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The United States Tax Court—Should Discovery be Expanded?

WILLIAM H. NEWTON III*

This article examines the methods and scope of discovery available to the taxpayer involved in tax litigation in the Tax Court, the Court of Claims and the federal district courts. After finding that discovery in the Tax Court is significantly more restricted than in the other two available forums, the author reviews the results of a recent survey of tax practitioners' views of discovery in that court and concludes that expansion is necessary.

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I. INTRODUCTION

"The law seldom decides the issue, the facts do; and as contrasted with the ascertainment of the facts, the law is relatively easy to discover."¹

In theory, a taxpayer has a choice of three forums in which to contest his tax liability—the United States Tax Court, the Court of Claims, or the federal district courts.² The Court of Claims and the

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1. L. STRYKER, *THE ART OF ADVOCACY* 11 (1954).

2. Jones, *Choice of Forum in Tax Litigation Revisited*, 35 N.Y.U. INST. FED. TAX. 373, 381 (1977); Keir & Argue, *Choosing a Forum for Tax Litigation*, 22 PRAC. LAW. 63, 63 (Oct. 15, 1976); Comment, *Discovery in Tax Court: A Preliminary Analysis*, 21 U.C.L.A. L. REV. 1339, 1340 (1974).

district courts require payment of the tax deficiency³ as a prerequisite to contesting liability.⁴ Only in the Tax Court does the taxpayer have the right to defend on the merits without first having to pay.⁵ This pragmatic economic consideration undoubtedly accounts in large part for the fact that the caseload in Tax Court is more than twice that of the combined total of tax cases in the other two available forums.⁶

One of the primary distinctions between proceedings in the Tax Court and in the Court of Claims or the district courts is the extent of discovery available.⁷ Discovery in the Tax Court is much more limited.⁸ Taxpayers unable to pay the deficiency and in need of

The Tax Court is an article I legislative court. See U.S. CONST. art. I, § 8; 26 U.S.C.A. § 7441 (West Supp. 1978). The Court of Claims and the federal district courts are article III constitutional courts. See U.S. CONST. art. III, § 3. From a jurisdictional viewpoint, the principal distinction between article I and article III courts is that the former exercise a limited statutory jurisdiction, while the latter exercise the broad judicial power authorized under the Constitution. The Tax Court exercises judicial power, but only as to matters expressly mandated by congressional statute. See, e.g., *Burns, Stix, Friedman & Co. v. Commissioner*, 57 T.C. 392, 396 (1971).

The existence of three separate forums for tax disputes has also given rise to substantial problems on the appellate level. Uncertainty concerning substantive tax law has resulted from the fact that each court of appeals may adopt an interpretation or rule of law different from or in direct conflict with another. This uncertainty is rarely resolved by the relatively few cases which reach the Supreme Court. See *Miller, A Court of Tax Appeals Revisited*, 85 YALE L.J. 228 *passim* (1975) (discussing problems and proposing solutions).

3. See 26 U.S.C. § 6211 (Supp. V 1975); Treas. Reg. § 301.6211-1(a) (1977) (defining "deficiency" as the amount by which tax imposed by statute exceeds tax shown on the taxpayer's return).

4. As a prerequisite to filing suit in the Court of Claims or the district courts, the taxpayer must pay the full amount of the tax deficiency. See, e.g., *Flora v. United States*, 362 U.S. 145, 148 (1960).

5. The Tax Court provides the taxpayer with the alternative of paying nothing until 90 days after entry of the court's decision or, if an appeal to the appropriate United States Court of Appeals is made, after all appeals have been exhausted. See 26 U.S.C. §§ 6213(a), 7481, 7483 (Supp. V 1975).

6. Cohen, *Litigation Techniques that Increase Your Chances of Success in Tax Court*, 35 J. TAX. 340, 340 (1971). Approximately 85% of all tax litigation in recent years has been in the Tax Court. Comment, *supra* note 2, at 1341 n.10.

In this day of easy credit a "no payment required" type of forum has a special appeal to litigating taxpayers. Small wonder that the Tax Court is doing substantially more federal income tax business—to say nothing of estate and gift tax cases—than all the federal district courts and the Court of Claims combined.

Furthermore, if a client is stone-broke or not liquid, the Tax Court is the only place for him.

Keir & Argue, *supra* note 2, at 63.

7. Numerous commentators have identified the distinctions in discovery as a basis for forum shopping. See, e.g., Crampton, 31 TAX LAW. 321, 326-27 (1978); Jones, *supra* note 2, at 378; Keir & Argue, *supra* note 2, at 65-66. See also, U.S. Dep't of Justice, *Study of the Trial Court System for Federal Tax Disputes*, 22 TAX LAW. 95, 105-10 (1968) (proposing alternatives to preclude forum shopping in tax litigation) [hereinafter cited as Dep't of Justice Study].

8. See Crampton, *supra* note 7, at 326-27; Jones, *supra* note 2, at 378; notes 52-123 and accompanying text *infra*.

discovery may rightfully argue that this is unfair, especially since their opponent in the Tax Court, the Commissioner of the Internal Revenue Service ("IRS"), has the opportunity through the summons and investigative powers of the government to obtain disclosure of information by means unavailable to taxpayers.⁹ Furthermore, the limits imposed on discovery in the Tax Court increase the prospects of unfair surprise and tend to perpetuate the common law "sporting theory of justice."¹⁰

It is the purpose of this article: (1) to examine the function of discovery; (2) to analyze and compare rules of discovery in the Tax Court with those in the Court of Claims and the district courts, especially as the discovery rules in the latter forums relate to tax litigation; and (3) to make proposals, based on the results of a recent survey of tax practitioners, for reforming deficiencies found to exist.

II. THE FUNCTION OF DISCOVERY

At common law, discovery was unavailable either in civil or criminal cases.¹¹ Common law courts relied on detailed factual pleadings or "forms of action."¹² Since the pleadings, in theory, were to provide the necessary factual development,¹³ courts were unconcerned with whether opposing counsel was able to review all available facts prior to trial.¹⁴ The effect of this procedure was to undercut principles of fairness and justice; trial was a battle of wits between opposing counsel.¹⁵ This common law approach has been de-

9. The Commissioner has liberal investigative powers to determine the correctness of any return. I.R.C. § 7602. These powers include the authority to examine any books, papers or other records, whether in the hands of the taxpayer or third parties. In addition, they include the right to compel testimony under oath. See notes 131-33 and accompanying text *infra*.

10. *Tiedman v. American Pigment Corp.*, 253 F.2d 803, 808 (4th Cir. 1958) (pointing out that trial is not a "sporting event" and that discovery is founded upon the policy of promoting search for truth). See note 16 and accompanying text *infra*.

11. At common law, the theory was that no man was bound to furnish evidence which could be used against him by his adversary. See J. FLEMING & G. HAZARD, *CIVIL PROCEDURE* 171-75 (2d ed. 1977). Discovery by a bill in equity was the only means by which a party could obtain evidence under the control of his adversary. *Id.* at 171. The process was time-consuming, costly and difficult. See *Pressed Steel Car Co. v. Union Pac. R.R.*, 241 F. 964, 967 (2d Cir. 1917).

12. Pretrial procedure focused entirely on elaborate rules of pleading which rarely ensured that the allegations and denials of the parties were even founded in fact. See Sunderland, *The Theory and Practice of Pre-Trial Procedure*, 36 MICH. L. REV. 215, 215-16 (1937) [hereinafter cited as *Theory & Practice*]. See generally R. POUND, *READINGS ON THE HISTORY AND SYSTEMS OF THE COMMON LAW* 364-99 (2d ed. 1921); Sunderland, *The English Struggle for Procedural Reform*, 39 HARV. L. REV. 725, 727-38 (1926).

13. See, e.g., *Theory & Practice*, *supra* note 12, at 215-16.

14. Pike & Willis, *The New Federal Deposition-Discovery Procedure: I*, 38 COLUM. L. REV. 1179, 1180 (1938) (pointing out that both sides were to conduct their operations with as much "secrecy as possible").

15. See, e.g., *Theory & Practice*, *supra* note 12, at 215. This common law approach

nominated the "sporting theory of justice."¹⁶

Demands for justice and fairness in litigation slowly eroded the common law approach. The concept of fact-revelation through pleadings was discarded; the pleadings were simply to provide notice of an alleged cause of action.¹⁷ Most forums have rejected outright the "sporting theory of justice."¹⁸ In general, trials are no longer conducted in the dark with the case being decided not on the merits but on the tactical skill of counsel.¹⁹ The adoption of a liberal scope of discovery was intended to "make a trial less a game of blind man's bluff and more a fair contest with the basic issues disclosed to the fullest practicable extent."²⁰ Discovery was also intended as a curative device to correct the imbalance between powerful and less powerful litigants.²¹ If one party lacked the physical or financial resources required to undertake an intensive investigative effort, that party could, through discovery, prevent his adversary from bottling up available evidence.²²

The thrust of discovery, in line with the objective of promoting fairness and justice for all litigants, is to attain disclosure of all relevant evidence prior to trial, making all facts available for careful study and examination by both sides.²³ This is accomplished by

apparently had its roots in the medieval concept of "trial by battle." See Pike & Willis, *supra* note 14, at 1180. Since surprise was a legitimate trial tactic, the decision often turned on the skill and strategy of counsel rather than on the merits.

16. See, e.g., *Martin v. Reynolds Metal Corp.*, 297 F.2d 49, 56 (9th Cir. 1961); *Tiedman v. American Pigment Corp.*, 253 F.2d 803, 808 (4th Cir. 1958). See also Holtzoff, *Instruments of Discovery under Federal Rules of Civil Procedure*, 41 MICH. L. REV. 205, 224 (1942).

