Trying Times – Litigating a Conservation Easement Case

The ABA Section of Taxation
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**Forums**

I. Various courts have jurisdiction to hear Federal civil tax matters. Federal tax cases may be litigated in the U.S. Tax Court, the U.S. Court of Federal Claims, the U.S. Bankruptcy Courts and the U.S. District Courts.

II. Article I Courts Verse Article III Courts

a. Judicial authority for Article I courts is derived from acts of Congress. They include the U.S. Tax Court, the U.S. Court of Federal Claims, and the U.S. Bankruptcy Court. Judges on these courts serve limited terms.

b. Judicial authority for Article III courts is derived from Article III of the U.S. Constitution and acts of Congress. These include the U.S. District Courts.

III. U.S. Court of Federal Claims.

a. Congress established the U.S. Court of Federal Claims in October 1982 by the Federal Courts Improvement Act as a court of record pursuant to its grant of authority in Article I of the U.S. Constitution. The Court of Claims hears cases involving monetary disputes with the United States Government founded upon the Constitution, federal statutes, executive regulations, or contracts, express or implied in fact. The Court of Federal Claims also hears tax refund suits, an area in which the court exercises concurrent jurisdiction with the United States district courts. 28 U.S.C. § 1346; see generally, 28 U.S.C., Pt. IV, Ch. 91, United States Court of Federal Claims.

b. Jurisdiction.

1) The Court of Federal Claims has jurisdiction over refund actions where the taxpayer typically seeks to recover taxes, penalties and interest that has been (wrongfully) assessed and collected by the IRS. See 28 U.S.C. §§ 1491 & 1346(a)(1).

2) Before a taxpayer can file an action in the Court of Federal Claims (or the federal district courts), the taxpayer must first pay the amount of tax in dispute.

3) The U.S. Court of Federal Claims “shall not have jurisdiction to hear any action or proceeding for any refund or credit of any penalty imposed under section 6700 of the Internal Revenue Code of 1954 [1986] [26 U.S.C. § 6700] (relating to penalty for promoting abusive tax shelters, etc.) or section 6701 of such
c. Appeals. The United States Court of Appeals for the Federal Circuit has jurisdiction for appeals.

IV. District Courts.

a. The district courts are the general trial courts of the federal court system, both civil and criminal. There are 94 Federal district courts located throughout the United States and its territories, including at least one district court in each State. District Courts are formed under Article III of the Constitution. U.S. District Judges have lifetime appointments.

b. Jurisdiction.

1) The District Court has jurisdiction over refund actions where the taxpayer typically seeks to recover taxes, penalties and interest that has been (wrongfully) assessed and collected by the IRS. 28 U.S.C. 1346(a)(1).

2) Before a taxpayer can file an action in the District Court (or the Court of Federal Claims), the taxpayer must first pay the amount of tax liability in dispute.

3) Choice of venue rules apply when refund actions are brought in District Court. Generally, the action must be brought in the district where the taxpayer resides at the time of filing the lawsuit.

c. Appeals. The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States. 28 U.S.C. § 1291.

V. U.S. Tax Court.

a. Congress established the U.S. Tax Court as a court of record under Article I of the U.S. Constitution. I.R.C. § 7441. The Tax Court is a court of nationwide jurisdiction that is based in Washington, D.C. The Tax Court conducts hearing and trials in 74 cities around the county. See generally, 26 U.S.C., Subtit. F, Ch. 76, Subch. C.

b. Jurisdiction.

1) The Tax Court’s jurisdiction is limited by statute, generally prescribed by I.R.C. § 7442, but specific grants of jurisdiction are interspersed throughout the Code.
2) The Tax Court is the only judicial forum in which a taxpayer may challenge a tax liability without having to first pay the disputed tax in full.

c. Appeals.

1) The U.S. Courts of Appeals (other than the U.S. Court of Appeals for the Federal Circuit) shall have exclusive jurisdiction to review the decisions of the Tax Court in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury.

2) Decisions are appealable to the U.S. Court of Appeals with jurisdiction where either the taxpayer resides (individual taxpayer) or the taxpayer’s principal place of business. (e.g., taxpayers residing in Georgia may appeal to the Eleventh Circuit Court of Appeals). I.R.C. § 7482.

d. *Golsen Rule*

1) Tax Court decisions are appealable to the U.S. Court of Appeals with jurisdiction where either the taxpayer resides (individual taxpayer) or the taxpayer’s principal place of business. (e.g., Taxpayers residing in Georgia may appeal to the Eleventh Circuit Court of Appeals). IRC § 7482.

2) In circuits where the U.S. Court of Appeals has established precedent on a particular issue to be decided in Tax Court, the Tax Court will follow the decision of that U.S. Court of Appeals. *Golsen v. Commissioner*, 54 T.C. 742 (1970).

3) When the judicial circuits are split on an issue, the Tax Court will follow the precedent of the judicial circuit where the taxpayer’s residence or principal place of business is located.

4) If there is no precedent in the judicial circuit where the taxpayer’s residence or principal place of business is located, the Tax Court may follow its own precedent.

**Choice of Forum Considerations.**

I. Prepayment Actions Verse Refund Suits; Cashflow

a. The Tax Court and Bankruptcy Court are generally prepayment forums. Prepayment actions may also be termed redetermination actions or
deficiency cases. In these matters, a taxpayer may challenge a tax liability without having to first pay the disputed tax in full. See I.R.C. 6512(b)(1).

b. The District Court and the Court of Federal Claims are the refund forums. In these courts, the taxpayer must pay the full amount of tax liability in dispute before they can file an action. 28 U.S.C. 1346(a)(1).

II. Timing.

a. Tax Court. The timing for filing a petition in Tax Court has a short and strictly followed. Under I.R.C. § 6213(a), taxpayer only has 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency is mailed, for the taxpayer to file a petition with the Tax Court for a redetermination of the deficiency.

1) Failure to meet the 90-day (or 150-day) statutory deadline will result in dismissal of the petition for lack of jurisdiction. The Tax Court has no authority to extend the jurisdictional deadline. *Joannou v. Commissioner*, 33 T.C. 868, 869 (1960).

b. Refund Forums. The time limits to file a refund claim or refund suit generally run longer than in Tax Court. In refund cases, the taxpayer must timely file an administrative claim before bringing suit.

1) Administrative Claim. Generally, a claim for credit or refund of an overpayment of tax must be filed by the taxpayer within three years from the time the tax return was filed or two years from the time the tax was paid, whichever of such periods expires the later. I.R.C. § 6511(a).

2) Filing a Refund Suit. If the administrative claim is made, a refund suit may be filed between the time beginning six months from the date of filing the administrative claim and ending two years after the disallowance of the claim. I.R.C. § 6532(a).

III. Pleadings.

a. Tax Court. Tax Court Rules of Practice and Procedure, sets forth the basic requirements for filing a petition with this Court. The Tax Court Rules require parties to plead “[c]lear and concise assignments of each and every error which the petitioner alleges to have been committed by the Commissioner in the determination of the deficiency or liability.” Tax Court Rules of Practice and Procedure Rule 34(b)(4).

1) Amending Pleadings. Pleadings may be amended outside of the proscribed timeframe “only by leave of Court or by written consent of the adverse party, and leave shall be given freely
when justice so requires.” Tax Court Rules of Practice and Procedure Rule 41


1) Amending Pleadings. District Courts must issue scheduling orders which “must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.” Fed. R. Civ. Pro. 16(b)(3)(A) (Required Contents of the Order); see also Ct. Fed. Cl. R. 16(b)(3)(A)(same). A Scheduling Order “may be modified only for good cause and with the judge’s consent.” Fed. R. Civ. Pro. 16(b)(4); Ct. Fed. Cl. R. 16(b)(4) (same).

IV. Discovery

a. Tax Court.

1) Under the Tax Court Rules of Practice and Procedure, Rule 70(a)(1), the “Court expects the parties to attempt to attain the objectives of discovery through informal consultation or communication before utilizing the discovery procedures provided in these Rules.” See Branerton Corp. v. Commissioner, 61 T.C. 691 (1974).

2) Stipulations. Discovery in Tax Court is heavily influenced by the required use of stipulations, which are “to be comprehensive.” Tax Court Rules of Practice and Procedure Rule 91(a).

A. Binding Effect. Stipulations are treated “as a conclusive admission by the parties to the stipulation …The Court will not permit a party to a stipulation to qualify, change or contradict a stipulation, in whole or in part.” Tax Court Rules of Practice and Procedure Rule 91(e).

3) Depositions. Depositions are not often taken. Tax Court Rules of Practice and Procedure Rule 74.

