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# **No More Document Dumps or Secret Subpoenas: Amending the U.S. Tax Court Rules to Conform to the Federal Rules of Civil Procedure, Streamlining Pretrial Discovery**

*Kaelyn J. Romey\**

## ABSTRACT

The U.S. Tax Court Rules of Practice and Procedure governing pretrial discovery and subpoena production should be amended to closely mirror the Federal Rules of Civil Procedure. Over the years, extensive amendments and regular updates were made to the Federal Rules, keeping them current with federal court practice. This is not true of the Tax Court Rules, which caused several pretrial discovery rules to become outdated. Specifically, the Tax Court Rules regarding subpoena enforcement. They currently allow for last-minute document dumps on the eve of, and sometimes day of, trial. This outdated rule creates a significant challenge for those who practice and litigate before the Tax Court. Amending the rules will bring transparency to the subpoena process, limit opportunities for parties to conduct “trial by ambush” on their opponents, and provide consistency and efficiency in enforcing the turnover of subpoenaed information before trial. The proposed Tax Court Rule amendment in this article does not expand the discovery rules beyond what is already contemplated in their plain language, but merely allows an earlier exchange of documents, encouraging earlier settlement between parties.

Following the informal theme of the Tax Court discovery rules, the proposed amendments are designed to assure that disputes are resolved on the merits of each party’s claim, while keeping in line with the Internal Revenue Service’s mission “to expeditiously dispose of cases, either by settlement or trial, in a manner which is fair both to the taxpayer and to the government.” The best way to accomplish this goal is through the free flow of information and on-going good faith discussions between the parties. Amending the Tax Court Rules to more closely align with the Federal Rules for subpoena enforcement will provide more transparency in the subpoena process and allow for efficient enforcement.

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## I. INTRODUCTION

Litigators who do not practice before the Tax Court find two aspects of pretrial discovery before the Tax Court especially surprising. First, counsel will likely not hear testimony from the opposing party, or their witnesses, until they are actually on the witness stand at trial. The lack of access to a party's likely testimony happens for three reasons: (1) there are no required initial disclosures between the parties; (2) taking depositions is considered an extraordinary practice; and (3) a party might not comply with the court's expectation that all parties amicably share information to resolve disputes informally. The second surprise is that counsel is only entitled to enforce the production of subpoenaed documents on the first day of trial. Neither practice advances the intentions of a court that values the free flow of information and cooperation between parties.

Often the documents needed to resolve a tax dispute are in the hands of a third-party such as a bank or financial institution. A third party can only be forced to provide testimony or documents in a case if they are subpoenaed. Currently, the U.S. Tax Court Rules of Practice and Procedure ("Tax Court Rules") require a subpoenaed party to provide documents at the court's calendar call on the first day of a scheduled trial session.<sup>1</sup> Formal discovery rules do not apply to non-parties, therefore, practitioners are not permitted to seek documents from non-parties using formal discovery rules.<sup>2</sup> As a trial date quickly approaches, and months have passed since formal discovery began, a party may realize that they need information from third parties. The options are to either serve a subpoena and wait until trial or serve notice and a subpoena *duces tecum*,<sup>3</sup> to take a third-party deposition and request documents. Taking a deposition is time-consuming, expensive, and likely even unnecessary if a party seeks only documents, and not testimony, from a witness. Litigators know the burden that last-minute document production places on them as they prepare their case for trial. This is especially true in high-dollar, high-stakes cases with voluminous tax and financial records. Thus, the current rules thwart timely settlement and cause expenses to rise exponentially, for each day that unnecessary trial preparation continues.

Interestingly, current Tax Court subpoena practices directly conflict with the Tax Court's own 14-day pretrial exchange of documents deadline in regular cases.<sup>4</sup> The exchange deadline requires parties to provide all documents of anticipated use at trial to the opposing party two weeks before the trial.<sup>5</sup> This rule allows each party access to information and documents prior to trial to allow time to prepare.<sup>6</sup>

The Tax Court has the authority to enforce the production of documents through a subpoena returnable at a scheduled "hearing" or deposition.<sup>7</sup> The Tax Court Rules flesh out the procedures under this statutory authority.<sup>8</sup> This article

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1. T.C. R. 147(b). (This is developed in the paper and my argument is explained).

2. T.C. R. 70–74.

3. A subpoena ordering the witness to appear in court and to bring specified documents, records, or things. — Also termed deposition subpoena *duces tecum*. *Subpoena duces tecum*, BLACK'S LAW DICTIONARY (11th ed. 2019).

4. US TAX CT., STANDING PRETRIAL ORDER, [https://www.ustaxcourt.gov/pro\\_se/SPTO\\_sample.pdf](https://www.ustaxcourt.gov/pro_se/SPTO_sample.pdf) (last visited Mar. 14, 2020).

5. *Id.*

6. *Id.*

7. T.C. R. 147(a)–(d).

8. I.R.C. § 7453 (2019).

proposes changes to the Tax Court Rules that simplify the enforcement process and allow a serving party to determine a “reasonable time” and place for the return of subpoenaed documents in the same way as the Federal Rules. Notice and timing rules would also be aligned with the Federal Rules.

Part II of this article presents case studies regarding subpoenas, detailing the ineffectiveness of Tax Court Rules and calling for reform. Part III addresses the impact of current subpoena rules on parties and non-parties. Part IV outlines the history and procedures of the Federal Rules of Civil Procedure (“Federal Rules”) and Tax Court Rules, while Part V analyzes their differences. Part VI suggests a workable solution and rule reform—setting a “reasonable time” for parties to respond and provide subpoenaed documents—and includes informal notice after third-party subpoenas are issued. The article concludes in Part VII with a critical analysis of the reform proposed.

## II. CASE STUDY

The mission of the Internal Revenue Service (“IRS”) is to resolve tax disputes both fairly and efficiently.<sup>9</sup> To that end, the IRS needs access to information, documents, and testimony supporting and substantiating the positions taken on a taxpayer’s return. Taxpayer compliance and tax enforcement are the necessary bedrock and foundation utilized to collect taxes and fund the United States Treasury.

The Tax Court is a specialized trial court with the jurisdiction to hear and resolve federal tax disputes.<sup>10</sup> The Tax Court developed its own procedural rules of practice,<sup>11</sup> which were based on, but also differ from, the Federal Rules.<sup>12</sup> This article shows how current Tax Court Rules work well for compliant, cooperative, and organized taxpayers, but fail when a party refuses to provide documents, disputes production, fails to follow rules, or is unable to obtain tax records on their own.

The Tax Court, much like the District Courts, requires that all parties attempt informal discovery before availing themselves of formal discovery rules and procedures.<sup>13</sup> Formal discovery requests are expensive, time-consuming, and often confrontational. They take time to draft and also allow for long response times. When parties are non-compliant with informal requests, opposing parties are forced to resort to filing motions to compel enforcement. Even though there are discovery procedures available to parties,<sup>14</sup> there are no rules or timelines guaranteeing that motions to compel will be resolved before the scheduled calendar date in Tax Court.<sup>15</sup> One could be left preparing for a potential hearing on pretrial issues, while concurrently preparing for trial, all while waiting for access to documents held by third parties that may resolve the dispute. The current rule specifically affects parties seeking bank documents, financial statements, return preparation information, and other third-party record-keeping documentation. Additionally, parties are prohibited from serving formal discovery requests on non-parties in Tax Court litigation

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9. I.R.S., INTERNAL REV. MANUALS 1.1.1.2, IRS MISSION (2019).

10. U.S. CONST. art. I, § 8, cl. 9.

11. See TAX CT. RULES ON PRAC. & PROC.

12. HAROLD DUBROFF & BRANT J. HELLWIG, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS 94–95 (2d ed. 2014).

13. T.C. R. 70(a).

14. See T.C. R. 70–74.

15. See TAX CT. R. PRAC. & PROC.

and must serve subpoenas, or notice depositions, to obtain third-party documents for trial.<sup>16</sup>

Under the Federal Rules, a party seeking third-party documents may begin after initial pleadings are filed.<sup>17</sup> Court-enforced, initial mandatory disclosures require parties to share discoverable evidence and identify potential witnesses.<sup>18</sup> When documents are needed from third-party record holders, a party may issue a subpoena and ask that it be returned in a reasonable time well before the start of trial.<sup>19</sup>

### A. Case Study: Cannabis Industry Taxpayer 1

In the following scenario, Taxpayer 1, a California resident, owns and operates a business in the cannabis industry. Even though California has legalized cannabis,<sup>20</sup> trafficking in the sale of cannabis is still considered illegal under federal law.<sup>21</sup> Those operating businesses in this industry must grapple with the disparity between state and federal taxation. Under Internal Revenue Code (“IRC”) § 280E,<sup>22</sup> Taxpayer 1 is required to report all income from any source derived, but is prohibited from deducting regular business expenses.<sup>23</sup> The IRC does not recognize expenses for a business that is conducting federally illegal activity.<sup>24</sup>

An ever-changing political climate and fluctuating legal landscape may incentivize Taxpayer 1 to delay the production of documents and resolution of their tax disputes. In recent years, raids were regularly made on cannabis retail operations, and Taxpayer 1 had a real fear of criminal prosecution. In cases where taxpayers have no incentive to provide documents to the federal government during an audit, appeals, or trial, the current Tax Court Rules as drafted provide little remedy. The minority of taxpayers who do not follow the tax laws may seek to delay the production of documents as long as possible. Some may delay until the political climate is more forgiving on certain issues or until a favorable settlement offer can be reached. Delay tactics in audit include ignoring informal requests, cancelling appointments, and agreeing to meet with the opposing party, but failing to respond or produce records at scheduled settlement conferences. When this occurs, a party can run down the clock on the statute of limitations, hoping the opposing party does not have the time or resources to issue or enforce a summons in the case. All of this behavior affects federal tax enforcement and hinder the job of those who were hired to collect taxes and enforce federal tax laws.

This issue has been partially remedied as the independent Office of Appeals enforces their procedures that include returning all of Taxpayer 1’s late produced documents to the IRS auditor who initially reviewed the case.<sup>25</sup> When cases do not

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16. *Id.*

17. FED. R. CIV. P. 45(a)(1)(C).

18. FED. R. CIV. P. 26(a)(1)(A).

19. FED. R. CIV. P. 45(a)(1)(A).

20. CAL. BUS. & PROF. CODE § 2600 (West 2020).

21. I.R.C. § 280E (2018).

22. *Id.*

23. I.R.C. § 162(a) (2018).

24. § 280E.

25. The Office of Appeals assists taxpayers in resolving their tax disputes through an informal administrative process after an examination by the IRS in an effort to avoid court proceedings. IRS, *Office of Appeals*, <https://www.irs.gov/appeals/appeals-an-independent-organization> (last visited Mar. 1, 2020).

resolve in appeals, they are forwarded to the IRS Chief Counsel's Office.<sup>26</sup> A case with a non-compliant party, one who fails to produce documents to substantiate their tax return in exam, often arrives underdeveloped and likely in need of formal discovery in Tax Court. Assuming that Taxpayer 1 was audited for all of the items on his filed return, Taxpayer 1's noncompliance is sometimes rewarded when the Tax Court limits the scope of issues that Chief Counsel is permitted to inquire about during formal discovery.

Before the recent shift in political climate, cannabis business owners often faced a true fear of reprisal in opening their books and records to federal agencies, whom they sometimes believed would produce their records to law enforcement. There was a mandatory prison sentence for persons found with set amounts of marijuana.<sup>27</sup> Producing inventory records to the IRS substantiating tax return positions could potentially be used to show that taxpayers held marijuana in amounts over those allowed by state statute. The fear of criminal inquiry could disincentivize Taxpayer 1 from producing documents during a tax audit examination, tax appeal, or Tax Court trial. Current subpoena rules allow Taxpayer 1 to potentially delay the production of documents by claiming that all requested documents are held by third parties over which the taxpayer has no control.<sup>28</sup> The Tax Court remedy is to allow a party to take a deposition *duces tecum*, requiring a party to appear with the requested documents.<sup>29</sup> This works well if the noticed witnesses are cooperative and responsive, the parties have sufficient funding, and the Tax Court deems the deposition necessary. In contentious cases, this is often not the scenario. Current subpoena rules provide a slow process and little remedy in obtaining third-party banking and financial documents prior to trial.<sup>30</sup> There is also no court-imposed deadline requiring notice of the intention to oppose or quash the subpoena.<sup>31</sup> Allowing Taxpayer 1 to hide behind the antiquated subpoena rule is prejudicial towards the party seeking third-party information.

Other obstructionist tactics that delay document production include refusing to identify persons who control documents, providing partial books and records, and claiming that records are lost or destroyed. This can occur in substantiation cases and especially where there are cash-based businesses or where taxpayers are involved in illegal activity. It is also prevalent in unreported income cases where the government has the burden of proof on the issues.

When taxpayers fail to cooperate in an exam, they can still arrive in appeals appearing ready to settle. This is problematic when taxpayers are non-cooperative throughout their audit and have failed to disclose books and records. This behavior can be rewarded by limited discovery practice in the Tax Court. Under current Appeals Office procedures, when new documents are provided in appeals, the case is returned to the field.<sup>32</sup> When cases are not resolved in appeals, they are forwarded to the Chief Counsel's Office.<sup>33</sup> This was not always the case with non-compliant taxpayers; even parties who failed to produce documents to substantiate their tax

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26. I.R.S., INTERNAL REV. MANUALS 8.13.1.6.2.6, COUNSEL INVOLVEMENT (2018).

27. 21 U.S.C. § 841(b)(1) (2018).

28. T.C. R. 147.

29. T.C. R. 81(b)(1)(E).

30. See T.C. R. 147.

31. See T.C. R..

32. I.R.S., INTERNAL REV. MANUALS 8.1.1.3(2), IRS MISSION (2017).

33. *Id.*

returns in exam could negotiate settlements in Appeals or arrive with an underdeveloped file that was likely in need of discovery in Tax Court.

### B. Case Study: *Pro Se*<sup>34</sup> Taxpayer 2

Another case study involves unrepresented *pro se* taxpayers. A majority of cases tried in the Tax Court involve taxpayers who are not represented,<sup>35</sup> and most *pro se* cases involve less than \$50,000 in dispute.<sup>36</sup> Having a low dollar amount at issue could significantly impact the amount of money that a taxpayer might want to make available to spend on court reporters, fees, travel, and service of process necessary to utilize the Tax Court subpoena rules. This is not to say that all taxpayers are incentivized to keep their documents out of the hands of the IRS; many wish to resolve their cases swiftly. Occasionally, language barriers and other hardships prevent taxpayers from locating and obtaining documents from financial, banking, or other institutions.<sup>37</sup> This is where the IRS could step in and assist those taxpayers to resolve their disputes without the need for trial.