17. See, e.g., *Hickman v. Taylor*, 329 U.S. 495, 500 (1947). See also G. RAGLAND, *DISCOVERY BEFORE TRIAL* 1-18 (1932).

18. Although, traditionally, discovery in criminal trials was more limited than in civil litigation, recent years have brought more liberalized discovery, even in the area of criminal law. For a discussion of this trend, see Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. L. Q. 279, 290.

19. See, e.g., *Hickman v. Taylor*, 329 U.S. 495 (1947). The Court stated that the pretrial deposition and discovery mechanisms provided by the Federal Rules of Civil Procedure, when applied in a manner consistent with recognized privileges, make available the fullest possible knowledge of the issues and the facts by all parties before the trial. *Id.* at 500-01.

20. *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958).

21. See generally Pike & Willis, *supra* note 14, at 1180. The authors emphasized that at common law, the character of ammunition and strategy contemplated were "regarded as the exclusive possession of the party able to possess and devise such materials," with the bar viewing suspiciously "any attempts to destroy this secrecy just as jingoists view with suspicion disarmament conferences." *Id.*

22. This imbalance and the need for a curative device become readily apparent in the Tax Court when the Commissioner's vast array of investigative powers is weighed against the rather meager discovery techniques available to the taxpayer. See note 9 *supra*.

23. Discovery is said to have three distinct purposes and uses: (1) to narrow the issues so that trial is required only on those issues which remain controverted; (2) to obtain evidence for trial; and (3) to secure information concerning the location and existence of discoverable evidence. See *Berry v. Haynes*, 41 F.R.D. 243, 244 (S.D. Fla. 1966); *Broadway & Ninety-Sixth*

permitting the discovery of evidence admissible at trial and of all information reasonably calculated to lead to the discovery of such evidence.²⁴ A party is able to probe into areas which may allow him to secure information concerning the location and existence of admissible evidence.²⁵ In effect, discovery allows each party great latitude to uncover and examine his opponent's case. As a result, settlements are encouraged and facilitated since counsel for both parties are able to evaluate their respective positions well in advance of trial.

When the facts reveal a gray area in the law and litigation is required, full disclosure prevents unfair surprise at trial and ensures that the decision of the court accurately reflects the true state of the facts rather than strictly the skill and expertise of trial counsel. An expansive scope of discovery, then, is essential to promote fairness, justice and judicial economy. These goals are accomplished by placing before the court and the parties all relevant facts well in advance of trial.²⁶

St. Realty Co. v. Loew's, Inc., 21 F.R.D. 347, 353 (S.D.N.Y. 1958); Ricket v. Hayes, 473 S.W.2d 446, 448 (Ark. 1971); J. FLEMING & G. HAZARD, *supra* note 11, at 176-77.

24. FED. R. CIV. P. 26(b)(1). This rule provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Id.

Similar provisions regarding the scope of discovery are contained in the rules of practice and procedure of both the Court of Claims and the Tax Court. See notes 74-75 & 100 *infra*. Of course, a broad scope of discovery is of itself ineffective where available discovery techniques are restricted.

25. See Hickman v. Taylor, 329 U.S. 495, 507-08 (1947); FED. R. CIV. P. 26(b). The Advisory Committee Note to the 1948 amendment of this rule stated:

[T]he broad scope of examination . . . may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case.

Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, 5 F.R.D. 433, 454 (1946).

26. Discovery, in tax litigation as well as in other cases, allows the parties to learn prior to trial the facts surrounding the cause of action. It rejects the sporting theory of justice in favor of full disclosure and minimizes the possibility that the parties will be surprised at trial by the introduction of fresh evidence. In addition, discovery tends to reduce the time and expense required for trial, not only because it may lessen the need for adducing testimony in court in those cases that are tried, but also because it aids in the settlement rather than trial of cases by bringing out the facts of the cause of action at an early stage in the proceedings.

Dep't of Justice Study, *supra* note 7, at 105.

III. ANALYSIS OF CONVENTIONAL DISCOVERY TECHNIQUES

Discovery rules in most forums provide for depositions, written interrogatories, requests for production of documents and admissions. Of these techniques, depositions are the most commonly used and are considered the most indispensable.²⁷ The special value of oral depositions, as contrasted with written interrogatories, is readily apparent. The attorney has maximum flexibility and can alter his line of inquiry depending upon the information he receives. When, as a result of a particular line of questioning, new issues are developed, they can be explored immediately. In addition, since both the opposing party and his attorney are present, counsel can judge their credibility and cooperativeness.

Depositions also provide the spontaneity necessary for gauging the probable behavior of a witness at trial. This is particularly true since, unlike written interrogatories, there is no opportunity to avoid the thrust of a question by consulting one's attorney to frame an evasive response. Since each attorney is, in effect, provided a preview of the case prior to trial, both are in a better position to judge the settlement value of the case. In addition, oral depositions maximize effective use of the time of the parties, their attorneys and the court.

In contrast, empirical studies demonstrate that written interrogatories are a principal source of tension in discovery. They are widely criticized and have been involved in many disputes before the courts.²⁸ More protective orders and motions to compel are sought with respect to interrogatories than any other discovery device.²⁹ In forums which have adopted broad discovery, restrictions on the use of interrogatories have been frequently suggested.³⁰ The reasons for resistance to interrogatories are readily apparent.³¹ Un-

27. Statistical studies have demonstrated that oral depositions are used more often than other discovery devices. See W. GLASER, *PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM* 52 (1968).

28. See, e.g., Speck, *The Use of Discovery in United States District Courts*, 60 *YALE L.J.* 1132, 1144 (1951); Note, *Discovery: Boon or Burden?*, 36 *MINN. L. REV.* 364, 377-79 (1952).

29. See, e.g., Weinstein, *Standing Masters to Supervise Discovery in the Southern District, New York*, 23 *F.R.D.* 36, 38 (1959).

30. See W. GLASER, *supra* note 27, at 149; Rall, *Proposed Revision of Supreme Court Rules on Civil Discovery*, 46 *CHI. B. REC.* 257, 258-59 (1965).

31. See *Developments in the Law—Discovery*, 74 *HARV. L. REV.* 940, 959-65 (1961). The author noted that while interrogatories have proven useful in many respects, they are also subject to three distinct problems. First, because they are inexpensive and require no prior court approval, they are often used unnecessarily to harass, especially where a considerable burden of research and expense may be imposed on the answering party. Second, a problem arises in connection with the continuing duty under *FED. R. CIV. P.* 33 to ensure the truthfulness of responses up to the date of trial. Often a witness or evidence is discovered after the party has responded to the interrogatories. Third, since litigants have proven so resourceful

like depositions, which can be used as evidence only under special circumstances, responses to interrogatories can be used as admissions since they come from parties and are given under oath.³² Accordingly, there is little motivation to be helpful and a strong proclivity to provide evasive responses tailored by the attorney for the party to whom the interrogatories are propounded.³³

While objections to written interrogatories are often raised, motions to compel responses are even more common.³⁴ The reason appears to be that, because of the significant amount of time required to respond properly, interrogatories can be effectively used for harassment. As a result, more recipients of allegedly objectionable interrogatories simply fail to respond or respond evasively than file objections. The proponent, then, bears the burden of compelling a proper response with attendant inconvenience and delay.

Requests for production of documents have proven to be of great value.³⁵ Their purpose is to make available documents or other evidence in the possession of the opposing party, thus eliminating unfair surprise. An empirical study has demonstrated that in the federal district courts, requests for production are used in thirty-one percent of all cases.³⁶ In contrast, requests for admissions have proven rather ineffective.³⁷ They are used infrequently, and the responses tend to be evasive when they are used.

IV. POLICY CONSIDERATIONS UNDERLYING THE DISCOVERY PROVISIONS OF THE UNITED STATES TAX COURT

For fifty years, from 1924 to 1974, no provision for discovery was made in the rules of practice and procedure of the Tax Court.³⁸ Instead of establishing a procedure for obtaining full disclosure of the facts prior to trial, the court relied upon the sense of equity and fairness of opposing counsel to lead to voluntary stipulation of all

at evading answers or objecting to interrogatories, a considerable burden has been placed upon the courts because of the time devoted to motions to compel, motions for protective orders and the filing of objections. The author made several suggestions for alternatives to the current procedures which could serve to reduce these problems without eliminating the valid purposes served by and the usefulness of interrogatories.

32. See, e.g., *Reese v. Pennsylvania R.R.*, 14 F.R.D. 153 (N.D. Pa. 1953); Holtzoff, *A Judge Looks at the Rules after Fifteen Years of Use*, 15 F.R.D. 155, 165 (1954).

33. The defects in interrogatories were an underlying cause for the introduction of oral depositions into the Federal Rules of Civil Procedure. Sunderland, *Scope and Methods of Discovery Before Trial*, 42 YALE L.J. 863, 875-76 (1933).

34. W. GLASER, *supra* note 27, at 147, table 35.

35. *Id.* at 63.

36. *Id.* at 53, table 1.

37. *Id.* at 211.

38. See Drennen, *New Rules of Practice and Procedure of the United States Tax Court: How Are They Working?* 27 U. FLA. L. REV. 897, 897 (1975).

relevant facts to the fullest practicable extent.³⁹ Theoretically, this approach should work well, as it is premised on the admirable goals of genuine cooperation and free and fair production of relevant facts prior to trial. Realistically, however, the stipulation procedure allows counsel absolute discretion over the facts within his control and places him in the conflicting roles of his client's advocate and the government's advisor.⁴⁰ Furthermore, as an advocate, his inclination would be to adhere to the now objectionable "sporting theory of justice."

