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Jeffrey E. Curtiss

University of Nebraska College of Law, jcurtiss@comcast.net

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TAXPAYERS DISCOVERY IN CIVIL FEDERAL TAX CONTROVERSIES

I. INTRODUCTION

A. SCOPE OF THE ARTICLE

The purpose of this article is to study the right of the taxpayer to elicit information from the federal government in a dispute over the amount of tax that is due. The article is limited to: (1) taxpayer's discovery, hence, it does not cover the ability of the government to elicit information about the taxpayer (by administrative summons or otherwise); (2) civil controversies, hence, it does not cover the right of the taxpayer to get information from the government when a criminal tax dispute arises; (3) federal controversies, hence, it does not cover the rights a taxpayer may have in gaining information from state taxing authorities; (4) tax controversies, hence, it does not cover the ability of the taxpayer to get information from the government regarding other types of disputes. Non-tax cases are discussed to the extent that the author feels they would be applicable to federal tax controversies. It is probably disputable whether tax controversies with the government differ materially from other types of controversies with the government, however, it is the opinion of the author that they do since taxes are the source of financial life for the government. Therefore, the author believes that discovery is looked on with less favor in tax disputes.

In a self assessment taxing system, it would seem that the opposite should be the case. The government derives its case from the information kept by taxpayers. It would seem only fair that the government should share that information with those from whom it is derived. The Internal Revenue Service has a duty only to collect those taxes legally owing to the government. If it has information which may establish that certain disputed funds are not owing to the government, it should have a duty to give that information to the taxpayer—much like a prosecutor has a duty to turn over favorable information to the attorney for the defense.

B. IMPORTANCE OF DISCOVERY IN TAX DISPUTES

In most situations the taxpayer will be in the best position to know the facts with regards to taxable transactions. If this is so, why would he worry about finding out what information the gov-

ernment possesses? There are two reasons why the taxpayer should consider discovery early in the stages of a federal tax dispute. First, it is important for settlement purposes to know what information the government possesses. Only by knowing what the other party believes the facts to be can one intelligently construct what theories that party is using to support its claim. One can then weigh the opposition's case and thereby know what amount to offer in settlement. Second, one must decide whether or not he wishes to use discovery because the different litigating forums provide vastly different rules regarding discovery.

In forum shopping a litigant must consider the availability of discovery from two aspects. First, by properly choosing his forum, a taxpayer may impede the government from gaining information from him (of course, the government would still have available the use of the Commissioner's administrative powers to gain such needed information). Also, by properly choosing his forum, the taxpayer may gain access to some government information concerning his case. Of course, discovery is only one of the taxpayer's considerations in choosing a forum, but in appropriate circumstances it might be an important consideration. Discovery may be available to the taxpayer prior to choosing his litigating forum; therefore, he might choose to conduct his discovery at the administrative level, then choose a restrictive forum for litigation.

II. ADMINISTRATIVE DISCOVERY

A. FREEDOM OF INFORMATION ACT

The Freedom of Information Act, reprinted in Appendix I, amended the Administrative Procedures Act (Section 3) and is now codified as Section 552 of Title 5 of the United States Code.

Section 552(a) (1) of the Act provides that certain information should be made available to the public by publication in the Federal Register. It also provides that such may be deemed to be so published if incorporated by reference into the Federal Register. Section 552(a) (2) provides that certain information should be made available to the public by the establishment of "reading rooms" where the public may come to the agency to elicit the desired information. Section 552(a) (3) provides that all other agency information shall be made available to the public upon request for "identifiable records." It also gives jurisdiction to the federal district courts to hear controversies arising out of such cases and places the burden of proof of sustaining its action upon the agency. Section

552(b) lists nine exempt classifications to which Section 552 does not apply. Those classifications include information required by executive order to be kept secret in the interest of national defense or foreign policy, information related solely to the internal personnel rules and practices of an agency, information exempted from disclosure by statute, trade secrets and commercial or financial information obtained from a person and privileged or confidential, certain inter-agency or intra-agency memorandums, files the disclosure of which would constitute an unwarranted invasion of privacy, investigatory files compiled for law enforcement purposes (to a limited extent), certain information about financial institutions, and certain geological and geophysical information. They will be discussed in more detail later.

B. HISTORY OF THE ACT

The history of the Freedom of Information Act is at best confusing, especially if one is attempting to decipher the combined meaning of the Senate and the House. The reason for this is that although both passed the same bill, each meant something different in enacting the legislation.¹ One author explains the difference by stating:

After the bill had passed the Senate on the basis of a committee report that was reasonably faithful to the words of the bill, the House committee was subjected to pressures to restrict the disclosure requirements. It yielded to the pressures. But it did not change the bill. Instead, it wrote the restrictions into the committee report. These restrictions differ drastically from the bill as passed by the Senate; they often contradict the words of the bill, and they sometimes contradict both the statutory words and the Senate committee report.

¹ "Even though the records of the various hearings over a ten year period are voluminous, probably more than ninety-five per cent of the useful legislative history is found in a ten page Senate committee report and in a fourteen page House committee report [S. Rep. No. 813, 89th Cong., 1st Sess. (1965) and H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966).] Problems of interpretation are aggravated not only by the 'specifically stated' clause but also by the differences between what the Act says on its face and what the committee reports say, and they are further complicated by differences between the two committee reports. In general, the Senate committee is relatively faithful to the words of the Act, and the House committee ambitiously undertakes to change the meaning that appears in the Act's words. The main thrust of the House committee remarks that seem to pull away from the literal statutory words is almost always in the direction of nondisclosure. The *Attorney General's Memorandum* consistently relies on such remarks by the House Committee." Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 762-63 (1967).

I believe (a) that statements in a House committee report that contradict the bill and depart from the understanding of the Senate committee are not the law, and (b) that inserting such statements into a committee report, instead of changing the bill, is a clear abuse. . . .²

The reasons why the courts will reject the House committee's abuse of legislative history, even though the Attorney General supports it, are overwhelming. Allowing the meaning of clear statutory words to be drastically changed by the House committee report would have many unsound consequences. Three major ones are: (1) The House that acts first would be deprived of any voice in the final meaning of the enactment, for the House that acts second could always adopt the same bill but alter its meaning through committee reports. (2) The sound system of the conference committee would be defeated, for the House that acts second, even when it knows the other House disagrees, could always make law as it chooses through the committee reports. (3) Statutes which are clear on their face would become unreliable indicia of the effective law. Indeed, if the Attorney General's Memorandum were to prevail, no careful lawyer could ever give advice by looking at a statute; he would always have to examine the legislative history.³

The one apparently truthful statement concerning the Freedom of Information Act is that, "there is no doubt that the legislative history of the act will play an important role in any subsequent agency or court interpretation,"⁴ but at least one authority has expressed that such should not be the case because an unambiguous Act should not be made ambiguous by its legislative history.⁵

Unfortunately, it is not as yet clear whether the courts will generally follow the Senate Committee Report or that of the House. Probably the fairest statement of the law today is:

² The omitted portion reads as follows: "I realize that habits have grown up in some quarters, both legislative and judicial, that are sometimes at variance with these two beliefs, but such habits seem to me very much in need of re-examination. The basic principle is quite elementary: The content of the law must depend upon the intent of both Houses, not of just one. In this instance, only the bill, not the House committee's statements at variance with the bill, reflects the intent of both Houses. *Indeed, no one will ever know whether the Senate committee or the Senate would have concurred in the restrictions written into the House committee report.*

All along the line, I think the *Attorney General's Memorandum* is unsound in assuming that whatever the House committee says is the law even when the words of the statute are unequivocally the opposite. The agencies, of course, will follow the *Memorandum* because it strains in the direction they want to go. But the courts will provide a better balance." *Id.* at 809-10. (footnotes omitted).

³ *Id.* at 810.

⁴ Kass, *The New Freedom of Information Act*, 53 A.B.A.J. 667 (1967).

