

Are changes looming over Tax Court's procedure rules?

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Tax controversy practitioners are undoubtedly aware of the gradual movement over the years to conform certain Tax Court procedure rules (Tax Court Rules) to those of the Federal Rules of Civil Procedure. In many ways, this makes sense to ensure uniformity of tax cases regardless of whether a taxpayer litigates his tax dispute in a refund forum in the US District Court or the US Court of Federal Claims, or prior to payment of tax in the Tax Court. Below we note a few important areas of divergence between the different rules, and point out situations where the Tax Court Rules do not address a particular matter. These matters were discussed at the [recent Tax Court Judicial Conference](#) held in Chicago last week.

Amicus briefs

As we have [discussed before](#), amicus briefs are not uncommon in other courts. However, the Tax Court does not have specific rules on the topic and, instead, permits each judge to decide a case-by-case basis whether to permit the filing of an amicus brief. Although the Tax Court has discussed standards for filing amicus briefs in unpublished orders, given the nationwide importance of many issues that arise in Tax Court litigation, it may be time for the court to issue specific rules addressing the issue.

Expanded electronic access to the Tax Court's docket

In recent years, there has been substantial discussion about whether taxpayers and practitioners should have electronic access to the Tax Court's docket and court filings. We have [previously covered](#) access to the dockets of federal courts and other sources of information for tax cases, statutory, regulatory, and legislative history materials, and Internal Revenue Service (IRS) guidance.

Through the "Docket Inquiry" tab on the Tax Court's website, the public can search for a particular case and retrieve the docket report (listing the pleadings filed and orders issued) for the case. Only orders and opinions issued by the court, however, are available electronically via hyperlink. To obtain any other court filing, taxpayers and practitioners must request (in person) a copy of a specific filing in a case or view the document on a computer terminal at the Tax Court in Washington, DC. Registered practitioners who have entered an appearance in that particular case, however, have access electronically to all the documents in their case.

Because many of the cases docketed in the Tax Court involve *pro se* taxpayers and there is often sensitive taxpayer information in the docket (social security numbers, bank account numbers, names of minor children, *etc.*), there are substantial privacy and identity concerns with making the Tax Court filings available electronically to the public. For example, a Notice of Deficiency and other documents issued by the IRS that form the basis on which the taxpayer files a petition with the Tax Court contain repeated references to a taxpayer's social security number and may also contain other

AUTHORS

[Andrew Roberson](#)



[Kevin Spencer](#)



confidential information. One solution would require that the IRS remove all such references from those documents and set up some other innocuous tracking system to correlate the petition related to the taxpayer. Additionally, the IRS could include in its packet of information sent to taxpayers a brief reminder as to the type of information that should be redacted. The onus is on taxpayers to redact confidential information before filing their pleadings in Tax Court, but these steps may help eliminate many of the redaction and confidential concerns. Making these changes would eliminate almost all issues on this subject.

Subpoenas issued to third parties

The Tax Court's Rules, unlike the Federal Rules of Civil Procedure, do not specifically require notice of non-party subpoenas. The Tax Court has indicated that it is considering whether to change this rule. We have written on this topic before, and noted the need for guidance given a lack of clear authority on the subject in the following: [Tax Court \(Again\) Rejects IRS Use of Secret Subpoenas](#), [Tax Court Inconsistent on IRS's Use of 'Secret Subpoenas'](#) and [Tax Court Considering Requiring Notice of Non-Part Subpoenas](#).

Practice point

Taxpayers and practitioners should continue to monitor when the Tax Court will issue new amendments to its rules, as they will impact the conduct of litigation in the court and parties' litigation strategy. We will continue to monitor developments and report on any new guidance.

For further information on this topic please contact [Andrew Roberson](#) or [Kevin Spencer](#) at McDermott Will & Emery by telephone (+1 312 372 2000) or email (aroberson@mwe.com or kspencer@mwe.com). The McDermott Will & Emery website can be accessed at www.mwe.com.

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