Fix the Tax Court's Evidentiary Statute: Swap D.C. for the FRE!

By Saul Mezei

Saul Mezei is an associate in the Washington office of Bingham McCutchen LLP. He thanks David J. Curtin, Michael J. Desmond, and Ronald L. Buch Jr. for their insightful suggestions and comments.

The statute governing the Tax Court's application of the rules of evidence — section 7453 — has long referenced the District of Columbia. That reference, which once served a legitimate purpose, now sows seeds of confusion. This article examines the statute's history, discusses the problems associated with the statute's continuing reference to D.C., and advocates a statutory amendment.

Section 7453 gives the Tax Court the authority to prescribe rules of practice and procedure (other than rules of evidence) and provides further that the Tax Court shall conduct its proceedings ''in accordance with the rules of evidence applicable in trials without a jury in the United States District Court for the District of Columbia.''[1] The Tax Court has interpreted the quoted language to require it to apply the evidentiary precedent of the D.C. Circuit in all cases,[2] an exception to the Tax Court's normal practice under *Golsen v. Commissioner*[3] of applying the precedent of the circuit court of appeals to which its decision is appealable.

Whether actually required by section 7453,[4] the Tax Court's application of the D.C. Circuit's evidentiary precedent regardless of the circuit to which its decision is appealable is understandable, considering the statute's history. However, that application is outmoded, adds an unwarranted layer of complexity to Tax Court proceedings, and constitutes a peculiar deviation from the Tax Court's usual practice under *Golsen*. Also, in its current form, section 7453 raises interpretive issues.

The fix is straightforward and should be noncontroversial: Congress should amend section 7453 to provide simply that the Tax Court is to conduct its proceedings ''in accordance with the Federal Rules of Evidence.'' Once the statute is amended, the Tax Court will be able to apply *Golsen* to evidentiary issues, thereby freeing those issues from their outlier status and bringing certainty to the area.

Brief History of Section 7453

Section 7453's antecedent statute dates to the creation of the Tax Court's predecessor, the Board of Tax Appeals (BTA), in 1924. Before the BTA's creation, a taxpayer who received a notice of deficiency had no prepayment right to independent agency review.[5] The sole avenue for external review was the post-payment pursuit of a refund suit in a federal district court or the U.S. Court of Claims.[6] At the BTA's inception, its role in the tax adjudication process was comparable to the current role of the IRS Appeals Office. Thus, the BTA's initial role differed markedly from the Tax Court's current role, which is akin to that of a federal district court. BTA decisions were not subject to appeal, and a taxpayer with an adverse BTA decision could pay the tax and file a refund suit seeking *de novo* review as he could have done in response to the notice of deficiency.[7] The BTA's findings of fact were merely considered prima facie evidence against the losing party.[8]

The first iteration of what is now section 7453 invited the BTA to prescribe its own rules of evidence.[9] Had there existed a single set of rules governing the manner in which federal courts admitted evidence, as has been the case since the Federal Rules of Evidence were enacted in 1975, Congress presumably would have subjected the BTA to those rules. Aside from adopting a rule concerning the admissibility of ex parte affidavits, the BTA did not accept Congress's invitation.[10]

---

[1]The quoted requirement is also reflected in Rule 143(a) of the Tax Court's Rules of Practice and Procedure.

[2]That is, in all cases except those in which section 7453 does not apply — *e.g.*, small tax cases.

[3]54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971).

[4]*See infra* at pp. 83 and 84.

[5]Although the BTA was renamed the Tax Court of the United States in 1942, it remained an independent executive agency until 1969, when it was renamed the U.S. Tax Court and transformed into a judicial body (an Article I court).

[6]The U.S. Court of Claims was abolished by the Federal Courts Improvement Act of 1982. The trial division of the U.S. Court of Claims was recreated as an Article I court and was initially named the U.S. Claims Court and later renamed the U.S. Court of Federal Claims. The appellate division of the U.S. Court of Claims was merged with the U.S. Court of Customs and Patent Appeals and established as an Article III court — the U.S. Court of Appeals for the Federal Circuit.

[7]*See Tigers Eye Trading LLC v. Commissioner*, T.C. Memo. 2009-121, *Doc 2009-11964, 2009 TNT 100-10* (''Under the Revenue Act of 1924, if the Government prevailed before the [BTA], the deficiency could be immediately assessed and collected. Although the taxpayer could not directly appeal the [BTA's] decision to a higher court, the taxpayer could file a claim for refund with the predecessor of the IRS and, upon denial of the claim, bring a refund action in a District Court or the Court of Claims.'').

[8]Revenue Act of 1924, section 900(g).