⁵ B. EATON & M. LYNCH, *Tax Practice As Affected by the Freedom of Information Act and the Information Retrieval System*, DEFENDING TAX FRAUD PROSECUTIONS, 216-17 (1969).

The Attorney General, in his commentary on the Act, relies on the remarks of the House Committee, and the Revenue Service Regulations go along with the Attorney General.

On the other hand, the Senate Judiciary Committee's Report on the Act is, in general, quite faithful to the statutory words and suggests a more literal and restricted meaning for the exemptions. The cases so far decided are not entirely consistent with each other; most move in the direction of the Senate Report, but some follow the House Report and the Attorney General's memorandum.⁶

C. USE IN LITIGATION AND GENERAL SCOPE OF THE ACT

The extent to which the Act may be used by litigants as a substitute for discovery is not clear. One authority views it as follows:

Before July 4, 1967, the effective date of the Act, a taxpayer could obtain these items only by using the discovery techniques under the Federal Rules of Civil Procedure after his case was at issue in court. One of the principal changes made by the Act is that it allows much of this discovery to take place at the administrative level, before the case gets to court.⁷

Another suggests that it might be more limited:

Before making any contrast, however, I feel constrained to point out that the new Act does not repeal or specifically abrogate the Federal Rules. Rather, it creates additional rights and a separate procedure for obtaining information from the government outside of litigation. While the Department of Justice's position has not been resolved it could be argued, for example, that the new Act is not available to a party who has commenced a district court suit against the government and we would plead, in a petition to compel disclosure, that "another action is pending."⁸

To the knowledge of the author, no such argument has been made by the Department of Justice, or at least, no cases have discussed the issue. In fact, the Act itself was amended so that the agency was to "make the records promptly available to *any* person."⁹

The scope of the Act is literally quite broad. In general terms the breadth of the Act has been aptly summarized as follows:

Despite the clumsy structuring of subparagraphs (a)(1), (2) and (3), which might have afforded an excuse for a more restrictive interpretation, the Attorney General's memorandum clearly states that the Act makes all agency information available in one way or

⁶ Emanuel, *Using the Freedom of Information Act in Tax Cases*, P-H TAX IDEAS ¶ 28,017.5 (1970) (footnotes omitted).

⁷ *Id.* at 28,017.

⁸ *Panel Discussion on Freedom of Information Act*, 20(3) A.B.A. SECTION OF TAXATION BULLETIN 43, 52 (1967) (remarks of Mr. Rogovin). This publication is now called TAX LAWYER.

⁹ 5 U.S.C. 552 (a) (3) (1967).

another unless the agency meets the burden of showing that the information falls "within specific categories of matters which are exempt from public disclosure." Subparagraph (a)(1) describes those matters which must be published in the Federal Register; subparagraph (2) covers those which must be indexed and made available for inspection and copying; while under subparagraph (3) all others, unless specifically exempt, must be made available on request if they are reasonably identifiable.

The Act thus compels disclosure of a much greater range of records than those obtainable under old Section 3 of the Federal Rules of Civil Procedure; and since it seems to eliminate the defenses of relevancy, good cause, work product and executive privilege, except in two partially exempt categories, litigants will often prefer to utilize the Act instead of relying entirely on Federal Rules.¹⁰

As mentioned previously, the test for disclosure differs under the Freedom of Information Act as compared to the test courts have devised under the discovery rules. Under the Act, it is:

The nature of the records themselves, rather than the interest of the person seeking the records, is now the controlling test. The Senate report concluded that "for the great majority of different records, the public as a whole has a right to know what its Government is doing."¹¹

In fact, the nature of the records is important not only in determining whether disclosure is necessary, but also in determining the means of disclosure. If such records fall within the class of records enumerated under Section 552(a) (1), then they must be published in the Federal Register. If a person does not have actual notice of the record, and it is not so published, then he "may not in any manner be required to resort to, or be adversely affected by" such records. It is up to the agency to determine whether or not a record falls within the category of records that Section 552(a) (1) embrace and: "If the agency guesses wrong and puts information in the latter rather than the former category, a private party can contend that he cannot be adversely affected thereby."¹²

Perhaps Section 552(a) (2) is the most important segment of the Freedom of Information Act (assuming one can steer clear of the exemptions from the Act in Section 552(b)) :

The most significant gains from the entire Act are those growing out of the requirement in subsection (b) of disclosure of six items—orders, opinions, statements of policy, interpretations, staff manuals, and instructions. An incidental gain is the opening of agency mem-

¹⁰ Kass, *supra* note 4, at 176-177.

¹¹ *Id.* at 669 n.4.

¹² Sexton, *New law changes rules on what information IRS must disclose; confusion likely*, 26(2) TAXATION 120, 122 (1967).

bers' votes in proceedings, required by subsection (d). Although the exemptions of subsection (e) drastically affect the disclosure of information, their effect on disclosure of legal materials is relatively small.¹³

It has been suggested by several authorities that Section 552 (a) (2) requires the publication of *all* revenue rulings and staff manuals (which set the guidelines in determining what returns are to be audited).¹⁴ However, the government does not interpret Section 552 (a) (2) so broadly. It believes that it need only index that material which is of precedential value.¹⁵ One government official believes that Section 552 (a) (2) does not require the indexing and disclosure of either private revenue rulings or of deficiency notices.¹⁶ The only case discussing the matter was litigated in the Court of Claims (the Court of Claims does not have jurisdiction to decide cases under the Freedom of Information Act), and the court stated that the rulings would not be discoverable under Section 552.¹⁷

Section 552 (a) (3) is the blanket coverage provision of the Act. It says that "each agency, on request for identifiable records . . . shall make the records available to any person." It then goes on to state that the action to get such records should be brought in federal district court after one has exhausted his administrative remedies, that the matter should be tried *de novo*, and that the burden is on the agency to sustain its action. The taxpayer should phrase his request as broadly as possible to get the documents that he will need.¹⁸ However, at least one court has rejected a request as being overbroad in part.¹⁹

D. EXEMPTIONS FROM DISCLOSURE

With the sweep of Section 552 (a) (1), (2) and (3) it is not surprising that most of the litigation in the area concerns one of the exemptions from disclosure enumerated in Section 552 (b). It is especially appropriate that this be so since the government bears

The statute lists nine exempt classifications. Exemptions b(1), b(6), b(8) and b(9) have little significance in regard to a taxpayer's

¹³ Davis, *supra* note 1, at 804.

¹⁴ *Id.* at 770, 778. See also, Kass, *supra* note 4, at 184.

¹⁵ Treas. Reg. § 601.702(b) (1) (1967).

¹⁶ *Panel Discussion on Freedom of Information Act*, *supra* note 8, at 55, 57 (Remarks of Mr. Uretz.); See also, Uretz, *Freedom of Information and the IRS*, 20 ARK. L. REV. 283 (1967).

¹⁷ *Shakespeare Co. v. United States*, 389 F.2d 772 (Ct. Cl. 1968).

¹⁸ P-H TAX IDEAS §28,017.2 (1970).

¹⁹ *Abel v. I.R.S.*, 26 Am. Fed. Tax R.2d 70-5347 (1970), which also stands for the proposition of exhausting one's administrative remedies.

the burden of proof of its right to non-disclosure by fitting the requested documents within one of the exemptions. right to elicit information from his government in tax disputes and, therefore, they will not be discussed.

1. *Section b(2)-related solely to the internal personnel rules and practices of an agency*

As before, the House Committee Reports and the Attorney General's Memorandum attempt to expand an otherwise clear provision (one which the Senate Committee adhered to the obvious meaning) by using the Committee Report in an awkward attempt to delete the word *solely* in the exemption.²⁰ Most of the cases to date accept the Senate version and reject the version the government would have enacted.²¹

2. *Section b(3)-specifically exempted from disclosure by statute*

There seems to be little controversy in this area. The Regulations list the statutes that will most likely prevent disclosure in the federal tax area.²² Of the Internal Revenue Code, Sections 4102, 4773, 4775, 6103, 6104, 6105, 6106, 6108, 7213, and 7237 (e) will under the appropriate circumstances limit disclosure. Also, the government alleges it cannot disclose certain information under 18 U.S.C. 1905.²³ There are few cases on point, but in a non-tax case 18 U.S.C.

