COMMENTS CONCERNING PROPOSED AMENDMENTS TO TAX COURT RULES

These comments ("Comments") are the individual views of the members of the Tax Court Subcommittee of the Low Income Taxpayer Committee of the Section of Taxation, who prepared them, and do not represent the position of the American Bar Association or the Section of Taxation.

These Comments were prepared by individual members of the Tax Court Subcommittee of the Low Income Taxpayer Committee of the ABA Section of Taxation. Principal responsibility was exercised by Elizabeth A. Copeland and Leandra Lederman co-chairs of the Tax Court Subcommittee of the Low Income Taxpayer Committee. Substantive contributions were made by Leslie Book, Dennis Perez and Kathryn Sedo of the Low Income Taxpayer Committee. The Comments were reviewed by Michael Mulroney of the Section's Committee on Government Submissions and by Janet R. Spragens, Council Director for the Low Income Taxpayer Committee.

Although many of the members of the Section of Taxation who participated in preparing these Comments have clients who would be affected by the federal tax principles addressed by these Comments or have advised clients on the application of such principles, no such member (or the firm organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

Contact persons: Elizabeth A. Copeland
                Telephone (210) 299-2347
                Facsimile: (210) 224-7540

                Leandra Lederman
                Telephone: (703) 993-8031
                E-mail: llederma@gmu.edu

Date: August 7, 2002
EXECUTIVE SUMMARY

The Tax Court ("Court") recently undertook the task of revising its Rules of Practice and Procedure to incorporate the changes occasioned by the Community Renewal Tax Relief Act of 2000, enacted as part of the Consolidated Appropriations Act, 2001, Pub. L. 106-554. The legislation significantly expanded the scope and jurisdiction of the Court in small tax cases. The Court asked for comments on the proposed rule changes from the Tax Section of the American Bar Association (the "Tax Section"). The Tax Section requested comments from the members of various committees, including the Low Income Taxpayers Committee ("LITP"). Members of the LITP were asked to specifically address the changes to the rules as they affect low-income taxpayers, who tend to appear pro se in Tax Court. Members of the Tax Court Subcommittee of the LITP (the "Subcommittee") undertook the review. What follows is a synopsis followed by the specific comments by individual members of the Subcommittee. The synopsis and specific comments represent the individual views of the members of the Subcommittee who prepared them and do not represent the position of the American Bar Association or the Section of Taxation. We applaud the Court’s effort to simplify the rules and our comments are directed at balancing that goal with the special needs of pro se and low-income taxpayers. We have listed below only those rules on which we have comments. For ease of readership, in the Specific Comment section that follows, the proposed Tax Court rule is stated, followed by our substantive comments.

Below is a synopsis of the matters addressed in the Specific Comments section:

- It would be helpful if Tax Court Rules 13 and 20 were also revised to address the new jurisdiction of the Tax Court in actions for relief from joint and several liability on a joint return and in lien and levy cases.

- It would be helpful if, in Rules 321(a), 321(c), 321(d), 324(a), 324(b), 331(a), and 331(d), the special procedures that apply to Small Tax Cases were be cross-referenced.

- Old Rule 173 was helpful to pro se and low income taxpayers because it provided information on the circumstances in which a small tax case would be redesignated as a regular case for trial.

- Under the proposed renumbered Rule 173(a)(2), low income taxpayers can request waiver of filing fees. It would be helpful to low-income taxpayers to provide that if an affidavit submitted under the Rule does not establish to the Court's satisfaction inability to pay, the petitioner has a reasonable time to make payment. It would also be helpful to provide a form for low income taxpayers to use to make such an affidavit.

- In cases involving actions for relief from joint and several liability on a joint return, respondent must provide notice of the action to non-electing spouse or ex-spouse; it would be helpful if such notice also advised the other individual of the 60 day deadline for notice.
intervening in the action.