Amending the Tax Court Rules to allow for an inexpensive and efficient use of subpoenas could assist *pro se* Taxpayer 2 in obtaining the documents that substantiate their tax returns, provided Taxpayer 2 wants to comply and would provide documents quickly to conclude their audit. A very high percentage of tax cases are resolved during a tax exam, tax appeal, or informally with counsel before trial.<sup>38</sup> When Taxpayer 2 struggles to obtain documents from a financial institution, the government can, and usually does, issue subpoenas to aid in resolution. Furthermore, with simplified rules for subpoena enforcement, low income taxpayer clinics can assist Taxpayer 2 in gaining documents before trial. Exchanging documents sooner will shed more light on the government's case and provide a better understanding to the taxpayer of what is needed to resolve it.

## III. THE IMPACT OF THE CURRENT TAX COURT RULE

### A. Unrepresented *Pro Se* Taxpayers

The impact on *pro se* litigants trying to obtain documents to substantiate their returns is significant. Most taxpayers want to comply and resolve their cases, so they provide documents quickly, hoping to conclude their audits. A very high percentage of tax cases resolve in examination, appeals, and informally with IRS Counsel before trial.<sup>39</sup> When taxpayers struggle to obtain documents from third-parties, like financial institutions and mortgage lenders who have changed hands repeatedly, the government can issue subpoenas to aid in resolving cases.<sup>40</sup> This is common in cases involving retirement account distributions, stock sales, and cancellation of

34. "Pro se" means "for oneself; on one's own behalf; without a lawyer." *Pro se*, BLACK'S LAW DICTIONARY (11th ed. 2019).

35. See NAT'L TAXPAYER ADVOCATE 2017 REPORT TO CONG. 290, <https://taxpayeradvocate.irs.gov/reports/2017-annual-report-to-congress/full-report> (last visited Feb. 1, 2020).

36. *Id.* at 78.

37. *Id.* at 133.

38. *Id.* at 199.

39. *Id.* at 345.

40. T.C. R. 147.

debt income. Furthermore, with simplified rules for subpoena enforcement, clinics can obtain waivers and issue subpoenas to assist taxpayers in gaining documents before trial. Under current rules, subpoenas are severely underutilized by taxpayers, due to the cost of tendering fees to bring witnesses and because there is no expectation that a taxpayer will receive requested information until trial.<sup>41</sup>

As *pro se* taxpayers struggle to find and gather the documents they need to resolve their cases, California pro bono tax clinic directors admit they are not in the practice of issuing subpoenas on their behalf.<sup>42</sup> An amended rule might assist clinics in getting documents earlier for clients who are having difficulty obtaining them.<sup>43</sup> Receiving the information before trial will allow the parties to understand their opponent's case sooner and provide the opportunity for parties to negotiate fair resolutions.

### *B. The U.S. Tax Court*

The suggested rule change raises the question of whether it will cause enforcement issues for the Tax Court, thus requiring additional court resources to resolve pretrial discovery motions. It is likely that a new notice requirement will increase the amount of motions to quash or amend subpoenas. This could require significant additional court resources, but allowing parties the ability to provide a reasonable time and place to return documents is not likely to have the same effect on resources. Furthermore, the desire for uniformity, clarity, and fairness to all parties should outweigh these resource costs. It is worth noting that resources will be saved through reduced need for trial time, travel, and court administrative time spent drafting opinions and conducting trials. Many times, subpoena issues are resolved by the parties prior to trial, without any assistance of the court. For example, roughly 180 Tax Court orders responding to subpoena motions were filed over the past decade.<sup>44</sup> At first glance, this could be considered a very low number of subpoena motions needing court assistance, when compared to the overall number of motions brought to the court and the overall number of subpoenas issued in cases.<sup>45</sup> Allowing the parties to choose a reasonable time, based on the size and issues in the case, may also open the door to disputes defining "reasonable," but this should be easily remedied since the "reasonableness" issue has already been tested in District Court.

The number of actual subpoenas issued in Tax Court cases likely far outnumber the amount detected through a search on the Tax Court website.<sup>46</sup> You cannot search for motions for a judge who is retired or is no longer sitting on the Court, and not all motions are filed in paper form with the Tax Court.<sup>47</sup> The majority of subpoenas issued are complied with without the need for Tax Court assistance in

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41. *Id.*

42. See Richard Carpenter, *A Review of California Law School Taxpayer Clinics*, CAL. J. OF TAX LITIG. (Feb. 1, 2020, 10:00 AM), <https://calawyers.org/taxation/california-journal-of-tax-litigation-2013-1st-quarter/>.

43. *Id.*

44. A search was conducted for all motions mentioning the word "subpoena" posted on the Tax Court website between January 2000 and January 2019. See U.S. TAX CT., <https://www.ustaxcourt.gov> (search for all motions mentioning the word "subpoena" posted on the Tax Court website between Jan. 2000 and Jan. 2019) (last visited Feb. 1, 2020).

45. *Id.*

46. *Id.*

47. *Id.*



enforcement.<sup>48</sup> This seems readily apparent when you consider that the IRS is required to issue a subpoena for all witnesses and testimony before it can force a witness to testify or produce documents at trial.<sup>49</sup> Furthermore, taxpayers often rely on the government to issue subpoenas on their behalf to get documents from third-party record keepers.

The sooner third-party information is exchanged, the sooner tax cases can be settled and resolved. The closer one gets to trial, the more litigation expenses are incurred by all parties (as well as the Tax Court). The deadlines looming during the last 30 days of preparation can increase costs significantly. Stipulations must be executed, documents must be copied and redacted, and pretrial memoranda must be drafted and read by the court. All of these tasks consume valuable time that could be better spent on genuinely contested issues of law. Throughout the tax examination process, taxpayers are encouraged to respond to examiners and provide records that support the claims filed on their tax returns.<sup>50</sup> They have ample opportunity to provide information informally or by amending their returns throughout the examination and appeals process. When documents are requested by agents, but are not produced before a Tax Court petition is filed, it is often an indication that the informal rules are not effective in their case.

If a party is not voluntarily responsive or cooperative, parties often need to file formal discovery or seek information from third parties.<sup>51</sup> This increases the need for enforcement assistance from the court. Including a notice requirement, and allowing for the reasonable place and time of compliance, may drive an increase in need for the court to referee more pretrial subpoena disputes, especially in large cases.

### C. The Government

The amendment would have a positive effect on the government by promoting a free exchange of documents that the government is already entitled to review before trial. It would promote a quicker collection of documents, lessen the fear of trial by ambush, and allow all parties to adequately prepare for their witness-examinations. The flurry of activity required for unresolved cases within 30 days of trial absorbs a large amount of resources.

Even though each party has the right and ability to issue their own subpoena on a third party during pre-trial discovery, the government is the one issuing subpoenas the majority of the time. Requiring a party to exchange documents at the moment they are obtained could seriously prejudice the government, especially in large cases. Taxpayers and their agents have access and knowledge about most, if not all, of the relevant documents in their own personal cases. Because there is no notice requirement, taxpayers are permitted to do their inquiries of third parties, and for documents, almost exclusively in private.<sup>52</sup> They are not required to turn over anything informally until the Tax Court's 14-day pretrial exchange deadline. Requiring the government to turn over every document that it seeks or obtains through

48. A search was conducted for all motions mentioning the word "subpoena" posted on the Tax Court website between January 2000 and January 2019. *Id.*

49. T.C. R. 147.

50. I.R.S., INTERNAL REV. MANUALS 4.10.1.2.1.4, IRS MISSION (2017).

51. T.C. R. 70.

52. *See* T.C. R. 147.

a subpoena creates an uneven playing field, and comes at an administrative cost. Strict adherence to this rule would disparately impact the parties forcing only one side to show their hand throughout trial preparation. The discrepancy is brought about by how each party is required to obtain documentation in a Tax Court case.

The Tax Court's exchange deadline, requiring parties to exchange documents that they intend to use at trial, is a necessary rule for the efficient resolution of cases.<sup>53</sup> However, requiring a party to exchange every document produced by a third party, whether or not it will be used at trial, at the moment it is received, also creates an enormous amount of additional work and places the onus of the exchange on the issuing party. Non-cooperative parties would benefit in refusing to produce documents informally, passing the cost of doing so to the government. Including a notice requirement in the amended subpoena rule could allow for both parties to attend the document production and to be responsible for their own copying and collecting of whatever third parties produce. This supports the goal of open exchange of information, as well as an efficient and expedient process that encourages settlement and avoids costly litigation.

The federal government would likely support the proposed amendment, as they proposed a similar rule change on September 11, 2015.<sup>54</sup> In a letter from the then-Chief Counsel, William Wilkins, the following revisions to the tax court rules were suggested:

Subpoenas. Currently, trial subpoenas are made returnable at the call of the calendar for the trial session on which a case has been calendared. Often, third-party custodians of records such as financial institutions will not produce documents subject to a subpoena duces recumbent until such return date. This hinders the parties' ability to adequately examine the documents and prepare for trial. The delay can also prevent the efficient presentation of evidence because the parties may be unable to stipulate to relevant documents as required by Rule 91 or otherwise authenticate them pursuant to Fed. R. Evid. 902(11). Although T.C. Rule 110 permits the parties to seek a pretrial conference, this provision does not specifically state that it is available for purposes of making the subpoenas returnable at the pretrial conference, and this procedure is rarely if ever, used for a subpoena.

In order to increase the efficiency and ability of the parties to receive, review, and stipulate to third-party documents in advance of the initial call of the trial calendar, we recommend that Tax Court Rule 147 be modified to allow for the return of subpoenas duces tecum directed to third-party custodians of records in advance of the trial calendar. The Court could consider scheduling hearings, including via the Electronic Courtroom, to allow for the return of subpoenas at least 30 days prior to trial.

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53. See *Taxpayer Information: Before Trial*, U.S. TAX CT., [https://www.ustaxcourt.gov/taxpayer\\_info\\_before.htm](https://www.ustaxcourt.gov/taxpayer_info_before.htm) (last visited Feb. 1, 2020).

54. See IRS PROPOSED RULES ON FILE WITH DEPARTMENT OF THE TREASURY, I.R.B. 2015-47 (Nov. 23, 2015), <https://www.irs.gov/pub/irs-irbs/irb15-47.pdf>.

Alternatively, the Court could consider amending Tax Court Rules 74 and 147(d) allow for a streamlined deposition process with respect to third-party custodians of records. For instance, Tax Court Rule 74 (c) (2) could be amended to provide that in the case of nonconsensual depositions of third-party custodians of records, the party seeking to take the deposition is presumed to have satisfied the availability requirements of T.C. Rule 74(c)(1)(B) (depositions are an extraordinary method of discovery only available when all other means fail) and that the burden to quash the deposition subpoena should be placed on the objecting party. Alternatively, Rule 110(b) could be amended to specifically authorize a pretrial conference for subpoena purposes.<sup>55</sup>

#### *D. Third Parties*

When documents are requested from third parties during pending litigation, compliance requires an expenditure of employee hours to search and copy information. Third parties are impacted by production costs incurred in cases that very well may settle before trial. Such settlement alleviates the need to search, copy, and produce records. It would make sense for banks, financial institutions, and third parties to prefer to wait to produce documents until the day of trial, hoping the request becomes moot. The Tax Court subpoena is an anomaly; third parties are often aware that they are different than District Court subpoenas, and that delaying production until the day of trial saves them resources.<sup>56</sup> This proposed rule change does nothing to expand the scope of appropriate documents that can be produced by subpoena. The proposal is to align the timing and production, create a better rule and form that encourages the spirit of cooperation, and allow for earlier production.

Banks and financial institutions know that Tax Court subpoenas are not returnable until trial.<sup>57</sup> Many third-party financial institutions refuse to produce the documents early, knowing there is nothing anyone can do to enforce the request. On occasion, banks might even mail the responsive documents directly to the courtroom, or produce them in an electronic format at the courthouse, creating a challenge for parties to review.<sup>58</sup>

This article also suggests a workable solution to enforcement by creating a hearing process utilizing the electronic D.C. courtroom or telephonic hearings to resolve subpoena disputes. In the past, common practice was for third-party production of subpoenaed documents before trial in hopes that their production would alleviate the need to appear at trial. The recent trend is for third-party financial institutions to refuse to produce anything until trial. This shift in practice frustrates pretrial discovery, causes delay, increases the need for continuances, and makes trial preparation extremely onerous. The cost to postpone a trial after witnesses are prepared, experts are hired, and everyone has traveled to testify places a great burden on all parties.

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55. *Suggestion Letter from Chief Counsel*, U.S. DEP'T OF THE TREASURY, IRS (Sept. 11, 2015), [https://www.ustaxcourt.gov/rules/suggestions/IRS\\_%2009-11-15.pdf](https://www.ustaxcourt.gov/rules/suggestions/IRS_%2009-11-15.pdf).

56. *Id.* at 2–3.

57. T.C. R. 147; *Subpoena Forms & Instructions*, US TAX CT., (last visited Feb. 1, 2020) <https://www.ustaxcourt.gov/forms.htm>.

58. *See id.*

*E. Private Practitioners and the American Bar Association*

On March 28, 2016, attorneys from Baker & McKenzie commented on the government's 2015 proposed amendments to the Tax Court Rules, claiming that the change would be unduly burdensome without providing any detail as to why they believe this to be the case.<sup>59</sup> They stated that:

In our experience, it is more of an exception, rather than a rule, that parties are faced with insufficient time to examine subpoenaed documents in advance of trial. In instances when third-party custodians are delayed in documents production, it can be due to a number of reasonable factors, such as; (1) the breadth of the request for documents; (2) the nature of the recipient's business; (3) the size of the recipient's business; (4) the estimated cost of compliance; and (5) the extent to which the recipient must compile information from his or her records and documents. As it currently exists, Rule 147 provides recognition of these factors, while still requiring the timely return of subpoenas. To eliminate this flexibility would be unduly burdensome to third parties. Nevertheless, we agree that there may become merit to allowing the return of a subpoena *duces tecum* prior to trial if it can be done in a way that minimizes any additional burden on the third party and on the taxpayer.<sup>60</sup>

In a comment drafted by George C. Howell, III, the Chair of the ABA Section of Taxation, he recognized the government's 2015 proposed rule change by acknowledging that subpoenas being returnable at the call of the calendar may inhibit the ability of parties to review third-party documents sufficiently in advance of trial and to stipulation to those that are not in dispute.<sup>61</sup> There was no objection to this proposed rule change.<sup>62</sup>

The ABA section suggested "amending Rule 147 to more closely track Rule 45 of the Federal Rules," having Rule 147 provide that "subpoenas *duces tecum* issued to third parties be returnable during some time period to the call of a calendar, such as 30 to 60 days."<sup>63</sup> "The return can be done by mail or, as provided by FRCP 45(c)(2), 'at a place within 100-miles of where the [subpoenaed] person resides, is employed, or regularly transacts business in person.'"<sup>64</sup> The ABA section includes a proposal that the issuing party should "be further required by an amendment to Rule 147 to provide to the other party or parties copies of both the non-party subpoenas and all responses and documents produced by non-parties."<sup>65</sup> This suggestion is in line with what is already required by Federal Rule 45(a)(4), where "notice

59. Response from Baker and McKenzie LLP to Judge Michael B. Thornton (Nov. 23, 2015), [https://www.ustaxcourt.gov/rules/suggestions/Baker\\_and\\_McKenzie\\_11-23-15.pdf](https://www.ustaxcourt.gov/rules/suggestions/Baker_and_McKenzie_11-23-15.pdf).