²⁰ (Referring to the House Report) "These interpretations go far beyond the Act's language, give no effect to the words 'solely' and 'personnel' in the exempting clause and seem contrary to the thrust of subparagraph (a) (2), which requires disclosure of 'administrative staff manuals and instructions to staff' that affect any member of the public!" Kass, *supra* note 4, at 198.

²¹ *Benson v. General Services Administration*, 289 F. Supp. 590 (S.D.N.Y. 1969); *Consumer's Union of the United States, Inc. v. Veteran's Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969).

²² Treas. Reg. § 601.701(b) (2) (1967).

²³ 18 U.S.C. § 1905 (1948) reads as follows: "Disclosure of confidential information generally. Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined

1905 was held not to apply under the particular facts.²⁴

3. *Section b(4)-trade secrets and commercial or financial information obtained from a person and privileged or confidential*

It has been said that this exemption will probably not be important in tax practice,²⁵ and the way the courts are construing the exemption seems to affirm that statement. Several courts have held that this exemption protects only information within the agency itself.²⁶ Some courts have allowed selection of certain information when the government attempted to use this exemption from disclosure, and an *in camera* inspection of the alleged "privileged or confidential" records sought.²⁷ Note that the exemption only applies to (1) trade secrets and commercial or financial information, (2) obtained from a person (outside of the agency) which is (3) privileged or confidential. However, one court has held that if the information is exempt in the hands of one agency, then that information retains its exempt character even if it is transferred to another agency.²⁸

4. *Section b(5)-inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency*

This exemption is probably the most significant of all in tax litigation with the government. The test the government has adopted to determine whether or not disclosure should be made is whether or not the information sought would be "routinely" discoverable under the Federal Rules of Civil Procedure.²⁹ Needless to say, the courts have not concurred with the government position. However, there are several tests that courts have applied; one court has applied the following test:

by any person except as provided by law; shall be fined not more than \$1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment."

²⁴ *Consumer's Union of the United States, Inc. v. Veteran's Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969).

²⁵ *Kass, supra* note 4, at 204.

²⁶ *Benson v. General Services Administration*, 289 F. Supp. 590 (S.D.N.Y. 1969); *Consumer's Union of the United States, Inc. v. Veteran's Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969).

²⁷ *Grunman Aircraft Engineer Corp. v. Renegotiation Bd.*, 425 F.2d 578 (D.C. Cir. 1970); *Bristol-Myers Co. v. F.T.C.*, 424 F.2d 935 (D.C. Cir. 1970).

²⁸ *Grunman Aircraft Engineer Corp. v. Renegotiation Bd.*, 425 F.2d 578 (D.C. Cir. 1970).

²⁹ The government position was taken from H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966), and incorporated in Treas. Reg. § 601.701(b) (1) (v) (1967).

It is thus irrelevant whether GSA would or would not routinely grant access to these documents.

Under a strict construction, GSA could prove that the documents are exempted under section (b)(5) by showing that there is no type of litigation between the agency and a private party in which the court would order production of the documents in appropriate discovery proceedings. This proposition is a universal negative, which is difficult to establish. And the statute does not place upon GSA the burden of proving that universal negative, but of sustaining its action. GSA can do this by showing that there are actions in which the documents would be sought in discovery proceedings, but in the normal sort of action in which the documents might be of value, courts would not order the documents produced. At this point, the burden would shift to the plaintiff at least to come forward with a theory of an action in which a court would order the documents produced.³⁰

Another court has held that the exemptions should be narrowly construed giving effect to the purpose of the statute,³¹ while another court has applied a more stringent test under b(5) by saying:

To determine if the requirements of the fifth exemption are met, this court must ask if the records sought are inter- or intra-agency memoranda or letters which would not be available to any party in any litigation in which the agency having the records might now be involved. The fulcrum of this test is discovery practices as regulated by the courts, not discovery as it is practiced by the government, as suggested by the Attorney General's Memorandum

To decide whether the records sought here are within the fifth exemption, the court must determine whether they were part of the deliberate process of the agency or were factual in substance. The legislative history of the Act supports this conclusion. The language "which would not be available by law to a party other than an agency in litigation with the agency" was substituted on the recommendation of the Senate Judiciary Committee for "dealing solely with matters of law or policy." In explaining the old language the Committee had said in an earlier report that "All factual [sic] material in Government records is to be made available to the public. . . ." The substituted language, being more precise, seems to be a refinement of the policy versus fact distinction so that the distinction can still be used within the discovery test now explicitly laid down by the statute. It is at least clear, in light of the strong Congressional drive to promote disclosure, that the amendment was not intended to place "factual material" within the coverage of the fifth exemption.³²

³⁰ *Benson v. General Services Administration*, 289 F. Supp. 590, 595. (W.D. Wash. 1968), *aff'd* 415 F.2d 878 (9th Cir. 1969).

³¹ *Bristol-Myers Co. v. F.T.C.*, 424 F.2d 935 (D.C. Cir. 1970).

³² *Consumer's Union of the United States, Inc. v. Veteran's Administration*, 301 F. Supp. 796, 804-05 (S.D.N.Y. 1969).

The factual v. theory distinction has been approved by several courts³³ including the only tax case in which the issue has been properly presented.³⁴ However, one must keep in mind that these cases were all decided prior to the 1970 amendments to the Federal Rules of Civil Procedure, and an argument can be made that these amendments liberalized discovery under the Rules; hence, there should be more discovery allowed under the Freedom of Information Act. Specifically, Rules 33 and 36 have been revised to permit discovery of opinions not only relating to fact, but also of application of law to fact (see subsequent discussion herein); hence, discovery under Section 552 should also be broadened to encompass more than mere factual data. One case under the federal rules has permitted discovery of regular and special agents' instruction manuals,³⁵ so perhaps the government cannot raise a viable defense under b(5) to them even if they are not deemed within Section 552(a) (2); thus, they would be discoverable under Section 552(a) (3).

If the intra-agency and/or inter-agency memo has been incorporated into a public document by reference, it loses its exempt status.³⁶ The fact that a person could have attained the information from sources other than the government is immaterial,³⁷ and it does not defeat his right to gain such information under the Act.

5. *Section b(7)-investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency*

The government position on b(7) differs from that on b(5).³⁸

³³ General Services Administration v. Benson, 415 F.2d 878 (9th Cir. 1969); Bristol-Myers Co. v. F.T.C., 424 F.2d 935 (D.C. Cir. 1970). But see, International Paper Co. v. F.P.C., 438 F.2d 1349 (2d Cir. 1971).

³⁴ Talbott Constr. Co. v. United States, 49 F.R.D. 68 (E.D. Ky. 1969). However, the court's opinion seems to say that the taxpayer has the burden of proving that the information sought is not exempt rather than that the government has to prove that the information is exempt. This seems contrary to the express wording of the statute.

³⁵ United States v. Moriarty, 23 Am. Fed. Tax. R.2d 69-930 (E.D. Wis. 1969). For more discovery allowed by the same litigants see United States v. Moriarty, 278 F. Supp. 187 (E.D. Wis. 1969).

³⁶ American Mail Line, Ltd. v. Gulick, 411 F.2d 696 (D.C. Cir. 1969).

³⁷ "And the fact that appellant might, presumably by a combination of intuition and diligent research, ferret out some of the materials relied upon is surely no reason to suppose that Congress made revelation under the Freedom of Information Act contingent upon a showing of exhaustion of one's own ingenuity." Ackerley v. Ley, 420 F.2d 1336, 1342 (D.C. Cir. 1969).

³⁸ U.S. ATT'Y GEN., MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURES ACT 37, 38.

