Scope of Pretrial Discovery: A Key Difference in Litigating Tax Cases in the Tax Court and Refund Tribunals

By Alex E. Sadler and Daniel G. Kim

Alex E. Sadler and Daniel G. Kim discuss forum selection and how substantially different refund tribunals and the Tax Court handle pretrial discovery.

In selecting the forum in which to litigate a tax dispute, taxpayers and their counsel must evaluate and weigh several important factors. A threshold question is whether the taxpayer can pay the disputed tax, which is a prerequisite for bringing a refund suit in the U.S. Court of Federal Claims or the federal district court for the judicial district in which the taxpayer resides or has its principal place of business. If the taxpayer cannot, or elects not to, pay the disputed tax, a deficiency proceeding in the Tax Court is the only available option.[1] The taxpayer should also consider the relevant legal precedent governing each potential forum.[2] Another common issue relating to forum selection is whether the taxpayer desires a jury trial. In cases arising in federal district court, either party may elect to have factual issues tried by a jury.[3] Jury trials are not available in the Tax Court or the Court of Federal Claims.[4]

The focus of this article is a less obvious but potentially important forum selection consideration sometimes overlooked by prospective tax litigants: the substantial differences between the refund tribunals and the Tax Court as to how pretrial discovery is carried out. The procedural rules governing the refund tribunals generally contemplate wide-ranging formal discovery.[5] Pretrial discovery in tax cases is no different than in the many other types of civil cases adjudicated by the refund tribunals. In contrast, pretrial discovery in the Tax Court is considerably more limited, principally because the Tax Court expects the IRS to have developed the facts supporting its position *before* it issues a notice of deficiency. To the extent that additional discovery is needed, the Tax Court expects parties to exchange information informally and cooperatively before resorting to formal discovery tools, which are regarded as a last resort. Similarly, in that the IRS can obtain testimony during audit pursuant to its summons power under Code Sec. 7602, depositions are far more limited in the Tax Court than in the refund tribunals, where in most cases they are conducted as a matter of course.

In highly factual cases, particularly those in which the facts may not have been thoroughly investigated during audit, the limitations on pretrial discovery in the Tax Court can provide a significant advantage to a taxpayer. Whereas government counsel in the refund tribunals can conduct full written and oral discovery, and thereby preview and be prepared for the taxpayer's evidence at trial, IRS counsel in Tax Court often have no ability to probe a prospective witness's knowledge before trial or to assess his or her credibility. While the significant differences in pretrial discovery between the refund tribunals and the Tax Court are unlikely to be the overriding consideration in a taxpayer's forum selection, in factually intensive

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cases they can have a significant impact and should be factored into the forum selection calculus.

Scope of Discovery in the Refund Tribunals

Civil tax cases filed in a federal district court are governed by the Federal Rules of Civil Procedure (FRCP), which provide for extensive pretrial discovery. FRCP 26 requires parties to meet and confer to develop a joint discovery plan to be filed with the court and, without waiting for a discovery request, to make a series of initial disclosures. Such disclosures include the identities of persons likely to possess discoverable information and copies or descriptions of documents that the disclosing party may use to support its claims or defenses. After making such initial disclosures, parties generally have broad latitude to issue formal discovery requests. Parties may seek discovery of "any nonprivileged matter that is relevant to any party's claim or defense . ... Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."[6] Accordingly, the principal boundaries on pretrial discovery are that the information sought be relevant in a broad sense and not fall within an available privilege, such as the attorney-client privilege or work product doctrine.

The most utilized discovery tools in tax cases litigated in federal district court are interrogatories (governed by FRCP 33), document requests (governed by FRCP 34) and oral depositions (governed by FRCP 30). Although local rules often impose limitations on the number of interrogatories and document requests that may be propounded, such written discovery requests generally can be phrased quite broadly to seek large amounts of information.[7] Depositions of fact witnesses and testifying experts are allowed as a matter of course and represent the norm. Generally, either party may depose up to 10 persons (including an opposing party) without leave of court.[8] A party may obtain leave of court to exceed the 10-deposition limit.[9] Depositions are limited to seven hours unless otherwise provided in local rules or court orders.[10] A party may take the deposition of a corporation or other legal entity through an authorized representative.[11]

The Rules of the Court of Federal Claims (RCFC) are substantially similar to the FRCP.[12] Just as in federal district court, litigants in the Court of Federal Claims enjoy broad discovery.[13] Depositions of both fact and expert witnesses are similarly commonplace.[14]

In sum, litigants in tax cases filed in the refund tribunals can reasonably expect that all relevant and nonprivileged facts will be subject to pretrial discovery by the opposing party through both formal written discovery mechanisms and depositions.

