REPORTS

OF THE

UNITED STATES TAX COURT

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MARY T. PITTMAN

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ERRATUM

77 T.C. at 1134 (*Boser v. Commissioner*):

By Court order dated June 18, 1982, footnote 5 was deleted and the following footnote inserted in lieu thereof:

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[5] We believe that Mr. Boser would need the use of the aircraft for 15 hours in order to obtain 12 hours of instrument flight time and that the petitioners' deduction should be based on an allocation of actual expenses, plus depreciation, between such use and the total hours Mr. Boser flew his aircraft during 1976.

JUDGES OF THE UNITED STATES TAX COURT

Chief Judge

THEODORE TANNENWALD, JR.

Judges

WILLIAM M. FAY	HERBERT L. CHABOT
HOWARD A. DAWSON, JR.	ARTHUR L. NIMS III
CHARLES R. SIMPSON	EDNA G. PARKER
C. MOXLEY FEATHERSTON	MEADE WHITAKER
LEO H. IRWIN	JULES G. KÖRNER III
SAMUEL B. STERRETT	PERRY SHIELDS
WILLIAM A. GOFFE	LAPSLEY W. HAMBLEN, JR.[1]
DARRELL D. WILES	MARY ANN COHEN[2]
RICHARD C. WILBUR	_____ _____ (VACANCY)

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

NORMAN O. TIETJENS	WILLIAM M. DRENNEN
BRUCE M. FORRESTER	IRENE F. SCOTT
ARNOLD RAUM	

Special Trial Judges

JAMES M. GUSSIS	JOHN J. PAJAK
FRED S. GILBERT, JR.	DARRELL D. HALLETT
FRANCIS J. CANTREL	FRED R. TANSILL
DANIEL J. DINAN	RANDOLPH F. CALDWELL, JR.
MARVIN F. PETERSON	LEE M. GALLOWAY

CHARLES S. CASAZZA, *Clerk*

[1] Judge Hamblen took oath of office September 14, 1982.
[2] Judge Cohen took oath of office September 24, 1982

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 adding Rules 75 and 152, by redesignating former Rule 230 as Rule 229A, by adding a new Title XXIII (Rules 230 through 233), and by amending Rules 34, 55, 70, 74, 80, 100, 102, 104, 143, 147, 155, 161, 171, 183, and 211.

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 are not included in the printed publication prepared for general distribution.

TITLE IV

PLEADINGS

RULE 34. PETITION

(b) Content of Petition in Deficiency or Liability Actions: The petition in a deficiency or liability action shall contain (see Form 1, Appendix I):

[Paragraphs (1) through (8) have not been changed.]

A claim for reasonable litigation costs shall not be included in the petition in a deficiency or liability action. For the requirements as to claims for reasonable litigation costs, see Rule 231.

Note

Par. (b) of this Rule is amended to make clear that a claim for reasonable litigation costs is not be included in the petition in a deficiency or liability action.

TITLE V

MOTIONS

RULE 55. MISCELLANEOUS

For reference in the Rules to other motions, see Rules 25(c) (extension of time), 40 (defenses made by motion), 41 (amendment of pleadings), 63 (substitution of parties), 71(c) (answers to interrogatories), 81(b) (depositions), 90(d) (requests for admissions), 91(f) (stipulations), 121(a) (summary judgment), 123(c) (setting aside default or dismissal), 134 (continuances), 140(d) (place of trial), 141 (consolidation and separation), 151(c) (delinquent briefs), 161 (reconsideration), 162 (vacating or revising decision), and 231 (reasonable litigation costs).

Note

This Rule is amended to incorporate a reference to motions for reasonable litigation costs under new Rule 231.

TITLE VII

DISCOVERY

RULE 70. GENERAL PROVISIONS

(a) General: (1) *Methods and Limitations of Discovery:* In conformity with these Rules, a party may obtain discovery by written interrogatories (Rule 71), by production of documents or things (Rules 72 and 73), by depositions upon consent of the parties (Rule 74), or by depositions without consent of the parties in certain cases (Rule 75). However, the Court expects the parties to attempt to attain the objectives of discovery through informal consultation or communication before utilizing the discovery procedures provided in these Rules. Discovery is not available under these Rules through depositions except to the limited extent provided in Rules 74 and 75. See Rules 91(a) and 100 regarding relationship of discovery to stipulations.

(2) *Time for Discovery:* Discovery shall not be commenced, without leave of Court, before the expiration of 30 days after joinder of issue (see Rule 38), and shall be completed, unless otherwise authorized by the Court, no later than 45 days prior to the date set for call of the case from a trial calendar. However, see Rule 75(a) regarding the time for taking a discovery deposition of a non-party witness without consent of the parties. Discovery of matters which are relevant only to the issue of a party's entitlement to reasonable litigation costs shall not be commenced, without leave of Court, before a motion for reasonable litigation costs has been noticed for a hearing, and shall be completed, unless otherwise authorized by the Court, no later than 45 days prior to the date set for hearing.