It believes that b(5) opens certain information to the general public, while b(7) opens information only to litigants (and then such information is only available to the extent that is allowed by prior law). There is presently a split of authority as to the extent of discovery available to litigants under b(7). One court has taken a rather restrictive view (citing the House Reports and the Attorney General's Memorandum),³⁹ while another court has taken a broader view.⁴⁰ The latter decision suggested that the test should be whether or not such information would be available to the party litigants if the government was not a party to the action. However, neither decision involved tax cases or related issues.

E. EQUITABLE CONSIDERATIONS AND CONCLUSIONS AS TO THE ACT

Even if the records sought should be available under the Act, it has been held that the court may deny discovery if in balancing the equities, it feels that disclosure should not be made.⁴¹

To what extent the agencies or the courts will allow disclosure is yet to be seen. One authority has said: "The liberal purpose of the Act will hopefully cause the Service and the courts to choose the course of maximum disclosure."⁴² And a government representative has assured us by saying: "You may be assured that the Revenue Service is prepared to expend the required time and effort to effectuate, in full, the intent and spirit of this Act."⁴³

The Regulations do not look so optimistic,⁴⁴ but they do provide that unless precluded by law, the Service may provide the public with information even though it does not feel that such is required under the Act.⁴⁵ Certain practitioners assert a substantial amount of success from such requests even considering the hard line legal stand the Service has taken on the disclosure standards.⁴⁶

It would seem that if the Freedom of Information Act were to give taxpayers any more meaningful disclosure than they could attain prior to its passage, then it must be given a broader scope than that which the regulations now provide.

³⁹ *Benson v. United States*, 309 F. Supp. 1144 (D. Neb. 1970).

⁴⁰ *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708 (E.D. Pa. 1968).

⁴¹ *Consumer's Union of the United States, Inc. v. Veteran's Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969).

⁴² *Kass*, *supra* note 4, at 205.

⁴³ 21 *TAX LAWYER* 19 (1967) (remarks of the Honorable Lester R. Uretz, Chief Counsel, Internal Revenue Service).

⁴⁴ *Treas. Reg.* §§ 601.701 and 601.702 (1967).

⁴⁵ *Id.*

⁴⁶ *B. EATON & M. LYNCH*, *supra* note 5, at 246.

III. COURT DISCOVERY

A. TAX COURT

The U.S. Tax Court has no rules of discovery. Its rules with regard to depositions apply to evidentiary depositions, and it has been stated that:

There is no formal Tax Court procedure that a taxpayer can utilize to discover what testimony a witness will give at the hearing or what evidence is in the Service's possession. While the taxpayer may take depositions of a witness, these may be taken for evidentiary purposes and only when the witness will not be available to testify at the trial or when the deposition is to be submitted in lieu of testimony at the trial.

It should be noted that the absence of taxpayer's discovery in the Tax Court stems from the Court's policy of refusing applications for the taking of depositions for discovery purposes. Hence, within the framework of the present Tax Court Rules discovery could be permitted. It is possible, therefore, that the Tax Court could change its practice and permit taxpayers discovery in appropriate cases without changing the Tax Court Rules.⁴⁷

The likelihood of the court changing its policy is minute. Chief Judge Drennen commented (unofficially) about the lack of discovery in his court as follows:

In its discussion of the present structure of the trial court system the Justice Department report compares the availability and use (or lack thereof) of discovery in the three forums, pointing out that extensive discovery is available only in the district courts, that the Tax Court has no discovery rule at all, and that the availability and use of discovery in the Court of Claims lies about midway between the district courts and the Tax Court. It is true that the Tax Court has no specific discovery rule and that it has no procedures for use of discovery for discovery purposes alone, as contrasted with discovery for purposes of obtaining evidence. The Tax Court believes that its stipulation rules, which have worked very successfully in the past, if followed to the hilt, provide about all the discovery that is necessary or desirable in tax cases. Of course, if this impression is wrong and it is convincingly shown that a discovery rule should be adopted by the Tax Court, I do not believe the Tax Court would refuse to adopt such a rule. Because of its nation-wide jurisdiction the Tax Court would have some difficulty in controlling discovery, but extrajudicial discovery could be conducted as easily by litigants in the Tax Court as by litigants in the district courts. If closer supervision and control of discovery proceedings is found necessary, I suppose in a fully integrated and correlated tax-litigating structure, the district court judges could supervise discovery proceedings in their locality, whether the information sought to be obtained is to be used in litigation in the Tax Court or in their own courts.

⁴⁷ M. GARBIS & R. FROME, *PROCEDURES IN FEDERAL TAX CONTROVERSIES*, 6-14 (1968) (footnotes omitted).

But I am not convinced that extensive discovery is either necessary or desirable in connection with federal tax litigation. I am a firm believer in the modern-day philosophy of trial procedures that all facts and evidence that either party intends to use during the course of a trial should be made known and available to the opposing party before the trial begins, and that "surprise" during the course of a trial should be eliminated. I think that is generally the case in all Tax Court proceedings under our existing rules. But I am not convinced that uncontrolled, extrajudicial, random discovery for the sake of discovery alone has a proper place in the tax field or is really wanted by either taxpayers or the Government. Under our self-assessing tax system all facts relating to the taxpayer's tax liability are known or should be known to him. I do not know what real benefit a taxpayer would derive from discovery proceedings against the Government that is not otherwise available to him. Almost anything the Government intends to use as evidence in the trial of a case can usually be discovered by the taxpayer under the court's pleading, stipulation, pretrial, and motions procedures which are presently available, and I have seen very few instances of surprise on the part of either party during the course of trials over which I have presided as a judge on the Tax Court. If the only objective of the taxpayer in discovery proceedings is to find out whether the Government has all the information relative to the taxpayer's liability that he, the taxpayer, has, I do not believe this is an objective that deserves assistance. On the other side of the coin, the Government's use of discovery would seem to me to be a means of circumventing the law that protects a taxpayer against a second inspection of his books and records. I think this rule of law is a meritorious one and is jealously guarded by the courts. The Government has many tools at its command for obtaining all the information the taxpayer has relative to his tax liability during the course of the audit and investigation of the taxpayer's returns. I would think it might subject a taxpayer to an unwarranted and repeated invasion of his privacy if the Government is allowed to conduct fishing expeditions in the name of discovery after the case gets to court. But, as I said at the outset, the Tax Court could and probably would adopt a discovery rule if it is convinced that such would improve the administration of justice and that the parties really want it. However, at the last Tax Court Judicial Conference, attended by representatives of the court, the Chief Counsel's Office, and the Tax Section of the American Bar Association, the matter was discussed and neither of the litigants' representatives felt that adoption of a discovery rule by the Tax Court was either necessary or desirable at this time.⁴⁸

Not all tax practitioners share the views of the Chief Judge.⁴⁹ However, it would seem that the Chief Judge's views have some statistical backing. A recent study revealed that when discovery

⁴⁸ Drennen, *Federal Tax Litigation as Viewed From the Back of the Bench*, 22 S. CAL. TAX INST. 1, 12-14 (1970), also called MAJOR TAX PLANNING.

