THE TOP FIVE PROCEDURAL SURPRISES IN U.S. TAX COURT LITIGATION

EMAN CUYLER is a tax associate at Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates in Washington, DC. She focuses her practice on federal tax controversy and tax planning for multinational corporations. Eman advises clients through all stages of a controversy, including audits, administrative appeals, and litigation. Eman also handles corporate tax planning related to domestic and international transactions, including mergers, acquisitions, and reorganizations. Additionally, Eman has an active pro bono practice, with a focus on counseling tax-exempt organizations, representing veterans before federal venues, and assisting immigrant clients on a wide variety of issues.

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To successfully litigate a case before the U.S. Tax Court, mastery of the applicable substantive tax rules is crucial. However, the importance of the Tax Court's unique Rules of Practice and Procedure (Rules) should not be overlooked.[1] As one commentator wisely stated, "[t]he procedural aspects of the tax law are of overriding importance in many controversies, eclipsing or making moot substantive issues…."[2]

In general, the Tax Court Rules are modeled after the Federal Rules of Civil Procedure. However, Tax Court Rules are unique in several critical respects, including with respect to pretrial discovery practice. In the Tax Court, the parties are required to exchange relevant evidence through the court's informal discovery and stipulation process before engaging in formal discovery. Moreover, formal discovery in the Tax Court is more limited than the broad discovery available in the Court of Federal Claims and the federal district courts (refund forums). Other unique features of the Tax Court Rules include the requirement of post-trial briefs, the court's distinct Court Conference Procedure, and the *Golsen* rule.[3]

As a prepayment forum, many of these Rules were implemented by the Tax Court to accelerate the inexpensive resolution of cases, promote efficiency, and reduce judicial workload.[4] The purpose of this article is to identify and explain some of the unique characteristics of the Tax Court's Rules. Thus, a comprehensive discussion of the Rules is beyond the scope of this article.

1. INFORMAL PRETRIAL DISCOVERY IS REQUIRED

"The Rules on discovery perhaps most clearly illustrate the uniqueness of the Tax Court Rules."[5]

A unique aspect of Tax Court practice, and the aspect that is perhaps most distinguished from the refund forums, is the requirement that parties engage in informal discovery prior to resorting to the court's compulsory discovery procedure. Rule 70(a)(1) makes clear that the parties must "attempt to attain the objectives of discovery through informal consultation or communication before utilizing the discovery procedures provided in these Rules."[6] In contrast, in the federal district courts, informal discovery is not mandated. Rather, there is a formal process, with discovery phases clearly defined under the rules and overseen and enforced by the presiding judge.

In practice, informal discovery is as simple as contacting the opposing party and requesting relevant information and documents. As Judge Mark Holmes of the Tax Court stated, the heart of the informal discovery requirement is "asking the other party nicely first."[7] An informal discovery request may be made

orally or in writing, but any oral request should be confirmed in writing in case this requirement is later an issue before the court. Usually, after a taxpayer files a petition, the Internal Revenue Service (Service) will send a "Branerton letter"—named after *Branerton Corp. v. Commissioner*,[8] the seminal case that established the informal discovery requirement.

Unlike formal discovery, there is no time period for completing informal discovery. To the extent the informal effort is unsuccessful, discovery is available through formal channels such as the use of written interrogatories, requests for production of documents, and depositions in certain circumstances.[9] However, the court will usually not enforce a formal discovery request until the parties have in good faith substantially complied with the informal discovery requirement.[10]

In *Int'l Air Conditioning Corp. v. Commissioner*, the Tax Court stated that:

> Rule 70(a)(1) does not speak of making informal "requests" prior to making formal "requests"... If this were all Rule 70(a)(1) was intended to accomplish, it would serve little purpose. Rather, Rule 70(a)(1) contemplates "consultation or communication," words that connote discussion, deliberation, and an interchange of ideas, thoughts, and opinions between the parties.[11]

The case law demonstrates the Tax Court's serious commitment to informal discovery. For example, in *Schneider Ints., L.P. v. Commissioner*,[12] the court held that formal requests issued by the Service before answer to a Branerton letter violated the court's informal discovery procedures and granted the taxpayers motion for a protective order.[13] The court stated:

[I]n the instant case, respondent has not demonstrated that most, if not all, of the information respondent needs could not be obtained through the informal procedures required by Rules 70(a), 90(a), and our *Branerton* opinion…. The actions of respondent's counsel in the instant case lead us to believe that he does not fully appreciate the importance of our *Branerton* opinion. His insistence on compliance with his formal discovery requests in advance of any conference between the parties does not effectively present an opportunity for the 'discussion, deliberation, and an interchange of ideas, thoughts, and opinions between the parties' that our rules contemplate.