Scope of Discovery in Tax Court

General Limitations

At first blush, the Tax Court's discovery rules appear similar to those in the refund tribunals. The Tax Court Rules of Practice and Procedure incorporate many of the formal discovery procedures available in the refund tribunals. Using language similar to that found in FRCP 26, Tax Court Rule 70(b) broadly defines the scope of available discovery as "any matter not privileged and which is relevant to the subject matter involved in the pending case." Such information need only to "appear[ ] reasonably calculated to lead to discovery of admissible evidence." Tax Court Rules 71 through 76 provide for formal discovery by written interrogatories, production of documents or things, and depositions of fact and expert witnesses.

As a practical matter, however, the scope of pretrial discovery in the Tax Court is much narrower than in the refund tribunals. The Tax Court has stated that its operations "are unique among the trial courts in the Federal court system," and as such, "necessarily require that its Rules to be dissimilar from the FRCP."[15] This dissimilarity is "most clearly illustrate[d]" in the Tax Court's rules regarding discovery and manifests itself in several ways.[16] The purpose of pretrial discovery in the Tax Court is not to conduct far-reaching fishing expeditions, but rather "to ascertain facts which have a direct bearing on the issues before the Court."[17] Furthermore, the Tax Court imposes limitations on discovery that do not exist under the FRCP, such as prohibiting nonconsensual depositions of third parties. As the Tax Court has explained: "[A]bsent a Court order, discovery through depositions without the consent of the opposing party is not available under our Rules ... as it is under the [FRCP]. *That limitation is intentional.*"[18] In addition, the Tax Court attempts to streamline discovery by requiring parties to stipulate to the fullest extent possible to all indisputable facts, "regardless of whether such 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 *which fairly should not be in dispute.*"[19]

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Requirement for Informal Discovery

Another key difference between Tax Court practice and practice in refund tribunals is that Tax Court litigants may use formal discovery procedures *only* after they have exhausted all attempts to exchange information informally.[20] This requirement was first articulated in the seminal case, *Branerton Corp.*, shortly after the Tax Court adopted rules in 1974 allowing discovery for the first time in its history.[21] Describing the stipulation process as "the bedrock of Tax Court practice," the Tax Court in *Branerton* refused to require the IRS to respond to extensive formal written interrogatories propounded by the taxpayers because they had "failed to comply with the letter and spirit of the discovery rules" by first seeking the information informally.[22] The court stated that litigants must make "reasonable informal efforts to obtain needed information voluntarily."[23] The court also noted that "[t]he recently adopted discovery procedures were not intended in any way to weaken the stipulation process."[24] Over the years the Tax Court has strictly enforced *Branerton*'s mandate.[25]

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The Tax Court imposed these limitations because it was concerned that unfettered pretrial discovery would tilt the playing field too far in favor of the IRS, which already has the opportunity to develop the facts supporting its position during audit. As the Tax Court explained in *Westreco, Inc.:*

> It was recognized that the Government had the most to gain by adoption of discovery rules. ... The parties' knowledge of the facts in a Tax Court case is noticeably different from the access to facts generally in other Courts. In the District Court, the "field" is circumscribed when the complaint and answer are filed. Discovery under the [FRCP] are very broad and afford both parties the opportunity to discover the facts of their adversaries.
>
> The "field" in a Tax Court proceeding is not circumscribed by the filing of the petition and answer. The "field" is first delineated when the Commissioner examines the taxpayer's tax returns. As amply demonstrated in this case, the Commissioner has substantial tools to ascertain the facts before mails a statutory notice of deficiency to the taxpayer which provides the taxpayer with a "ticket" to the Tax Court.[26]