Facts, to be incorporated into a stipulation, must first be produced.⁴¹ Without an adequate means of discovery, those facts may never be produced; at best, voluntary production may be made at a time which will generate unfair surprise. The absence of full discovery provides the opportunity to obtain unfair advantage either through the total absence of production of relevant and material facts or through delayed production until shortly before trial, in an effort to force a better settlement, or during trial in an effort to influence directly the court's decision.⁴² Delaying production until shortly before trial creates serious problems with verification and

39. Former T. Ct. R. 31(b)(1). Former Tax Court Rule 31(b)(5) provided the only remedy for failure to stipulate. The procedure was, however, both cumbersome and of limited use. See Cohen, *supra* note 6, at 342. Certainly, where a party was unaware of the existence of facts under the control of his opponent, a motion under Rule 31(b)(5) would never have been considered.

40. In his role as an advocate, "a lawyer should represent a client zealously within the bounds of the law." ABA CANONS OF PROFESSIONAL ETHICS No. 7. Furthermore,

[i]n practice before the Internal Revenue Service, which is itself an adversary party rather than a judicial tribunal, the lawyer is under a duty not to mislead the Service either by misstatement, silence or through his client, but he is under no duty to disclose the weaknesses in his client's case.

Id. at No. 314. It has been argued that this provision does not impose a duty to disclose facts. See Saltzman, *Ethical Rules of Conduct for Tax Practitioners: Where Do We Now Stand?* 41 J. TAX. 162, 164 (1974).

The conflicting nature of the dual roles was expressed by Justice Frankfurter: "The function of an advocate is not to enlarge the intellectual horizon. His task is to seduce, to seize the mind for a predetermined end, not to explore paths for truths." F. FRANKFURTER, *OF LAW AND MEN* (1956).

41. In light of counsel's responsibility to his client, it is inappropriate to conclude that he would, or even should, voluntarily produce and freely stipulate all facts even to the detriment of his client's interests. See Cohen, *supra* note 6, at 340; note 40 *supra*.

The tactical advantage gained by withholding relevant facts could well influence the outcome of the trial. Nonproduction could have a significant impact where there are relevant but undisclosed rebuttal facts which would effectively refute the facts generating the unfair surprise, and where opposing counsel, though he has access to all other relevant facts, lacks the necessary trial expertise to regroup and use those facts to meet the unfair surprise. The failure to disclose facts does not violate any ethical rule provided the opposing party is not mislead thereby. See Saltzman, *supra* note 40, at 162.

42. A liberal approach to discovery, however, would encourage zealous representation of a client's interests since aggressiveness through the use of such discovery would be rewarded by thorough factual development. See notes 40-41 *supra*.

with obtaining what would otherwise be available rebuttal evidence.⁴³ Perhaps the greatest weakness of the stipulation procedure lies in its effect on testimonial evidence. Without adequate discovery, there is no procedure for determining the nature of a witness' testimony or gauging his credibility prior to trial.⁴⁴

As a result, the absence of discovery in the Tax Court served to discourage settlements and to enhance the prospect of obtaining unfair advantage at trial through nondisclosure. If the facts generating the surprise were obtainable through discovery, a timely opportunity would be presented to judge the merit of prospective settlements, to determine whether the facts presented were accurate and correct, to locate any available rebuttal evidence and to prepare adequately for trial. It was precisely these considerations which led to rejection of the "sporting theory of justice" and the adoption of broad discovery provisions such as those contained in the Federal Rules of Civil Procedure.⁴⁵

In 1974, the Tax Court took a step toward the elimination of the common law approach by adopting new rules of practice and procedure which provide limited discovery⁴⁶ in the form of written interrogatories⁴⁷ and requests for production of documents.⁴⁸ The new rules also provide for requests for admissions, which the court has characterized not as discovery but as an aid in trial preparation.⁴⁹ The court cautiously took this limited step, and, while it

43. The difficulty of obtaining a continuance, even where the grounds are apparently justifiable, adds to this problem. See, e.g., *United States v. Allen*, 522 F.2d 1229, 1232-33 (6th Cir. 1975), *cert. denied*, 423 U.S. 1072 (1976) (denial of continuance reversed only where clear abuse of discretion is shown).

44. Although counsel for each side can attempt to contact witnesses informally to discuss the case with them, there is no alternative available if witnesses prove uncooperative. Nor is there any method of pinning a witness down and binding him to his story. Consequently, even if a witness were agreeable to a pretrial interview, there would be nothing to preclude him from changing his testimony at trial. The prospect of such surprise can be greatly reduced if a witness' testimony has been previously recorded under oath.

45. See notes 11-24 and accompanying text *supra*.

46. I.R.C. § 7453 provides that the Tax Court shall have authority to prescribe rules of practice and procedure governing its proceedings. Part of the impetus for the Tax Court's adoption of discovery was probably the debate generated at the 1962 meeting of the ABA Section of Taxation, regarding a proposal that federal district courts be given concurrent jurisdiction with the Tax Court, such that taxpayers would have two forums in which payment of the tax was not required. See Drennen, *supra* note 38, at 897-98. The proposal stemmed in part from the fact that the rules of the Tax Court contained no provision for discovery. *Id.* See also *Proposed Rules of the Tax Court, A Panel Discussion Sponsored by the Section of Taxation*, 26 TAX LAW. 377, 378 (1973) [hereinafter cited as *Proposed Rules*].

47. U.S.T.C. R. PRAC. & PRO. 71.

48. *Id.* R. 72.

49. *Id.* R. 90. The note to Rule 90 indicates that requests for admissions are principally a means of establishing matters which are not disputed. This distinction was articulated by Judge Raum of the United States Tax Court:

sought to parallel the Federal Rules of Civil Procedure as closely as possible, it was reluctant to reach their full scope. The court feared that discovery would become a substitute for the stipulation procedure and that the court's dockets and judges would become mired in proceedings to administer and enforce discovery.⁵⁰ Primary reliance for obtaining the facts was to be placed on the stipulation procedure, and if the discovery rules were abused, the court would consider their elimination from the rules of practice.⁵¹

V. COMPARISON OF DISCOVERY IN THE TAX COURT WITH DISCOVERY IN THE COURT OF CLAIMS AND THE FEDERAL DISTRICT COURTS

A. *Discovery in the Tax Court*

The new Tax Court rules reject the detailed fact pleading required at common law. The rules expressly provide that no technical forms of pleadings are required and that the pleadings shall give the parties and the court "fair notice" of the matters in controversy.⁵² Despite rejection of the common law approach to pleading, the Tax Court has failed to provide for discovery to the extent required for full development of the facts and for the elimination of unfair surprise.

The rules of the court provide that the parties cannot initiate discovery until after they have failed to attain their objectives through informal consultation.⁵³ In *Branerton Corp. v. Commissioner*,⁵⁴ the court concluded that the petitioner failed to satisfy this requirement because he initiated discovery prior to any

And note, if you please, the essential difference between discovery on the one hand and request for admission on the other. Both appear to be superficially similar but they are markedly different. In discovery, you don't know the answer or are unsure. You are seeking information. By contrast, in the case of a request for admission, you know the answer, and what you are seeking to do is to nail it down for the purposes of the case.

Proposed Rules, *supra* note 46, at 382.

From a procedural perspective, the only distinction between admissions and written interrogatories and requests for documents is the absence of the requirement of informal consultation as to the former. See *Pearsall v. Commissioner*, 62 T.C. 94 (1974). The timing requirements for commencement and conclusion of discovery remain applicable to admissions. See U.S.T.C. R. PRAC. & PRO. 70(a)(2).

50. See *Drennan*, *supra* note 38, at 899.

51. *Id.*

52. U.S.T.C. R. PRAC. & PRO. 31(a). In view of the emphasis which the court deems should be placed on notice pleading it has correspondingly deemphasized motions for more definite statements under Rule 51. For example, in *Ryskiewicz v. Commissioner*, 63 T.C. 83 (1974), the court denied the petitioner's motion for a more definite statement with respect to respondent's fraud allegations in its answer, concluding that while more information might be appropriate, the pleadings met the fair notice requirements of the rules.

53. U.S.T.C. R. PRAC. & PRO. 70(a)(1).

54. 61 T.C. 691 (1974).

informal conferences for the exchange of information or stipulation of facts. The court granted the government's motion for a protective order.⁵⁵ Subsequently, in *International Air Conditioning Corp. v. Commissioner*,⁵⁶ the court held that classifying a request for information as "informal" and offering to receive the information in person failed to satisfy the spirit of the consultation requirement. Instead, the court determined that "discussion, deliberation, and an interchange of ideas, thoughts, and opinions between the parties" was required.⁵⁷

Thus, before any discovery may be initiated in the Tax Court, the parties must either schedule or hold a settlement conference.⁵⁸ While the informal exchange of information should be encouraged, there should be no such fixed requirement, especially in situations where it is already apparent that opposing counsel will prove uncooperative. The common law experience with the "sporting theory of justice" evidences that where delayed production will be detrimental to an opponent's case, information will seldom be informally or voluntarily disclosed. Therefore, liberal discovery provisions should be available to facilitate full development of the facts at the earliest possible time. Early access to and disclosure of information can spell the difference between justice and injustice. In any event, there should be no mandatory requirement of informal consultation. The determination whether to confer informally or to initiate discovery in the first instance should rest with the good judgment and sound discretion of counsel.