The importance of informal consultation is also emphasized in the Service's Internal Revenue Manual (IRM), which states that "failure to supply facts and documents to Appeals does not excuse the Office of Chief Counsel from the *Branerton* requirements."[14] The IRM further states that the appropriate response to a "premature discovery request is a response denying [taxpayer's] right to premature discovery and offering informal consultation or communication in accordance with T.C. Rule 70(a)."[15]

The Tax Court has acknowledged that the principal purpose of the informal discovery procedure "is to save the time and resources of the Court and of the parties before it in the development of relevant and undisputed facts."[16] Moreover, the court has explained that the specialized scope of cases before the court makes informal discovery "especially useful," stating:

> For example, the requirement in section 6001 that taxpayers maintain adequate records promotes the informal development of much relevant evidence. Additionally, under sections 7602 and 7609, the Commissioner, who is always a party to cases before us, possesses broad statutory authority to compel the production of documents and testimony by the use of administrative summonses even before a case is filed in our Court…. Many years of experience with the use of informal discovery in a variety of circumstances have demonstrated to our satisfaction the efficacy of that procedure.[17]

2. STIPULATIONS OF FACT REQUIRED

"For many years the bedrock of Tax Court practice has been the stipulation process...."[18]

Another unique aspect of Tax Court practice is that the court heavily relies upon the "stipulations of

fact" process, which is intertwined with the court's informal discovery procedure discussed above.[19] Under Rule 91(a), the "parties are required to stipulate, to the fullest extent to which complete or qualified agreement can or fairly should be reached, all matters not privileged, regardless of whether such matters involve fact or opinion or the application of law to fact." The purpose of this process is to narrow controversies to their essential issues of dispute, and to materially assist the court in managing its caseload.[20] This obligation to stipulate differs from the practice in the refund forums, where the parties are permitted to stipulate, but are not required to do so. As the Second Circuit observed, "[t]here 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."[21]

Pursuant to Rule 91, the parties are required to agree to "all facts, all documents and papers"[22] and all evidence about which there is no dispute. The parties are also required to agree to matters obtained through "discovery or requests for admission or through any other authorized procedure."[23] Where there is a question about the authenticity of the evidence, a party may register an objection on the ground of materiality or relevance but may not refuse to stipulate. The stipulation must be clear and concise, and separate items should be stated in separate paragraphs. Stipulated exhibits should be numbered serially, and the number should be followed by "P" if offered by the taxpayer (e.g., 1–P); "R" if offered by the Service (e.g., 2–R); or "J" if joint, (e.g., 3–J).[24]

Signed stipulations are typically filed with the court at or before the commencement of the trial of the case, rather than formally offered into evidence. If, after the date of issuance of trial notice in a case, a party has failed to confer with an adversary with respect to entering into a stipulation, the party proposing to stipulate may, 45 days prior to trial calendar, file a Motion to Compel Stipulation pursuant to Rule 91(f).[25] Once a stipulation is properly filed, it is conclusive and binding unless otherwise permitted by the court or agreed upon by those parties.[26] The Service and the taxpayers are equally bound by stipulations validly entered, even where the stipulation creates a windfall for the taxpayer.[27] For example, in *Tate & Lyle, Inc. v. Commissioner*,[28] the parties filed a joint stipulation of facts, and based upon that stipulation, settled all but one remaining issue. Shortly thereafter, the Service discovered that there was an error in allowing the taxpayer a general business credit. The Service then filed a Motion for Leave to File Amendment to Answer, which the taxpayer opposed. In denying the Service's motion, the Tax Court explained that:

> [T]he stipulation of settled issues, like a contract, reflects the parties' bargained-for exchange—each of the parties made concessions in the course of arriving at the settlement…. Considering all the circumstances, it seems inescapable that to grant [the Service's] pending motion would necessarily lead to the collapse of the stipulated settlement. Recognizing that [the Service] was in possession of all the facts necessary to raise the … issue at the time the deficiency notice was issued in this case, and giving due regard to the policy favoring the settlement of cases brought before this Court, we are convinced that justice would best be served if [the Service] is precluded from raising a new issue at this time, and we so hold.[29]

Moreover, the Sixth Circuit has explained: "[i]t would seem that if parties could challenge their prior stipulations at will, stipulations would lose much of their purpose."[30] The Tax Court has broad discretion to dismiss a case when the parties fail to execute a meaningful stipulation as required by the Rules.[31] Thus, litigants should have a thorough knowledge of the issues in a case and ensure that only facts known to be true are stipulated.[32]

