Estate Planning Council of Montgomery County

March 12, 2020

Settlement of Estate and Gift Tax Cases

Beth Shapiro Kaufman
Caplin & Drysdale, Chartered
One Thomas Circle, NW
Suite 1100
Washington, DC 20005
bkaufman@capdale.com
Phone: 202-862-5062

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I. INTRODUCTION

A. Some Basic Statistics From the IRS 2018 Data Book.

1. In FY2018, 34,092 estate tax returns and 245,584 gift tax returns were filed.
2. $22.6 billion of estate tax and $1.2 billion of gift tax was collected.
3. The Mid-Atlantic states were responsible for about 26% of the gift tax and 18% of the estate tax. New York was a heavy contributor, with nearly 11% of the estate tax and 14% of the gift tax. In fact, New York was #1 in gift tax paid, but only #3 in estate tax paid.

B. Audit Rates.

1. Overall, the IRS examined 0.5% of all returns filed in calendar year 2017 for all kinds of tax.
2. The vast majority of these were correspondence audits, but estate and gift audits are all field audits.
3. Of almost 1 million examinations of tax returns, about 22,000 taxpayers did not agree with the IRS examiner's determination. Almost 30,000 examinations resulted in refunds to the taxpayers.
4. The examination rate for gift tax returns filed in 2017 was 0.9%.
5. The examination rate for estate tax returns filed in 2017 was 8.6%. Examination rate broken down by size of the gross estate:
    a. Under $5 million: 2.7%;
    b. $5 million up to $10 million: 12.6%;
    c. $10 million or more: 31%.
6. 19% of the estate tax examinations and 30% of the gift tax examinations were closed with no change.
7. 20% of estate tax examinations resulted in refunds, but almost no gift tax examinations resulted in refunds. (Refunds in estate cases could be attributable to additional deductions for attorney/accounting fees incurred in the course of the examination.)

[1] The author wishes to thank Christopher S. Rizek, of Caplin & Drysdale for his generosity in allowing the author build on material from an outline he prepared. The author, of course, is responsible for any errors in the final content.

C. Settlements at Audit, Appeal, and in Tax Court.

1. Nearly 40% of estate tax exams are closed with no change or a refund.
2. An additional 35% of cases settle at exam.
3. Another 20% of the cases settle at appeals.
4. 5% of tax cases end up docketed in court, and only 10% of those go to trial.

D. Sources.

1. No outline can substitute for careful study of the actual law.
2. References for this outline, and sources that should be reviewed, include the following:
    a. Cited provisions of the Internal Revenue Code of 1986, including especially §§ 6212-6215 and 7441-7487
    b. Saltzman & Book, *IRS Tax Practice and Procedure*
    c. Internal Revenue Manual, available on the IRS website at https://www.irs.gov/irm
    d. The Tax Court's official website, https://www.ustaxcourt.gov/
    e. The Rules of the United States Tax Court (also available on the website, at https://www.ustaxcourt.gov/rules.htm)
    f. Kafka, Cavanagh, and Akins, *Litigation of Federal Civil Tax Controversies* (2d ed. 2017)
    Dubroff and Hellwig, *The United States Tax Court: An Historical Analysis* (2d ed. 2014)

II. SETTLEMENT IN THE EXAMINATION PROCESS

A. Exam's Settlement Authority.

1. Primary responsibility is to determine the relevant facts.
2. Prohibited from taking into account hazards of litigation.
    a. In practice, Exam may choose to trade off issues with the taxpayer.
    b. You may need to frame argument as a factual matter.
    c. It still pays to negotiate.
    d. Exam is bound by IRS published positions (*e.g.* Revenue Rulings, non-acquiescences).
    e. Exam is not supposed to use penalties as a bargaining chip.
3. Exam's determination is subject to supervisory review.

B. Limitations on Settlement Authority.

1. Exam must respect an IRS-favorable Chief Counsel Advice in the case.
2. Exam can't deviate from a national settlement initiative.