• The new Form 2, to be used as the Petition in Small Tax Cases, should be helpful to small tax case petitioners. We recommend adding instructions indicating to the small tax case petitioner which documents to attach to the Form 2 Petition. In addition, we recommend certain format changes to provide more room for signatures, addresses and telephone numbers. Finally, we commend the drafters of Form 2 for mitigating problems posed by Rule 331(b)(4), which Rule deems conceded any issue not raised in the Petition. Such Rule can create harsh results for a pro se petitioner.

SPECIFIC COMMENTS TO THE PROPOSED TAX COURT RULES

TITLE XVII, Small Tax Cases

1. PROPOSED RULE 170, GENERAL: The Rules of this Title XVII, referred to herein as the "Small Tax Case Rules," set forth the special provisions which are to be applied to small tax cases. The term "small tax case" means a case in which the amount in dispute is $50,000 or less (as defined by the Internal revenue Code) and the Court has concurred in the petitioner's election. See Code Sections 7436(c) and 7463. Except as otherwise provided in these Small Tax Case Rules, the other rules of practice of the Court are applicable to such cases.

Comment: Rule 170 includes in the definition following the $50,000 limitation the brief phrase "and the Court has concurred in the petitioner's election" -- without information on how the petitioner makes the election-- unlike old rule 171(b). A cross-reference here to new rule 171 would be helpful, particularly for pro se taxpayers.

2. OLD RULE 173, DISCONTINUANCE OF PROCEEDINGS: After the commencement of a trial of a small tax case, but before the decision in the case becomes final, the Court may order that the proceedings be discontinued under Code Section 7463, and that the case be tried under the Rules of Practice other than the Small Tax Case Rules, but such order will be issued only if (1) there are reasonable grounds for believing that the amount of the deficiency, or the claimed overpayment, in dispute will exceed $50,000 and (2) the Court finds that justice requires the discontinuance of the proceedings under Code Section 7463, taking into consideration the convenience and expenses for both parties that would result from the order.

Comment: This rule has been deleted. This rule limited the Tax Court to discontinuing small tax case status after the start of trial to the situation in which (1) there were reasonable grounds for believing that the case exceeded the jurisdictional cap and (2) the Court found that justice required discontinuing the
proceedings as a small tax case, taking into account the convenience and expenses of both parties. It is the Committee's opinion that the old Rule 173 was advantageous for pro se and low income taxpayers because it informed them that a case could be removed from small tax case status and it set forth the standards that would be applied in removing the small tax case status. If the Court envisions that there is any circumstance under which the Court would discontinue small case status after the start of trial, then the Committee recommends that the gist of old Rule 173 be retained, possibly by adding a new subsection (d) to new Rule 171.

3. PROPOSED RULE 173, PLEADINGS:

(a) Petition: (1) Form and Content. The petition in a small tax case shall be substantially in accordance with Form 2 shown in Appendix I.

Comment: The deletion of a reference to Rule 34(b) in the new rule makes it less confusing and should be helpful to low income taxpayers.

(2) Filing Fee. The fee for filing a petition shall be $60, payable at the time of filing. The payment of any fee under this paragraph may be waived if the petitioner establishes to the satisfaction of the Court by an affidavit containing specific financial information the inability to make such payment.

Comment: It would provide helpful guidance to low-income taxpayers and their advisers to provide that if an affidavit submitted under Rule 173(a)(2) does not establish to the Court's satisfaction inability to pay, the petitioner has a reasonable time to make payment. In addition, it would be helpful to provide, in the Appendix to the Rules, a form for the low income taxpayer to use to make such a financial affidavit to the Court.

* * * * *

TITLE XVIII, Special Trial Judges

4. PROPOSED RULE 182, CASES INVOLVING $50,000 OR LESS: Except as otherwise directed by the Chief Judge, the following procedure shall be observed in small tax cases (as defined in Rule 170) and in all other cases where neither the amount in dispute (within the meaning of Code Section 7463 or 7436(c)), nor the amount of any claimed overpayment, exceeds $50,000:

(a) Small Tax Cases: Except in cases where findings of fact or opinion are stated orally pursuant to Rule 152, a Special Trial Judge who conducts the trial of a small tax case shall, as soon after such trial as shall be practicable, prepare a summary of the facts and reasons for the proposed disposition of the case, which then shall be submitted promptly to the
Chief Judge, or, if the Chief Judge shall so direct, to a Judge or Division of the Court.