Once the requirement of informal consultation has been met, each party may obtain discovery in the Tax Court only by means of written interrogatories⁵⁹ and requests for production of documents and things.⁶⁰ The rules also provide for requests for admissions through which a party may be required to admit the truthfulness

55. The court stated:

For many years the bedrock of Tax Court practice has been the stipulation process, now embodied in Rule 91. Essential to that process is the voluntary exchange of necessary facts, documents, and other data between the parties as an aid to the more expeditious trial of cases as well as for settlement purposes. The recently adopted discovery procedures were not intended in any way to weaken the stipulation process.

Id. at 692 (citation omitted).

56. 67 T.C. 89 (1976).

57. *Id.* at 93.

58. It is the author's experience that the office of the Regional Counsel for the IRS schedules settlement conferences as a matter of course before initiating discovery. If the petitioner attempts to initiate discovery before the scheduled conference date, the government will automatically file a motion for protective order.

59. U.S.T.C. R. PRAC. & PRO. 71.

60. *Id.* R. 72.

of any fact or application of law to the fact.⁶¹ All of these techniques, however, may be directed only to the parties to the pending actions.⁶² This raises one of the most significant defects in the Tax Court rules—there is no provision for third party discovery. A petitioner, as a result, cannot obtain the testimony of, or documents from, third persons not parties to the proceeding prior to the date of trial.⁶³

The rules do allow a party to obtain a copy of a statement made by him, related to the subject matter of the case and in the possession of another party where he has no convenient means of otherwise obtaining it.⁶⁴ The court, however, has restricted application of this provision to statements made directly to another party.⁶⁵ For example, if the petitioner made a statement to a third party which is later acquired by the respondent from that third party, it is not within the purview of the rule since it is merely "a third party statement."⁶⁶ In addition, since there is no third party discovery, there is no technique for obtaining information concerning the statement directly from the third party.

Not only must the parties exhaust informal consultations before initiating discovery, but once they have done so, they must comply with strict timing requirements regulating discovery procedures.⁶⁷ Since the Tax Court, in contrast to the Court of Claims and federal district courts, has no provision for modification of its rules through agreement of the parties, it is probable that if informal consultation were not completed prior to these deadlines, the right to discovery would be lost.⁶⁸ Even if informal consultation were com-

61. *Id.* R. 90. It is not ground for objection that the admissions relate to opinions of law or fact. *See, e.g., Estate of William R. Allensworth v. Commissioner*, 66 T.C. 33 (1976) (requiring the Commissioner to admit certain matters including statements of position concerning his construction of a will). *See also* note 49 *supra*.

62. *See, e.g., U.S.T.C. R. PRAC. & PRO.* 71(a), 72(a) & 90(a).

63. The rules do allow the issuance of subpoenas and subpoenas duces tecum to compel the attendance of witnesses and the production of documents at trial. *Id.* R. 147. This does not, however, provide an opportunity to confront crucial witnesses or to examine important documents prior to trial.

64. *Id.* R. 70(c).

65. *Phelps v. Commissioner*, 62 T.C. 513 (1974).

66. *Barger v. Commissioner*, 65 T.C. 925, 929 (1976).

67. Written interrogatories must be initiated 120 days prior to call of the case for trial. *ABA, Points to Remember*, 28 TAX LAW. 409, 410 (1974). This period represents the 75 day deadline on completion of discovery and the 45 day response period. *U.S.T.C. R. PRAC. & PRO* 70(c) & 71.

Similarly, requests for documents and admissions must be made 105 days prior to calendar call in order to be timely. *Id.* R. 72 & 90.

68. The rules of practice and procedure in both the Court of Claims and the federal district courts expressly provide for modification of discovery provisions pursuant to an agreement between the parties. *See* notes 98 & 115 *infra*. While it is arguable that the parties to a proceeding in the Tax Court could, by written agreement, modify the discovery deadlines, the absence of express sanction portends an ominous fate for this procedure.

pleted prior to these cutoff dates, the combination of informal consultation and deadlines makes follow up discovery difficult, if not impossible, in the absence of a continuance. Rarely does a party have the opportunity to use supplemental discovery in the Tax Court after receiving the response to his initial discovery request. Though the information embodied in the response may have developed new avenues or approaches which should be immediately explored, there will be little opportunity to do so until trial; at that point, however, it may be too late to avoid unfair surprise.

While this dilemma could be obviated through the use of oral depositions,⁶⁹ the rules of practice for the Tax Court do not provide for this means of discovery.⁷⁰ Such a provision, however, would give counsel the flexibility to explore new avenues immediately as they are developed during the deponent's oral testimony and the benefit of personal contact for gauging the credibility of each witness. After the depositions of several witnesses, an attorney can better foresee the overall impact of their testimony at trial, and counsel can determine more accurately the settlement value of each case. The discovery rules of the Tax Court do not provide such opportunities and, indeed, as presently structured, do not give assurance of any personal contact, except between opposing counsel prior to trial.

This reluctance to allow depositions as a means of discovery probably reflects the fear that discovery would become a substitute for the stipulation procedure and that the court would become mired in discovery proceedings.⁷¹ In light of these concerns, it is anomalous that the court would adopt written interrogatories as a discovery technique while precluding the use of depositions for discovery. The use of written interrogatories in other forums has been strongly criticized, and they have been the subject of more protective orders and motions to compel than any other technique.⁷² By adopting discovery through the use of written interrogatories, the Tax Court may be generating problems it sought to avoid. Certainly, if written interrogatories are to be utilized, discovery by way of deposition, which in comparison has no significant history of abuse, should be provided as well.⁷³

The scope of discovery for those procedures which are available under the rules of the Tax Court appears broad. It extends to any

69. See note 27 and accompanying text *supra*.

70. See U.S.T.C. R. Prac. & Pro. 80(a). The note to Rule 81 states: "[T]he primary reason [for a deposition] must be for perpetuation of testimony and not for discovery." *Id.* R. 81 n.; see *Gauthier v. Commissioner*, 62 T.C. 245 (1974).

71. See *Drennan*, *supra* note 38, at 847.

72. See notes 28-33 and accompanying text *supra*.

73. See note 27 and accompanying text *supra*.

matter not privileged which is relevant to the subject matter involved in the pending case.⁷⁴ It is not ground for objection that the information sought will be inadmissible at trial if the information "appears reasonably calculated to lead to discovery of admissible evidence."⁷⁵ Nevertheless, the requirement of informal consultation coupled with strict cutoff dates and the absence of depositions or other third party discovery methods effectively curtail what would otherwise be an effective and functional scope of discovery. A party using discovery should be able to probe into his opponent's case to the greatest practicable extent in order to secure information concerning the location and existence of evidence; in the Tax Court, however, he is effectively precluded from doing so.

The Tax Court's application of its discovery rules has been ambivalent and has restricted expansion of discovery to the scope apparently allowed under the rules. Several cases, without question, have adopted a flexible and liberal approach.⁷⁶ Other cases, however, have been restrictive. For example, in *P.T. & L. Construction Co. v. Commissioner*,⁷⁷ the court created a qualified privilege protecting the "decisional process, i.e., the opinions and recommendations of administrative officials,"⁷⁸ which effectively precludes discovery of all appellate conferee reports.⁷⁹ Carried to its logical ex-

74. U.S.T.C. R. PRAC. & PRO. 70(b).

75. *Id.*

76. In *Pearsall v. Commissioner*, 62 T.C. 94, 95 (1974), the court held that the requirement of informal consultation does not apply to requests for admissions but only to requests for production of documents and written interrogatories. *See also* note 49 *supra*. In *Estate of William R. Allensworth v. Commissioner*, 66 T.C. 33, 38 (1976), the court concluded that admissions may be applied not only to statements of fact but also to the application of law to facts. In *Corelli v. Commissioner*, 66 T.C. 220, 222-23 (1976), the court granted the petitioner's request for admissions with respect to the accuracy of an IRS letter ruling as well as to the findings of fact contained therein; the court compelled production of the ruling and related documents after concluding that no privilege was applicable. In *Singleton v. Commissioner*, 65 T.C. 1123, 1137 (1976), the court denied the government's motion for a protective order filed to stay discovery pending petitioner's criminal trial. The court explained that the petitioner, whose assets had been the subject of a jeopardy assessment and who was indicted only after his civil tax case was already "well down the road," had a right to have his civil case promptly decided; the right included utilization of available discovery procedures.

77. 63 T.C. 404 (1974).

78. *Id.* at 412.