60. *Id.*

61. Response from Chair of ABA section on taxation response to Judge Michael B. Thornton 8 (Nov. 10, 2015), [https://www.ustaxcourt.gov/rules/suggestions/ABA\\_Tax\\_Section\\_11-10-15.pdf](https://www.ustaxcourt.gov/rules/suggestions/ABA_Tax_Section_11-10-15.pdf).

62. *Id.* at 8.

63. *Id.*

64. *Id.*

65. Response from Chair of ABA section on taxation response to Judge Michael B. Thornton 8 (Nov. 10, 2015), [https://www.ustaxcourt.gov/rules/suggestions/ABA\\_Tax\\_Section\\_11-10-15.pdf](https://www.ustaxcourt.gov/rules/suggestions/ABA_Tax_Section_11-10-15.pdf); See Order Granting Petitioner's Motion to Compel, *Kissling v. Comm'r Int. Rev.*, No. 19857-10 (T.C. July 16, 2015).

and copy of the subpoenas must be served on each party” prior to service of the subpoena.<sup>66</sup> No party should ever be forced to review subpoenaed documents on the first day of trial, and it is unclear from the comment above how Rule 147 currently requires the “timely” return of subpoenas.<sup>67</sup> The current rule states that documents are to be produced at the calendar call for trial.<sup>68</sup>

There is a potential risk of abuse connected to easing the ability to issue and obtain documents through subpoenas. It is problematic if parties use subpoenas to obtain third-party documents inappropriately. There are no ethical rules mandating *pro se* parties to self-police, and they are not bound by the same ethical rules as officers of the court. If abuse occurs, the safeguard is that third parties can file a motion to quash the subpoena.<sup>69</sup> With the proposed notice requirement, parties have a better opportunity to quash or limit abusive subpoenas. The Tax Court already issues sanctions for failure to produce or appear when under subpoena, and adding language from Federal Rule 45 to the subpoena instructions could provide clearer direction about parties not abusing the power to subpoena.

The government has its own internal controls and needs for permission before documents are issued.<sup>70</sup> This works to control Chief Counsel attorneys, making it less likely that they will abuse the use of subpoenas. Counsel is also controlled by ethical rules of both the state bar and the Tax Court.<sup>71</sup> Furthermore, federal government counsel already has the ability to issue subpoenas, and there were very few Tax Court motions or orders between 2011 and 2019 addressing abusive subpoena use.<sup>72</sup> Also, the rules can lay out the repercussions when there is abuse.

#### IV. HISTORICAL OVERVIEW OF THE FEDERAL AND TAX COURT RULES

The Tax Court began as an administrative board and was granted status as a court under Article I Section 8 of the Constitution by the Tax Reform Act of 1969.<sup>73</sup> When the status of the Tax Court changed from an administrative board to an Article I court, the Tax Court made efforts to draft and conform its rules to those in other federal courts.<sup>74</sup> In 1972, the Tax Court promulgated Rules of Practice and Procedure, which were approved in 1974.<sup>75</sup>

Initially, the rules were created to provide legitimacy to the Tax Court and were designed to make the court an accessible venue where taxpayers could litigate tax

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66. FED. R. CIV. P. 45(a)(4).

67. T.C. R. 147.

68. *See id.*

69. T.C. R. 147.

70. I.R.S., INTERNAL REV. MANUALS 4.10.2.1, IRS MISSION (2019).

71. Model Rules of Professional Conduct r. 3.4 (Am. Bar Ass’n, Discussion Draft 1983).

72. A search was conducted for all motions mentioning the word “subpoena” posted on the Tax Court website between January 2000 and January 2019. *See* U.S. TAX CT., <https://www.ustaxcourt.gov> (search for all motions mentioning the word “subpoena” posted on the Tax Court website between Jan. 2000 and Jan. 2019) (last visited Feb. 1, 2020).

73. U.S. CONST. art. I, § 8, cl. 9; Tax Reform Act of 1969, Pub. L. No. 91-172, § 951.

74. *Proposed Rules of the Tax Court*, 26 Tax Law. 377 (1973). In a panel discussion of the proposed Rules of the Tax Court, Judge Arnold Rahim, Chairman of the Tax Court’s Rules Committee, stated: “With the enactment of the Tax Reform Act of 1969 and the consequent new status for the Tax Court under that Act, most of us felt that the time had come for a comprehensive revision of the rules. With particular attention to the Federal Rules of Civil Procedure.” *Id.* at 378.

75. *Id.*

disputes with the IRS both efficiently and inexpensively.<sup>76</sup> The intention of the drafters was not only to simplify, but also to mirror, many of the Federal Rules that existed in 1973.<sup>77</sup> Over the past 40 years, however, the Federal Rules have evolved, taking into account new policies and practices. By contrast, the Tax Court Rules have stagnated, become outdated, and have drifted out of line with the Federal Rules. The Tax Court is unique in that the Judges travel around the United States to nearly 76 locations allowing taxpayers access without the added cost of traveling to Washington D.C.<sup>78</sup>

While some of the differences between the Federal and Tax Court Rules appear to have been by design, others were not.<sup>79</sup> A notable area where the rules diverge is in pretrial discovery practice.<sup>80</sup> Many cases before the Tax Court involve taxpayers attempting to substantiate claimed expenses and deductions. These attempts regularly unravel into document production disputes, which can extend the time and costs associated with case settlement. Regardless of whether a case is a small, or “S,” case—where less than \$50,000 is in dispute—or a large dollar case, an open and free exchange of documents and information is imperative to facilitating an efficient resolution. This exchange of information is often deterred, delayed, and obstructed by third parties who hold the necessary information. It is widely accepted that informal discovery procedures promote settlement and can often resolve cases without lengthy formal discovery or the need for Tax Court assistance. The Tax Court’s informal discovery procedures and settlement meetings, “Branerton conferences,” are essential to resolving tax disputes.<sup>81</sup>

Because the Tax Court began as an administrative agency, the history of its rules and procedures differ from those of the federal courts.<sup>82</sup> Therefore, the Tax Court is not required to heed the Judicial Rules and Oversight Committee when it wishes to create or amend rules of practice and procedure.<sup>83</sup> Furthermore, the Administrative Procedures Act (“APA”) does not apply to the Tax Court, as it does with other federal courts.<sup>84</sup> This freedom allows the Tax Court to create its own rules and procedures when it deems necessary, and also allows them to amend the Tax Court rules at its discretion.<sup>85</sup>

The general rulemaking power of the Supreme Court and all other courts authorized by Congress is outlined in 28 U.S.C. § 2071. The statute requires that copies of prescribed rules be open to public comment and submitted to the judicial council.<sup>86</sup> The requirements of 28 U.S.C. § 2071 do not apply to the Tax Court.<sup>87</sup> The Tax Court gains its authority to create its own rules of practice and procedure

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76. *Id.*

77. *Id.*

78. U.S. TAX CT., [https://www.ustaxcourt.gov/dpt\\_cities.htm](https://www.ustaxcourt.gov/dpt_cities.htm) (last visited Feb. 1, 2020).

79. See Order Granting Petitioner’s Motion to Compel, *Kissling v. Comm’r Int. Rev.*, No. 19857-10 (T.C. July 16, 2015).

80. T.C. R. 70–74; FED. R. CIV. P. 26–37.

81. *Branerton Corp. v. Comm’r*, 61 T.C. 691 (1974).

82. DUBROFF & HELLWIG, *supra* note 12, at 384–85.

83. T.C. R. 1(a).

84. *Ax v. Comm’r*, 146 T.C. 153, 163 (2016).

85. See Brian Harris & Anna Els, *The Applicability of the Administrative Procedure Act to Federal Tax Litigation*, FLA. B. J., 44, 46 (2017).

86. *Id.* at 47.

87. 28 U.S.C. § 2071 n. 1988 (“The amendments shall not affect the authority of the Tax Court to prescribe rules under section 7453 of the Internal Revenue Code of 1986 [26 U.S.C. § 7453].”).

under 26 U.S.C. § 7453,<sup>88</sup> and the power to administer oaths, procure testimony, and enforce subpoenas for documents is granted by 26 U.S.C. § 7456. The Tax Court may examine witnesses and require, by subpoena, the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, documents, correspondence, and other evidence, from any place in the United States at any designated place of a hearing.<sup>89</sup>

A party may also subpoena a non-party and take their deposition. Tax Court Rule 74 provides a method to obtain documents from a non-party in a case.<sup>90</sup> Under the rule, a party must notice a deposition and serve a subpoena *duces tecum* on the non-party.<sup>91</sup> When the non-party cooperates, the deposition may not be necessary, but when they do not, the only solution is a non-consensual deposition.<sup>92</sup> Although allowed under the rules, the Tax Court considers this to be an “extraordinary” method of discovery.<sup>93</sup> When a non-party is non-responsive, this method of obtaining documents and the notice and enforcement requirements become expensive, and the utility can quickly be outweighed by the cost to small-dollar *pro se* cases.

### A. History of the Federal Rules

In the 80 years since the Federal Rules went into effect, they have seen significant amendments.<sup>94</sup> In contrast, the Tax Court Rules have been amended far less frequently, leading to significant divergence from the Federal Rules.<sup>95</sup> There has been little discussion among scholars regarding amending the Tax Court subpoena rules in the past decade, but a comprehensive discussion on the history of the original Federal Rules can be found in Charles E. Clark’s article from 1958.<sup>96</sup> The preliminary draft of the 1936 Federal Rules of Civil Procedure lays out the policy and purpose of the general spirit and characteristic of the rules to obliterate the procedural distinction in the federal courts between law and equity.<sup>97</sup> Combined, the Federal Rules governing document production and subpoenas, Rules 34 and 45, respectively, have seen more amendments since enactment.<sup>98</sup> Below we address some of the most significant changes to the Federal Rules since 1946. An article drafted for the judicial conference provides a step-by-step breakdown of how the Federal Rules

88. I.R.C. § 7453 (2015).

89. § 7456(a).

90. T.C. R. 74.

91. *Id.*

92. See generally Steven L. Walker, *New Tax Court Depositions Rules—The IRS Can Take Your Client’s Deposition Without Consent in Certain Circumstances*, 12 J. TAX PRACTICE & PROC. 19 (2010) (discussing the 2010 revision of Tax Court Rule 74 allowing the IRS to take depositions without consent.).

93. T.C. R. 74(b).

94. FED. R. CIV. P. Historical Note, Cornell Law School Legal Information Institute <https://www.law.cornell.edu/rules/frcp> (last visited Feb. 24, 2020).

95. See *supra* note 80 and accompanying text.

96. Charles E. Clark, *The Federal Rules of Civil Procedure 1938-1958: Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435 (1958). Mr. Clark is often credited as one of the main influencers/drafters of the original FRCP. He has an interesting take on the original purpose behind these rules. See REPORT OF THE ADVISORY COMMITTEE ON THE RULES FOR CIVIL PROCEDURE (Apr. 1937), [https://www.uscourts.gov/sites/default/files/fr\\_import/CV04-1937.pdf](https://www.uscourts.gov/sites/default/files/fr_import/CV04-1937.pdf).

97. Ilsen, Werner. *The Preliminary Draft of Federal Rules of Civil Procedure*, 11 ST. JOHN’S L. REV. 212 (1937), <https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=5802&context=lawreview>.

98. FED. R. CIV. P. 34; FED. R. CIV. P. 45.

of Civil Procedure are amended, and could be used as a model for how the Tax Court Rules should be modified.<sup>99</sup>

### *i. Federal Rule 34: Production of Documents*

Federal Rule 34 provides procedural guidelines concerning the production of documents for parties and non-parties.<sup>100</sup> It outlines the scope of the discovery rules designating what can be requested, what the contents of the request can contain, and how to respond and object to the request.<sup>101</sup> Federal Rule 34 was amended in 1946 to limit the scope of inquiry so that it is more in line with the language allowed under Federal Rule 26.<sup>102</sup> Also, the amendment clarified who can seek the benefit of a protective order. In 1970, Federal Rule 34 was

revised to accomplish the following major changes in the existing rule: (1) to eliminate the requirement of good cause; (2) to have the rule operate extrajudicially; (3) to include testing and sampling as well as inspecting or photographing tangible things; and (4) to make clear that the rule does not preclude an independent action for analogous discovery against persons not parties.<sup>103</sup>

In 1991, Federal Rule 34 was amended to reflect the change effected by the revision of Federal Rule 45.<sup>104</sup> This amendment provided for subpoenas to compel non-parties to produce documents and things and to submit to an inspection of premises.<sup>105</sup>

The 2006 Federal Rule amendments to Rule 34 largely involved Electronically Stored Information (“ESI”) and privilege remedies.<sup>106</sup> Previous versions of Federal Rule 34 focused only on the discovery of “documents” and “things.”<sup>107</sup> In 1970, Rule 34(a) was amended to

include discovery of data compilations. . . . Federal Rule 34(a) is amended to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents. The change clarifies that Federal Rule 34 applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined.<sup>108</sup> At the same time, a Federal Rule 34 request for production of ‘documents’ should be understood to encompass, and the response should include, electronically stored information unless discovery in the

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99. *See Overview for the Bench, Bar, and Public* <https://www.uscourts.gov/rules-policies/about-rule-making-process/how-rulemaking-process-works/overview-bench-bar-and-public> (last visited Feb. 24, 2020) (providing a short summary of amending procedure); *see generally Governance & the Judicial Conference* <https://www.uscourts.gov/about-federal-courts/governance-judicial-conference> (last visited Feb. 24, 2020) (describing the judicial conference).

