# Requests for Admission in Federal Tax Litigation: Uses, Limitations, Rules, and Strategic Considerations

*By Alex E. Sadler**

Alex E. Sadler reviews the key uses of requests for admission, applicable limitations on their use, the rules governing admission requests, procedural differences between the Tax Court and the refund tribunals, and strategic considerations.

## Introduction

Requests for admission are likely the least utilized discovery tools in Federal tax litigation. In some respects, admission requests are not discovery mechanisms at all since their principal purpose is to narrow the facts and issues in dispute rather than to elicit new information. Still, requests for admission serve several important functions, and their potential uses should be considered in most tax cases. To assist practitioners, this article reviews the key uses of requests for admission, applicable limitations on their use, the rules governing admission requests, procedural differences between the Tax Court and the refund tribunals, and strategic considerations. The discussion is based on the pertinent rules of procedure and a comprehensive review of the decisions of the Federal courts of appeal and district courts, Court of Federal Claims, and Tax Court.

## Uses

The principal function of requests for admission is "to eliminate issues over facts that are not in dispute, and to narrow issues to be tried before the court."[1] One court has explained: "The quintessential function of Requests for Admissions is to allow for the narrowing of issues, to permit facilitation in presenting cases to the factfinder and, at a minimum, to provide notification as to those facts, or opinions, that remain in dispute."[2] Similarly, the Tax Court has stated: "The point of admissions is to avoid wasting the fact finder's time with issues that the parties can resolve on their own."[3]

To achieve this objective, "a request may ask a party to admit (1) that a fact is true, (2) that the party holds a certain opinion about a fact, (3) that a certain application of law to a factual situation is correct, or (4) that the party holds a certain opinion about the application of law to a certain factual situation."[4] Litigants are allowed "to request admissions as to a broad range of matters, including ultimate facts, as well as applications of law to fact."[5]

The range of permissible admission requests is thus very broad. A party may use requests for admission to establish noncontroversial background facts, the opposing party's contentions and theories regarding the facts and issues, detailed technical and scientific matters, the admissibility, contents, and interpretation of documentary evidence, the central or ultimate issues to be decided in a case, and other matters.

Representative examples of admission requests in Federal tax cases include:

- Request by the government for the taxpayer to admit that at no time during a period of time did a subchapter S corporation own 100 percent of a qualified subchapter S subsidiary, or "QSub," a fact that was dispositive of the taxpayers' claimed tax treatment of a transaction;[6]

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- Request by the government that the proof of claim filed by the IRS in the taxpayer's bankruptcy proceeding accurately described his tax liability;[7]
- Requests by the government that a property conveyance rendered the taxpayer insolvent,[8] and that "[t]he transfer of an uncollateralized loan to [the taxpayer] rendered [a company in which the taxpayer held an interest] unable to pay its tax liabilities";[9]
- Requests by the government that the taxpayer was liable for the asserted taxes, that he knew such taxes were due and owing, that various transfers left him insolvent, and that the transfers were sham conveyances without consideration;[10]
- Requests by the government that a tax return preparer was responsible for determining whether the information on a return was true, and that he had never fired or disciplined an employee for preparing a false return;[11]
- Request by the government that the taxpayer paid creditors of corporations at a time when the taxpayer knew he was a responsible person and that the corporations were indebted to the IRS for withheld employment taxes;[12]
- Requests by the taxpayer for the government to admit the authenticity of the transaction documents for a disputed tax shelter transaction;[13]
- Requests by the taxpayer that a will created a valid marital trust that complied with the conditions set forth in a revenue procedure for the allowance of a marital deduction;[14]
- Requests by the taxpayer that the insurance policies at issue had received all state regulatory approvals necessary to insure the taxpayer's employees;[15]
- Requests by the taxpayers that they cooperated with the IRS during the audit, did not fail to comply with recordkeeping requirements, the IRS made no discovery requests during the audit, and the taxpayer filed a timely refund claim;[16] and
- Requests by the taxpayer that IRS advice memoranda were genuine and to establish the status of regulations authorized by statute but not yet promulgated by the IRS.[17]

Another use of admission requests is to establish evidentiary foundations for documentary evidence, which can be particularly valuable in document-intensive cases. "Requests for admission relating to the genuineness of documents can be particularly useful in helping parties determine which documents that are to be introduced at trial will present foundational problems and which will not."[18] For example, requests might be used to obtain admissions that attached documents are true and accurate reproductions of genuine originals and that they are records of regularly conducted activity (*i.e.*, a business record) under Federal Rule of Evidence 403(5). If the matters are admitted, the evidentiary foundations have been established, saving considerable time and effort at trial. If the matters are denied, the requesting party knows that at trial it must put on proof to establish the document's authenticity or satisfaction of the business records hearsay exception, or both.