⁴⁹ Ritholz, *Diverse Views on Discovery in the Tax Court*, 21 A.B.A. SECTION OF TAXATION BULLETIN 639 (1968).

was available the government rather than the taxpayer utilized it more frequently.⁵⁰ The same study on the other hand recognized that:

While discovery is ordinarily employed by the Government, there are situations in which the taxpayer is anxious to learn facts in the Government's possession, and in those instances, the availability of discovery in the district courts, and, to a lesser extent, in the Court of Claims, may influence the taxpayer's choice. Of course, the taxpayer may desire to expose as few of the facts of the financial transactions involved in his case as possible and may, therefore, seek to avoid the possibility of extensive discovery by bringing suit in the Tax Court.⁵¹

In *Starr v. Commissioner*⁵² the Seventh Circuit held that the lack of discovery procedures in the Tax Court did not deny the taxpayer due process:

Discovery procedure has improved the administration of justice and speeded the disposition of civil cases in both state and federal courts. However, it has never been held that the Constitution of the United States requires that discovery procedure be adopted by any court. We are unwilling to make any such decision. In our view, no constitutional question is involved. Furthermore, we think the request that the Tax Court modify its rules was addressed to a matter that was purely discretionary with that court. *Board of Tax Appeals v. United States*, 59 App. D.C. 161, 37 F.2d 442. We hold that taxpayer was not denied due process because the Tax Court refused to grant his motion for discovery.⁵³

However, in *Robida v. Commissioner*⁵⁴ the Ninth Circuit allowed the petitioner discovery of his personal records. The factual situation in *Robida* was exceptional, and it should not be relied upon as setting any trend to allow discovery in the Tax Court.⁵⁵

Since as early as 1947⁵⁶ there has been a movement to allow more discovery in the Tax Court; however, to date such movement has met with little success. The absence of formal discovery rules in the Tax Court does not mean that a taxpayer cannot elicit information to a limited extent from the government. Certain motion practice in the court will provide the taxpayer with some informa-

⁵⁰ Dept. of Justice, *Study of the Trial Court System for Federal Civil Tax Disputes*, 22 TAX LAWYER 95, 105 (1968).

⁵¹ *Id.* at 108.

⁵² 226 F.2d 721 (7th Cir. 1955), *cert. denied* 350 U.S. 993 (1956).

⁵³ *Id.* at 722.

⁵⁴ 371 F.2d 518 (9th Cir. 1967).

⁵⁵ The factual situation was unique in that the records the taxpayer sought were his own personal records which had been seized by German authorities and turned over to the Internal Revenue Service.

⁵⁶ 2 L. CASEY, FEDERAL TAX PRACTICE § 7.31 n. 94 (1955).

tion. Rule 31 (b) requires the parties to stipulate to all facts not in dispute, which is somewhat similar to requests for admissions. One author has said:

It is in obtaining a stipulation that the exercise of skill by counsel is required. Generally, stipulations can be obtained either informally by consent or by a motion made to the Court. The second method, although described as a "motion for an order to show cause why certain facts should not be stipulated" is actually quite similar to a request for admissions used in many states and in the Federal courts.⁵⁷

Rule 17 of the U.S. Tax Court provides for a motion for a further and better statement of the nature of a party's claim or defense upon the showing of good cause. Rule 28 provides for pretrial conferences. At one time the Tax Court allowed pre-trial depositions to preserve testimony. These, however, were poor discovery tools compared with those available in other forums.

[I]t [referring to the discovery in Tax Court motion practice] is hardly equivalent to pretrial and discovery as it is handled by some district courts under the Federal Rules. Regardless, the Tax Court has been very successful in boiling down issues and simplifying trials.⁵⁸

1. *Pre-trial Depositions to Preserve Testimony*

Prior to 1961⁵⁹ the Tax Court allowed the taking of depositions to preserve testimony.⁶⁰ However, in *Louisville Builders Supply Co. v. Commissioner*,⁶¹ the Sixth Circuit held that the Tax Court's order allowing such was beyond the power of that court. It did so on the reasoning that when such authority exists, it is specifically provided for by a rule of court or a statute. The Court felt that Rule 45 of the Tax Court⁶² did not encompass depositions prior to institution of proceedings in that court. It also felt that the rules of evidence of the District of Columbia Code allowing for such depositions (§ 14-201)⁶³ were not applicable because they applied only to proceed-

⁵⁷ M. GARBIS & R. FROME, *supra* note 47, at 6-23.

⁵⁸ L. KEIR & D. ARGUE, *TAX COURT PRACTICE* 530-31 (1970).

⁵⁹ *Louisville Builders Supply Co. v. Commissioner*, 294 F.2d 333 (6th Cir. 1961).

⁶⁰ 2 L. CASEY, *supra* note 56, at § 7.22 n. 32.

⁶¹ 294 F.2d 333 (6th Cir. 1961).

⁶² Rule 45 (a) and (b) are substantially the same now as they were when the court decided the case.

⁶³ The Court quoted Section 14-201 as follows: "In any case where the interests of justice may require, the District Court of the United States for the District of Columbia may grant a *dedimus potestatem* to take depositions according to common usage, and may, according to the usages of chancery, direct depositions to be taken in *perpetuam rei memoriam* if they relate to any matters that might be cognizable in any court of the United States."

ings of the Tax Court, and Rule 7 of the Tax Court defines initiation of proceedings as beginning with the filing of the petition. However, the deposition involved in *Louisville Builders* was not only one to preserve testimony but also a discovery mechanism. The Court of Appeals itself recognized this fact in its opinion by stating:

We construe it to be an application for leave to take a deposition for discovery. A fair reading of it demonstrates that while he seeks to perpetuate testimony, he likewise is seeking to employ the procedural aid of pretrial discovery. His application, other than giving a description of the subject matter of his inquiry, does not set out the facts which he desires to establish by the witness von Sieben-thal, nor the substance of the testimony which he expects to elicit from him. (Such would be required if Rule 27 of the Federal Rules of Civil Procedure were available and employed by the Commissioner for the purpose of perpetuating testimony.) Absent some statement of what the witness is expected to say, it cannot be determined whether his testimony will be material and relevant. Whatever the form of procedure used, one seeking to perpetuate testimony must, by his application for leave to do so, demonstrate that the testimony sought "will be material in the determination of the matter in controversy; that the testimony will be competent evidence;" *Arizona v. California*, 292 U.S. 341, 348, 78 L. Ed. 1298, 1301. Whether legally sufficient for either purpose, the application involved seeks leave to take a deposition which will both discover and perpetuate testimony.⁶⁴

Perhaps this is one reason why the court was so hostile to allowing the order granting the deposition to stand. In any case, the Tax Court no longer allows such depositions—for discovery or for preserving testimony.

In *Estate of Bernard A. Marx v. Commissioner*⁶⁵ the Tax Court decided to follow the Sixth Circuit rule. The case was strictly one of preserving testimony. The applicants wished to preserve the testimony of a 58 year old doctor who had heart trouble. The testimony concerned a patient of the doctor who had made \$1,575,906.21 of gifts prior to his death. Although the case is not clear on the point, it would seem the issue was whether such gifts were made in contemplation of death.

Perhaps it is a mixed blessing that the Tax Court does not allow discovery. This allows the taxpayer to have a forum available where he will not have to bear the expense necessary to carry on discovery and where he can prevent the government from using the *court* process as a means of eliciting more information about the particular tax dispute. It is unfortunate that the taxpayer does not

⁶⁴ 294 F.2d 333, 335 (6th Cir. 1961).

⁶⁵ 40 T.C. 1 (1963).

have a forum that allows liberal discovery without payment of the tax (and suit for refund), but perhaps a liberal interpretation of the Freedom of Information Act may rectify the situation.

B. FEDERAL DISTRICT COURT

Rule 26 provides for the scope of discovery in the federal district court system and Rules 27 through 37 explain the methods by which discovery is to take place.

The availability of discovery varies widely between the forums. The most extensive discovery is permitted in the district courts under the Federal Rules of Civil Procedure. There is no discovery procedure in the Tax Court and only limited discovery in the Court of Claims.