100. FED. R. CIV. P. 34.

101. *Id.*

102. *Id.* (Notes of Advisory Committee on 1946 amendment).

103. *Id.* (Notes of Advisory Committee on 1970 amendment).

104. *Id.* (Notes of Advisory Committee on 1991 amendment).

105. *Id.*

106. *Id.* (Notes of Advisory Committee on 2006 amendment).

107. *See id.*

108. *Id.*



action has clearly distinguished between electronically stored information and ‘documents.’<sup>109</sup>

In 2015, the amendments were “aimed at reducing the potential to impose unreasonable burdens by objections to requests to produce.”<sup>110</sup> To achieve this goal, the amendments introduced requirements that documents are to be produced within 30 days of a 26(f) conference if a request was submitted before the conference, that objection requests must be stated with specificity and must include a mention of anything withheld because of the objection, and that ESI must be produced in tangible form instead of just allowing for inspection.<sup>111</sup>

### *ii. Federal Rule 45: Subpoena*

Federal Rule 45 provides procedural guidance for the issuance of subpoenas outlining rules for service, place of compliance, enforcement, and duties in responding to subpoenas.<sup>112</sup> Federal Rule 45 allows for the issuance of a subpoena commanding an individual’s attendance at a deposition, hearing, or trial, or a subpoena commanding permission for inspection, or the production of documents.<sup>113</sup> Federal Rule 45 also allows for the production of documents without commanding the appearance of the individual served.<sup>114</sup> When served with a subpoena, one must either respond or object within 14 days, or by the date of compliance—whichever is sooner.<sup>115</sup> If there is no objection, the documents must be produced by the date of compliance, with a reasonable time being determined by the issuing party.<sup>116</sup>

In 1946, Federal Rule 45 was amended to ensure that the rules for *duces tecum* (the production of documents) and subpoenas issued for a deposition conformed with one another.<sup>117</sup> Also, a change was made to ensure that Federal Rule 45’s scope was in line with Federal Rule 26.<sup>118</sup> In 1970, Federal Rule 45 was amended to make “clear that the subpoena authorizes inspection and copying of the materials produced,” bringing the Federal Rule 45 language more in line with Federal Rule 34.<sup>119</sup>

In 1980, Federal Rule 45 was amended to define “proof of service” and make the reach of a District Court subpoena “at least as extensive as that of the state courts of general jurisdiction in the state in which the district court is held.”<sup>120</sup> In 1985, Federal Rule 45 was amended to provide that any person may be subpoenaed to attend a deposition within a specified radius from that person’s residence, place of business, or where the person was served.<sup>121</sup> The 40-mile limited radius was increased to 100 miles.<sup>122</sup> In 1991, Federal Rule 45 was amended to:

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109. *Id.*

110. FED. R. CIV. P. 34 (Notes of Advisory Committee on 2015 amendment).

111. *Id.*

112. FED. R. CIV. P. 45.

113. FED. R. CIV. P. 45(a)(C).

114. FED. R. CIV. P. 45(d)(2)(A).

115. FED. R. CIV. P. 45(d)(2)(B).

116. *See* FED. R. CIV. P. 45(d)(3)(A)(i).

117. FED. R. CIV. P. 45 (Notes of Advisory Committee on 1946 amendment).

118. *Id.* (Notes of Advisory Committee on 1970 amendment).

119. *Id.*

120. *Id.* (Notes of Advisory Committee on 1980 amendment).

121. *Id.* (Notes of Advisory Committee on 1985 amendment).

122. *Id.*

(1) clarify and enlarge the protections afforded persons who are required to assist the court by giving information or evidence; (2) to facilitate access outside the deposition procedure provided by Federal Rule 30 to documents and other information in the possession of persons who are not parties; (3) to facilitate service of subpoenas for depositions or productions of evidence at places distant from the district in which an action is proceeding; (4) to enable the court to compel a witness found within the state in which the court sits to attend trial; (5) to clarify the organization of the text of the rule.<sup>123</sup>

In 2005, Federal Rule 45 was minimally amended, requiring that a deposition subpoena state the method for recording the testimony.<sup>124</sup> In 2006, the rule was further amended to conform the subpoena provisions to the changes in other discovery rules related to the discovery of ESI.<sup>125</sup>

In 2013, Federal Rule 45 was extensively amended to provide greater clarity and to simplify its operation: “[t]he amendments recognize the court where the action is pending as the issuing court, permit nationwide service of subpoena, and collect in a new subdivision (c) the previously scattered provisions regarding the place of compliance.”<sup>126</sup> “Former [Federal] Rule 45(b)(1) required ‘prior notice’ to each party of any commanded production of documents and things or inspection of premises.”<sup>127</sup> “Courts agreed that notice must be given ‘prior’ to the return date, and have tended to converge on an interpretation that requires notice to the parties before the subpoena is served on the person commanded to produce or permit inspection.”<sup>128</sup> “That interpretation is adopted in amended [Federal] Rule 45(b)(1) to give clear notice of general present practice.”<sup>129</sup>

### ***iii. Federal Rule 26: Duty to Disclose; General Provisions Governing Discovery***

Federal Rule 26 outlines general provisions of discovery procedure, including requiring initial disclosures, setting the scope and limits of discovery, and requiring that parties participate in planning conferences.<sup>130</sup> In 1980, Federal Rule 26 was amended in the hope of remedying the widespread abuse of discovery in the courts by adding “counsel who has attempted without success to effect with opposing counsel a reasonable program or plan for discovery is entitled to the assistance of the court.”<sup>131</sup> In 2006, Federal Rule 26 was “amended to parallel Rule 34(a) by recognizing that a party must disclose electronically stored information as well as documents that it may use to support its claims or defenses.”<sup>132</sup> Several changes were made after publication; civil forfeiture was added to the list of Rule 26

123. *Id.* (Notes of Advisory Committee on 1991 amendment).

124. *Id.* (Notes of Advisory Committee on 2005 amendment).

125. *Id.* (Notes of Advisory Committee on 2006 amendment).

126. *Id.* (Notes of Advisory Committee on 2013 amendment).

127. *Id.* (Notes of Advisory Committee on 2007 amendment).

128. *Id.*

129. *Id.*

130. FED. R. CIV. P. 26.

131. *Id.* (Notes of Advisory Committee on 1980 amendment).

132. *Id.* (Notes of Advisory Committee on 2006 amendment).

disclosure exemptions, and “limitations of Rule 26(b)(2)(C) continue to apply to all discovery of electronically stored information, including that stored on reasonably accessible electronic sources.”<sup>133</sup>

In 2015, the amendment to Federal Rule 26 included the goal of bringing the rule back in line with the 1983 amendments: “[t]he objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry.”<sup>134</sup> This was accomplished by “[r]estoring the proportionality calculation to Rule 26(b)(1)” and by introducing the following language: “including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.”<sup>135</sup> Lastly, the amendment removed the provision that allowed the court, with good cause, to order discovery on any relevant matter.<sup>136</sup>

### B. History of the Tax Court’s Rules

The United States Tax Court began as an advisory tax board in 1918, then evolved into the Board of Tax Appeals in 1924, and became the United States Tax Court in 1942.<sup>137</sup> The United States Tax Court became an Article 1 court in 1969, and was designed to create a venue for resolving administrative tax disputes.<sup>138</sup> The overarching tenor of the Tax Court was to be a forum encouraging cooperation and the free flow of information, striving to be essentially a “people’s court,” as both an accessible and affordable option to resolve tax disputes.<sup>139</sup> The Tax Court and its rules encourage the spirit of cooperation, and provide the people with an inexpensive venue for the fast resolution of tax disputes.

The Tax Court was granted the authority to create its own rules in the Internal Revenue Code of 1954, § 7453.<sup>140</sup> The rules of Tax Court Practice and Procedure, which the Tax Court may prescribe pursuant to the authority of the predecessor to 26 USCS § 7453, have the force and effect of law.<sup>141</sup>

Tax Court Rule 1(a) outlines the Tax Court’s rulemaking authority, defines the scope of the rules, and lays out the procedure for rule creation and amendment.<sup>142</sup> Tax Court Rule 1(b) indicates that the rules were drafted and are to be “construed to secure the just, speedy, and inexpensive determination of every case.”<sup>143</sup> Tax Court Rule 1(a) also requires that “appropriate public notice” and an “opportunity for comment” take place before a rule can be made and amended.<sup>144</sup> However, The Tax Court has the ability to forgo the notice and comment requirement and adopt

133. *Id.*

134. *Id.* (Notes of Advisory Committee on 2015 amendment).

135. *Id.*

136. *Id.*

137. Dubroff & Hellwig, *supra* note 12, at 175.

138. *Id.* at 175, 226, 228.

139. See United States Tax Court, Court Mission, <https://www.ustaxcourt.gov/about.htm> (last updated Aug. 6, 2019).

140. “[T]he proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure . . . [a]s the Tax Court may prescribe.” I.R.C. § 7453 (1954).

141. *Di Prospero v. Comm’r*, 176 F.2d 76, 77–78 (9th Cir. 1949).

142. See generally T.C. R. 1 (giving a brief description of the rules as a whole and their general goals).

143. T.C. R. 1(d); See also FED. R. CIV. P. 1 (one should note the similarities in both scope and goal between the two sets of rules.).

144. T.C. R. 1(a).

an interim amendment if it determines that there is an immediate need.<sup>145</sup> The general practice of the Tax Court is to elicit and accept public comment on the proposed rules allowing practitioners and taxpayers to respond before proposed rule changes go into effect.<sup>146</sup>

The history of pretrial discovery in the Tax Court shows that the old (pre-1974) Tax Court Rules dealt minimally with discovery.<sup>147</sup> In fact, under the old Tax Court Rules,<sup>148</sup> formal discovery was not allowed at all.<sup>149</sup> The Tax Court and parties who practiced before it had only strictly enforced stipulation rules in tax controversy practice to rely upon, describing the stipulation process as “the bedrock of Tax Court practice.”<sup>150</sup> One remedy for parties under the old rules when opposing parties refused to stipulate the facts and evidence, was to file a motion requesting an order for the opposing party to show cause.<sup>151</sup> Very basic discovery rules existed but they were of little use as discovery devices in actual practice. Today, the Tax Court continues to support informal rules and stipulation rules as sufficient discovery rules of practice.<sup>152</sup> Over the years, the Tax Court Rules have slowly evolved to allow for more formal discovery where deemed necessary by the Court.<sup>153</sup>

New Tax Court Rules were approved by the Court in 1973.<sup>154</sup> Significant proposed rule amendments were made to the Tax Court Rules related to discovery on

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145. T.C. R. 1(c); See Press Release, U.S. Tax Court (Mar. 28, 2016), [www.ustax-court.gov/press/032816.pdf](http://www.ustax-court.gov/press/032816.pdf).

146. T.C. R. 1(c).

147. See FED. R. CIV. P. 26(a). Pre-1974 Federal Discovery procedures generally included the following: (1) Depositions upon oral examination or written questions; (2) written interrogatories; (3) production of documents and things or permission to enter upon land or other property, for inspections and other purposes; (4) physical and mental examinations; and (5) requests for admissions.

148. Alex E. Sadler & Daniel G. Kim, *Scope of Pretrial Discovery: A Key Difference in Litigating Tax Cases in the Tax Court and Refund Tribunals*, J. OF TAX PRAC. & PRO. 55 (Apr.–May 2009), [https://www.ipbtax.com/media/publication/174\\_Sadler%20Apr\\_May%2009%20JTTP.pdf](https://www.ipbtax.com/media/publication/174_Sadler%20Apr_May%2009%20JTTP.pdf) (citing *Branerton Corp. v. Comm’r*, 61 T.C. 691, 691–92, Dec. 32,479 (1974). Before 1974, discovery was not allowed in the Tax Court or the predecessor Board of Tax Appeals.) [hereinafter *Scope of Pretrial Discovery*]; Alex E. Sadler & Jennifer A. Ray, *Electronic Tax Trials: Taking Advantage of the Tax Court’s Electronic (North) Courtroom*, J. of Tax Prac. & Pro. 39 (Aug.–Sept. 2008), [https://www.crowell.com/PDF/Electronic-Tax-Trials\\_Journal-of-Tax-Practice-Procedure.pdf](https://www.crowell.com/PDF/Electronic-Tax-Trials_Journal-of-Tax-Practice-Procedure.pdf) [hereinafter *Electronic Tax Trials*].

149. T.C.R. 91(a)(1), (providing that the Court expects the parties to stipulate evidence to the fullest extent to which complete or qualified agreement can be reached including all material facts that are not or fairly should not be in dispute).

150. NATIONAL ARCHIVE, *Records of the U.S. Tax Court*, <https://www.archives.gov/research/guide-fed-records/groups/308.html> (last visited Feb. 1, 2020).

151. FED. R. CIV. P. 26(a) (Notes of Advisory Committee on 1970 amendment).

152. See T.C. R.

153. See T.C.R.

154. An Introduction to the comprehensive revision of the Tax Court Rules of Practice and Procedure approved by the Court on May 29, 1973, appears at 60 T.C. 1057-1058, *Guide to Rules, Amendments, and Notes*, US TAX COURT (Feb. 1, 2020, 10:00 AM), [https://www.ustax-court.gov/rules/Guide\\_to\\_Rules\\_Amendments\\_and\\_Notes.pdf](https://www.ustax-court.gov/rules/Guide_to_Rules_Amendments_and_Notes.pdf).

in 1990,<sup>155</sup> 1997,<sup>156</sup> 2002,<sup>157</sup> 2008<sup>158</sup> and 2010,<sup>159</sup> with significant amendments regarding interrogatories and depositions in 2009.

