Washington Law Review

Volume 36
Number 4 *Annual Meeting of the Washington State Bar Association*

11-1-1961

Revenue Procedure 60-18—New Techniques for the Early Consideration and Disposition of Tax Court Cases

Melvin L. Sears

REVENUE PROCEDURE 60-18—NEW TECHNIQUES FOR THE EARLY CONSIDERATION AND DISPOSITION OF TAX COURT CASES

MELVIN L. SEARS*

With the promulgation of Revenue Procedure 60-18 (published in IRB No. 1960-37, p. 61), the Internal Revenue Service has again instituted a procedure for the benefit of the taxpayers, the tax Bar, the Tax Court and the Service. The effective operation of this new procedure undoubtedly will prove to be of substantial benefit to all parties concerned by securing a fair and expeditious disposition, either by settlement or trial, of tax controversies before the Tax Court.

The first significant step made in recent years in the improvement in the handling of litigation in the Tax Court was the issuance in 1958 of Delegation Order No. 60, Chief Counsel's Order No. 1958-5 (published in 1958-1 C.B. 681). Under the 1958 Order cases docketed in the Tax Court were divided into two classes—those in pre-session status and those in session status. Cases are considered in pre-session status from the date they are docketed in the Tax Court to the opening date of the session of the Court at which the particular case is calendared for trial. Cases are in session status on and after the opening date of the trial session at which they are calendared for trial.

This Delegation Order further provides that the determination of whether cases in pre-session status are to be settled or tried is the joint responsibility of the Regional Counsel and the Regional Appellate Division. However, in any pre-session case where disagreement might arise between the respective offices of the Appellate Division and Regional Counsel, the ultimate decision as to the action to be taken with respect to the whole of such case or any issue or issues involved is vested in the Chief Counsel and his decision is controlling. There is no diminution of the ultimate authority of the Chief Counsel in this respect under Revenue Procedure 60-18.

As to session cases, the conclusion of the Regional Counsel as to whether the case in whole or in part should be settled, conceded or tried is controlling. Here also Revenue Procedure 60-18 does not dilute this authority, as set forth in the Delegation Order of 1958.

* Regional Counsel, San Francisco Region, Internal Revenue Service, U. S. Treasury Department.

From the standpoint of the Internal Revenue Service in the handling and processing of Tax Court cases, Revenue Procedure 60-18 supplements the procedures of the 1958 Delegation Order. But more important, from the over-all standpoint of Tax Court litigation, this Revenue Procedure supplements the practices and procedures of the Tax Court. In other words, this procedure in its simplest terms is a method whereby *both parties* in a Tax Court case may comply with the directives of the Tax Court in an orderly and efficient manner.

Some four or five years ago the Tax Court instituted a procedure under which the Court sent to both parties—taxpayer or his counsel of record and to the Chief Counsel—an inquiry, Tax Court form letter 30, in which the Court asked specific questions of each party as to the status of the case which was being considered by the Court for setting on a trial calendar. This inquiry letter is commonly referred to as the Tax Court's Trial Status Request. The Court needs the requested information since in selecting cases for trial calendars at a designated session, the Court takes into consideration the views of the parties as to the readiness of cases for trial, the probability and possibility of settlement, what efforts have been made by the parties to stipulate facts, the estimated trial time, and other pertinent information which the Court obtains from both parties.

To give the Court answers to these questions, if such answers are to be of any material assistance to the Court in calendaring cases for trial, it is necessary that the parties confer and determine whether the case can be settled in whole or in part, what facts can be stipulated thereby reducing trial time, and what facts will have to be proven by oral testimony. The taking of oral testimony is a time consuming process and has a material bearing on the number of cases which the Court can handle at a given trial session.

The tax practitioner as well as the attorneys of the Regional Counsel's office handling tax litigation are enrolled practitioners before the Tax Court. As members of the Tax Court Bar, they have the same responsibilities and duties to that Court as they have to any other Court, state or federal, of which they are members. Thus, the heart of Revenue Procedure 60-18 is the Tax Court's Trial Status Request. The procedures provided for will and should enable both parties to confer, settle those cases in the Trial Status Request period which should be settled, inform the Court as to the cases which very likely will be tried and enable both the tax practitioner and attorneys of the Regional Counsel's staff to adequately and thoroughly prepare the cases which

are calendared for trial by the Court. The Tax Bar has as much interest in the success of this procedure as does the Service. It is as much for their benefit as it is for the Service. We are determined to make it succeed and we seek the wholehearted cooperation of every tax practitioner who has a case pending before the Tax Court.