[9]*Id.* at section 900(h).

[10]Harold Dubroff, ''The United States Tax Court: An Historical Analysis (Part VI: Trial and Post-Trial Procedure),'' 42 *Alb. L. Rev.* 191, 193 (1978).

Considering the limited nature of the BTA's role in the tax adjudication process, it is not surprising that the BTA gave the development of evidentiary rules short shrift. Because a BTA proceeding was ''little more than a preliminary skirmish,'' the BTA tended to err on the side of admissibility and to weigh the evidence as it saw fit.[11]

The BTA's role would change quickly and drastically. In 1926 Congress rendered BTA decisions appealable to the circuit courts of appeals and stripped the losing party of the right to a trial *de novo* in the wake of an adverse BTA decision. Congress simultaneously subjected the BTA to a definite body of evidentiary rules: ''The proceedings of the Board and its divisions shall be conducted . . . in accordance with the rules of evidence applicable in courts of equity in the District of Columbia.''[12]

The legislative history reflects that before settling on that standard, the House Ways and Means Committee discussed the possibility of keeping intact the statute that allowed the BTA to develop its own rules of evidence.[13] The committee also discussed the prospect of compelling the BTA to adopt the rules of evidence prevailing in federal district courts.[14] The former proposal was rejected on the basis that it ''would have implied a duty on the part of the [BTA] to write a treatise on evidence.''[15] The latter proposal was rejected because the federal district courts ''applied the rules of the particular State in which they were located'' and because Congress sought ''a uniform practice governing the trial of all cases before the [BTA] instead of 48 different rules.''[16]

It is clear that subjecting the BTA to a single set of evidentiary rules was Congress's paramount goal in requiring the BTA to apply the evidentiary rules applicable in D.C. equity courts.[17] In the absence of such a set of evidentiary rules, which would not exist until the Federal Rules of Evidence were adopted in 1975, Congress seemingly did the next best thing. In the words of the first chair of the BTA, ''The rules governing the introduction of evidence in equity courts are essentially the same in all jurisdictions.''[18] Congress chose the District of Columbia because it needed ''some definite guide post.''

In considering Congress's motivation for subjecting the BTA to the evidentiary rules applicable in D.C. equity courts, it is important to distinguish between a scenario involving a single set of rules interpreted by multiple courts and one involving multiple sets of rules interpreted by multiple courts. The former scenario is the manner in which our tax system operates on substantive matters: The Internal Revenue Code and Treasury regulations establish a single set of substantive tax rules, but the appeals chain is nonuniform — that is, there is no national court of tax appeals, and the 13 circuit courts of appeals are free to interpret the single set of substantive tax rules as they see fit in the absence of controlling Supreme Court precedent. In enacting section 7453's predecessor, Congress sought to shield the Tax Court from the latter scenario. While a single set of tax statutes and regulations applied to all federal courts, the same could not be said of evidentiary rules until 1975.

Section 7453 has been meaningfully amended only a few times since 1926. In 1939 the statute was amended to reflect the promulgation of the Federal Rules of Civil Procedure in 1938 and the merger of law and equity cases into a single form of civil

---

[11]*Blair v. Curran*, 24 F.2d 390, 392 (1st Cir. 1928).

[12]Revenue Act of 1926, ch. 27, section 1000. To dispel potential confusion, the D.C. courts referred to in the 1926 statute have evolved to become the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia Circuit. The Supreme Court of the District of Columbia was renamed the District Court for the District of Columbia in 1936 and the United States District Court for the District of Columbia in 1948. *See* Federal Judicial Center, ''History of the Federal Judiciary: Federal Courts of the District of Columbia,'' *available at* http://www.fjc.gov/history/home.nsf/page/courts_special_dc.html. The Court of Appeals for the District of Columbia was renamed the U.S. Court of Appeals for the District of Columbia in 1934 and the U.S. Court of Appeals for the District of Columbia Circuit in 1948. *Id.* Those courts exercised a combination of federal and local jurisdiction until 1971, when the District of Columbia Court Reform and Criminal Procedure Act of 1970 established two local courts — the D.C. Superior Court and the D.C. Court of Appeals — to assume local jurisdiction similar to that of state courts. *Id.*

[13]67 *Cong. Rec.* 1144.

[14]*Id.*

[15]*Id.*

[16]*Id.* There were 48 states from 1912 to 1959 (Alaska and Hawaii became states in 1959), hence the reference to ''48 different rules.''

[17]*See Harrington v. Commissioner*, 48 T.C. 939, 954 n.6 (1967) (''Sec. 7453 . . . and its precursive provisions were enacted to insure uniformity of the rules of evidence applied by the Tax Court and to obviate the necessity of applying the various and differing rules of evidence of the respective States in which trials are held.'').