The Tax Court was also concerned that the introduction of wide-ranging discovery, replete with its potential abuses, into its proceedings would hinder the stipulation process and, in turn, fundamentally change what once was a "relatively uncomplicated and inexpensive format" for resolving tax disputes.[27] In response to these concerns, the Tax Court "closely limited the scope of the new pretrial discovery procedures that it authorized."[28]

It is debatable whether the informal discovery process that has evolved in Tax Court practice satisfies the Tax Court's expectations in *Branerton*. The IRS typically initiates informal discovery by sending a "*Branerton* letter" to the taxpayer requesting information, documents, and/or admissions. Such requests are often very extensive. Although *Branerton* requests do not carry the weight of a formal discovery request and are not enforceable through a motion to compel, they appear very similar to formal discovery requests. The IRS often follows up on *Branerton* requests by issuing formal discovery requests seeking identical categories of information. This imposes a formal obligation upon the taxpayer to provide complete responses and prevents the taxpayer using responsive information at trial that was not disclosed during discovery. The IRS, however, must give the taxpayer a reasonable opportunity to answer informal discovery before following up with formal discovery.[29]

Nevertheless, as a general rule, formal discovery is used less extensively in the Tax Court than in the refund tribunals.[30] A notable exception is requests for admission under Tax Court Rule 90, which are used extensively in the Tax Court. In refund tribunals, requests for admission generally serve limited purposes, such as establishing evidentiary foundations for trial exhibits or noncontroversial background facts. Requests for admission are used much more extensively in the Tax Court, particularly by the IRS. Such requests must first be made informally.[31] If formal admission requests are propounded by either party, both the requests and the responses are filed with the Tax Court.[32]

Depositions in Tax Court

Before 1974, the Tax Court allowed depositions only for the limited purpose of perpetuating testimony

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when a witness was unavailable for trial. Discovery depositions were not allowed until Tax Court Rule 74, which provides for consensual depositions, was adopted in 1979. While allowing the use of depositions, the Tax Court emphasized its intention "to avoid the excessive and abusive use of discovery depositions."[33] The current version of the Tax Court Rules expresses the Tax Court's desire to limit the role of discovery depositions and rely instead on other discovery tools.[34]

The Tax Court Rules now provide for discovery depositions for parties, third parties, and experts. The availability of depositions, however, varies according to whether the witness is a party, a third party or a testifying expert.

Parties

Party witnesses may be deposed pursuant to Tax Court Rule 74, but only if all parties consent to the deposition. Either party may withhold consent for any reason.[35] Since the facts underlying tax disputes are typically within the taxpayer's control, the limits on party depositions are generally more advantageous to the taxpayer than the IRS. The IRS's inability to compel the deposition of the taxpayer effectively precludes the government from probing the taxpayer's knowledge, demeanor and credibility until trial. The taxpayer's decision whether to consent to a deposition under Tax Court Rule 74 is critical and must be carefully evaluated in each case.

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Third Parties

Like parties, third-party witnesses may be deposed pursuant to Tax Court Rule 74 if the parties consent. Nonconsensual depositions of nonparties are also available, but only under "very limited" circumstances.[36] In this regard, Tax Court Rule 75(b) states:

> The taking of a deposition of a nonparty witness under this Rule is an *extraordinary method of discovery* and may be used only where a nonparty witness can give testimony or possesses documents or things which are discoverable within the meaning of Rule 70(b) and where such testimony, documents, or things *cannot be obtained through informal consultation or communication (Rule 70(a)(1)) or by a deposition taken with consent of the parties (Rule 74)*. If such requirements are satisfied, then a deposition may be taken under this Rule, for example, where a party is a member of a partnership and an issue in the case involves an adjustment with respect to such partnership, or a party is a shareholder of an electing small business corporation ... and an issue in the case involves an adjustment with respect to such corporation. ...[37]