4) Requests for Admission.

b. Refund Forums.

1) Discovery is more formal, following the structures of the Scheduling Order and Federal Rules of Civil Procedure.

A. Scope of Discovery. Unless otherwise limited by court order, parties may obtain discovery regarding any
nonprivileged matter that is relevant to any party’s claim or defense. Fed. R. Civ. Pro. 26(b)(1).

2) Permitted forms of discovery include the use of depositions (Fed. R. Civ. Pro 30 and 31), interrogatories (Fed. R. Civ. Pro. 33), request for production of documents Fed. R. Civ. Pro. 34), and requests for admission (Fed. R. Civ. Pro. 36).

V. Select Circuit Court Precedents for Conservation Easement Issues

a. Conservation Purpose – Inconsistent Use

1) *Glass v. Commissioner*, 471 F.3d 698 (6th Cir. 2006).

   A. The Sixth Circuit resoundingly affirmed the Tax Court’s decision in all respects. In particular, the Circuit Court held that the easements protected significant habitat because threatened and endangered species were documented on the encumbered property and because, even without such documentation, there was ample evidence that such species could potentially inhabit the encumbered property. The Circuit Court also held that the easement’s reserved rights were not inconsistent with the easement’s habitat protection purposes. Third, the Circuit Court upheld the Tax Court’s analysis of IRC § 170(h)(5), which requires donors to grant easements “exclusively for conservation purposes.”

2) *PBBM-Rose Hill, Ltd. Commissioner*, 900 F.3d 193 (5th Cir. 2018).

   A. The Fifth Circuit reversed the Tax Court holding that PBBM’s conservation easement failed to protect a conservation purpose. However, the Circuit Court affirmed the Tax Court’s other findings, including that the improvements clause rendered the easement deed noncompliant with the extinguishment regulation in Treasury Regulation Section 1.170A-14(g)(6). See *PBBM Rose Hill, LLC, No. 17-60276*.

   B. Three aspects of the Fifth Circuit’s opinion are significant: (1) the opinion invalidates a common easement deed provision allocating proceeds from judicially extinguished conservation easements; (2) the opinion contradicts existing law governing whether the IRS must comply with the managerial approval of penalties requirement under Code section IRC § 6751(b); and (3) the Fifth Circuit reversed the Tax Court and determined that protection of conservation purpose is based on the language of the
easement deed, disregarding the actions of a subsequent owner of the eased property.

b. Substantial Compliance

1) Scheidelman v. Commissioner, 682 F.3d 189 (2nd Cir. 2012).

A. In Scheidelman v. Commissioner, T.C. Memo. 2010-151, the Tax Court held that “the lack of a recognized methodology or specific basis for the calculated after-donation value is too significant for us to ignore under the guise of substantial compliance.” I.e., when the methodology is not found to be up to be a certain standard, substantial compliance is not applicable.

B. This holding was reversed on appeal. The Second Circuit held that this test for reliability was inappropriate. “The regulation requires only that the appraiser identify the valuation method ‘used’; it does not require that the method adopted be reliable.” The Scheidelman Court did not directly address the substantial compliance issue.

c. Perpetuity

1) Simmons v. Commissioner, 646 F.3d 6 (D.C. Cir. 2011).

A. The D.C. Circuit affirmed the Tax Court’s finding that façade easements on historic rowhouses were valid conservation easements even though the donee could consent to changes to the rowhouses. The Court found that the language in a deed that provides that all work shall comply with the requirements of all applicable Federal, State, and local government laws and regulations is sufficient to satisfy the conservation requirements in perpetuity of IRC § 170(h).

B. The IRS has also argued that deed language that implies that the Trust Organization may abandon the Conservation Deed implies that the Deed was not granted in perpetuity. This argument was rejected by Simmons, 646 F.3d at 10. As noted by the Simmons Appellate Court, the possibility of non-enforcement (which would place the organization’s tax-exempt status in peril) is remote and thus not grounds for disallowance under Treas. Reg. § 1.170A-14(g)(3). This same argument was rejected in Kaufman v. Shulman, 687 F. 3d at 27-28 with regard to the National Architectural Trust.
2) *Kaufman v. Shulman*, 87 F.3d 21 (1st Cir. 2012).

3) *Belk v. Commissioner*, 774 F.3d 221 (4th Cir. 2014).

   A. The Fourth Circuit handed down its decision in *Belk*, which is the first Appellate court opinion to interpret the IRC § 170(b)(2) requirement of a “qualified real property interest” in the context of donating a conservation easement. The Fourth Circuit held that to be a “qualified real property interest,” an easement must cover a fixed parcel of land. Consequently, it held that a provision allowing a substitution of the underlying land violated a perpetuity component of “qualified real property interest.” The Fourth Circuit also refused to give effect to a savings clause in the easement deed that prohibited the Land Trust from agreeing to any amendment (including an amendment to substitute the underlying land) if the amendment would cause the easement to fail to qualify as a charitable donation under IRC § 170(h).


   A. The Tax Court held, in part, that the conservation easements were not granted in perpetuity because the ability to make amendments to the boundary lines of the homesite parcels violated the perpetual restriction requirement under *Belk*.

   B. The Fifth Circuit vacated the Tax Court’s holding. Th court recognized that an amendment to make minor modifications of boundary lines of the homesite parcels, all within the four corners of the ranch property, could only be made with the approval of the donee land trust. In distinguishing *Belk*, the court noted that (1) the donee land trust had to approve any such amendments, and (2) the homesite parcels could not be increased in size and neither the external boundaries of the easement area nor the total acreage of the easement could change.

   C. The Fifth Circuit observed that in *Belk* the easement could be moved, lock, stock and barrel, to a tract or tracts different and remote from the original easement property, allowing the donor to change the nature of the eased property and possibly undermining the appraisal of the property.

5) Valuation

   A. *Palmer Ranch Holdings Ltd. v. Commissioner*, 812 F.3d 982 (11th Cir. 2016).
a. The Eleventh Circuit affirmed the Tax Court’s finding that there is a reasonable probability that the subject property could have been successfully rezoned to allow for the development of multi-family dwellings.

b. The Eleventh Circuit remanded the case because the Tax Court used a different valuation methodology than the parties’ appraisers.

**Initiating Litigation in the Tax Court**

I. Filing the Petition

a. Taxpayers may initiate a suit in the Tax Court by filing a Petition after they have received a statutory notice of deficiency or “90-day letter” from the Service. Tax Ct. R. 20(a). The Petition must be filed within 90 days after the statutory notice of deficiency is mailed.

b. Filing the Petition tolls the statute of limitations for refund claims, as well as additional assessments or levies, until after the Tax Court’s decision becomes final. IRC § 6503(a).

c. A Tax Court Petition must include the following information:

1) Basic information about the petitioner including name and address;

2) The office of the IRS with which the tax return for the period in controversy was filed;

3) The date the notice of deficiency was issued;

4) The type of tax, amounts of deficiency, and years involved;

5) A description of the errors committed by the IRS;

6) The facts on which the petitioner relies;

7) A prayer for relief; Tax Ct. R. 34(b); and

8) A copy of the notice of deficiency must also be attached to the Petition. Tax Ct. R. (34)(b)(8).

d. Taxpayers should *not* include their taxpayer identification numbers, e.g., employer identification or social security numbers, in the Tax Court Petition. Tax Ct. R. 27(a). Instead, taxpayers should file a separate
Statement of Taxpayer Identification Number under seal. Tax Ct. R. Appendix I, Form 4. Tax Ct. R. 27(c). Alternatively, taxpayers may include the taxpayer identification number in the Tax Court Petition but ask that the court order the information be redacted in the public record. Tax Ct. R. 27(c).

e. Typically, a separate Petition is filed with respect to each Notice of Deficiency. However, a single Petition may be filed with respect to all notices of deficiency directed to a taxpayer. In other words, a single Petition may cover notices for two or more years. Tax Ct. R. 34(b)(8).

f. Amending the Petition. After the Tax Court Petition is filed, the taxpayer may amend the Petition once without the Tax Court’s permission provided the amendment is made before the opposing party files its Answer. Tax Ct. R. 41(a). Otherwise, the Petition only may be amended upon agreement of the Government or upon the taxpayer seeking leave of the Court. Tax Ct. R. 41(a). However, a Petition may be amended after the expiration of time for filing, the Petition if the amendment would be necessary to establish the Tax Court’s jurisdiction.