While stipulations are not to be set aside lightly, the Tax Court has broad discretion to permit a party to later qualify, change, or contradict a stipulation where "manifest injustice would result."[33] Examples include instances where a party entered a stipulation due to duress, mistake, or ignorance of the law.[34] Generally, the factors the court considers

to determine if relief from stipulations is justified include whether:

- The taxpayer was represented by counsel when agreeing to stipulations;
- The party opposing the motion for relief from stipulations can point to evidence that has been lost or to arguments that might have been made but no longer can be; and
- Stipulations were entered into after careful negotiations or through inadvertence or honest lack of ability.[35]

In addition, the court has determined a stipulation is not binding where language in a stipulation is so ambiguous that the intent of the parties cannot be discerned.[36] Finally, where facts presented at trial are clearly contrary to those stipulated to by the parties, the court has discretion not to be bound by the stipulation.[37]

In addition to stipulating facts of a case, the parties can also voluntarily enter into a stipulation of issues when they have resolved some of the issues in the case. These stipulations usually state which issues are still unresolved. Finally, the parties can also submit a case fully stipulated to the court for a ruling by filing a motion pursuant to Rule 122. Parties generally submit a case fully stipulated where the case does not require a trial (i.e., where sufficient facts have been admitted, stipulated, established by deposition, or included in the record in some other way).[38] The submission of a case pursuant to Rule 122 does not change the burden of proof.[39]

3. FORMAL DISCOVERY IS LIMITED

"It is undisputed that the Tax Court has historically permitted limited discovery and, although the Court has expanded the Rules on discovery, its Rules are not as broad as the Federal Rules of Civil Procedure."[40]

The discovery devices available in the Tax Court are generally more limited than those in the refund forums. The use of depositions is highly restricted in Tax Court.[41] Pursuant to Rule 74, parties are allowed to take a deposition of a party or a nonparty if all parties consent. In the absence of such consent, however, depositions are only permitted under "very limited circumstances" and where such information cannot be obtained through informal discovery.[42] As the Tax Court has explained, "absent a Court order, discovery through depositions without the consent of the opposing party is not available under our Rules ... as it is under the Federal Rules [of Civil Procedure]."[43] In contrast, in the federal district courts depositions are allowed as a matter of course, and each party is permitted to take up to 10 depositions without leave of court.[44]

Moreover, pursuant to Tax Court Rule 143(g),[45] a party who calls an expert witness must have that witness prepare a written report, which is served on the opposing party and lodged with the Court before trial. This is entirely unique to the Tax Court, and if the expert is qualified, the report serves as the direct testimony of the expert.[46] Furthermore, the Tax Court rules contain no provision comparable to the automatic disclosure rules of the Federal Rules of Civil Procedure, which require parties to automatically share routine evidentiary information that would otherwise be available during discovery.[47]

The Tax Court has explained that the limitation on formal discovery is intentional because "unnecessarily broad discovery may cause extensive delays and jeopardize the administration, the integrity, and the effectiveness of the internal revenue laws."[48] Similarly, the court has expressed concern that litigation costs could rise dramatically if unfettered pretrial discovery were to be permitted.[49]

4. THE TAX COURT SPEAKS WITH ONE VOICE

The Tax Court aims to speak with "one voice." Unlike most other forums, the court's default is that, unless an opinion has gone through the Court Conference Procedure,[50] discussed below, and is published with any dissenting or concurring opinions, each opinion is issued as the opinion of the court. Generally, after the completion of trial and submission of briefs,[51] the presiding judge reviews the record and drafts an opinion (referred to in the statute as a "report")

pursuant to Code sections 7459 and 7460.[52] The judge then submits the draft opinion to the chief judge for consideration. The chief judge and his team review all draft opinions to ensure consistency with prior court opinions. In addition, the chief judge and his team offer suggestions on formatting (i.e., grammar, citation, etc.), which the authoring judge can choose to accept or decline. After the chief judge's review is completed, the draft opinion is then shared with each Tax Court judge prior to publication. Thus, each opinion issued by the court is a collaborative effort.

Unless the chief judge, within 30 days of receiving the draft opinion, directs that such opinion be reviewed by the full court under its Court Conference Procedure, the opinion "shall become the report of the Tax Court."[53] Therefore, in most cases, the opinion of the authoring judge becomes the opinion of the court, which in large part justifies the assertion that the Tax Court is a single, national court, as opposed to 19 separate courts. In contrast, in the federal district courts there is far less collaboration before opinions are issued, at least as a formal matter.