Depending on the particular case, requests for admission can serve other purposes as well, such as strategically to set up a summary judgment motion,[19] to develop stipulations of fact,[20] or to clarify the opposing party's theories and contentions.[21]

## Limitations

While admission requests serve important purposes, they are not appropriate for every situation. Admission requests were not designed and are not well suited to discover the existence of facts, elicit new information, obtain production of documents, or evaluate the credibility of a witness. Other discovery tools such as interrogatories, document requests, and depositions should be used for these purposes.[22]

Courts have also placed boundaries on the use of admission requests. A request may not ask for the admission of an abstract legal proposition or a pure conclusion of law unrelated to the facts of a case.[23] For example, while a request to admit that "ABC Corporation is thinly capitalized" is appropriate, a request to admit that "a company is thinly capitalized when its debts account for such a large proportion of its capital structure that the amount of its equity capital is negligible or negative" calls for an abstract legal conclusion and is improper.[24] Similarly, requests for admissions relating to the application of law to hypothetical facts, as opposed to the actual facts at issue, effectively seek a legal conclusion and thus are impermissible.[25] "In short, hypothetical legal questions are not within the purview of" the rules.[26]

An admission request that "seeks an admission that is irrelevant to the case being tried" is objectionable.[27] For example, in *Amergen Energy Co.*, the Court of Federal Claims held that a taxpayer's admission requests relating to private letter rulings the IRS had issued to other taxpayers were objectionable because such administrative determinations are generally ir-

relevant and inadmissible in a refund suit.[28] Similarly, in *Vons Co.*, the Court of Federal Claims held that the taxpayer's admission requests concerning the authenticity of IRS technical advice memoranda, which have no precedential value in refund suit litigation, were improper and objectionable.[29] In *Xcel Energy, Inc.*, the district court found requests concerning the IRS's treatment of unrelated third-party taxpayers to be irrelevant and objectionable.[30]

An admission request may not seek information that is protected by an applicable privilege. For example, an admission request may not seek to determine what evidence the opposing party intends to introduce at trial, which is protected from disclosure under the work product doctrine.[31] An admission request seeking tax return information protected from disclosure under the confidentiality provisions of section 6103 of the Internal Revenue Code is similarly objectionable.[32]

Admission requests may not be overly burdensome, unreasonably cumulative, or duplicative.[33] For example, it is considered unduly burdensome and an abuse of the judicial process for a party to simply re-serve its complaint or petition, as the case may be, in the form of admission requests in order to require the respondent to admit or deny matters that have already been answered.[34] It has been found to be duplicative to request admissions concerning the genuineness of quotes from documents the authenticity of which had already been admitted[35] or that a witness testified to certain information at a deposition.[36]

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In Tax Court, it is objectionable for a party to issue admission requests, particularly if they are voluminous, without first trying to establish the matters through informal discussion and consultation.[37]

A party is not required to admit or deny requests for admission containing vague and ambiguous wording.[38] Rather, it is incumbent on the requesting party to draft admission requests that are clear, direct, and limited to singular relevant facts so that the responding party can easily agree or disagree.

A party is not required to admit the truth of facts that are exclusively within the knowledge of the requesting party because the ascertainment of the truth or falsity of the facts is not reasonably within the answering party's power.[39]

## Procedural Rules

The rules governing requests for admission are set forth in Rule 36 of the Federal Rules of Civil Procedure (FRCP) and Rules of the Court of Federal Claims (RCFC) and Rule 90 of the Tax Court's Rules of Practice and Procedure. For refund suits filed in Federal district court, the local rules must also be reviewed to identify additional requirements such as limitations on the number of admission requests.

### Requests

A party may serve upon another party a written request to admit for purposes of the pending action the truth of any discoverable matter relating to facts, the application of law to fact, or opinions about either and the genuineness of documents. Each matter must be separately stated. Requests to admit the genuineness of a document must attach a copy of the document unless it has been previously made available to the answering party.[40]

In Federal district courts and the Court of Federal Claims, requests for admission may not be served until the parties have met and conferred to develop a discovery plan.[41] In the Tax Court, requests may not be served before the expiration of thirty days after "joinder of issue," which typically is when the Commissioner files his or her answer, and must be completed no later than forty-five days prior to the date set for the call of the case from a trial calendar.[42]

As noted above, the party propounding an admission request has an obligation to make the request clear, concise, and understandable. Any ambiguity in the wording of a request is construed against the issuing party.[43]

### Responses

The party to whom the request is directed must serve a written answer or objection signed by the party or the party's attorney within 30 days after service. A shorter or longer time may be stipulated by the parties or ordered by the court.[44] That other forms of discovery, such as interrogatories or deposition questioning, address the same subjects of the admission requests does not obviate the requirement that admission requests be answered within 30 days.[45]