## V. WHERE THE TAX COURT AND FEDERAL RULES DIVERGE

### A. Limited Formal Discovery

The Tax Court's opinion in *Ash v. Commissioner* highlights the rationale behind the limited scope of Tax Court discovery rule.<sup>160</sup> In *Ash*, the taxpayer was seeking a protective order under Tax Court Rule 103 to restrict the government's use of information obtained through administrative summons.<sup>161</sup> The court explained that the limitations to the rules and procedures were "intentional" by the Tax Court because "unnecessarily broad discovery may cause extensive delays and jeopardize the administration, the integrity, and the effectiveness of the Internal [R]evenue laws."<sup>162</sup> Yet, according to the comments from former Chief Judge Marvel, change may be on the horizon for Rule 147 governing the issuance of subpoenas.<sup>163</sup>

On June 16, 2017, at the New York University School of Professional Studies Tax Controversy Forum, former Chief Judge Paige Marvel stated that the Tax Court is considering amendments to the Tax Court Rule 147 to conform to the Federal Rules.<sup>164</sup> It appears that change to the notice requirements in Rule 147 is likely to be well-received by taxpayers. There would also likely be a restriction on the issuance of secret subpoenas by the IRS to gather information from non-parties without a taxpayer's knowledge.<sup>165</sup>

The government's broad summons power, which can be utilized during a tax audit, is countered by the noticeably limited reach of Tax Court discovery and the thought that a well-developed case has little need for formal discovery.<sup>166</sup> In *Westreco, Inc. v. Commissioner*, the Tax Court again discusses this balance.<sup>167</sup> "The

155. *Guide to Rules, Amendments, and Notes*, U.S. TAX COURT, [https://www.ustax-court.gov/rules/Guide\\_to\\_Rules\\_Amendments\\_and\\_Notes.pdf](https://www.ustax-court.gov/rules/Guide_to_Rules_Amendments_and_Notes.pdf) (last visited Feb. 1, 2020, 10:00 AM) ("A Prefatory Note to the extensive amendments to the Tax Court Rules of Practice and Procedure approved by the Court on January 12, 1990, appears at 93 T.C. 821").

156. *Id.* ("A Prefatory Note to the extensive amendments to the Tax Court Rules of Practice and Procedure approved by the Court on September 12, 1997, appears at 109 T.C. 507.")

157. *Id.* ("A Prefatory Note to the extensive amendments to the Tax Court Rules of Practice and Procedure approved by the Court on November 15, 2002, appears at 120 T.C. 479.")

158. *Id.* ("A Prefatory Note to the substantial revisions to the Tax Court Rules of Practice and Procedure generally effective as of October 3, 2008, appears at 130 T.C. 345.")

159. *Id.* ("A Prefatory Note to the substantial revisions to the Tax Court Rules of Practice and Procedure generally effective as of January 1, 2010, appears at 134 T.C. 304.")

160. *Ash v. Comm'r.*, 96 T.C. 459, 463 (1991).

161. *Id.*

162. *Id.*

163. Nathan J. Richman & Andrew Velarde, *Partnership Audit Transition Potentially Is 'Tax Procedure Hell'*, TAX NOTES (Jun. 20, 2017), <https://www.taxnotes.com/editors-pick/partnership-audit-transition-potentially-tax-procedure-hell>.

164. Andrew R. Robertson, *Tax Court Considering Requiring Notice of Non-Party Subpoenas*, THE NAT'L LAW REVIEW (Jun. 26, 2017), <https://www.natlawreview.com/article/tax-court-considering-requiring-notice-non-party-subpoenas>.

165. *Id.*

166. *Westreco, Inc. v. Comm'r.*, 60 T.C.M. 824, 833 (1990).

167. *Id.*

Tax Court imposed these limitations because it was concerned that unfettered pre-trial discovery would tilt the playing field too far in favor of the IRS, which already has the opportunity to develop the facts supporting its position during audit.<sup>168</sup> Furthermore, “[i]t is generally presumed that the IRS has developed its case in the administrative audit process and that, as a developed case, extensive discovery should not be necessary.”<sup>169</sup> In reality, non-responsive taxpayers near trial have usually been consistently uncooperative throughout the audit and appeal process. This behavior is often carried well into the litigation phase of their tax disputes. By not responding to the requests for documents early, taxpayers may be able to limit both the scope of the audit, and, consequently, the trial. This may also prohibit the government from learning of whom to call as witnesses or whom to subpoena for relevant documents in the case. The formal discovery process is arduous, and the Tax Court Rules do not provide assurances that discovery disputes will find resolution prior to the beginning of trial.

Unfortunately, when contentious cases are docketed in Tax Court, the existing Tax Court Rules are not ideal. Often the IRS will be requesting the same documents and information from taxpayers for years. Taxpayers have the opportunity to provide information through informal requests, amendments to their returns, examinations, audits, and through the appeals process.<sup>170</sup> If the documents are still not produced as the taxpayer arrives in Tax Court, it accentuates how the informal rules are not effective. The limited discovery rules can cause issues to await resolution until the first day of trial.

Attorneys Alex E. Sadler and Daniel G. Kim acknowledge that, “[i]n highly factual cases, particularly those in which the facts may not have been thoroughly investigated during audit, the limitations on Pretrial discovery in the Tax Court can provide a significant advantage to a taxpayer.”<sup>171</sup> They also acknowledge the fact that, “IRS counsel in Tax Court often have no ability to probe a prospective witness’s knowledge before trial or to assess his or her credibility.”<sup>172</sup>

The Tax Court’s unique transience, and impermanent locations for trial, creates a layer of complexity for subpoenas unparalleled in the U.S. District Court. The Tax Court is based in Washington D.C, although the judges travel to 76 cities, they might only be scheduled to travel to certain cities once a year.<sup>173</sup> This unintentionally causes delays and uncertainty in the timing of receiving rulings on pending discovery motions. Sometimes issues are not resolved until trial, forcing parties to continue to incur trial preparation expenses while knowing that a ruling on a motion could change the trajectory, timing, and outcome of a case.

Another difference between the discovery rules in the Tax Court and U.S. District Court relates to the enforcement of pretrial discovery requests.<sup>174</sup> In the Tax Court, parties are expected to exhaust all informal attempts to gather information before taking formal action, such as noticing depositions.<sup>175</sup> Further, parties cannot file motions in a Tax Court case until a judge is assigned, which generally does not

168. *Scope of Pretrial Discovery*, *supra* note 148, at 55.

169. Michael J. Desmond & Kathleen Pakenham, *Commencement of a Deficiency Proceeding and Pre-trial Practice*, 29 PRAC. TAX LAW. 21 (2015).

170. I.R.S., INTERNAL REV. MANUALS 4.10.1.2.1.5, IRS MISSION (2017).

171. *Scope of Pretrial Discovery*, *supra* note 148.

172. *Id.*

173. US TAX CT., [https://www.ustaxcourt.gov/taxpayer\\_info\\_about.htm](https://www.ustaxcourt.gov/taxpayer_info_about.htm) (last visited Feb. 1, 2020).

174. T.C. R. 70, 72; *cf.* FED. R. CIV. P. 26, 34.

175. T.C. R. 70–74, 80.

occur until five months before trial.<sup>176</sup> Lastly, under the current subpoena rules, there is no notice requirement for issued subpoenas and no avenue for the Tax Court to enforce a subpoena before trial.<sup>177</sup> In the U.S. District Courts, parties are required to provide a response within a reasonable time, and to provide notice to all parties when third-party subpoenas for documents are issued.<sup>178</sup> These differences add to the complexity and difficulty of parties obtaining documents in contested cases in the Tax Court.

### B. *Informal Pretrial Discovery and Lack of Initial Disclosures*

Both the Tax Court Rules and the Federal Rules require parties to begin discovery using informal means, specifically, the Federal Rules require “initial disclosures” as part of the discovery plan,<sup>179</sup> taking place before formal discovery proceedings can be initiated.<sup>180</sup> Although there are no formal written rules requiring initial disclosures as part of Tax Court litigation, parties are generally required by the court (and *Branerton*) to engage in informal meetings to hopefully resolve the case without expensive discovery.<sup>181</sup>

Tax Court Rule 70 outlines the expectation that all parties will attempt to attain the same objective of discovery through informal means.<sup>182</sup> In theory, this is an excellent idea, and it allows many cases to resolve quickly, inexpensively, and informally. However, Rule 70 causes conflicts when applied to contentious cases, including cases involving fraud, unreported income, wrongdoing, undisclosed offshore accounts, trade secrets, or even businesses conducted in controversial industries like the cannabis industry.<sup>183</sup> In many of these cases, banks and financial institutions, as well as other third parties hold the documents necessary to resolve tax issues and they are often not informally shared.<sup>184</sup> Tax Court Rule 72 allows parties to serve requests on the opposing party for the production of documents, ESI, and things.<sup>185</sup> A request under Tax Court Rule 72 is the next step in pre-trial discovery after an unsuccessful *Branerton* informal request for documents.<sup>186</sup> Rule 72 does not currently pertain to requests for documents that are in the custody and control of third-parties.<sup>187</sup> The Tax Court’s expressed preference for informal discovery has merit and is based on the notion that both parties have an opportunity to develop

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176. T.C. R. 50–58.

177. T.C. R. 147.

178. FED. R. CIV. P. 45.

179. FED. R. CIV. P. 26.

180. FED. R. CIV. P. 26.; T.C. R. 70.

181. T.C. R. 70(a)(1); *see also* *Branerton Corp. v. Comm’r Int. Rev.*, 61 T.C. 691, 692 (1974).

182. T.C. R. 70(a)(1).

183. *See id.*; *See also* Leslie Book, *The Practice of Secret Subpoenas in Tax Court: Tax Court Out of Step with Other Courts and IRS Itself*, PROCEDURALLY TAXING (Dec. 6, 2016), <https://procedurallytaxing.com/the-practice-of-secret-subpoenas-in-tax-court-tax-court-out-of-step-with-other-courts-and-irs-itself/>; *See also*, Dan Pilla, *Tax Court Trouble-Shooting Guide*, TAX FREEDOM INST., <https://www.taxfreedominstitute.com/tax-court-trouble-shooting-guide-troublespot-1.html> (last visited Mar. 22, 2020).

184. I.R.S., INTERNAL REV. MANUALS 25.5.6, IRS MISSION (2009).

185. T.C. R. 72(a)(1).

186. *Id.* at 72(b).

187. *Id.* at 72(a).

their cases during the audit process.<sup>188</sup> This is in contrast to the federal district courts where parties often retain attorney representatives, and are required to make full payment of the tax due prior to bringing a claim for refund or to dispute the tax matter.<sup>189</sup> Promoting the use of informal discovery is consistent with the court's mission to provide fair and inexpensive access to a venue for litigating tax disputes. In an ideal case, discovery would never be necessary, and taxpayers would resolve their tax disputes by simply providing the documents and information used to prepare their tax returns. Unfortunately, cooperation can fail, and ideal cases become rare in the face of litigation.

### *C. Subpoena Enforcement – Forms and Instructions*

We compare the language in Tax Court Rule 147 to Federal Rule 45 noting several differences where the subpoena rules should be aligned: (1) the place of compliance; (2) the reasonable time for return; (3) the notice requirement; and (4) protections for persons subject to the subpoena.<sup>190</sup> The issuing party should be permitted to set the return date in Tax Court just as they are permitted in District Court. The location, notice, and protections for persons subject to subpoena should be provided using form instructions as proposed.

A federal subpoena generally may only command a non-party to testify under certain conditions:

**For a Trial, Hearing, or Deposition.** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.<sup>191</sup>

In Tax Court, parties are not limited to 100 miles of where the witness lives and can compel testimony from a person located anywhere in the United States.<sup>192</sup>

Generally, parties in U.S. District Court must conduct their Federal Rule 26(f) pretrial discovery conference, also known as a meet and confer, before subpoenas can be served.<sup>193</sup> In the Tax Court, subpoenas are not considered discovery, and the only limitation on when a subpoena can be issued is that the case first be calendared

188. T.C. R. 70.

189. 28 U.S.C. § 1346(a) (2013); *See* *Flora v. United States*, 357 U.S. 63 (1958), *modified on reh'g*, 362 U.S. 145 (1960).

190. *Compare* T.C. R. 147, *with* FED. R. CIV. P. 45.

191. FED. R. CIV. P. 45(c).

192. *See* T.C. R. 147.

193. FED. R. CIV. P. 26(d)(1).



with a location and date.<sup>194</sup> Federal Rule 45 provides for the place of compliance, protections for a person subject to a subpoena, the procedure for quashing a subpoena, the duties in responding to a subpoena, and rules around privilege claims.<sup>195</sup> Under Federal Rule 45, the requesting party may serve separate document subpoenas and testimonial subpoenas directed to the same person,<sup>196</sup> and may allow up to 30 days after service to comply with a subpoena.<sup>197</sup> Compliance within a shorter time period may be demanded if reasonable under the circumstances.<sup>198</sup> Each issuing court's local rules for subpoenas may differ, and each may provide their own minimum time period for compliance.<sup>199</sup> For document subpoenas that do not also command testimony, the issuing party must serve a separate notice and a copy of the subpoena on each party to the lawsuit before the subpoena is served on the witness.<sup>200</sup> According to the advisory committee, the purpose of this requirement is to give other parties a chance to object to the production or inspection or to serve a subpoena for additional materials.<sup>201</sup>

Under Tax Court Rule 147, a party may issue a subpoena for testimony and documents at trial, for a hearing, or for a deposition.<sup>202</sup> The parties must tender fees for all subpoenaed witnesses and ensure proper service for enforcement (the taxpayer must tender fees upon service of the subpoena).<sup>203</sup> Rule 147 has no notice requirement for the issuance of a subpoena to a third party. Under the Federal Rules, an attorney who seeks to obtain evidence or a deposition from a non-party must notify all other parties of the subpoena's issuance.<sup>204</sup>

For document subpoenas, Federal Rule 45(a)(4) does not expressly state whether the issuing party must give notice to the other parties once the subpoena recipient produces the requested documents at the designated location, or whether the issuing attorney must inform other parties of any negotiated post-service changes or modifications to the subpoena.<sup>205</sup> Nevertheless, notifying the other parties of these developments is within the spirit of Federal Rule 45(a)(4). The amendment requiring notice was later added to the Federal Rules because, in practice, attorneys often failed to obey the pre-service notice rule by notifying parties contemporaneously with service on the witness.<sup>206</sup> Sometimes, notification occurs after service of the subpoenas on the witness.<sup>207</sup> Depending on the circumstances, a court could find that failure to comply with the pre-service notice requirement would

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194. T.C.R. 147(a).

195. FED. R. CIV. P. 45(c)-(e).

196. *Id.* at 45(a)(1)(C).

197. DAVID J. LENDER ET AL., SUBPOENAS: USING SUBPOENAS TO OBTAIN EVIDENCE 3, Westlaw Practical Law (2013), <https://www.weil.com/~media/files/pdfs/subpoenas-using-subpoenas-to-obtain-evidence.pdf>; Subpoenas.

198. See *Subair Sys., LLC v. Precisionaire Sys., Inc.*, 2008 WL 1914876, at \*2 n.4 (S.D. Fla. Apr. 26, 2008) (finding ten days-notice reasonable under FED. R. CIV. P. 45).