3. Exam can't settle an issue that is a nationally coordinated issue.

C. Statute of Limitations ("SOL") Issues.

1. Gift Tax.
    a. General rule is 3 years from due date (including extensions), IRC § 6501.
    b. If a gift is not "adequately disclosed" on a return, the SOL does not begin to run, IRC § 6501(c)(9) (effective 1997).
    c. Gift tax SOL can be extended by agreement, just like an income tax. SOL. Typically extended on Form 872, for a fixed period of time.
    d. IRS will ask for an extension during an examination when there is about 1 year left.
    e. If taxpayer doesn't sign the extension, a Notice of Deficiency ("90-day letter") will be issued before the SOL expires.
2. Estate Tax.
    a. General SOL is 3 years from due date (including extensions), IRC § 6501.
    b. Unlike gift and income taxes, an estate tax SOL cannot be extended.
    c. IRS likes to resolve examination with 9 months left on the SOL.
    d. Can only go to Appeals if 1 year left on the SOL.
    e. Even if examination is not completed, Exam will issue a Notice of Deficiency before the SOL runs.
    f. If insufficient time to go to Appeals, can file a Tax Court petition and then request to go to Appeals.

D. Settlement Documentation.

1. About 75% of cases will settle at Exam, many of them with no change and, in the case of an estate tax examination, many with refunds.
2. If all issues are agreed, Exam will prepare Form 890 through which the taxpayer waves restrictions on assessment and collection of a deficiency.
3. Form 890 does not prevent the filing of a refund claim and suit in Federal District Court or Court of Federal Claims.
4. It is also possible to sign a Form 890 that only resolves some issues and preserves others.
    a. In that case (or if all issues are unagreed), Exam will also prepare a Revenue Agent's Report ("RAR") describing the proposed adjustments and reasons for Exam's position.
    b. This may be given to the taxpayer in draft.
    c. If there is sufficient time on the SOL, the RAR will be sent to the taxpayer formally with a "Preliminary Notice of Deficiency" (a "30-day letter"), which gives the taxpayer 30 days to file a protest with Appeals.

5. If no administrative appeal is filed, a 90-day letter will be issued.

6. When a 90-day letter is issued, the taxpayer can either file a Petition in Tax Court, or do nothing for 90 days, after which the tax deficiency will be assessed. If the deficiency is assessed and paid, the taxpayer can then contest it by filing a refund claim. Proposed denial of a refund claim usually can be appealed to Appeals, or can be the subject of suit in the Federal District Court or Court of Federal Claims.

III. SETTLEMENT IN APPEALS

A. Introduction.

1. Appeals Mission. "The Appeals mission is to resolve tax controversies, without litigation, on a basis which is fair and impartial to both the Government and the taxpayer and in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the Service" I.R.M. 1.1.7.1.

2. Estate and gift appeals are not assigned geographically. There are only 8 estate and gift appeals officer ("AO") positions nationwide, and as of this writing, 2 are vacant. All estate and gift AOs are lawyers.

3. IRS Appeals is not governed by the Administrative Procedures Act.

4. Appeals is not an independent tribunal; it is still part of the IRS.

5. Going to Appeals is optional. It is not necessary to exhaust administrative remedies. (However, it is generally recommended to go to Appeals.)

6. A case can get to Appeals in one of three ways:

   a. After issuance of a 30-day letter, by the taxpayer filing a protest
   b. After the case is docketed in the Tax Court, on referral by IRS counsel. In that case, Appeals has exclusive settlement jurisdiction until the case is noticed for trial or settlement negotiations conclude (with or without a settlement). Rev. Proc. 87-24, 1987-1 C.B. 720.
   c. By paying a tax and filing a claim for refund, and then, if that request is proposed to be denied, requesting that the case be referred to Appeals.

7. An Appeals team manager must approve any settlement

B. Appeals Settlement Authority.

1. Unlike Exam, the AO is authorized to take hazards of litigation into account in settling a case. I.R.M. 8.6.1.3.4.

2. Appeals can split the additional tax attributable to an issue.

3. Appeals can concede disputed issues, in whole or in part, based on the taxpayer's concession of other issues.

4. However, the Appeals Officer must justify a proposed settlement in writing.
5. Appeals cannot settle a case in a manner that:
    a. Is contrary to a national settlement initiative I.R.M. 8.7.3.6 and 8.7.3.11
    b. Is predicated on "nuisance value" I.R.M. 1.2.1.8.4
        i. Settlement for nuisance value would be a concession made solely to eliminate the inconvenience or cost of further negotiations or litigation and is not related to the merits of the case.
        ii. Generally a settlement below 20% or above 80% is considered to be nuisance value settlement.
    c. Trades a proposed penalty for a taxpayer concession on another issue without consideration of the merits of the penalty.
6. The taxpayer can stop the accrual of interest without the loss of Tax Court jurisdiction by paying the deficiency plus interest after issuance of the 90-day letter.
7. The Service can raise new issues in the Tax Court, but the Service will bear the burden of proof with regard to those issues.
8. A docketed case may receive expedited consideration at Appeals.