* * * * * * *

(d) Use in Case: The answers to interrogatories, things produced in response to a request, or other information or

responses obtained under Rules 71, 72, 73, 74, and 75, may be used at trial or in any proceeding in the case prior or subsequent to trial, to the extent permitted by the rules of evidence. Such answers or information or responses will not be considered as evidence until offered and received as evidence. No objections to interrogatories or the answers thereto, or to a request to produce or the response thereto, will be considered unless made within the time prescribed, except that the objection that an interrogatory or answer would be inadmissible at trial is preserved even though not made prior to trial.

Note

Pars. (a) and (d) of this Rule are amended to reflect the addition of Rule 75, relating to discovery depositions without consent of the parties in certain cases.

Par. (a)(2) of this Rule is amended to prohibit discovery of matters relevant only to the issue of a party's entitlement to reasonable litigation costs until after a motion for such costs has been noticed for a hearing, unless the Court otherwise permits, and to require that discovery of such matters be completed not later than 45 days prior to the date set for hearing, unless otherwise authorized by the Court.

RULE 74. DEPOSITIONS FOR DISCOVERY PURPOSES—UPON CONSENT OF PARTIES

(f) Other Applicable Rules: Depositions for discovery purposes under this Rule shall be governed by the provisions of the following Rules with respect to the matters to which they apply: Rules 81(e) (persons before whom deposition taken), 81(f) (taking of deposition), 81(g) (expenses), 81(h)(1) and (2) (execution and form of deposition), 81(i) (use of deposition), and 85(b), (c), (d), and (e) (objections and irregularities). For Rules concerned with the timing and frequency of depositions, supplementation of answers, protective orders, effect of evasive or incomplete answers or responses, and sanctions and enforcement action, see Title X.

Note

The heading is amended to make clear that this Rule applies to discovery depositions taken upon consent of all parties.

Par. (f) is amended to make clear that it applies only to discovery depositions under this Rule.

RULE 75. DEPOSITIONS FOR DISCOVERY PURPOSES—WITHOUT CONSENT OF PARTIES IN CERTAIN CASES

(a) When Depositions May Be Taken: After a notice of trial has been issued or after a case has been assigned to a Judge or Special Trial Judge of the Court, any party may, without leave of Court, take a deposition for discovery purposes of a non-party witness in the circumstances described in paragraph (b) of this Rule. Unless the Court shall determine otherwise for good cause shown, the taking of such a deposition will not be regarded as sufficient ground for granting a continuance from a date or place of trial theretofore set.

(b) Availability: The taking of a deposition of a non-party witness under this Rule is an extraordinary method of discovery and may be used only where a non-party witness can give testimony or possesses documents or things which are discoverable within the meaning of Rule 70(b) and where such testimony, documents, or things practicably cannot be obtained through informal consultation or communication (Rule 70(a)(1)) or by a deposition taken with consent of the parties (Rule 74). If such requirements are satisfied, a deposition may be taken under this Rule, for example, where a party is a member of a partnership and an issue in the case involves an adjustment with respect to such partnership, or a party is a shareholder of an electing small business corporation (as defined in Code Section 1371(b)) and an issue in the case involves an adjustment with respect to such corporation.

(c) Notice: A party desiring to take a deposition under this Rule shall give notice in writing to every other party to the case and to the non-party witness to be deposed. The notice shall state the name of the party seeking the deposition, the name and address of the person to be deposed, the time and place proposed for the deposition, and the officer before whom the deposition is to be taken. If the deposition is to be taken on written questions, a copy of the questions shall be annexed to the notice.

(d) Objections: Within 15 days after service of the notice of deposition, a party or a non-party witness shall serve on the party seeking the deposition any objections to the deposition. The burden shall be upon the party seeking the deposition to move for an order with respect to any such objections or any failure of the non-party witness, and such party shall annex to his motion the notice of deposition with proof of service thereof, together with a copy of any responses and objections. Prior to moving for such an order, neither the notice nor the responses shall be filed with the Court.

(e) Other Applicable Rules: Depositions for discovery purposes under this Rule shall be governed by the provisions of the following Rules with respect to the matters to which they apply: Rule 74(d) (transcript), 74(e) (depositions upon written questions), Rule 81(c) (designation of person to testify), 81(e) (person before whom deposition taken), 81(f) (taking of deposition), 81(g) (expenses), 81(h)(1) and (2) (execution and form of deposition), 81(i) (use of deposition); and Rule 85(a), (b), (c), (d), and (e) (objections and irregularities). For Rules concerned with the timing and frequency of depositions, supplementation of answers, protective orders, effect of evasive or incomplete answers or responses, and sanctions and enforcement action, see Title X.

