DISCOVERY IN U.S. TAX COURT:

THE BASICS

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I. INTRODUCTION

A. Timing

Tax Court discovery is usually the precursor to trial and takes places after administrative-level settlement negotiations have been determined to be unsuccessful.

B. Other Courts Compared

Unlike the Tax Court, the Court of Federal Claims and U.S. District Court cases commence free-ranging discovery early in the case. And this can be extremely expensive for tax controversy litigants. Thus, discovery in Tax Court is one of the areas where Tax Court litigation differs significantly from other federal court litigation. Over the last forty years, however, the Tax Court has gradually expanded its discovery rules to conform more closely to other federal courts.

One of the significant differences between the Tax Court rules and the federal rules of civil procedure is that the Tax Court does not require each party to make an initial disclosure of potential witnesses and documents which might be used to support its case.

C. Discovery Rules

Because the Tax Court is empowered to prescribe its own rules, it obviously has its own discovery rules. Discovery methods are addressed in Titles VII through X (generally Rules 70 through 82) of the Tax Court rules of Practice and Procedures. References in this outline to "The Rules" or to a "Rule" refer to these rules.

D. Consolidated Cases

Any party in a consolidated case can avail themselves of the discovery rules. The Tax Court Rules' references to a "party" include any party in a consolidated case.[1]

E. Scope of Discovery

Discovery may be sought for any relevant, non-privileged matter.[2]

II. FORMALITY VS. INFORMALITY: "BRANERTON" PROCEDURES

A. Policy Considerations

[1] Rule 70(a)(3).
[2] Rule 70(b)(1).

The Tax Court is generally hostile to formal discovery, and that is a unique feature of that forum. A policy reason for this attitude is that the government has had multiple opportunities at the administrative levels of examination and appeals to conduct discovery of evidence. And to force taxpayers to submit to formal discovery after already producing evidence in the examination phase would be unduly burdensome.

B. General Rule

The Tax Court rules impose strict adherence to the requirement of informality-first. The Rules specify that the Court expects the parties to attain the objectives of discovery through informal consultation or communication before utilizing the formal procedures outlined in the Rules.[3]

C. The Branerton Case

The leading case interpreting Rule 70(a)(1) and requiring informality is *Branerton v. Commissioner*.[4] In that case the petitioner's counsel served on respondent detailed written interrogatories pursuant to Rule 71 without requesting an informal conference with respondent's counsel. The Court held that ignoring the Rules' clear mandate was an abuse of the Court's procedures that justified granting of respondent's motion for protective order. Of course, if the informal process does not work properly, the parties may proceed with formal discovery under the Rules.

D. The "Branerton" Letter

The *Branerton* case spawned a tradition in Tax Court procedure known as the Branerton letter. This letter typically is sent by the respondent to the petitioner, but there is no prohibition against the petitioner sending such a letter. This letter usually requests the informal production of needed documents and answers to questions. It also typically suggests a date for a informal conference between respondent's counsel and the petitioner or his counsel.

E. Specificity

The better practice is to be as specific as possible in the Branerton letter in order to specifically document what has informally been requested rather than to send out a one-paragraph conference invitation.

F. Timing

After the government has filed its answer, chief counsel's office routinely forwards the administrative file to the IRS Office Appeals for informal settlement. If the

[3] Rule 70(a)(a).
[4] 61 T.C. 691 (1974).

administrative settlement process is unsuccessful, the case file is sent back to counsel's office for trial preparation. The question arises, then, regarding when a *Branerton* letter should be sent by the petitioner. The better practice is to allow the "appeals" process to work first before sending a *Branerton* letter. On the other hand, if the case drags on for too long, the parties would be bumping up against the 45-day discovery deadline of Rule 70(a)(2). Many practitioners follow the practice of automatically sending out a *Branerton* letter whenever the case first appears on a trial calendar, unless it is clear that the case is in the final stages of settlement in Appeals.

III. THE STIPULATION PROCESS

A. General Considerations

Tax Court trials rely heavily on stipulations of fact. Preparation of the stipulations of facts is part of the discovery process. The use of the stipulation process has much limited the need for pretrial discovery because of the necessity of disclosure of documentary proof prior to trial.