II. Partnership Proceedings.

a. TEFRA Partnership Actions

1) The complex partnership procedures set forth in the Tax Equity and Fiscal Responsibility Act (“TEFRA”) govern partnership tax disputes for tax year 2017 and earlier years. TEFRA partnership items are determined at a single, partnership level proceeding.

2) The Tax Matters Partner (or other notice partner under I.R.C. § 6226(b)) may file a petition in the Tax Court, District Court or Court of Federal Claims within 90 days of receiving a final partnership administrative adjustment from the IRS. I.R.C. § 6226.

b. BBA Partnership Actions

1) The Bipartisan Budget Act of 2015 (“BBA”) repealed TEFRA and set out new centralized partnership audit rules, which apply to tax years starting in 2018.

2) On July 15, 2019, the Tax Court added Title XXIV.A to its Rules of Practice and Procedure. New Title XXIV.A prescribes the rules for a partnership proceeding commenced pursuant to IRC § 6234(a)(1).

3) The Tax Court obtains jurisdiction over a BBA partnership action for readjustment after:
A. The Service has mailed a notice of final partnership adjustment with respect to the partnership’s taxable year(s); and

B. The partnership representative files a petition for readjustment with respect to the year(s) within 90 days. Tax Ct. R. 255.1(c).

III. Answer

a. General Requirements for Filing an Answer

1) The United States must file an Answer within 60 days after the Petition is served. Tax Ct. R. 36(a).

2) The Answer must fully advise the petitioner and the Court of the nature of the Government’s defense. It must also contain the admissions or denials of each material allegation in the Petition. The government may respond that it lacks knowledge or information sufficient to form a belief as to the truth of an allegation. Such a response constitutes a denial. The Answer must also include a statement of every ground and the associated supporting facts, with which it has the burden of proof. This includes new issues and affirmative defenses. Tax Ct. R. 36(b).

b. Raising New Issues

1) In the Tax Court, the issue is the correct tax liability for the years in question. The IRS may raise new issues in the Answer to increase the asserted deficiency. IRC §§ 6503(a)(1), 6214(a). The Service has the burden of proof on such issues if they are “new matters.” Tax Ct. R. 142(a).

c. Amending the Answer

1) Generally, the Service is subject to the same rules for amending the Answer that the taxpayer is subject to with respect to amending its petition. Tax Ct. R. 41(a). However, the Service has authority to assert claims for additional taxes at any time before the trial. IRC § 6214(a). For this reason, the Tax Court will typically allow the Service to amend its answer to assert additional tax claims in later stages of litigation.

IV. Reply

a. The petitioner generally is not required to file a Reply.
1) The petitioner can elect to file a Reply that responds to allegations in the Answer on which the IRS bears the burden of proof. If the petitioner elects not to file a Reply, every affirmative allegation set out in the Answer is deemed denied unless the IRS files a motion that specified allegations in the Answer be deemed admitted. Tax Ct. R. 37(c).

2) The taxpayer has 45 days after receiving the Answer to file a Reply. Tax Ct. R. 37(a).

V. Qualified Offer

a. A qualified offer under IRC § 7430 gives taxpayers an opportunity to recover costs, including attorney fees, paid or incurred in connection with certain tax court cases.

b. A qualified offer is a written offer which:

   1) Is made by the taxpayer during the “qualified offer period” – the period of time that begins when the notice of deficiency is sent and ending 30 days before the date the case is first set for trial;

   2) Specifies the amount offered;

   3) Designates itself as a qualified offer; and

   4) Remains open until the earliest of the date the offer is rejected, the date the trial begins, or the 90th day after the offer is made. IRC § 7430(g)(1).

c. A well-written and well-timed qualified offer gives the IRS 90 days to accept the offer or come to a settlement with the taxpayer. IRC § 7430(g)(1)(D).

d. There are five general requirements for taxpayer recovery of administrative costs and litigation costs in connection with a federal tax controversy under IRC § 7430:

   1) The costs must be incurred in an administrative or court proceeding brought by or against the United States; IRC § 7430(a);

   2) The taxpayer must be the prevailing party. IRC § 7430(a);

   A. A prevailing party means any party that has substantially prevailed with respect to the amount in controversy or with respect to the most significant issue or set of issues presented. IRC § 7430(c)(4)(A).
B. A taxpayer meets the prevailing party requirement if:

   a. The taxpayer makes a qualified offer;

   b. The Service does not accept the qualified offer during the acceptance period; and

   c. The taxpayer ultimately obtains a better outcome in the case than they would have if the Service accepted the qualified offer. IRC § 7430(c)(4)(E).

3) The costs must be reasonable; IRC 7430(a);

4) The costs must be incurred in connection with the determination, collection, or refund of tax, interest, or penalty imposed by the Internal Revenue Code; IRC § 7430(a); and

5) The costs must be allocable to the United States and not any other party. IRC § 7430(b)(2).

e. A taxpayer cannot recover costs under IRC § 7430, if the taxpayer’s net worth exceeds the requirements of 28 U.S.C. § 2412(d)(1)(B) at the time the action was filed.


   2) $7 million or 500 or more employees for entities. 28 U.S.C. § 2412(d)(2)(B)(ii).

Discovery

VI. Purpose and Scope of Discovery

   a. Discovery is used by the parties to obtain information about the factual and legal support of their opponent’s case through documents, testimony, or other items.

   b. The standard for discovery is much broader than the evidentiary standard for trial.

      1) In Tax Court, “[t]he information or response sought through discovery may concern any matter not privileged and which is relevant to the subject matter involved in the pending case.” Tax Ct. R. 70(b).

VII. Procedural Requirements

   a. Initial Discovery: Informal and Mandatory Requests
1) The Tax Court imposes the obligation to communicate informally prior to formal discovery. Tax Ct. R. 70(a)(1). The Tax Court will not enforce formal discovery requests made prior to good faith attempts at informal communication. *Branerton Corp. v. Commissioner*, 61 T.C. 691, 692 (1974).

b. Time Limitations

1) Discovery may not be commenced before the expiration of 30 days after joinder of issue without the Court’s permission. Tax Ct. R. 70(a)(2). “Joinder of issue” occurs upon the filing of the answer (or reply, if required). Tax Ct. R. 38.

2) All discovery must be completed no later than 45 days before the date set on a trial calendar for the calling of the case, unless otherwise authorized by the Court. Tax Ct. R. 70(a)(2). In large cases, the date for completion of discovery frequently is accelerated pursuant to a pretrial order to a date prior to the exchange of expert reports.

c. Discovery Devices

1) Interrogatories

A. Interrogatories are written questions issued by one party to another and may relate to any discoverable matter. Tax Ct. R. 70(b)(1). Interrogatories are normally used to discover facts for a subsequent request for production or deposition, for the stipulation process, or for preparation for trial. Interrogatories generally are answered under oath. Tax Ct. R. 71(c).

B. A party generally has 30 days in which to respond in writing to formal interrogatories. Tax Ct. R. 71(c).

C. A party must either object to or answer the interrogatories within the prescribed period based on all information available to the party after reasonable inquiry. Tax Ct. R. 71(b)-(c).

D. Records may be made responsive to the interrogatory in lieu of a narrative response when the answer to an interrogatory may be derived from business records and if the burden of deriving or ascertaining the answer is substantially the same for either party. Tax Ct. R. 71(e).

E. In Tax Court, a party cannot give lack of information or knowledge as an answer to an interrogatory, unless such
party has made a reasonable inquiry and the information known or readily obtainable by such party is insufficient to enable such party to respond. Tax Ct. R. 71(b).

F. Each party is limited to 25 interrogatories, including all discrete sub-parts. However, a party may seek leave to serve additional interrogatories. Tax Ct. R. 71(a), 70(c)(1).

2) Use of Interrogatories Relating to Testifying Experts

A. In Tax Court, interrogatories may be used to discover:

1) The identity and qualifications of any expert witness expected to be called at trial; Tax Ct. R. 71(d)(1)(A).

2) The subject matter to be addressed by the expert, the substance of the expert’s opinion, and the facts relied upon by the expert; Tax Ct. R. 71(d)(1)(B).

3) And a summary of the grounds for each of the expert’s opinions. Tax Ct. R. 71(d)(1)(B).

B. Additional discovery of expert witnesses through depositions generally is not available in Tax Court. Estate of Van Loben Sels v. Commissioner, 82 T.C. 64, 68-69 (1984); Howe v. Commissioner, 49 T.C. Memo 1396 (1985). A party may depose an expert witness without the consent of the opposing party, but this is viewed as an “extraordinary method” of discovery and requires an order of the Court. Tax Ct. R. 74(c)(1)(B), (c)(4).

