182 for commissioner-tried cases is not applicable.

In *John Albert Gilday*, 62 T.C. 260 (1974), respondent affirmatively alleged fraud in his answer. When petitioner failed to reply, respondent moved under old Rule 18(c) (new Rule 37(c)) that the affrmative allegations in his answer be deemed admitted, which motion was granted. When the case was called for trial, petitioner failed to appear and respondent moved for judgment by default on the fraud issue, based on the facts deemed admitted. Since respondent had the burden of proving fraud, the court concluded that it must decide whether the facts deemed admitted carried respondent's burden of proving fraud and denied the motion for judgment by default on the fraud issue. Upon consideration of the admitted facts, however, the court made a finding of fraud and entered decision for respondent.

Burden of Proof

Rule 142 deals with the burden of proof. Paragraph (a) states that, except as provided in paragraphs (b)-(e), the burden of proof is on petitioner, and that in respect of any new matter, increases in deficiency, and affirmative defenses pleaded in his answer, the burden shall be upon respondent.

In a Memorandum Sur Order entered November 1, 1974, in *I.S.C., Inc.*, Docket No. 3653-74, the question was whether the reasons stated in respondent's answer for disallowance of a deduction for contributions made by petitioner to its pension plan differed sufficiently from the reasons stated in the notice of deficiency to constitute "new matters" which shifted the burden of proof to respondent under Rule 142(a). Holding that it did not, the judge stated that the fact that the reasons for disallowing the deduction were badly expressed in the notice of deficiency does not shift the burden of proof where petitioner knew that the reasons raised in the answer were in issue.

Small Tax Case Procedure

Rule 172, which provides for the election of the small tax case procedure where the amount of the deficiency placed in dispute does not exceed $1,500 for any one year (see Rule 171), was involved in a Memorandum Sur Order entered in *John W. & Ann D. Nichols,* Docket No. 6766-74S. In the notice of deficiency, for two of the three years involved respondent disallowed deductions of amounts which produced deficiencies in excess of $1,500. In their petition, taxpayers alleged error in the disallowance of all of the expenses claimed but in paragraph three alleged that only $1,500 of the deficiencies was in dispute. Respondent objected to petitioners' election of the small tax case procedure for those two years. Concluding that it was inconsistent for petitioner to dispute the entire amount of the proposed adjustments but only a part of the deficiencies produced thereby, the judge sustained respondent's objection on the pleadings as they then stood, suggesting, however, that petitioners could amend their petition to contest a lesser amount of the deductions disallowed and thus qualify for the small tax case procedure.

I believe the above rather exhaustive discussion refers to all rulings issued by the court and the judges thereof on the new rules from January 1, 1974, the date the new rules became effective, until April 1, 1975, the date this report was completed. I make no attempt to generalize the court's attitude or approach in applying the new rules; I simply hope this reference to these not-too-well publicized rulings will permit the concerned party or practitioner to inspect those rulings and draw those conclusions for himself.