What Other Courts Can Learn From Tax Court Exceptionalism

by Michael D. Kummer and James G. Steele III

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In this report, Kummer and Steele identify a practical reason to embrace Tax Court exceptionalism: As the Tax Court continues to evolve, other courts can also use, in appropriate cases, certain unique procedures the Tax Court has itself developed over the years.

The views expressed in this report, and any errors in it, are the authors' own.

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I. Introduction

The Tax Court is a unique venue for taxpayers to challenge IRS determinations. Each year, its judges — experts in tax law — oversee an extraordinarily large number of cases on diverse tax matters brought by taxpayers ranging from pro se individuals to the world's largest corporations. Recognizing the Tax Court's vital adjudicative function, Congress long ago vested it with broad discretion to develop its own rules and procedures to efficiently and effectively resolve its sizable and diverse caseload.

To a substantial degree, the Tax Court Rules of Practice and Procedure (Tax Court rules) have corollaries in the Federal Rules of Civil Procedure (FRCP), but they are unique in several critical respects. In recent years, academics have called for the Tax Court to become more like other federal tribunals. This report does not entirely reject those calls, but it argues that the converse is also true — at least for some unique procedural rules designed to efficiently resolve a substantial caseload.

In some ways, the Tax Court has proven itself a procedural pioneer — capable of implementing unique and efficient rules worthy of consideration by other federal tribunals in both tax and nontax cases. In fact, other federal courts have in some instances chosen to adopt, follow, or discuss particular Tax Court rules. Thus, in the proper context, there are reasons to embrace rather than reject what some scholars term "Tax Court exceptionalism."

Chief Justice John G. Roberts Jr. highlighted one of those reasons in his 2016 year-end report on the federal judiciary. He observed that because of the "press of their dockets," judges in federal district courts face severe time and resource constraints and benefit from disputes being resolved "efficiently with minimal expense and delay."[1] Some district judges, he noted, were asked to participate in pilot programs to test several "promising case management techniques" designed to reduce the costs of discovery.

[1] Roberts, "2016 Year-End Report on the Federal Judiciary," at 6-7 (Dec. 31, 2016).

Although Chief Justice Roberts did not mention the Tax Court, it has long had unique case management techniques designed for efficient case resolution. When appropriate, U.S. district judges can and should draw on that body of judicial experience to create ways to alleviate resource constraints and efficiently resolve their own cases.

II. Overview of the Tax Court

A. The Tax Court's Exceptional Task

Unlike any other federal court, the Tax Court has always been exclusively devoted to tax matters and has given taxpayers the right to challenge IRS determinations before paying the disputed tax liability.[2] It unquestionably performs a unique judicial function.

Today the Tax Court oversees more than 90 percent of all federal tax cases and is responsible for resolving disputes that, in the aggregate, involve tens of billions of dollars of potential government revenue each year.[3] The Tax Court also has fewer judges than active federal district courts, but it hears substantially more cases. For example, at the end of its 2016 fiscal year, the Tax Court had 27,564 pending cases[4] and 32 judges.[5] By contrast, as of March 31, 2016, the U.S. District Court for the Southern District of New York had 18,120 pending civil and criminal cases[6] and 59 judges.[7] This has been the trend historically.[8] A significant majority of the Tax Court's cases are brought by pro se individuals disputing as little as several hundred dollars of potential liability.[9] But large corporations also commonly litigate multimillion-dollar disputes in Tax Court.[10] In addition to grappling with a significant volume of cases, high stakes, and a wide range of litigants, the Tax Court must answer an extraordinarily diverse set of substantive (and contentious) legal questions.[11] It decides a broad range of issues, including the validity of government regulations,[12] the interpretation of complex statutory regimes,[13] the arm's-length price for tangible or intangible assets,[14] and which former spouse is liable for a tax debt after divorce.[15]

Although there can be little question about the rarity of the Tax Court's judicial task, the tribunal's position in the U.S. judicial and administrative framework has been hotly debated for years.[16] This is partly because the Tax Court's status has changed over time. In 1924 Congress created the Board of Tax Appeals as an executive agency. With the Revenue Act of 1942, Congress renamed the board the Tax Court of the United States and changed the title of its members to judges. Then, in 1969, Congress established the Tax Court as an Article I court.[17]

As one scholar put it, the Tax Court has "fallen into a gap between branches of government."[18]

[2] *See* L. Paige Marvel, "The Evolution of Trial Practice in the United States Tax Court," 68 *Tax Law.* 289 (2015). *See also* Harold Dubroff and Brant J. Hellwig, *The United States Tax Court: An Historical Analysis* (2d ed. 2014); Hellwig, "The Constitutional Nature of the United States Tax Court," 35 *Va. Tax Rev.* 269 (2016); and David Laro, "The Evolution of the Tax Court as an Independent Tribunal," 1995 *U. Ill. L. Rev.* 17 (1995).

[3] *See* Marvel, *supra* note 2, at 289; and Laro, *supra* note 2, at 18.

[4] IRS Publication 55B, "Internal Revenue Service Data Book 2016," at 62, Table 27 (2015).

[5] The Tax Court has 16 full-time judges; 11 senior status judges, and five special trial judges, who may be appointed by the court to hear specific matters (*see* section 7443A). The Tax Court is statutorily authorized to have 19 full-time judges. *Compare* section 7443(a), *with* 28 U.S.C. section 133(a) (establishing the authorized number of district judges for each federal district court).

[6] U.S. Courts, "Statistical Tables for the Federal Judiciary — December 2016," at tables C and D (Dec. 31, 2016).

[7] Today the 59 judges consist of 43 full-time and senior status judges and 15 magistrate judges.

[8] Dubroff and Hellwig, *supra* note 2, at 905; and 1926 Attorney General Annual Report at 147, 158, and 187.

[9] *See* Marvel, *supra* note 2, at 289.