Note

Rule 75 authorizes a new discovery method, the taking of discovery depositions of non-party witnesses without consent of the parties, subject to the conditions prescribed by the Rule.

The Rule permits any party, without the consent of any other party and without leave of the Court, to take the deposition of a non-party witness under the notice procedure prescribed in par. (c) and subject to the Court's ruling on any objections under par. (d). A deposition may be taken under the Rule only after the case has been assigned to a Judge or Special Trial Judge or after a notice of trial has been issued.

Under the Rule, a discovery deposition may be taken only of a witness who is not a party to the case; the deposition of a party may be taken only upon consent of all parties under Rule 74. The new Rule 75 provides an extraordinary method of discovery which may be used only where the information sought cannot be obtained by informal consultation or by other discovery methods. For example, if the other requirements of the Rule are satisfied, a deposition might be taken under the Rule in a case involving the tax liability of a limited partner who does not have access to the books and records of the partnership, or where a bank or other person possesses records

which are relevant to the tax liability of a party and are otherwise unavailable.

Certain provisions of Rule 74, as well as many of the procedural Rules applicable to depositions to preserve evidence under Title VIII, have been made applicable to discovery depositions under the new Rule 75, as set forth in par. (e).

Depositions may be taken under Rule 75 after January 3, 1983, in pending or future cases.

TITLE VIII

DEPOSITIONS

RULE 80. GENERAL PROVISIONS

(a) General: On complying with the applicable requirements, depositions to perpetuate evidence may be taken in a pending case before trial (Rule 81), or in anticipation of commencing a case in this Court (Rule 82), or in connection with the trial (Rule 83). Depositions under this Title may be taken only for the purpose of making testimony or any document or thing available as evidence in the circumstances herein authorized by the applicable Rules. Depositions for discovery purposes may be taken only in accordance with Rules 74 and 75.

Note

Par. (a) of this Rule is amended to reflect the addition of Rule 75, relating to discovery depositions without consent of the parties in certain cases.

TITLE X

GENERAL PROVISIONS GOVERNING DISCOVERY, DEPOSITIONS, AND REQUESTS FOR ADMISSION

RULE 100. APPLICABILITY

The Rules in this Title apply according to their terms to written interrogatories (Rule 71), production of documents or

things (Rule 72), examination by transferees (Rule 73), depositions (Rules 74, 75, 81, 82, 83, and 84), and requests for admissions (Rule 90). Such procedures may be used in anticipation of the stipulation of facts required by Rule 91, but the existence of such procedures or their use does not excuse failure to comply with the requirements of that Rule. See Rule 91(a)(2).

Note

This Rule is amended to add a reference to new Rule 75 (discovery depositions without consent of the parties in certain cases).

RULE 102. SUPPLEMENTATION OF RESPONSES

A party who has responded to a request for discovery (under Rules 71, 72, 73, 74, or 75) or to a request for admission (under Rule 90) in a manner which was complete when made, is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any matter directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony. In respect of the requirement to furnish reports of expert witnesses, see Rule 71(d)(2).

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which he knows that (A) the response was incorrect when made, or (B) the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the Court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

Note

This Rule has been amended to extend it to discovery depositions without consent of the parties under new Rule 75.

RULE 104. ENFORCEMENT ACTION AND SANCTIONS

(a) Failure to Attend Deposition or to Answer Interrogatories or Respond to Request for Inspection or Production: If a party or an officer, director or managing agent of a party or a person designated in accordance with Rule 74(b), 75(c), or 81(c) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition pursuant to Rule 74, 75, 81, 82, 83, or 84, or (2) to serve answers or objections to interrogatories submitted under Rule 71, after proper service thereof, or (3) to serve a written response to a request for production or inspection submitted under Rule 72 or 73 after proper service of the request, the Court on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraph (b) or (c) of this Rule. If any person, after being served with a subpoena or having waived such service, willfully fails to appear before the officer who is to take his deposition or refuses to be sworn, or if any person willfully fails to obey an order requiring him to answer designated interrogatories or questions, such failure may be considered contempt of court. The failure to act described in this paragraph (a) may not be excused on the ground that the deposition sought, or the interrogatory submitted, or the production or inspection sought, is objectionable, unless the party failing to act has theretofore raised the objection, or has applied for a protective order under Rule 103, with respect thereto at the proper time and in the proper manner, and the Court has either sustained or granted or not yet ruled on the objection or the application for the order.

(b) Failure to Answer: If a person fails to answer a question or interrogatory propounded or submitted in accordance with Rule 71, 74, 75, 81, 82, 83, or 84, or fails to respond to a request to produce or inspect or fails to produce or permit the inspection in accordance with Rule 72 or 73, or fails to

make a designation in accordance with Rule 74(b), 75(e), or 81(c), the aggrieved party may move the Court for an order compelling an answer, response, or compliance with the request, as the case may be. When taking a deposition on oral examination, the examination may be completed on other matters or the examination adjourned, as the proponent of the question may prefer, before he applies for such order.