[18]J. Gilmer Korner, ''Procedure in the Appeal of Tax Cases under the Revenue Act of 1926,'' 4 *Nat. Inc. Tax Mag.* 413, 414 (1926).

action.[19] From 1939 to 1954, the statute provided that the BTA would conduct its proceedings in accordance with the rules of evidence ''applicable in the courts of the District of Columbia in the type of proceedings which prior to September 16, 1938, were within the jurisdiction of said courts of equity of said District.'' In 1954 the relevant language assumed its current form and its current place in the IRC.[20] The Tax Court itself served as the catalyst for the 1954 amendment, having informed Congress that practitioners were concerned by the statute's continuing reference to an obsolete type of proceeding.

But change was on the horizon, and section 7453 has not kept up.

Adoption of the *Golsen* Rule

The Tax Court adopted the *Golsen* rule in 1970. Before *Golsen*, the Tax Court's practice was to adhere to ''its own honest beliefs'' until the Supreme Court had ruled on a legal issue. Under that practice, sometimes referred to as the *Lawrence* doctrine, the Tax Court refused to apply the precedent of the circuit court of appeals to which its decision was appealable if it believed that precedent was erroneous.[21] The Tax Court justified the *Lawrence* doctrine on the basis that it was a court of national jurisdiction charged with the uniform application of the federal tax laws.

Golsen overruled *Lawrence* and established that the Tax Court would apply the precedent of the court of appeals to which its decision is appealable when that precedent is squarely on point in situations that would result in summary reversal. The Tax Court adopted the *Golsen* rule not because it came to realize that it lacked the authority to defy the court of appeals to which its decision was appealable, but because ''it would be futile and wasteful to do so where we would surely be reversed.''[22]

Were it not for section 7453, the Tax Court would either develop its own evidentiary rules or apply the *Golsen* rule to evidentiary precedent. In other words, the Tax Court would treat evidentiary precedent like all other precedent.

Enactment of the Federal Rules of Evidence

Although legal scholars had long recognized the need for a uniform set of federal evidentiary standards, the Federal Rules of Evidence were not enacted until 1975. From 1938 until the enactment of the Federal Rules of Evidence, the broad standards of Federal Rule of Civil Procedure 43(a) governed the general admissibility of evidence in federal courts. Rule 43(a) provided that evidence was admissible in federal court if it was admissible under any of three alternate standards: (1) a federal statute; (2) federal equity practice; or (3) the rules of evidence applicable in the courts of general jurisdiction in the state in which the federal court was located.[23] Because of the dearth of federal evidentiary statutes and the fact that federal equity practice disappeared in 1938 with the promulgation of the Federal Rules of Civil Procedure, federal courts tended to lean heavily on state law when dealing with questions of admissibility.[24] Thus, until 1975 there was no single set of federal evidentiary rules, the problem from which Congress in 1926 had justifiably sought to insulate the Tax Court.

By 1975 section 7453 had for almost a half century served Congress's purpose of anchoring the Tax Court to a single set of evidentiary rules in a sea of differing state standards. The adoption of the Federal Rules of Evidence called for a fresh look at the statute.

Because the Federal Rules of Evidence apply ''in non-jury trials in the United States District Court for the District of Columbia,'' section 7453 indirectly requires the Tax Court to apply the Federal Rules of Evidence. However, the indirectness of the statutory language and that the operative language has remained essentially unchanged since 1926 raise interpretive questions.

Section 7453 can be interpreted narrowly as follows: The statute merely mandates that the Tax Court apply the rules of evidence applicable in bench trials in the U.S. District Court for the District of Columbia. The Federal Rules of Evidence apply in bench trials in the U.S. District Court for the District of Columbia. Therefore, the Federal Rules of Evidence apply to the Tax Court. Under that narrow reading, which does not speak to the D.C.

---

[19]*Id.*

[20]The statute was amended in 1969 to reference section 7463 and in 1997 to reference 7436(c). Both of those provisions address the Tax Court's small case procedures, and the references were to clarify that S cases are exempt from section 7453. Thus, those amendments have no bearing on the issues discussed in this article.

[21]*See Lawrence v. Commissioner*, 27 T.C. 713 (1957), *rev'd*, 258 F.2d 562 (9th Cir. 1958).

[22]*Lardas v. Commissioner*, 99 T.C. 490, 495 (1992).

[23]*See Matter of Bobby Boggs Inc.*, 819 F.2d 574, 581 n.9 (5th Cir. 1987).