[10] *See, e.g.*, *Bank of New York Mellon Corp. v. Commissioner*, 140 T.C. 15 (2013), *aff'd*, 801 F.3d 104 (2d Cir. 2015); *PepsiCo Puerto Rico Inc. v. Commissioner*, T.C. Memo. 2012-269; *Exxon Corp. v. Commissioner*, T.C. Memo. 1993-616, *aff'd*, 98 F.3d 825 (5th Cir. 1996); and *Philip Morris Inc. v. Commissioner*, 96 T.C. 606 (1991), *aff'd*, 970 F.2d 897 (2d Cir. 1992).

[11] *See, e.g.*, Laro, *supra* note 2, at 27 ("Because tax law permeates so many other fields and activities, Tax Court cases tend to be interesting and diverse.").

[12] *See, e.g.*, *Altera Corp. v. Commissioner*, 145 T.C. 91 (2015).

[13] *See, e.g.*, *Rhone-Poulenc Surfactants and Specialties LP v. Commissioner*, 114 T.C. 533 (2000), *appeal dismissed and remanded*, 249 F.3d 175 (3d Cir. 2001).

[14] *See, e.g.*, *Edwards v. Commissioner*, 67 T.C. 224 (1973) (construction equipment); and *Medtronic Inc. v. Commissioner*, T.C. Memo. 2016-112 (intangible property).

[15] *See, e.g.*, *King v. Commissioner*, 116 T.C. 198 (2001).

[16] *See* Stephanie Hoffer and Christopher J. Walker, "The Death of Tax Court Exceptionalism," 99 *Minn. L. Rev.* 221, 224-225 (2014). *See also* Leandra Lederman, "Restructuring the U.S. Tax Court: A Reply to Stephanie Hoffer and Christopher Walker's 'The Death of Tax Court Exceptionalism,'" 99 *Minn. L. Rev.* 1, 1-2 (2014).

[17] *See, e.g.*, Dubroff and Hellwig, *supra* note 2, at 175, 188-195, and 226-228.

[18] Lederman, "Tax Appeal: A Proposal to Make the U.S. Tax Court More Judicial," 85 *Wash. U. L. Rev.* 1195, 1247-1248 (2008).

Nearly three decades ago, the Supreme Court noted that the Tax Court "exercises judicial, rather than executive, legislative, or administrative, power" and that it "remains independent of the Executive and Legislative Branches."[19] In 2014, however, the D.C. Circuit explained that the Tax Court "exercises Executive authority as part of the Executive Branch."[20]

Congress recently weighed in. In December 2015 it amended section 7441 to clarify that "the Tax Court is not an agency of, and shall be independent of, the executive branch of the Government."[21] However, that amendment did not necessarily end the debate.[22] Scholars and commentators have argued that the 2015 amendment "changes nothing,"[23] "stop[s] short" of making the Tax Court entirely like other courts,[24] and "may have just made things more confusing."[25] Therefore, scholars' complaints that the Tax Court is "anomalous"[26] and "insular"[27] and "plays by its own rules"[28] remain pertinent, as do their arguments for the death of Tax Court exceptionalism[29] and their claims that legislators should increase the respect given to the Tax Court by making it more like other courts.[30]

This report offers a different perspective. It identifies discrete, practical reasons for welcoming some of the Tax Court's differences that scholars have not emphasized. For instance, the Tax Court has developed unique pretrial and trial procedures to efficiently address the significant volume and range of cases it adjudicates. Other courts have begun encouraging the use of those procedures to increase efficiencies in their cases.[31] This practice should continue. Indeed, rather than always lagging behind other tribunals, the Tax Court has adopted rules — such as the general requirement that testifying experts provide written reports — well before corollaries were incorporated into the FRCP.[32]

B. The Tax Court's Rules and Rulemaking Process

Long before it was called the Tax Court, the tribunal adopted its own rules of practice and procedure. On July 28, 1924, what was then known as the Board of Tax Appeals published its first rules, which covered eligibility to practice, pleadings, briefs, motions, hearings, subpoenas, evidence, depositions, interrogatories, and stipulations.[33] However, it did not institute formal pretrial discovery procedures and, indeed, the FRCP did not yet exist.[34] Still, in the Tax Court's view, its own basic judicial procedures would "best accommodate the conflicting demands of speed, accuracy, and justice."[35] And, indeed, the Tax Court successfully kept current with its expanding caseload, even though the number of cases docketed with the 15-member board during its first 16 months of existence closely approached the total number of civil cases filed in 25 U.S. district courts (which collectively had 54 judges) during the same period.[36]

The Tax Court has revised its rules many times since 1924,[37] including by adopting pretrial

[19] *Freytag v. Commissioner*, 501 U.S. 868, 890-891 (1991).

[20] *Kuretski v. Commissioner*, 755 F.3d 929, 932 (D.C. Cir. 2014).

[21] P.L. 114-113.

[22] *See, e.g.*, *Battat v. Commissioner*, 148 T.C. No. 2 (2017) (confirming that the portion of the judicial power Congress assigned to the Tax Court includes only public law disputes and does not include matters reserved for Article III courts).

[23] Bryan T. Camp, "Initial Take on the *Kuretski* Language in the PATH Law," Procedurally Taxing (Dec. 19, 2015).

[24] Lederman, "On the PATH to a More Judicial Tax Court," TaxProf Blog (Dec. 23, 2015).

[25] Hoffer and Walker, "The Tax Court and the Administrative State: Congress Responds to the D.C. Circuit's Decision in *Kuretski*," TaxProf Blog (Dec. 28, 2015). Litigants have maintained similar arguments. *See Byers v. United States Tax Court*, 211 F. Supp.3d 240 (D.D.C. 2016).

[26] Lederman, *supra* note 18, at 1247-1248.

[27] Hoffer and Walker, *supra* note 16, at 225.

[28] *Id. See also* Lederman, *supra* note 18, at 1247-1248 (stating that the Tax Court has "fended for itself" from a rulemaking and accountability standpoint).

[29] Hoffer and Walker, *supra* note 16, at 228-229.