(c) **Sanctions:** If a party or an officer, director, or managing agent of a party or a person designated in accordance with Rule 74(b), 75(c), or 81(c) fails to obey an order made by the Court with respect to the provisions of Rule 71, 72, 73, 74, 75, 81, 82, 83, 84, or 90, the Court may make such orders as to the failure as are just, and among others the following:

(1) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the case in accordance with the claim of the party obtaining the order.

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence.

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the case or any part thereof, or rendering a judgment by default against the disobedient party.

(4) In lieu of any of the foregoing orders or in addition thereto, an order treating as a comtempt of the Court the failure to obey any such order.

(d) **Evasive or Incomplete Answer or Response:** For purposes of this Rule and Rules 71, 72, 73, 74, 75, 81, 82, 83, 84, and 90, an evasive or incomplete answer or response is to be treated as a failure to answer or respond.

Note

This Rule has been amended to include references to new Rule 75 (discovery despositions without consent of the parties).

TITLE XIV

TRIALS

RULE 143. EVIDENCE

(a) General: Trials before the Court will be conducted in accordance with the rules of evidence applicable in trials without a jury in the United States District Court for the District of Columbia. See Code Section 7453. To the extent applicable to such trials, those rules include the rules of evidence in the Federal Rules of Civil Procedure and any rules of evidence generally applicable in the Federal courts (including the United States District Court for the District of Columbia). Evidence which is relevant only to the issue of a party's entitlement to reasonable litigation costs shall not be introduced during the trial of the case. As to claims for reasonable litigation costs, see Rules 231 and 232.

Note

Par. (a) of this Rule is amended to prohibit the introduction of evidence relevant only to the issue of reasonable litigation costs at the trial of the case.

RULE 147. SUBPOENA

(d) Subpoena for Taking Depositions: (1) *Issuance and Response:* The order of the Court approving the taking of a deposition pursuant to Rule 81(b)(2), or the executed stipulation pursuant to Rule 81(d), or the service of the notice of deposition pursuant to Rule 74(b) or 75(c), constitutes authorization for issuance of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things, which come within the scope of the order or stipulation pursuant to which the deposition is taken. Within 10 days after service of the subpoena or such earlier time designated therein for compliance, the person to whom the subpoena is directed may serve upon the party on whose behalf the subpoena has been issued written objections to compliance with the subpoena in any or all respects. Such objections

should not include objections made, or which might have been made, to the application to take the deposition pursuant to Rule 81(b)(2) or to the notice of deposition under Rule 74(c) or 75(d). If an objection is made, the party serving the subpoena shall not be entitled to compliance therewith to the extent of such objection, except as the Court may order otherwise upon application to it. Such application for an order may be made, with notice to the other party and to any other objecting persons, at any time before or during the taking of the deposition, subject to the time requirements of Rule 70(a)(2) or Rule 81(b)(2). As to availability of protective orders, see Rule 103; and, as to enforcement of such subpoenas, see Rule 104.

(2) *Place of Examination:* The place designated in the subpoena for examination of the deponent shall be the place specified in the notice of deposition served pursuant to Rule 74(b) or 75(c) or in the order of the Court referred to in Rule 81(b)(2) or in the executed stipulation referred to in Rule 81(d). With respect to a deposition to be taken in a foreign country, see Rules 74(e), 81(e)(2), and 84(a).

Note

Par. (d) of this Rule has been amended to provide for issuance of a subpoena to enforce attendance of a non-party witness at a discovery deposition under new Rule 75, relating to discovery depositions without consent of the parties in certain cases. Related references to Rule 75 also are incorporated.

RULE 152. ORAL FINDINGS OF FACT OR OPINION

(a) General: Except in actions for declaratory judgment or for disclosure (see Titles XXI and XXII), the Judge, or the Special Trial Judge in any case in which he is authorized to make the decision of the Court pursuant to Code Section 7456(d)(2) or (3), may, in his discretion, orally state his findings of fact or opinion if he is satisfied as to the factual conclusions to be reached in the case and that the law to be applied thereto is clear.

(b) Transcript: Oral findings of fact or opinion shall be recorded in the transcript of the trial. The pages of the transcript that contain such findings of fact or opinion (or a written summary thereof) shall be served by the Clerk upon all parties.

(c) Citation: Opinions stated orally in accordance with paragraph (a) of this Rule shall not be cited or relied upon as precedent. However, such opinions (including findings of fact) may be referred to for purposes of the application of the doctrine of res judicata, collateral estoppel, or law of the case.

Note

Rule 152 permits the presiding Judge or Special Trial Judge to orally state findings of fact or opinion in appropriate cases, pursuant to the authority of section 106(b) of the Miscellaneous Revenue Act of 1982, Pub. L. 97-362 (Oct. 25, 1982). The Rule does not apply in actions for declaratory judgment or for disclosure.