The Tax Court generally issues four types of opinions: division opinions, memorandum opinions, bench opinions, and summary opinions.[54] Division opinions, also referred to as "Tax Court Opinions," are usually issued in cases that involve a legal issue of first impression or appear to conflict with a prior decision of the court.[55] Division opinions are precedential and are published in the official Tax Court reporter. They can also be "court-reviewed" opinions, similar to en banc opinions of the U.S. federal courts of appeals, when the chief judge determines that review by the full court is necessary.[56] In advance of a scheduled court conference, which takes place about once a month, the draft opinion is distributed to the court. At the conference, the report is discussed and voted upon.[57] Generally, all presidentially appointed judges can participate in court conferences, except recalled senior judges. However, a recalled judge may vote at the conference on all cases tried by that judge. For a report to be approved at the conference and become a court-reviewed opinion, it must be approved by a majority of the judges entitled to vote. If an opinion is approved, it is released as an opinion of the court. If an opinion is not adopted, the report is reassigned to the authoring judge to be rewritten in accordance with the majority vote. If the authoring judge chooses not to rewrite the report, the case will be re-assigned to a new judge to draft a report conforming to the opinion of the Court Conference.[58] Note, parties cannot address the full court during the Court Conference and are not informed that a case has been designated for full court review.

The chief judge has considerable discretion in selecting draft opinions for court review. Judge Mary Ann Cohen of the Tax Court, who served as chief judge, explained that court review is usually directed if:

> [T]he report proposes to invalidate a regulation, overrule a published Tax Court case, or reconsider, in a circuit that has not addressed it, an issue on which we have been reversed by a court of appeals…. Court review is also directed in cases of widespread application where the result may be controversial, where the Chief Judge is made aware of differences in opinion among the judges before the opinion is released, or, occasionally, where a procedural issue suggests the desirability of obtaining a consensus of the judges.[59]

Memorandum opinions are issued in fact-intensive cases or where the law is settled. Although memorandum opinions do not have binding precedential value and are not published in the official Tax Court reporter, these opinions are often cited by litigants and the court and are recognized as very persuasive authority.[60]

Bench opinions are stated orally by the presiding judge and recorded in the transcript of proceedings.[61] Rule 152 provides that, except in actions for declaratory judgment or disclosure, a judge is authorized to issue a bench opinion if the judge "is satisfied as to the factual conclusions to be reached in the case and that the law to be applied thereto is clear."[62] Bench opinions are not binding precedent.[63]

Summary opinions are issued in cases tried under the court's elective "Small Tax Case" Procedure. When filing a petition with the court, taxpayers can elect to have their cases conducted as small tax cases if the amount in dispute, including penalties, is $50,000 or less.[64] Small tax cases are conducted under less formal procedures than regular cases and those decisions are final and non-appealable. These opinions are not published in the official Tax Court reporter and have no precedential value.[65]

5. IDENTIFYING GOVERNING PRECEDENT IS COMPLEX

As a "national court," the Tax Court is charged with deciding all cases uniformly regardless of where in its nationwide jurisdiction they may arise.[66] The court's decisions, however, can be appealed to the courts of appeals, which lie in different judicial circuits.[67] Yet each of the circuit courts is of coordinate rank and is therefore free not to follow the precedents of the others.[68] As a result, the various circuits may render inconsistent decisions for two distinct taxpayers with the same exact facts that are only differentiated by which circuit heard their appeals. Thus, the Tax Court has to decide, if at all, when it should be bound by the precedent of a court of appeals ruling.[69] Initially, the Tax Court had taken the view that, to foster uniformity, it was not bound to follow the precedent of any of the courts of appeals. In 1957, the court ruled in *Lawrence v. Commissioner* that:

> The Tax Court, being a tribunal with national jurisdiction over litigation involving the interpretation of Federal taxing statutes which may come to it from all parts of the country, has a similar obligation to apply with uniformity its interpretation of those statutes. That is the way it has always seen its statutory duty and, with all due respect to the Courts of Appeals, it cannot conscientiously change unless Congress or the Supreme Court so directs.[70]

The court's decision in *Lawrence* attracted unfavorable criticism,[71] largely because if a Tax Court case was appealable to a court of appeals that previously had taken a contrary position on precisely the same issue, reversal would appear certain under *Lawrence*.[72] Accordingly, in 1970, the Tax Court ruled in *Golsen v. Commissioner*[73] that judicial efficiency required it to follow the binding precedent of the circuit to which its decision is appealable. This rule, often referred to as the "*Golsen* rule," however, only applies where the relevant court of appeal's decision is "squarely on point." As the Tax Court explained:

> It should be emphasized that the logic behind the *Golsen* doctrine is not that we lack the authority to render a decision inconsistent with any Court of Appeals (including the one to which an appeal would lie), but that it would be futile and wasteful to do so where we would surely be reversed. Accordingly, bearing in mind our obligation as a national court … we should be careful to apply the *Golsen* doctrine only under circumstances where the holding of the Court of Appeals is squarely on point.[74]

Additionally, the Tax Court has clarified the reach of the *Golsen* rule by emphasizing that it should be "construed narrowly and applied only if 'a reversal would appear inevitable, due to the clearly established position of the Court of Appeals to which an appeal would lie.'"[75] The *Golsen* rule does not apply where the precedent from the court of appeals constitutes dicta or contains distinguishable facts or law.[76]

In contrast, the refund forums' system of precedent is less complex. The federal district courts follow the binding precedents of the court of appeals within their respective circuit. Similarly, the Court of Federal Claims follows decisions of the Federal Circuit Court of Appeals, the only court to which an appeal will lie.[77]

CONCLUSION

Having a firm understanding of the applicable procedural rules can be as critical to effectively resolving a case in the Tax Court as mastery of the substantive law and should not be ignored by litigants.

Notes

1 See, e.g., Brooks v. Comm'r, 82 T.C. 413, 422-423 (1984), aff'd. without published opinion, 772 F.2d 910 (9th Cir. 1985).

2 Theodore D. Peyser, 627-3rd Tax Management Portfolio, Limitations Periods, Interest on Underpayments and Overpayments, and Mitigation at 1 (2010).

3 Under the Golsen Rule, named after Golsen v. Comm'r, 54 T.C. 742 (1970), the Tax Court must apply the law as interpreted by the Circuit Court of the taxpayer's domicile. It is possible, then, that the Tax Court will reach different rulings for different taxpayers, even on the same facts.

4 See, e.g., Lovenguth v. Comm'r, 93 T.C.M. 1040 (T.C. 2007). By a large margin, the majority of federal tax cases are litigated in the Tax Court in comparison to the federal district courts and the Court of Federal Claims. This is because the Tax Court is the only forum, except the bankruptcy court, in which taxpayers can bring a claim prior to payment of the disputed amounts tax in full. Before taxpayers can file an action in the refund forums, taxpayers must first pay the amount of tax in dispute and then file a lawsuit for a refund.

5 Westreco, Inc. v. Comm'r, 60 T.C.M. 824, *37 (1990).

6 T.C.R. 70(a)(1); see also T.C.R. 90(a), dealing with requests for admissions, which has a similar language, stating that "the Court expects the parties to attempt to attain the objectives of such a request through informal consultation or communication before utilizing the procedures provided in this Rule."

7 John A. Townsend, Federal Tax Procedure 519 (2020 Practitioner Ed.), available at https://ssrn.com/abstract=3665377 (citing Sam Young, Tax Court Judge, IRS Attorneys Discuss Impact of Changes to E-Discovery Rules, 2010 TNT 44-13 (3/8/10)).

8 Branerton Corp. v. Comm'r, 61 T.C. 691 (1974). In Branerton Corp., the taxpayer served, pursuant to Rule 71, written interrogatories upon the Service prior to any informal consultation or communication. Citing Rule 70(a)(1), the Service moved for a protective order. The court granted the protective order providing that the Service need not answer the interrogatories, stating: "[i]t is plain that this provision in Rule 70(a)(1) means exactly what it says. The discovery procedures should be used only after the parties have made reasonable informal efforts to obtain needed information voluntarily." Id. at 692.

9 See T.C.R. 70-74, 80-85.

10 See, e.g., Pleier v. Comm'r, 60 T.C.M. 463 (T.C. 1990), aff'd, 956 F.2d 1167 (9th Cir. 1992).

11 Int'l Air Conditioning Corp. v. Comm'r, 67 T.C. 89, 93 (1976) (stating "Petitioners' refusal to enter into any informal discussion prior to receiving responses to interrogatories—whether formally submitted under Rule 71, or informally submitted in a letter—'sharply conflicts with the intent and purpose of Rule 70(a)(1) and constitutes an abuse of the Court's procedures.'" (citing Branerton, 61 T.C. at 692)).