C. Appeals Process.

1. The key to getting to Appeals is to file a protest within 30 days of the date on the 30-day letter. The protest if filed with Exam, which forwards it to Appeals. In a docketed case where there is no 30-day letter, there is no formal requirement of a protest, but you generally need to file something similar to brief the case for Appeals. In that situation, Appeals will set the due date and you will file the memorandum (or protest) directly with Appeals.
2. Extensions are typically available, but don't count on getting more than an additional 30 days.
3. If you have seen the Revenue Agent's Report, start writing the protest. You don't need to wait for the 30-day letter.
4. If you are out of time, submit a "skeletal" (abbreviated) protest that meets all requirements and supplement it later.
5. Formal requirements:
    a. The procedural regulations state that where required to do so, the taxpayer must file "a written protest setting forth specifically the reasons for his refusal to accept the findings" of the examining agents. See Treas. Reg. § 601.106(f)(5).
    b. The publication which is sent to the taxpayer with the 30-day letter (Internal Revenue Service, Publication No. 5, (Rev. 1-99)) details the formal requirements for a protest:

i. Taxpayer's name, address, and phone number and the tax years involved;
ii. A statement that you want to appeal the IRS findings to the Appeals Office;
iii. A copy of the letter showing the proposed changes (or the date and symbols from the letter);
iv. A list of the changes that you don't agree with, and why you don't agree;
v. The facts supporting your position on any issue that you don't agree with; and
vi. The law or authority on which you are relying.
vii. The protest must be signed under penalties of perjury.

6. Suggestions:
    a. Put forth your best arguments in your protest. The taxpayer has the burden of proof.
    b. If the Appeals Officer decides to concede or compromise an issue, he or she will need to write a report to the supervisor. Give the AO enough material to make this easy.
    c. If the facts are not sufficiently well developed, the AO will send the case back to Exam for further finding of the facts. (Therefore you should make sure there is adequate factual development at Exam so you don't need to return.)

7. Appeals Conference.
    a. You will likely have a conference either in person or by phone to try to negotiate a settlement. We always try to meet in person.
    b. The AO will be well prepared for the conference. The AO will have a copy of the administrative file with all information developed at Exam, possibly including Exam's reaction to the protest. The AO will also have done research.
    c. Taxpayer's representative needs to be well prepared for the conference.
        i. Be prepared to present your arguments orally.
        ii. Bring exhibits, an outline, and/or a PowerPoint presentation.
        iii. Agree in advance as to which issues will be discussed and in what order.
        iv. Establish credibility with the AO.
        v. Anticipate the concerns of the AO and be ready with your responses.
        vi. Be reasonable.
    d. Use your network to find out how others have settled similar issues.
    e. Don't bring the taxpayer to the conference.
    f. Rules of evidence do not apply. Admissions could be used against you in court, so identify the settlement discussion (and any documents provide) as subject to FRE 408 and thus not admissible.
    g. Appeals will usually expect the taxpayer to make the opening offer.

Consider settlement options in advance (and discuss them with the client). Get a sense of where the client would be willing to settle the case.

h. You can settle some issues without settling all of them.

8. About 20% of all cases are settled in Appeals (meaning about 80% of the cases that go to Appeals settle there).

9. Settlement documentation in non-docketed cases.

   a. Settlement of non-docketed cases is documented on Form 890-AD (the AD stands for Appeals Division) for estates and generally the Form 870-AD for gift tax. (The Form 890 is used if the adjustment only impacts use of the unified credit.)
   b. The 890-AD differs from the Form 890 in that it contains mutual pledges
      i. The IRS will not reopen the case unless there was fraud, malfeasance, concealment, or misrepresentation of a material fact, or an important mistake in mathematical calculation.
      ii. The taxpayer will not claim or sue for a refund.
      iii. The prevailing view of the courts is that the Form 870-AD does not constitute a binding settlement agreement, but some courts have applied equitable estoppel to prevent taxpayers from suing for refunds after the SOL on assessment has run.