(b) **Other Cases Involving $50,000 or Less:** Except in cases where findings of fact or opinion are stated orally pursuant to Rule 152, a Special Trial Judge who conducts the trial of a case (other than a small tax case) where neither the amount in dispute (within the meaning of Code Section 7463 or 7436(c)), nor the amount of any claimed overpayment, exceeds $50,000 shall, as soon after such trial as shall be practicable, prepare proposed findings of fact and opinion, which shall then be submitted promptly to the Chief Judge.

(c) **Decision:** The Chief Judge may authorize the Special Trial Judge to make the decision of the Court in any small tax case (as defined in Rule 170) and in any other case where neither the amount in dispute (within the meaning of Code Section 7463 or 7436(c)), nor the amount of any claimed overpayment, exceeds $50,000, subject to such conditions and review as the Chief Judge may provide.

**Comment:** In the introduction to the rule and in (b) and (c), the reference to "the amount in dispute (within the meaning of Code Section 7463 or 7436(c)) . . ." might be clarified by adding "depending on the nature of the proceeding."

**TITLE XXXI, Action for Relief from Joint and Several Liability on A Joint Return**

**RULE 321. COMMENCEMENT OF ACTION FOR DETERMINATION OF RELIEF FROM JOINT AND SEVERAL LIABILITY ON A JOINT RETURN**

5. **PROPOSED RULE 321(a), Commencement of Action:** An action for determination of relief from joint and several liability on a joint return is commenced by filing a petition with the Court. See Rule 20, relating to commencement of case; Rule 22, relating to the place and manner of filing the petition; and Rule 32, relating to the form of pleadings.

**Comment:** Rule 321(a) pertains to regular cases involving relief from joint and several liability on a joint return. Rule 321(a) cross-references to Rules 20, 22 and 32; however, there is no mention in Rule 20 as to the additional ways a Petition for relief from joint and several liability can be filed. Rule 20(a) states as follows:

A case is commenced in the Court by filing a petition with the Court, inter alia, to redetermine a deficiency set forth in a notice of deficiency issued by the Commissioner, or to redetermine the liability of a transferee or fiduciary set forth in a notice of liability issued by the Commissioner to the transferee or fiduciary, or to obtain a declaratory judgment, or to obtain or restrain a disclosure, or to adjust or readjust partnership items, or to obtain an award for reasonable administrative costs, or to obtain a review of the Commissioner’s failure to abate interest. See Rule 13. Jurisdiction.
It would be helpful if Rule 20 were modified to state that a petition for relief from joint and several liability may also be filed in one of the two circumstances set forth in Code Section 6015(e)(1). A cross-reference to Code Section 6015(e)(1) would be helpful because, in addition to bringing an affirmative defense of relief from joint and several liability in response to a Notice of Deficiency, such claim can be litigated in either of the two following manners:

(1) A petition for relief from joint and several liability on a joint return may be filed after the claimant receives from the Internal Revenue Service a Notice of Final Determination of Relief Available to the Individual, rejecting the claim for relief; or

(2) A petition for relief from joint and several liability on a joint return may be filed once the claimant has filed an election with the Internal Revenue Service to claim relief (as an innocent spouse) and more than six (6) months has passed.

Also, Rule 20(a) cross-references Rule 13 for jurisdiction. It would be helpful if Rule 13 were modified to state that jurisdiction is available under the provisions of Code Section 6015 for cases involving relief from joint and several liability. This request for relief from joint and several liability also arises in lien and levy actions, so a cross-reference in Rule 13 and Rule 20 to Code Section 6030(c) may be helpful.

Rule 321(a) also cross-references Rule 32; however, Rule 32 does not mention that if the small tax case procedure is elected, the taxpayer should use the new Form 2. It might be better for Rule 321(a) to reference both Rule 32 and Rule 173.