Under the Rule, the Court's findings will be recorded in the transcript of the proceeding. Those pages of the transcript which record the Court's findings of fact or opinion (or a written summary thereof) will be provided to all parties free of charge.

The authority conferred by this Rule may be exercised on and after March 1, 1983, in pending and future cases.

TITLE XV

DECISION*

RULE 155. COMPUTATION BY PARTIES FOR ENTRY OF DECISION

(a) Agreed Computations: Where the Court has filed or stated its opinion determining the issues in a case, it may withhold entry of its decision for the purpose of permitting the parties to submit computations pursuant to the Court's determination of the issues, showing the correct amount of the deficiency, liability, or overpayment to be entered as the decision. If the parties are in agreement as to the amount of the deficiency or overpayment to be entered as the decision pursuant to the findings and conclusions of the Court, they, or either of them, shall file promptly with the Court an original and two copies of a computation showing the amount of the deficiency, liability, or overpayment and that there is no

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*For statutory provisions relating to entry, date, and finality of decision, see Code Sections 7459, 7463(b), and 7481.

disagreement that the figures shown are in accordance with the findings and conclusions of the Court. The Court will then enter its decision.

Note

Par. (a) of Rule 155 is amended to reflect the addition of Rule 152, regarding oral findings of fact or opinion.

TITLE XVI

POST-TRIAL PROCEEDINGS

RULE 161. MOTION FOR RECONSIDERATION OF FINDINGS OR OPINION

Any motion for reconsideration of an opinion or findings of fact, with or without a new or further trial, shall be filed within 30 days after a written opinion or the pages of the transcript that contain findings of fact or opinion stated orally pursuant to Rule 152 (or a written summary thereof) have been served, unless the Court shall otherwise permit.

Note

Rule 161 is amended to reflect the addition of Rule 152, relating to oral findings of fact or opinion.

TITLE XVII

SMALL TAX CASES

RULE 171. SMALL TAX CASE DEFINED

The term "small tax case" means a case in which:

(a) Neither the amount of the deficiency, nor the amount of any claimed overpayment, placed in dispute (including any additions to tax, additional amounts, and penalties) exceeds—

(1) $5,000 for any one taxable year in the case of income taxes,

(2) $5,000 in the case of estate taxes,

(3) $5,000 for any one calendar year in the case of gift taxes, or

(4) $5,000 for any one taxable period or, if there is no taxable period, for any taxable event in the case of excise taxes under Chapter 41, 42, 43, or 44 of the Code (taxes on certain organizations and persons dealing with them) or under Chapter 45 of the Code (windfall profit tax);

(b) The petitioner has made a request in accordance with Rule 172 to have the proceedings conducted under Code Section 7463; and

(c) The Court has not entered an order in accordance with Rule 172(d) or Rule 173, discontinuing the proceedings in the case under Code Section 7463.

Note

A new subpar. (4) has been added to par. (a) of this Rule to reflect the expansion of small tax cases to include cases involving the excise taxes relating to public charities, private foundations, qualified pension, etc., plans (Chapters 41, 42, 43, and 44 of the Code) and the crude oil windfall profit tax (Chapter 45 of the Code). See Section 106(a) of the Miscellaneous Revenue Act of 1982, Pub. L. 97–362 (Oct. 25, 1982). The revised Rule is applicable to petitions filed after October 25, 1982.

TITLE XVIII

SPECIAL TRIAL JUDGES

RULE 183. SMALL TAX CASES

Rule 182 shall not apply to small tax cases as defined in Rule 171. Except in cases where findings of fact or opinion are stated orally pursuant to Rule 152, a Special Trial Judge who conducts the trial of such a small tax case shall, as soon after such trial as shall be practicable, prepare a summary of the facts and reasons for his proposed disposition of the case, which then shall be submitted promptly to the Chief Judge or to a Judge or Division of the Court, if the Chief Judge shall so direct.

Note

Rule 183 is amended to reflect the addition of Rule 152, which authorizes the Special Trial Judges to render oral findings of fact or opinion in small tax cases.

TITLE XXI

DECLARATORY JUDGMENTS

RULE 211. COMMENCEMENT OF ACTION FOR DECLARATORY JUDGMENT

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

[Paragraphs (1) through (8) have not been changed.]

A claim for reasonable litigation costs shall not be included in the petition in an exempt organization action. For the requirements as to claims for reasonable litigation costs, see Rule 231.

Note

Par. (f) of this Rule is amended to make clear that a claim for reasonable litigation costs is not to be included in the petition in an exempt organization action. The procedure for claiming reasonable litigation costs in actions involving the revocation of exempt organization status is set forth in Rule 231.

TITLE XXII

DISCLOSURE ACTIONS

RULE 229A. PROCEDURE IN ACTIONS HEARD BY A SPECIAL TRIAL JUDGE OF THE COURT

* * * * * * *

Note

Former Rule 230 is redesignated Rule 229A.