10. Settlement documentation in docketed cases.

    a. In a docketed case, the settlement must be incorporated into a "decision document" for submission by IRS counsel to the Tax Court. See further discussion below.

IV. SETTLING CASES IN TAX COURT

A. Nature of the Tax Court.

1. Congress established the United States Tax Court as a court of record in IRC §7441 and pursuant to its grant of authority in Article I of the Constitution.

   a. Although the Tax Court has nationwide jurisdiction, it is based in Washington, D.C.
   b. The Tax Court conducts hearing and trials in Washington and 73 other cities around the country.
   c. All cases before the Tax Court involve civil tax issues.

2. Judges.

   a. The Tax Court is composed of 19 regular judges who are appointed to 15-year terms by the President with the advice and consent of the Senate. IRC §7443(b).
   b. Although judges must retire at age 70, many judges typically serve on recall as senior judges at the request of the Chief Judge. IRC

§7447(c).

c. The Chief Judge may also appoint Special Trial Judges, IRC §7443A, to whom specified issues may be assigned. The Special Trial Judges generally preside over the Small case docket.

3. Jurisdiction.

   a. The Tax Court, like all Federal courts, is a court of limited jurisdiction. This means that the Tax Court may exercise its jurisdiction only to the extent expressly authorized by Congress.
   b. Congress has given the Tax Court jurisdiction over many different Federal tax matters, including estate and gift tax deficiencies. IRC § 6213(a).

B. Invoking the Tax Court's Jurisdiction in Deficiency Proceedings.

1. The Notice of Deficiency will be issued by Appeals, if the case goes to Appeals, or by Exam if there is insufficient time left under the SOL for the case to go to Appeals.

2. The Tax Court's deficiency jurisdiction is founded on IRC § 6213(a); *see* Rule 20(a). The Tax Court's jurisdiction to re-determine a deficiency depends upon there being a valid Notice of Deficiency and a timely filed petition. Both must be present before the Tax Court has jurisdiction over a case.

3. Applicable Procedural Provisions

   a. The Service is authorized to issue a Notice of Deficiency if it is determined that there is a deficiency in income, estate, gift, or certain excise taxes of a taxpayer. IRC § 6212(a).
   b. A taxpayer must be formally notified by registered or certified mail when the Service issues a Notice of Deficiency. IRC § 6212(a).
   c. A Notice of Deficiency is to be mailed to the taxpayer at his or her last known address even if the taxpayer is deceased, under a legal disability, or in the case of a corporation, has terminated its existence. IRC § 6212(b)(1).
      i. The Service defines the phrase "last known address" as the address on the most recently filed and properly processed tax return, ***unless*** the taxpayer has clearly and concisely notified the Service of a change of address, in which case, the last known address is the address so notified. Rev. Proc. 2010-16, 2010-19 I.R.B. 664. Absent notice to the contrary, the Service may rely upon the address per the most recently filed return.

4. Contents of a Notice of Deficiency

   a. In General: The Notice of Deficiency generally must do the following:
      i. Identify the petitioner;
      ii. Show that a deficiency has been determined;
      iii. State the taxable year or years involved; and
      iv. Set forth the amount of the deficiency.

b. An inadequate description of the adjustments or the items in controversy will not invalidate the Notice of Deficiency. IRC §7522(a).

5. The Notice of Deficiency frames the issues for the Court's decision.

   a. The first page of the Notice of Deficiency should set forth the taxpayer's name, address, tax year(s) involved, the amount of the deficiency, and any penalties, additions to tax, or additional taxes that the Service determined.
   b. The attachments to the Notice of Deficiency are considered by the Court as part of the Notice of Deficiency and practitioners should closely read the Notice of Deficiency to assign error to any items in the Notice of Deficiency with which the taxpayer disagrees.
   c. The failure to assign error to these determinations in the petition may waive the right to challenge them.