6. PROPOSED RULE 321(b), Content of Petition: A petition filed pursuant to this Rule shall be entitled “Petition for Determination of Relief from Joint and Several Liability on a Joint Return” and shall contain the following:

(1) The petitioner's name, legal residence, mailing address, and taxpayer identification number (e.g., Social Security number).

(2) A statement of the facts upon which the petitioner relies to support the jurisdiction of the Court and, as an attachment, a copy of the Commissioner's notice of determination of the relief available pursuant to Code Section 6015, if any.

(3) A statement of the facts upon which the petitioner relies in support of the relief requested.

(4) A prayer setting forth the relief sought by the petitioner; and
The signature mailing address, and telephone number of petitioner or each petitioner's counsel, as well as counsel's Tax Court bar number.

A claim for reasonable litigation or administrative costs shall not be included in the petition in an action for determination of relief from joint and several liability on a joint return. For the requirements as to claims for reasonable litigation or administrative costs, see Rule 231.

Comment: Because low income taxpayers may find this confusing, it would be helpful if Rule 321(b) made clear that this Rule does not apply to small tax cases.

7. PROPOSED RULE 321(c), Small Tax Case under Code Section 7463(f)(1): For provisions regarding the contents of a petition in a small tax case under Code Section 7463(f)(1), see the Small Tax Case Rules contained in Title XVII.

Comment: Because the form of the Petition is different in small tax cases, it would be helpful if at the end of Rule 321(c), the following statement were added: “these Small Tax Case Rules shall be followed in lieu of Rule 321(b).”

8. PROPOSED RULE 321(d), Filing Fee: The fee for filing a petition for determination of relief from joint and several liability on a joint return shall be $60, payable at the time of filing.

Comment: If the small tax case taxpayer cannot afford the filing fee, there is a waiver procedure set forth in Rule 173(a)(2) that requires filing an affidavit of financial information and inability to make the payment. It would be helpful to the pro se taxpayer if, as the last sentence of Rule 321(d), the following cross-reference were added: “See Rule 173(a)(2) for information on waiver of the filing fee.”

Rule 324. OTHER PLEADINGS

9. PROPOSED RULE 324(a), Answer: The Commissioner shall file an answer or shall move with respect to the petition within the periods specified in and in accordance with the provisions of Rule 36.

Comment: Because there are alternate rules for the small tax cases, we recommend that the following cross-reference added as the last sentence of Rule 324(a): “For small tax cases, see Rule 173(b).”

10. PROPOSED RULE 324(b), Reply: For provisions relating to the filing of a reply, see Rule 37.
Comment: Because there are alternate rules for the small tax cases, we recommend that the following cross-reference be added as the last sentence of Rule 324(b): “For small tax cases see Rule 173(c).”

Rule 325. NOTICE AND INTERVENTION

11. PROPOSED RULE 325(a), Notice: On or before 60 days from the date of the service of the petition, the Commissioner shall serve notice of the filing of the petition on the other individual filing the joint return and shall simultaneously file with the Court a copy of the notice showing proof of service.

Comment: In cases involving relief from joint and several liability, the intervening spouse may not be sophisticated enough to know that there is a 60 day deadline for filing an intervention in the case. Thus, it would be helpful if Rule 325(a) instructed the Internal Revenue Service to tell the potential intervening spouse of this 60 day deadline. We recommend adding the following sentence to Rule 325(a): “The notice shall advise the other individual of the right to intervene by filing a notice of intervention with the Court not later than 60 days after the date of service on the other individual.”

* * * * *

TITLE XXXII, Lien and Levy Actions

12. PROPOSED RULE 331(a), Commencement of Action: A lien and levy action under Code Sections 6320(c) and 6330(d) shall be commenced by filing a petition with the Court. See Rule 20, relating to commencement of case; Rule 22, relating to the place and manner of filing the petition; and Rule 32, regarding the form of pleadings.