79. In reaching this conclusion, the court accepted the reasoning but rejected the results in *Peterson v. United States*, 52 F.R.D. 317 (S.D. Ill. 1971), and *Abel Inv. Co. v. United States*, 53 F.R.D. 485 (D. Neb. 1971), both requiring production of appellate conferee reports. The court instead cited *Simons-Eastern Co. v. United States*, 354 F. Supp. 1003 (N.D. Ga. 1972), and *Weir Foundation v. United States*, 72-1 U.S. Tax Cas. 84,520 (S.D.N.Y. 1972), holding that production was not required. *See* notes 120-123 and accompanying text *infra*. The court's reliance on *Simons-Eastern Co.* was misplaced, because in that case the court subsequently required production of the appellate conferee's report. 55 F.R.D. 88 (N.D. Ga. 1972). *See* *Equal Employment Opportunity Comm'n v. Los Alamos Constructors*, 382 F. Supp. 1373, 1381 (D.N. Mex. 1974) (emphasizing that *Simons-Eastern Co.* required production of conferee's report); note 120 and accompanying text *infra*.

treme, this rationale would protect the internal reports of all government officials. Such a result strains credulity; it was certainly not foreseen by many commentators prior to adoption of the new rules,⁸⁰ and it has not been a foreordained conclusion in other tax forums.⁸¹

In the same vein, the court has held that those portions of the special agent's report containing his recommendations and his deliberations leading up to those recommendations are protected by "executive or governmental privilege."⁸² The court has indicated that this exemption should apply where necessary to protect government officials from embarrassment due to dissemination of certain statements to the public.⁸³ The court has also been reluctant to permit discovery of the "T-letter"⁸⁴ portion of the revenue agent's report and related workpapers.⁸⁵ In *Barger v. Commissioner*,⁸⁶ the court denied production of a revenue agent's entire report on the ground that it was cumulative evidence already discovered. While cumulative evidence may be excluded at trial on grounds of judicial economy, it should be included in discovery because the scope of discovery is broader than the scope of admissible evidence. Discovery of such information should be permitted. Although the facts may initially appear to vary only slightly from other information already revealed, they may on detailed examination contain refinements leading to or disclosing previously unknown evidence. By precluding discovery on the ground that the information sought is cumulative of other evidence already discovered, the court creates

Similarly, in *Weir Foundation* production was withheld but on the grounds of work product, a result expressly rejected by the court in its *P.T. & L. Constr. Co.* decision. See also Murray, *Tax Court Discovery: The Need for Restraint*, 53 TAXES 327, 334 (1975) (discussing this distinction). In effect, the court withheld production without any analogous authority to support its decision.

80. See, e.g., Comment, *supra* note 2, at 1368. The author suggests that if requests for production of documents could reach internal government memoranda, it would be "a tremendous boon to the taxpayer in his quest to learn the underlying theories the Government has used in its determination of the taxpayer's deficiency." *Id.*

81. Many district court cases have required production of appellate conferee reports. See, e.g., *Simons-Eastern Co. v. United States*, 55 F.R.D. 88 (N.D. Ga. 1972); *Abel Inv. Co. v. United States*, 53 F.R.D. 485 (D. Neb. 1971); *Peterson v. United States*, 52 F.R.D. 317 (S.D. Ill. 1971). The Court of Claims has cited the *Abel* and *Peterson* cases in also requiring production. See *Cetron Elec. Corp.*, 208 Ct. Cl. 985, 992 (1975).

82. *P.T. & L. Constr. Co.*, 63 T.C. at 411.

83. *Id.* at 410-12.

84. A transmittal letter is a summary report which is not given to the taxpayer. It includes confidential, informant and third party information as well as the agent's appraisal of the taxpayer. See *Branerton Corp. v. Commissioner*, 64 T.C. 191, 195 (1975).

85. In *Branerton Corp.*, the court, concluding that discovery of the T-letter was warranted, emphasized the heavy burden placed on the petitioner to show that the adjustment by the respondent of the petitioner's reserve for bad debts constituted an abuse of discretion. *Id.* at 200-01.

86. 65 T.C. 925, 931 (1975).

one of the very difficulties it eschewed in adopting restrictive discovery. It becomes "mired in discovery proceedings,"⁸⁷ and in effect must review *in camera* all information sought to be discovered to determine whether it is cumulative.⁸⁸

B. *Discovery in the Court of Claims*

Discovery in the Court of Claims is broader both in terms of availability and scope than in the Tax Court.⁸⁹ In the Court of Claims, there is no requirement that the parties confer informally prior to initiating discovery. Instead, discovery may be initiated immediately after the filing of an answer or other responsive pleading to the petition.⁹⁰ Provision for early initiation of discovery optimizes the time of counsel for both sides, obviating the requirement of attending conferences designed solely for the informal exchange or stipulation of information.

Furthermore, the Court of Claims provides for methods of discovery unavailable in the Tax Court.⁹¹ These include the use of third party discovery. Under the rules of practice of the Court of Claims, depositions both on oral examination and written questions may be taken of any person, parties or third parties.⁹² In addition, since subpoenas duces tecum directed to third parties may be used in connection with the taking of all depositions, the production of documents far in advance of trial may be effectively compelled from those third persons.⁹³

Discovery may also be obtained by "calls," a method unique to the Court of Claims which consists of calling upon and requiring

87. See note 50 and accompanying text *supra*.

88. The court has created a special exception precluding discovery of statements of either the petitioner or third party witnesses which are to be used primarily for impeachment purposes. See, e.g., *Barger*, 65 T.C. at 929-30. But see *Industrial Elec. Sales & Serv., Inc. v. Commissioner*, 65 T.C. 844 (1976) (ordered government to produce witnesses' statements allegedly to be used for impeachment purposes but delayed production until petitioner responded to government's request for admissions).

89. See note 7 *supra* (differences in discovery procedures between forums provide a basis for forum-shopping). See generally Evans, *Current Procedures of Court of Claims*, 55 GEO. L.J. 422, 428 (1966) (discussing discovery in the Court of Claims); see also Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 609 (1969) (describing the Court of Claims' role in tax litigation as "an anachronism, which serves today only to provide an opportunity for forum-shopping"); Miller, *Tax Litigation in the Court of Claims*, 55 GEO. L.J. 454, 454 (1966) (emphasizing that tax refund suits represent the single largest category of litigation in the Court of Claims).

90. CT. CL. R. 71(c).

91. See *id.* R. 71(a) (providing a general summary of available discovery methods).

92. *Id.* R. 84 (providing for depositions on oral examination with leave of court); *id.* R. 85 (providing for depositions on written question with leave of court).

93. *Id.* R. 82.

production of information or papers from a department or agency of the United States government.⁹⁴ Moreover, as in the Tax Court, discovery, directed only to parties, may be obtained by means of written interrogatories,⁹⁵ requests for production of documents and things,⁹⁶ and admissions.⁹⁷ While discovery, with the exception of written interrogatories, may only be obtained by leave of the court, the parties have authority to modify the procedures under the rules by written stipulation so as to permit other methods of discovery.⁹⁸

Opinions of the Court of Claims regarding its discovery procedures are published only on rare occasions.⁹⁹ However, in contrast with the somewhat ambivalent approach of the Tax Court, the Court of Claims has been "relatively liberal in granting discovery motions."¹⁰⁰ For instance, in *Centron Electric Corp.*,¹⁰¹ the plaintiff sought production of internal reports of IRS officials. The government's principal contention was that the documents were protected by governmental privilege. In rejecting this claim, the court pointed out there is "a general public policy for production of evidence needed in the search for truth. In the adversary system of establishing truth by litigation, this is very important, for such a system required development of all relevant facts to produce real justice through due process."¹⁰² In ordering production, the court relied primarily on two district court cases¹⁰³ for what it considered "the weight of modern authority."¹⁰⁴ The court viewed these cases, which required production of appellate conferee reports, as holding that the mere presence of government "opinions, conclusions and recommendations . . . is no protection against discovery"¹⁰⁵ when relevance and genuine need are shown.

In *Shakespeare Co. v. United States*,¹⁰⁶ the Court of Claims held that IRS private and letter rulings issued to third party taxpayers need not be produced. This position, also taken by the Tax Court,¹⁰⁷

94. *Id.* R. 75. See also, Evans, *supra* note 89, at 429.

95. Ct. Cl. R. 73.

96. *Id.* R. 74.

97. *Id.* R. 72.

98. *Id.* R. 71(d).

99. See Miller, *supra* note 89, at 466.

100. *Id.* The scope of discovery available in the Court of Claims is quite broad. See, e.g., *Farm & Home Aluminium Prods., Inc. v. United States*, 211 Ct. Cl. 291 (1976).

101. 207 Ct. Cl. 985 (1975).

102. *Id.* at 989.

103. See *Abel Inv. Co. v. United States*, 53 F.R.D. 485 (D. Neb. 1971); *Peterson v. United States*, 52 F.R.D. 317 (S.D. Ill 1971). See also notes 120-23 and accompanying text *infra*.

104. 207 Ct. Cl. at 992.

105. *Id.*

106. 389 F.2d 772, 778 (Ct. Cl. 1968).

107. See *Davis v. Commissioner*, 65 T.C. 1014, 1022 (1976); *Teichgraeber v. Commissioner*, 64 T.C. 453, 456 (1975).

has been rejected through congressional adoption of 26 U.S.C. § 6110.¹⁰⁸ This statute, providing for public inspection of IRS private rulings and other determinations, represents a public policy favoring increased disclosure by the IRS concerning its advice to taxpayers about the tax treatment of their contemplated transactions. Increased discovery under the Tax Court rules would also further this policy objective.

C. *Discovery in the Federal District Courts*

Discovery in federal district courts is broader than that available in either the Tax Court or the Court of Claims. There is no requirement of informal consultation in the district courts. Instead, the general rule is that discovery may be obtained from the plaintiff after his filing of the complaint and from any other party after service of the summons and complaint on that party.¹⁰⁹

The discovery techniques available in the district courts allow counsel to avoid unfair surprise. These methods include the use of depositions on both oral examination¹¹⁰ and written questions.¹¹¹ As in the Court of Claims, these depositions may be directed to both parties and third parties. In addition, the use of subpoenas in connection with depositions provides a means of obtaining the discovery of documents from third parties.¹¹² As in the Tax Court, discovery is supplemented by requests for production of documents and things,¹¹³ and admissions,¹¹⁴ all of which may be directed only to parties. Leave of the court generally is not required in order to employ any of these available means of discovery. Moreover, in line with the Court of Claims but in contrast to the Tax Court, the district courts give the parties additional discretion and flexibility to modify the available discovery procedures by written stipulation.¹¹⁵ In addition, the district courts have no specific rule requiring completion of discovery by a certain deadline prior to trial. This is established by local rule.