6. Presumption of Correctness and Burden of Proof

   a. The Notice of Deficiency is a legal determination that is presumed correct. *Welch v. Helvering*, 290 U.S. 111 (1933).
   b. The burden of proof is generally on the taxpayer by a preponderance of the evidence, except that the burden of proof is on the Commissioner with respect to any new matter, increases in the deficiency, or affirmative defenses pleaded in the answer.
   c. The burden of production (*i.e.*, the initial burden of coming forward with evidence) is on the Commissioner with respect to penalties, additions to tax, and additional taxes. IRC §7491(c). Once the Commissioner meets his burden of production, the burden of persuasion is upon the taxpayer to show that the penalties should not be imposed on account of reasonable cause, substantial authority, or other mitigating factors.
   d. In any case involving fraud with intent to evade tax, the burden of proof is on the Commissioner by clear and convincing evidence. IRC §7454(a).

C. The Petition – Timeliness Requirement.

1. A case is commenced in the Tax Court by filing a petition with the Court. Rule 20(a).

   a. A petition is a taxpayer's request to the Tax Court for a redetermination of the deficiency determined by the IRS in the Notice of Deficiency.
   b. Once the Tax Court has jurisdiction, it can re-determine the amount of tax and additions to tax, even if those are greater than the amounts determined by the Commissioner in the deficiency notice. IRC §6214(a). It can even order a refund, if appropriate. IRC §6512(b)(1).

2. For the Tax Court to have jurisdiction over a case, the petition *must* be timely

filed. IRC § 6213(a). The filing of a timely petition is jurisdictional; failure to meet the deadline will result in the Tax Court being deprived of jurisdiction over the deficiency.

a. IRC § 6213(a) provides that a taxpayer has 90 days (or 150 days if the Notice of Deficiency is mailed to a taxpayer outside of the United States) after the Notice of Deficiency is mailed to file a petition with the Tax Court for a redetermination of the deficiency.
b. The 90-day period begins with the date the Service mails the Notice of Deficiency, not the date on which the taxpayer receives the Notice of Deficiency.
    i. To compute the time prescribed for filing the petition, the day of the act shall not be included and the last day shall be included. Rule 25(a). Thus, the date of the Notice of Deficiency is counted as day 0. Saturdays, Sundays, and legal holidays in the District of Columbia shall be counted, *except* if the last day to file is a Saturday, Sunday, or legal holiday in the District of Columbia, then that day is to not be included and the period shall run until the next day which is not a Saturday, Sunday, or legal holiday in the District of Columbia.

3. Timely Mailing Treated as Timely Filing: The "Mailbox Rule"

a. IRC § 7502 generally provides that timely mailing of a petition is treated as timely filing of the petition if the petition is delivered to the Tax Court by U.S. mail (or certain private delivery services) after the filing deadline and the postmark date stamped on the envelope is on or before the filing deadline.
b. Stated differently, timely mailing is treated as timely filing if the following requirements are met:
    1. The postmark is within the 90-day filing deadline;
    2. The petition is properly addressed to the Tax Court with postage prepaid; and
    3. The petition is delivered after the due date.
    ii. A metered postmark date must be within the filing period and the petition must be received within normal delivery time by the US Postal Service. Treas. Reg. § 301.7502-1(c). If the petition is received later than the ordinary delivery time, the taxpayer must prove the following:
        1. That the petition was deposited in the mail on time;
        2. That the delay was caused in the transmission of the mail; and
        3. The cause of the delay. Treas. Reg. § 301.7502-1(c).
    iii. Private delivery services designated by the Service also qualify pursuant to IRC § 7502(f); namely, the DHL Express, Federal Express and United Parcel Service delivery services listed in Notice 2016-30.
    iv. The date of registration or the date on the certified mail receipt controls even if contradicted by a legible postmark.

v. The petition, along with a copy of the Notice of Deficiency, should be addressed and mailed to the United States Tax Court, 400 Second Street, N.W., Washington, D.C. 20217. The petition should not be submitted to the Service. Rule 10(e).

c. An untimely petition will be subject to a motion to dismiss based on lack of jurisdiction. If the taxpayer does not file a timely petition with the Tax Court, then the deficiency will be assessed and shall be payable upon notice and demand of payment from the Service. IRC § 6213(c).

