

**UNITED STATES TAX COURT
WASHINGTON, D.C. 20217**

December 28, 2011

PRESS RELEASE

Chief Judge John O. Colvin announced today that the United States Tax Court has proposed amendments to its Rules of Practice and Procedure. The proposals include:

(1) amending Rule 23 to: (a) reduce the number of copies required for papers filed with the Court, (b) delete the nonproportional font requirement for papers filed with the Court, and (c) revise the language regarding the Court's return of documents;

(2) deleting Rule 175, as the number of copies required for papers filed with the Court in small tax cases would be the same as in all other cases;

(3) amending Rule 26 to require electronic filing by most attorneys;

(4) amending Rules 70 and 143 to conform the Court's Rules to rule 26(a)(2)(B) of the Federal Rules of Civil Procedure, regarding the contents of expert witness reports, rule 26(b)(3) of the Federal Rules of Civil Procedure, regarding work product protections, and revisions to rule 26(b)(4) of the Federal Rules of Civil Procedure, limiting discovery of draft expert witness reports and trial preparation communications and materials;

(5) amending Rule 121, Summary Judgment, to conform the Rule with revisions to rule 56 of the Federal Rules of Civil Procedure;

(6) amending Rule 155 to clarify that computations may be filed in conjunction with dispositive orders;

(7) amending Rule 241, Commencement of Partnership Actions, so that its notice provisions are consistent with those of section 301.6223(g)-1(b)(3), Proced. & Admin. Regs.;

(8) adopting new Rule 345 to provide privacy protections in whistleblower cases;

(9) amending various Rules to make conforming changes;
and

(10) providing new Form 18 in recognition of 28 U.S.C. sec. 1746, which allows an unsworn declaration to substitute for an affidavit.

Conforming changes to the Table of Contents, Appendix I, and the Index are not included in the proposals but will be made before publication. The proposed amendments are contained in the Notice attached to this press release and are available on the Tax Court's Web site, www.ustaxcourt.gov.

Chief Judge Colvin also announced that the Tax Court invites public comment on the proposed amendments. Written comments must be received by February 27, 2012. Comments must be addressed to:

Robert R. Di Trolio
Clerk of the Court
U.S. Tax Court
400 Second St., N.W., Room 111
Washington, D.C. 20217

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WASHINGTON, D.C. 20217

NOTICE OF PROPOSED AMENDMENTS TO RULES

Pursuant to section 7453 of the Internal Revenue Code as amended and Rule 1 of the Tax Court Rules of Practice and Procedure, the United States Tax Court hereby provides notice that it proposes the attached amendments to its Rules of Practice and Procedure and invites public comment thereon. Written comments must be received by February 27, 2012. Comments must be addressed to:

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The proposed amendments and explanations are as follows.

New Rule 345 is adopted.

**Proposed RULE 345. PRIVACY PROTECTIONS FOR FILINGS
IN WHISTLEBLOWER ACTIONS**

(a) Anonymous Petitioner: A petitioner in a whistleblower action may move the Court for permission to proceed anonymously, if appropriate. Unless otherwise permitted by the Court, a petitioner seeking to proceed anonymously pursuant to this Rule shall file with the petition a motion, with or without supporting affidavits or declarations, setting forth a sufficient, fact-specific basis for anonymity. The petition and all other filings shall be temporarily sealed pending a ruling by the Court on the motion to proceed anonymously.

(b) Redacted Filings: Except as otherwise directed by the Court, in an electronic or paper filing with the Court in a whistleblower action, a party or nonparty making the filing shall refrain from including, or shall take appropriate steps to redact, the name, address, and other identifying information of the taxpayer to whom the claim relates. The party or nonparty filing a document that contains redacted information shall file under seal a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list may be amended as a matter of right. Subsequent references in the case to a listed identifier will be construed to refer to the corresponding item of information. The Court in its discretion may later unseal the reference list, in whole or in part, if appropriate.

(c) Other Applicable Rules: For Rules concerned with privacy protections and protective orders, generally, see Rules 27 and 103(a).

Explanation

Letters From Associate Chief Counsel and National Taxpayer Advocate

On March 1, 2011, Deborah Butler, Associate Chief Counsel of the Internal Revenue Service (IRS), and Nina Olson, National Taxpayer Advocate, sent separate letters to the Court raising concerns and suggesting the promulgation of rules regarding privacy protections for nonparty taxpayer information in whistleblower cases. Ms. Butler stated that the IRS does not include taxpayer information in a determination notice issued pursuant to section 7623 and does not intend to do so in the future; nevertheless, whistleblowers routinely disclose nonparty taxpayer information in petitioning the Court. The IRS recommends that the Court consider developing rules applicable to petitions filed in whistleblower cases, as well as to subsequent filings, that require filing parties to redact identifying information of nonparty taxpayers in whistleblower cases such as names, taxpayer identification numbers, and addresses, and to consider whether and in what way nonparty taxpayers should or could be included in a redaction process or be afforded some other opportunity to protect identifying or sensitive information.