12 Schneider Ints., L.P. v. Comm'r, 119 T.C. 151, 154 (2002).

13 See, e.g., Roat v. Comm'r, 847 F.2d 1379 (9th Cir. 1988) (finding that taxpayers who failed to attempt to obtain information from Service through informal consultation were not entitled to engage in formal discovery); Int'l Air Conditioning Corp., 67 T.C. at 89 (denying petitioners' discovery motions finding that "[p]etitioners' counsel has not made a good faith effort to comply with the directive of Rule 70(a)(1) that urges the parties to undertake informal consultation or communication before utilizing formal discovery procedures."); Pleier, 60 T.C.M. at 464 (granting the Service's Motion for Protective Order "because petitioner failed to show that he in good faith exhausted all efforts toward informal communication and discovery within the meaning of Rules 70 and 90, and Branerton Corp. v. Comm'r, 61 T.C. 691 (1974).").

14 IRM 35.4.3.2 (4) (8-11-04).

15 IRM 35.4.3.2 (5) (8-11-04).

16 Schneider Ints., 119 T.C. at 154.

17 Id. at 155.

18 Branerton Corp., 61 T.C. at 692; see also Ash v. Comm'r, 96 T.C. 459, 475 (1991) ("this Court's focus on the stipulation process has been designed to push the parties to voluntarily provide each other with information relevant to the case at hand.").

19 Stamos v. Comm'r, 87 T.C. 1451, 1456 (1986) (stating "[w]e reiterate and emphasize what previously has been said concerning the stipulation process—Economy of the time of both litigants and courts is greatly favored, and no more useful device is found than the stipulation which agrees to the existence of material and relevant facts concerning which there is no dispute, thus avoiding time- consuming and unnecessary presentation of proof…. The stipulation is to be encouraged as an efficient means of presenting evidence." (quoting Insurance Co. of No. Amer. v. Northwestern Nat. Ins. Co., 494 F.2d 1192, 1196 (6th Cir. 1974)).

20 See Mathia v. Comm'r, 93 T.C.M. 653 (T.C. 2007).

21 Farrell v. Comm'r, 136 F.3d 889, 893-894 (2d Cir. 1998) (quoting Laurence F. Casey, et al., Federal Tax Practice § 11.49a (1993)).

22 T.C.R. 91(a).

23 Id.

24 T.C.R. 91(b).

25 T.C.R. 91 (f).

26 T.C.R. 91(e) ("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. The Court 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. 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."). A party can, however, be relieved of a stipulation if the "interests of justice" so require.

27 Kampel v. Comm'r, 634 F.2d 708, 710 n. 3 (2d Cir. 1980) ("Although the Service presumably did not intend to give away its case, it is difficult to find the alleged ambiguity in

this wording. We thus deem the commissioner bound by the stipulation.").

28 Tate & Lyle, Inc. v. Comm'r, 71 T.C.M. 2200 (T.C. 1996), rev'd on other grounds, 87 F.3d 99 (3d Cir. 1996); see also Farrell, 136 F.3d at 894 (stating that "[t]he Tax Court has been "reluctant to set aside a stipulated decision in absence of fraud, mutual mistake of fact, or other like cause"); Applestein v. Comm'r, 56 T.C. 1169 (1989) ("A settlement stipulation is usually a compromise, and the mere fact that the Commissioner now feels more confident about some point or points that he did not insist upon in first determining and later stipulating these particular deficiencies is not sufficient grounds for avoiding the settlement agreement.").

29 Tate & Lyle, Inc., 71 T.C.M. at *15; see also Mathia v. Comm'r, 93 T.C.M. 653 (T.C. 2007) ("Given the importance of the stipulation process to this Court, our reluctance to relieve a party of a stipulation it negotiated and executed is understandable. Permitting challenges to otherwise binding stipulations of fact undermines the stipulation process and injects uncertainty into our litigation process, often after the record is closed.")

30 Est. of Quirk v. Comm'r, 928 F.2d 751, 759 (6th Cir.1991).

31 See, e.g., Edelson v. Comm'r, 829 F.2d 828, 831 (9th Cir. 1987); Larsen v. Comm'r, 765 F.2d 939, 941 (9th Cir. 1985); Long v. Comm'r, 742 F.2d 1141, 1143 (8th Cir. 1984); Douge v. Comm'r, 899 F.2d 164, 167 (2d Cir. 1990); Miller v. Comm'r, 654 F.2d 519, 521 (8th Cir. 1981).

32 For an excellent discussion regarding the perils of the stipulation process, see Bryan Camp, Lesson From The Tax Court: The Perils of Stipulations, TaxProf Blog, June 7, 2021, https://taxprof.typepad.com/taxprof_blog/2021/06/lesson-from-the-tax-court-the-perils-of-stipulations.html.