199. for example, E.D. VA. L. CIV. R. 45(E) (requiring trial subpoena to be served at least fourteen days before the return date); *Id.* at 45(F) (requiring deposition subpoenas to be served at least 11 days before the date of the deposition).

200. FED. R. CIV. P. 45(a)(4).

201. FED. R. CIV. P. 45(a) (Notes of Advisory Committee on 2013 amendment).

202. T.C. R. 147(a).

203. *Id.* at (c).

204. T.C. R. 81(b)(2).

205. FED. R. CIV. P. 45(a)(4).

206. *Id.*

207. FED. R. CIV. P. 45(a) (Notes of Advisory Committee on 2013 amendment).

invalidate the subpoena.<sup>208</sup> Additionally, parties may request in their scheduling order that the court require this notice, as well as access to materials once they are produced.<sup>209</sup>

The Tax Court provides a blank subpoena form template (Form 14) to be used by parties in order to issue a subpoena.<sup>210</sup> When properly completed and served, the form commands that an individual appear before the Tax Court.<sup>211</sup> There are blanks for the issuing party to include the date, time, and location of the trial summoning the party to appear.<sup>212</sup> Under the Federal Rules in a civil case, there are separate subpoena forms for requesting witness testimony and a “check the box” form for requesting the production of documents and inspection of premises.<sup>213</sup> The Federal Subpoena Form (AO 88A) can also be found on the Tax Court’s official website.<sup>214</sup>

## VI. ISSUES ARISING UNDER THE CURRENT TAX COURT RULES

Utilizing the Tax Court Rules, in their current form, as they pertain to subpoenas, can generate three significant pretrial issues in practice: (1) delay of trial caused by last-minute surprise motions to quash a subpoena; (2) prejudice on the parties due to voluminous last-minute “document dumps” at the calendar call; and (3) trial by ambush through the lack of notice requirements for subpoenas issued to third parties for documents.<sup>215</sup> When extensive document production is permitted on the eve of trial, parties are greatly prejudiced. In practice, each of these situations are handled differently by different Tax Court judges.<sup>216</sup> Current remedies by the court include allowing for last-minute continuances, conducting calendar-call hearings prior to the start of trial, holding the record open after trial potentially delaying the ultimate decision, setting the case for trial later on the calendar, and simply not taking any action while hoping that the issue will resolve itself.<sup>217</sup> Although each solution can be helpful, they are not ideal because they cause uncertainty, confusion, and the waste of precious resources.

### *A. Surprise Motions to Quash Subpoena*

Last-minute motions to quash prevent parties from timely obtaining documents, preventing the development of well-prepared defenses. Parties also lose the opportunity to fully cross-examine witnesses who may be relying on the content of withheld documents for their courtroom testimony. This type of delay is most

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208. *Id.*

209. *Id.*

210. See T.C. Form 14, [https://www.ustaxcourt.gov/forms/Subpoena\\_Form\\_14.pdf](https://www.ustaxcourt.gov/forms/Subpoena_Form_14.pdf).

211. *Id.*

212. *Id.*

213. See, e.g., *Subpoena to Testify at a Deposition in a Civil Action*, ADMIN. OFF. U.S. CTS. (Feb. 1, 2014), available at <https://www.uscourts.gov/sites/default/files/ao088a.pdf> (providing access to Federal Subpoena Form AO 88A).

214. See *Forms*, U.S. TAX CT., <https://www.ustaxcourt.gov/forms.htm> (last visited Feb. 1, 2020).

215. A search was conducted for all motions mentioning the word “subpoena” posted on the Tax Court website (2000 through January 2019). See *Opinions Search*, U.S. TAX CT., <https://www.ustaxcourt.gov/USTCInOP/OpinionSearch.aspx> (last visited Feb. 1, 2020).

216. *Id.*

217. *Id.*

common when a subpoena is issued to a third party for financial records held by financial organizations, advisors, and banks.

### *B. Voluminous Last-Minute “Document Dumps”*

In significant cases, voluminous documents can be “dumped” or produced at the last minute, prohibiting parties from utilizing adequate time to review and prepare for trial. Uncooperative parties benefit from delaying or hindering production knowing that the Tax Court formal discovery rules are not self-enforcing. This is prejudicial to a party who was already forced to prepare formal discovery, may be awaiting a ruling on a motion to compel, and is delayed again when seeking the same documents by subpoena. Disallowing adequate time to review documents can affect the ability of a party to meet the burden of production and proof in unreported income cases. Document dumps are an effective tactic used to create trial by ambush.

Continuances are extremely costly and inconvenient. Continuances increase a party’s travel expenses by forcing them to incur double fees for witness and trial preparation and additional travel costs for third-party witnesses and experts. This is especially true when witnesses are not local, or for witnesses who are fully prepared to testify only to receive a last-minute continuance right before trial. Interest also continues to accrue on contested tax liability, and tax liens may impact taxpayers while their litigation matters linger.<sup>218</sup> Potential impacts on a taxpayer include being surprised by new documents and information as trial begins. This can require additional time off of work, and increased travel costs and childcare expenses to attend trial.

Holding the record open and giving a party the opportunity to review the documents during the trial is also not ideal. This frustrates the adversarial judicial system in which evidence is to be confronted. If evidence comes into the record on the eve of trial or worse, after trial, there is little opportunity to secure and present alternative evidence to challenge its validity. Trial preparation is already difficult, and burdening a party with last-minute evidence can be prejudicial. For *pro se* taxpayers, the costs can be very high. Trial preparation includes drafting stipulations, copying documents, redacting documents, preparing witnesses and exhibit binders, document review, and drafting pretrial memorandums for the court. Parties are ordered to comply with the Tax Court judge’s pretrial standing orders.<sup>219</sup> All of these tasks take significant time that could be better spent resolving real disputes and issues of law.

### *C. Trial by Ambush and the Lack of Notice*

Failing to require notice for issued subpoenas can prejudice parties in their trial preparation. Federal Rule 45 requires notice to parties when subpoenas are issued to third parties for documents.<sup>220</sup> There is no corresponding Tax Court Rule and no

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218. I.R.C. § 6322 (2012).

219. See *Taxpayer Information: Before Trial*, U.S. TAX CT., [https://www.ustaxcourt.gov/taxpayer\\_info\\_before.htm](https://www.ustaxcourt.gov/taxpayer_info_before.htm) (last visited Feb. 1, 2020).

220. FED. R. CIV. P. 45(a)(4).

notice is required when a party serves a subpoena to a third party for documents.<sup>221</sup> As shown below, through the analysis of a decade of Tax Court motions and orders, a trend emerges where Tax Court judges require parties to provide notice when a subpoena is served.

Another issue worth noting is that because of the Tax Court Rule's lack of required mandatory initial disclosures, settlement delays may result and the need for additional discovery can often arise to obtain even the most basic information in a case.<sup>222</sup> As discussed above, while Federal Rule 26 requires that parties engage in extensive pretrial discovery in federal courts, there is no similar Tax Court Rule.<sup>223</sup> Under the Federal Rules, parties are required to disclose the identities of persons with relevant discoverable information and provide copies, descriptions, and documents that they plan to use to support their case.<sup>224</sup> Mandatory disclosures were included in the Federal Rules to limit the need for formal discovery and reduce costs allowing parties access to information early in a case.<sup>225</sup> Similar requirements are lacking in the current Tax Court Rules and parties are not even required to disclose general information in their Tax Court petitions.<sup>226</sup> Federal Rule 26(a) streamlines the discovery process and requires parties to work together freely exchanging basic information. Federal Rule 26(a) states that

*a party must, without awaiting a discovery request, provide to the other parties: (i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment; (ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.*<sup>227</sup>

The Tax Court should consider adding a similar rule to enhance the prompt exchange of information while limiting the need for discovery. In the Tax Court, parties are only required to meet informally at a *Branerton* conference.<sup>228</sup> Taxpayers are required only to state the general basis for their tax dispute with the IRS in their Tax Court petitions.<sup>229</sup> Parties should be required to provide basic information about evidence that assists in resolving the dispute as well as the identity of potential witnesses. This will lessen the need for formal discovery during potential resolution of each case. Sample Petition FORM 2 merely asks taxpayers two questions about their tax dispute.<sup>230</sup> Locating information, witnesses, and documents can be a difficult task, and basic disclosures identifying witnesses, the location and identification

221. T.C. R. 147(c).

222. *See generally* T.C. R.

223. *Compare* FED. R. CIV. P. 26(a), *with* T.C. Rule 147.

224. FED. R. CIV. P. 26(a)(3)(A).

225. FED. R. CIV. P. 26(a) (Note of Advisory Committee on 1993 amendment).

226. *See* T.C. Form 2, [https://www.ustaxcourt.gov/forms/Petition\\_Simplified\\_Form\\_2.pdf](https://www.ustaxcourt.gov/forms/Petition_Simplified_Form_2.pdf).

227. FED. R. CIV. P. 26(a)(1)(A).

228. *See* *Branerton Corp. v. Comm'r Int. Rev.*, 61 T.C. 691, 692 (1974) (interpreting the requirements of T.C. Rule 70(a)(1)).

229. T.C. R. 34.

230. *See* T.C. Form 2, [https://www.ustaxcourt.gov/forms/Petition\\_Simplified\\_Form\\_2.pdf](https://www.ustaxcourt.gov/forms/Petition_Simplified_Form_2.pdf).

of bookkeepers, and documents that support the case would streamline the pretrial process, also hopefully leading to an earlier settlement.

Over the past decade, the Tax Court has taken various approaches when addressing subpoena enforcement.<sup>231</sup> When a party (or non-party) receives a subpoena, the Tax Court Rules allow the recipient to file a motion to quash or modify the subpoena.<sup>232</sup> Once a motion to quash or modify is filed, the Tax Court has many avenues to resolve the issue: (1) continue the case generally; (2) set a hearing; (3) keep the record open; (4) set it on another calendar or before another Judge; or (5) do nothing until trial.<sup>233</sup> This section provides an analysis for each of the Tax Court's approaches.

Tax Court judges may continue a case by either retaining jurisdiction (and monitoring the progress of the case) or continuing it generally and returning the case to the general docket.<sup>234</sup> If the case is returned to the general docket, the subpoenas previously issued are no longer enforceable and become moot. This is costly and delays the pretrial discovery process. Parties seeking information must again personally serve each subpoena, and also must wait to do so until the case has been recalendared. In *Cvjeticanin v. Commissioner*, taxpayers sought a continuance to subpoena documents, and the Court granted one.<sup>235</sup> A general continuance forces a party to halt their pretrial discovery and trial preparation and await a new trial calendared date, forcing the issuing party to personally re-serve each subpoena.<sup>236</sup> This is a large waste of resources—not to mention the inconvenience that personal service inflicts on third parties. It is also an option for the court not to rule on a motion for continuance until the requested documents are produced.

The Tax Court can also schedule and conduct a hearing to resolve a motion to quash a subpoena.<sup>237</sup> The assigned judge can order that a hearing take place telephonically, in Washington, D.C., or at the scheduled calendar call.<sup>238</sup> When the Tax Court sets motions for hearing by telephone, it is convenient for parties who are not in Washington D.C., and assuming all parties agree, it is the most expeditious way to resolve the dispute. Under this approach, parties are not forced to prepare for trial while awaiting a resolution or order from the Court, and, hopefully, the documents are exchanged before trial. In *Scott v. Commissioner*, the Tax Court set the motion to quash for hearing in Washington D.C., allowing the parties to find a resolution before trial.<sup>239</sup> In *Tritt*<sup>240</sup> and *Cojocar*,<sup>241</sup> the motions were continued to their respective calendar calls where the hearings would take place before trial.

Another Tax Court solution is to keep the trial record open, continue the case to later in the calendared week, and allow the parties a small window of time to

231. A search was conducted for all motions mentioning the word “subpoena” posted on the Tax Court website between January 2000 and January 2019. See *Opinions Search*, U.S. TAX CT., <https://www.ustaxcourt.gov/UstcInOp/OpinionSearch.aspx> (last visited Mar. 1, 2020).

232. T.C. R. 147(b).

233. T.C. R. 50.

234. See T.C. R. 133.

235. See Order Denying Respondent's Motion, *Cvjeticanin v. Comm'r Int. Rev.*, No. 25305-14S (T.C. Nov. 10, 2016).

236. See generally T.C. R. 110; T.C. R. 133.

237. See T.C. R. 110(a)–(e).

238. See T.C. R. 130.

239. See Order in Response to Motion, *Scott v. Comm'r*, No. 7809-17W (T.C. May 2, 2018).

240. See Order Continuing Case, *Tritt v. Comm'r Int. Rev.*, No. 8653-11S (T.C. Mar. 23, 2012).

241. See Order Setting Hearing for Intervenor's Motion, *Cojocar v. Comm'r Int. Rev.*, No. 17319-15 (T.C. Apr. 26, 2017).

review the documents while they continue trial preparation. Through my personal experience at trial, there is nothing prohibiting a third-party witness from providing voluminous documents under subpoena at the calendar call before trial, forcing counsel to review the documents overnight before the trial begins. This solution only works if the production of documents is small, as expecting a party to review voluminous documents during or immediately before trial is an enormous burden. Extensive trial preparation is usually required of all parties leading up to trial. Counsel is already tasked with preparing witnesses, negotiating stipulations, arguing motions, and managing all of the court's demands leading up to trial. Adding document review, copying and redaction, and potentially redrafting witness examinations does not facilitate last-minute settlement, nor does it narrow the issues or expense of a trial.

Occasionally, the Tax Court will set a hearing to resolve the motion with a fellow judge, and in rare cases, allow the parties to issue the subpoena for documents on another calendar call prior to the calendared trial. This appears to be the preferred practice of the court.<sup>242</sup> An example would be the case of *Haddix v. Commissioner*, where the judge set the hearing with a special trial judge.<sup>243</sup>

The final, and least helpful, solution is reserving any ruling or determination on the matter until trial and requiring the parties to raise the motion again at trial if not resolved. Several Tax Court orders show cases where the disposition of the motion recorded is that the issue became moot.<sup>244</sup> New issues arise using the above well-intended solutions by the Tax Court, but incorporating the amendment draft language would provide better uniformity and consistency, while also providing the parties and the Court with clearer instruction in resolving subpoena disputes.

