

REPORTS  
OF THE  
UNITED STATES  
TAX COURT



April 1, 1977, to September 30, 1977

Volume 68

(Cite 68 T.C.)

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MARY T. PITTMAN  
REPORTER OF DECISIONS

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U.S. GOVERNMENT PRINTING OFFICE  
WASHINGTON: 1977

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(Title 68 T.C.)

MARY T. FETTMAN  
Reporter of Decisions

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WASHINGTON: 1977

## JUDGES OF THE UNITED STATES TAX COURT

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### *Chief Judge*

C. MOXLEY FEATHERSTON<sup>1</sup>

### *Judges*

ARNOLD RAUM

WILLIAM M. DRENNEN

IRENE F. SCOTT

WILLIAM M. FAY

HOWARD A. DAWSON, JR.

THEODORE TANNENWALD, JR.

CHARLES R. SIMPSON

LEO H. IRWIN

SAMUEL B. STERRETT

WILLIAM H. QUEALY

WILLIAM A. GOFFE

CYNTHIA HOLCOMB HALL

DARRELL D. WILES

RICHARD C. WILBUR

——— (Vacancy)

Retired judges recalled to perform judicial duties under the provisions of section 7447 of the Internal Revenue Code of 1954:

J. GREGORY BRUCE

NORMAN O. TIETJENS

BRUCE M. FORRESTER

### *Special Trial Judges*

JAMES M. GUSSIS

JOSEPH N. INGOLIA<sup>2</sup>

CHARLES R. JOHNSTON

JOHN H. SACKS<sup>3</sup>

RANDOLPH F. CALDWELL, JR.

LEHMAN C. AARONS

MURRAY H. FALK

EDNA G. PARKER<sup>4</sup>

FRED S. GILBERT, JR.<sup>4</sup>

---

CHARLES S. CASAZZA, Clerk

WILLIAM P. CREWE, Court Executive<sup>5</sup>

---

<sup>1</sup> Judge Featherston succeeded Judge Dawson as Chief Judge on July 1, 1977.

<sup>2</sup> Resigned September 26, 1977.

<sup>3</sup> Resigned August 27, 1977.

<sup>4</sup> Appointed September 1, 1977.

<sup>5</sup> Retired July 30, 1977.

## Supplement 5

Effective July 1, 1977, and until further notice, Judge Richard C. Wilbur is designated as the Judge in charge of the Small Tax Case Division of the United States Tax Court, succeeding Judge William A. Goffe.

C. MOXLEY FEATHERSTON

**Chief Judge.**

**Dated: July 1, 1977**

IV

AMENDMENTS  
to  
RULES OF PRACTICE AND PROCEDURE  
of the  
UNITED STATES TAX COURT

The Rules of Practice and Procedure of the United States Tax Court are amended by substituting at the end thereof the following new Title XXI and adding new Title XXII.

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



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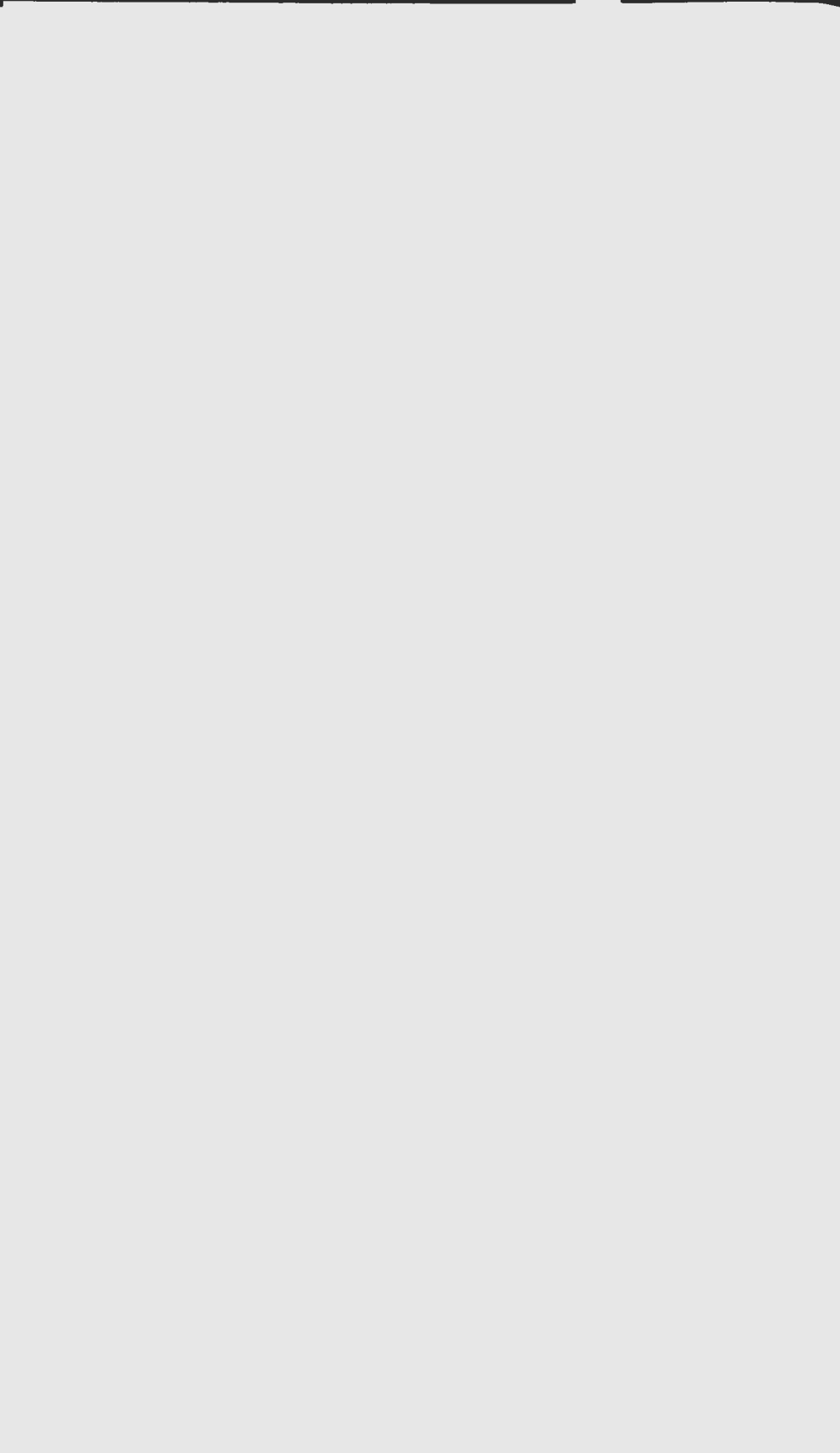
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**TITLE XXI.**  
**DECLARATORY JUDGMENTS—**  
**RETIREMENT PLANS,**  
**SECTION 367 EXCHANGES, EXEMPT**  
**ORGANIZATIONS**

**Rule 210. GENERAL**

**(a) Applicability:** The Rules of this Title XXI set forth the special provisions which apply to declaratory judgment actions, relating to the qualification of retirement plans, exchanges described in Code Section 367(a)(1), and the initial or continuing qualification of certain exempt organizations or the initial or continuing classification of certain private foundations. Except as otherwise provided in this Title, the other Rules of Practice and Procedure of the Court, to the extent pertinent, are applicable to such actions for declaratory judgment. The Rules of this Title shall take effect on July 1, 1977.