33 T.C.R. 91(e); Lovenguth v. Comm'r, 93 T.C.M. at *3; Bokum v. Comm'r, 992 F.2d 1132, 1135 (11th Cir. 1993) (quoting Jackson v. Seaboard Coast Line R.R., 678 F.2d 992, 1019 (11th Cir.1982).

34 See, e.g., Corson v. Comm'r, 114 T.C. 354, 364 (2000) ("'All concessions, including stipulated settlement agreements, are subject to the Court's discretionary review' and may be rejected in the interests of justice." (quoting McGowan v. Comm'r, 67 T.C. 599, 607 (1976))).

35 Lovenguth, 93 T.C.M. at *4.

36 Stamos, 87 T.C. at 1455.

37 Jasionowski v. Comm'r, 66 T.C. 312 (1976).

38 T.C.R. 122(a).

39 See T.C.R. 122(b); Weaver v. Comm'r, 121 T.C. 273, 275 (2003); Cristo v. Comm'r, 114 T.C.M. (CCH) 617 (T.C. 2017), aff'd, 775 F. App'x 303 (9th Cir. 2019).

40 Westreco, Inc. v. Comm'r, 60 T.C.M. at *37.

41 See T.C.R. 70(a) ("Discovery is not available under these Rules through depositions except to the limited extent provided in Rule 74").

42 See, e.g., Brunwasser v. Comm'r, 51 T.C.M. 1011 (T.C. 1986).

43 Ash, 96 T.C. at 463.

44 Fed. R. Civ. P. 30(a)(1), (2). The parties can also stipulate to exceed the 10 depositions limitation, or a party can seek leave of court.

45 T.C.R. 143(g).

46 Id.; Purple Heart Patient Ctr., Inc. v. Comm'r, 121 T.C.M. 1260 (2021).

47 Fed. R. Civ. P. 26; U.S. Ct. Fed. Claims R. 26(a).

48 Ash, 96 T.C at 463 (citing Est. of Woodard v. Comm'r, 64 T.C. 457, 459 (1975)).

49 See Westreco, Inc., 60 T.C.M. 824.

50 Mary Ann Cohen, How to Read Tax Court Opinions, 1 Hous. Bus. & Tax. L.J. 1, 6-7 (2001) (discussing, inter alia, "court reviewed opinions").

51 After the trial of a case in the Tax Court, the parties are generally required to file a "post-trial brief" outlining the main factual and legal issues in the case. Stringer v. Comm'r, 84 T.C. 693, 704 (1985), aff'd, 789 F.2d 917 (4th Cir. 1986); T.C.R. 151(a), 151(b),151(e). In some circumstances, if a party fails to file post-trial briefs on issues that have been tried, the court may consider those issues abandoned, waived, or conceded. See, e.g., Nicklaus v. Comm'r, 117 T.C. 117, 120 n. 4, (2001); Stringer, 84 T.C. at 704–708; Khuong Duong v. Comm'r, 109 T.C.M. 1476 (T.C. 2015); Rose v. Comm'r, 117 T.C.M. 1367 (T.C. 2019); Mileham v. Comm'r, 114 T.C.M. 249 (T.C. 2017); Golan v. Comm'r, 115 T.C.M. 1425 (T.C. 2018). Similarly, failure to file a post-trial brief can result in the dismissal of all issues on which a party has the burden of proof. Stanwyck v. Comm'r, 103 T.C.M. 1955 (T.C. 2012); see Stringer, 84 T.C. at 704–708.

52 26 U.S.C. § 7460(a) ("A division shall hear, and make a determination upon, any proceeding instituted before the Tax Court and any motion in connection therewith, assigned to such division by the chief judge, and *shall make a report of any such determination which constitutes its final disposition of the proceeding*") (emphasis added).

53 26 U.S.C. § 7460(b) ("The report of the division shall become the report of the Tax Court within 30 days after such report by the division, unless within such period the chief judge has directed that such report shall be reviewed by the Tax Court. Any preliminary action by a division which does not form the basis for the entry of the final decision shall not be subject to review by the Tax Court except in accordance with such rules as the Tax Court may prescribe. The report of a division shall not be a part of the record in any case in which the chief judge directs that such report shall be reviewed by the Tax Court.").