Tax Court Rule 75 "does not sanction 'fishing expeditions.'"[38] Rather, the party seeking a nonconsensual deposition of a third party must establish "a specific and compelling basis" for taking the deposition.[39] It must allege with a sufficient "degree of specificity ... the nature of the information sought and the grounds for the party's belief that such will be forthcoming from a particular deponent."[40] The requesting party should be "seeking *specific and precise factual information essential to that party's case*," and it cannot rely upon "an inchoate hope of uncovering some vaguely defined form of potentially useful information."[41]

Furthermore, a deposition is not available for the sole purpose of assessing a witness's veracity or credibility before trial. In *K & M La Botica Pharmacy, Inc.*, the taxpayer was unsuccessful in its effort to compel a deposition "to test the extent of [the deponent's] knowledge and his veracity with respect to the allegations he has previously made, and to determine whether he claims to know of additional information regarding the issues in this case."[42] The Tax Court reasoned that Tax Court Rule 75 "is not intended to serve as a substitute for cross-examination at trial."[43] Rather, a nonconsensual deposition "is an appropriate vehicle for obtaining particular information from the sole source where that information is likely to be found."[44]

Ultimately, the decision whether to allow a nonconsensual deposition lies in the discretion of the presiding judge.[45] In factually complex cases, such as those involving complex financial transactions or highly technical concepts, the Tax Court has given the IRS some latitude to conduct nonconsensual depositions.[46]

A corollary issue relevant to corporate taxpayers is whether current and former officers and employees are parties or nonparties. In keeping with agency principles, the presumption is that current employees and officers are parties with respect to whom the taxpayer may withhold its consent to allow a deposition under Tax Court Rule 74.[47] However, former officers and employees are considered nonparties whose depositions the IRS can seek to compel under Tax Court Rule 75.[48]

Although the Tax Court also has not specifically addressed who qualifies as a nonparty witness for

purposes of Tax Court Rule 75, it has discussed the issue in a different context. In *Fu Investment Co.*,[49] the Tax Court interpreted Model Rule of Professional Conduct 4.2, which prohibits an attorney from engaging in *ex parte* communications with a person known to be represented by counsel, to preclude the IRS from contacting a corporate taxpayer's *current* employees without consent of the taxpayer's counsel. However, it held that a taxpayer cannot prevent the IRS from directly contacting its *former* employees.[50] *Fu Investment* suggests that taxpayers may withhold consent to depositions of its current employees, but not necessarily its former employees.

> As a practical matter, however, the scope of pretrial discovery in the Tax Court is much narrower than in the refund tribunals.

Taxpayers should keep in mind that depositions are a two-way street. For example, a taxpayer might consider deposing an IRS agent regarding an aspect of the audit. IRS agents may not be excused from being deposed or testifying at trial based solely on their status as IRS agents.[51] Of course, assuming that the agent continues to be employed by the IRS, such depositions are subject to the IRS's consent, and a nonconsensual deposition is not allowed absent court authorization.[52]

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Experts

As a practical matter, expert depositions are used much less frequently in the Tax Court than in the refund tribunals. Tax Court Rule 76 provides that an expert witness may be deposed upon consent of all parties, or, as in Tax Court Rule 75, under extraordinary circumstances in the absence of such consent. The Tax Court, on its own motion, also may order expert depositions.[53]

Generally, the Tax Court will order an expert deposition only if it is satisfied that the deposition will serve one or more of the following purposes: (1) encouraging the reciprocal exchange of information between or among the parties; (2) promoting the settlement of disputed issues; (3) assisting the Tax Court in its fact-finding process; (4) facilitating the exposition of the expert's opinion where it is not readily reducible to a written report; and (5) minimizing the improper use of an expert witness at trial as an overzealous advocate.[54]

An expert deposition is limited to specific issues, such as (1) the knowledge, skill, experience, training or education that qualifies the deponent as an expert with respect to disputed issues; (2) the deponent's expert opinions; (3) any facts/data underlying the deponent's opinions; and (4) the deponent's expert analysis.[55]

Generally, an expert deposition may be used at trial just like any other deposition.[56] In addition, the Tax Court allows the proponent of the expert witness to move to have the expert's deposition transcript serve as his or her written report.[57] The Tax Court may find this option appropriate if it believes that the expert's opinions are not readily reducible to a written report.