An answer must admit the matter, specifically deny the matter, or state in detail why the answering party cannot truthfully admit or deny the matter. A denial must fairly respond to the substance of the matter. When good faith requires that a party qualify an admission or deny only part of a matter, the answer must specify the part admitted and qualify or deny the rest. The rule thus "expressly sets forth a good faith requirement when the responding party qualifies an answer or denial to a request for admission."[46] A qualification "must be both clear and advanced in good faith,"[47] and a party should not "undermine the efficacy of the rule by creating disingenuous, hair-splitting distinctions whose unarticulated goal is unfairly to burden an opposing party."[48]

The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made a reasonable inquiry and that the information readily obtainable is insufficient to allow it to admit or deny.[49] A response is inadequate "if the answering party has not, in fact, made 'reasonable inquiry,' or if information 'readily obtainable' is sufficient to enable him to admit or deny the matter."[50] A reasonable inquiry includes investigating documents and persons readily available and within the responding party's control.[51] It may also encompass inquiry of a third party that is friendly to and shares interests with the responding party.[52]

An objection must state the grounds. It is improper to object solely on the ground that the request presents a genuine issue for trial.[53] The Tax Court's rules specifically provide that an objection on the basis of relevancy may be noted, but asserted lack of relevancy is not to be regarded as just cause for refusal to admit or deny.[54]

## Motion To Review Sufficiency of Responses

A requesting party may file a motion requesting the court to determine the sufficiency of answers or objections. If the court finds that an objection is unjustified, it must order an answer to be served. Upon finding that an answer is noncompliant, the court may either order that an amended answer be served or that the matter at issue is deemed admitted. A third option available to the court is to defer its final decision until a specified time before trial.[55]

Courts have "significant discretion in choosing the appropriate remedy" where an answer is found to be improper.[56] In general, where an admission request has been answered, courts are reluctant to deem the matter admitted absent a finding that the responding party did not act in good faith, such as where facts sufficient to admit the matter are readily available or where the responding party has been evasive and uncooperative.[57] More typically, if a response is deficient, courts will order the responding party to serve a supplemental answer.[58] Other courts have awarded sanctions to the requesting party where the requested matter was proven at trial and the responding party was unjustified in refusing to admit the matter.[59]

The Tax Court's rules specifically provide that if a party unjustifiably fails to admit a matter, the requesting party may apply for sanctions on the other party or other party's counsel.[60] A refusal to admit may be found unjustifiable unless the Tax Court finds that the request was objectionable, the admission sought was of no substantial importance, the answering party had a reasonable ground to doubt the matter, or there was other good cause for the failure to admit.[61]

## Effect of an Admission

An admitted matter is treated as a "judicial admission" that conclusively establishes the matter for purposes of the pending case unless the court on motion permits the admission to be withdrawn or amended. "When a party in a lawsuit makes an admission in its pleadings or in its answer to a request for admissions, it makes a judicial admission that can determine the outcome of that lawsuit."[62] Judicial admissions are "formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them. They may not be controverted at trial or on appeal."[63] A party that admits a matter may not attempt to introduce evidence refuting its admission.[64]

An admission, however, is conclusive for purposes of the pending action only. It is not an admission for any other purpose, nor may it be used against the admitting party in any other proceeding.[65]

## Effect of Noncompliance

A party who fails to respond to an admission request is deemed to have admitted the subject matter of the request.[66] No motion to establish the admission is necessary because the rules are self-executing.[67] Deemed admissions "render the matter requested conclusively established for the purpose of that suit."[68] As is the case with an explicit admission, a party cannot overcome a deemed admission by offering conflicting affidavits, depositions, or other evidence.[69] Citing the need for parties to comply with the procedural

rules and the availability of a motion to withdraw or amend admissions, courts have frequently entered summary judgment on the basis of deemed or default admissions.[70] The only exception to this general rule is that some courts have shown reluctance to enter summary judgment against a *pro se* taxpayer solely on the basis of default admissions, especially where the taxpayer was unaware of the effect of failing to respond to the admission requests.[71]

Evasive, incomplete, or nonresponsive answers to admission requests also may result in the subject matter of the request being deemed admitted.[72] Such answers may also result in attorney's fees being imposed on the answering party.

In this regard, Rule 37(c)(2) of the FRCP and RCFC provides that if a party fails to admit what is requested and if the requesting party later proves a document to be genuine or the requested matter to be true, the requesting party may move for the party who failed to admit to pay the requesting party's reasonable attorney's fees in making the proof. Such a motion must be allowed unless the court finds that the request was objectionable, the admission was of no substantial importance, the party failing to admit had reasonable grounds that it might prevail on the matter, or there was other good reason for the failure to admit.[73]

Similarly, Rule 90(f) of the Tax Court's rules provide that a party's or counsel's signature constitutes a certification that a request or a denial is consistent with the Tax Court's rules, warranted by existing law or good faith argument for a departure from existing law, not interposed for an improper purpose such as to cause unnecessary delay, and not unreasonable or unduly burdensome or expensive given the needs of the case, the discovery already taken, the amount in controversy, and the importance of the issues at stake in the litigation.[74] If a certification violates this rule, the Tax Court may on motion or its own initiative impose an appropriate sanction, including an order to pay the attorney's fees and other costs incurred because of the violation.[75]