D. Contents of the Petition in a Deficiency Action.

1. The petition is the initial pleading which, as discussed above, prevents the Service from assessing a deficiency determined to be due until the Tax Court has decided the taxpayer's liability. The petition must be sufficiently complete to enable the Court to ascertain the issues intended to be presented.

2. The petition must be written. No telegram, cablegram, radiogram, telephone call, electronically transmitted copy, or similar communication will be recognized as a petition. Rule 34(a)(1)

3. Rule 34(b)(1) sets forth very precisely what the petition must contain. *See also* Appendix, Forms 1 (standard petition) and 2 ("simplified" form).

   a. In the case of a petitioner who is an individual, the petitioner's name and State of legal residence on the date the petition is filed. In the case of a petitioner that is other than an individual, the petitioner's name and principal place of business or principal office or agency as of the date the petition is filed.
   b. The petitioner's mailing address as of the date of the petition.
   c. The office of the Service with which the tax return for the period in controversy was filed.
   d. The date of the Notice of Deficiency or liability (or other proper allegations showing jurisdiction of the Court).
   e. The city and state of the office of the Service which issued the notice.
   f. The amount of the deficiency or liability, as the case may be, determined by the Service.
   g. The nature of the tax (*e.g.*, income, estate, gift, excise) and the year or years or other periods for which the determination was made.
   h. If different from the Service's determination, the approximate amount of taxes in controversy.
   i. Clear and concise assignments of each and every error which the petitioner alleges to have been committed by the Service in the notice.
   j. Any issues for which the burden of proof is on the Service.
   k. Clear and concise lettered statements of the facts on which the petitioner bases the assignments of error.
   l. A prayer setting forth the relief sought by the petitioner.
   m. The signature, mailing address, and telephone number of each

petitioner or each petitioner's counsel, as well as the counsel's Tax Court bar number.

n. A copy of the Notice of Deficiency.

4. Any issue not raised in the petition will be deemed conceded by the Court. Rule 34(b)(4). It is therefore critical that the petition set forth the issues to be decided by the Court.

    a. A mistake or change of heart may be remedied by filing an amended pleading.
    b. A claim for reasonable litigation or administrative costs shall not be included in the petition in a deficiency or liability action. Rule 34(b).

E. Other Issues in Commencement of a Case

1. Tax Court Rule 20(a) provides that a case is commenced in the Tax Court by filing a petition, along with a copy of the Notice of Deficiency, notice of determination, notice of liability, or other notice on which the petition is based. *See also* Rule 34(b)(8). The items to be included in the petition are discussed above.

2. Other items that must be filed.

    a. The petitioner shall also submit with the petition a statement of the petitioner's taxpayer identification number (*e.g.*, Social Security number or employer identification number). The statement of taxpayer identification number is separate from the petition and a petitioner's taxpayer identification number should not be stated in the petition. Rule 20(b). The taxpayer's taxpayer identification number should also be redacted from the Notice of Deficiency submitted with the petition.
    b. The filing fee is $60 and must be paid at the time the petition is filed. Rule 20(d).
        i. The filing fee may be waived if the petitioner establishes to the satisfaction of the Court an inability to pay the filing fee. Rule 20(d). The petitioner must support his or her inability to pay with an affidavit or declaration containing specific financial information.
    c. A "Request for Place of Trial" must be included with the petition, selecting one of the cities in which the Tax Court hears cases as the petitioner's designated place for trial. Rule 140.

F. Docketed Cases Can Go To Appeals for Settlement Negotiations.

1. If the case was not considered by Appeals after examination, IRS Counsel can refer the case to Appeals after the petition and answer are filed in Tax Court.

2. In that case, Appeals would be granted settlement authority by Counsel. Appeals can retain jurisdiction over the case until it is calendared for trial.

G. The Stipulation Process

1. If the case doesn't settle, Counsel and the taxpayer's representative will begin the stipulation process. The stipulation process is, for the most part, unique to the Tax Court. Whereas many courts have steered towards the costly formal discovery process, the Tax Court has not.

2. "As commentators have observed, 'There is no rule in the Federal Rules of Civil Procedure comparable to Rule 91 of the Tax Court Rules of Practice and Procedure, requiring the parties to stipulate, to the fullest extent to which complete or qualified agreement can or fairly should be reached ...'" *Farrell v. Commissioner*, 136 F.3d 889, 893-894 (2d Cir. 1998) (quoting Laurence F. Casey, et al., *Federal Tax Practice* § 11.49a (1993)).