Deposition Procedures

All depositions are subject to the general time limits prescribed in Tax Court Rule 70(a)(2) for discovery.[58] Subject to these limits, consensual depositions may occur anytime upon consent during the allowable discovery period.[59] Nonconsensual depositions must wait until a notice of trial has been issued or a judge has been assigned to the case.[60] The party seeking a deposition also must provide sufficient notice to the prospective deponent and opposing party to allow for any objections and motions to compel to be resolved before the discovery period closes.[61]

Before attempting to notice a deposition, a party must make a good-faith effort to consult with the opposing party in an effort to eliminate the need for the deposition by such means as an informal interview. If such efforts are unsuccessful, the party seeking the deposition must serve a deposition notice and a subpoena upon the deponent to compel his or her attendance.

Conclusion

There are many differences, both substantive and procedural, in litigating a tax dispute in the refund tribunals versus the Tax Court. Of these differences, the disparity in the scope of pretrial discovery is among the most important, particularly in fact-intensive cases. In their consideration of potential forums, taxpayers and their counsel should carefully consider the implications of the discovery differences described in this article upon their case.

ENDNOTES

[1] 28 USC §1346(a)(1).

[2] Generally, Tax Court decisions may be appealed to the U.S. Court of Appeals for the judicial circuit in which a taxpayer's principal office or place of business is located. Code Sec. 7482(b). The Tax Court generally follows decisions from that circuit as controlling precedent. *J.E. Golsen*, 54 TC 742, 756, Dec. 30,049 (1970), *aff'd*, CA-10, 71-2 USTC ¶9497, 445 F2d 985, *cert. denied*, 404 US 940 (1971). Federal district court decisions are appealable to the judicial circuit governing the district in which the district court is located. 28 USC §1294(1). Appeals of cases arising in the Court of Federal Claims lie in the Court of Appeals for the Federal Circuit. 28 USC §1295(a)(3).

[3] 28 USC §2402.

[4] *E.K. Rowlee*, 80 TC 1111, 1115, Dec. 40,228 (1983); *J.P McNeil*, FedCl, 2007-2 USTC ¶50,620, 78 FedCl 211, 216, note 7 (2007).

[5] *See, e.g.*, *Grissom v. Ingles Mkts., Inc.*, No. 3:07-CV-60, 2008 U.S. Dist. LEXIS 77580, at *2 (D. Tenn. Oct. 2, 2008) ("The scope of discovery under the [FRCP] is traditionally quite broad."); *see also Ratliff v. Davis Polk & Wardwell*, CA-2, 354 F3d 165, 170 (2003) (noting that discovery rules "are accorded broad and liberal treatment"); *Osage Tribe of Indians*, 84 FedCl 495, 497 (2008) (discussing broad scope of RCFC 26).

[6] Fed. R. Civ. P. 26(b)(1).

[7] *See* Fed. R. Civ. P. 26(b)(2); *e.g.*, D. Md. R. 104(1) (limiting parties to a total of 30 requests for production of documents).

[8] Fed. R. Civ. P. 30(a)(1),(2).

[9] Fed. R. Civ. P. 30(a)(2).

[10] Fed. R. Civ. P. 30(d)(1).

[11] Fed. R. Civ. P. 30(b)(6).

[12] *See* RCFC 26 *and* 30; *see also* RCFC App. A (describing case management and discovery procedures).

[13] *Int'l Paper Co.*, FedCl, 96-2 USTC ¶50,686, 36 FedCl 313, 317 (1996) ("[W]e are similarly mindful of the generally broad scope of discovery in this court. ...") (citing RCFC 26(c)).

[14] *See Capital Props.*, 49 FedCl 607, 611 (2001) (citing RCFC 30(a)).

[15] *Westreco, Inc.*, 60 TCM 824, 833, Dec. 46,882(M), TC Memo. 1990-501 (1990) (citing *G.D. Brooks*, 82 TC 413, 429, Dec. 41,043 (1984)).