The district court rules serve as a model for maximizing discovery prior to trial. By not requiring informal consultation, by provid-

108. 26 U.S.C.A. § 6110 (West Supp. 1978).

109. See FED. R. Civ. P. 26, 31, 33, 34 & 36. With respect to depositions on oral examination, however, leave of the court is required if the plaintiff seeks to take a deposition within 30 days of service of summons, unless the defendant has initiated discovery or is about to go beyond a 100 mile radius of the district. FED. R. Civ. P. 30(a) & (b)(2).

110. *Id.* R. 30.

111. *Id.* R. 31.

112. *Id.* R. 45(b).

113. *Id.* R. 34.

114. *Id.* R. 36.

115. *Id.* R. 29.

ing for all traditional means of discovery without leave of the court and by not requiring completion of discovery by a certain fixed date prior to trial, the federal district courts tend to minimize the prospect of unfair surprise. The effect is a virtual rejection of the "sporting theory of justice."

The scope of allowable discovery under the rules of the district courts is basically identical, insofar as linguistic content is concerned, to that in the Tax Court and the Court of Claims.¹¹⁶ Despite the apparent coextensive scope of discovery under the respective rules, decisions by the district courts in connection with tax matters have tended to be much more flexible in authorizing discovery than have those of the Tax Court.¹¹⁷ Although the IRS "holds the track record as the most reluctant bureaucratic dragon in its claims of confidentiality," it has, in the district courts, suffered an "almost unbroken string of losses . . . in its unrelenting defiance of the requirements of disclosure."¹¹⁸

In *Simons-Eastern Co. v. United States*,¹¹⁹ the government was ordered to produce several documents from its files on the company seeking repayment of tax overcharges. The IRS had contended that documents such as the intra-agency reports of the various agents investigating the taxpayer were the work product of the government created in anticipation of litigation. Therefore, the information contained within the documents was privileged because it consisted of opinions and legal conclusions of the agents rather than objective facts. The court reviewed the files, balanced the interests of the parties and ordered disclosure of the relevant factual material but specifically exempted any documents relaying conclusions and opinions of the agents.

In *Peterson v. United States*,¹²⁰ the district court was even more liberal in opening IRS files to the taxpayer. There, the court construed the discovery provisions of the Federal Rules of Civil Proce-

116. See, e.g., notes 74 & 91 *supra*. See also, Cr. Cl. R. 71(b)(1).

Under the Federal Rules of Civil Procedure, "parties may obtain discovery of any matter, not privileged, which is related to the subject matter of the pending action. It is not ground for objection that the information will be inadmissible at trial if the information sought appears reasonably calculated to lead to discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

117. See, e.g., *Equal Protection Opportunity Comm'n v. Los Alamos Constructors, Inc.*, 382 F. Supp. 1373 (D.N. Mex. 1974).

118. *Id.* at 1376, 1379. In *Center on Corporate Responsibility, Inc. v. Schultz*, 368 F. Supp. 863 (D.D.C. 1973), the IRS failed to comply with the court's discovery orders, claiming that executive privilege barred discovery of information located in the White House. Because the IRS hindered and delayed discovery, the plaintiff's claim was deemed established without the proof discovery might have yielded. *Id.* at 873.

119. 55 F.R.D. 88 (N.D. Ga. 1972).

120. 52 F.R.D. 317 (S.D. Ill. 1971).

dures as encouraging the free discovery of all relevant material so long as it was not prepared in anticipation of litigation. Since few cases result in litigation, the court presumed the file was not privileged. The government was given the burden of establishing that a file was trial material rather than material gathered for information and assessment.

*Abel Investment Co. v. United States*¹²¹ was similar to *Peterson* in both facts and result. The taxpayer sought discovery of the revenue agent's report along with all schedules and exhibits, worksheets used in preparing the report, notes of conversations held between the revenue agent and others in the course of preparing the report, and the appellate conferee's report. Again, the IRS attempted to prevent discovery on grounds of work product and governmental privilege. The district court rejected the work product contention,¹²² emphasizing that to conclude otherwise

would indeed put the government in a position markedly advantageous to that of a private litigant. I think that any government agency whose determinations might lead to litigation could show the same continuity, as all serve the same master; but to hold that any intra-agency or inter-agency report which eventually could be relayed to the attorney who must try the case for the government is a report or document prepared in anticipation of litigation would be effectively to shield all government reports. This is, I think, clearly contrary to the intent of Rule 26.¹²³

The court found that the public policy argument of governmental privilege was undercut by the government's own affidavits, which established that the requested documents contained nothing which would prove unduly embarrassing. As a result, it allowed discovery.

VI. PROPOSALS FOR REFORMING THE RULES OF DISCOVERY IN THE TAX COURT

Both the Court of Claims and the federal district courts provide

121. 53 F.R.D. 485 (D. Neb. 1971).

122. The district court identified several factors establishing that the requested documents were not work product prepared in anticipation of litigation. First, the reports were routinely prepared in each case and before filing of any lawsuit. Second, they were not prepared by or at the direction of an attorney who would try the case should litigation develop. Third, since the reports were impartial as between the taxpayer and the government, they were not designed to be adversarial in nature. Fourth, the documents probably did not fix the government's theory of the case to be used at trial, because trial counsel should and undoubtedly would set the defense from all available facts and theories whether or not conceived and expressed by personnel at the various stages of the settlement process. Fifth, the reports were not the result of the government's own investigative work but rather of evidence submitted by both the taxpayer and the government. *Id.* at 489.

123. *Id.* at 490.

a more liberal and pragmatic approach to discovery than does the Tax Court.¹²⁴ Neither requires informal consultation prior to the use of discovery, and the federal district courts, in contrast to the Tax Court, do not provide a stringent cutoff deadline curtailing the use of discovery.¹²⁵ In addition, the district courts and the Court of Claims provide for third party discovery through the use of depositions which, when used in conjunction with subpoenas duces tecum, effectively require the production of documents from third parties. Since the depositions may be oral, as well as on written questions, maximum flexibility is afforded through direct personal contact to gauge the credibility of witnesses and to develop further factual discovery. The Court of Claims and the federal district courts appear to have been more liberal in the construction of their respective rules¹²⁶ than has the Tax Court.

Some commentators have urged that discovery in the Tax Court should not be expanded, since to do so would benefit the government more than the taxpayer.¹²⁷ Some of these commentators were opposed to even the limited discovery provisions implemented by the Tax Court.¹²⁸ They argue that since the taxpayer typically has control of the facts and may reveal them as strategy dictates, to implement discovery would simply provide the government with a means of getting at these facts and could lead to governmental abuse and harassment.¹²⁹

Other commentators, however, find this a shortsighted viewpoint.¹³⁰ Through the use of its summons power, the government already has a means of obtaining disclosure of virtually any information.¹³¹ This flexible power, which is subject to neither consultation requirements nor specific cutoff dates, gives the government authority to obtain oral testimony of any party or third party witnesses¹³² and disclosure of documents in the hands of third parties.

124. See Dep't of Justice Study, *supra* note 7, at 105-06.

125. See note 67 and accompanying text *supra* (discussion of deadlines in the Tax Court). The Court of Claims does have an analogous but less stringent rule; after the scheduling of trial, no measure of discovery may be commenced without leave of the court for good cause shown. Ct. Cl. R. 71(c).

126. See Jones, *supra* note 2, at 377.

127. See, e.g., Cohen, *supra* note 6, at 340; *Proposed Rules*, *supra* note 46, at 387-89 (remarks of Lester M. Ponder).

128. See *Proposed Rules*, *supra* note 46, at 387.

129. See Cohen, *supra* note 6, at 340-41.

130. See, e.g., Dep't of Justice Study, *supra* note 7, at 109-10; Comment, *supra* note 2, at 1362 *passim*.

131. See note 9 *supra*.

132. It has been held that use of the summons power is available to the government even though the taxpayer's case is pending before the Tax Court. See, e.g., *National Plate & Window Glass Co. v. United States*, 254 F.2d 92, 93 (2d Cir. 1958); *In re Norda Essential Oil & Chem. Co. v. United States*, 253 F.2d 700, 701 (2d Cir. 1958).

A taxpayer who brings suit in the Tax Court has none of these means for compelling disclosure of information.¹³³

The effect is to discriminate against those taxpayers who are relegated to suit in the Tax Court by virtue of their monetary situation. A taxpayer in this position is twice discriminated against. He is unable to take advantage of the broader discovery provisions in the Court of Claims and district courts, methods available to those who can pay the tax in advance, and he is unable to utilize methods of disclosure available to his opponent, the government. One of the aims of discovery is to correct the imbalance between the investigatory resources of large and small litigants.¹³⁴ This imbalance remains uncorrected in the Tax Court.

Discovery, through oral depositions or third party discovery, would provide substantial assistance to the taxpayer faced with litigation where the government plans to call as a witness the revenue officer who investigated the underlying facts concerning an assertion of transferee liability¹³⁵ or the special agent who performed the same function concerning an assertion of fraud penalty. Written interrogatories are of little assistance in these typically recurring fact situations. Responses are often couched in evasive terms, and there is little opportunity for followup under the strict timing requirements of the Tax Court.¹³⁶ Present Tax Court rules provide no opportunity for a face to face meeting with either of these government witnesses prior to trial. Oral depositions would provide both an opportunity for judging the credibility of the witnesses and a means for developing and exploring new facts prior to trial.