The Federal Rules were amended to add notice requirements because parties serving subpoenas frequently failed to give the required notice to the other parties on their own accord.<sup>245</sup> The new rules added a requirement that a copy of the subpoena be attached to the notice.<sup>246</sup> The amendments are intended to enable parties with the opportunity to object or serve a subpoena for additional documents.<sup>247</sup> Parties desiring access to information produced in response to the subpoena will need to follow up with the party serving it or the person served to obtain such access. The rule does not limit the court's authority to order notice or receipt of produced materials or access to them.<sup>248</sup>

A review of current orders and motions before the Tax Court show that some judges desire to add a notice requirement to the Tax Court subpoena rules.<sup>249</sup> The Judge in *Ryder v. Commissioner* imposed such a rule on the parties after learning that the government served 77 subpoenas.<sup>250</sup> Because there is no notice requirement in the Tax Court Rules, the government did not tell petitioners who had been

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242. See Order Assigning Jurisdiction, *Haddix v. Comm'r Int. Rev.*, No. 7385-16L (T.C. Nov. 10, 2016).

243. *Id.*

244. See Order of Dismissal, *Whistleblower v. Comm'r*, No. 21277-13W (D.C. Cir. Mar. 29, 2018); See also *Jiminez v. Comm'r*, No. 15067-16S (T.C. Mar. 13, 2017).

245. FED. R. CIV. P. 37(d) (Note of Advisory Committee on 1970 amendment).

246. FED. R. CIV. P. 45(a) (Note of Advisory Committee on 2013 amendment).

247. *Id.*

248. *Id.*

249. See Order Adopting Notice Requirement at 3, *Ryder v. Comm'r Int. Rev.*, No. 14619-10 (T.C. Jul. 8, 2016).

250. *Id.* at 1.

served.<sup>251</sup> In an order served in *Ryder*, just 17 days before trial, the Tax Court judge stated as follows:

This is not a new problem. As this division of the Court has observed before, it stems from a startling divergence between our Court's Rules and those of the Article III courts. Federal Rule of Civil Procedure (FRCP) 45(a)(4) and its predecessors have for close to a quarter century required notice to other parties before service of nonparty subpoenas for the production of documents, information, or tangible things. Petitioners understandably want to know about these subpoenas, what if anything the Commissioner got in response, and who might end up on a witness list.<sup>252</sup>

The Tax Court judge ultimately ordered the Commissioner to serve all of the non-party subpoenas issued, with all responses and documents that were produced in response to those subpoenas on counsel for petitioners.<sup>253</sup> Further, it was ordered that both parties comply with Federal Rule 45(a)(4) in the case.<sup>254</sup>

It seems that, in fairness, notice should be provided when subpoenas are issued, and that all documents received should be turned over to the other side. It is worth highlighting the disparity this might create for parties. Nothing prohibits a party from issuing a subpoena for third-party documents in their own case, and by the court's own responses to frequently asked questions,<sup>255</sup> parties are encouraged to try to obtain the documents informally. Taxpayers are responsible for knowing the universe of documents and the identity of witnesses and record keepers involved in preparing and filing their returns.<sup>256</sup> Taxpayers are in the best position to obtain copies of their own personal documents informally, while the government is likely to need a subpoena to obtain the same third-party documents. This unbalances the playing field, and places the onus on the government to serve third-party subpoenas for documents that were likely already requested through the petitioner. By requiring the government to turn over all of their inquiries for documents while preparing their case for litigation, there becomes an issue of disclosing work product.

In *Kissling v. Commissioner*, the Tax Court ordered the Commissioner to serve all non-party subpoenas, and the responses and documents obtained through the subpoenas, on petitioners.<sup>257</sup> The order agrees that there is no existing Tax Court Rule expressly requiring such notice, but disagrees with the Commissioner's argument that the absence of a rule creates an implication that secret subpoenas are favored.<sup>258</sup> The Tax Court goes on to explain the Tax Court's position behind the rules:

We promulgated our Court's Rule 147, which governs subpoena practice, back in 1973. At that time, the Tax Court's stated goal was a rule

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251. *Id.* at 2.

252. *Id.* at 1.

253. *Id.* at 2.

254. *Id.*

255. *Frequently Asked Questions*, U.S. TAX CT., <https://www.ustaxcourt.gov/faq.htm> (last visited Mar. 1, 2020).

256. I.R.C. § 6001 (1982).

257. See Order Granting Petitioner's Motion to Compel at 2, *Kissling v. Comm'r Int. Rev.*, No. 19857-10 (T.C. July 16, 2015).

258. *Id.*

substantially similar to FRCP 45. Back then, FRCP 45 didn't require notice for subpoenas.<sup>259</sup>

The notice requirement was added in 1991 to give parties the same opportunity to challenge nonparty subpoenas for documents that they had to challenge subpoenas for depositions (since FRCP 30 and 31 already provided notice protection in these circumstances). See Fed. R. Civ. Prof. 45 advisor committee's notes (1991). We have never publicly stated that we intended to deviate from Article III practice - - it's just an example of the two sets of rules drifting apart over time.<sup>260</sup>

The Court adopted the notification requirement of Federal Rule 45 for the *Kissling* case, and this appears to remain the preference of the Court.<sup>261</sup>

## VII. AMENDMENT OF THE TAX COURT RULES

Subpart A of this section suggests amending 26 U.S.C. § 7456, giving the Tax Court the authority to adjust their rules without requiring a traditional "hearing" to enforce subpoenaed document requests. Subpart B proposes to amend Tax Court Rule 72 by adding language for the issuance of a subpoena including reasonable timing, notice, and protections for third parties. Subpart C suggests a new Tax Court Subpoena Form 14(b), and clarifying instructions concerning their issuance that aligns with the Federal Rules. Subpart D addresses adding informal initial disclosure rules for both parties in pretrial discovery practice and utilizing Tax Court Rule 110 allowing parties to set pretrial hearings to discuss resolution of document disputes with non-parties.

### A. Congressional Amendment to 26 U.S.C. § 7456

The language of 26 U.S.C. § 7453 limits the court's ability to enforce subpoenaed document production without a "hearing."<sup>262</sup> Due to the inclusion of the word "hearing" in the statute, the court is without authority to enforce production outside of a hearing setting.<sup>263</sup> Tax Court hearings traditionally take place at the calendar call on the Monday at the place on trial.<sup>264</sup> The Tax Court is established as a court of record under Article I of the Constitution by § 7441 of the IRC.<sup>265</sup> Pursuant to its statutory authority in § 7453, the court has promulgated Rules of Practice and Procedure under which it operates,<sup>266</sup> and is granted subpoena power to demand testimony and documents from parties.<sup>267</sup> The language of 26 U.S.C. § 7456 specifically

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259. FED. R. CIV. P. 45 (1970).

260. See Order Granting Petitioner's Motion to Compel at 2, *Kissling v. Comm'r Int. Rev.*, No. 19857-10 (T.C. July 15, 2015) (first citing 60 T.C. 1137 (1973); then citing FED. R. CIV. P. 45).

261. *Id.* at 3.

262. See I.R.C. § 7453(a) (2008); see also I.R.C. § 7463; see also I.R.C. § 7463(c).

263. See I.R.C. § 7453(a) (2008); see also I.R.C. § 7463(c).

264. T.C. R. 131.

265. I.R.C. § 7441 (2015).

266. I.R.C. § 7453 (2015).

267. I.R.C. § 7456(a).



states that a “hearing” is required to enforce the request for documents.<sup>268</sup> The Tax Court has the authority to administer oaths and procure testimony:

(a) In General. For the efficient administration of the functions vested in the Tax Court or any division thereon, any judge or special trial judge of the Tax Court, the clerk of the court or his deputies, as such or any other employee of the Tax Court designated in writing for the purpose by the chief judge, may administer oaths, and any judge or special trial judge of the Tax Court may examine witnesses and require, by subpoena ordered but he Tax Court or any division thereof and signed by the judge or special trial judge (or by the clerk of the Tax Court or by any other employee of the Tax Court when acting as deputy clerk).

(1) The attendance and testimony of witnesses, and the production of all necessary returns, books, papers, document, correspondence, and other evidence, from any place in the United States at any designated place of hearing, or

(2) The taking of a deposition before any designated individual competent to administer oaths under this title. In the case of a deposition the testimony shall be reduced to writing by the individual taking the deposition or under his direction and shall then be subscribed by the deponent.<sup>269</sup>

### *B. Add Reasonable Timing and Notice Requirement*

Tax Court Rule 72 provides guidance for requesting the production of documents.<sup>270</sup> One solution includes a necessary amendment to Federal Rule 72 (b)(1) language by: (1) adding a “reasonable” timing reference and allowing the issuing party to choose the location for production of documents; (2) including a notice requirement for subpoenas issued to third-parties for documents; and (3) providing protections for third-parties.

The Federal Rules already include a “reasonable time” for production of documents through subpoenas; this definition of a “reasonable time” to respond has been resolved in litigation in the federal district courts.<sup>271</sup> The proposal suggests 30 days as a reasonable time, noting that the definition of “reasonable time” depends on the facts of a case and the size and dollar amount at issue. The extent of the documents requested will affect the analysis. By analyzing the language in Federal Rule 34(b)(2)(A) we can see that the court did not specifically define “reasonable time” but left it up to the parties to determine.<sup>272</sup> Local rules differ, and as case law develops it will create acceptable parameters with each case’s differing facts driving the reasonableness of a request. In Federal Rule 34(b)(2)(A), the party to whom the request is directed must respond in writing within 30 days of either being served or—if the request was delivered under Federal Rule 26(f)— after the parties first

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> T.C. R. 72(b).

<sup>271</sup> FED. R. CIV. P. 45(d)(3)(A); *Washington v. Thurgood Marshall Acad.*, 230 F.R.D. 18, 25 (D.C. Cir. 2005).

<sup>272</sup> FED. R. CIV. P. 34(b)(2)(A).

settlement conference.<sup>273</sup> A shorter or longer time may be stipulated to or be ordered by the court.

When a subpoena *duces tecum* is issued in a civil action, parties are given 14 days to produce the documents after receipt of the subpoena.<sup>274</sup> The alternative is to have the parties agree upon a time. “Reasonable time to respond” varies greatly based on the actual documents and information sought. Third parties are protected under the Federal Rules because a court will usually grant a motion quashing a subpoena if it does not allow someone a reasonable time to respond.<sup>275</sup> Again, the definition of reasonable depends on the jurisdiction. Sometimes a minimum of 10-14 days is enough to comply.

Another difference between Federal Rule 45 and the Tax Court subpoena rule is the requirement that documents be produced at a location not more than 100 miles away; there is no corresponding distance issue in the Tax Court, and rightfully so.<sup>276</sup> Parties in a Tax Court case are not limited to 100 miles in their ability to subpoena document or testimonial witnesses.<sup>277</sup> Tax Court calendars do not exist in all towns;<sup>278</sup> it would be a serious disadvantage if parties had to limit their subpoenas to 100 miles. A geographic limit would be impracticable and open the door to venue shopping and gamesmanship in picking trial locations. It is worth noting that in nearly all cases, the taxpayer controls the location of trial—petitioning taxpayers check the box on Tax Court FORM 2.<sup>279</sup>

The proposed amendment allows for a more understandable Tax Court Rule 72 when interpreted in connection with Tax Court Rule 147, which references that documents must be produced by the time stated in the request.<sup>280</sup> This brings the rule closer to mirroring the language of Federal Rule 34.<sup>281</sup> This solution also continues to encourage the cooperation and exchange of documents while allowing parties to self-police the process. The Federal Rules have been amended to create a subpoena form for the production of documents separate from a subpoena form for testimony.<sup>282</sup> Furthermore, the amendment would allow for less judicial oversight throughout the pretrial discovery process because the parties would have a clearer understanding of the time restraints they face, and therefore, would be able to self-police.

Tax Court Rule 147 references that the Tax Court would apply the same compliance standard (“at or before the time specified in the subpoena for compliance therewith”).<sup>283</sup> The proposal is to change the language limiting the Tax Court’s discretion to approve the time for production stated in the subpoena. Limiting the Court’s involvement with the initial request will lead to easier enforcement by both

273. FED. R. CIV. P. 34.

274. FED. R. CIV. P. 45(d).

275. *Id.*

276. FED. R. CIV. P. 45(c)(1)(A).

277. *See* T.C. R. 147.

278. *Taxpayer Information: About the Tax Court*, U.S. TAX CT. (Feb. 1, 2020), [https://www.ustax-court.gov/taxpayer\\_info\\_about.htm](https://www.ustax-court.gov/taxpayer_info_about.htm).

279. *See Request for Place of Trial*, U.S. TAX CT. (Feb. 1, 2020), [https://www.ustax-court.gov/forms/Form\\_5\\_Request\\_for\\_Place\\_of\\_Trial.pdf](https://www.ustax-court.gov/forms/Form_5_Request_for_Place_of_Trial.pdf).

280. T.C. R. 147.

281. FED. R. CIV. P. 34(b)(2).

282. *See Federal Form AO 88B*, ADMIN. OFF. U.S. CTS. (Feb. 1, 2020),

<https://www.uscourts.gov/forms/notice-lawsuit-summons-subpoena-subpoena-produce-documents-information-or-objects-or-permit>.

283. T.C. R. 147(b).

parties. The Internal Revenue Manual guides federal practice and acknowledges that a “reasonable time” will vary in the case of a subpoena *duces tecum*. The nature of the documents and records called for by the subpoena will affect the determination of reasonableness;<sup>284</sup> “[i]f the subpoena calls for the production of documents and records, the witness is entitled to a reasonable time to gather records.”<sup>285</sup> By establishing that 14 days is a reasonable time, this alleviates concerns by the parties about last-second revisions by a judge unless they become necessary. Furthermore, it encourages continuous communication between the parties regarding compliance.

Adding a notice requirement for issued subpoenas is supported by the reasoning for the prior Federal Rule 45 amendment. By including a notice provision for subpoenas when there is no corresponding deposition, third parties would lose the protections afforded them under other Federal Rules. Therefore, the Federal Rule 45 Amendment including a provision requiring review of prior notice pursuant to Rule 45 of compulsory pretrial production or inspection has been added to paragraph (b)(1).<sup>286</sup> In federal practice, the rule is interpreted to not require notice before the subpoena is issued. Requiring notice within 30 days should suffice. There are many difficulties associated with conducting personal service of subpoenas, and alerting an opposing party to the upcoming attempts to serve a subpoena could exacerbate these issues. The proposed language mirrors that from the Federal Rules 34 and 45(a)(4) and would continue the Tax Court’s trend of moving pretrial discovery rules more in line with the Federal Rules.