[30] Lederman, *supra* note 18, at 1199.

[31] *See Deseret Management Corp. v. United States*, 112 Fed. Cl. 438, 447 n.16 (2013) (following the practice under Tax Ct. R. 143(g) of receiving experts' reports in lieu of live testimony, which "saved considerable trial time"); and *Jicarilla Apache Nation v. United States*, 112 Fed. Cl. 274, 286 n.16 (2013) (same). *See also Principal Life Insurance Co. v. United States*, 76 Fed. Cl. 326, 328 (2007) (use of process loosely patterned after Tax Ct. R. 155); *Deseret Management*, 112 Fed. Cl. at 465 (same); and *Ervin v. United States*, 13-cv-127 (W.D. Ky.) (orders dated Mar. 21, 2017, and Aug. 24, 2017, following but not mentioning Tax. Ct. R. 155).

[32] *Compare* Advisory Committee notes to Tax Ct. R. 143(f), 85 T.C. 1136 (1986), *with* Advisory Committee notes to Fed. R. Civ. P. 26 (1993).

[33] Dubroff and Hellwig, *supra* note 2, at 94.

[34] *Id.* at 623-626. The Supreme Court adopted the FRCP in 1938. *Id.*

[35] *Id.* at 95 (citing Kingman Brewster, "Some Observations Relating to the Board of Tax Appeals," 3 *Nat'l Inc. Tax Mag.* 251 (1925)).

[36] *Id.* at 107-113 and n.308.

[37] *See, e.g.*, "Guide to Rules Amendments and Notes."

discovery procedures, effective January 1, 1974. Those revisions did not occur in a vacuum. As the 1973 introduction to the new rules explained, the court has generally adapted the rules of other tribunals to "the special nature of litigation in the Tax Court, while at the same time retaining the essential features of the Court's existing rules which had proved to be sound and which appeared to be more appropriate for the Court."[38] The revisions were enabled in part by the significant discretion Congress gave the Tax Court to make its own rules.[39]

Today the Tax Court rules implement that statutory grant of authority by stating that the Tax Court may make and amend rules governing its practice and procedure after giving appropriate public notice and an opportunity for comment.[40] The Tax Court does so regularly and relatively quickly. For instance, although it usually takes two to three years to implement changes to the FRCP, many recent amendments to the Tax Court rules took less than a year to take final effect after being released for public comment.[41]

Many of those amendments have conformed Tax Court rules to the FRCP. The court also commonly looks to "suitably adaptable" rules in the FRCP to informally fill gaps in its own rules when appropriate for the matter at hand.[42] In some instances, however, the Tax Court retains specific procedures to address the unique needs of the litigants and the high volume of cases it oversees. The result is a set of rules that differs from the FRCP in certain material respects. The Tax Court is now taking a "fresh look" at its rules and considering whether they should conform to the FRCP to a greater degree.[43]

The Tax Court's ability to quickly hone its procedures does not cast doubt on its substantive expertise or the reliability of its judicial determinations. In fact, the opposite appears true. Other courts regularly cite Tax Court decisions as persuasive authority on substantive tax issues.[44] District judges began that practice when the Tax Court was still named the Board of Tax Appeals and was unambiguously an executive agency.[45] The practice continued after the board was renamed the Tax Court,[46] and it has persisted since Congress established the Tax Court as an Article I court in 1969.[47] Thus, contrary to the suggestion that the Tax Court lacks respect among its peers, other courts have regularly looked to the Tax Court for substantive guidance despite — and perhaps because of — the Tax Court's unique position in the United States judicial and administrative framework.

Academic concerns about insularity ignore or minimize the practical reality that the Tax Court pursues the same goal as other courts: the just, speedy, and inexpensive determination of every case.[48] Indeed, the Tax Court is statutorily obligated to decide its cases "as quickly as practicable."[49] And like other courts, it adheres to the Federal Rules of Evidence because doing so "is a sound way to protect the integrity of [its]

[38] Introduction, "Rules of Practice and Procedure of the United States Tax Court," 60 T.C. 1057, 1057 (1973).

[39] *See* section 7453.

[40] Tax Ct. R. 1(a).

[41] *Compare* "Overview for the Bench, Bar, and Public: The Federal Rules of Practice and Procedure," *with* archived Tax Court press releases (showing, for instance, four months for rule requiring the IRS to file an answer in all small tax cases, six months for amendment to Tax Ct. R. 155 computation deadlines, and six months for rule requiring electronic filings by most practitioners); *see also* Introduction, *supra* note 38, at 1057-1058 (noting that it took approximately a year and a half for the Tax Court to solicit, receive, and incorporate public comments on its first set of pretrial discovery procedures).

[42] Tax Ct. R. 1(b). For a useful summary of instances when the Tax Court has taken this approach, see *Guralnik v. Commissioner*, 146 T.C. No. 15 (2016) ("We have employed Rule 1(b) in various contexts to fill gaps in our Rules.").

[43] William R. Davis, "Judges Debate Direction of Tax Court Rule Changes," *Tax Notes*, Nov. 16, 2015, p. 883 (quoting Judge Marvel). *See also* letter from William J. Wilkins, IRS chief counsel, to former Chief Judge Michael B. Thornton (Sept. 11, 2015) (noting that at a tax conference, Judge Albert G. Lauber invited suggestions for revisions to the Tax Court's rules).

[44] *See, e.g.*, *Gragg v. United States*, No. 4:12-cv-03813 (N.D. Cal. 2014); *Riether v. United States*, 919 F. Supp.2d 1140, 1151 (D.N.M. 2012); *Easton Nissan Inc. v. Ford Motor Credit Co.*, 755 F. Supp. 671, 674 (D. Md. 1991); *Blalock v. United States*, 695 F. Supp. 874, 880 (N.D. Miss. 1988); and *Rodriguez v. United States*, 629 F. Supp. 333, 346 (N.D. Ill. 1986). *See also Andantech LLC v. Commissioner*, 331 F.3d 972, 977 (D.C. Cir. 2003).