C. The Tax Court requires an expert to submit a written report that sets forth the qualifications of the expert, the rationale or basis for the opinions of the expert, and the facts or data upon which the opinions are based. Tax Ct. R. 143(g)(1). The parties are required to exchange and submit these reports not later than 30 days before the date set for trial. Tax Ct. R. 143(g)(1).

3) Requests for Production of Documents, Electronically Stored Information and Tangible Things, or Entering onto Land for Inspection of other Purposes.

A. A party may serve a request on any other party for the production of any documents in the custody or control of the other party, or to permit entry upon designated land or property. Tax Ct. R. 72(a).
B. The Tax Court has expanded the definition of “documents” to include electronically stored information (“ESI”). Tax Ct. R. 70(a), 72(a). ESI includes writings, drawings, graphs, charts, photographs, sound recordings, images, and other data compilations stored in any medium from which information can be obtained, either directly or translated by the responding party into a reasonably useable form. Tax Ct. R. 72(a)(1).

C. The inclusion of ESI within the definition of “documents” for discovery purposes triggers additional duties of preservation for sources of electronic data, including company servers, workstations, laptops, PDAs, materials created, maintained and hosted through the internet, and similar items.

D. The Tax Court allows the use of predictive coding to respond to electronic discovery requests. *Dynamo Holdings v. Commissioner*, 143 T.C. No. 9 (2014).

4) Production from Non-Parties

A. Given the limited availability of depositions in the Tax Court, a trial subpoena may be necessary to obtain documents from a non-cooperative non-party witness. Tax Ct. R. 147(d).

5) Depositions

A. Historically, the taking of depositions is far more restricted in Tax Court than in other forums.

1) Consensual Depositions

   i. If all parties consent by stipulation filed with the Tax Court, depositions may be taken of party or non-party witnesses. Tax Ct. R. 74(b)(1).

   ii. If the witness is a non-party or an expert, a written notice of deposition must be served on the witness. Tax Ct. R. 74(b)(2). Within 15 days after the service of the notice of deposition, a non-party or expert witness must serve any objections on the party seeking the deposition. Tax Ct. R. 74(b)(3). The party seeking the deposition has the burden to file a motion with the court for an
order with respect to the notice of deposition and objections. Tax Ct. R. 74(b)(3).

2) Nonconsensual Depositions

i. In Tax Court, a party may take a nonconsensual deposition for discovery of a party, non-party, or expert witness where:

1. Such witness can give testimony or possesses documents, electronically stored information, or things that are discoverable; and

2. Such testimony, documents, electronically stored information, or things practicably cannot be obtained through informal consultation, interrogatories, request for production of documents, or consensual depositions. Tax Ct. R. 74(c)(1)(B).

3. This procedure is viewed as an “extraordinary method” of discovery. Tax Ct. R. 74(c)(1)(B).

ii. A party desiring to take a nonconsensual deposition of a non-party witness must serve written notice upon every other party and the non-party witness to be deposed. Tax Ct. R. 74(c)(2)(A). If a party or nonparty to be deposed serves an objection to the deposition within 15 days after service of the notice of deposition on the party seeking the deposition, the burden is on the party seeking the deposition to file a motion with the Court seeking an order with respect to such notice of deposition and objections. Tax Ct. R. 74(c)(2)(B).

iii. A party desiring to take a nonconsensual deposition of a party or expert witness must file a written motion with the Court. Tax Ct. R. 74(c)(3)(A), (4)(B). The Court shall issue an order directing the non-moving party to file a written objection or response.
Tax Ct. R. 74(c)(3)(B). Any objection or response must be filed with the Court within 15 days after service of the motion. Tax Ct. R. 74(c)(4)(B)(ii). The Court will issue an order if it approves the taking of a deposition. Tax Ct. R. 74(e)(4).

B. Depositions may be used at trial to the extent allowed by the rules of evidence (e.g. as an admission of a party, as testimony from an unavailable witness, or as impeachment evidence). Tax Ct. R. 81(i).

6) Requests for Admission

A. The Tax Court requires the parties to first use informal communication before utilizing requests for admissions. Tax Ct. R. 90(a); Odend’hal v. Commissioner, 75 T.C. 400, 403-404 (1980).

B. A party may issue to another party a request for admission, which is a request to admit or deny the truthfulness of separately enumerated statements or opinions of fact, or of the application of law to fact. Tax Ct. R. 90(a).

C. A party has 30 days after the service of Requests for Admission to respond or the request is deemed admitted. Tax Ct. R. 90(c).

D. The non-requesting party must admit or deny each requested admission, state with specificity the reason that each request cannot be truthfully admitted or denied, or object. Tax Ct. R. 90(c).

E. A party cannot rely upon lack of information or knowledge for failing to admit or deny an allegation, unless the party states that the party has made reasonable inquiry and the information available to the party is insufficient to permit an admission or denial. Tax Ct. R. 90(c).

d. Defenses and Objections to Discovery

1) Numerous defenses and objections to discovery requests are available as described in the Tax Court Rules and the Federal Rules of Evidence.

2) The party opposing the production of information has the burden of establishing that the information is not relevant or otherwise

3) The most common defenses and objections include: 1) withholding documents on grounds of privilege, 2) relevance, and 3) overly broad and burdensome requests.

4) Privilege

   A. Documents and electronically stored information that contain, in whole or in part, discussions that fall under one or more listed privileges can be withheld from production to the opposing party. While there are many statutory and common law privileges, the most common privileges asserted in federal tax cases are: the attorney-client privilege; work product doctrine; and IRC § 7525 accountant-client privilege.

   B. Attorney-Client Privilege

      1) The taxpayer is not required to produce in discovery documents that are protected by the attorney-client privilege. Tax Ct. R. 70(b).

   C. Work Product Doctrine

      1) The taxpayer is not required to produce in discovery documents that are protected by the work product doctrine. *Branerton Corp v. Commissioner*, 64 T.C. 191, 198-99 (1975); Tax Ct. R. 70(c)(3)(A).

      2) Work product protection may be waived if there is disclosure to an adversary. *United States v. Deloitte, LLP*, 610 F. 3d 129, 139-143 (D.C. Cir. 2010); *Hartz Mountain Indus., Inc. v. Commissioner*, 93 T.C. 521, 527-28 (1989).

5) Section 7527 Tax-Practitioner Privilege

   A. The common law protections of confidentiality that apply to communications between taxpayers and attorneys also apply to certain communications regarding tax advice between taxpayers and federally authorized tax practitioners. IRC § 7525(a)(1).

   B. Partial disclosure of information otherwise protected by the tax-practitioner privilege may lead to waiver of the privilege as to all materials between the tax-practitioner and
the taxpayer relating to the subject matter. United States v. Textron, Inc., 577 F. 3d 21, 25 (1st Cir. 2009) (describing District Court’s holding that tax practitioner privilege can be waived by disclosure to independent accountant).

6) Asserting Privileges in the First Instance: Use of a Privilege Log

A. When a party withholds otherwise discoverable information on the grounds of privilege, a privilege log generally must be provided. Tax Ct. R. 1(b) (when no applicable rule exists, particular weight may be given to the Federal Rules of Civil Procedure).

B. The contents of a privilege log may be negotiated between counsel, but should include at a minimum: 1) an express claim of the privilege or protection invoked to justify withholding the information; and 2) a description of the information withheld that enables the requesting party to evaluate the privilege or protection claimed. Fed. R. Civ. P. 26(b)(5)(A).

7) Relevancy

A. The most common objection to discovery is that the information or document sought is not relevant to the case. However, documents do not need to qualify as relevant admissible evidence under the Federal Rules of Evidence to be discoverable.

B. The rules employ a broad definition of relevancy, and permit discovery of any information or document that is not privileged or relevant to a claim or defense of either party, or is reasonably calculated to lead to the discovery of admissible evidence. Tax Ct. R. 70(b)(1). The Tax Court liberally construes relevancy to embrace all but the most clearly unrelated discovery requests. Bennett v. Commissioner, 74 T.C. Memo. 1144 (1997).