## Ability to Withdraw or Amend an Admission

A court may permit a party to withdraw or modify an admission or deemed admission if it would promote the presentation of the merits of the case and the withdrawal or amendment will not prejudice the requesting party in maintaining or defending the action on the merits.[76] This two-part standard "emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice."[77] Such a motion is the only proper procedural mechanism for withdrawing an explicit or deemed admission.[78]

Whether to allow a withdrawal or amendment is entrusted to the discretion of the trial court and will be overturned only for abuse of such discretion.[79] However, trial courts must "be cautious in exercising their discretion to permit withdrawal or amendment of an admission,"[80] and must exercise their discretion within the parameters of the two-part test set forth in the rules.[81] The Tax Court has observed that the benefits of admission requests would be lost if parties were free to withdraw admissions that their opponents had properly obtained in an effort to advance litigation.[82]

The burden is on the party that made the admission to show that withdrawal or amendment of the admission would promote the presentation of the merits.[83] That withdrawal would require trial of the facts at issue is insufficient to meet this burden. Rather, the standard is met if "the admission is contrary to the record of the case,"[84] or when "upholding the admissions would practically eliminate any presentation of the merits of the case."[85] "The court may allow amendment or withdrawal of an admission when an admission is no longer true because of changed circumstances or when through an honest error a party has made an improvident admission."[86] However, this requirement is not satisfied where a party fails to provide any evidence contrary to the admission.[87]

The party who obtained the admission has the burden of proving that withdrawal of the admission would prejudice its case.[88] The prejudice contemplated is "not simply that the party who obtained the admission will have to convince the factfinder of its truth."[89] Rather, the prejudice prong "relates to the difficulty a party may face in proving its case" with respect to the matters previously admitted or deemed admitted.[90] Prejudice may occur where a party faces "special difficulties . . . caused by a sudden need to obtain evidence upon withdrawal or amendment of an admission."[91] The Tax Court has expressed a somewhat more lenient standard, stating that a party is prejudiced by withdrawal of admissions "if he has relied on them and will suffer delay, added expense, and additional effort because of the withdrawal."[92] Prejudice has been found where the defendants initially admitted liability, gave the plaintiffs a false sense that the liability issue had been settled, caused the

plaintiffs to cancel scheduled depositions, and then recanted the admissions.[93] It has also been found where withdrawal would require the government to depose an unwilling and uncooperative witness,[94] where a party relied on the admissions in preparing for trial,[95] where the defaulting party had been uncooperative throughout discovery,[96] and where a party relied on deemed admissions to prepare a summary judgment motion.[97]

Once trial has begun, courts apply a more restrictive standard to determine whether to allow a party to withdraw an admission.[98] Not surprisingly, courts "are more likely to find prejudice when the motion for withdrawal is made in the middle of trial."[99]

## Procedural Differences between the Tax Court and Refund Tribunals

While the procedures governing admission requests are largely similar in the Tax Court and refund tribunals, there are a handful of notable differences. Perhaps the most significant difference is the expectation memorialized in Tax Court Rule 90(a) that the parties "attempt to attain the objectives of [an admission] request through informal consultation or communication before utilizing the procedures provided in this Rule."[100] In *Odend'hal*,[101] the Tax Court held that the principles of the seminal case *Branerton Corp.*[102] applied to requests for admission and, accordingly, litigants are required to pursue the objectives of Rule 90 through informal consultation and communication before resorting to the rule's compulsory procedures.[103] Such consultation and communication "connote discussion, deliberation, and an interchange of ideas, thoughts, and opinions between the parties."[104] The Tax Court has admonished that "[i]n order to meet *Branerton* requirements of informal discovery, more is required of petitioners than the exchange by mail of lists of requested information."[105]

A second important procedural difference is that the Tax Court views admission requests as more of an aid to the stipulation process than a discovery device. Whereas Rule 36 of the FRCP and RCFC is contained in the "discovery and disclosures" title of those rules, Tax Court Rule 90 is contained in the "admissions and stipulations" title. This reflects the importance that the Tax Court places on stipulations, which the court has referred to as "the bedrock of Tax Court practice."[106]

The Tax Court's rules contain several ancillary requirements to ensure that admission requests achieve their ultimate objective of facilitating the stipulation process. In Tax Court, the requesting party must serve a copy of the admission requests and file the original requests with the court.[107] This differs from refund litigation practice in which admission requests are not filed except as part of a subsequent motion. Furthermore, the Tax Court's rules specifically provide that an objection on the basis of relevancy may be noted, but alleged lack of relevancy is not to be regarded as just cause for refusal to admit or deny.[108] Finally, as noted above, the Tax Court's rules provide that a party's or counsel's signature constitutes a certification that a request or a denial is made in good faith and supported by a reasonable basis.[109]

# Strategic Considerations

Admission requests are too often overlooked in Federal tax litigation. At the outset of the discovery process of any tax case, litigants should consider the potential uses of admission requests. Those uses include but are not necessarily limited to establishing background information and other noncontroversial matters, establishing the authenticity and evidentiary foundations of documentary evidence, setting up the factual predicates for a summary judgment motion, and obtaining concessions that can be presented with persuasive impact (such as by reading the admissions to a jury at an appropriate juncture) during trial.

