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REPORTER OF DECISIONS
Retired August 1, 1975

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Appointed August 3, 1975

U. S. TAX COURT

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Volume 100 of Reports of the United States Tax Court

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JUDGES OF THE UNITED STATES TAX COURT

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

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AUSTIN HOYT

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CHARLES S. CASAZZA, *Clerk*

WILLIAM P. CREWE, *Court Executive*

UNITED STATES TAX COURT

WASHINGTON, D. C.

GENERAL ORDER NO. 2

Supplement 3

Effective July 1, 1975, and until further notice, Judge C. Moxley Featherston is designated as the Judge in charge of the Small Tax Case Division of the United States Tax Court, succeeding Judge Bruce M. Forrester.

Effective July 1, 1975, Commissioner Randolph F. Caldwell, Jr., is designated Chief Commissioner, succeeding Commissioner Joseph N. Ingolia. The purpose of such designation is to represent the Commissioners of the Court in coordinating with the Chief Judge, the Judge in charge of the Small Tax Case Division, the Court Executive, and the Clerk of the Court all administrative and policy matters affecting the duties and responsibilities of the Commissioners as a group. This designation shall remain in effect until June 30, 1977, unless otherwise terminated.

HOWARD A. DAWSON, JR.

Chief Judge.

Dated: June 30, 1975

AMENDMENTS TO RULES OF PRACTICE AND PROCEDURE OF THE UNITED STATES TAX COURT

*Prefatory Note*¹

Section 1041 of the Employee Retirement Income Security Act of 1974 adds Section 7476 to the Internal Revenue Code and provides for jurisdiction of the United States Tax Court to issue declaratory judgments with respect to the qualification of retirement plans. The procedures set forth in the statute are "applicable to pleadings filed more than 1 year after the date of the enactment of this Act," which occurred on September 2, 1974. The accompanying new Title XXI of the Rules of Practice and Procedure of the United States Tax Court contains the procedural rules which will govern this declaratory judgment litigation. The following material outlines the principal considerations which influenced the formulation of these Rules and discusses the major provisions which should be kept in mind:

(1) The focus of the declaratory judgment procedure in respect of qualification of retirement plans 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.

¹This prefatory note was prepared by the Rules Committee and is reproduced here for such assistance as it may provide for the bar. It is not officially part of the Rules. Cf. 60 T.C. 1057, 1058.

(2) The entire declaratory judgment procedure is predicated upon the existence of an "actual controversy" as required by Section 7476(a). Thus the inclusion in Rule 211 of the provisions of the Rule 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 under Section 7476—to be so entitled an "actual controversy" must exist.

(3) 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. See Rule 210(a).

(4) The requirements contained in Rule 211 that a party allege in his petition that he has given notice to other interested parties, that he has exhausted his administrative remedies, and that the retirement plan has been put into effect prior to the filing of a petition for a declaratory judgment are of critical importance. See Rule 211(c)(1), (2), and (3), and (e)(2). It is anticipated that the Secretary of the Treasury will issue regulations in regard to qualification as an interested party for purposes of the administrative proceeding and in regard to the administrative remedies which will be available.

(5) Declaratory judgment cases will usually be decided on the basis of the administrative record made in the proceedings within the Internal Revenue Service in connection with a request for a determination on the qualification of a retirement plan or amendment thereto. See Section 217. The parties will normally be able to stipulate the contents of the administrative record. To facilitate this stipulation process the respondent is expected to retain the administrative record in his field office for at least 30 and not more than 45 days after the filing of his answer in order to afford petitioner an opportunity to examine it. To facilitate further the stipulation process, the respondent is required to file with his answer an index to the administrative record. See Rule 213(a)(3). Similarly, the requirement that the petitioner *shall* file a reply (and that his failure to do so will be deemed an admission of the affirmative allegations of the answer), which is the reverse of the situation obtaining under Rule 37, is designed as a further tool for assuring that the administrative record will be complete or that any differences between the parties will be brought to the attention of the Court. See Rule 213(b). It should

be noted that the definition of "administrative record" (see Rule 210(b)(3)) is not intended to be all-inclusive but it is essential that such record contain all the material upon which the Commissioner based his determination. See Rule 217(b)(1).

(6) It is contemplated that after the administrative record has been filed and the issue joined (see Rule 214), the case will be placed on a calendar for submission to the Court (see Rule 212). Representations and other information contained in the administrative record will be assumed to be true for the purpose of decision. See Rule 217(b)(1). Ordinarily a trial will be held only with respect to a factual dispute in the administrative record or to resolve disagreement between the parties as to whether a particular item is a part of such record.