Taxpayer litigants in the Tax Court are placed at a severe disadvantage at trial where pretrial discovery of third party government witnesses is not available. Consider, for example, the need to obtain discovery concerning hostile minority shareholders who are prepared to testify for the government in an estate tax case regarding decedent's exercise of effective control,¹³⁷ or third party govern-

133. A taxpayer in the Tax Court has no assurance that his counsel has been able to contact personally the government's witnesses prior to trial. See note 70 and accompanying text *supra*. A taxpayer is unable even to obtain copies of his own statements made to third parties which have come into the hands of the government. See notes 65-66 and accompanying text *supra*.

134. See notes 21-23 and accompanying text *supra*.

135. See, e.g., *Newsome v. Commissioner*, 35 T.C.M. (CCH) 335, 337 (1976) (revenue officer testified as to insolvency of the transferor and the fact "that there were no prospects for future development, production or sales"). See generally *Newton, Collection of Federal Taxes by Transferee Liability: How it Works; Who Can be Caught*, 43 J. TAX. 112, 113-14 (1975) (discussing substantive requirements of transferee liability).

136. See L. PONDER, *UNITED STATES TAX COURT PRACTICE AND PROCEDURE* 105-06 (1976) (discussing strict timing requirements for discovery in Tax Court).

137. See, e.g., *Estate of Alfred J. Schneider-Paas v. Commissioner*, 28 T.C.M. (CCH) 81 (1969).

ment witnesses who are prepared to testify where the taxpayer is alleged to have failed to report income.¹³⁸

When considering the effects of the expansion of discovery in Tax Court proceedings, attention should not be directed to who benefits the most, the government or the taxpayer, but rather to the promotion of justice and fairness in Tax Court litigation. The Tax Court should reject the "sporting theory of justice." Victory in the Tax Court should be won on the merits based on all the facts; surprise should play no part in that process.

In the past, the Tax Court has not been in a position to gauge the effectiveness of discovery due to the nature of its procedures. As pointed out in a recent letter from Chief Judge Featherston, "the discovery papers with the exception of requests for admissions (if such requests are regarded as discovery) are not filed with the Court unless a dispute arises between parties. For that reason, the Court is not fully aware of the extent of the use of the discovery procedures."¹³⁹ As a result, the court of necessity has "depended heavily upon reports from the Bar as to the effectiveness and fairness of the operation of [its] Rules."¹⁴⁰ In this connection, the Tax Court has taken the initiative. At the court's request, *The Tax Lawyer* recently initiated a survey of tax practitioners exploring areas where alterations and improvement of the rules of practice and procedure of the court might be appropriate.¹⁴¹ The results of the Tax Court Rules Experience Survey, released in a Report of the Committee on Court Procedure of the American Bar Association Section on Taxation, dated May 6, 1977, reflect a growing realization of the need and increasing demand for additional discovery in the Tax Court.¹⁴²

A significant majority of the survey respondents agreed that discovery procedures facilitated both the preparation of stipulation facts and the settlement of a case through disposition without trial.¹⁴³ The responding practitioners not only believed that the new discovery procedures had not been abused¹⁴⁴ but also indicated that the benefits of discovery far outweighed any possible burdens or

138. See, e.g., *Branerton Corp. v. Commissioner*, 64 T.C. 191 (1975). But see *Weimerskirch v. Commissioner*, 67 T.C. 672 (1977) (government's failure to disclose identity of informers does not deprive petitioner of fair trial); *Davis v. Commissioner*, 65 T.C. 1014 (1976).

139. Letter from Chief Judge Featherston of the United States Tax Court, Washington, D.C., to William H. Newton III (Dec. 8, 1977) (on file at *University of Miami Law Review*).

140. *Id.*

141. 30 TAX LAW. 545 (1977).

142. See appendices A, B & C *infra*. The survey was provided by Chief Judge Featherston pursuant to his letter of December 8, 1977. See note 139 *supra*. Only that portion of the survey which directly relates to discovery is included.

143. Appendix B, question 3b *infra*.

144. *Id.* question 4a.

misuses.¹⁴⁵ The general conclusion regarding judicial involvement in effectuating use of discovery procedures was that intervention of the court was, at most, only occasionally required.¹⁴⁶

The survey indicated a decided preference for continued expansion of the existing discovery tools. For example, depositions for discovery purposes were favored by a majority of about two to one.¹⁴⁷ Approximately the same number approved of discovery directed at third parties.¹⁴⁸ Even those opposing the use of discovery as to third parties would authorize use of interrogatories or depositions as to experts in valuation cases.¹⁴⁹

In addition, despite the assertion that expanded discovery would not benefit the taxpayer to any great extent, the survey emphasized that practitioners from both sides of the Tax Court proceedings have concluded that expansion of discovery "would permit better trial preparation and facilitate settlement by enabling both parties to develop all relevant facts before trial and evaluate the credibility of their own and their adversaries' witness."¹⁵⁰

Practitioners from the taxpayers' side view discovery as a means of attaining parity, of achieving the same degree of access to information already available to the government through its investigative and summons powers.¹⁵¹ After fifty years without discovery, the Tax Court has been cautious in implementing discovery procedures. The survey establishes that the court's concerns that discovery would become a substitute for the stipulation procedure and that the court would become mired in proceedings to enforce and administer discovery have not materialized.

The survey concludes that rather than becoming a substitute for the stipulation procedure, discovery has actually facilitated it and, in addition, has promoted disposition of cases without the need for trial. In effect, it appears that discovery has made it easier for the parties to reach a basis of settlement and, where trial is necessary, has facilitated preparation of the stipulation by making it easier to get at the facts. Discovery provides a fair means of obtaining evidence which might otherwise never be produced, or the production of which could otherwise be delayed to obtain unfair advantage. Increasing present discovery methods in the Tax Court will further enhance the stipulation process and decrease unfair pretrial and trial tactics.

145. *Id.* question 4b.

146. *Id.* question 4a.

147. *Id.* question 6a.

148. *Id.*

149. *Id.* question 6b.

150. Appendix C *infra*, at p. 643.

151. *Id.* See also note 134 and accompanying text *supra*.

Nor is there any indication that the court's concern that it would become mired in proceedings to administer and enforce discovery has materialized.¹⁵² On the contrary, the survey indicates that the court's involvement or intervention into the discovery procedures was at most only occasionally required.¹⁵³ In fact, in addition to providing justice and fairness between litigants, discovery has actually promoted judicial economy within the court by encouraging settlements, by facilitating stipulation preparation and by minimizing trial time. Since there has been an absence of abuse and neither of the reasons of the Tax Court for restricting discovery has materialized, a more liberal approach to discovery, like those in the Court of Claims and district courts, is now warranted.

Specifically, it is recommended that the Tax Court eliminate the requirement of informal consultation prior to the use of discovery. Rather than discovery being subordinated to the stipulation procedure, both should be placed on a parity, complementing each other. To effectuate this result, all forms of discovery should be immediately available for use after the respondent has filed its answer. In addition, discovery should continue to be available as close as practicable up to the date of trial.¹⁵⁴ Similarly, the period of time for responding to interrogatories should be reduced from forty-five to thirty days, as it is in the Court of Claims and the federal district courts.¹⁵⁵

The Tax Court rules should also provide for third party discovery by way of oral deposition and depositions on written questions, both without leave of the court. Oral depositions, in contrast to written interrogatories, have special value in that they provide maximum flexibility to explore immediately new avenues of discovery and to judge the credibility of each witness. When coupled with subpoenas duces tecum, depositions provide an effective means of obtaining the production of documents from third party witnesses. It is suggested that the use of depositions should be allowed up to thirty days prior to the trial date.

Moreover, serious consideration should be given to allowing additional discovery provisions beyond the scope of the Rules of Practice of the Court of Claims and the Federal Rules of Civil Procedure. A number of survey respondents favored the use of depositions

152. See text accompanying notes 72-73 *supra*.

153. Appendix B, question 4c *infra*.

154. The present 120 day cutoff point for interrogatories and 90 day deadlines for requests for documents and admissions are too restrictive. These time limits appear in U.S.T.C. R. PRAC. & PRO. 70(a)(2), 71(c), 72(b) & 90. A more realistic alternative would be to allow all forms of discovery up to 45 days prior to trial.

155. See U.S.T.C. R. PRAC. & PRO. 71(c) & 72(b); CT. CL. R. 72(d) & 73(b); FED. R. CIV. P. 33(a), 36(a) & 34(b).

as to experts. The Federal Rules of Civil Procedure do provide this option but only with leave of the court.¹⁵⁶ In addition, a number of cases in the district courts have held that expert reports are not discoverable.¹⁵⁷ A significant number of cases tried in Tax Court involve valuation issues where expert testimony is required.¹⁵⁸ These cases, which only involve issues of ultimate fact, such as the valuation of certain properties, would typically be settled if the expert testimony and valuation reports were required to be disclosed beforehand. Expanded discovery with respect to expert testimony and reports would further restrict the impact of the "sporting theory of justice" in those cases that proceed to trial.

One of the arguments advanced for not further expanding discovery is the possibility of abuse and harassment by the government.¹⁵⁹ If this prospect is deemed sufficiently realistic, however, remedies are available. For example, all discovery by the government, in contrast to that by the taxpayer, could be made subject to court approval upon a showing by the government of substantial necessity. Provision could be made for assessing costs and attorney's fees against the government, if it were demonstrated that the government acted vexatiously or in bad faith for the purpose of harassment through its use of discovery.¹⁶⁰ This provision could be applied regardless of the outcome of the litigation. Alternatively, rules could be adopted for an offer of judgment, a procedure in which a formal offer of settlement is made through the court.¹⁶¹ If the offer is accepted, the case is concluded, but if the offer is rejected and the deficiency, if any, as subsequently determined by the court, is within the limits of the earlier settlement proposal, all costs subsequent to the offer are taxed to the party rejecting it. Adoption of these proposals would effectively prevent abuse or harassment by the government.