The thoughtful use of admission requests offers many benefits to litigants. Admissions can clarify and simplify the issues in a case, thereby reducing the time and expense of litigation and allowing the parties to focus their attention on the real issues in dispute. In some instances, an admission might dispose of an entire case or issues in a case. Where triable issues remain, admissions can narrow the scope of trial. Admissions can establish the admissibility of documents, eliminating or reducing the need to go through the cumbersome process of laying evidentiary foundations for every exhibit. Admission requests can provide a party with leverage in the stipulation process if the opposing party is not cooperating. Admissions might provide a key concession that a party can highlight in briefs and at trial and oral arguments.

Requests for admission are generally not well suited to elicit new information or to evaluate the credibility of witnesses and, accordingly, should not be viewed as substitutes for interrogatories, document requests, and depositions. Nevertheless, admission requests can serve valuable discovery-related functions, such as clarifying and confirming concessions made in other discovery responses and filling in holes in interrogatory

and deposition responses. A party may also couple admission requests with an interrogatory asking for an explanation of any denials, which tends to effectively elicit the opposing party's theories and contentions.

A party employing admission requests should be mindful of the limitations on their use, as well as the procedural requirements governing their use and enforcing compliance with the rules.

## ENDNOTES

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1 *AmerGen Energy Co., LLC*, FedCl, 2010-2 USTC ¶50,600, 94 FedCl 413.

2 *Lakehead Pipe Line Co. v. Am. Home Assurance Co.*, 177 FRD 454, 457-58 (D. Minn. 1997); *see also Asea, Inc. v. S. Pac. Transp. Co.*, CA-9, 669 F2d 1242, 1245 (1981) ("The purpose of Rule 36(a) is to expedite trial by establishing certain material facts as true and thus narrowing the range of issues for trial.").

3 *M. Hersch*, 63 TCM 2763, Dec. 48,154(M), TC Memo. 1992-222.

4 *Id.*

5 *In re Carney*, CA-5, 258 F3d 415, 419 (2001); *see also Presidio Advisors, LLC*, FedCl, 2011-2 USTC ¶50,662, 101 FedCl 393; *W.R. Allensworth, Est.*, 66 TC 33, Dec. 33,752, 37-38 (1976).

6 *Presidio Advisors, supra* note 5.

7 *In re Carney, supra* note 5, 258 F3d, at 416.

8 *Karras v. Karras*, CA-8, 16 F3d 245, 247 (1994).

9 *Hersch, supra* note 3, 63 TCM, at 2764.

10 *Kasuboski*, CA-7, 834 F2d 1345, 1348 (1987).

11 *N. Sonibare*, DC-MN, 2007-1 USTC ¶50,353, 504 FSupp2d 566, 570, 572.

12 *N.A. Attick, Jr.*, DC-CT, 95-2 USTC ¶50,640, 904 FSupp 77, 81.

13 *JZ Buckingham Investments LLC*, 77 FedCl 37, 39 (2007).

14 *W.R. Allensworth, Jr., supra* note 5, at 35 n.2 & 36 n.3.

15 *Xcel Energy, Inc.*, 237 FRD 416, 422 (D. Minn. 2006).

16 *Manship Est.*, 232 FRD 552, 556 n.5 (M.D. La. 2005).

17 *Vons Cos.*, FedCl, 2002-1 USTC ¶50,158, 51 FedCl 1.

18 Moore's Federal Practice 3d ¶36.10[9]; *see also JZ Buckingham, supra* note 13, 77 FedCl, at 45 ("Pursuant to the rule, therefore, the propounding party can indeed request admission as to the genuineness or authenticity of documents.").

19 Presidio Advisors, *supra* note 5 ("It is well-established that such admissions can form 'the factual predicate for summary judgment.'"); *In re Carney, supra* note 5, 258 F3d, at 420 n.6 ("Various federal courts from around the country have relied on default admissions to support a grant of summary judgment.").

20 Moore's Federal Practice 3d ¶36.02[2] (suggesting that requests for admission be served before negotiating stipulations to determine what matters the opposing party is ready to admit).

21 *W.R. Allensworth, Jr., supra* note 5, 66 TC, at 35-36 (finding admission requests seeking the government's theories of the case to be proper).

22 Moore's Federal Practice 3d ¶36.02[2] ("[R]esorting to requests for admission should not be considered a substitute for other discovery tools, if other tools are necessary to elicit facts, establish information, or obtain documents."); see also Lakehead Pipe Line Co., 177 FRD, at 458 ("Requests for Admission are not a discovery device.").