[24]*See Sims v. Great Am. Life Ins. Co.*, 469 F.3d 870, 878 (10th Cir. 2006) (''Under Rule 43, federal courts typically applied state evidentiary law to questions regarding the admissibility of evidence.''). In addition to the fact that federal equity practice vanished in 1938, such a practice was difficult to identify, and federal courts in equity cases often applied state court precedent. *See Monarch Ins. Co. v. Spach*, 281 F.2d 401, 411 (5th Cir. 1960).

Circuit's precedent interpreting the Federal Rules of Evidence, section 7453 mandates *only* that the Tax Court apply the Federal Rules of Evidence and not the D.C. Circuit's interpretive precedent. Under such a reading, applying the *Golsen* rule, the Tax Court would apply the applicable Federal Rules of Evidence as interpreted by the circuit court of appeals to which its decision is appealable.[25]

However, because the U.S. District Court for the District of Columbia follows the D.C. Circuit's interpretation of the Federal Rules of Evidence, the statute can also be interpreted broadly to require the Tax Court to apply D.C. Circuit precedent interpreting the Federal Rules of Evidence. The statute's continuing, albeit unnecessary, reference to the District of Columbia and the fact that the Tax Court has historically applied the interpretive precedent of the D.C. federal district and circuit courts mitigates in favor of interpreting the statute to require the Tax Court to apply the D.C. Circuit's interpretive gloss, *Golsen* notwithstanding.

The Tax Court's Application of 7453

A survey of published Tax Court opinions[26] since the enactment of the Federal Rules of Evidence suggests confusion as to the proper application of section 7453. The Tax Court appears uncertain as to whether section 7453 requires it to apply D.C. Circuit precedent regardless of the circuit court of appeals to which its decision is appealable, or whether section 7453 merely requires the Tax Court to apply the Federal Rules of Evidence while permitting it to apply the *Golsen* rule and abide by the interpretive precedent of the relevant circuit court of appeals.[27] As a result, although its published opinions are not always consistent on that point, the Tax Court tends to apply both D.C. Circuit precedent and the precedent of the circuit court of appeals to which its decision is appealable in accordance with the *Golsen* rule, observing either explicitly or implicitly that the two bodies of appellate court precedent do not lead to disparate results.[28] While that approach is certainly pragmatic, the Tax Court should not feel compelled to punt on the choice-of-precedent question. That the court often does so is ample evidence that it has no clear view on section 7453's evidentiary mandate in light of its adoption of the *Golsen* rule and the enactment of the Federal Rules of Evidence.

Current Section 7453 Raises Some Questions

Because the Tax Court applies D.C. Circuit precedent across the board only on issues concerning the rules of evidence, the Tax Court's choice of precedent turns on whether the issue before it in a given case concerns a rule of evidence. That determination can be deceptively difficult. A good example of the interpretive difficulty inherent in section 7453 is the question of whether the work product doctrine constitutes a rule of evidence.[29] Considering the well-publicized circuit split on whether tax accrual workpapers can be protected from disclosure under the work product doctrine,[30]

---

[25]Interestingly, the circuit courts of appeals have an unexplained tendency to omit the reference to the District of Columbia when citing section 7453. *See*, *e.g.*, *Kanofsky v. Commissioner*, 271 Fed. Appx. 146, 150 (3d Cir. 2008), *Doc 2008-7154, 2008 TNT 64-8*; *Moretti v. Commissioner*, 77 F.3d 637, 644 (2d Cir. 1996), *Doc 96-6198, 96 TNT 43-6*. That tendency, which may be attributable in part to a lack of historical appreciation for section 7453, supports the narrow reading of section 7453.

[26]The evidentiary issues decided in published opinions likely represent only a small fraction of the Tax Court's written determinations on evidentiary issues. Many, if not most, evidentiary issues have been resolved in unpublished orders, rendering the manner in which the Tax Court interprets section 7453 difficult to research.

[27]*Compare Fu Inv. Co. Ltd. v. Commissioner*, 104 T.C. 408 (1995), *Doc 95-3625, 95 TNT 65-8*, *with Costa v. Commissioner*, T.C. Memo. 1990-572.

[28]*See e.g.*, *Johnston v. Commissioner*, 119 T.C. 27, 33 (2002), *Doc 2002-18452, 2002 TNT 154-12* (discussing both D.C. Circuit and Ninth Circuit precedent on the issue of attorney-client privilege waiver); *Conti v. Commissioner*, 99 T.C. 370, 373 (1992) (noting that "we follow precedents of the [D.C. Circuit] in interpreting the Federal Rules of Evidence" but that Sixth Circuit precedent compelled the same result).