[45] *See, e.g.*, *Cary v. United States*, 22 F.2d 298, 299 (W.D.N.Y. 1927); *Fuller & Smith v. Routzahn*, 23 F.2d 959, 964 (N.D. Ohio 1927); *Lonsdale v. United States*, 31 F.2d 482, 484 (E.D. Mo. 1928); *Williams & Waddell Inc. v. Pitts*, 148 F. Supp. 778, 780 (E.D.S.C. 1957) (quoting rule established by Board of Tax Appeals); and *Hechavarria v. United States*, 374 F. Supp. 128, 132 (S.D. Ga. 1974) (same).

[46] *See Stern v. Carey*, 119 F. Supp. 488, 489 (N.D. Ohio 1953).

[47] *See* cases cited, *supra* note 44.

[48] *Compare* Tax Court Rule 1(d), *with* Fed. R. Civ. P. 1.

[49] Section 7459(a).

proceedings."[50] The Tax Court also voluntarily adopted provisions of the Rules Enabling Act in 2005. However, the Tax Court typically amends its rules and responds to commentary more efficiently than other federal courts.[51] Any further proposals to make the Tax Court more like other courts should take care to preserve efficiencies in how the Tax Court drafts rules and responds to commentary.

It is worth noting that the House Judiciary Committee announced one such legislative proposal on October 12, 2017. The Protecting Access to the Courts for Taxpayers Act (H.R. 3996) is a bipartisan proposal to allow federal district courts (and other courts) to, "in the interest of justice," transfer tax cases to the Tax Court if the case could have been brought in Tax Court at the time the case was filed in the other court. The proposal would protect taxpayers who, for example, accidentally file in federal district courts cases that should have been filed in Tax Court (such as deficiency actions). The proposal would accomplish this by amending 28 U.S.C. section 1631 to add the Tax Court as a court to which other federal courts can transfer civil actions. But the proposal certainly would not change other of the Tax Court's processes and procedures. Instead, the proposal implicitly recognizes that the Tax Court plays a distinct but, in practical terms, important role as part of the federal judiciary.

To be clear, this report does not wade into the debate about the Tax Court's constitutional status as a court or agency (or something else).[52] Nor do we argue that all the Tax Court's unique processes and procedures are worthy (or capable) of emulation by other tribunals. Rather, this report offers some practical reasons for welcoming a few of the Tax Court's anomalies. Judges, practitioners, and parties in appropriate instances in tax or nontax cases in other federal courts should consider adopting certain Tax Court rules to facilitate discovery, save trial time, and manage cases more efficiently. Making the Tax Court more like other courts should not be a one-way street whereby the Tax Court jettisons the rules and procedures it has spent years refining. Further, any additional legislative change to the Tax Court's status should allow it continued leeway to develop policies and procedures that best fit its exceptional judicial task. In other words, Congress should ensure that any legislative change does not spell the death of Tax Court exceptionalism.[53]

III. Exceptional Rules for an Exceptional Task

The Tax Court's task is exceptional, but its rules encourage the same efficient, low-cost resolution of cases that all courts seek. What follows is not an end-to-end survey of the differences between the Tax Court rules and those of other tribunals.[54] Rather, we highlight just a few of the Tax Court rules to illustrate practical reasons for continuing to respect the Tax Court's unique position and, in appropriate cases, perhaps exporting some of those practices to other federal tribunals. Other federal courts have discretion to adopt specific pretrial and trial practices on a case-by-case and practice-by-practice basis, and in some contexts they have done so by reference to the Tax Court rules. Moreover, some of those courts have adopted practices from the Tax Court on a broader scale.

[50] *Snyder v. Commissioner*, 93 T.C. 529, 531 (1989).

[51] *See supra* note 41.

[52] That issue has received significant coverage by scholars and practitioners. *See, e.g.*, Hellwig, *supra* note 2; Nathan J. Richman, "Suit Seeks to Establish Whether the Tax Court Is Subject to FOIA," *Tax Notes*, Oct. 19, 2015, p. 342; Lederman, "When the Bough Breaks: The U.S. Tax Court's Branch Difficulties," 34 *ABA Tax Section NewsQuarterly* (Winter 2015); Jaime Arora, "Tax Court Is Part of Executive Branch, D.C. Circuit Holds" *Tax Notes*, June 30, 2014, p. 1478; Deborah A. Geier, "Tax Court Article III and the Proposal Advanced by the Federal Courts Study Committee: A Study in Applied Constitutional Theory," 76 *Cornell L. Rev.* 985 (1991); and Daniel L. Ginsburg, "Is the Tax Court Constitutional?" 35 *Miss. L.J.* 382 (1964).

[53] Another reason to encourage at least some Tax Court exceptionalism is to continue to allow the court to function as a venue in which innovative procedural rules can be tested and refined to address an enormous and diverse caseload. Several practitioners recently discussed one such concept, although this report does not offer comment on that particular suggested procedure. *See* Ryan Finley, "IRS Focused on Better Transfer Pricing Case Selection, Kane Says," *Tax Notes*, June 19, 2017, p. 1662 (noting the possibility of using court-appointed expert economists to improve the resolution of some cases).

[54] For example, in the Tax Court, a deposition without the parties' consent is "an extraordinary method of discovery." Tax Ct. R. 70(c)(1)(B). Under the FRCP, subject to a few exceptions, a party generally may take up to 10 depositions without leave of court. *See* Fed. R. Civ. P. 30(a)(1).