*Note*

The jurisdiction of the Court, in the three types of declaratory judgment actions which are the subject of the Rules of Title XXI, is conferred by Code Section 7476, relating to the qualification of retirement plans; Code Section 7477, relating to Code Section 367 transactions; and Code Section 7428, relating to exempt organizations and private foundations.

Code Section 7476 was enacted by Section 1041(a) of the Employee Retirement Income Security Act of 1974, and under Section 1041(d) of that Act applies to pleadings filed after September 2, 1975. Cf. *Federal Land Bank Association v. Commissioner*, 67 T.C. 29 (1976). Code Section 7477 was enacted by Section 1042(d) of the Tax Reform Act of 1976, and under Section 1042(e)(1) of that Act applies to pleadings filed after October 4, 1976, but only with respect to transfers beginning after October 9, 1975. Code Section 7428 was enacted by Section 1306(a) of the Tax Reform Act of 1976, and under Section 1306(c) of that Act applies to pleadings filed after April 4, 1977, but only with respect to determinations (or requests for determinations) made after January 1, 1976.

This Title XXI replaces existing Title XXI which became effective on September 2, 1975, and was confined to declaratory judgment actions relating to retirement plans. The Rules there contained have been

retained in substantially unaltered form with respect to retirement plans in this Title XXI, and have furnished the pattern for the Rules here adopted with respect to Section 367 exchanges and exempt organizations and private foundations.

In general, the focus of the declaratory judgment procedure in the actions within this Title XXI is review of an administrative determination (or failure to make such a determination) and thus has a much narrower scope than exists in respect of declaratory judgment litigation of the United States District Courts. Consequently, much of the practice and procedure involved in such litigation is not applicable to the declaratory judgment procedures of the Court. However, to the extent pertinent, such practice and procedure may be used as guidelines for the application of the within Rules.

As is the case with Title XVII relating to Small Tax Cases, Title XXI makes clear that, except as otherwise provided, the other Rules of Practice and Procedure of the Court, to the extent pertinent, are applicable to declaratory judgment litigation.

Where pleadings within the subject areas of this Title have been filed prior to adoption of this Title, it is contemplated that the Rules of this Title will be applied in a manner consistent with the philosophy of Rule 2(a).

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

(1) "Retirement plan" has the meaning provided by Code Section 7476(d).

(2) "Exchange" is an exchange described in Code Section 367(a)(1).

(3) "Exempt organization" is an organization described in Code Section 501(c)(3) which is exempt from tax under Code Section 501(a) or is an organization described in Code Section 170(c)(2).

(4) "Private foundation" is an organization described in Code Section 509(a).

(5) "Private operating foundation" is an organization described in Code Section 4942(j)(3).

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

(7) A "determination" means—

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

(ii) A determination as to whether an exchange is in pursuance of a plan having as one of its principal purposes the avoidance of Federal income taxes, or made with respect

to the terms and conditions on which an exchange will be deemed not to be in pursuance of such a plan; or

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

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

(9) "Action for declaratory judgment" is either a retirement plan action, a Section 367 action, or an exempt organization action, as follows:

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

(ii) A "Section 367 action" means an action for declaratory judgment provided for in Code Section 7477 with respect to an exchange.

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

(10) "Administrative record" includes the request for determination, all documents submitted to the Internal Revenue Service by the applicant in respect of the request for determination, all protests and related papers submitted to the Internal Revenue Service, all written correspondence between the Internal Revenue Service and the applicant in respect of the request for determination or such protests, all pertinent returns filed with the Internal Revenue Service, and the notice of determination by the Commissioner. In addition—

(i) In the case of a determination relating to a retirement plan, the administrative record shall include the retirement plan and any related trust instruments, any written modifications thereof made by the applicant during the proceedings

in respect of the request for determination before the Internal Revenue Service, and all written comments (and related correspondence) submitted to the Internal Revenue Service in those proceedings (see Section 3001(b) of the Employee Retirement Income Security Act of 1974).

(ii) In the case of a determination relating to an exempt organization or a private foundation or a private operating foundation, the administrative record shall include the charter or articles of incorporation or association, or trust indenture or agreement, and any similar or related documents of the organization and any modifications thereof.

(11) "Party" includes a petitioner and the respondent Commissioner of Internal Revenue. In a retirement plan action, an intervenor is also a party. In an exempt organization action, only the organization may be a petitioner.

(12) "Declaratory judgment" is the decision of the Court in a retirement plan action, a Section 367 action, or an exempt organization action.

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

(1) The Commissioner has issued a notice of determination, or has been requested to make a determination and failed to do so for a period of at least 270 days after the request for such determination was made. In the case of a retirement plan action, the Court has jurisdiction over an action brought because of the Commissioner's failure to make a determination with respect to the continuing qualification of the plan only if the controversy arises as a result of an amendment or termination of such plan. See Code Section 7476(a)(2)(B).

(2) There is an actual controversy. In that connection—

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

(ii) In the case of a Section 367 action, the exchange has begun before commencement of the action.

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

(3) A petition for declaratory judgment is filed with the Court within the period specified by Code Section 7476(b)(5)

with respect to a retirement plan action, or the period specified by Code Section 7477(b)(4) with respect to a Section 367 action, or the period specified by Section 7428(b)(3) with respect to an exempt organization action. See Code Section 7502.

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

### **Note**

The determination reviewed in an action within this Title XXI may relate to the initial qualification or classification or the continuing qualification or classification of a plan or an organization. Par. (c)(1) of this Rule encompasses all such determinations. In the case of a revocation with respect to a retirement plan, attention is called to *Sheppard & Myers, Inc. v. Commissioner*, 67 T.C. 26 (1976).

The entire declaratory judgment procedure is predicated upon the existence of an "actual controversy" as required by Code Sections 7476(a), 7477(a), and 7428(a). Thus, satisfying the provisions relating to the content of petitions to be filed by certain persons does not necessarily indicate such a person is entitled to commence an action—to be so entitled an "actual controversy" must exist. Par. (c)(2) of this Rule imposes conditions which have a bearing on the existence of such a controversy.

The requirement in Par. (c)(4) of this Rule, that the petitioner shall have exhausted his administrative remedies, is of critical importance. The statutory scheme, on which these declaratory judgment actions are based, entails action by the Tax Court only after the procedures of the Internal Revenue Service have been exhausted, and thereby also tends to insure an administrative record on which the Court can make its review.

**(d) Form and Style of Papers:** All papers filed in an action for declaratory judgment, with the exception of documents included in the administrative record, shall be prepared in the form and style set forth in Rule 23; except that whenever any party joins or intervenes in the action in those instances in which joinder or intervention is permitted, then thereafter, in addition to the number of copies required to be filed under such Rule, an additional copy shall be filed for each party who joins or intervenes in the action.

### **Note**

With respect to intervention in retirement plan actions, see Rule 216. With respect to joinder in such actions and in Section 367 actions, see Rule 215.