(7) Provision is made for joinder of other parties under certain circumstances. See Rule 215. It should be noted that where a party moves to have another party joined, he is responsible for causing personal service to be made on such other party. See Rule 215(b). 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 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 FRCP.

(8) Provisions relating to the burden of proof are included. See Rule 217(c). These pertain primarily to the burden of proving that a retirement plan does or does not qualify, since, in the usual case, all of the facts will be contained in the agreed administrative record and will be assumed for the purposes of decision.

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

*** TITLE XXI.**

DECLARATORY JUDGMENTS— RETIREMENT PLANS

RULE 210. GENERAL

(a) Applicability:¹ The Rules of this Title XXI set forth the special provisions to be applied to actions for declaratory judgments with respect to the qualification of retirement plans. Except as otherwise provided in this Title, the other Rules of Practice and Procedure of the Court, to the extent pertinent, are applicable to actions for declaratory judgments. The Rules of this Title shall take effect on September 2, 1975.

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

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

(2) A "determination" means a determination with respect to the initial qualification of a retirement plan, or with respect to the continuing qualification of such a plan.

(3) "Administrative record" includes the request for determination, the retirement plan and any related trust instruments, any written modifications thereof made by the applicant during the proceedings within the Internal Revenue Service, all other documents submitted to the Internal Revenue Service by the applicant in respect of the request for determination, all written correspondence between the Internal Revenue Service and the

^{*} New Title, effective September 2, 1975.

¹ See Prefatory Note, paragraph (3).

applicant in respect of his request for determination, and all written comments (and correspondence in respect thereto) submitted to the Internal Revenue Service in the administrative proceedings in respect of the request for determination. See Section 3001(b) of the Employee Retirement Income Security Act of 1974.²

(4) "Party" includes a petitioner, a respondent, and any intervenor.

(5) "Declaratory judgment" is the decision of the Court in an action for declaratory judgment.

(c) Jurisdictional Requirements: The Tax Court does not have jurisdiction of an action for declaratory judgment unless the Commissioner has issued a notice of determination with respect to the initial or continuing qualification of a retirement plan or unless he has been requested to make a determination—

(1) With respect to the initial qualification of such a plan, or

(2) With respect to the continuing qualification of such a plan if the controversy arises as a result of an amendment or termination of such a plan,

and fails to do so for a period of at least 270 days. If the Commissioner has issued a notice of determination which may be the subject of an action for declaratory judgment, a petition for such a judgment must be filed within the period specified by Code Section 7476(b)(5). See also Code Section 7502. For other jurisdictional requirements, see Code Section 7476(a) and (b).

(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, 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.

² See Prefatory Note, paragraph (5).

RULE 211. COMMENCEMENT OF ACTION FOR DECLARATORY JUDGMENT³

(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, which shall be entitled "Petition for Declaratory Judgment," shall contain:

(1) 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

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

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

(1) A separate numbered paragraph setting forth a statement 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;⁴

(2) A separate numbered paragraph setting forth a statement that he has exhausted his administrative remedies within the Internal Revenue Service in accordance with Code Section 7476(b)(3);⁵

(3) A separate numbered paragraph setting forth a statement that the retirement plan has been put into effect in accordance with Code Section 7476(b)(4);⁶

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

(i) the date of mailing of the notice of his determination,

(ii) a copy of such notice of determination, and

(iii) 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 the facts on which he relies in support of his claim;

³ See Prefatory Note, paragraph (2).

⁴ See Prefatory Note, paragraph (4).

⁵ See Prefatory Note, paragraph (4).

⁶ See Prefatory Note, paragraph (4).

(5) Where the Commissioner has not issued a notice of determination with respect to the qualification of the retirement plan, a separate numbered paragraph setting forth the statements—

(i) that a request for a determination with respect to the qualification of such plan has been made,

(ii) that the requested determination is of the type described in Rule 210(c)(1) or (2),

(iii) that no such determination has been made by the Commissioner, and

(iv) that the retirement plan does qualify;

(6) An appropriate prayer for relief; and

(7) The signature of each petitioner or his counsel. If the petition is filed in the name of more than one petitioner, it shall be signed by each petitioner or his counsel.

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

(1) 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

(2) In separate numbered paragraphs, the statements described in subparagraphs (1), (2), (3), (4), (5), (6), and (7) of paragraph (c) of this Rule.