We have adopted a course of action under which each tax practitioner, or taxpayer who is not represented by an attorney of record in the Tax Court, is to receive either from Regional Counsel or the Appellate Division a copy of the Revenue Procedure. Let us examine its provisions. Its introduction sets forth clearly its basic purpose and objectives which apply as much to the taxpayer as to the Service:

> * * * to provide for prompt action and insure expeditious disposition of cases before the Tax Court of the United States which may be settled; to enable Regional Counsel to stipulate undisputed facts as required by the Tax Court in an orderly manner and make adequate preparation for trial and defense of the Commissioner's determinations of tax liabilities; to avoid the rush and delay occasioned by last minute settlement negotiations; * * *

Revenue Procedure 60-18 subdivides pre-session cases into three distinct categories based upon the factor of time. During each of the periods different courses of action are taken by personnel of the Service and different courses of action should be undertaken by representatives of the Tax Bar. The first period commences at the time the case is at issue in the Court, and extends to the date the Tax Court distributes its Trial Status Request. Such request is sent by the Court usually 60 to 90 days prior to the issuance of the trial notice. The second period is the "Trial Status Request" period. It begins with the receipt of the Trial Status Request and terminates with the Court's issuance of the trial calendar. The third period is the time from the issuance of the calendar to the opening of the session at which the case is to be tried, generally a period of approximately 90 days.

During the first period the Appellate Division will promptly schedule settlement conferences on all cases in which the statutory notice was issued by the District Director, with the exception of those cases wherein criminal prosecution is pending. It is expected that the attorney in the office of the Regional Counsel to whom the case is assigned will actively participate in such conferences. This affords the taxpayer and his representative the opportunity for early settlement discussions and can lead to disposition without need for trial of many cases that otherwise might find their way on to a Tax Court calendar.

The second period—the Trial Status Request period—will be

marked by active efforts to conclude settlement negotiations on all cases not previously settled nor referred prior thereto to the Regional Counsel for trial. Cases in which the Appellate Division has issued the statutory notice will generally be returned by the Regional Counsel to the Appellate Division at the commencement of this period since in most of those cases the attorneys of the Regional Counsel's office would not have actively participated in the settlement conferences in docketed status. Final settlement conferences at which attorneys of the office of the Regional Counsel will take an active part will accordingly be scheduled by the Appellate Division.

While settlement negotiations between the parties should begin as soon as practical and feasible after a case is docketed in the Tax Court and is at issue, it is essential that the parties get down to "brass tacks," so to speak, in settlement negotiations on all cases susceptible of settlement in whole or in part as soon as possible after issuance by the Court of the Trial Status Request, since both parties must comply with the directive for informing the Court of the status of the case. The Court requests the taxpayer to report to it fifty days after receipt of the Trial Status Request and the Chief Counsel reports to the Court shortly thereafter. Thus, settlement negotiations must be completed in sufficient time to enable both the taxpayer or his counsel and the Chief Counsel to submit the timely reports to the Court.

During the Trial Status period every feasible opportunity will be afforded the taxpayer and his counsel to discuss and negotiate the settlement of cases. But, except for most unusual circumstances, *the termination of the trial status period marks the end of settlement negotiations.*

The important consideration in the first two periods is the settlement of cases, in whole or in part, which are susceptible of settlement. *These are the settlement negotiation periods* and the taxpayer can get just as favorable a settlement in these periods as he can in the third period, which is the trial preparation period. In fact, after our attorneys have prepared a case for trial in the third period the settlement value of the case to the Government is, in most instances, greater than in the two preceding periods. The attorney for a taxpayer who has the feeling that he can get a better settlement from the Government just prior to the trial session may well find that he will have to pay a greater amount at that time to settle his case than he could have settled it for in the first two periods and prior to the time our attorney prepared the case for trial.

Thus at the commencement of the third period, upon the receipt of

the trial calendar, trial preparation is undertaken with vigor by the attorney in the office of the Regional Counsel and by the representative of the taxpayer. After the commencement of this final period, conferences, in the main, are attended only by the attorney in the office of the Regional Counsel; and such conferences are directed *solely* at trial preparation. While authority is in the Chief Counsel ultimately to settle docketed cases, generally no effort will be made to continue or reactivate settlement negotiations or recommence a program of settlement conferences. That type of consideration was had and exhausted in the prior two periods. With the announcement by the Tax Court of its trial calendar, trial preparation must be undertaken in earnest. Since the trial calendar will have been issued approximately 90 days prior to the opening of the session, it is at once apparent that there is need for both parties to proceed without delay to the orderly stipulation of facts and to the commencement of such other steps as are necessary to complete trial preparation without the last minute rush that was not an uncommon occurrence prior to this new procedure.

Obviously, in some cases during trial preparation, and particularly during the process of stipulating facts, it may appear that facts are different than thought by one party or the other with resulting change in evaluation of position. At this point settlement negotiations will not be re-instituted. However, any fair, firm offer by the taxpayer will be given immediate and serious consideration and will be accepted or rejected without negotiations.

The beneficial results that can be achieved by the proper operation of Revenue Procedure 60-18 are many. Needless to say, it can only operate effectively if both the Bar and Internal Revenue Service recognize that it is a vehicle which in the long run will save time and expense of taxpayers, relieve the burden on the Tax Court, and permit the Internal Revenue Service to dispose of more cases in an orderly manner. What is important is that there be an early end to settlement negotiation and an earlier emphasis on trial preparation. Taxpayers and their representatives should regard these conferences as the occasion for a full and frank presentation of all facets of their case. They should be prepared to make their proposal of settlement based upon a realistic evaluation of the case.

An enthusiastic approach to Revenue Procedure 60-18 by the Bar and by the Internal Revenue Service will lead to the orderly disposition of the tax controversies before the Tax Court with dispatch, diligence, and dignity.