Comment: See the discussion at Rule 321(a) above; it would be helpful if Rules 13 and 20 cross-referenced the lien and levy rules for bringing a Petition in Tax Court. In addition, because, for small tax cases, Rule 173 controls the form and content of the Petition (rather than Rule 32,) it would be helpful if Rule 331(a) cross-referenced Rule 173 in addition to the cross-reference to Rule 32.

13. PROPOSED RULE 331(b), Content of Petition: A petition filed pursuant to this Rule shall be entitled “Petition for Lien or Levy Action under Code Section 6320(c) or 6330(d),” as applicable, and shall contain the following:

(1) In the case of a petitioner other than a corporation, the petitioner’s name and legal residence; in the case of a corporate petitioner, the petitioner’s name and principal place of business or principal office or agency; and, in all cases, the petitioner’s mailing address and identification number (e.g. Social Security number or employer identification number). The mailing address, legal residence, and principal place of business, or principal office or agency, shall
be stated as of the date that the petition is filed.

(2) The date of the determination made by the Internal Revenue Service Office of Appeals under Code Section 6320 or 6330, as applicable (hereinafter the “lien or levy determination”), and the City and State of the Office which made such determination.

(3) The amount or amounts of the underlying tax liability, and the year or years or other periods to which the lien or levy determination relates.

(4) Clear and concise assignments of each and every error which the petitioner alleges to have been committed in the lien or levy determination. Any issue not raised in the assignments of error shall be deemed to be conceded. Each assignment of error shall be separately lettered.

(5) Clear and concise lettered statements of the facts on which the petitioner bases each assignment of error.

(6) A prayer setting forth the relief sought by the petitioner.

(7) The signature, mailing address, and telephone number of each petitioner or each petitioner’s counsel, as well as counsel’s Tax Court bar number.

(8) As an attachment, a copy of the lien or levy determination.

A claim for reasonable litigation or administrative costs shall not be included in the petition in a lien and levy action. For the requirements as to the claims for reasonable litigation or administrative costs, see Rule 231.

Comment: For clarity, we recommend that Proposed Rule 331(b), in its entirety, apply to regular cases and not to small tax cases. Furthermore, in Proposed Rule 331(b)(4) above, any issue not raised in the Petition is deemed conceded. This can create rather harsh results for a pro se taxpayer. The new Form 2 may mitigate adverse consequences in small tax cases, which the Committee supports.

14. PROPOSED RULE 331(c), Small Tax Case under Code Section 7463(f)(2): For provisions regarding the contents of a petition in a small tax case under Code Section 7463 (f) (2), see the Small Tax Case Rules contained in Title XVII.

Comment: A reference to the actual rule numbers would help an unsophisticated reader, who might not realize that each section of the rules has a title number.
15. **PROPOSED RULE 331(d), Filing Fee:** The fee for filing a petition for a lien and levy action shall be $60, payable at the time of filing.

**Comment:** A reference to Rule 173(a)(2) or a similar provision for waiver of the filing fee would help those who cannot afford to pay.

**APPENDIX**

16. **PROPOSED FORM 2**

**Comment:** The proposed new form reflects valuable simplification. However, the change of the phrase "Rules 170-179" to Rules "170 et seq." may make it harder for low-income taxpayers to know which rules to refer to. Also, after "A COPY OF WHICH IS ATTACHED" it would help to have a footnote or parenthetical stating ("You must attach the letter from the Internal Revenue Service to this Form"). In addition, the form probably should allow space for both legal address and residence, an issue for rural petitioners. The Court should consider formatting the form so that a taxpayer can reproduce it (photocopy or download to a printer) and simply fill in the blanks. In any event, the form does not provide enough space for signatures and addresses and phone numbers. Perhaps the spacing in the style of the case could be condensed to provide additional room at the bottom of Form 2 for this information. Finally, it would also help pro se petitioners if the IRS document (Notice of Deficiency, Determination Letter from Appeals, etc.) were referenced at the end of the line where the box is to be checked, e.g., “Petition for Redetermination of a Deficiency (responding to Notice of Deficiency from the Internal Revenue Service).”