[16] *Id.*

[17] *M.K. Ash*, 96 TC 459, 463, Dec. 47,221 (1991) (citing *Penn-Field Indus., Inc.*, 74 TC 720, 722, Dec. 37,076 (1980)).

[18] *Id.* (emphasis added).

[19] Tax Ct. R. 91(a)(1) (emphasis added). If a party refuses to stipulate to a fact, the opposing party may move for "an order directing the delinquent party to show cause why the matters covered [by the proposed stipulation] should not be deemed admitted for the purposes of the case." Tax Ct. R. 91(f)(1).

[20] Tax Ct. R. 70(a)(1).

[21] *Branerton Corp.*, 61 TC 691, 691–92, Dec. 32,479 (1974). Before 1974, discovery was not allowed in the Tax Court or the predecessor Board of Tax Appeals. *Westreco, supra* note 15, at 833.

[22] *Branerton, supra,* at 692.

[23] *Id.*

[24] *Id.*

[25] *See, e.g.*, *R.C. Curci*, 90 TCM 528, 529–30, Dec. 56,206(M), TC Memo. 2005-273 (2005) (dismissing case where taxpayer failed to comply with informal discovery requests); *Schneider Interests, L.P.*, 119 TC 151, 156, Dec. 54,892 (2002) (issuing protective order for taxpayer in response to IRS's formal discovery—which was served without prior conference between parties—and criticizing IRS for failing to "fully appreciate the importance of our *Branerton* opinion"); *W. Harper*, 99 TC 533, 546–47, Dec. 48,610 (1992) (dismissing petition and issuing sanctions against petitioner's counsel, who acted in bad faith in case that was "replete with pretrial discovery issues"). *See also Boso*, 69 TCM 2711, 2712, Dec. 50,658(M), TC Memo. 1995-228 (1995) (concluding that *Branerton* contemplates "discussion, deliberation, and an interchange of ideas, thoughts, and opinions between the parties," not merely exchanging lists of requested information by mail) (citations and quotations omitted).

[26] *Westreco, supra* note 15, at 833.

[27] *Id.*

[28] *Id.*

[29] *See Schneider Interests*, *supra* note 25, at 152, 156 (concluding that IRS acted improperly by issuing 68 pages of informal interrogatories and document requests, then formally serving, just one month later, 77 pages of interrogatories and 78 pages of document requests).

[30] *See* Mertens, LAW OF FED. INCOME TAX'N, at §50:16 (noting "inescapable conclusion that permissible discovery is broader ... and may be used more frequently in the two tax refund forums than in the Tax Court"); Kafka, FED. CIV. TAX CONTROVERSIES, at ¶1.08[1] ("Consistent with [the mandatory stipulation process] of the Tax Court, traditionally, the district counsel's office has followed a restrictive policy in the use of discovery on behalf of the Commissioner in deficiency litigation").

[31] *See F. Odend'hal, Jr.*, 75 TC 400, 403, Dec. 37,471 (1980) (noting that amendment to Tax Court Rule 90(a) merely amplifies Tax Court's mandate for informal discovery).

[32] Tax Ct. R. 90(b),(c).

[33] Official Note to Tax Ct. R. 74, 1 TC 1177, 1194–95 (1979); *see D.W. Van Loben Sels Est.*, 82 TC 64, 67–68, Dec. 40,916 (1984).

[34] *See* Tax Ct. R. 70(a) ("*Discovery is not available under these Rules through depositions* except to the limited extent provided in Rules 74, 75, and 76") (emphasis added).

[35] *N. DeLucia*, 87 TC 804, 811, Dec. 43,439 (1986) (denying deposition where deponent "still is a party in the instant case, [so] the literal language of Rule 75 precludes the application of that rule" to him).

[36] *Id.*, at 810.

[37] Tax Ct. R. 75(b) (emphasis added).

[38] *K & M La Botica Pharmacy, Inc.*, 81 TCM 1147, 1148, Dec. 54,240(M), TC Memo. 2001-33 (2001).

[39] *Id.*

[40] *Id.*, at 1148–49.

[41] *Id.*, at 1148 (emphasis added).