### *C. Amend Tax Court Rule 147 to Closely Mirror Federal Rule 45*

Tax Court Rule 147<sup>287</sup> should be amended to more closely mirror Federal Rule 45.<sup>288</sup> Rule 45 requires that a subpoena for production of documents, ESI, or tangible things must be returnable at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person.<sup>289</sup> Rule 45(d) provides for protections for a person subject to a subpoena, sanctions when the issuance causes an undue burden or expense, and procedures for objections and motions to quash a subpoena. Rule 45(e) outlines the duties in responding to a subpoena, requiring that the production of documents include ESI, and lays out the procedure for claiming privilege or protection.<sup>290</sup>

The notice issue can be remedied with an amendment to the subpoena rules, preventing parties from issuing “secret subpoenas.” Adding rule language supporting notice will allow parties the opportunity to object if subpoenas for documents are issued that impact their litigation. This rule should be changed out of fairness to the parties and will initiate the earlier exchange of documents prior to the calendar call.

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284. I.R.S., INTERNAL REV. MANUALS 35.4.4.4, IRS MISSION (2004).

285. I.R.S., INTERNAL REV. MANUALS 11.3.35.9, IRS MISSION (2015).

286. FED. R. CIV. P. 45 (b)(1).

287. T.C. R. 147.

288. FED. R. CIV. P. 45 (c)(2)(A).

289. *Id.*

290. *Id.* at (e).

The Tax Court currently provides FORM 14 on its website to be used by parties issuing subpoenas for testimony and/or production of documents.<sup>291</sup> The Federal Rules have separate forms for each subpoena, and allows the parties to issue one (or both) in a case.<sup>292</sup> This proposal would add a second form to the Tax Court that can be used for the production of documents only. Rather than using the language “*Duces Tecum* Subpoena,” the proposal mirrors the Federal Rules by suggesting that the Court use plain language in the title “Subpoena for Production of Documents.” Currently, a party need only ask the clerk of the court or download a subpoena form directly from the Tax Court website.<sup>293</sup> The basic form and instructions are easy to follow and are addressed in the frequently asked questions by the court.<sup>294</sup> In their own rules, the Tax Court does not want a copy of the subpoena unless the party is seeking the Court’s assistance in enforcing it.<sup>295</sup>

A new form titled “Tax Court FORM 14(b)” could be used when a party is merely seeking third-party documents. In the alternative, the current form could be amended to include check the box functions similar to those on the federal form. In combination with creating a new subpoena form, new instructions and procedures could be drafted allowing counsel to set the location and return date of the subpoena for documents. This would allow the parties to choose an alternative Tax Court calendar in the same location prior to the scheduled trial, schedule a telephonic hearing or travel to the permanent Tax Courthouse in Washington D.C. for a hearing, or choose a location to transfer documents that is convenient to all parties.

The location of a trial imposes constraints to the feasibility, utility, and enforceability of these suggestions. Although the Tax Court travels to many locations, less-populated locations may only see the Tax Court once a year, and it might not even be in the town in which a petitioner lives.<sup>296</sup> The least complicated suggestion would be to have subpoenas returnable to the issuing party utilizing a telephonic hearing when the recipient does not comply. This is a viable solution in remote locations, and locations like San Francisco, Los Angeles, and New York, where Tax Court calendars occur on a monthly (and sometimes bi-monthly) basis.

The new proposed form includes a notice requirement, similar to that required by Federal Rules. Federal Rule 45 (a)(4) states that “[i]f the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served on the person to whom it is directed, a notice and a copy of the subpoena must be served on each party.”<sup>297</sup> Using the federal subpoena rules and form as a guide, the following suggestions amend the rules and add a second form, allowing the parties to determine a reasonable time,<sup>298</sup> and place, for production.<sup>299</sup>

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291. See *Subpoena Form*, U.S. TAX CT. (Feb. 26, 2020), [https://www.ustaxcourt.gov/forms/Subpoena\\_Form\\_14.pdf](https://www.ustaxcourt.gov/forms/Subpoena_Form_14.pdf).

292. See *Federal Forms AO89, AO90*, ADMIN. OFF. U.S. CTS (Feb. 1, 2020), <https://www.uscourts.gov/services-forms/forms>.

293. *Taxpayer Information: Before Trial*, U.S. TAX CT. (Feb. 1, 2020), [https://www.ustaxcourt.gov/taxpayer\\_info\\_before.htm](https://www.ustaxcourt.gov/taxpayer_info_before.htm).

294. *Id.*

295. T.C. R. 147(c).

296. See, e.g., *Most Current Calendar as of Publication Date*, U.S. TAX CT. (Feb. 1, 2020), [https://www.ustaxcourt.gov/court\\_schedules/Winter\\_2020.pdf](https://www.ustaxcourt.gov/court_schedules/Winter_2020.pdf).

297. FED. R. CIV. P. 45(a)(4).

298. The current Tax Court FORM 14 is shown in Appendix C.

299. The Federal Rules Form AO 88B for the production of documents shown in Appendix D.

The subpoena instructions should be amended to follow the relevant provisions of Federal Rule 45(c),<sup>300</sup> for the place of compliance; Rule 45(d), for the protection as a person subject to a subpoena; and Rule 45(e) and (g), for the duty to respond to this subpoena and the potential consequences of not doing so.<sup>301</sup>

Using the Federal Rules and instructions as a guide, the proposal is to add subpart (b) to Tax Court FORM 14—to be used when the parties only wish to subpoena a third party or custodian of records for documents, but do not wish to subpoena the third party for attendance at trial or to take a deposition.<sup>302</sup> This would allow the parties to determine a reasonable time and place for production, and would allow the parties to ask for a return of documents before the actual date of trial. The new proposed subpoena subpart FORM 14(b) will also include a notice requirement to opposing parties after a subpoena is served, similar to that required by Federal Rule 45.<sup>303</sup> The instructions should also reference the potential consequences of not complying, and protections for a person subject to a subpoena.

#### *D. Tax Court Rule 110 – Requesting Pretrial Conferences*

Tax Court Rule 110 allows parties to request a court conference to resolve pretrial discovery issues prior to the calendar call.<sup>304</sup> A party can contact the court and request that the assigned judge set the case for a pretrial conference, the Court has discretion to entertain this request.<sup>305</sup> This is a helpful tool to resolve issues between the parties, but may not work as well when the case has been taken off calendar, or when the issues exist between parties and non-parties to the case. It does not resolve the issue if a non-party does not wish to correspond or cooperate. When a third-party subpoena is at issue, the court still only has authority to enforce it at the “hearing” or calendar call for trial as stated on the subpoena.<sup>306</sup>

### VIII. CONCLUSION

The amendment aligns the Tax Court Rules with the Federal Rules by addressing subpoena enforcement issues that arise in tax controversy litigation, gives clarity to Tax Court judges and practitioners, and provides a uniform approach in subpoena enforcement. A shift towards conforming the Tax Court Rules with the Federal Rules seems to be without real opposition. The proposal to require notice and a reasonable time to return subpoenaed documents is feasible. Implementation merely requires applying existing federal rules and procedures, already long understood and followed in U. S. district courts. An historic review of the Tax Court Rules shows that recent changes both expand and limit discovery in tax litigation. The Tax Court’s shift in pretrial discovery rules towards consistency with the Federal Rules indicates that these suggested changes are feasible, and that the court is willing to make them.

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300. FED. R. CIV. P. 45.

301. The proposed Federal Tax Court Form can be found in Appendix E.

302. *See Subpoena Form*, U.S. TAX CT., [https://www.ustaxcourt.gov/forms/Subpoena\\_Form\\_14.pdf](https://www.ustaxcourt.gov/forms/Subpoena_Form_14.pdf) (last visited Feb. 1, 2020).

303. T.C. R. 74.

304. T.C. R. 110.

305. *Id.*

306. T.C. R. 147.

An amended rule conforming to Federal Rule 45 allows taxpayers and government attorneys access to necessary documents within a reasonable time before trial. Allowing for a timely document exchange alleviates the burdensome need to involve the court in discovery disputes at the calendar call and promotes faster resolution of cases while encouraging settlements. Preventing third parties from postponing responses and production until the day of trial will spare resources for all parties. This proposal streamlines the pretrial discovery process and provides clear enforcement guidance for subpoenaed information while promoting the mission of the Tax Court to efficiently and fairly resolve tax disputes.

APPENDIX A

**AMENDED U.S. TAX COURT RULE 72. PRODUCTION OF DOCUMENTS,  
ELECTRONICALLY STORED INFORMATION, AND THINGS**

(a) **Scope:** Any party may, without leave of Court, serve on any other party, *or upon a nonparty through the issuance of a subpoena*, a request to:

(1) Produce and permit the party making the request, or someone acting on such party's behalf, to inspect and copy, test, or sample any designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data compilations stored in any medium from which information can be obtained, either directly or translated, if necessary, by the responding party into a reasonably usable form), or to inspect and copy, test, or sample any tangible thing, to the extent that any of the foregoing items are in the possession, custody, or control of the party on whom the request is served; or

(2) Permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon.

(b) **Procedure:**

(1) **Contents of the Request:** The request shall set forth the items to be inspected, either by individual item or category, describe each item and category with reasonable particularity, and may specify the form or forms in which electronically stored information is to be produced. It shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(2) **Responses and Objections by a Party:** The party upon whom the request is served shall serve a written response *within 30 days after service of the request*. The Court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to in whole or in part, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, then that part shall be specified. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party shall state the form or forms it intends to use. To obtain a ruling on an objection by the responding party, on a failure to respond, or on a failure to produce or permit inspection, the requesting party shall file an appropriate motion with the Court and shall annex thereto the request, with proof of service on the other party, together with the response and

objections if any. Prior to a motion for such a ruling, neither the request nor the response shall be filed with the Court.

(3) **Responses and Objections by a Nonparty.** *A nonparty may be compelled to produce documents and tangible things or to permit an inspection when they are properly served with a subpoena (See Tax Court Rule 147).*

*a. **Reasonable Time.** The nonparty upon whom the subpoena request for documents is served shall serve a written response to the subpoena within a reasonable time period (30 days where practicable) after service of the subpoena. The production of documents must then be completed no later than the time for inspection specified in the subpoena request. The Court may allow a shorter or longer time.*

*b. **Place of Production.** The nonparty shall produce the documents to the location instructed in the subpoena.*

*c. **Notice to Other Parties After Service to Third-Party for Documents.** If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then after the subpoena is served on the person to whom it is directed, a notice and a copy of the subpoena must be served on each party.*

(4) **Producing Documents or Electronically Stored Information:** Unless otherwise stipulated or ordered by the Court, these procedures apply to producing documents or electronically stored information: (A) A party shall produce documents as they are kept in the usual course of business or shall organize and label them to correspond to the categories in the request; (B) If a request does not specify a form for producing electronically stored information, a party shall produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and (C) A party need not produce the same electronically stored information in more than one form.



## APPENDIX B

***AMENDED U.S. TAX COURT RULE 147. SUBPOENAS***

(a) **Attendance of Witnesses; Form; Issuance:** Every subpoena shall be issued under the seal of the Court, shall state the name of the Court and the caption of the case, and shall command each person to whom it is directed to attend and give testimony *at a “reasonable” time (within 30-days where practicable) and place as specifically directed therein*. A subpoena, including a subpoena for the production of documentary evidence or electronically stored information, signed and sealed but otherwise blank, shall be issued to a party requesting it, who shall fill it in before service. Subpoenas may be obtained at the Office of the Clerk in Washington, D.C., or from a trial clerk at a trial session. See Code sec. 7456(a).

(b) **Production of Documentary Evidence and Electronically Stored Information:** *A subpoena for documents may also command the person to whom it is directed to produce the books, papers, documents, electronically stored information, or tangible things designated therein, and may specify the form or forms in which electronically stored information is to be produced. The subpoena for document shall command each person to whom it is directed, to produce the records within 30-days, at a “reasonable” place as directed therein.* The Court, upon motion made promptly and in compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive, or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, electronically stored information, or tangible things.

(c) **Service:** A subpoena may be served by a United States marshal, or by a deputy marshal, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to such person the fees for one day’s attendance and the mileage allowed by law. When the subpoena is issued on behalf of the Commissioner, fees and mileage need not be tendered. See Rule 148 for fees and mileage payable. The person making service of a subpoena shall make the return thereon in accordance with the form appearing in the subpoena.

(d) **Section (d) is not altered by the proposal and was excluded in this discussion.**

(e) **Command to Produce Materials or Permit Inspection.** (A) *Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.* (B) *Objections. A person commanded to produce documents or tangible*

things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 30 days after the subpoena is served. If an objection is made, the following rules apply: (i) At any time, on notice to the commanded person, the serving party may move the Tax Court for an order compelling production or inspection. (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(f) **Quashing or Modifying a Subpoena.** (A) **When Required.** On timely motion, the court is required must quash or modify a subpoena that: (i) fails to allow a reasonable time to comply; (ii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or (iv) subjects a person to undue burden. (B) **When Permitted.** To protect a person subject to or affected by a subpoena, the court may, on motion, quash or modify the subpoena if it requires: (i) disclosing a trade secret or other confidential research, development, or commercial information; or (ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party. (C) **Specifying Conditions as an Alternative.** The court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party: (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and (ii) ensures that the subpoenaed person will be reasonably compensated.

(g) **Notice to Other Parties.** If the subpoena commands from a third-party the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then after it is served on the person to whom it is directed, notice of the subpoena must be served on each party.

(h) **Contempt:** Failure of any person without adequate excuse to obey a subpoena served upon any such person may be deemed a contempt of the Court.

APPENDIX C

**SUBPOENA: U.S. TAX COURT FORM 14**

“To \_\_\_\_\_ YOU ARE HEREBY COMMANDED to appear before the United States Tax Court \_\_\_\_\_ at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_ then and there to testify on behalf of \_\_\_\_\_ in the above-entitled case, and to bring with you \_\_\_\_\_ and not to depart without leave of the Court.”

APPENDIX D

**SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR  
OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL  
ACTION**

“To: \_\_\_\_

- **Production:** YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material:

Place:

Date and Time:

- **Inspection of Premises:** YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:

Date and Time:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

**Notice to the person who issues or requests this subpoena.**

If this subpoenas commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ P. 45(a)(4).”

APPENDIX E

**PROPOSED U.S. TAX COURT FORM 14(b)  
SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR  
OBJECTS**

“To: \_\_\_\_

- **Production:** YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material:

Place:

Date and Time:

The following provisions of Tax Court Rule 147 are attached, relating to the place of compliance; relating to your protection as a person subject to a subpoena; and relating to your duty to respond to this subpoena and the potential consequences of not doing so.”