54 Pursuant to 26 U.S.C. § 7459(d), once a petition contesting a notice of deficiency is filed, the Tax Court does not lose jurisdiction over a case even if the parties agree that there is no deficiency, and the court will issue a decision of some sort. For a detailed discussion regarding backing out of the Tax Court, see Bryan Camp, Lesson From The Tax Court: The Hotel California Rule, TaxProf Blog, Nov. 12, 2018, https://taxprof.typepad.com/taxprof_blog/2018/11/lesson-from-the-tax-court-the-hotel-california-rule.html/.

55 Cohen, supra note 50, at 7.

56 See Harold Dubroff and Dan Grossman, The United States Tax Court: An Historical Analysis, Part VI: Trial and Post-

Trial Procedure, 42 Albany L. Rev. 191, 236-237 (1978); Harold Dubroff and Brant J. Hellwig, The United States Tax Court: An Historical Analysis 760 (2nd ed. 2014), available at https://www.ustaxcourt.gov/resources/book/Dubroff_Hellwig.pdf.

57 Dubroff and Hellwig, The United States Tax Court: An Historical Analysis, supra note 56, at 760.

58 See, e.g., Dixon v. Comm'r, 141 T.C. 173 (2013) (Judge Holmes was the presiding trial judge, but wrote a dissenting opinion); In Succession of McCord v. Comm'r, 461 F.3d 614, 621 (5th Cir. 2006), rev'g and remanding 120 T.C. 358 (2003), (the court explaining this as unusual, stating: "The case was tried several months later before Judge Maurice B. Foley, largely on a joint stipulation of facts filed on the day of trial.… Approximately two years after that trial, the Acting Chief Judge of the Tax Court issued an unusual order that resulted in a proceeding that resembles an en banc rehearing. In essence the case was taken away from Judge Foley retroactively and reassigned to Judge James S. Halpern who, on the same day, filed an opinion on behalf of the Majority.").

59 Cohen, supra note 50, at 7-8 ("Finally, it is a misnomer to refer to court-reviewed opinions as en banc, to the extent that that term implies judges sitting together to hear arguments by the parties. The court conference where opinions are reviewed is attended only by the judges, who sit around a conference table without robes, and the Clerk of the Court, who records votes. Neither the parties nor the law clerks are ever present.").

60 Convergent Techs. v. Comm'r, 70 T.C.M. 87 (T.C. 1995) ("Sun Microsystems, Inc., being a memorandum opinion of this Court, is not controlling precedent. Darby v. Comm'r, 97 T.C. 51, 67 (1991). However, given the substantial similarity of the factual foundation of this case and Sun Microsystems, Inc., there is no reason why we should not follow the same analytical approach…."). But see James S. Halpern, What Has the U.S. Tax Court Been Doing? an Update, 151 Tax Notes 1277, 1288 (May 30, 2016) ("The classification of opinions by precedential weight serves an important signaling function. The Court's relatively indiscriminate citation of memorandum and division opinions risks confusion and frustrates the signaling function that classification ought to achieve. I propose that the Court return to its historical custom of not citing memorandum opinions as legal precedent.")

61 26 U.S.C. § 7459(b).

62 Congress amended section 7459(b) of the Code to provide that "[s]ubject to such conditions as the Tax Court may by rule provide, the requirements of this subsection and of section 7460 are met if findings of fact or opinion are stated orally and recorded in the transcript of the proceedings."

63 T.C.R. 152(c).

64 Rule 171 provides the rules for the election of the "small tax case" procedure.

65 26 U.S.C. § 7463(b).

66 Lawrence v. Comm'r, 27 T.C. 713, 719–20 (1957), rev'd, 258 F.2d 562 (9th Cir. 1958), and overruled by Golsen, 54 T.C. 742 (1970); Laurence F Casey, Casey Federal Tax Practice A Treatise of the Laws and Procedures Governing the Assessment and Litigation of Federal Tax Liabilities § 6:06.

67 26 U.S.C. § 7482.

68 Dubroff and Hellwig, The United States Tax Court: An Historical Analysis, supra note 56, at 815.

69 Id.

70 Lawrence, 27 T.C. at 719.

71 Dubroff and Hellwig, The United States Tax Court: An Historical Analysis, supra note 56, at 817.

72 Lardas v. Comm'r, 99 T.C. 490, 494–95 (1992).

73 Golsen, 54 T.C. at 757.

74 Lardas v. Comm'r, 99 T.C. 490, 495 (1992).

75 Est. of True v. Comm'r, T.C.M. 2001-167, aff'd, 390 F.3d 1210 (10th Cir. 2004) (citing Lardas, 99 T.C. 490).

76 See, e.g., Best Life Assur. Co. v. Comm'r, T.C.M. 2000-134.

77 28 U.S.C. §1295(a)(3).