In the district courts, three discovery devices are used most frequently in tax litigation: depositions upon oral examination, interrogatories to adverse parties, and requests for admission. All three methods are extrajudicial, available for use by the parties without intercession by the court.⁶⁶

Since the liberalization of the federal court discovery rules in 1970, it would seem that most practitioners would agree that the federal district court forum provides the most liberal discovery rules. The changes brought about by the 1970 revision pertinent to tax litigation can best be summarized as follows:

A showing of good cause is no longer required for discovery of documents and things and entry upon land (Rule 34). However, a showing of need is required for discovery of "trial preparation" materials other than a party's discovery of his own statement and a witness' discovery of his own statement; and protection is afforded against disclosure in such documents of mental impressions, conclusions, opinions, or legal theories concerning the litigation. (Rule 26(b)(3)). . . . Provision is made for discovery with respect to experts retained for trial preparation, and particularly those experts who will be called to testify at trial (Rule 26(b)(4)). . . . It is provided that interrogatories and requests for admission are not objectionable simply because they relate to matters of opinion or contention, subject of course to the supervisory power of the court (Rules 33(b), 36(a)).⁶⁷

The government usually objects to taxpayer's discovery basing its objection on one or more of the following grounds: privilege (either attorney-client or executive), relevancy, good cause, or work product. It seems that it depends on the nature of the case as to whether the government prevails in its objections. The cases in which discovery has been an issue might be classified as follows: (1) tax refund suits (perhaps this classification would be further

⁶⁶ Dept. of Justice, *supra* note 50, at 105.

⁶⁷ *Proposed Amendments to Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 487, 487-88 (1969)

subdivided into cases involving fraud and those not involving fraud); (2) suits by the government to collect a refund allegedly erroneously made; and (3) suits by the government to enforce an administrative summons.

1. *Privilege*⁶⁸

Perhaps as to the objection based upon privilege it would make no difference what the nature of the suit is because the policy behind privilege overrides other considerations regardless of who has the burden of proof or what that burden is. Both as to executive privilege and to attorney-client privilege there is a split of authority.⁶⁹ Some courts have analyzed executive privilege narrowly—restricting it to cases involving national security.⁷⁰ Other courts have construed it so broadly that they grant relief on that basis summarily.⁷¹ Other courts have construed the privilege to extend to all information not made available to taxpayers by the Freedom of Information Act.⁷²

As to the availability of the attorney-client privilege there is also a split of authority.⁷³ Most of the cases asserting attorney-client privilege involve production of IRS documents under Rule 34, therefore, the documents requested become important in determining the outcome of the cases. However, even considering this there is no way to reconcile the cases.

⁶⁸ The government has asserted the housekeeping regulations as a defense to disclosure. It is now generally recognized that those regulations will not constitute a viable defense to disclosure. See *United States v. Certain Parcels of Land*, 15 F.R.D. 224 (S.D. Cal. 1954). For a more extended discussion of the matter see, Kass, *supra* note 4, at 108.

⁶⁹ Executive privilege: *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962); *United States v. Gates*, 35 F.R.D. 524 (D. Colo. 1964); but see, *Cenname v. Bingler*, 7 Am. Fed. Tax R.2d 1886 (W.D. Pa. 1961); *E. W. Bliss Co., v. United States*, 202 F. Supp. 175 (N.D. Ohio 1961). Attorney-Client privilege: *United States v. San Antonio Portland Cement Co.*, 33 F.R.D. 513 (W.D. Tex. 1963); but see, *United States v. Gates*, 35 F.R.D. 524 (D. Colo. 1964); *Detroit Screwmatic Co. v. United States*, 25 Am. Fed. Tax R.2d 70-511 (S.D.N.Y. 1970).

⁷⁰ *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962). See also *United States v. Reynolds*, 345 U.S. 1 (1953), for the leading authority regarding executive privilege (non tax case).

⁷¹ *Cenname v. Bingler*, 7 Am. Fed. Tax R.2d 1886 (W.D. Pa. 1961).

⁷² *Talbott Constr. Co. v. United States*, 49 F.R.D. 68 (E.D. Ky. 1969).

⁷³ *Detroit Screwmatic Co. v. United States*, 25 Am. Fed. Tax R.2d 70-511 (S.D.N.Y. 1970); *United States v. Gates*, 35 F.R.D. 524 (D. Colo. 1964); *United States v. San Antonio Portland Cement Co.*, 33 F.R.D. 513 (W.D. Tex. 1963).

Many of the cases do not rest their decision on one ground, but rather find several grounds; therefore, it is difficult to weigh the effect of a particular objection in the outcome of any single case. At least one court has held that if the government asserts the defense of privilege it may not use the information that was requested (and denied because of privilege) in formulation of its case.⁷⁴ Some courts have suggested that the attorney-client privilege extends only to the materials developed by the Department of Justice;⁷⁵ other courts have extended it to documents prepared by IRS employees.⁷⁶ The new rules do not affect discovery of privileged materials, however, as the wording of the new rules is such that it discusses materials prepared in anticipation of litigation, more courts might give a more restrictive definition to attorney-client privilege in such cases.

2. Relevancy

It is in the area of relevancy that the nature of the case probably has the most significance. In the tax refund case the taxpayer has the burden of proof. He must prove his correct tax liability. This has led at least one court to say:

The most that plaintiff can gain from the matters it seeks is an idea of defendant's theory as to why Section 531 has application to it. We do not conceive that this is information to which plaintiff is entitled. If plaintiff proves its case for the retention of net profits what difference does it make what theory defendant has to the contrary?⁷⁷

However, not all courts feel that the government theory is irrelevant.⁷⁸ It should be noted that the committee notes to the 1970 revision of the rules of civil procedure state that:

Since decision as to relevance to the subject matter of the action are made for discovery purposes well in advance of trial, a flexible treatment of relevance is required and the making of discovery, whether voluntary or under court order, is not a concession or determination of relevance for purposes of trial.⁷⁹

⁷⁴ *Continental Distilling Corp. v. Humphrey*, 17 F.R.D. 237 (D.D.C. 1955).

⁷⁵ *United States v. Gates*, 35 F.R.D. 524 (D. Colo. 1964); *United States v. San Antonio Portland Cement Co.*, 33 F.R.D. 513 (W.D. Tex. 1963).

⁷⁶ *Detroit Screwmatic Co. v. United States*, 25 Am. Fed. Tax R.2d 70-511 (S.D.N.Y. 1970).

⁷⁷ *Unistrut Corp. v. United States*, 37 F.R.D. 478, 479 (E.D. Mich. 1965).

⁷⁸ *Talbott Constr. Co. v. United States*, 49 F.R.D. 68 (E.D. Pa. 1969).

⁷⁹ *Proposed Amendments to Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 487, 498 (1969).

It would seem that the court ought to use a looser standard with regards to relevancy for discovery purposes than it would use for evidentiary purposes. Several cases in the tax refund area have granted discovery, but usually such cases have a unique twist to them which makes them readily distinguishable should a subsequent court desire to distinguish them. In *Frazier v. Phinney*⁸⁰ discovery was allowed, but the deficiency notice sent to the taxpayer merely said that the determination of additional tax due was made on information possessed in government files. In *Timkin Roller Bearing v. United States*⁸¹ the court allowed discovery, but from the facts of the case the court concluded that the government's contention must be based upon a "novel" theory.

In suits by the government to collect erroneous refunds taxpayers have fared better with regard to getting discovery.⁸² One court has held that it is significant that the government is the moving party.⁸³ At first glance it would appear irrational to say that simply by payment of the refund, something that is irrelevant (the government theory) becomes relevant. However, when one realizes that the payment (in a suit for erroneous refund) shifts the burden of proof, it becomes more plausible that this could be the case. Without knowing what to defend against how can a taxpayer put on a viable defense to a government claim?

Also, in the area of suits by the government to enforce an administrative summons, taxpayers are faring better in getting discovery. There is a split of authority as to whether discovery will be granted,⁸⁴ but most courts are at least acknowledging that the rules of civil procedure apply.⁸⁵ Rule 81 (a) (3) provides the basis for applying the discovery rules (as well as the other rules of civil procedure).

⁸⁰ 24 F.R.D. 406 (S.D. Tex. 1959).

⁸¹ 38 F.R.D. 57 (N.D. Ohio 1964).

⁸² *United States v. Gates*, 35 F.R.D. 524 (D. Colo. 1964); *United States v. San Antonio Portland Cement Co.*, 33 F.R.D. 513 (W.D. Tex. 1963).

⁸³ *United States v. San Antonio Portland Cement Co.*, 33 F.R.D. 513 (W.D. Tex. 1963).