23 *W.R. Allensworth, Jr., supra* note 5, 66 TC, at 38 ("These requests do not call for the expression of abstract principles of law, which may not be the subject of requested admissions."); *see also R. Dickerson, Est.*, 189 FSupp2d 622, 625-26 (W.D Tex. 2001); *Playboy Enterprises, Inc. v. Welles*, 60 FSupp2d 1050, 1057 (S.D. Cal. 1999); *Lakehead Pipe Line Co.*, 177 FRD, at 458; Vons Cos., 51 FedCl at 13.

24 *Hersch, supra* note 3, 63 TCM, at 2765.

25 *Abbott*, 177 FRD 92, 93 (N.D.N.Y. 1997) ("The defect of this request is plain—plaintiffs have attempted to have the Government respond to a legal question unconnected to the facts of the case at bar.").

26 *Vons Cos., supra* note 17, 51 FedCl, at 13.

27 *Amergen, supra* note 1, 94 FedCl, at 416; *see also Cederloff, Est.*, No. DKC 08-2863, 2010 WL 157512, at *2 (D. Md. Jan. 13, 2010) (denying motion to compel admission where requests were "wholly irrelevant" to the case).

28 *Amergen, supra* note 1, 94 FedCl, at 423-24.

29 *Vons Cos., supra* note 17, 51 FedCl, at 13.

30 *Xcel Energy*, supra note 15, 237 FRD, at 423; *see also Schiefen*, 926 FSupp. 877, 883 (D.S.D. 1995) (striking as patently frivolous requests for the government to admit "[t]hat the fringed flag in the United States District Court for the District of South Dakota Southern Division means it is not a Art III court" and "[t]hat all federal judges are unregistered foreign agents").

31 *Howell v. Maytag*, 168 FRD 502, 504 (M.D. Pa. 1996).

32 *Vons Cos., supra* note 17, 51 FedCl, at 15-19.

33 *Hersch, supra* note 3, 63 TCM, at 2765; *Vons Cos., supra* note 17, 51 FedCl, at 14.

34 *Perez v. Miami-Dade County*, 297 F3d 1255, 1268-69 (11th Cir. 2002).

35 *Van Wagenen v. Consol. Rail Corp.*, 170 FRD 86, 87 (N.D.N.Y. 1997).

36 *Caruso v. Coleman Co.*, No. 93-CV-6733, 1995 WL 347003, at *2 (E.D. Pa. 1995).

37 Tax Ct. R. 90(a); *see also Odend'hal*, 75 TC 400, Dec. 37,471, at 404 (1980); *J.H. Boso*, 69 TCM 2711, TC Memo. 1995-228, Dec. 50,658(M).

38 *Dubin v. E.F. Hutton Group, Inc.*, 125 FRD 372, 375-76 (S.D.N.Y. 1989).

39 *Boso, supra* note 37, at 2713-14; see also *Herrera v. Scully*, 143 FRD 545, 551 (S.D.N.Y. 1992).

40 FRCP 36(a)(1); RCFC 36(a)(1); Tax Ct. R. 90(a), (b).

41 FRCP 26(d)(1); RCFC 26(d)(1).

42 Tax Ct. R. 90(a).

43 *Talley v. United States*, 990 F2d 695, 699 (1st Cir. 1993) ("To the extent that the request is ambiguous, that ambiguity is to be construed against [the plaintiff] (whose lawyer drafted the request)."); see also *Long v. Howard Univ.*, 561 FSupp. 2d 85, 94-96 (D.D.C. 2008) (declining to impose sanctions where request "used very broad and ambiguous language").

44 FRCP 36(a)(2); RCFC 36(a)(2); Tax Ct. R. 90(c).

45 *Kasuboski, supra note 10*, 834 F2d, at 1349.

46 *JZ Buckingham, supra* note 13, 77 FedCl, at 45.

47 *Xcel Energy, supra* note 15, 237 FRD, at 422.

48 *Thalheim v. Eberheim*, 124 FRD 34, 35 (D. Conn. 1988).

49 FRCP 36(a)(3); RCFC 36(a)(3); Tax Ct. R. 90(c).

50 *Asea, Inc., supra* note 2, 669 F2d, at 1247.

51 *JZ Buckingham, supra* note 13, 77 FedCl, at 47; *T. Rowe Price Small-Cap Fund, Inc. v. Oppenheimer & Co.*, 174 FRD 38, 43 (S.D.N.Y. 1997); *United States v. Taylor*, 166 FRD 356, 363-64 (M.D.N.C. 1996).

52 *JZ Buckingham, supra* note 13, 77 FedCl, at 47; *Unidem Am. Corp. v. Ericsson, Inc.*, 181 FRD 302, 304 (M.D.N.C. 1998); *T. Rowe Price Small-Cap Fund, supra* note 51, 174 FRD, at 43.