156. FED. R. CIV. P. 26(b)(4).

157. See, e.g., *United States v. 145.31 Acres of Land*, 54 F.R.D. 359 (M.D. Pa. 1972); *Smith v. Central Linen Serv. Co.*, 39 F.R.D. 15 (D. Md. 1966).

158. Estate and gift tax cases typically involve valuation issues. See I.R.C. §§ 2031, 2512.

159. See Cohen, *supra* note 6, at 340-41.

160. A similar provision, included in 42 U.S.C.A. § 1988 (West Supp. 1974-77), provides:

[I]n any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue code . . . the court, in its discretion, may allow the prevailing party other than the United States, a reasonable attorney's fee as part of the costs.

Courts have not agreed on whether, in order for fees to be awarded, the taxpayer must be the defendant in the action and must show vexatious or harassing treatment by the government. Compare *Lieb v. United States*, 77-2 U.S. Tax Cas. 88,560 (E.D. Okla. 1977) (denying attorney's fees because taxpayer brought suit and did not show bad faith harassment by the government) with *Levno v. United States*, 77-2 U.S. Tax Cas. 88,329 (D. Mont. 1977) (awarding attorney's fees to plaintiff taxpayer without finding of harassment).

161. See FLA. R. CIV. P. 1.442 (providing a similar procedure for an offer of judgment).

VII. CONCLUSION

The Tax Court should immediately begin to expand the scope of discovery under its rules of practice and procedure. Since the scope of discovery is much broader in the Court of Claims and in the district courts, expansion of discovery is warranted in the Tax Court to avoid discrimination against those taxpayers who choose or are forced to litigate in that court. This need is especially urgent since discovery methods which the taxpayer is unable to utilize in Tax Court are available to the government through the use of its summons powers.

Until now, the Tax Court has not been in a position to determine the effectiveness of its rules. The recent survey of tax practitioners, however, establishes that the court's initial concerns in restricting the scope of discovery have not proved valid. Therefore, in order to avoid discrimination, to eliminate the "sporting theory of justice" and to promote fairness in Tax Court proceedings, further expansion of the discovery rules of the court is essential.

APPENDIX A

Report of the Committee on Court Procedure* Tax Court Rules Experience Survey

In response to announcement by the United States Tax Court that its Rules Committee was undertaking review of the Court's Rules of Practice and Procedure which became effective on January 1, 1974, the Committee on Court Procedure of the Section of Taxation of the American Bar Association prepared a Tax Court Rules Experience Survey which was published at 30 *Tax Lawyer* 545 (Winter 1977).

The Survey was presented in a form intended to elicit responses regarding those aspects of the Rules which invoked the most discussion at the time of their adoption, the general impact of the Rules upon the conduct of proceedings in the Tax Court, and to afford respondents the opportunity to express views on other aspects of the Rules not specifically dealt with by the various Survey questions.

In the belief that the comments with the greatest value to the Court would be those of practitioners actually appearing before the Court in proceedings governed by the Rules, the Survey required respondents to indicate that they had appeared as counsel in cases governed by the Rules. Moreover, responses have been compared to counsel of record listings in the Tax Court docket published commercially to verify that respondents possessed the requisite experience.

The experience limitation obviously limited the number of subscribers to *The Tax Lawyer* who were eligible to respond. Responses were received from both counsel for petitioners and counsel for respondent.

As of the date of this Report, 29 qualified responses have been received which commented in substantially all respects on the Survey questions. In addition, several other responses have been received from practitioners with requisite appearances, but

* ABA, Section on Taxation, Comm. on Court Procedure (May 6, 1977) (report submitted by Chairman Steven C. Salch).

who indicated they did not believe it would be appropriate that they comment since the cases in which they were involved were disposed of without trial and the necessity of employment of discovery procedures or the completion of the stipulation process in preparation for trial.

It is deemed inappropriate for the Committee to endeavor to draw inferences or conclusions from the Survey responses. The Committee believes it to be more appropriate to let the responses speak for themselves and accordingly, to submit its Report in the form of a tabulation of Survey responses and summary of individual responses to Question 10 of this Survey.

This form of submission will enable the Court and the bar as a whole to draw their own inferences and conclusions from the Survey responses.

. . . .

APPENDIX B

Tax Court Rules Experience Survey*

1. Since January 1, 1974 (the effective date of the new Tax Court Rules of Practice and Procedure (the "Rules")) I have appeared as counsel in proceedings before the Tax Court (including cases pending on January 1, 1974) in:

| | |
|-------------------|----|
| 1 case | 3 |
| 2-5 cases | 12 |
| More than 5 cases | 14 |

NOTE:

This is an *experience* survey. Comments and suggestions from all members of the Section regarding the Rules are always welcome, but it is not the purpose of this particular survey to solicit responses from those who have not actually practiced under the new Rules.

. . . .

3a. Which of the following discovery or admissions procedures made available by the Rules have you utilized?

| | |
|-------------------------|----|
| Written interrogatories | 10 |
| Request for documents | 10 |
| Request for admissions | 10 |
| None of the above | 10 |
| No answer | 2 |

b. If you utilized one or more of the above procedures, please indicate whether they:

| | | | | |
|---|----|---|-----|----|
| Facilitated preparation of the stipulation of facts | No | 2 | Yes | 13 |
| Facilitated disposition of the case without trial | No | 2 | Yes | 8 |
| No answer | | | | 13 |

* The questionnaire was published in 30 TAX LAW. 545 (1977).

4a. Do you believe the Tax Court's new discovery procedures have been abused? (Specific comments are invited).

| | |
|-----------|----|
| Yes | 2 |
| No | 22 |
| No answer | 5 |

4b. On the whole do you believe that abuses of the discovery procedures outweigh the benefits and that the Court should discontinue these procedures in the future? (If your answer is *No*, specify comments as to the benefits which you see in the discovery procedures are invited).

| | |
|-----------|----|
| Yes | 1 |
| No | 18 |
| No answer | 10 |

4c. Did you or respondent find it necessary to seek the intervention of the Court in connection with the utilization of the discovery procedures?

| | |
|--------------|---|
| Frequently | 1 |
| Occasionally | 9 |
| Rarely | 6 |
| Never | 7 |
| No answer | 6 |

5. Should the Rules allow depositions to be taken for discovery purposes?

| | |
|-----|----|
| Yes | 19 |
| No | 10 |

6a. Should the Rule provide for application of discovery procedures to persons not parties to the case?

| | |
|-----------|----|
| Yes | 20 |
| No | 8 |
| No answer | 1 |

6b. If your answer to the preceding question was *No*, would your answer be different if third party discovery was limited to interrogatories or depositions of experts in valuation cases?

| | |
|-----------|----|
| Yes | 8 |
| No | 1 |
| No answer | 20 |

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10. Briefly identify or describe problem areas or suggestions as to how the Rules might be improved.

See APPENDIX C

APPENDIX C

Tabulation of Responses to Tax Court Rules Experience Survey

Summary of Comments in Response to Question 10

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III. *Discovery.* As might be expected a substantial portion of the comments dwelt upon various aspects of the discovery procedures in the Rules.

Scope of Discovery.

A number of comments advocate expansion of the discovery procedures to include, upon leave of the Court, depositions and to expand discovery to third parties. Third-party discovery is advocated from commentators on both sides of Tax Court proceedings on the basis that it would permit better trial preparation and facilitate settlement by enabling both parties to develop all relevant facts before trial and evaluate the credibility of their own and their adversaries' witnesses. Practitioners on petitioners' side also see third-party discovery as a means of attaining the same access available to respondent through respondent's investigative and summons powers. It is suggested that third-party discovery is particularly valuable in valuation cases and in whipsaw situations in which only one of the affected taxpayers is before the Tax Court.

Foreign Depositions.

Two respondents commented unfavorably as to their experience under the portion of the Rules dealing with depositions abroad. The view was expressed that the Rules were archaic in this respect and should be conformed to what can practically be done and that the paucity of use of these procedures occasioned some difficulty in obtaining correct orders and authentication of the commission.

Procedures: Time Limits.

The view was expressed that hearings on motions for discovery should be expedited.

Several responses suggested that the point of cutoff of discovery should be moved to either 50 days prior to the time the case is set for call on a calendar or to the date of call from a calendar. It was noted that the 120-day Trial Status Report transmission coupled with the 45-day objection period in Rule 71(c) and the 30-day response periods in Rules 72(b) and 90(c) coupled with the 90-day notice of calendaring could operate to cut off discovery and reward a dilatory party while leaving the parties to motions to compel stipulation as the only means of limiting factual issues to the facts reasonably in dispute.

Sanctions.

One respondent suggested that sanctions be called for in cases of "harassment" discovering citing as examples thereof requests for admissions served on the Commissioner which go to the theory of the case and interrogatories served by a petitioner relative to facts purely within the petitioner's knowledge.

IV. Stipulations.

Respondents suggested that the limitation on filing motions to compel stipulations be relaxed to permit such motions to be filed at any time prior to call of the case from a trial calendar and that the Rule 91(f) (3) hearing be held in conjunction with a pretrial conference under Rule 110.

It was also suggested that the Court should be more stringent in granting motions to compel stipulations.

V. Pretrial Procedures.

It was suggested that it would be helpful if the Court would call for more pretrial conferences *sua sponte*.

It was also suggested that the Rules provide for the filing of pretrial submissions in all cases other than "S" cases in a manner similar to that obtaining under the practice of the Court of Claims and of various United States district courts.

It was further suggested that the Rules spell out the purpose and usage of the Request for Trial Status Report.