## **Rule 211. Commencement of Action for Declaratory Judgment**

**(a) Commencement of Action:** An action for declaratory judgment shall be commenced by filing a petition with the Court. See Rule 22, relating to the place and manner of filing the petition, and Rule 32, relating to form of pleadings.

**(b) Contents of Petition:** Every petition shall be entitled "Petition for Declaratory Judgment (Retirement Plan)" or "Petition for Declaratory Judgment (Section 367 Exchange)" or "Petition for Declaratory Judgment (Exempt Organization)." Each such petition shall contain the allegations described in paragraph (c), (d), or (e) of this Rule.

**(c) Petition in Retirement Plan Action:** The petition in a retirement plan action shall contain:

(1) *All Petitions:* All petitions in retirement plan actions shall contain the following:

(i) The petitioner's name and address, and the name and principal place of business, or principal office or agency of the employer at the time the petition is filed; and

(ii) The office of the Internal Revenue Service with which the request for determination was filed and the date of such filing.

(2) *Employer Petitions:* In addition to including the information specified in paragraph (c)(1) of this Rule, a petition filed by an employer shall also contain:

(i) A separate numbered paragraph stating that he has complied with the requirements of the regulations issued under Code Section 7476(b)(2) with respect to notice to other interested parties;

(ii) A separate numbered paragraph stating that he has exhausted his administrative remedies within the Internal Revenue Service;

(iii) A separate numbered paragraph stating that the retirement plan has been put into effect in accordance with Code Section 7476(b)(4);

(iv) Where the Commissioner has issued a notice of determination that the retirement plan does not qualify—

(A) the date of the notice of his determination,

(B) a copy of such notice of determination,



(C) in a separate numbered paragraph, a clear and concise assignment of each error, set forth in a separate lettered subparagraph, which he alleges to have been committed by the Commissioner in the determination, and

(D) a statement of facts upon which petitioner relies to support each such claim;

(v) Where the Commissioner has not issued a notice of determination with respect to the qualification of the retirement plan, separate numbered paragraphs stating that—

(A) the requested determination is of the type described in Code Section 7476(a)(1) or (2),

(B) no determination has been made by the Commissioner in response thereto, and

(C) the retirement plan does qualify;

(vi) An appropriate prayer for relief; and

(vii) The signature of each petitioner or his counsel.

(3) *Petitions Filed by Plan Administrators*: In addition to including the information specified in paragraph (c)(1) of this Rule, a petition filed by a plan administrator shall contain:

(i) The name, address, and principal place of business, or principal office or agency, of each employer who is required to contribute under the plan; and

(ii) In separate numbered paragraphs, the statements or information required in the case of employer petitions in paragraph (c)(2) of this Rule.

(4) *Employee Petitions*: In addition to including the information specified in paragraph (c)(1) of this Rule, a petition filed by an employee shall also contain:

(i) A separate numbered paragraph setting forth a statement that he has qualified as an interested party in accordance with the regulations issued under Code Section 7476(b)(1);

(ii) In separate numbered paragraphs, the statements described in subparagraph (2)(ii) and (iii) of paragraph (c) of this Rule;

(iii) Where the Commissioner has issued a notice of determination that the retirement plan does not qualify, a copy of such notice of determination, and in separate numbered paragraphs, the statements described in subparagraph (2)(iv)(A), (C) and (D) of paragraph (c) of this Rule;

(iv) Where the Commissioner has issued a notice of determination that a retirement plan does qualify, a copy of such notice of determination, and in separate numbered paragraphs, the date of such notice of determination, and a clear and concise statement of each ground, set forth in a separate lettered subparagraph, upon which he relies to assert that such plan does not qualify and the facts to support each ground;

(v) Where the Commissioner has not issued a notice of determination with respect to the qualification of the retirement plan, a statement, in a separate numbered paragraph, as to whether the retirement plan qualifies—

(A) if he alleges that the retirement plan does qualify, such paragraph shall also include the statements described in paragraph (c)(2)(v) of this Rule, or

(B) if he alleges that the retirement plan does not qualify, in addition to the statements described in paragraph (c)(2)(v) of this Rule, such paragraph shall also include a clear and concise statement of each ground, in a separate lettered subparagraph, upon which he relies to support his allegation that such plan does not qualify and the facts upon which he relies to support each ground; and

(vi) In separate numbered paragraphs, the statements described in paragraph (c)(2)(vi) and (vii) of this Rule.

(5) *Petitions Filed by the Pension Benefit Guaranty Corporation*: In addition to including the information specified in paragraph (c)(1) of this Rule, a petition filed by the Pension Benefit Guaranty Corporation shall also contain in separate numbered paragraphs the statements described in paragraph (c)(4)(ii), (iii), (iv), (v), and (vi) of this Rule.

**(d) Petition in Section 367 Action:** The petition in a Section 367 action shall contain:

(1) The petitioner's name and legal residence, in the case of a petitioner other than a corporation; in the case of a corporate petitioner, its name and principal place of business or principal office or agency;

(2) The office of the Internal Revenue Service with which the request for determination was filed and the date of such filing;

(3) A statement that the petitioner is a transferor or transferee of stock, securities, or property transferred in an exchange described in Code Section 367(a)(1);

(4) Separate numbered paragraphs stating—(i) that the petitioner has exhausted his administrative remedies within the Internal Revenue Service;

(ii) that the exchange has begun in accordance with Code Section 7477(b)(3); and

(iii) the date on which the exchange began;

(5) Where the Commissioner has issued a determination—

(i) the date of the notice of determination;

(ii) a copy of such notice of determination;

(iii) in a separate numbered paragraph, a clear and concise statement of each reason, in separate lettered subparagraphs, why the determination was not reasonable; and

(iv) a statement of facts upon which petitioner relies to support each of such reasons;

(6) Where the Commissioner has not issued a notice of determination, separate numbered paragraphs stating—

(i) that no such determination has been made by the Commissioner;

(ii) that the exchange is not in pursuance of a plan having as one of its principal purposes the avoidance of Federal income taxes; and

(iii) the terms and conditions, if any, which he deems reasonable;

(7) An appropriate prayer for relief; and

(8) The signature of each petitioner or his counsel.

(e) **Petition in Exempt Organization Action:** The petition in an exempt organization action shall contain:

(1) The petitioner's name and principal place of business or principal office or agency;

(2) The date upon which the request for determination, if any, was mailed to the Internal Revenue Service, and the office to which it was mailed;

(3) A statement that the petitioner is an exempt organization or a private foundation or a private operating foundation, as the case may be, the qualification or classification of which is at issue;

(4) A statement that the petitioner has exhausted its administrative remedies within the Internal Revenue Service;

(5) Where the Commissioner has issued a determination—

(i) the date of the notice of determination;

(ii) a copy of such notice of determination;

(iii) in a separate numbered paragraph, a clear and concise statement of each reason, in separate lettered subparagraphs, why the determination is erroneous; and

(iv) a statement of facts upon which petitioner relies to support each of such reasons;

(6) Where the Commissioner has not issued a notice of determination, separate numbered paragraphs stating that—

(i) no such determination has been made by the Commissioner; and

(ii) the organization is qualified under Code Section 501(c)(3) or 170(c)(2), or should be classified with respect to Code Section 509(a) or 4942(j)(3) in the manner set forth by the petitioner in its request for determination;

(7) An appropriate prayer for relief; and

(8) The signature of the petitioner or its counsel.

