

Department
of the
Treasury

Internal
Revenue
Service

Office of
Chief Counsel

Notice

[CC-2004-005]

[November 21, 2003]

Subject: Motions for Protective Order

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Purpose

This Notice advises attorneys and managers of the standards and procedures for the preparation and approval of motions for protective orders in Tax Court proceedings.

Background

T.C. Rule 103(a) provides that, upon motion by a party and for good cause shown, the Tax Court may make any order which justice requires to protect a party from annoyance, embarrassment, oppression, undue burden, or expense. The Tax Court can enter a protective order providing that a party need not respond to requests for discovery or admissions, or the court may set conditions on a party's obligation to respond. While numerous situations can occur in which a motion for protective order may seem appropriate because of defects or other failures surrounding a discovery request, "good cause" for granting such a motion exists only when intervention of the court is truly necessary to prevent substantial abuse of the court's processes causing cognizable harm to the responding party. The court may consider a motion for protective order premature and unnecessary when the opposing party has not taken action to compel a response to what the other party considers objectionable discovery, or sought to involve the court in the resolution of the discovery dispute. This is particularly true when the information sought is discoverable, and the objecting party expects to ultimately provide a response.

Procedure

Chief Counsel attorneys should not file motions for protective orders in response to objectionable discovery requests without "good cause." For example, the failure of a party to comply with the informal discovery requirement imposed by T.C. Rule 70(a)(1) and Branerton Corp. v. Commissioner, 61 T.C. 691 (1974), does not ordinarily provide

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good cause for filing a motion for protective order. Nor should attorneys generally file a motion for protective order against pro se litigants.

In lieu of seeking a protective order, attorneys generally should prepare and serve a response or objection to the offending discovery or admissions request. If the petitioner makes a formal request for admissions, attorneys must serve a copy of the response to the request with the court pursuant to Rule 90(c) stating the objection in order to avoid self-executing deemed admissions under the rule. The original response should be filed with the court in accordance with the rule. If the objection is that the petitioner did not comply with the Branerton requirement, the response should note that fact as a general objection to complying with formal discovery or requests for admissions. When possible, in the spirit of cooperation and in furtherance of the court's informal consultation requirement, attorneys should advise the petitioner that they are prepared to treat the premature formal discovery or requests for admissions as an informal request for information, and respond accordingly, particularly when discoverable information is sought. In many instances, once the petitioner understands the requirements of the Tax Court's rules, the petitioner will agree to engage in informal discovery. By proceeding in this manner, we can avoid unnecessarily involving the court.

If the petitioner persists in seeking formal discovery over our objections, the petitioner, rather than our office, will then have to engage the court in a discovery dispute through the filing an enforcement motion. With an enforcement motion, the petitioner will have the burden of showing satisfaction with all applicable prerequisites for serving and enforcing formal discovery, including the Branerton requirement.

Attorneys should consider filing a motion for protective order, however, when the offending request is excessively burdensome, repetitive, or clearly intended to harass, embarrass, or distract the responding party from trial preparation. In these situations, good cause may exist to prevent substantial abuse. Responding separately to each request, as required by the court's rules, may otherwise result in undue burden and expense, or may cause other cognizable harm such as the disclosure of confidential information.

Motions for protective order should not be direct filed. The Office of Associate Chief Counsel (Procedure & Administration) must approve all motions for protective order prior to filing. Attorneys who think a motion for protective order may be appropriate, under the standards outlined above, should prepare a draft motion and forward it for review to APJP, Branch 3, through the Technical Services Support Branch (TSS4510). APJP, Branch 3, will coordinate the motion as necessary with the Associate Chief Counsel office with subject matter jurisdiction over the substantive issues in the case. No motion for protective order should be filed until it has been approved and reviewed as described above.