8) Overly Broad and/or Burdensome

A. Discovery requests that are overly broad or unduly burdensome are objectionable and will not be enforced by the courts. Tax Ct. R. 70(b)(2); Branerton Corp. v. Commissioner, 64 T.C. 191, 202 (1975).
VIII. Discovery Motions and Subpoenas

a. Motion to Compel. If a party refuses to provide discoverable information in Tax Court, the other party may file a motion to compel discovery no later than 45 days prior to the trial date, unless otherwise authorized by the Court. Tax Ct. R. 70(a)(2). If the motion is granted, a party from whom discovery is requested may show that the information is not reasonably accessible because of undue burden or cost; however, the Court may order discovery nonetheless if the requesting party shows good cause. Tax Ct. R. 70(b)(3).

b. Motion to Review. A party may move to determine the sufficiency of answers or objections to requests for admission. Tax Ct. R. 90(e). If the court finds that an answer does not comply with the rules, it may deem the matter admitted or order that an amended answer be served. Tax Ct. R. 90(e).

c. Subpoenas of Third-Party Documents and Testimony. A party may request that the court issue a subpoena that requires the person served to attend a deposition, hearing, or trial; or produce and permit copying and inspection of documents, electronically stored information, or tangible items. Tax Ct. R. 147(a), (b), (d).

d. The Tax Court may hold in contempt any person who has been served with a subpoena and fails to obey it without an excuse. Tax Ct. R. 147(e).

e. Motion for Sanctions. A party may be sanctioned for failing to provide discoverable information, respond to interrogatories or a request for production of documents, or properly affirm a request for admission. Tax Ct. R. 104(c).

IX. Pretrial Procedures

a. Stipulation of Facts

1) Stipulations of fact are critical and a necessary component of any Tax Court case. The Tax Court requires the parties to stipulate to “all evidence which fairly should not be in dispute.” Tax Ct. R. 91(a)(1).

A. Stipulated facts and documents should be organized coherently along subject matter lines and in a logical order. Tax Ct. R. 91(a)(2).

B. A party is not required to stipulate if the truth or authenticity is disputed. Tax Ct. R. 91(a)(1).
C. A party cannot refuse to stipulate relevant evidence on grounds of waste of time under Fed. R. Evid. 403 upon a showing that the probative value of the evidence is outweighed by its potential for undue delay and waste of trial time. *Sundstrand Corp. v. Commissioner*, 89 T.C. 810, 813-14 (1987).

D. A stipulated fact is a “conclusive admission” by the parties. Tax Ct. R. 91(e). Thus, the party must be careful not to “stipulate itself out of court” through the stipulation of adverse facts. *VERITAS Software Corp. v. Commissioner*, 133 T.C. 174, 186 (2009); *Estate of Quirk v. Commissioner*, 928 F.2d 751, 758-59 (6th Cir. 1991); *Ball v. Commissioner*, 47 T.C. Memo 1684, 1690-91 (1984).

2) Fully Stipulated Case. The Tax Court rules allow parties to submit a case for decision at any time after joinder of the issue when sufficient facts have been stipulated. Tax Ct. R. 122(a); *Lawinger v. Commissioner*, 103 T.C. 428, 430 (1994); *Estate of Thomas v. Commissioner*, 84 T.C. 412 (1985); *Gehl Co. v. Commissioner*, 49 T.C. Memo. 372 (1984), aff’d, 795 F.2d 1324 (7th Cir. 1986). A submission on stipulation does not alter the applicable burden of proof. Tax Ct. R. 122(b).

b. Pre-Trial Conferences

1) Judges will consult with the parties to expedite discovery, narrow factual and legal issues, stipulate facts, simplify the presentation of evidence, assist in trial preparation and facilitate settlement. Tax Ct. R. 110(a).

2) Tax Court judges generally take a more active role in complex tax litigation, including conservation easement cases. Such cases often involve substantial expert testimony or valuation issues, and many cases involve multiple issues. Complex cases are likely to be placed on special trial calendars and are subject to periodic pre-trial conferences.

c. Summary Judgment

1) Partial or complete summary judgment may be granted upon motion if the pleadings, answers to interrogatories, depositions, admissions, affidavits, stipulations of fact, and any other admissible materials show that there is no genuine issue as to any material fact and that a decision should be rendered as a matter of law. Tax Ct. R. 121(b).
2) The moving party has the burden of demonstrating that the
material facts are not in dispute.

A. The existence of any reasonable doubt as to the facts at
issue will result in the denial of the motion. *Seagate Tech.,
Inc. v. Commissioner*, 80 T.C. Memo. 912 (2000); *Bond v.
Commissioner*, 100 T.C. 32, 36 (1993); *Gulfstream Land &
Dev. Corp. v. Commissioner*, 71 T.C. 587, 596 (1979);

B. The motion cannot be defeated by a mere allegation that
there is a dispute over a material fact. The adverse party
must set forth specific evidence that establishes that there is
a genuine issue for trial. Tax Ct. R. 121(d); *Vallone v.
may be in the form of expert opinions. *Seagate Tech., Inc.

d. Protective Orders

1) Generally, a taxpayer may seek a protective order to protect
c confidential taxpayer information, including non-public financial
data, strategic planning documents, product specifications, trade
secrets, source code and object code, and other non-public items,
from disclosure during litigation. Tax Ct. R. 103(a); *Penn-Field
Indus., Inc. v. Commissioner*, 74 T.C. 720 (1980). The motion
for protective order may not be ruled upon by the court until after
discovery is closed or after documents and information are
stipulated to by the parties.

2) A party or any person from whom discovery is sought may move
for a protective order. For good cause shown, the court may
issue an order to protect the party or person from annoyance,
embarrassment, oppression, or undue burden or expense. Tax Ct.
R. 103(a).

3) Protective orders may be requested to do the following to protect
sensitive taxpayer information:

A. Forbid a disclosure or discovery. Tax Ct. R. 103(a)(1);

B. Specify terms, including time and place, for the disclosure
or discovery. Tax Ct. R. 103(a)(2);

C. Prescribe a discovery method other than the one selected by
the party seeking discovery. Tax Ct. R. 103(a)(3);
D. Forbid inquiry into certain matters or limit the scope of discovery to certain matters. Tax Ct. R. 103(a)(4);

E. Designate who may be present while the discovery is conducted. Tax Ct. R. 103(a)(5);

F. Require that a deposition be sealed and opened only on court order. Tax Ct. R. 103(a)(6);

G. Require that a trade secret or other information not be disclosed or only be disclosed in a designated way. Tax Ct. R. 103(a)(7);

H. Require that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs. Tax Ct. R. 103(a)(8);

I. Require that an expense involved in a method or procedure be borne in a particular manner or by a specified person. Tax Ct. R. 103(a)(9);

J. Impound documents or records to be available for review by the parties before and during trial. Tax Ct. R. 103(a)(10).

4) Upon the filing of a motion and a showing of good cause, a court may issue a protective order to protect privileged or confidential documents and information from discovery. Tax Ct. R. 103(a); Penn-Field Indus., Inc. v. Commissioner, 74 T.C. 720 (1980).

5) If the Court denies a motion for a protective order in whole or in part, the court may, on just terms, order a party to provide or permit discovery. Tax Ct. R. 103(b).

e. Consolidation or Severance

1) Consolidation. If cases are before the court that both involve a common question of law or fact, the court may order a joint hearing or trial of any or all matters in issue, order the cases consolidated, or issue any other orders to avoid unnecessary cost or delay. Tax Ct. R. 141(a). The Court may take similar action where cases involve different tax liabilities of the same parties, even if there is no common issue. Tax Ct. R. 141(a).

2) Severance. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more issues, claims, defenses, or of the tax liability of any party or parties. Tax Ct. R. 141(b).
f. Judgment on the Pleadings

1) Any party may move for judgment on the pleadings after the pleadings are closed as long as the motion does not delay trial. Tax Ct. R. 120(a).

2) The motion will be treated as a motion for summary judgment if matters not in the pleadings are presented to and not excluded by the court. Tax Ct. R. 120(b).

g. Other Pre-Trial Filings:

1) Witness List. This document must be provided to the other parties and filed with the court. It should include the name, address, and telephone number of each witness, and separately identify the witnesses the party expects to call and those it may call, if needed. Fed. R. Civ. P. 26(a)(3)(A)(i).

2) Disclosure of Experts. A party must disclose to the other parties the identity of any witness who may present expert testimony. Tax Ct. R. 143(g).

   A. Expert disclosure must be accompanied by a written report prepared and signed by the expert witness. The report must contain the following:

      1) A statement of all opinions the witness will express and reasons for them;

      2) Data considered in forming them;

      3) The witness’s qualifications;

      4) A list of recent previous cases in which the witness testified as an expert; and

      5) A statement of the compensation to be paid for testimony in the case.

   The expert report must be served on the opposing party not later than 30 days before the trial date. Tax Ct. R. 143(g).