## ENDNOTES

[53] FRCP 36(a)(4); RCFC 36(a)(4); Tax Ct. R. 90(c).

[54] Tax Ct. R. 90(c).

[55] FRCP 36(a)(5); RCFC 36(a)(5); Tax Ct. R. 90(e).

[56] *JZ Buckingham, supra* note 13, 77 FedCl, at 46; *see also Asea, Inc., supra* note 2, 669 F2d, at 1247 ("Although the [trial] court should ordinarily first order an amended answer, and deem the matter admitted only if a sufficient answer is not timely filed, this determination, like most involved in the oversight of discovery, is left to the sound discretion of the [trial] judge.").

[57] *JZ Buckingham, supra* note 13, 77 FedCl, at 45.

[58] *Id.*, at 45-46.

[59] *Chem. Eng'g Corp. v. Essef Indus., Inc.*, 795 F2d 1565, 1575 (Fed. Cir. 1986) (affirming trial court's award of sanctions when party refused to admit that the accused device did not raise the pH of the water, which was subsequently proved by experts at trial); *Pioneer Title Ins. Co. v. Andrews*, 652 F2d 439, 443 (5th Cir. 1981) (finding no abuse of discretion when trial court imposed sanctions on the responding party after it refused to admit the genuineness of an important document, forcing the propounding party to have to prove its genuineness at trial); *Bradshaw v. Thompson*, 454 F2d 75, 81 (6th Cir. 1972) (upholding sanctions where stipulated to a previously denied fact on the fifth day of trial).

[60] Tax Ct. R. 90(g).

[61] *Id.*

[62] *Kohler v. Leslie Hindman, Inc.*, 80 F3d 1181, 1185 (7th Cir. 1996); see also *Adventis, Inc. v. Consol. Prop. Holdings, Inc.*, 124 Fed. Appx. 169, 173 (4th Cir. 2005) ("Rule 36 admissions are conclusive for purposes of the litigation and are sufficient to support summary judgment.") (quoting *Langer v. Monarch Life Ins. Co.*, 966 F2d 786, 803 (3d Cir. 1992)).

[63] *Keller v. United States*, 58 F3d 1194, 1199 n.8 (7th Cir. 1995); *see also In re Carney, supra* note 5, 258 F3d, at 420 ("Since Rule 36 admissions, whether express or by default, are conclusive as to the matters admitted, they cannot be overcome at the summary judgment stage by contradictory affidavit testimony or other evidence in the summary judgment record.").

[64] *Kasuboski, supra note 10*, 834 F2d, at 1350 ("Affidavits and depositions entered in opposition to summary judgment that attempt to establish issues of fact cannot refute... admissions."); *Presidio Advisors, supra* note 5 (noting that in light of the taxpayers' failure to seek to withdraw their admission, their "admissions stand, thereby preventing them from invoking other evidence in an attempt to create a question of fact as to whether and when Prevad transferred its stock to Presidio.").

[65] FRCP 36(b); RCFC 36(b); Tax Ct. R. 90(f); *see, e.g., .T.V. Cassidy*, CA-7, 90-1 USTC ¶50,023, 892 F2d 637, 639-41 (holding that Tax Court's judgment on whether the taxpayer acted fraudulently, based solely on facts deemed admitted by the taxpayer due to his failure to respond to admission requests, did not have collateral estoppel effect in a bankruptcy proceeding regarding whether the fraud penalties were dischargeable).

[66] FRCP 36(a)(2); RCFC 36(a)(2); Tax Ct. R. 90(c); *see, e.g., J.L. Smith*, CA-9, 86-2 USTC ¶9706, 800 F2d 930, 935 ("[T]axpayers were deemed to have admitted that they had not paid the bill because they failed to respond to a request for admission.").

[67] *Smith v. Pac. Bell Tel. Co.*, 662 FSupp2d 1199, 1229 (C.D. Cal. 2009) ("No motion to establish the admissions is needed because Federal Rule of Civil Procedure 36(a) is self-executing."); *FTC v. Medicor, LLC*, 217 FSupp2d 1048, 1053 (C.D. Cal. 2002); *Morrison*, 81 TC 644, 647 (1983); *Freedson*, 65 TC 333, 334-36 (1975), *aff'd*, CA-5, 78-1 USTC ¶9171, 565 F2d 954.

[68] *Luick v. Graybar Elec. Co.*, 473 F2d 1360, 1362 (8th Cir. 1973); *see also Dickerson, Est., supra* note 23,at 625.

[69] *Am. Auto. Ass'n v. AAA Legal Clinic*, 930 F2d 1117, 1119 (5th Cir. 1991).