For instance, each of the district courts of U.S. Territories had the opportunity to adopt local rules of civil procedure.[55] The district courts of the U.S. Virgin Islands and Guam chose to adopt tax-specific procedural rules.[56] The District Court of the U.S. Virgin Islands, for instance, is a federal district court but, unlike other federal district courts, hears tax deficiency cases in addition to tax refund cases. Rather than relying exclusively on the FRCP to govern all of its tax cases, the District Court of the U.S. Virgin Islands expressly adopted a number of the Tax Court's rules to govern its deficiency proceedings.[57] The Tax Court's rules the court chose to import covered topics unique to the Tax Court, such as the computation process under Tax Ct. R. 155, but also topics that are otherwise covered by the FRCP or district court local rules, such as rules for answers or briefs.[58] Thus, to provide specific rules for instances in which it hears deficiency cases, the District Court of the U.S. Virgin Islands looked to the Tax Court for guidance even on topics addressed by the FRCP. Similarly, without specifically mentioning the Tax Court's rules, the District Court of Guam appears to have followed an analogous practice.[59]

Moreover, the rules described below not only undercut the notion that the Tax Court should conform all its procedures to other federal courts, they also suggest that other federal courts should consider embracing aspects of the Tax Court rules in appropriate instances. Several of the examples — such as requiring stipulations and informal discovery — reflect the Tax Court's decision to adopt unique rules that, although consistent with principles underlying the FRCP, go a step further and mandate compliance to encourage efficient resolution of the wide range and high volume of cases the Tax Court adjudicates. The requirement that testifying expert witnesses provide a written report is an example of the FRCP adopting a Tax Court rule. Yet another example — the computation process of Tax Ct. R. 155 — is a unique procedure that other tribunals should consider adopting in appropriate cases.

A. Stipulation: The Bedrock of Tax Court Practice

The Tax Court promulgated a rule encouraging stipulations in 1924, made it mandatory in 1955, and maintained it amid the rule revisions effective January 1, 1974.[60] It is now Tax Ct. R. 91, and it requires parties to stipulate "to the fullest extent to which complete or qualified agreement can or fairly should be reached" on all relevant, non-privileged matters.[61] The stipulation requirement applies regardless of whether the matters at issue "involve fact or opinion or the application of law to fact."[62]

The Tax Court's Rules Committee explained in 1973 that this practice had been a mainstay in the Tax Court and that "the intention of this rule is to strengthen and clarify that process, and to continue its central function as an instrument for the more expeditious trial of cases as well as for purposes of settlement."[63]

While the rules committee reemphasized "the continuing obligation to observe the stipulation requirements" in Tax Court,[64] it also clarified that the stipulation process is flexible:

[55] District courts of U.S. Territories are Article IV Territorial District Courts. *See* Michael W. Weaver, "The Territory Federal Jurisdiction Forgot: The Question of Greater Federal Jurisdiction in America Samoa," 17 *Pac. Rim L. & Pol'y J.* 325, 330-331 (2008). Under 48 U.S.C. sections 1611(c) and 1424-1, respectively, the District Court of the U.S. Virgin Islands and the District Court of Guam, may promulgate their own rules of practice and procedure.

[56] For their tax systems, the U.S. Virgin Islands and Guam follow a mirror system whereby the territory substitutes its name for "United States" (and vice versa) in the Internal Revenue Code. *See Danbury Inc. v. Olive*, 820 F.2d 618, 620 (3d Cir. 1987) (U.S. Virgin Islands); and *Armstrong v. Northern Mariana Islands*, 576 F.3d 950, 953 (9th Cir. 2009) (Guam).

[57] *See* D.V.I. LRCi 71A.1.

[58] D.V.I. LRCi 71A.1(a). The court adopted Tax Ct. R. 34(a), (b), and (c) (petitions); Tax Ct. R. 36 (answers); Tax Ct. R. 37 (replies); Tax Ct. R. 91 (stipulations); Tax Ct. R. 122 (submission of a case without trial); Tax Ct. R. 142 (burden of proof); Tax Ct. R. 151 (briefs); and Tax Ct. R. 155 (computation by parties for entry of decision). The court also adopted various aspects of the Tax Court's small tax case regime. *See* D.V.I. LRCi 71A.1(b).

[59] *See, e.g.*, D. Guam TXLR 2 (filing of petition for redetermination); D. Guam TXLR 3 (content of petition in deficiency or liability actions); D. Guam TXLR 4 (filing fee, number filed, and entry on docket); D. Guam TXLR 5 (answer); D. Guam TXLR 6 (reply); D. Guam TXLR 8 (stipulations for trial); and D. Guam TXLR 14 (special rules for tax cases where the amount at issue is $50,000 or less).

[60] *See* Dubroff and Hellwig, *supra* note 2, at 598-617. *See also Branerton Corp. v. Commissioner*, 61 T.C. 691, 692 (1974) ("For many years the bedrock of Tax Court practice has been the stipulation process, now embodied in Rule 91.").

[61] Advisory Committee notes to Tax Ct. R. 91(a), 60 T.C. 1057, 1117 (1973).

[62] Tax Ct. R. 91(a) (1974).

[63] Advisory Committee notes to Tax Ct. R. 91(a), 60 T.C. at 1117.

[64] Advisory Committee notes to Tax Ct. R. 100, 60 T.C. 1057, 1121 (1973).

> The stipulation process is more comprehensive [than requests for admission], supported by affirmative action of the Court, and mandatory in all cases. . . . The stipulation process is more flexible, based on conference and negotiation between parties, adaptable to statements on matters in varying degrees of dispute, susceptible of defining and narrowing areas of dispute, and offering an active medium for settlement.[65]

As the Tax Court has acknowledged, the FRCP has no comparable rule.[66] But the federal district courts could benefit from such a practice. The stipulation process allows the Tax Court to efficiently handle the unprecedented volume of cases docketed each year.[67] And the Tax Court's adoption of pretrial discovery procedures in 1974 was designed to aid, not supplant, the stipulation process.[68] By rule, discovery mechanisms "may be used in anticipation of the stipulation of facts required" by Tax Ct. R. 91, but their existence or use does not excuse failure to comply with the stipulation process.[69]

Although the Tax Court's reliance and emphasis on stipulation is unique, the stipulation requirement is consistent with practices encouraged by other courts. The Tax Court's Rules Committee noted in 1973 that the stipulation process "is woven through other procedures such as the pretrial conference."[70] In fact, shortly before the 1974 effective date of the revisions to the Tax Court rules, the First Circuit remanded a tax case on appeal from federal district court and encouraged the parties on remand "to enter into stipulations which would expedite the resolution of this litigation without prejudice to either side."[71] This is in keeping with guidance from other circuits that "stipulations fairly entered into are favored. They often expedite a trial and eliminate the necessity of much tedious proof."[72]

More recently, the Court of Federal Claims expressly looked to the Tax Court's stipulation process. That court acknowledged that it considered and had been guided by the Tax Court's stipulation process in drafting an order that required the parties to stipulate facts before trial.[73] Other courts likewise could benefit from following aspects of the Tax Court's stipulation process.