TITLE XXIII

CLAIMS FOR LITIGATION COSTS

RULE 230. GENERAL

(a) Applicability: The Rules of this Title XXIII set forth the special provisions which apply to claims for reasonable litigation costs authorized by Code Section 7430. 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 claims for reasonable litigation costs.

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

(1) "Reasonable litigation costs" include the items described in Code Section 7430(c).

(2) A "deficiency action" is an action to redetermine a deficiency determined by the Commissioner in income, gift, or estate tax or in the taxes under Chapter 41, 42, 43, or 44 of the Code (relating to the excise taxes on certain organizations and persons dealing with them), or in the tax under Chapter 45 of the Code (relating to the windfall profit tax), or in any other taxes which are the subject of a notice of deficiency by the Commissioner.

(3) A "liability action" is an action to redetermine fiduciary or transferee liability determined by the Commissioner.

(4) A "partnership action" is an action for readjustment of partnership items under Code Section 6226 or adjustment of partnership items under Code Section 6228.

(5) A "revocation action" is an action for declaratory judgment involving the revocation of a determination that an organization is described in Code Section 501(c)(3).

(6) In the case of a partnership action, the term "party" includes partners who are treated as parties under Code Section 6226(c) or Code Section 6228(a)(4).

(7) "Attorney's fees" include fees paid or incurred for the services of attorneys and fees paid or incurred for the services of an individual (whether or not an attorney) admitted to practice before the Court. For the procedure for admission to practice, see Rule 200.

Note

Title XXIII sets forth rules regarding claims for litigation costs under Code Section 7430, enacted by Section 292(a) of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97–248 (Sept. 3, 1982). Code Section 7430 authorizes the Court, subject to the limitations specified therein, to award reasonable litigation costs to a prevailing party who establishes that the position of the Commissioner was unreasonable. Par. (a) of this Rule makes clear that, except as otherwise provided, the other Rules of Practice and Procedure of the Court, to the extent pertinent, apply to claims for litigation costs.

Title XXIII applies only in actions commenced after February 28, 1983; the Court has no authority under Code Section 7430 to award litigation costs in actions commenced before March 1, 1983. The Court also has no authority to award litigation costs in any declaratory judgment action other than a revocation action as defined in par. (b)(5) of this Rule. Code Section 7430(a)(4).

Par. (b)(6) of this Rule provides that the term "party" includes partners treated as parties to a partnership action under Code Section 6226(c) or Code Section 6228(a)(4). This definition is not intended to express any view as to whether a partner who does not participate in the action may be entitled to an award of litigation costs.

RULE 231. CLAIMS FOR LITIGATION COSTS

(a) Time and Manner of Claim: (1) *Agreed Cases:* Where the parties have reached a settlement which disposes of all issues in the case including litigation costs, an award of reasonable litigation costs, if any, shall be included in the stipulated decision submitted by the parties for entry by the Court.

(2) *Unagreed Cases:* Where a party has substantially prevailed and wishes to claim reasonable litigation costs, and there is no agreement as to that party's entitlement to such costs, a claim shall be made by motion filed—

(i) Within 30 days after the service of a written opinion determining the issues in the case;

(ii) Within 30 days after the service of the pages of the transcript that contain findings of fact or opinion stated orally pursuant to Rule 152 (or a written summary thereof); or

(iii) After the parties have settled all issues in the case other than litigation costs. See paragraphs (b)(2) and (c) of this Rule regarding the filing of a stipulation of settlement with the motion in such cases.

(b) Content of Motion: A motion for an award of reasonable litigation costs shall be in writing and shall contain the following:

(1) A statement that the moving party is a party to a deficiency or liability action, a partnership action, or a revocation action, and that any such action was commenced after February 28, 1983;

(2) A statement sufficient to demonstrate that the moving party has substantially prevailed with respect to either the amount in controversy or the most significant issue or set of issues presented in that action, including a stipulation in the form prescribed by paragraph (c) of this Rule as to any settled issues;

(3) A clear and concise statement of each reason why the moving party alleges that the position of the Commissioner in that action was unreasonable, and a statement of the facts on which the moving party relies to support each of such reasons;

(4) A statement that the moving party has exhausted the administrative remedies available to such party within the Internal Revenue Service;

(5) A statement of the specific litigation costs for which the moving party claims an award, supported by an affidavit in the form prescribed in paragraph (d) of this Rule;

(6) If the moving party requests a hearing on the motion, a statement of the reasons why the motion cannot be disposed of by the Court without a hearing (see Rule 232(a)(3) regarding the circumstances in which the Court will direct a hearing); and

(7) An appropriate prayer for relief.