⁸⁴ Allowing discovery: *United States v. Moriarty*, 23 Am. Fed. Tax R.2d 69-930 (E.D. Wis. 1969); *United States v. Nunnally*, 21 Am. Fed. Tax R.2d 1099 (W.D. Tenn. 1968); *United States v. Moriarty*, 278 F.2d 187 (E.D. Wis. 1967). Denying discovery: *United States v. Salter*, 26 Am. Fed. Tax R.2d 70-5686 (1st Cir. 1970); *United States v. Jordan*, 21 Am. Fed. Tax R.2d 1014 (W.D. Wash. 1958).

⁸⁵ *Kennedy v. Rubin*, 254 F. Supp. 190, (N.D. Ill. 1966). *But see*, *United States v. Salter*, 26 Am. Fed. Tax R.2d 70-5686 (1st Cir. 1970).

Simply bringing the case within the rules of civil procedure does not automatically guarantee the right to discovery.

All provisions as to scope of discovery are subject to the initial qualification that the court may limit discovery in accordance with these rules. Rule 26(c) (transferred from 30(b)) confers broad powers on the courts to regulate or prevent discovery even though the materials sought are within the scope of 26(b), and these powers have always been freely exercised.⁸⁶

There is also authority to the effect that in cases such as these, the court should not grant discovery.⁸⁷ The more recent cases, however, are allowing discovery, at least to show that the summons was issued for an improper purpose.⁸⁸ This seems logical, as again, the government's theory is the very heart of the matter in controversy. Some courts have moderated the application of the rules by stating that in addition to alleging an improper purpose for the issuance of the summons, the taxpayer must show some evidence to support that allegation.⁸⁹ How the taxpayer is to get the evidence before he gets discovery the court did not explain.

3. *Good Cause*

Before the 1970 amendments to the rules of civil procedure a number of tax cases refused to allow discovery of government documents on the basis that the taxpayer failed to show good cause.⁹⁰ By the 1970 amendments the good cause requirement was dropped from the rule (Rule 34). However, dropping the requirement of good cause will not necessarily mean that the taxpayer will be able to get discovery of the government documents.

The rules are amended by eliminating the general requirement of "good cause" from Rule 34 but retaining a requirement of a special showing for trial preparation materials in this subdivision. The required showing is expressed, not in terms of "good cause" whose generality has tended to encourage confusion and controversy, but in terms of the elements of the special showing to be made: substantial need of the materials in the preparation of the case and inability without undue hardship to obtain the substantial equivalent of the materials by other means. . . .

⁸⁶ *Proposed Amendments to Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 487, 498 (1969).

⁸⁷ *United States v. Salter*, 26 Am. Fed. Tax R.2d 70-5686 (1st Cir. 1970); *United States v. Jordan*, 21 Am. Fed. Tax R.2d 1014 (W.D. Wash. 1958).

⁸⁸ *United States v. Nunnally*, 21 Am. Fed. Tax R.2d 1099 (W.D. Tenn. 1968); *United States v. Moriarty*, 20 Am. Fed. Tax R.2d 5898 (E.D. Wis. 1967).

⁸⁹ *United States v. Salter*, 26 Am. Fed. Tax R.2d 70-5686 (1st Cir. 1970).

⁹⁰ *Talbott Constr. Co. v. United States*, 49 F.R.D. 68, (E.D. Ky. 1969).

Elimination of a "good cause" requirement from Rule 34 and the establishment of a requirement of a special showing in this subdivision will eliminate the confusion caused by having two verbally distinct requirements of justification that the courts have been unable to distinguish clearly. Moreover, the language of the subdivision suggests the factors which the courts should consider in determining whether the requisite showing has been made. The importance of the materials sought to the party seeking them in preparation of his case and the difficulty he will have obtaining them by other means are factors noted in the *Hickman* case. The courts should also consider the likelihood that the party, even if he obtains the information by independent means, will not have the substantial equivalent of the documents the production of which he seeks.⁹¹

Since the good cause distinction, if there ever was one, no longer has any viability, it would seem that the new area of controversy which is bound to spring up is whether or not the materials sought were prepared for trial. The Committee Notes show the importance of this distinction. "Apart from trial preparation, the fact that the materials sought are documentary does not in and of itself require a special showing beyond relevance and absence of privilege."⁹² As we shall see later, the Court of Claims has maintained in its rules the requirement of good cause to get discovery, thus, perhaps the past cases dealing with good cause in the district courts will have some precedent value in the Court of Claims.

4. *Work Product*

Some of the cases that have denied discovery on other grounds have also stated that the materials sought were the work product of the government.⁹³ At least some of the cases that have looked into the issue have decided that IRS records are not protected under work product,⁹⁴ and others have stated that work product, unlike privilege, relevancy or good cause, is not a total defense, but merely puts more of a burden on the taxpayer in proving his need for such materials.⁹⁵ The rules, as revised, seem to support this latter statement.

⁹¹ *Proposed Amendments to Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 487, 500-01 (1969).

⁹² *Id.* at 500.

⁹³ *Detroit Screwmatic Co. v. United States*, 25 Am. Fed. Tax R.2d 70-511 (S.D.N.Y. 1970).

⁹⁴ *United States v. San Antonio Portland Cement Co.*, 33 F.R.D. 513 (W.D. Tex. 1963).

⁹⁵ *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962); *United States v. Gates*, 35 F.R.D. 524 (D. Colo. 1964).

The courts are divided as to whether the work-product doctrine extends to the preparatory work only of lawyers. . . .

Subdivision (b)(3) reflects the trend of the cases by requiring a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf. The subdivision then goes on to protect against disclosure the mental impressions, conclusions, opinions, or legal theories concerning the litigation of an attorney or other representative of a party. The *Hickman* opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories, as well as mental impressions and subject evaluations of investigators and claim-agents. In enforcing this provision of the subdivision, the courts will sometimes find it necessary to order disclosure of a document but with portions deleted.⁹⁶

It would seem that by a special showing of need and inability to obtain the information elsewhere, it might be possible to discover the work product of the government. It is important that one attempt to do so by the correct method. The distinction between the availability of information by deposition or request for admissions as opposed to the production of documents is shown by the following language in the Committee Notes:

Rules 33 and 36 have been revised in order to permit discovery calling for opinions, contentions, and admissions relating not only to fact but also to the application of law to fact. Under those rules, a party and his attorney or other representative may be required to disclose, to some extent, mental impressions, opinions, or conclusions. But documents or parts of documents containing these matters are protected against discovery by this subdivision. Even though a party may ultimately have to disclose in response to interrogatories or requests to admit, he is entitled to keep confidential documents containing such matters prepared for internal use.⁹⁷

If one is attempting to get information which may be susceptible to the above objections, he might fare better to attempt to do so by deposition or request for admissions than by production of documents. There is some established case law allowing taxpayers to depose IRS agents.⁹⁸

5. Failure to Allow Discovery

The tax cases are few in number that discuss the problem arising upon order by the court, the government is to allow discovery but

⁹⁶ *Proposed Amendments to Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 487, 501-02, (1969).

⁹⁷ *Id.* at 502.

⁹⁸ *O'Keefe v. Shaughnessey*, 95 F. Supp. 900 (N.D.N.Y. 1951); *Brewer v. Hassett*, 2 F.R.D. 222 (D. Mass. 1942).

refuses to do so. In *Campbell v. Eastland*⁹⁹ the court held that the trial court had abused its discretion by rendering judgment for the taxpayer simply because the government would not allow discovery.