3. The reason the Tax Court favors the stipulation process as opposed to more formalized discovery is that the stipulation process reduces trial time, keeps tax litigation more affordable, and grants litigants greater access to the Tax Court. Harold Dubroff, *The United States Tax Court: An Historical Analysis* (1979). It is considered "largely responsible for the court's ability to keep current with the thousands of cases docketed each year." *Id.*

4. The stipulation process has been called "the bedrock of Tax Court practice". *Branerton Corp. v. Commissioner*, 61 T.C. 691, 692 (1974).

5. Parties who fail to agree to a comprehensive stipulation unnecessarily add to the time of trial, weigh on the Court's already strained resources, and compromise the purpose and efficiency of the Tax Court.

H. Provisions Governing the Stipulation Process.

1. Rule 91(a) requires the parties "to stipulate, 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."

2. Stipulations must be comprehensive. "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 procedures should be regarded as aids to stipulation". Rule 91(a)(2).

3. Stipulations shall be in writing, signed by the parties (or their counsel), and shall observe the general rules concerning form and style of papers. Rule 91(b).

4. Stipulations should not merely attach an exhibit (*i.e.*, they should not simply say "Attached as Exhibit 23-J is Petitioner's purported general ledger for the 2008 tax year."). Documents or other papers which are the subject of the stipulation in any respect and which the parties intend to place before the Court shall be annexed to or filed with the stipulation. Rule 91(b).

5. Any objection to all or any part of a stipulation should be noted in the stipulation. Rule 91(d). The Court will consider any objection to a stipulated matter made at the commencement of the trial or for good cause shown made during the trial. *Id.*

6. Executed stipulations and related exhibits should be filed by the parties at or before commencement of the trial of the case, unless the Court in the particular case otherwise directs. Rule 91(c).

    a. A stipulation shall be treated, to the extent of its terms, as a conclusive admission by the parties to the stipulation, unless otherwise permitted by the Court or agreed upon by those parties. Rule 91(e). The Court generally will not permit a party to a stipulation to qualify, change, or contradict a stipulation in whole or in part, except that it may do so where justice requires. *Id.*
    b. Stipulations Inconsistent With the Record: The Court need not accept stipulations contrary to facts disclosed by the record. *See Jasionowski v. Commissioner*, 66 T.C. 312, 318 (1976).
    c. A stipulation and the admissions therein shall be binding and have effect only in the pending case and not for any other purpose, and cannot be used against any of the parties thereto in any other case or proceeding. Rule 91(e).

7. Noncompliance With the Stipulation Process:

    a. Where a party refuses to stipulate, fails to confer with an adversary with respect to entering into a stipulation, or refuses to make such a stipulation, the party proposing to stipulate may file with the Court a Motion to Compel Stipulation. Rule 91(f).
    b. The party proposing to stipulate may, at a time not later than 45 days prior to the calendar call, file a motion with the Court for an order directing the delinquent party to show cause why the matters covered in the stipulation should not be deemed admitted for purposes of the case.
        i. The requirements for a motion to compel stipulation are set forth in Rule 91(f)(1).
    c. The Court will usually grant the motion and issue an order to show cause. The order to show cause will be served by the Clerk of the Court and a copy sent to the moving party.
    d. Within 20 days of service of the order to show cause, the party to whom the order is directed (*i.e.*, the non-moving party) shall file a response with the Court showing why the matters set forth in the motion papers should not be deemed admitted for purposes of the pending case. Rule 91(f)(2)
    e. The Court may set the order to show cause for a hearing. Rule 91(f)(2).
    f. After a motion to compel and any responses related thereto are filed, the Court will take action with respect to its Order to Show Cause. The Order to Show Cause may be made absolute (*i.e.*, the moving party

gets the relief requested), discharged (*i.e.*, the moving party does not get the relief requested), or made absolute in part and discharged in part. The Court may also order sanctions against the noncompliant party under Rule 104.

8. To the extent either party concedes all or a part of the issues in a case, that concession should be memorialized in writing and filed with the Court in the form of a Stipulation of Settled Issues. Alternatively, the parties may include any concessions in the Stipulation of Facts.