(f) **Service:** For the provisions relating to service of the petition and other papers, see Rule 21.

### *Note*

The provisions in this Rule, regarding the contents of a petition in a retirement plan action, follow closely the requirements for this purpose heretofore in Title XXI which was effective on September 2, 1975. The alphabetical and numerical designations used in these provisions have been changed for the purpose of clarity in expanding the scope of Title XXI to include the other types of declaratory judgment actions.

The provisions in this Rule, regarding the contents of the petitions in Section 367 actions and in exempt organization actions, are patterned after the comparable provisions relating to retirement plan actions, with changes made in response to the difference in subject matter, the governing statutes, and related procedures.

These provisions apply to determinations of the Internal Revenue Service as defined in Rule 210(b)(7), and in that context are sufficiently broad to encompass determinations concerned with revocations of (or continuing) qualification or classification as well as initial qualification or classification. See Note to Rule 210(c). Where the situation is one of revocation by the Service, it is not likely that there will have been a request for a determination in that connection.

For the convenience of the Court, a copy of the notice of determination is to be appended to the petition notwithstanding its inclusion in the administrative record. See Rule 210(b)(10).

## **RULE 212. REQUEST FOR PLACE FOR SUBMISSION TO THE COURT**

At the time of filing a petition for a declaratory judgment, a request for place for submission to the Court shall be filed in accordance with Rule 140, and the provisions of that Rule shall be applied in designating such place. In addition to including in the request the information specified in Rule 140, the petitioner shall also include the date on which he expects the action will be ready for submission to the Court and his estimate of the time required therefor. In cases involving a revocation, the Commissioner shall, at the time of filing his answer, also set forth in a separate statement the date on which he expects the action will be ready for submission to the Court and an estimate of the time required therefor. After the action becomes at issue (see Rule 214), it will ordinarily, without any further request by the Court for information as to readiness for submission, be placed on a calendar for submission to the Court. See Rule 217(b).

### ***Note***

In most cases not involving a revocation, the declaratory judgment action will be submitted to the Court on the basis of the administrative record and without the need for a trial. See Note to Rule 217(a). The petitioner is required under this Rule to inform the Court as to when he expects to have the case ready for submission. In revocation cases, however, there may be factual disputes involving evidence outside the administrative record which cannot be resolved without a trial, as explained in the Note to Rule 213(a)(2). In such cases, this Rule also requires the views of the Commissioner as to readiness for trial, in order to enable the court to plan its calendars.

## **RULE 213. OTHER PLEADINGS**

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

date of service of those papers within which to answer or move in response thereto, except as the Court may otherwise direct.

(2) *Form and Content:* The answer shall be drawn so that it will advise the petitioner and the Court fully of the nature of the defense. It shall contain a specific admission or denial of each material allegation of the petition. If the Commissioner shall be without knowledge or information sufficient to form a belief as to the truth of an allegation as to jurisdictional facts or as to inferences or conclusions that may be drawn from materials in the administrative record or as to facts involved in a revocation, he may so state, and such statement shall have the effect of a denial. Facts other than jurisdictional facts, and other than facts involved in a revocation, may be admitted only for purposes of the pending action for declaratory judgment. If the Commissioner intends to qualify or to deny only a part of an allegation, he shall specify so much of it as is true and shall qualify or deny only the remainder. In addition, the answer shall contain a clear and concise statement of every ground, together with the facts in support thereof, on which the Commissioner relies and has the burden of proof. Paragraphs of the answer shall be designated to correspond to those of the petition to which they relate.

### *Note*

The primary guideline, shaping the rules of this Title relating to pleading by the Commissioner in cases other than those involving a revocation, is the acceptance by the Internal Revenue Service of the facts presented by a taxpayer for the purpose of obtaining a ruling on a retirement plan, on a Section 367 exchange, or on an exempt organization or private foundation. In considering an application for such a ruling, the commissioner accepts those facts without investigating them, and is not in a position ordinarily to know whether they are true or false. The basic rule therefore has been adopted here which permits the commissioner to continue to accept such facts for the purpose of such declaratory judgment action, without making those facts binding on him in other respects. Under this Rule, the Commissioner may plead by admitting such facts only for the purpose of the pending action.

Within certain narrow areas, such as jurisdictional facts, the Commissioner may have some knowledge as to the facts, or at least sufficient knowledge to form a belief as to the facts. In such instances, this Rule enables the Commissioner to plead accordingly. In other instances, involving allegations of ultimate fact or conclusions or inferences of fact,

the Commissioner likewise is permitted under this Rule to admit or deny those facts or to plead insufficient knowledge to form a belief as to them.

In cases involving a revocation, the procedure of the Internal Revenue Service preceding its determination is basically different, in that such revocations usually result from an audit, in the course of which the Service has made its own investigation of the facts. In such cases, the Service need not rely on the factual assertions of the petition but rather is in a position to make its independent evaluation of the facts, and disputes as to the facts may result in the action before the Court. A trial, therefore, may be necessary to resolve these factual disputes. However, consistently with its policy in regard to stipulation of facts, see Rule 91(a), the Court expects in such cases that the parties will admit or agree to the facts prior to trial to the maximum extent feasible.

The facts and materials presented by the petitioner to the Internal Revenue Service will be in the administrative record filed with the Court, and, except as supplemented in some situations with respect to jurisdictional facts and with the exception of factual disputes in revocation cases, the administrative record usually will constitute the sole basis on which the Court will make its decision in a declaratory judgment action. In respect of certain additional facts alleged in the reply, see the Note to Rule 213(b). Except with respect to the contents of the administrative record or disputes as to jurisdictional facts or in cases involving a revocation, it is not anticipated that there will be any occasion for a trial in such actions. See the Note to Rule 217(a).

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

### **Note**

The affirmative allegation regarding the administrative record, required under this Rule, is part of the Commissioner's pleading in his answer, and is subject to the rules of pleading.

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

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

(1) *Time to Reply or Move:* The petitioner shall have 60 days from the date of service of the answer within which to file a reply, or 30 days from that date within which to move with respect to the answer. With respect to an amended answer or amendments to the answer, the petitioner shall

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

(2) *Form and Content*: In response to each material allegation in the answer and the facts in support thereof on which the Commissioner has the burden of proof, the reply shall contain a specific admission or denial; however, if the petitioner shall be without knowledge or information sufficient to form a belief as to the truth of an allegation, he shall so state, and such statement shall have the effect of a denial. In addition, the reply shall contain a clear and concise statement of every ground, together with the facts in support thereof, on which the petitioner relies affirmatively or in avoidance of any matter in the answer on which the Commissioner has the burden of proof. In other respects, the requirements of pleading applicable to the answer provided in paragraph (a)(2) of this Rule shall apply to the reply. The paragraphs of the reply shall be designated to correspond to those of the answer to which they relate.

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

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

### *Note*

The general rule is provided that new material in the reply is deemed to be denied, so that no further pleading is needed for the joinder of issue. See Rule 214.