[29]Practitioners appear uncertain whether the work product doctrine constitutes a "rule of evidence" for which the Tax Court would apply D.C. Circuit precedent. *See* Amy S. Elliott, "Schedule UTP Might Require Protected Work Product Disclosure," *Tax Notes*, Oct. 11, 2010, p. 168, *Doc 2010-21878*, or *2010 TNT 194-2* (One practitioner noted that the Tax Court follows D.C. Circuit precedent "for rules of evidence but that there is a question whether work product privilege is a rule of evidence." Another opined that he did not believe the work product doctrine is a rule of evidence but stated that he could see both sides of the argument. He also noted that the issue had been argued before the Tax Court but that the court "sidestepped it in the related unpublished opinion."). The difficulty stems in part from the fact that the work product doctrine is contained in Rule 26(b)(3) of the Federal Rules of Civil Procedure, and the Tax Court has interpreted section 7453 as requiring it to apply the rules of evidence (but not the procedural rules) contained in the Federal Rules of Civil Procedure. *See*, *e.g.*, *Bennett v. Commissioner*, T.C. Memo. 1997-505, *Doc 97-7937, 97 TNT 54-10*.

Although the Tax Court has never specifically adopted Rule 26(b)(3) of the Federal Rules of Civil Procedure, it has stated that materials prepared in anticipation of litigation are intended to be beyond the scope of allowable discovery. *See Ratke v. Commissioner*, 129 T.C. 45, 50 (2007), *Doc 2007-20395, 2007 TNT 173-4* ("Further, the work product doctrine is given negative recognition in the Tax Court Rules of Practice and Procedure in that, even though it is not mentioned in the body of the Rules, it is dealt with in the notes of our Rules Committee to Rule 70(b).").

[30]D.C. Circuit and Sixth Circuit precedent favors taxpayers. *See United States v. Deloitte LLP*, 610 F.3d 129 (D.C. Cir. 2010), *Doc 2010-14431, 2010 TNT 125-11*; *see also New Phoenix Sunrise Corp. v. Commissioner*, 2010 WL 4807077 (6th Cir. 2010), *Doc 2010-24825, 2010 TNT 224-13*. First Circuit and Fifth Circuit precedent

(Footnote continued on next page.)

the answer can have significant implications. The question itself would be rendered moot if the Tax Court could apply the *Golsen* rule to evidentiary issues, as would be the case if Congress replaced the reference to the rules of evidence applicable in non-jury trials in the U.S. District Court for the District of Columbia with a simple reference to the Federal Rules of Evidence (that is, with no reference to any particular federal district court).

Although not every circuit split on an evidentiary issue involves deciding whether a rule of evidence is involved, every such circuit split at a minimum presents a choice-of-precedent problem. Until the uncertainty surrounding section 7453 is laid to rest once and for all by statutory amendment, for purely pragmatic reasons, the Tax Court may continue to avoid deciding those difficult interpretive questions to the maximum extent possible. If the court is unable to do so, it may one day be compelled to rule on those issues in an opinion that has the potential to end up in court conference and on appeal, thereby consuming significant judicial resources. Moreover, the outcome of the judicial process is uncertain and potentially leaves the area unsettled for many years to come.

Conclusion

For nearly five decades, section 7453 and its predecessor dutifully served Congress's goal in allowing taxpayers and the Tax Court to reference a single body of evidentiary rules instead of scores of state rules. With the 1975 enactment of the Federal Rules of Evidence, the federal district courts were provided a common set of evidentiary rules. Now, a statute that once fostered uniformity on evidentiary matters instead fosters uncertainty and confusion. It is time for Congress to amend section 7453 to provide simply that the Tax Court is to conduct its proceedings ''in accordance with the Federal Rules of Evidence.'' The Tax Court applies the *Golsen* rule to substantive tax issues, and there is no sound reason that the court should subject evidentiary issues to a different standard.

---

favors the government. *See United States v. Textron Inc.*, 577 F.3d 21 (1st Cir. 2009) (*en banc*), *Doc 2009-1304, 2009 TNT 12-11*; *United States v. El Paso Co.*, 682 F.2d 530 (2d Cir. 1982). If a taxpayer whose Tax Court decision is appealable to the First Circuit asserts in the Tax Court that its tax accrual workpapers are subject to protection under the work product doctrine, would the Tax Court apply *Deloitte* and shield the documents from disclosure, or would it apply *Textron* and compel disclosure? A taxpayer whose Tax Court decision is appealable to a circuit court of appeals that has yet to weigh in on the issue faces uncertainty as to whether the Tax Court will apply *Deloitte* or will develop its own position on whether tax accrual workpapers are protected from disclosure by the work product doctrine.