B. Requirements of Tax Court Rules

The parties are required to stipulate comprehensively, to the fullest extent to which complete or qualified agreement can or fairly should be reached, all matters not privileged which are relevant to the pending case, regardless of whether such matters involve fact or opinion or the application of law to fact.[5] Stipulated facts are treated as conclusive admissions, but only for purposes of the pending case. Matters to which stipulations must be made include all facts, all documents and papers, and all evidence that should not reasonably be in dispute. Objections to any stipulation may be noted in the stipulations and considered by the court either before or during the trial. Objection to the relevance of a document may be noted by any other party but is not cause for a refusal to stipulate when the truth or authenticity of a document is not otherwise reasonably in dispute. Stipulations are required regardless of where the burden of proof lies with respect to any matter in the case.

The fact that any matter may have been obtained through discovery or requests for admission or through any other authorized procedure is not grounds for omitting such matter from the stipulation. Such other procedures should be regarded as aids to stipulation, and matter obtained through them which is within the scope of [the

[5] Rule 91(a)(1); Rule 91(e).

required stipulations] must be set forth comprehensively in the stipulation, in logical order in the context of all other provisions of the stipulation.[6]

C. Refusal to Stipulate

The Tax Court Rules contain a specific remedy (motion to compel) to enforce the court's requirement to stipulate. The court will thereafter issue a show cause order. After a response, the court will determine whether a genuine dispute exists or whether a deemed stipulation would be contrary to the interests of justice. If a party refuses to stipulate to facts under Rule 91, the Tax Court has authority to dismiss the case, after aggrieved party has filed the appropriate motion under Rule 91(f). Requiring Rule 91 stipulations does not deny the taxpayer his due process rights.[7]

D. Form of Stipulations

Stipulations are required to be in writing and signed by parties or their counsel. Separate facts are to be set forth in clear and concise numbered or lettered paragraphs, in logical order.[8]

E. Exhibits

Documents the parties intend to place before the court are to be annexed to the stipulation. They are considered part of the stipulation itself. Exhibits to a stipulation are numbered serially, including a designation indicating "P" for petitioner, "R" for respondent or "J" for joint (e.g. "1-P," "2-R," or "3-J").[9]

F. Ambiguous or Incorrect Stipulations

When the language in a stipulation is so ambiguous that the intent of the parties cannot be discerned, the language in question will be disregarded and the court will construe such a stipulation not to exist. Similarly, the court is not bound by and may ignore stipulations that are simply incorrect based on the facts disclosed by the record.[10]

G. When Filed

Stipulations can be filed with the court at any time before the trial starts, and they need not be formally offered into evidence. The court can specify a different time for filing.[11]

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[6] Rule 91(a)(2).
[7] Rule 91(f); Rule 123; Miller v. Commissioner, 81-2 USTC ¶ 9604 (8th Cir. 1981).
[8] Rule 91.
[9] Id.
[10] Stamos v. Commissioner, 87 T.C. 1451 (1986); Eddy Estate v. Commissioner, 115 T.C. at 137 (2000).
[11] Rule 91(c).

IV. DEADLINES

A. Commencement of Case

Discovery cannot be commenced without leave of court, before the expiration of 30 days after "joinder of issue." Issues are said to be joined upon the filing of the last permissive pleading or the close of thirty days after the last mandatory pleading. The last mandatory pleading is the reply.[12]

B. Completion of Discovery

Discovery must be complete, and any motion to compel must be filed no later than 45 days prior to the date set for calendar call. Discovery is not "completed" when served; it is only completed when the time for response has passed. Thus, discovery with a 45-day period for response (interrogatories) must be served at least 90 days before calendar call. The careful attorney should calendar discovery to have response dates well in advance of the final 45-day deadline in order to leave time for motions to compel.[13]

Because the 45-day cutoff presents serious potential for a discovery time-bind, it would appear prudent to commence discovery at the earliest permissible date under the rules

V. REQUESTS FOR ADMISSIONS

A. "Branerton" Process Distinguished

A *Branerton* letter has its limitations. For example, if a petitioner wants the government to admit something that is not contained in its answer, nothing short of a Request for Admissions or a stipulation will accomplish that. Regardless, the best practice is always to go through the motions of a *Branerton* conference before initiating more formal discovery devices. There is, however, authority tacitly approving the submission of a list of requested admissions with a *Branerton* letter.[14]

B. Use of

Requests for admissions are a very useful discovery tool whenever the other party is being dilatory. The reason is that a default in response is an automatic deemed admission. One can then follow such a default with a motion for summary judgment. It is also useful in narrowing the scope of issues for which fact finding is necessary at trial.

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[12] Rules 70(a)(2) and 38.
[13] Rule 70(a)(2).
[14] Lam v. Commissioner, 53 T.C.M. (CCH) 359 (1987).