Par. (b) of this Rule contemplates the possibility that the Commissioner's answer may set forth a ground, to sustain his position, which was not contained in his notice of determination and as to which the petitioner may consider that an affirmative allegation is necessary. See Note to Rule 217(a). In the event that any new ground in the Commissioner's answer calls for a response based upon facts not in the administrative record, the petitioner may allege such facts in his reply, but it is expected that the Commissioner by stipulation will ordinarily concede such facts for purposes of the action and that such stipulation, together with the administrative record, will be the basis for the decision.



As noted previously, however, cases involving a revocation arise in a different posture. See Note to Rule 213(a)(2). In those cases, there may be unresolved factual disputes, as to which the Commissioner has evidence or information obtained by the Internal Revenue Service, and the disposition of which will call for proof at a trial rather than the concession of facts indicated with respect to other cases.

## **RULE 214. JOINDER OF ISSUE IN ACTION FOR DECLARATORY JUDGMENT**

An action for declaratory judgment shall be deemed at issue upon the filing of the reply or at the expiration of the time for doing so.

## **RULE 215. JOINDER OF PARTIES**

**(a) Joinder in Retirement Plan Action:** The joinder of parties in retirement plan actions shall be subject to the following requirements, and in other respects, to the extent relevant, shall be subject to Rules 61 and 62:

(1) *Permissive Joinder:* Any person who, under Code Section 7476(b)(1), is entitled to commence an action for declaratory judgment with respect to the qualification of a retirement plan may join in filing a petition with any other such person in such an action with respect to the same plan. If the Commissioner has issued a notice of determination with respect to the qualification of the plan, any person joining in the petition must do so within the period specified in Code Section 7476(b)(5). If more than one petition is filed with respect to the qualification of the same retirement plan, see Rule 141 (relating to the possibility of consolidating the actions with respect to the plan).

(2) *Joinder of Additional Parties:* Any party to an action for declaratory judgment with respect to the qualification of a retirement plan may move to have joined in the action any employer who established or maintains the plan, plan administrator, or any person in whose absence complete relief cannot be accorded among those already parties. Unless otherwise permitted by the Court, any such motion must be filed not later than 30 days after joinder of issue (see Rule 214). Such motion shall be served on the parties to the action (other than the movant). See Rule 21(b). The movant shall cause personal service to be made on each person

sought to be joined by a United States marshal or by his deputy, or by any other person who is not a party and is not less than 18 years of age, who shall make a return of service, see Form 13, Appendix I. Such return of service shall be filed with the motion, but failure to do so or otherwise to make proof of service does not affect the validity of the service. Unless otherwise permitted by the Court, any objection to such motion shall be filed within 30 days after the service of the motion. The motion will be granted whenever the Court finds that in the interests of justice such person should be joined. If the motion is granted, such person will thereupon become a party to the action, and the Court will enter such orders as it deems appropriate as to further pleading and other matters. See Rule 50(b) with respect to actions on motions.

(3) *Nonjoinder of Necessary Parties*: If the Court determines that any person described in subparagraph (2) of this paragraph is a necessary party to an action for declaratory judgment and that such person has not been joined, the Court may, on its own motion or on the motion of any party or any such person, dismiss the action on the ground that the absent person is necessary and that justice cannot be accomplished in his absence, or direct that any such person be made a party to the action. An order dismissing a case for nonjoinder of a necessary party may be conditional or absolute.

**(b) Joinder of Parties in Section 367 Action:** A person may join in a Section 367 action only if he is a transferor or transferee of stock, securities, or property transferred in the same exchange in respect of which the declaratory judgment is sought, and only upon satisfying the jurisdictional requirements of Rule 210(c). In other respects, to the extent relevant, joinder of parties shall be subject to Rules 61 and 62. With respect to consolidation of actions, see Rule 141.

**(c) Joinder of Parties in Exempt Organization Action:** Joinder of parties is not permitted in an exempt organization action. See Code Section 7428 (b)(1). With respect to consolidation of actions, see Rule 141.

### **Note**

Provision is made in this Rule for joinder of other parties under the indicated circumstances. It should be noted that where a party moves to

have another party joined in a retirement plan action, he is responsible under paragraph (a)(2) of this Rule to cause personal service to be made on such other party. This is to be contrasted with the provisions for service by mail either by the party or the Clerk of the Court as provided in Rule 21. Provisions for intervention in retirement plan actions are also included. See Rule 216. In developing these provisions for joinder and intervention, the corresponding provisions of the Federal Rules of Civil Procedure were considered; but, since the parties who may join or intervene in a declaratory judgment action in the Tax Court and the circumstances under which they may do so are more limited, the Tax Court Rules are not nearly as broad as those provisions of the Federal Rules of Civil Procedure.

### **RULE 216. INTERVENTION IN RETIREMENT PLAN ACTIONS**

**(a) Who May Intervene:** The Pension Benefit Guaranty Corporation and, if entitled to intervene pursuant to the provisions of Section 3001(c) of the Employee Retirement Income Security Act of 1974, the Secretary of Labor, or either of them, shall be permitted to intervene in a retirement plan action in accordance with the provisions of Code Section 7476.

**(b) Procedure:** If either of the persons mentioned in paragraph (a) of this Rule desires to intervene, he shall file a pleading, either a petition in intervention or an answer in intervention, not later than 30 days after joinder of issue (see Rule 214) unless the Court directs otherwise. All new matters of claim or defense in a pleading in intervention shall be deemed denied.

### **RULE 217. DISPOSITION OF ACTIONS FOR DECLARATORY JUDGMENT**

**(a) General:** Disposition of an action for declaratory judgment, which does not involve a revocation, will ordinarily be made on the basis of the administrative record, as defined in Rule 210 (b)(10). Only with the permission of the Court, upon good cause shown, will any party be permitted to introduce before the Court any evidence other than that presented before the Internal Revenue Service and contained in the administrative record as so defined. Disposition of an action for declaratory judgment involving a revocation may be made on the basis of the administrative record alone only

where the parties agree that such record contains all the relevant facts and that such facts are not in dispute.

### *Note*

Although the Rule states that an action not involving a revocation will "ordinarily" be disposed of on the basis of the administrative record, there do not appear to be at this time any circumstances under which a trial will be held except as to disputed jurisdictional facts or to resolve disagreement between the parties as to the contents of the administrative record. It is expected that the Court's function will be merely to adjudicate whether the Commissioner's determination is erroneous (or in the case of a Section 367 action whether the Commissioner's determination is reasonable) upon the basis of the materials contained in the administrative record upon which the determination of the Commissioner was based. The facts and representations revealed by the administrative record will be assumed to be true for purposes of the proceeding, except of course as to ultimate conclusions and inferences that may be drawn therefrom or as to disputed jurisdictional facts. The entire second sentence and the word "ordinarily" in the first sentence appear in the Rule merely out of an abundance of caution to provide for the possibility of a trial on other facts or the presentation of evidence in the event that a situation not now contemplated might arise in which a trial would be appropriate.

The distinction in treatment under this Rule for cases involving a revocation results from the difference in processing of such cases by the Internal Revenue Service, which usually bases its determination of revocation on its own investigation rather than by accepting the facts asserted by the applicant and which go into the administrative record in other cases. See Notes to Rule 213(a)(2) and (b).