I. Setting the Case for Trial.

1. Calendar Calls and Trials. If a hearing is to be held on a motion or other matter, other than a motion related to a trial on the merits, then the hearing may be held on a motion calendar in Washington, D.C., or any other location that the Court determines.

2. Trial Calendars (Rule 131)

    a. Each case, when at issue, will be placed upon a calendar for trial. A case is usually calendared for trial through a Notice of Trial or an Order setting the case for trial. Rule 131(a).
    b. Practically speaking, you can expect a case to be set for trial approximately five or six months to a year after the case is at issue.
    c. The Court conducts regular trial sessions, small tax case calendar sessions, and special trial sessions.
        i. A regular trial session (Rule 131) is a calendar of all regular tax cases (typically in the range of anywhere between 25 and 200 cases, depending upon the city, the judge, and how many cases settle). Regular trial sessions typically last one or two weeks.
        ii. A special trial session is a calendar of one or a few cases. Special trial sessions can be as short as one day or as long as is needed for a trial. Special trial sessions may be set by the Judge for hearing specific cases, usually in a pretrial order or scheduling order. Rule 132.
    d. The Court will typically issue a standing pretrial order or other order setting trial deadlines "to facilitate the orderly and efficient disposition of all cases on a trial calendar. " Rule 131(b).
    e. After a case is calendared for trial, the Court will call the case at the calendar call of the trial session (this is essentially an exercise in which the judge will call *all* cases calendared for trial at a given trial session). Rule 131(c).
    f. The presiding judge will call all the cases at the calendar call to get a sense for the length of all cases needing a trial. The judge will typically give the parties a date and time for trial during the session.
    g. The parties can also request a date and time certain for trial by filing a motion with the Court. The benefit of doing so is to avoid having to appear for the calendar call to obtain a trial date and time.

3. Continuances.

    a. A case or matter scheduled on a calendar may be continued by the Court *sua sponte* or upon a motion of a party. Rule 133.
    b. A motion to continue shall inform the Court as to the other party's view with respect thereto.
    c. A motion to continue based upon the pendency in a court of a related case or cases shall state the name and docket number of the related case, the names of counsel for the parties in such case, and shall identify all issues common to any related case.
    d. Continuances will be granted only in exceptional circumstances. Rule 133. Conflicting engagements of counsel or employment of new counsel ordinarily will not be regarded as grounds for a continuance. *Id.*
    e. A motion to continue filed within 30 days of trial may be set for a hearing but will ordinarily be deemed dilatory and will be denied unless the ground therefor arose during the period or there was good reason for not making the motion sooner. Rule 133.

4. Place of Trial.

    a. As note previously, a "Request for Place of Trial" must be included with the petition, the purpose of which is to designate a place of trial. Rule 140.
    b. If the petitioner does not designate the place of trial when filing the petition, then the Commissioner shall make a request at the place most convenient for him when the Answer is filed.
    c. If a party desires a change in place of trial, then the party shall file a motion to that effect stating fully the reasons therefor. If the motion is filed after the case has been set for trial, the motion may be deemed dilatory (*i.e.*, with the principal purpose of delay).

J. Settlement Before Trial.

1. IRS Counsel represents the IRS in Tax Court. Counsel litigates the case, and also has broad settlement authority. If the case has already been before Appeals, Counsel has exclusive authority to settle.
2. Counsel will not ordinarily engage in serious settlement discussions until the facts have been developed.
3. Counsel will settle a case when the evidence, the law, and other factors justify settlement.
4. Counsel can take hazards of litigation into consideration.
5. Counsel cannot settle a case with a nuisance settlement.
6. Counsel can negotiate split issue settlements and can concede some issues while demanding concession of other issues by the taxpayer.
7. In order to actually settle a case, a Manager must sign off on the settlement.

K. Settlement Documentation.

1. A settlement while a case is pending in Tax Court is generally evidenced by a stipulated decision signed by counsel.
2. This stipulated decision is filed with the Judge, who enters a decision.

L. Approval of Refunds.

1. If a case involves a large refund, the Joint Committee on Taxation must approve the refund before it is issued.
2. The threshold for requiring JCT approval is $2,000,000.
3. That approval process takes several months.