C. Rules

A party may serve on any other party a request for admission as to the truth of any non-privileged relevant matter, including the genuineness of any document. A party may not serve a request for admissions until after 30 days have expired following joinder of issue (see Rule 38).[15]

The party receiving a request for admissions must answer the request in writing within 30 days after service of the request. Otherwise each matter is deemed admitted.[16]

If the requesting party is not satisfied with the responses, he may move to determine the sufficiency of the answers or objections. The court may thereafter order the matter admitted or than an amended answer be served.[17]

VI. INTERROGATORIES

A. Availability

A party may serve on any other party no more than 25 interrogatories, including all discrete subparts. Leave of court is not required.[18]

B. Answers

The answering party is required to make reasonable inquiry to ascertain readily obtainable information. An answering party may not give lack of information or knowledge as an answer unless he states that he has made reasonable inquiry. Each interrogatory must be answered separately and under oath. The answers must be served within 30 days after service of the interrogatories.[19]

C. Business Records

In the case of business records, it is sufficient to answer that there are records from which the answers may be derived and that they are available for inspection and copying.[20]

D. Motion to Compel

[15] Rule 90(a).
[16] Rule 90(c).
[17] Rule 90(e).
[18] Rule 71(a).
[19] Rule 70(b),(c).
[20] Rule 71(e).

In the case of failure to answer or an objection by the responding party, the burden is on the requesting party to file a motion to compel. Prior to a motion for such an order, the interrogatories and responses are not filed with the court.[21]

E. Experts

A party may require any other party to identify all experts and state the substance of their testimony. In lieu of that, however, the responding party may simply furnish a copy of the expert's report.[22]

VII. ORAL DEPOSITIONS

A. When to Take

With consent of the parties, depositions may be taken at any time within the normal formal discovery time limits of Rule 70(a)(2). If consent cannot be obtained, depositions may be taken only after a trial noticve has been issued or the case has been assigned to a judge. There is also a procedure whereby, with the approval of the court, a deposition may be taken during the trial of the case.[23]

B. Depositions to Perpetuate Testimony

An application for an order to take a deposition is required only with respect to taking a deposition to perpetuate testimony. The application should be filed only where there is a substantial risk that the person, document, or electronically stored information will not be available at trial. Parties or their counsel may execute and file a stipulation to take a deposition by agreement instead of filing an application.[24]

The Tax Court has promulgated a procedure under which a potential party to a case yet to be commenced may take a deposition to perpetuate testimony or preserve any document or electronically stored information. This procedure requires an application with the court that shows various elements listed in the rules.[25]

C. Non-Party or Expert Witness

A non-party or expert witness must file any objection within fifteen days of service of the notice.[26]

D. Transcript

[21] Rule 71(c).
[22] Rule 71(d).
[23] Rule 74(b),(c); Rule 83.
[24] Rule 74(a), as amended; Rule 81(a)(d).
[25] Rule 82.
[26] Rule 74(b)(3).

A transcript must be made of every deposition, but the transcript and any exhibits are not to be filed with the court.[27]

E. Written Questions

Depositions upon written questions are disfavored by the court and should only be taken in this manner under special circumstances.[28]

F. Stipulation

Usually the parties will agree on the taking of a deposition, but it is the party who is taking the deposition who must make all the arrangements.[29]

G. Compelled Attendance

Attendance at a deposition may be compelled by issuing a subpoena to the deponent.[30]

H. Expenses

The party taking the deposition must pay all fees and expenses, including witness fees.[31]

I. Failure to Attend

If a party's witness fails to attend a deposition, that is a sanctionable offense that can result in attorney fees being awarded.[32]

J. Execution and Return

After the deposition is transcribed, the witness must read and sign it unless that requirement is waived.[33]

K. Video Depositions

A deposition to perpetuate testimony may be video recorded.[34] Query: What about other types of depositions? May they also be video recorded?

L. Objections

Errors and irregularities in obtaining approval for taking a deposition are waived unless made in writing within the time for making objections.[35]

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[27] Rule 74(e)(1).
[28] Rule 74(e)(2); Rule 84(a).
[29] Rule 81(f)(1).
[30] Rule 81(f)(2).
[31] Rule 81(g).
[32] Rule 81(g)(2).
[33] Rule 81(h).
[34] Rule 81(j)(1).