**(b) Procedure:** (1) *Disposition on the Administrative Record:* The Court expects that, within 30 days after service of the answer, the parties will file with the Court the entire administrative record (or so much thereof as either party may deem necessary for a complete disposition of the action for declaratory judgment), stipulated as to its genuineness. If, however, the parties are unable to file such a stipulated administrative record, then, not sooner than 30 days nor later than 45 days after service of the answer, the Commissioner shall file with the Court the entire administrative record, as defined in Rule 210(b)(10), appropriately certified as to its genuineness by the Commissioner or by an official authorized to act for him in such situation. See Rule 212, as to the time and place for submission of the action to the Court. The Court will thereafter issue an opinion and declaratory judgment in the action. Except in a case

involving a revocation, the Court's decision will be based upon the assumption that the facts as represented in the administrative record as so stipulated or so certified are true and upon any additional facts as found by the Court if the Court deems that a trial is necessary. In the case of a revocation, the Court may, upon the basis of the evidence presented, make findings of fact which differ from the administrative record. See subparagraph (3) of this paragraph.

### *Note*

With respect to the difference in treatment of cases involving revocations, see the Notes to Rule 213(a)(2) and (b) and to paragraph (a) of this Rule.

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

(3) *Disposition Where Trial Is Required:* Whenever a trial is required in an action for declaratory judgment, such trial shall be conducted in accordance with the Rules contained in Title XIV, except as otherwise provided in this Title.

(c) **Burden of Proof:** The burden of proof in declaratory judgment actions shall be as follows:

(1) *Retirement Plan Actions:* (i) *Parties Petitioner:* In all cases, the burden of proof shall be upon the petitioner as to jurisdictional requirements. The burden of proof shall be upon the petitioner, and upon any party joining or intervening on his side, as to those grounds set forth in the respondent's notice of determination that a retirement plan does not qualify. Where the respondent has determined that a retirement plan does qualify, the petitioner, and any party joining or intervening on his side, shall bear the burden of proof as to every ground on which he relies to sustain his position that such plan does not qualify. Where the Commissioner has failed to issue a notice of determination—

(A) the petitioner who contends that the retirement plan does qualify, and any party joining or intervening on his side, shall bear the burden of proof as to the jurisdictional

requirements described in Rule 210(c) and also with respect to the date on which the request for determination, if any, was mailed to the Internal Revenue Service and the office to which it was mailed, and that no notice of determination has been issued by the Commissioner; but

(B) the petitioner who contends that the retirement plan does not qualify, and any party joining or intervening on his side, shall bear the burden of proof as to the matters set forth in subparagraph (1)(i)(A) of this paragraph (c) and also as to the grounds and supporting facts on which he relies for his claim that the plan does not qualify.

(ii) *Parties Respondent*: The burden of proof shall be upon the respondent, and upon any party joining or intervening on his side, as to any ground not stated in the notice of determination upon which either relies to sustain the respondent's determination that a retirement plan does not qualify. If the respondent has not issued a notice of determination, he, and any party joining or intervening on his side, shall bear the burden of proof as to every ground upon which either relies to sustain his position that such plan does not qualify. See also subparagraph (1)(i)(B) of this paragraph (c).

### **Note**

The burden of proof provisions in Par. (c) (1) of this Rule, relating to retirement plan actions, are identical in substance with those of Rule 217 (c) in Title XXI which became effective on September 2, 1975. Those provisions have since been approved in the course of enactment of the Tax Reform Act of 1976. See, e.g., S. Rept. No. 94-938, 94th Cong., 2d Sess., p. 588.

(2) *Other Actions*: (i) *Petitioner*: The burden of proof shall be upon the petitioner as to jurisdictional requirements and as to the grounds set forth in the notice of determination. Where the Commissioner has failed to issue a notice of determination, the burden of proof shall be on the petitioner with respect to jurisdictional requirements, and also with respect to the date on which the request for determination, if any, was mailed to the Internal Revenue Service and the office to which it was mailed, and that no notice of determination has been issued by the Commissioner.

(ii) *Respondent*: The burden of proof shall be upon the respondent as to any ground upon which he relies and which

is not stated in the notice of determination. If the respondent has not issued a notice of determination, he shall bear the burden of proof as to every ground upon which he relies to sustain his position, other than those matters as to which the burden is on the petitioner under subparagraph (2) (i) of this paragraph (c) where such a notice is not issued.

*Note*

These burden of proof provisions, applicable to Section 367 actions and to exempt organization actions, are patterned after those applicable to retirement plan actions, with changes reflecting the differences between these actions in regard to third party participation through joinder or intervention.

**RULE 218. PROCEDURE IN ACTIONS HEARD  
BY A COMMISSIONER OF THE COURT**

**(a) Where Commissioner Is To Make the Decision:** When an action for declaratory judgment is assigned to a commissioner and he is authorized in the order of assignment to make the decision, the opinion of the commissioner and his proposed decision shall be submitted to and approved by the Chief Judge or by another Judge designated by the Chief Judge for that purpose, prior to service of the opinion and decision upon the parties.

**(b) Where Commissioner Is Not To Make the Decision:** Where an action for declaratory judgment is assigned to a commissioner but he is not authorized in the order of assignment to make the decision, the procedure provided in Rule 182 shall be followed.

**TITLE XXII.**

**DISCLOSURE ACTIONS**

**RULE 220. GENERAL**

**(a) Applicability:** The Rules of this Title XXII set forth the special provisions which apply to the three types of disclosure actions relating to written determinations by the Internal Revenue Service and their background file docu-

ments, as authorized by Code Section 6110. They consist of (1) actions to restrain disclosure, (2) actions to obtain additional disclosure, and (3) actions to obtain disclosure of identity in the case of third party contacts. Except as otherwise provided in this Title, the other Rules of Practice and Procedure of the Court, to the extent pertinent, are applicable to such disclosure actions. The Rules of this Title shall take effect on August 1, 1977.

### **Note**

Code Section 6110, which confers jurisdiction on the Court in such actions, was enacted by Section 1201(a) of the Tax Reform Act of 1976, and under Section 1201(e) of that Act became effective on November 1, 1976.

Jurisdiction over such actions to restrain disclosure is conferred exclusively on the Court. Jurisdiction over the other two types of actions, to compel disclosure, is conferred as well on the United States District Court for the District of Columbia.

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

(1) A "written determination" means a ruling, determination letter, or technical advice memorandum. See Code Section 6110(b)(1).

(2) A "prior written determination" is a written determination issued pursuant to a request made before November 1, 1976.

(3) A "background file document" has the meaning provided in Code Section 6110(b)(2).

(4) A "notice of intention to disclose" is the notice described in Code Section 6110(f)(1).

(5) "Party" includes a petitioner, the respondent Commissioner of Internal Revenue, and any intervenor under Rule 225.

(6) A "disclosure action" is either an "additional disclosure action," and "action to restrain disclosure," or a "third party contact action," as follows:

(i) An "additional disclosure action" is an action to obtain disclosure within Code Section 6110(f)(4).

(ii) An "action to restrain disclosure" is an action within Code Section 6110(f)(3) or (h)(4) to prevent any part or all of a written determination, prior written determination, or background file document from being opened to public inspection.

(iii) A "third party contact action" is an action to obtain disclosure of the identity of a person to whom a written



determination pertains in accordance with Code Section 6110(d)(3).