6. *Pre-trial Depositions to Preserve Testimony*

Rule 27 of the Federal Rules of Civil Procedure deal with depositions to preserve testimony in federal courts (and for pending appeals). Although there is little authority on the subject, it seems that in appropriate circumstances such a deposition will be permitted prior to issuance of the notice of deficiency by the IRS. *Petition of Ernst*¹⁰⁰ allowed the taking of testimony from the executrix of an estate regarding gifts in the amount of \$162,920 and \$155,360 made by the testator prior to his death. At the time the petition requesting such a deposition was filed with the court, the IRS had made no determination of a deficiency with regard to the estate tax return. The executrix, an elderly lady, was to testify as to the motives of the gifts made by the deceased. The court disregarded the fact that upon issuance of the deficiency notice the taxpayer could petition the Board of Tax Appeals (now the U.S. Tax Court); instead the court stated that the taxpayer had the alternative remedy of paying the tax and suing for a refund. The case is quite similar to *Estate of Bernard A. Marx v. Commissioner*¹⁰¹ in its facts, thus it would seem that one will receive more favorable treatment with regard to getting a deposition to preserve testimony in federal district court than in the U.S. Tax Court.

Another case, *In re Boren*,¹⁰² dealt with an attempt to obtain a deposition to preserve the testimony of several IRS agents (including a special agent). The court held that the petition should be denied because the taxpayer was attempting to use such deposition as a discovery device rather than a device to preserve known testimony. The facts bear out the result of the court. The petition was filed with the court after the notice of deficiency was sent to the taxpayer so the taxpayer could have brought an action against the government by petitioning the U.S. Tax Court. The deponents were agents of the adverse party, and the information sought was not within the knowledge of the party seeking to preserve it.

The extent to which Rule 27 may be used as a discovery device is not entirely clear.

⁹⁹ 307 F.2d 478 (5th Cir. 1962).

¹⁰⁰ 2 F.R.D. 447 (S.D. Cal. 1942).

¹⁰¹ 40 T.C. 1 (1963).

¹⁰² 48 Am. Fed. Tax R. 1864, 55-2 U.S. Tax Cas. 9561 (1955).

The Rule is intended primarily to perpetuate testimony for use as evidence and not primarily for discovery; and it may not be used for the sole purpose of framing a complaint. It has been held, on the other hand, that discovery by depositions under Rule 27 may be had on a showing that the proposed plaintiff "is presently unable to bring" the action, the only requisite being that the moving party convince the court that there is reasonable ground to believe that a cause of action exists and can be proved if the necessary facilities are afforded him.¹⁰³

So the law is unclear as to the extent to which depositions to preserve testimony may be used as discovery devices. If not used as a discovery device, there is still authority for allowing such depositions in tax matters.¹⁰⁴ However, this is not the case when discovery is the primary objective of the taking of the deposition.

C. COURT OF CLAIMS

Rule 71 of the Rules of the Court of Claims describes the scope of discovery within that court. Rule 36 and Rules 72 through 92 provide the mechanics by which discovery can be attained. A government study released the following conclusion as to discovery in the Court of Claims:

The position of the Court of Claims on discovery is about intermediate between the Tax Court and the district courts: discovery is available but not as extensively as in the district courts. The Court of Claims permits depositions upon oral examination to be taken for use as evidence or for use as discovery. Depositions in the Court of Claims, however, are not extrajudicial devices as they are in district courts; they may be taken only by leave of court on a showing of good cause. The structure of the Court of Claims gives rise to another difference in deposition procedures. Under the federal rules, if a deponent refuses to answer a question, the proponent may apply to the court in which the deposition is being taken for an order compelling an answer. While depositions can be taken anywhere in the United States in a Court of Claims proceeding, disputes caused by refusal to answer must be resolved by the court or a commissioner in Washington, D.C.¹⁰⁵

The Court of Claims revised its rules on September 1, 1969; the revision did not seem to substantially change what was discoverable under the prior rules, but it did change the manner in which it was discoverable. Prior to the amendments much of the discovery done in the Court of Claims was done by "calls"¹⁰⁶ because of the awk-

¹⁰³ 35A C.J.S. *Federal Civil Procedure* § 544 (1960) (footnotes omitted); *Petition of Johanson Glove Co.*, 7 F.R.D. 156 (E.D.N.Y. 1945). *But see*, *Bowles v. Pure Oil Co.*, 5 F.R.D. 300 (E.D. Pa. 1946).

¹⁰⁴ *Petition of Ernst*, 2 F.R.D. 447 (S.D. Cal. 1942).

¹⁰⁵ Dept. of Justice, *supra* note 50, at 106.

¹⁰⁶ M. GARBIS & R. FROME, *supra* note 47, at 13-18.

ward procedures involved in getting other means of discovery. It appears as if the 1969 revision intended to deemphasize "calls" (see Rule 75 after the revision as compared to Rule 39 prior to the revision) and to make the procedures in the court more compatible with those in the federal district courts.

The revised rules, however, still require a showing of good cause before discovery will be granted.¹⁰⁷ The revised rules deal with requests for admissions (Rule 42 prior to revision), interrogatories to parties (not provided for prior to the revision), production of documents (Rule 40 prior to revision), calls (Rule 39 prior to revision), failure to comply with discovery order (Rule 41 prior to revision), and several rules as to depositions (Rules 30, 31, 32, 33, 35 and 36 prior to the revision).

Tax cases regarding discovery are rare in the Court of Claims. However, a novel case, *Shakespeare v. United States*,¹⁰⁸ deals with production of documents and good cause in the Court of Claims. The taxpayer was attempting to find out if the Commissioner had issued revenue rulings to other taxpayers that were contrary to the position taken by the Commissioner in that case. He requested inspection of all the private rulings issued on the subject from 1954. He was hoping to gather enough information so that he could make out a case under one of the equitable doctrines that some authors feel the court is so susceptible to follow.¹⁰⁹ The court denied discovery of the revenue rulings. It talked in terms of good cause, relevancy and that the documents requested were not calculated to lead to the discovery of admissible evidence. The request in the case was overbroad, but the trial commissioner limited his initial order allowing discovery to those rulings having precedent value. The court still reversed.

Rule 71(b) (1) also declares that the "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . ." It goes on to state that "it is not grounds 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."

¹⁰⁷ CT. CL. R. 71(a).

¹⁰⁸ 389 F.2d 772 (1968).

¹⁰⁹ L. KEIR & D. ARGUE, *supra* note 58, at 33.

Pre-trial Depositions to Preserve Testimony

The Court of Claims does not have a procedure by which one may preserve testimony prior to petitioning the court. However, Rule 86 (Rule 33 as amended by the 1969 revisions) provides for depositions pending certiorari. Also, the Court of Claims' Rule 36 provides for filing a petition with the court to have discovery against the government so that a party plaintiff can file properly with the court a petition based on enough facts to sustain a cause of action. A Rule 36 petition need not be answered as it is specially for the purpose of eliciting information possessed by the government. It must be followed by use of the Court of Claims' other discovery rules.

IV. CONCLUSION

The taxpayer can conduct discovery of government information on two levels: the administrative level and the court level. His primary tool on the administrative level is the Freedom of Information Act.¹¹⁰ His tools at the court level are embodied within the rules of the particular forum he chooses. In the U.S. Tax Court he is unlikely to gain a substantial amount of information from the government. Also, the government will not be able to use any tools of that court to gain information from the taxpayer (however, the government may still make use of the administrative summons). In federal district court the taxpayer may be able to gain some information concerning the government's case. At least this forum provides the most liberal discovery rules available. On the other hand, the government will also be able to take advantage of this liberal discovery practice if it chooses. In the U.S. Court of Claims the taxpayer may be able to get discovery provided he can prove good cause in addition to the usual burden of proving relevancy and a lack of privilege. Compared to the administrative level (where the government has the burden of proving that the information is exempt), this may or may not be disadvantageous depending on the nature of the information sought.

Usually the taxpayer has knowledge of most of the facts of his case, however, the modern discovery rules of federal district courts allow discovery of more than mere facts; they allow discovery of application of law to fact. Therefore, the unique circumstances of each case will probably determine the extent to which the taxpayer will wish to seek information from the government. When this determination is made, the choice of the forum will be critical for discovery purposes.

Jeffrey E. Curtiss '72

¹¹⁰ 5 U.S.C. 552 (1967).

APPENDIX

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records, made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are —

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.