[42] *Id.*

[43] *Id.; see also DeLucia*, *supra* note 35, at 813 (rejecting deposition where purpose would have been simply to obtain testimony before trial or otherwise to organize trial presentation).

[44] *K & M La Botica*, *supra* note 38, at 1148.

[45] *See, e.g.*, *A.N. Brunwasser*, 51 TCM 1011, 1013, Dec. 43,053(M), TC Memo. 1986-196 (1986) (exercising discretion to deny petitioner's deposition requests).

[46] *See, e.g.*, *Ash*, *supra* note 17, at 479–81 (concurring op.) (urging Tax Court to be more liberal in granting leave to take non-party depositions in large cases); *R.B. Ripley*, 50 TCM 1391, 1395, Dec. 42,472(M), TC Memo. 1985-555 (1985) (allowing non-consensual deposition where deponent possessed information regarding petitioners' bank accounts, which petitioner established could not be otherwise obtained).

[47] *See* Mertens, *supra* note 30, at §50:105 ("A corporate party, however, is entitled to withhold its consent to allow the deposition of an employee"); *see also Westreco*, *supra* note 15, at 833–35 (limiting IRS's use of summonses to undermine Tax Court's discovery rules, and noting that because taxpayer cannot summons IRS employees without consent pursuant to Tax Court Rule 74, the IRS should be similarly limited).

[48] The only IRS guidance on this issue is a 1988 litigation guideline memorandum concluding that corporate officers, directors, managing agents and other employees or persons designated by the corporate party to testify on its behalf would be considered "party witnesses" for purposes of the Tax Court's discovery rules and thus outside the scope of Tax Court Rule 75. The memorandum states that corporate employees who are not officers, directors, or managing agents and who are not designated nor consent to testify on behalf of the corporation will not be considered "party witnesses" in which case their depositions could be

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Endnotes

compelled. *See* 1988 LGM TL-31, 1988 WL 898136 (Jan. 22, 1988).

[49] *Fu Investment Co.*, 104 TC 408, 412, Dec. 50,563 (1995).

[50] *Id.*, at 413–15.

[51] 1988 LGM TL-33, 1988 WL 898138 (Jan. 22, 1988); *see Blair v. Osterlein Mach. Co.*, SCt, 272 US 220, 227 (1927). *See also* Mertens, *supra* note 30, at §50:106 (noting that IRS agents may be summoned to give expert testimony, if they "possess[ ] knowledge sufficient to render an opinion on a material item") (citing *F.J. Shippen*, CA-5, 60-1 USTC ¶9263, 274 F2d 860, 863 (1960)).

[52] The IRS has taken the position that Appeals Officers and their managers are nonparty witnesses for purposes of Tax Court Rule 75, and as such, any requests by taxpayers to depose them should be opposed. *See* Chief Counsel Notice 2003-016 (May 29, 2003); *see also Andrew Crispo Gallery, Inc.*, 63 TCM 2152, 2157, Dec. 48,021(M), TC Memo. 1992-106 (1992), *vac'd on other grounds*, CA-2, 94-1 USTC ¶50,097, 16 F3d 1336 (1994) (refusing to compel deposition of IRS agent who audited taxpayer's tax returns, as agent was nonparty witness subject to Tax Court Rule 75).

[53] Tax Ct. R. 76(f).

[54] Official Note to Tax Ct. R. 76, 93 TC 821, 912 (1989).

[55] Tax Ct. R. 76(c).

[56] Tax Ct. R. 76(e)(2); *see also* Tax Ct. R. 81(i) (governing use of depositions at trial). Though the Tax Court Rules discuss the usage and admissibility of depositions, it is worth noting that the FRCP are still persuasive with respect to these issues, as well. *See* Tax Ct. R. 1(b).

[57] Tax Ct. R. 76(e)(1). It should be noted, though, that the taking of an expert deposition has no impact on the deadlines for lodging expert reports. *Id.*

[58] Generally, all discovery must be completed by 45 days before the calendar call of the case. Tax Ct. R. 70(a)(2).

[59] Tax Ct. R. 74(a).

[60] Tax Ct. R. 75(a).

[61] Tax Ct. R. 70(a)(2).

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