(7) "Third party contact" means the person described in Code Section 6110(d)(1) who has communicated with the Internal Revenue Service.

**(c) Jurisdictional Requirements:** The Court does not have jurisdiction of a disclosure action under this Title unless the following conditions are satisfied:

(1) In an additional disclosure action, the petitioner has exhausted all administrative remedies available within the Internal Revenue Service. See Code Section 6110(f)(2)(A) and (4)(A).

(2) In an action to restrain disclosure—

(i) The Commissioner has issued a notice of intention to disclose or, in the case of a prior written determination, the Commissioner has issued public notice in the Federal Register that the determination is to be opened to public inspection.

(ii) In the case of a written determination, the petition is filed with the Court within 60 days after mailing by the Commissioner of a notice of intention to disclose; or, in the case of a prior written determination, the petition is filed with the Court within 75 days after the date of publication of the notice in the Federal Register.

(iii) The petitioner has exhausted all administrative remedies available within the Internal Revenue Service. See Code Section 6110(f)(2)(B) and (3)(A)(iii).

(3) In a third party contact action—

(i) The Commissioner was required to make a notation on the written determination in accordance with Code Section 6110(d)(1).

(ii) A petition is filed within 36 months after the first date on which the written determination is open to public inspection.

**(d) Form and Style of Papers:** All papers filed in a disclosure action shall be prepared in the form and style set forth in Rule 23; except that whenever any party joins or intervenes in the action, then thereafter, in addition to the number of copies required to be filed under such Rule, an additional copy shall be filed for each party who joins or

intervenes in the action. In the case of anonymous parties, see Rule 227.

## **RULE 221. COMMENCEMENT OF DISCLOSURE ACTION**

**(a) Commencement of Action:** A disclosure action shall be commenced by filing a petition with the Court. See Rule 22, relating to the place and manner of filing the petition, and Rule 32, relating to the form of pleadings.

**(b) Contents of Petition:** Every petition shall be entitled "Petition for Additional Disclosure" or "Petition to Restrain Disclosure" or "Petition to Disclose Identity." Subject to the provisions of Rule 227, dealing with anonymity, each petition shall contain the petitioner's name and address, an appropriate prayer for relief, and the signature of the petitioner or his counsel. In addition, each petition shall contain the allegations described in paragraph (c), (d), or (e) of this Rule.

**(c) Petition in Additional Disclosure Action:** The petition in an additional disclosure action shall contain:

(1) A brief description (including any identifying number or symbol) of the written determination, prior written determination, or background file document, as to which petitioner seeks additional disclosure. A copy of any such determination or document, as it is then available to the public, shall be appended.

(2) The date of the petitioner's request to the Internal Revenue Service for additional disclosure, with a copy of such request appended.

(3) A statement of the Commissioner's disposition of the request, with a copy of such disposition appended.

(4) A statement that the petitioner has exhausted all administrative remedies available within the Internal Revenue Service.

(5) In separate lettered subparagraphs, a clear and concise statement identifying each portion of the written determination, prior written determination, or background file document as to which petitioner seeks additional disclosure together with any facts and reasons to support disclosure. See Rule 229 with respect to the burden of proof in an additional disclosure action.

**(d) Petition in Action to Restrain Disclosure:** The petition in an action to restrain disclosure shall contain:

(1) A statement that the petitioner is (i) a person to whom the written determination pertains, or (ii) a successor in interest, executor, or other person authorized by law to act for or on behalf of such person, or (iii) a person who has a direct interest in maintaining the confidentiality of the written determination or background file document or portion thereof, or (iv) in the case of a prior written determination, the person who received such prior written determination.

(2) A statement that the Commissioner has issued a notice of intention to disclose with respect to a written determination or a background file document, stating the date of mailing of the notice of intention to disclose and appending a copy of it to the petition; or, in the case of a prior written determination, a statement that the Commissioner has issued public notice in the Federal Register that the determination is to be opened to public inspection, and stating the date and citation of such publication in the Federal Register.

(3) A brief description (including any identifying number or symbol) of the written determination, prior written determination, or background file document, as to which petitioner seeks to restrain disclosure.

(4) The date of petitioner's request to the Internal Revenue Service to refrain from disclosure, with a copy of such request appended.

(5) A statement of the Commissioner's disposition of the request, with a copy of such disposition appended.

(6) A statement that petitioner has exhausted all administrative remedies available within the Internal Revenue Service.

### **Note**

While the statute is not explicit as to whether administrative remedies have to be exhausted before bringing an action to restrain disclosure of a prior written determination, the Court expects that all administrative avenues available in such instances will be exhausted before resorting to such Court action.

(7) In separate lettered subparagraphs, a clear and concise statement identifying each portion of the written determina-

tion, prior written determination, or background file document as to which petitioner seeks to restrain disclosure together with any facts and reasons to support his position. See Rule 229 with respect to the burden of proof in an action to restrain disclosure.

**(e) Petition in Third Party Contact Action:** The petition in a third party contact action shall contain:

(1) A brief description (including any identifying number or symbol) of the written determination to which the action pertains. There shall be appended a copy of such determination, and the background file document (if any) reflecting the third party contact, as then available to the public.

(2) The date of the first day that the written determination was open to public inspection.

(3) A statement of the disclosure sought by the petitioner.

(4) A clear and concise statement of the impropriety alleged to have occurred or the undue influence alleged to have been exercised with respect to the written determination or on behalf of the person whose identity is sought, and the public interest supporting any other disclosure. See Rule 229 with respect to the burden of proof in a third party contact action.

**(f) Service:** For the provisions relating to service of the petition and other papers, see Rule 21.

**(g) Anonymity:** With respect to anonymous pleading, see Rule 227.

## **RULE 222. REQUEST FOR PLACE FOR SUBMISSION TO THE COURT**

At the time of filing a petition in a disclosure action, a request for a place of hearing shall be filed in accordance with Rule 140, and the provisions of that Rule shall be applied in designating such place. In addition, the petitioner shall include the date on which he believes the action will be ready for submission to the Court and his estimate of the time required therefor. The Commissioner shall, at the time of filing his answer, also set forth in a separate statement the date on which he expects the action will be ready for submission to the Court and an estimate of the time required therefor. An intervenor shall likewise furnish such information to the Court in a separate statement filed with his first

pleading in the case. After the action is at issue (see Rule 224), it will ordinarily, without any further request by the Court for information as to readiness for submission, be placed on a calendar for submission to the Court. See also Rule 229.

## RULE 223. OTHER PLEADINGS

(a) **Answer:** (1) *Time to Answer or Move:* The Commissioner shall have 30 days from the date of service of the petition within which to file an answer or move with respect to the petition, or, in an action for additional disclosure, to file an election not to defend pursuant to Code Section 6110(f)(4)(B), in which event he shall be relieved of the obligation of filing an answer or any subsequent pleading. With respect to intervention when the Commissioner elects not to defend, see Rule 225.

(2) *Form and Content:* The answer shall be drawn so that it will advise the petitioner and the Court fully of the nature of the defense. It shall contain a specific admission or denial of each material allegation in the petition. If the Commissioner shall be without knowledge or information sufficient to form a belief as to the truth of an allegation, he shall so state, and such statement shall have the effect of a denial. If the Commissioner intends to qualify or to deny only a part of an allegation, he shall specify so much of it as is true and shall qualify or deny only the remainder. In addition, the answer shall contain a clear and concise statement of every ground, together with the facts in support thereof on which the Commissioner relies and has the burden of proof. Paragraphs of the answer shall be designated to correspond to those of the petition to which they relate.