   B. Disclosures must be made at the times and in the sequence that the court orders. Absent a court order, disclosures must be made at least 90 days before the date set for trial or, if evidence is intended solely to contradict evidence identified by another party, within 30 days after the other party’s disclosure. Fed. R. Civ. P. 26(a)(2)(C).
3) Trial Memo. The Court may order the parties to file a trial memorandum in advance of trial. Each party’s trial memorandum summarizes each party’s legal and factual arguments, identifies the witnesses and their projected testimony, and discusses other issues that may be before the court during the trial.

4) Supplemental Discovery Filings. The parties have a duty to supplement their discovery responses as additional responsive documents and information are identified during the course of the litigation. Supplemental discovery filings must be made in a timely manner.

C. In Tax Court, a duty to supplemental responses may be imposed by the court, by agreement of the parties, or at any time before trial by a new request to supplement prior responses. Tax Ct. R. 102(3). Supplemental responses may address the following matters:


2) The identity of each person expected to be called as an expert witness at trial, and the subject matter and substance of each expert’s testimony. Tax Ct. R. 102(1)(B).

3) A party must amend a prior response if the party learns that the response was incorrect when made or if the response is no longer true and a failure to amend the response would amount to a knowing concealment. Tax Ct. R. 102(2).

Presentation of the Case

X. Burden of Proof

a. In the Tax Court, the general rule is that the taxpayer has the burden of proving by a preponderance of the evidence that the deficiency set forth in the Notice of Deficiency is erroneous. Tax Ct. R. 142(a); Borchers v. Commissioner, 95 T.C. 82, 90-91 (1990); Gulf Oil Corp. v. Commissioner, 84 T.C. 447, 459 (1985). The burden of proof is the same for a fully stipulated case. Tax Ct. R. 122(b); Nemitz v. Commissioner, 130 T.C. 102 (2008); Borchers, 95 T.C. at 91.

1) A higher burden of proof is imposed in certain types of cases in which the taxpayer is required to demonstrate that the
Commissioner abused its discretion (e.g., IRC § 482 cases, cases that involve a change in method of accounting, and cases that otherwise involve the clear reflection of income). In such cases, the taxpayer must show that the determination of the Commissioner is “arbitrary, capricious or unreasonable.” *Kenco Restaurants, Inc. v. Commissioner*, 206 F. 3d 588, 596 (6th Cir. 2000); *H Group Holding, Inc. v. Commissioner*, 78 T.C. Memo. 533 (1999); *Eli Lilly & Co. v. Commissioner*, 84 T.C. 996, 1108 (1985), *aff’d in part and rev’d in part*, 856 F.2d 866 (7th Cir. 1988).

2) The burden of proof is on the Service in the following circumstances:

A. When the Service raises a new matter in the Answer or Amendment to the Answer. Tax Ct. R. 142(a)(1);

B. When the Service asserts that there should be an increase in the deficiency in the Answer or Amendment to the Answer. Tax Ct. R. 142(a)(1);

C. When the Service raises an affirmative defense (e.g. *res judicata*, collateral estoppel, equitable estoppel, statute of limitations) in the Answer or in an amendment to the Answer. Tax Ct. R. 142(a)(1); *McCulloch Corp. v. Commissioner*, 48 T.C. Memo. 802, 809-10 (1984);

D. When fraud with intent to evade tax is at issue. In such a case the burden must be carried by “clear and convincing evidence.” IRC § 7454(a); Tax Ct. R. 142(b);

E. When the taxpayer produces credible evidence on any factual issue relevant to the assessment and has complied with statutory requirements, including maintaining all documents required. IRC § 7491(a); Tax Ct. R. 142(a)(2);

F. When the liability of the petitioner as transferee of the taxpayer is at issue (but not the tax liability of the taxpayer). IRC § 6902(a); Tax Ct. R. 142(d); and

G. When the Notice of Deficiency is based on an allegation of accumulation of corporate earnings and profits beyond the reasonable needs of the business. IRC § 534(a)(2); Tax Ct. R. 142(e).
XI. Presentation of Factual Evidence

a. Tax trials vary significantly in length, ranging from one or two hours to several weeks. The length of the trial depends on the number of fact witnesses and expert witnesses presented by the parties and the degree to which the parties stipulate to the relevant facts and documents in advance of trial. Regardless of the length, it is critical that the taxpayer’s case-in-chief be presented in a coherent and credible fashion to the trier of fact, because the taxpayer generally bears the burden of persuasion based on the evidence in the record.

1) Coherency in presentation of the taxpayer’s case-in-chief requires the taxpayer’s counsel to have assembled and admitted as evidence the proper mix, and sequencing, of exhibits (e.g., documents, physical evidence or demonstrative exhibits), stipulations, factual testimony and expert testimony to establish each legal element supporting the taxpayer’s position.

2) Counsel must make subjective determinations as to which testimony and exhibits should be used to prove each element in order to maintain the credibility of the evidence used to support the taxpayer’s case.

A. Because an appellate court generally will not reverse a trial court’s findings of fact unless they are “clearly erroneous,” the determination by the trier of fact of the relative probative value of evidence based on an assessment of its relative credibility is normally final. Anderson v. Bessemer City, 470 U.S. 564, 575 (1985); Johnson v. Commissioner, 50 F. 3d 2 (2nd. Cir. 1995).

B. Significant time is required to identify appropriate party and nonparty factual witnesses, as well as expert witnesses, to ensure the credibility of testimony.

C. The decision as to the testimony and exhibits to be used during the trial is not merely a decision made before opening argument. These decisions are continually tested and evolve as testimony and evidence is brought in by the parties to the litigation and also in response to questions and concerns raised by the trier of fact.

b. Testimony is generally the “life blood” of the taxpayer’s case because it brings the stipulations and exhibits “to life” for the trier of fact.

1) A fact witness may testify as to facts and give limited opinion testimony. Such opinion testimony is admissible only if it is based on the perceptions of the witness and is helpful to the court
in understanding the testimony of the witness or in determining a fact in issue. Fed. R. Evid. 701-706.

2) Proper pretrial preparation of a witness’s testimony is extremely time consuming. However, the importance of this pretrial preparation cannot be underestimated.

A. Each witness’s direct testimony should be reviewed repeatedly between examining counsel and the witness. This process is intended to improve the effectiveness of the witness’s testimony.

B. Each witness should also be thoroughly prepared by one or more members of the trial team for possible areas of cross-examination. The trial team should review documents or specific questions with the witness that the witness may be asked on cross-examination.

3) Certain factual matters relevant to an issue, such as the nature and function of a product or the activities conducted by a party, or the intentions or purpose of a party, may be appropriately and vividly proven at trial through the use of tangible or visual evidence, accompanied by explanatory testimony.

A. Documents prepared contemporaneous to the issue in controversy or use of demonstrative exhibits can be particularly compelling.

B. Physical items can be used as demonstration evidence to assist in a witness’s testimony. The item itself does not become part of the trial record (unless it is introduced into evidence) but can immeasurably aid the fact-finder in understanding the witness’s testimony, particularly if the testimony is technical in nature.

C. Physical things, such as product samples, may be offered into evidence pursuant to the normal rules of evidence applicable to any document. Fed. R. Civ. P. 901, 1001.

D. Photographs and videotapes are admissible pursuant to Fed. R. Evid. 901 and 1001(2) after a demonstration that the photograph or videotape accurately represents what it purports to portray. United States v. Akel, 337 Fed. App’x 860 (11th Cir. 2009); United States v. Englebrecht, 917 F.2d 376, 378 (8th Cir. 1990), cert. denied 499 U.S. 912 (1991); United States v. Clayton, 643 F.2d 1071, 1074 (5th Cir. 1981).
E. Video presentations have been used in several cases (for example, in cases involving large intercompany pricing issues and other issues) to demonstrate visually the viable and substantial operations conducted by foreign subsidiaries or other entities, and to show graphically the relationship between different parts, products, and machines.

F. Video, photographs, slides, and other visual media can be an effective aid to a witness’s testimony and can be made by the taxpayer’s in-house communications or graphic arts department or by outside companies that specialize in the preparation of visual trial aids.

G. Computer animations have been allowed by courts “if authenticated by testimony of a witness with personal knowledge of the content of the animation, upon a showing that it fairly and adequately portrays the facts and that it will help to illustrate the testimony given in the case.” *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 559 (D. Md. 2007).

4) If electronic media or exhibits are going to be used, be sure to plan ahead in terms of whether the court: 1) has electronic or multimedia capabilities; and 2) what the rules are for using the courtroom technology; 3) become familiar with the courtroom technology; and 4) always have a back up plan in case of technology failure.