B. The *Branerton* Process

Another unique aspect of Tax Court practice is the informal consultation requirement. In 1974 the Tax Court mandated that parties "attempt to attain the objectives of discovery through informal consultation or communication" before using the discovery procedures.[74] As the Tax Court later observed, the rule contemplates "consultation or communication" — "words that connote discussion, deliberation, and an interchange of ideas, thoughts, and opinions between the parties."[75]

Just two months after this rule took effect, the Tax Court gave it teeth. In *Branerton*, the Tax Court granted the IRS's motion for a protective order and relieved the commissioner of responding to interrogatories the taxpayer served without first attempting to obtain the information voluntarily through informal consultation.[76] In Tax Court, parties now undertake the eponymous *Branerton* process before resorting to formal discovery.

[65] Advisory Committee notes to Tax Ct. R. 91(a), 60 T.C. at 1118.

[66] *Id.* at 1117-1118.

[67] *See* U.S. Tax Court, "Standing Pretrial Order," para. 1 ("To help the efficient disposition of all cases on the trial calendar . . . [i]t is ORDERED that all facts shall be stipulated (agreed upon in writing) to the maximum extent possible."); *Cf.* Dubroff and Hellwig, *supra* note 2, at 598 (noting that according to many, the stipulation process "is largely responsible for the court's ability to keep current with the thousands of cases docketed each year. . . . Many observers believe that the high rate of pretrial settlements that obtains in the Tax Court is largely due to this facet of practice" (internal citations omitted).).

[68] *See Branerton*, 61 T.C. at 692 ("The recently adopted discovery procedures were not intended in any way to weaken the stipulation process."). Dubroff and Hellwig, *supra* note 2, at 599-600, 616-617.

[69] Tax Ct. R. 100.

[70] Advisory Committee notes to Tax Ct. R. 91(a), 60 T.C. at 1118.

[71] *United States v. Rexach*, 482 F.2d 10, 32 (1st Cir. 1973).

[72] *Burstein v. United States*, 232 F.2d 19, 23 (8th Cir. 1956). *See also Caban Hernandez v. Philip Morris USA Inc.*, 486 F.3d 1, 5-6 (1st Cir. 2007); and *Ins. Co. of N.V. v. Northwestern Nat. Ins. Co.*, 494 F.2d 1192, 1196 (6th Cir. 1974).

[73] *Jicarilla Apache Nation v. United States*, 120 Fed. Cl. 135, 136 n.1 (2015).

[74] Tax Ct. R. 70(a)(1) (1974).

[75] *International Air Conditioning Corp. v. Commissioner*, 67 T.C. 89, 93 (1976).

[76] *Branerton*, 61 T.C. at 692.

This rule is aimed at efficiency. The Tax Court has noted that a "principal purpose of the requirement for informal discovery is to save the time and resources of the Court and of the parties before it in the development of relevant and undisputed facts."[77] And it has explained that the specialized scope of cases before the Tax Court makes the *Branerton* process "especially useful":

> The requirement in section 6001 that taxpayers maintain adequate records promotes the informal development of much relevant evidence. Additionally, under sections 7602 and 7609, the Commissioner, who is always a party to cases before us, possesses broad statutory authority to compel the production of documents and testimony by the use of administrative summonses even before a case is filed in our Court. Many years of experience with the use of informal discovery in a variety of circumstances have demonstrated to our satisfaction the efficacy of that procedure.[78]

Although the *Branerton* process is unique, it is not inconsistent with other courts' objectives.[79] In 2010 the Tax Court acknowledged that the *Branerton* process "is akin to so much of Fed. R. Civ. P. 26(a) as imposes on the parties an affirmative duty to disclose basic information (without awaiting formal discovery)."[80] Indeed, effective December 1, 1993, the FRCP imposed "a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement."[81] Critical differences remain, however: One purpose of imposing the disclosure duty under Fed. R. Civ. P. 26(a) is to help the parties decide which depositions will actually be needed,[82] whereas the Tax Court prefers other means of discovery and considers nonconsensual depositions an extraordinary method.[83]

As with the *Branerton* process, efficiency was a major purpose of adopting these initial disclosures under the FRCP — specifically, accelerating and making more efficient the exchange of basic information about the case.[84] Although it did not mention the Tax Court, the FRCP advisory committee noted:

> The experience of the few state and federal courts that have required pre-discovery exchange of core information such as is contemplated in Rule 26(a)(1) indicates that savings in time and expense can be achieved, particularly if the litigants meet and discuss the issues in the case as a predicate for this exchange.[85]

In fact, one district judge suggested that the 1993 amendments to the FRCP could go further and provide a rule requiring "prompt disclosure of all material documents and information by all parties at the commencement of every action, permitting supplemental traditional discovery for good cause only."[86] Although that rule was not adopted, it would have been much like — but even more stringent than — the Tax Court's *Branerton* process.

Effective December 1, 2015, the FRCP allows parties to begin discovery in district courts earlier to "facilitate focused discussion during the Rule 26(f) conference" in recognition that that may produce changes in the discovery requests.[87] This is the exact type of consultation or communication the Tax Court envisioned when it established the *Branerton* process in 1974.[88] Of course, cases heard

[77] *Schneider Interests LP v. Commissioner*, 119 T.C. 151, 154 (2002).