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

(b) **Reply:** Each petitioner may file a reply or move with respect to the answer within 20 days from the date of service of the answer. Where a reply is filed, every affirmative allegation set out in the answer and not expressly admitted or denied in the reply, shall be deemed to be admitted. Where a reply is not filed, the affirmative allegations in the

answer will be deemed denied. Any new material contained in the reply shall be deemed denied.

### **RULE 224. JOINDER OF ISSUE**

A disclosure action shall be deemed at issue upon the filing of the reply or at the expiration of the time for doing so.

### **RULE 225. INTERVENTION**

(a) **Who May Intervene:** The persons to whom notice is required to be given by the Commissioner pursuant to Code Section 6110(d)(3), (f)(3)(B), or (f)(4)(B) shall have the right to intervene in the action as to which the notice was given. The Commissioner shall append a copy of the petition to any such notice.

(b) **Procedure:** If a person desires to intervene, he shall file an initial pleading, which shall be a petition in intervention or an answer in intervention, not later than 30 days after mailing by the Commissioner of the notice referred to in paragraph (a) of this Rule. In an action for additional disclosure where the Commissioner elects not to defend pursuant to Code Section 6110(f)(4)(B), the Commissioner shall mail to each person, to whom he has mailed the notice referred to in paragraph (a) of this Rule, a notice of his election not to defend, and any such person desiring to intervene shall have 30 days after such mailing within which to file a petition in intervention or an answer in intervention. The initial pleading of an intervenor, whether a petition or answer, shall show the basis for the right to intervene and shall include, to the extent appropriate, the same elements as are required for a petition under Rule 221 or an answer under Rule 223. An intervenor shall otherwise be subject to the same rules of procedure as apply to other parties. With respect to anonymous intervention, see Rule 227.

### **RULE 226. JOINDER OF PARTIES**

The joinder of parties in a disclosure action shall be subject to the following requirements, and in other respects, to the extent relevant, to Rules 61 and 62:

**(a) Commencement of Action:** Any person who meets the requirements for commencing such an action may join with any other such person in filing a petition with respect to the same written determination, prior written determination, or background file document. But see Code Section 6110(f)(3)(B) and (h)(4).

**(b) Consolidation of Actions:** If more than one petition is filed with respect to the same written determination, prior written determination, or background file document, see Rule 141 with respect to the consolidation of the actions.

## **RULE 227. ANONYMOUS PARTIES**

**(a) Petitioners:** A petitioner in an action to restrain disclosure relating to either a written determination or a prior written determination may file the petition anonymously, if appropriate.

**(b) Intervenors:** An intervenor may proceed anonymously, if appropriate, in any disclosure action.

**(c) Procedure:** A party who proceeds pursuant to this Rule shall be designated as "Anonymous." In all cases where a party proceeds anonymously pursuant to paragraph (a) or (b) of this Rule, such party shall set forth in a separate paper his name and address and the reasons why he seeks to proceed anonymously. Such separate paper shall be filed with his initial pleading. Anonymity, where appropriate, shall be preserved to the maximum extent consistent with the proper conduct of the action. See Rule 13(c), relating to contempt of Court. With respect to confidential treatment of pleadings and other papers, see Rule 228.

## **RULE 228. CONFIDENTIALITY**

**(a) Confidentiality:** The petition and all other papers submitted to the Court in any disclosure action shall be placed and retained by the Court in a confidential file and shall not be open to inspection unless otherwise permitted by the Court.

**(b) Publicity of Court Proceedings:** On order of the Court, portions or all of the hearings, testimony, evidence, and reports in any action under this title may be closed to the public or to inspection by the public, to the extent deemed by the Court to be appropriate in order to preserve

the anonymity, privacy, or confidentiality of any person involved in an action within Code Section 6110. See Code Section 6110(f)(6).

### *Note*

Traditionally, the records of the Tax Court and the proceedings before it are open to the public, but under Code Section 6110(f)(6) an exception had to be made because of the specific need to protect public and private rights of nondisclosure recognized by the statute, e.g., the provisions with respect to exemptions from disclosure (Code Section 6110(c)) and with respect to proceeding anonymously (Code Section 6110(d)(3), (f)(3), and (f)(4)(B)). Additionally, third party contact actions, which involve issues of impropriety and undue influence, may be brought by *any person* without any prior investigatory safeguards. A disclosure action, by hypothesis, involves a disputed issue as to disclosure and, in any such action, public and disputed nonpublic material will be likely to be intertwined. It appears utterly impracticable to expect personnel of the Clerk's office, in the first instance, to separate the materials when filed between those to be kept confidential and those available for public inspection. In light of the foregoing considerations, the Rule recognizes the specific need for protection and provides for confidentiality "unless otherwise permitted by the Court." Thus, while a case is still in the course of litigation, it would not ordinarily be feasible to function with a 2-file system, one confidential and the other open to the public. However, the Rules contemplate that once a case is finally adjudicated, an order would be entered that would divide the theretofore confidential file into two files, only one of which would be open to public inspection.

## **RULE 229. BURDEN OF PROOF**

The burden of proof shall be upon the petitioner as to the jurisdictional requirements described in Rule 220(c). As to other matters, the burden of proof shall be determined consistently with Rule 142(a), subject to the following:

(a) In an action for additional disclosure, the burden of proof as to the issue of whether disclosure should be made shall be on the Commissioner and on any other person seeking to deny disclosure. See Code Section 6110(f)(4)(A).

(b) In an action to restrain disclosure, the burden of proof as to the issue of whether disclosure should be made shall be upon the petitioner.

(c) In a third party contact action, the burden of proof shall be on the petitioner to establish that one could reasonably conclude that an impropriety occurred or undue



influence was exercised with respect to the written determination by or on behalf of the person whose identity is sought.

### *Note*

This Rule sets forth the normal rules as to burden of proof with such modifications and explicit provisions as are dictated by the statutory mandate and legislative history. See Code Section 6110(f)(4)(A); S. Rept. No. 94-318, pp. 313, 314; H. Rept. No. 94-658, pp. 324, 325. The fact that the Rule does not contain any provision dealing explicitly with the burden of proof in respect of the issue of disclosure in the public interest in third party contact actions (see Code Section 6110(d)(3)) is not to be taken as indicative of where the burden of proof lies in respect of such issue.

## **RULE 230. PROCEDURE IN ACTIONS HEARD BY A COMMISSIONER OF THE COURT**

**(a) Where Commissioner Is To Make the Decision:**  
When a disclosure action is assigned to a commissioner and he is authorized in the order of assignment to make the decision, the opinion of the commissioner and his proposed decision shall be submitted to and approved by the Chief Judge, or by another Judge designated by the Chief Judge for that purpose, prior to service of the opinion and decision upon the parties.

**(b) Where Commissioner Is Not To Make the Decision:**  
When a disclosure action is assigned to a commissioner but he is not authorized in the order of assignment to make the decision, the procedure provided in Rule 182 shall be followed.