Ms. Olson indicated that a taxpayer who is considering whether to request judicial review of an administrative finding has an opportunity to weigh the advantages of judicial review against any disadvantages associated with the public disclosure of information that ordinarily becomes part of the case file and public record in a Tax Court case. The taxpayer in a whistleblower case, however, is not a party and has no control over what information is presented by the whistleblower or included in the case file or opinion. She observed that in Cooper v. Commissioner, 135 T.C. 70 (2010), for example, the Court published the name, the amount of the alleged underpayment, and other identifying information of the taxpayer to whom the whistleblower claim related, who was neither a party to the case nor subject to any deficiency determined by the IRS. She recommended in her 2010 Annual Report to Congress that it amend section 7623 or other applicable provisions to require redaction of nonparty taxpayers' return information in administrative and judicial proceedings relating to whistleblower claims, with an opportunity for a nonparty taxpayer to request additional

redactions before disclosure, and to provide a nonparty taxpayer a subsequent right of action for civil damages for unauthorized disclosure by the whistleblower. She recommended the administrative and judicial process be commenced with a "notice of intention to disclose" to the nonparty taxpayer, legislatively designated as a party, concerning redaction, but not regarding the merits of the whistleblower claim.

Ms. Butler and Ms. Olson both suggest that section 7461(b)(1) currently provides the Court with authority to amend its Rules to provide for appropriate redaction of nonparty taxpayers' taxpayer information, similar to that allowed by Rules 27 and 103.

Policy Considerations

The Tax Court, like other courts, has broad discretionary authority to control and seal, if necessary, records and files in its possession. See Willie Nelson Music Co. v. Commissioner, 85 T.C. 914, 920 (1985). Section 7461(b)(1) authorizes the Court to "make any provision which is necessary to prevent the disclosure of trade secrets or other confidential information". This provision provides ample authority for the Court to protect confidential information about nonparty taxpayers in whistleblower cases, including return information, confidential business information, trade secrets, etc.

Under Whistleblower 14106-10W v. Commissioner, 137 T.C. ____ (2011), a whistleblower's identity, although kept confidential by the IRS Whistleblower Office, is entitled to protection in the Tax Court upon a sufficient showing of harm that outweighs counterbalancing societal interests in knowing the whistleblower's identity. The balancing test is driven largely by notions of the common law right of public access to court proceedings.

Arguably, protecting a nonparty taxpayer's identity is justified in furtherance of protecting the nonparty taxpayer's tax return information, trade secrets, and other confidential information, which the Court is clearly authorized to protect under section 7461(b)(1). Anonymous v. Commissioner, 127 T.C. 89 (2006). Because the taxpayer is not a party to the case, and might not even know about the case, it may be impracticable for the Court adequately to police the redaction of all confidential information about the nonparty taxpayer that might warrant protection. By concealing the name of the nonparty taxpayer, at least in the early stages of litigation, the consequences of inadvertent disclosure of such information are greatly mitigated,

since the information could not be readily linked to the nonparty taxpayer. At some point in the litigation, if for instance the Court decided that the whistleblower was entitled to a large award, the Court might conclude that the public's interest in knowing the nonparty taxpayer's identity was sufficiently great that the nonparty taxpayer's name should no longer be protected.

Proposed Rule 345

The Court proposes the adoption of new Rule 345. The proposed Rule would formalize the existing procedure whereby whistleblowers may seek anonymity in their cases. See Whistleblower 14106-10W v. Commissioner, *supra*. Additionally, the proposed Rule would provide that the parties shall refrain from including or redact the nonparty taxpayer's name, address, and other identifying information. Redacted information would be sealed in a reference list, which the Court could unseal, in whole or in part, after a determination as to whether the nonparty taxpayer's identity should remain protected. In making that determination, it is contemplated that the trial judge would have discretion to direct that prior notice be provided to the nonparty taxpayer. Cf. Nordstrom v. Commissioner, 50 T.C. 30, 32-33 (1968) (establishing a procedure for notification to the heirs at law before dismissing for lack of prosecution the case of a deceased petitioner). However, the proposed Rule would not require notice to the nonparty taxpayer of the commencement of the case or provide a formal means of intervention. The need for and the type of notice will be decided on a case-by-case basis, taking into account the competing privacy interests of the whistleblower and the nonparty taxpayer. Further, absent either legislation specifically authorizing an individual to intervene¹

¹In 2007, the Senate-passed versions of both the Fair Minimum Wage Act of 2007, H.R. 2, 110th Cong., 1st Sess., sec. 233(c), and the U.S. Troop Readiness, Veterans' Health, and Iraq Accountability Act, 2007, H.R. 1591, 110th Cong., 1st sess., sec. 543(c), contained proposed amendments to modify section 7623. Those amendments would have authorized the Court in new section 7623(b)(4)(B) to seal portions of the record in whistleblower cases. The amendments were substantially identical to section 6110(f)(6), which addresses publicity of Tax Court proceedings in disclosure cases, but did not include language comparable to section 6110(f)(1), requiring a notice of intent to disclose, and 6110(f)(3)(B) and (4)(B), requiring a notice of the filing of a petition to restrain disclosure or obtain additional disclosure and a corresponding right to intervene by the person noticed.

or a Federal rule permitting such intervention², and given the potential difficulties presented by treating the nonparty taxpayer as a party if the whistleblower were proceeding anonymously, the issue of intervention may not be appropriate to resolve by rule. Compare sec. 7623(b)(4) (whistleblower appeals) with secs. 6110(f)(3)(B) and (4)(B) (disclosure actions, Rule 225), 6015(e)(4) (relief from joint liability, Rule 325(b)), 6226(b)(6) (partnership actions, Rule 245), and 7476(d) (declaratory judgment actions, Rule 216). Finally, the proposed Rule cross-references Rule 27, which requires a party or nonparty filing a document to redact all taxpayer identification numbers, dates of birth, names of minor children, and financial account numbers.