[78] *Id.* at 155 (internal citations omitted).

[79] *See* Marvel, *supra* note 2, at 293. At least one Tax Court judge has recently expressed something of a contrary view. *See* Davis, *supra* note 43 (quoting Judge Mark V. Holmes as saying that the *Branerton* letter "makes no sense to a nontax civil litigator" but noting that Judge Holmes acknowledged that his is a minority viewpoint in the Tax Court).

[80] Advisory Committee notes to Tax Ct. R. 71, 134 T.C. 304, 324 (2010).

[81] Advisory Committee notes to Fed. R. Civ. P. 26 (1993).

[82] *Id.*

[83] Tax Ct. R. 70(c)(1)(B).

[84] Advisory Committee notes to Fed. R. Civ. P. 26 (1993).

[85] *Id.*

[86] *See id.* (citing William W. Schwarzer, "The Federal Rules, the Adversary Process, and Discovery Reform," 50 *U. Pitt. L. Rev.* 703, 721-723 (1989)).

[87] Advisory Committee notes to Fed. R. Civ. P. 26 (2015).

[88] *See International Air Conditioning Corp. v. Commissioner*, 67 T.C. 89, 93 (1976).

by the Tax Court typically follow an administrative audit during which the taxpayer and the IRS exchange information. In that respect, cases heard by the Tax Court may be different from many civil cases heard by district courts, in which the parties may initially have little to no information about one another. Nevertheless, in appropriate cases, the Tax Court's informal discovery process could benefit district courts.

C. Written Expert Reports

Effective July 1, 1986, the Tax Court adopted the predecessor to Tax Ct. R. 143(g), which, absent leave of court, obligated testifying expert witnesses to prepare written reports for submission to the court and parties.[89] When Tax Ct. R. 143(g) was introduced, neither the FRCP nor the Rules of the Court of Federal Claims (RCFC) contained a similar requirement.[90] Many members of the tax bar criticized Tax Ct. R. 143(g) for that reason.[91]

Those criticisms were resolved several years later — but not because the Tax Court succumbed to critique and conformed its rules to those of other courts. Rather, effective December 1, 1993, the FRCP adopted a rule similar to Tax Ct. R. 143(g). However, when it was adopted in 1993, Fed. R. Civ. P. 26(a)(2)(B) imposed the written report obligation on "persons retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve the giving of expert testimony."[92] Tax Ct. R. 143(g) did not have a similar limitation in 1993,[93] but the Tax Court adopted one on July 6, 2012.[94] This rulemaking dialogue demonstrates that the Tax Court is not as insular or anomalous as some academics suggest. Rather, the Tax Court is a regular and attentive participant in the U.S. judicial system.

To be sure, aspects of Tax Ct. R. 143(g) remain unique and have not been incorporated into the FRCP or the RCFC. For instance, in Tax Court, expert witnesses typically do not provide live testimony on direct examination. Rather, Tax Ct. R. 143(g)(2) provides that the expert's written report serves as her direct testimony.[95] The FRCP and the RCFC contain no corollary to that provision, even though their required written expert reports are "intended to set forth the substance of the direct examination" and "should be written in a manner that reflects the testimony to be given by the witness."[96]

Also, the Tax Court does not provide jury trials, whereas district courts often do. Because a live direct examination of an expert witness can be essential to establishing the expert's credibility with a jury, and because jurors may not read the expert's report before beginning deliberations and therefore may need additional explanation of its key opinions, there is good reason for not adopting a blanket corollary to Tax Ct. R. 143(g)(2) in district courts. On the other hand, that requirement — a calculated way to streamline the presentation of trial evidence in Tax Court — may benefit district courts in bench trials.

Indeed, the Court of Federal Claims, which, like the Tax Court, conducts only bench trials, has applied Tax Ct. R. 143(g)(2) in both tax and nontax cases to save trial time.[97] Judge Francis Marion Allegra had adopted the concept and notified the parties at pretrial conferences (at the outset of discovery, before the experts generated their reports).[98] District judges, in appropriate non-jury cases, should consider following suit to

[89] Advisory Committee notes to Tax Ct. R. 143(f), 85 T.C. 1121, 1135 (1985). Tax Ct. R. 143(f) was redesignated as Tax Ct. R. 143(g) in 2010. Dubroff and Hellwig, *supra* note 2, at 644.

[90] *See* Fed. R. Civ. P. 26 (1986); and R. Ct. Fed. Cl. 26 (1986).

[91] Dubroff and Hellwig, *supra* note 2, at 645.

[92] Advisory Committee notes to Fed. R. Civ. P. 26 (1993).

[93] Advisory Committee notes to Tax Ct. R. 143(f), 85 T.C. 1121, 1135 (1985).

[94] Advisory Committee notes to Tax Ct. R. 143(g), 139 T.C. 521, 554-555 (2012). *See also* Tax Court press release (July 6, 2012) ("In general, the adopted amendments align the Tax Court's Rules more closely with certain provisions of the Federal Rules of Civil Procedure as well as make other technical, clarifying, and conforming changes.").

[95] Tax Ct. R. 143(g)(2) states that the "report will be marked as an exhibit, identified by the witness, and received in evidence as the direct testimony of the expert witness." However, the rule allows additional direct testimony "to clarify or emphasize matters in the report, to cover matters arising after the preparation of the report, or otherwise at the discretion of the Court."

[96] Advisory Committee notes to Fed. R. Civ. P. 26 (1993).

[97] *Deseret Management Corp. v. United States*, 112 Fed. Cl. 438, 447 n.16 (2013); *Jicarilla Apache Nation v. United States*, 112 Fed. Cl. 274, 286 n.16 (2013).

[98] *Deseret Management*, 112 Fed. Cl. at 447 n.16; *Jicarilla Apache Nation*, 112 Fed. Cl. at 286 n.16.

streamline the presentation of evidence and save trial time.