XII. Consider Treatment of Sensitive or Confidential Information

a. Consider the sensitivity of the documents and testimony to be presented and determine whether a pre-trial motion should be filed to seal the record and/or to clear the courtroom before testimony is presented.

b. A court may issue a protective order to protect a party’s confidential or proprietary information in response to a motion showing good cause. Tax Ct. R. 103.

c. A motion for protective order should include as an exhibit any discovery requests received involving information covered by the pretrial motion. Tax Ct. R. 103(a). The motion should be filed before trial in case the courtroom needs to be cleared of any non-parties during some or all of the testimony.

d. While the issuance of a protective order to seal the record will result in certain records being sealed and segregated from other materials in the
case file, the sealed records can be unsealed pursuant to a court order. Post-trial action may be required to keep the record sealed.

e. In addition, a third party may submit a motion to intervene for the limited purpose of protecting the third party’s trade secrets or other proprietary information. Fed. R. Civ. P. 24.

XIII. Expert Witnesses

a. Use of Experts

1) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise. Fed. R. Evid. 702; Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999); Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993); Seagate Technology, Inc. v. Commissioner, 102 T.C. 149, 321 (1994).

2) Fed. R. Evid. 702 has effectively codified the U.S. Supreme Court’s holdings in Kumho and Daubert and provides that an expert may not testify unless:

A. The testimony is based upon sufficient facts or data;

B. The testimony is the product of reliable principles and methods; and

C. The witness has applied the principles and methods reliably to the facts of the case.

3) The court is not bound by the opinion of any expert. Expert evidence is weighed in light of the demonstrated qualifications of experts and all other relevant evidence. Bausch & Lomb, Inc. v. Commissioner, 933 F.2d 1084, 1092 (2d Cir. 1991); Union Carbide Corp. v. Commissioner, 97 T.C. Memo. 1861, 1870 (2000).

4) The court can adopt certain portions of an expert’s testimony and reject other portions of the testimony. Lukens v. Commissioner, 945 F.2d 92, 96 (5th Cir. 1991).

5) The expert’s credibility is critical for the presentation to be persuasive to a court. VERITA Software Corp. v. Commissioner, 133 T.C. 14 (2009) (Respondent’s expert was unconvincing and its notice of deficiency was determined to be arbitrary, capricious and unreasonable).
A. Credibility is dependent on a number of factors, including the relationship of the expert’s specific expertise to the matter at issue, the expert’s familiarity with the case and his demeanor and personality.

6) Unlike testifying experts, who should be disclosed in advance of trial, non-testifying experts, or consultants, are not generally disclosed.

A. Communications and opinions of non-testifying experts need to be handled with care, as they can be discoverable under exceptional circumstances. Fed. R. Civ. P. 26(b)(4)(b).

B. As a result, dual role utilization of an expert (i.e. to testify and to provide consultative services) should be carefully considered to avoid the risk that work product disclosed to the expert will become discoverable.

b. Substance of Expert Evidence

1) Presentation of Expert Opinion

A. The expert’s opinion must be put in proper context vis-à-vis other testimony.

B. The expert’s testimony must be properly organized and made understandable to the court. In that regard the testimony should:

   1) Establish the expert’s qualifications;

   2) Lay the foundation of the expert’s understanding of the facts;

   3) Establish the appropriateness of the expert’s methodology and sub-opinions;

   4) Anticipate impeachment tactics.

C. The ultimate goal is not merely to have the expert’s opinion on the ultimate issue admitted into the record, but to persuade the trier of fact to accord significant weight to the expert’s opinion.
2) Bases of Opinion Testimony by Experts

A. The Tax Court permits the use of interrogatories to discover information about expert witnesses and require the expert’s report to be produced before trial.

B. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If the facts or data are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, they need to be admissible into evidence. Fed. R. Evid. 703.

C. Since Fed R. Evid. 703 permits an expert to base testimony on facts made known to the expert before trial and which might not be admissible into evidence Fed. R. Evid. 703 is essentially an exception to the hearsay rule. Thus, inadmissible hearsay can be incorporated into the record through an expert.

3) Opinion on Ultimate Issue

A. Generally, testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. Fed. R. Evid. 704.

B. This rule permits opinions such as an opinion on the arm’s length nature of the price of a product under section 482.

4) Form of the Expert’s Opinion

C. In the Tax Court, an expert must submit to the Court (and provide to the opposing party) at least 30 days prior to the trial (or earlier if ordered by the Court) a report that serves as the direct testimony of the expert. Tax Ct. R. 143(f)(1); Keogh v. Commissioner, 52 F.3d 312 (1995) (in an unpublished opinion, court did not permit expert to testify when report was not timely filed.).

D. The Tax Court may allow an expert to testify without a written report in very particular circumstances, such as “where the expert testifies only with respect to industry practice or only in rebuttal to another expert witness.” Tax Ct. R. 143(f)(2).
E. Because the expert report is deemed to constitute the expert’s direct testimony, the report must set forth each of the elements discussed above, and the expert may be given little or no opportunity at trial to supplement the report (except to discuss matters that arise subsequent to the submission of the report). Tax Ct. R. 143(f)(1); Fed R. Civ. P. 37(c). But cf., Harvey v. Dist. Of Columbia, 949 F. Supp. 874, 877 (D.D.C. 1996) (judge allowed testimony when opposing party did not timely object to inadequacy of expert’s report).

F. In cases that involve complex expert testimony, the Tax Court may require the submission of rebuttal expert reports prior to the trial. In such a case, the rebuttal report of an expert serves as the direct rebuttal testimony of the expert.

G. The expert’s report must contain a complete statement of the bases for each opinion expressed by the expert. Jenkins v. Bartlett, 487 F.3d 482, 487 (7th Cir. 2007).

H. The broad disclosure requirement under Fed. R. Civ. P. 26 (a)(2)(B)(ii) provides that the expert’s report must include “data or information considered.” Therefore, counsel must anticipate that every communication with the expert, regardless of content, will be discoverable and fodder for cross-examination by the government.

5) Concurrent Witness Testimony – “Hot-Tubbing” Experts

A. “Hot-tubbing” is the colloquial name for the process of allowing competing expert witnesses to testify concurrently before a court. The expert witnesses for both sides are called to give testimony and subject themselves to cross-examination, i.e., the experts engage in a discussion with each other.

B. In recent years, the Tax Court has employed the technique in cases involving highly technical issues. See, e.g., Green Gas Delaware Statutory Trust v. Commissioner, 147 T.C. No. 1 (July 14, 2016). The Court has noted that allowing the parties’ experts to openly discuss their opinions and bring their positions closer together.

c. Expert Disclosure Issues to Consider

1) Fed. R. Evid. 612—Writing Used to Refresh Memory
A. If an expert witness uses a writing to refresh his memory for the purpose of testifying, either while testifying, or before testifying, a court may grant the adverse party’s motion to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce into evidence those portions that relate to the testimony of the witness.

1) Although Fed. R. Evid. 612 is applicable to documents used to refresh recollection of any witness, it is especially relevant to expert testimony because counsel may have provided an expert with particularly sensitive documents in the course of witness preparation.

2) As a general matter, counsel should provide to an expert only those documents that counsel anticipates will be part of the record in the case, that are not harmful to the taxpayer, or that have been otherwise made available to the Service.

B. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the court may examine the writing in camera, excise any portions not so related, and order delivery of the remainder of the party entitled thereto.

C. If a writing is not produced or delivered pursuant to an order under Fed. R. Evid. 612, the court shall make any order justice requires, including limitations on the testimony of the witness.

2) Attorney-Client Privilege

A. Some courts have used Fed. R. Evid. 612 to hold that any material consulted by a witness prior to trial loses privileged status. See R.J. Hereley & Son Co. v. Stotler & Co., 87 F.R.D. 358 (N.D. Ill. 1980) (attorney-client privilege waived by attorney’s use of client-supported memorandum at a settlement conference to refresh recollection); Ehrlich v. Howe, 848 F. Supp. 482 (S.D.N.Y. 1994) (weight of authority shows privilege waived with regard to factual memorandum reviewed by deponents); see also In Re Pioneer Hi-Bred Int’l, Inc., 238 F.3d 1370, 1374-75 (Fed. Cir. 2001) (under Fed. R. Civ. P. 26, all documents provided to testifying expert lose privilege protection).

3) Work Product Doctrine

A. The ability to use the work product doctrine to protect materials consulted by an expert witness was called into question in *Berkley Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613 (S.D.N.Y. 1977). In Berkley experts consulted notebooks containing counsel’s work product. While not requiring disclosure because counsel were not aware of the potential for a stark choice between withholding the notebooks from the experts or turning them over to opposing counsel, the court suggested that “the decision to give the work product to the witness could well be deemed a waiver of the privilege.” *Id.* at 616-17. The court warned that “hereafter powerful reasons” will warrant the disclosure of work product used to refresh a witness’s memory. *Id.* at 617.