[70] *See In re Carney, supra* note 5, 258 F3d, at 420-22; *Karras, supra* note 8, 16 F3d, at 247; *Kasuboski, supra* note 10, 834 F2d, at 1350 ("Admissions made under Rule 36, even default admissions, can serve as the factual predicate for summary judgment."); *Dukes v. South Carolina Ins. Co.*, 770 F2d 545, 548-49 (5th Cir. 1985); *Donovan v. Carls Drug. Co.*, 703 F2d 650, 652 (2d Cir. 1983); *Chess Music, Inc. v. Bowman*, 474 FSupp. 184, 185 (D. Neb. 1979) ("It is well settled that a failure to respond to requests for admission is deemed to be an admission of the matters set forth and may form the proper basis for summary judgment."); *Marshall*, 85 TC 267, 271 (1985); *Doncaster*, 77 TC 334, 336 (1981); *Freedson*, 65 TC, at 335.

[71] *Jones v. Jack Henry & Assocs., Inc.*, No. 3:06cv428, 2007 WL 4226083, at *2 (W.D.N.C. Nov. 30, 2007); *United States v. Turk*, 139 FRD 615, 618 (D. Md. 1991); cf. *Renfrow*, 612 FSupp. 2d 677, 682-83 (E.D.N.C. 2009) (entering summary judgment on the basis of default admissions where the pro se taxpayer was sophisticated and informed of the effect of failing to respond to the government's requests).

[72] *Asea, Inc., supra* note 2, 669 F2d, at 1245; *Cochrane*, 107 TC 18, 26 (1996).

[73] FRCP 37(c)(2); RCFC 37(c)(2); see, e.g., *Valentine v. Info. Servs. LLC*, 543 FSupp2d 1232, 1237 (D. Or. 2008) (declining to impose sanctions); *Long*, 561 FSupp2d, at 94-96 (same).

[74] Tax Ct. R. 90(f).

[75] *Id.*

[76] FRCP 36(b); RCFC 36(b); Tax Ct. R. 90(f); *see Perez, supra* note 34, 297 F3d, at 1264; *In re Carney, supra* note 5, 258 F3d, at 419; *Hadley v. United States*, 45 F3d 1345, 1348 (9th Cir. 1995).

[77] *Smith v. First Nat'l Bank of Atlanta*, 837 F2d 1575, 1577-78 (11th Cir. 1988).

[78] *Kasuboski, supra* note 10, 834 F2d, at 1349-50.

[79] *Id.*, at 1350 n.7; *In re Carney, supra* note 5, 258 F3d, at 419; Am. Auto Ass'n, 930 F2d, at 1119; Bergemann v. United States, 820 F2d 1117, 1121 (10th Cir. 1987); *999 v. C.I.T. Corp.*, 776 F2d 866, 869 (9th Cir. 1985); *Carls Drug Co.*, 703 F2d, at 652; *Chapoteau*, 56 TCM 1145, 1146 (1989) ("At the outset, we note that we possess considerable discretion in deciding whether to permit withdrawal of deemed admissions.").

[80] *999, supra* note 79, 776 F2d, at 869.

[81] *Farr Man & Co. v. M/V ROZ-ITA*, 903 F2d 871, 876 (1st Cir. 1990); *Ropfogel*, 138 FRD 579, 582 (D. Kan. 1991).

[82] *Morrison*, 81 TC, at 650.

[83] *Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 123 FRD 97, 102 (D. Del. 1988).

[84] *Id.*, at 103; *see also FDIC v. Prusia*, 18 F3d 637, 641 (8th Cir. 1994); *Strickland v. Allen*, 216 FRD 531 (N.D. Fla. 2003) (allowing the United States to withdraw its admission where it was based on excusable neglect and withdrawal would enhance the "ascertainment of the truth and the development of the merits"); *Ropfogel*, 138 FRD, at 583; *Kramer*, 89 TC 1081, 1085 (1987); *Prakash*, 59 TCM 5, 8 (1990); *Chapoteau*, 56 TCM, at 1146-47.

[85] *Hadley*, 45 F3d at, 1348; *Ropfogel*, 138 FRD, at 583.

[86] *Ropfogel*, 138 FRD, at 583.

[87] *United States v. Persaud*, 229 FRD 686, 693 (M.D. Fla. 2005).

[88] *Id.; see also Hadley*, 45 F3d, at 1348; Prusia, 18 F3d, at 640; Coca-Cola Bottling Co., 123 FRD, at 102.

[89] *Brook Village N. Assocs. v. General Elec. Co.*, 686 F2d 66, 70 (1st Cir. 1982); *see also Bergemann*, 820 F2d, at 1121; N. *La. Rehab. Center, Inc. v. United States*, 179 FSupp2d 658, 663 (W.D. La. 2001) ("The necessity of having to convince a trier of fact of the truth of a matter erroneously admitted is not sufficient.") (quoting *Prusia*, 18 F3d, at 640); *Ropfogel*, 138 FRD, at 583; Morrison, 81 TC, at 648-49.

[90] *Brook Village*, 686 F2d, at 70; *see also Gutting v. Falstaff Brewing Corp.*, 710

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