D. Computation Process

Tax Ct. R. 155 generally requires the parties to compute the dollar impact of the Tax Court's decision. Although Tax Court judges decide substantive tax issues — such as the arm's-length price for an asset; the existence or amount of an item of income, deduction, or credit; or the situs of income — the monetary effect of those decisions on a taxpayer's tax liability is not always readily apparent. It can depend on various aspects of the taxpayer's unique tax return.

Tax Ct. R. 155 shifts to the parties the burden of converting the court's legal conclusions into a "monetary equivalent."[99] It establishes specific procedures if the parties disagree but precludes them from relitigating the decided issues or raising any new ones.[100] The rule, which has changed little since it was first adopted as Tax Ct. R. 50 in December 1924,[101] was designed to resolve cases efficiently. In the words of the Supreme Court, it "was a proper exercise of the power of the Board to prescribe the practice in proceedings before it."[102] As the Third Circuit explained while discussing the Tax Court's application of the rule, "The Tax Court is informed by experience as to what is best to promote efficiency in disposing of the volume and variety of its work."[103]

Although Tax Ct. R. 155 facilitates the efficient entry of judgment in cases, it makes sense that there is no direct corollary in the FRCP. A precise dollar amount of damages is often the very issue district judges or juries must decide, so in many cases, such as simple tort actions, Tax Ct. R. 155 may be of little help to district judges.

However, Tax Ct. R. 155 might be helpful in multiparty tort cases, actions for apportionment, or other complex cases with nuanced financial ramifications. It certainly has potential application in tax cases in district court. In fact, at least one claims court judge has followed a process "loosely" patterned after Tax Ct. R. 155.[104] The same appears to be true for a district judge who, in a recent refund action, ordered the parties to file an agreed stipulation on the precise amount of the refund and a proposed judgment or to submit the matter to the court for resolution.[105] Although the district judge's order did not cite Tax Ct. R. 155, it had a similar ultimate effect. Other district judges could follow suit in appropriate cases.

E. Small Tax Cases

Tax Ct. R. 170 allows taxpayers to elect to have simplified procedures apply to disputes that involve $50,000 or less.[106] Unlike most Tax Court rules, the small tax case procedures were initiated by congressional action.[107] According to legislative history, Congress envisioned that the special procedures would expedite the Tax Court's workload by giving it "greater capability to manage many of the smaller cases conducted before it."[108] The language of section 7463 achieves that intent. It provides that the Tax Court may issue its decisions in small tax cases in abbreviated opinions and that those decisions are final and non-appealable.[109] Tax Ct. R. 170 through 174 provide for a simplified petition and a trial conducted "as informally as possible consistent with orderly procedure."[110] Also, the parties in small tax cases are not required to file briefs or

[99] Dubroff and Hellwig, *supra* note 2, at 783-784. *See Cloes v. Commissioner*, 79 T.C. 933, 935 (1982) (stating that Tax Ct. R. 155 is a "mechanism whereby the Court is enabled to enter a decision for the dollar amounts of deficiencies and/or overpayments resulting from the disposition of the issues involved in a case where those amounts cannot readily be determined").

[100] Tax Ct. R. 155(b) and (c).

[101] Dubroff and Hellwig, *supra* note 2, at 778-780.

[102] *Bankers' Pocahontas Coal Co. v. Burnet*, 287 U.S. 308, 313 (1932).

[103] *Commissioner v. Erie Forge Co.*, 167 F.2d 71, 78 (3d Cir. 1948) (discussing the predecessor to Tax Ct. R. 155).

[104] *See Principal Life Insurance*, 76 Fed. Cl. at 328; and *Deseret Management*, 112 Fed. Cl. at 465.

[105] Order, *Ervin*, 13-cv-127 (Mar. 21, 2017). *See also* Order, *Ervin*, 13-cv-127 (Aug. 24, 2017).

[106] *See also* section 7463(a).

[107] Dubroff and Hellwig, *supra* note 2, at 883-886.

[108] *Id.* (citing S. Rep. No. 91-552, at 303 (1969)).

[109] Section 7463(a) and (b). These summary opinions are not precedential. *See* Dubroff and Hellwig, *supra* note 2, at 886. In electing small tax case status, the taxpayer waives the right to appeal the Tax Court's decision. *See* section 7463(b).

[110] Tax Ct. R. 173(a) and 174(b).

engage in oral argument.[111] Those simplified procedures play a critical role in the Tax Court's ability to manage its large caseload.[112]

In recent years, roughly half of all Tax Court cases have been small cases.[113] A procedure that allows those cases to proceed in a simplified, efficient manner is imperative to the Tax Court's ability to function. If its resources and caseload remain constant, any attempt to make the Tax Court more like other federal courts should preserve the small tax case procedures. Put simply, a wholesale adoption of the FRCP is not a viable option for the Tax Court.

In appropriate contexts and within reason, district judges in small-dollar or other pro se cases might consider drawing from some of the Tax Court's small case procedures, such as the provisions for relaxed briefing, informal trials, and waiver of oral argument.

IV. Conclusion

The Tax Court rules are constantly evolving. At times, that evolution has more closely aligned the Tax Court's rules with those of the FRCP and other federal tribunals. Other times, the evolution has caused a divergence from the FRCP and other tribunals. As illustrated above, some of those divergences have resulted from the unique posture of the Tax Court and the efficiencies it requires to timely resolve its large caseload.

Because resolving cases in a timely and efficient manner is also a goal of other federal tribunals, those courts should, in appropriate cases, consider adopting some of the procedures the Tax Court has developed to accomplish its unique judicial purpose. In short, making the Tax Court more like other courts — perhaps a welcome change in many respects — should not be a one-way street whereby the Tax Court simply deserts the rules and procedures it has spent years refining. Other courts should embrace Tax Court exceptionalism and learn what they can from an independent tribunal. ■

[111] Tax Ct. R. 174(c).

[112] Dubroff and Hellwig, *supra* note 2, at 886.

[113] *Id.* at 886-887.