(c) Stipulation as to Settled Issues: Where some or all of the issues in a case (other than litigation costs) have been settled by the parties, a motion for an award of reasonable litigation costs shall be accompanied by a stipulation, signed by the parties or by their counsel, setting forth the terms of the settlement as to each such issue (including the amount of tax involved). A stipulation of settlement shall be binding upon the parties unless otherwise permitted by the Court or agreed upon by those parties.

(d) Affidavit in Support of Costs Claimed: A motion for an award of reasonable litigation costs shall be accompanied by a detailed affidavit by the moving party or counsel for the

moving party which sets forth distinctly the nature and amount of each item of costs paid or incurred for which an award is claimed.

Note

Under par. (a) of this Rule, a claim for reasonable litigation costs is to be made only after all of the other issues in the case have been either settled by the parties or determined by the Court. If the parties reach a settlement as to all issues, including litigation costs, an award of such costs, if any, is to be included in a stipulated decision; otherwise, a claim for reasonable litigation costs is to be made by motion. If the case is tried by the Court, the motion is to be filed within the time period specified.

The information required to be included in a motion for reasonable litigation costs by par. (b)(2), (3), and (4) of this Rule is of critical importance. Code Section 7430 authorizes an award of litigation costs only where a party substantially prevails with respect to either the amount in controversy or the most significant issue or set of issues presented and establishes that the position of the Commissioner was unreasonable. Moreover, the Court may not award litigation costs unless it determines that the moving party has exhausted the remedies available to that party within the Internal Revenue Service. The stipulation as to settled issues required by par. (c) of this Rule is necessary to enable the Court to determine whether the moving party has substantially prevailed where some or all of the issues have been settled by the parties.

The moving party is not required to attach bills, receipts, or canceled checks to a motion for reasonable litigation costs. Instead, par. (d) of this Rule provides for the submission of a detailed affidavit to document the costs claimed. However, if a dispute develops as to whether any such costs in fact have been paid or incurred, the Court may require additional proof.

RULE 232. DISPOSITION OF CLAIMS FOR LITIGATION COSTS

(a) General: A motion for reasonable litigation costs may be disposed of in one or more of the following ways, in the discretion of the Court:

(1) The Court may take such action as it deems appropriate, on such prior notice, if any, which it may consider reasonable. The action of the Court may be taken without written response or hearing.

(2) The Court may take action after directing that a written response be filed. In that event, the motion shall be served

upon the Commissioner, who shall file such response within 60 days after service of the motion.

(3) After receiving the Commissioner's response, the Court may direct a hearing, which will be held at a location that serves the convenience of the parties and the Court. A motion for reasonable litigation costs ordinarily will be disposed of without a hearing unless it is clear from the motion and the Commissioner's written response that there is a bona fide factual dispute that cannot be resolved without an evidentiary hearing.

(b) Conference Required: Where the Court directs the Commissioner to file a written response, counsel for the Commissioner and the moving party or his counsel shall confer prior to the date for filing such response and attempt to reach an agreement as to each of the allegations by the moving party. The Court expects that, at such conference, the moving party or his counsel shall make available to counsel for the Commissioner substantially the same information relating to any claim for attorney's fees which, in the absence of an agreement, he would be required to file with the Court pursuant to paragraph (d) of this Rule.

(c) Response by the Commissioner: Where the Court directs the Commissioner to file a written response, such response shall specifically state:

(1) Whether the Commissioner agrees that the moving party has substantially prevailed;

(2) Whether the Commissioner agrees that the position of the Commissioner was unreasonable;

(3) Whether the Commissioner agrees that the moving party has exhausted the administrative remedies available to such party within the Internal Revenue Service;

(4) Whether the Commissioner agrees that the amounts of costs claimed are reasonable; and

(5) The basis for the Commissioner's disagreeing with any such allegations by the moving party.

If the Commissioner agrees with the moving party's request for a hearing, or if the Commissioner requests a hearing such response shall include a statement of the Commissioner's reasons why the motion cannot be disposed of without a hearing. If the Commissioner opposes the moving party's

request for a hearing, such response shall include a statement of the reasons why no hearing is required.

(d) Additional Affidavit: Where the Commissioner's response indicates that he and the moving party are unable to agree as to the amount of attorney's fees which is reasonable, counsel for the moving party shall, within 30 days after service of the Commissioner's response, file an additional affidavit which shall include:

(1) A detailed summary of the time expended by each attorney for whom fees are sought, including a description of the nature of the services performed during each period of time summarized. Counsel is expected to maintain contemporaneous, complete, and standardized time records which accurately reflect the work done by each attorney. Where the reasonableness of the hours claimed becomes an issue, counsel is expected to make his time records available for inspection by the Court or by counsel for the Commissioner upon request.

(2) The customary fee for the type of work involved. Counsel shall provide specific evidence of the prevailing community rate for the type of work involved as well as specific evidence of his actual billng practice during the time period involved. Counsel may establish the prevailing community rate by affidavits of other attorneys with similar qualifications reciting the precise fees they have received from clients in comparable cases, by evidence of recent fees awarded by the courts or through settlement to attorneys of comparable reputation and experience performing similar work, or by reliable legal publications.