VIII. MOTIONS TO COMPEL

A. Motions for Order

If a party fails to respond to a discovery request, the aggrieved party may, within the time for completion of discovery, move the court for an order compelling the answer, etc. Assuming the court grants an appropriate order to comply, if the dilatory party still fails to respond, then the aggrieved party may go back to court for an order for sanctions.[36]

B. Sanctions

The court has shown no reluctance to use dismissal and other extreme sanctions to punish intentional obstruction of the discovery process. The court has broad discretion to sanction a party for failure to obey an order related to discovery. The rules list four possible actions the court can take to punish the offending party.[37]

IX. DEFENSES TO DISCOVERY REQUESTS

A. General Rule

All of the common defenses available in federal procedure generally may be raised to improper discovery. These include claims that the discovery is overbroad, burdensome, unintelligible, ambiguous, or repetitive, or that the discovery violates privilege. Also, the recipient may defend on the basis that the discovery violates the *Branerton* requirement. The court may limit the use of discovery if it is perceived to be unreasonably duplicative, cumulative, or burdensome.[38]

B. Admissibility

Admissibility is not a ground for objection so long as information or a response is reasonably calculated to lead to the discovery of admissible evidence.[39]

C. Protective Order

Any party may move for a protective order to prevent annoyance, embarrassment, undue burden, or expense, etc. The Rules list ten non-exclusive examples requiring

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[35] Rule 85(a).
[36] Rule 104(b).
[37] Rule 104(c).
[38] Rule 70(b)(2).
[39] Rule 70(b)(1).

such an order.[40] For example, the court could order that certain documents related to trade secrets should be sealed.

D. Sanctions

The court has broad discretion to sanction a party for failure to obey an order of the court related to discovery. See VII, B., *supra*.

X. MISCELLANEOUS TOPICS

A. Section 7430 Costs

Discovery of matters relating to reasonable administrative or litigation costs under § 7430 cannot begin without leave of the Tax Court before a motion for such costs has been noticed for hearing. In § 7430 cases, the 45-day rule applies just as any case tried on the merits.[41]

B. Use as Evidence

Discovery responses may be used at trial. However, such responses will not be considered as evidence until offered and received as evidence during the trial.[42]

C. Signatures

Each discovery request must be signed by a party or his counsel, conforming to the requirements of Rule 23(a)(3). Unsigned requests, responses, or objections can be stricken.[43] The signature constitutes a certification that the signer has read the contents and that to the best of his knowledge it is consistent with the Tax Court rules, warranted by existing law or a good faith argument for a change in law, not interposed for an improper purpose, and not unreasonable or unduly burdensome.

D. Sequence

Unless the court orders otherwise, a party may utilize discovery procedures in any order and as often as he likes, so long as there is no delay or impediment of the case.[44]

E. Duty to Supplement

Generally a party is under no duty to supplement discovery responses, except as to: identity of potential witnesses or corrections of errors in previous responses.[45]

F. Published Rulings on Discovery

[40] Rule 103.
[41] Rule 70(a)(2).
[42] Rule 70(d).
[43] Rule 70(e).
[44] Rule 101.
[45] Rule 102.

There are very few published rulings on discovery disputes in Tax Court. Therefore, there is very little precedent on interpretation of the rules. Also, there may be substantial differences among the judges in discovery matters.

XI. CONCLUSIONS AND RECOMMENDATIONS

A. Planning

A discovery plan should be made early in the case planning, making scheduling an early Branerton conference advantageous, as it will allow a party to ascertain earlier in the case how much formal discovery is likely to be needed. In tax court it is easy to let discovery deadlines slip by unless careful attention is paid to this aspect of the case.

B. Timing of *Branerton* Letter

Often, due to workload considerations, appeals officers will delay working on docketed cases that are not on a trial calendar. Consequently, as soon as the petitioner receives a notice of trial setting, serious consideration should be given to sending the respondent a *Branerton* letter. This will send a message to government counsel that you are serious about this case and fully capable of trying it. This tactic can go a long way toward attaining a favorable settlement.

C. Necessity for Discovery

While it could be argued that the petitioner does not need significant discovery in tax court because he is already in possession of his own evidence that he needs in order to meet his burden of proof, there are occasions when discovery is desirable. If, for example, a revenue agent has made a significant error in his examination process, the petitioner may want to take his deposition to get him to explain himself rather than waiting until trial. If the government has hired an expert witness, the petitioner will want to depose that expert or at least obtain a copy of his report. The petitioner is also well advised to get the government committed as early as possible to a theory of its case rather than being surprised at trial when it attempts to raise a new theory.