B. The work product doctrine has since received mixed treatment under Fed. R. Evid. 612.

1) Experts commonly consider and rely on documents provided by the engaging attorney that portray the attorney’s mental impressions of the case. Courts are split on whether Fed. R. Civ. P. 26(a) abrogates the protection under Fed. R. Civ. P. 26(b)(3)(A) for work product and therefore requires disclosure of such documents.

2) Use of work product by a witness either at trial or pretrial to refresh memory has required disclosure. See, e.g., *Boring v. Keller*, 97 F.R.D. 404 (D. Colo. 1983) (no privilege applied to defendant attorney’s notes on plaintiff’s demeanor and appearance or plaintiff’s substantive depositions where such documents were given to defendant’s experts to assist in preparation of the testimony); see also
Omaha Pub. Power Dist. v. Foster Wheeler Corp., 109 F.R.D. 615 (D. Neb. 1986) (defendant was permitted to examine plaintiff’s witness on any relevant matter and ask the witness to identify any documents selected and segregated by counsel which informed the witness); TV-3 Inc. v. Royal Ins. Co., of Am., 193 F.R.D. 490, 492 (S.D. Miss. 2000) (when an attorney hires an expert, even his oral “marching orders” can be discovered).

3) Other courts have concluded that wholesale disclosure is not available absent a strong showing of need. See Bogosian v. Gulf Oil Corp., 783 F.2d 587 (3d Cir. 1984) (court held that the Federal Rules of Civil Procedure, which permit discovery of facts/opinions held by expert witnesses, do not permit discovery of attorney work product, even though the experts may rely on such material in formulating their opinions).

C. In the present state of uncertainty, attorneys should not refresh prospective deponents or witnesses with material containing counsel’s theories or thought processes. This is also important because the credibility of an expert witness (or a fact witness) may be destroyed if the Court perceives that the testimony is unduly influenced by writings prepared by counsel.

XIV. Rebutting the Government’s Case

a. The government’s case may include a) a simple denial of one or more elements of the taxpayer’s case on factual grounds, or b) specific theories or characterizations of the transaction at issue which contradict the taxpayer’s position. The effective rebuttal of the government’s case requires the taxpayer to determine precisely the theory or theories upon which the government relies. Because the taxpayer generally bears the burden of proof, the government may intentionally obfuscate its position in order to maximize its options at trial.

1) During the pretrial period, the taxpayer should attempt to pin down the government’s position as narrowly as possible through discovery requests, stipulations and partial summary judgment motions.

2) If necessary, the taxpayer should consider a motion to limit the theories upon which the government can rely at trial. In response to such motion, the court may at least compel the government to
commit to writing the specific theory or theories upon which it will rely to prevent surprise.

3) The court, on its own initiative, may order the parties to prepare a “Statement of the Case” or other memorandum to be submitted to the court in order to clarify the issues in controversy.

b. The taxpayer can refute the government’s case at trial through a combination of the following techniques:

1) Introduce testimonial and other evidence as part of the taxpayer’s case-in-chief to disprove factual findings relevant to the government’s theory of the case.

2) Effectively cross-examine the government’s fact and expert witnesses to expose weaknesses in the assumptions, factual findings and legal positions in the case. If the testimony is technical in nature, the taxpayer’s counsel should use his own experts and/or the taxpayer’s employees as a resource for preparing for cross-examination. The taxpayer should take advantage of every opportunity to attack the government’s expert witness’s qualifications, opinion, foundation for the opinion, and credibility through voir dire, and cross-examination.

3) Introduce rebuttal testimony and other evidence after the government’s case is concluded to refute aspects of the government’s affirmative case.

Post-Trial

XV. Post-Trial Procedures

a. Post-Trial Briefs

1) In the Tax Court, briefs typically are filed after trial, though the presiding judge may require otherwise. Tax Ct. R. 151(a). Tax Ct. R. 151 permits two types of post-trial briefs: simultaneous briefs (two main and two answering briefs) and seriatim briefs (opening, answer, and reply briefs). Normally, simultaneous briefs are submitted, but seriatim briefs may be required at the discretion of the judge. Tax Ct. R. 151(b).

A. For simultaneous briefs, the opening briefs must be filed with 75 days after the conclusion of the trial and the answering briefs must be submitted 45 days thereafter. Tax Ct. R. 151(b).
B. When seriatim briefs are required, the opening briefs must be filed within 75 days after the conclusion of the trial, answering briefs are to be filed within 45 days thereafter, and reply briefs are to be filed within 30 days after the due date of the answering brief. Tax Ct. R. 151(b). In recent cases, several judges have indicated a preference for seriatim briefs.

C. Under the Tax Court rules, there are no page limitations on Tax Court briefs. However, the presiding judge frequently imposes page limits on a case-by-case basis.

2) Briefs are crucial elements of a tax case, but their quality can be no better than the quality of the trial on which they are based. Tax Ct. R. 151(e)(3). Post-trial briefs are based on the evidence introduced during trial, and rely on the testimonial and documentary record. Thus, extreme care must be taken to establish at trial all facts, through stipulation, testimony during trial, and documents or real evidence introduced during trial, necessary to win the case.

b. Typical Post-Trial Motions

1) Motions to alter or amend the judgment may be granted. Tax Ct. R. 161.

2) Motions to seal parts of the record may be granted. IRC § 7461(b)(1)(the Tax Court may make any provision which is necessary to prevent the disclosure of trade secrets or other confidential information, including sealing of the record); Tax Ct. R. 103(a)(7) & (8).

3) Motions for reconsideration of the opinion or findings of fact, with or without a new or further trial, may be granted in Tax Court. Tax Ct. R. 161; see e.g., Louisville & Nashville R.R. v. Commissioner, 641 F.2d 435, 443-44 (6th Cir. 1981).

c. Opinions and Decisions

1) Decisions are rendered and opinions are issued after trial has been completed and the court has considered the evidence and briefs. IRC § 7459(a).

2) A decision of the Tax Court (except a decision dismissing a proceeding for lack of jurisdiction) shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Tax Court. IRC § 7459(c).
A. Entry of a decision based upon the Tax Court’s opinion may be delayed until the parties compute the correct amount of the underpayment or overpayment of tax pursuant to the decision. Tax Ct. R. 155(a). If the parties cannot agree, each party may file its own computations and the court will decide the correct amount. The court may permit argument by parties on this issue, but such argument is limited to the correct computation of the deficiency or overpayment, and the court will not consider new issues. Tax Ct. R. 155; Harwood v. Commissioner, 83 T.C. 692 (1984), aff’d, 786 F.2d 1174 (9th Cir. 1986); Dell v. Commissioner, 49 T.C. Memo. 1538 (1985).

B. All Tax Court opinions are reviewed by the Chief Judge and divided into the following groups:

4) Opinions are published in the official Tax Court reporter and reviewed by all Tax Court judges. These opinions involve important legal issues, factual patterns of general legal interest, or reversal of a prior decision;

5) Opinions to be published in the official reporter, but not to be reviewed by the full court; and

6) Memorandum opinions not to be published in the official reporter, because they are confined to particular facts, enunciate no important principles of law, or follow principles of law clearly decided and accepted by the court.

C. Each opinion of the Tax Court is made available to all judges of the Court for consideration on the morning of the date on which the opinion is to be released. If one or more of the judges object to the release of an opinion, the Chief Judge will give further consideration to the appropriate disposition of the opinion.

XVI. Appeals from the Tax Court

a. An appeal of a Tax Court decision is to the Court of Appeals in which a corporate taxpayer has its principal place of business or principal office or agency. If the corporation has no principal place of business or principal office or agency within an judicial circuit, the appeal must be brought in the circuit in which the corporation’s return was filed. IRC § 7482(b)(1)(B); Tax Ct. R. 190(c).
b. Notice of the Appeal must be filed with the Tax Court clerk within 90 days after the decision has been entered. The other party then has 120 days from entry of the decision to file its appeal. IRC § 7483; Tax Ct. R. 190(a).

c. In order to stay assessment or collection pending the outcome of an appeal, the taxpayer must file with the Tax Court, on or before the date the notice of appeal is filed, a bond or other security in an amount fixed by the Tax Court, but not exceeding double the amount of the deficiency for which the appeal is filed, and a surety approved by the Tax Court. IRC § 7485; Tax Ct. R. 192.