(3) A description of the fee arrangement with the client. If any part of the fee is payable only on condition that the Court award such fee, the description shall specifically so state.

(4) The preclusion of other employment by the attorney, if any, due to acceptance of the case.

(5) Any time limitations imposed by the client or by the circumstances.

(6) Any other problems resulting from the acceptance of the case.

(7) The professional qualifications and experience of each attorney for whom fees are sought.

(8) The nature and length of the professional relationship with the client.

(9) Awards in similar cases, if any.

(10) Any other information counsel believes will assist the Court in evaluating his claim, which may include, but shall not be limited to, information relating to the novelty and difficulty of the questions presented, the skill required to perform the legal services properly, and any efforts to settle the case.

Where there are several counsel of record, all of whom are members of or associated with the same firm, an affidavit filed by first counsel of record or his designee (see Rule 21(b)(2)) shall satisfy the requirements of this paragraph, and an affidavit by each counsel of record shall not be required.

(e) Burden of Proof: The moving party shall have the burden of proving that he has substantially prevailed, that he has exhausted the administrative remedies available to him within the Internal Revenue Service, that the position of the Commissioner was unreasonable, and that the amount of costs claimed is reasonable.

(f) Disposition: The Court's disposition of a motion for reasonable litigation costs shall be included in the decision entered in the case. Where the Court in its opinion states that the decision will be entered under Rule 155, or where the parties have settled all of the issues other than litigation costs, the Court will enter an order granting or denying the motion and determining the amount of reasonable litigation costs, if any, to be awarded. The parties, or either of them, shall thereafter submit a proposed decision including an award of any such costs, or a denial thereof, for entry by the Court.

Note

Three procedures for disposing of a motion for reasonable litigation costs are provided in par. (a) of this Rule. The Court, in its discretion, may dispose of such a motion without a written response and without a hearing. Alternatively, the Court may order the Commissioner to file a written response and defer disposition until such response is filed. After receiving a written response, the Court may hold a hearing; however, motions for reasonable litigation costs generally will be disposed of without a hearing unless there is a bona fide factual dispute that cannot be resolved without a hearing.

Where the Commissioner is ordered to file a written response, par. (b) directs the parties to confer prior to the date for filing such response. The Court expects that at such conference the parties will make a good-faith effort to reach an agreement as to each of the allegations in the motion for

reasonable litigation costs. Par. (c) directs the Commissioner in his written response to state his agreement or disagreement with each of such allegations, as well as the reasons for any disagreement. This procedure is intended to ensure that the Court consider only those questions that are legitimately the subject of dispute between the parties and is to facilitate the prompt disposition of motions for reasonable litigation costs.

Where the Commissioner disputes the reasonableness of the amount of attorney's fees claimed, par. (d) of this Rule provides that counsel for the moving party shall file an additional affidavit in the form prescribed therein. Par. (d) substantially incorporates the factors that the decided cases have held should be considered in determining what is a reasonable attorney's fee (see, e.g., *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (D.C. Cir. 1982), *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973)); these also are the factors set forth in Rule 1.5(a) of the American Bar Association's Model Rules of Professional Conduct (Final Draft 1982), regarding what is a reasonable fee. Par. (d)(3) provides that the affidavit shall include a description of the fee arrangement with the client, and, if any part of the fee is payable only if the Court awards such fee, a statement to that effect. By requiring this information, the Court is not taking a position on whether the Court is authorized to award fees paid or incurred by someone other than the client (e.g., an organization described in Code Section 501(c)(3)) or whether it may award fees where all or part of the fee is payable only if the Court makes such an award, but the information is necessary so that the Court can consider the issue.

Under par. (e) of this Rule, the moving party has the burden of proving that he has satisfied each of the statutory requirements for an award of reasonable litigation costs.

Par. (f) incorporates the requirement of Code Section 7430(e) that an order disposing of a claim for reasonable litigation costs shall be incorporated as part of the Court's decision in the case. Where the decision is to be entered under Rule 155, or where the parties have settled all issues other than litigation costs, the parties, or either of them, are required to submit a proposed decision, incorporating the Court's order awarding or denying costs, for entry by the Court.

RULE 233. MISCELLANEOUS

For provisions prohibiting the inclusion of a claim for reasonable litigation costs in the petition, see Rules 34(b) (petition in a deficiency or liability action) and 211(f) (petition in a revocation action). For provisions regarding discovery, see Rule 70(a)(2). For provisions prohibiting the introduction of

evidence regarding a claim for reasonable litigation costs at the trial of the case, see Rule 143(a).

Note

This Rule provides references to pertinent provisions of certain other Rules of Practice and Procedure of the Court.

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