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

(1) 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);

(2) In separate numbered paragraphs, the statements described in subparagraphs (2) and (3) of paragraph (c) of this Rule;⁷

(3) 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 paragraph (c)(4)(i) and (iii) of this Rule;

(4) 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

⁷ See Prefatory Note, paragraph (4).

mailing 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;

(5) Where the Commissioner has not issued a notice of determination with respect to the qualification of the retirement plan, in a separate numbered paragraph, a statement (a) that the retirement plan does qualify or (b) that the retirement plan does not qualify—

(i) if he alleges that the retirement plan does qualify, such paragraph shall also include the statements described in paragraph (c)(5) of this Rule, or

(ii) if he alleges that the retirement plan does not qualify, in addition to the statements described in paragraph (c)(5)(i), (ii), and (iii) of this Rule, such paragraph shall also include a clear and concise statement of each ground, set forth 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

(6) In separate numbered paragraphs, the statements described in subparagraphs (6) and (7) of paragraph (c) of this Rule.

(f) Petitions Filed by the Pension Benefit Guaranty Corporation: In addition to including the information specified in paragraph (b) of this Rule, a petition filed by the Pension Benefit Guaranty Corporation shall also contain in separate numbered paragraphs the statements described in subparagraphs (2), (3), (4), (5), and (6) of paragraph (e) of this Rule.

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

RULE 212. REQUEST FOR PLACE FOR SUBMISSION TO THE COURT ⁸

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 believes the action will be

⁸ See Prefatory Note, paragraph (6).

ready for submission to the Court and his 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 also Rule 217(b)(2).)

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 in the petition; however, 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) *Index to Administrative Record:*⁹ In addition, the answer shall contain a statement 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.

(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:**¹⁰ Each petitioner shall file a reply in every action

⁹ See Prefatory Note, paragraph (5).

¹⁰ See Prefatory Note, paragraph (5).

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*:¹¹ 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.

¹¹ See Prefatory Note, paragraph (5).

RULE 214. JOINDER OF ISSUE IN ACTION FOR DECLARATORY JUDGMENT¹²

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 PARTIES¹³

(a) Permissive Joinder: Any person who under Code Section 7476(b)(1) is entitled to commence an action for a 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. After a petition has been filed, any such person may join therein with the consent of all the petitioners and the permission of the Court. 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).

(b) Joinder of Additional Parties:¹⁴ 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)(1). 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

¹² See Prefatory Note, paragraph (6).

¹³ See Prefatory Note, paragraph (7).

¹⁴ See Prefatory Note, paragraph (7).

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.

(c) Nonjoinder of Necessary Parties: If the Court determines that any person described in paragraph (b) of this Rule 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, dismiss the action on the ground that the absent person is indispensable and that justice cannot be accomplished in his absence. An order dismissing a case for nonjoinder of a necessary party may be conditional or absolute.

RULE 216. INTERVENTION ¹⁵

(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 an action for declaratory judgment brought under Code Section 7476 in accordance with the provisions of such section.

(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.

¹⁵ See Prefatory Note, paragraph (7).

RULE 217. DISPOSITION OF ACTIONS FOR DECLARATORY JUDGMENT¹⁶

(a) **General:** Disposition of an action for declaratory judgment will ordinarily be made on the basis of the administrative record, as defined in Rule 210(b)(3). 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.

(b) **Procedure:** (1) *Disposition on the Administrative Record:*¹⁷ 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 respondent shall file with the Court the entire administrative record, as defined in Rule 210(b)(3), 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 with respect to the qualification of the retirement plan, 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. See subparagraph (3) of this paragraph.

(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

¹⁶ See Prefatory Note, paragraph (5).

¹⁷ See Prefatory Note, paragraphs (6) and (6).

conducted in accordance with the Rules contained in Title XIV, except as otherwise provided in this Title.

(c) Burden of Proof: ¹⁸ (1) *Parties Petitioner*: 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 described in Rule 210(c)(1) or (2)—

(i) 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 statements contained in paragraph (c)(5) or (e)(5)(i), with the exception of the statement required by paragraph (c)(5)(iv), of Rule 211, if such statements are denied by the respondent in his answer; but

(ii) 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 grounds described in paragraph (e)(5)(ii) of Rule 211.

(2) *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 described in Rule 210(c)(1) or (2), 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. But see also subparagraph (1)(ii) of this paragraph.

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

¹⁸ See Prefatory Note, paragraph (8).

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 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.