Department of the Treasury	**Internal Revenue Service**	**Office of Chief Counsel**	**N o t i c e**

[CC-2004-023]

June 04, 2004

Subject: Expert Witness Procedures

Cancel Date: Upon incorporation into CCDM

Purpose

This notice reiterates the requirements under T.C. Rule 143(f) that expert witnesses sign the expert witness report submitted to the Tax Court and be available to testify at trial.

Discussion

The purpose of expert testimony is to assist the trier of fact to understand the evidence better or to decide a fact in issue. Fed. R. Evid. 702; RLC Industries v. Commissioner, 98 T.C. 457 (1992). Experts in the Tax Court typically present their direct testimony in the form of a written report. Specifically, T. C. Rule 143(f)(1) provides that any party who calls an expert witness must submit a written report prepared by the witness setting forth the witness' qualifications, opinion, the data upon which the opinion is based and detailed reasons for the witness' conclusions. Because the report will generally be received into evidence as the direct testimony of the expert after it is identified by the expert, the report must satisfy the admissibility standards set forth in the Federal Rules of Evidence. In order to establish admissibility of expert testimony, the proponent need only demonstrate that the expert's opinion satisfies the standards of admissibility specified in Fed. R. Evid. 702 and 703.

An expert's testimony will be excluded for failure to comply with T.C. Rule 143(f)(1) unless the failure is shown to be due to good cause and the failure does not unduly prejudice the opposing party. An example of undue prejudice under T.C. Rule 143(f)(1) occurs when the failure significantly impairs the opposing party's ability to cross-examine the expert.

To the extent portions of an expert witness report consist of out-of-court statements by experts who are not available to testify, such statements may be considered hearsay.

While the testifying expert may attempt to adopt those statements, the fact remains that the non-testifying expert is not available for cross-examination of the direct testimony contained in the report. In addition, simply because an expert adopts the words of a report prepared by another does not establish that the expert is familiar with material matters in the report. The proponent of the report must establish that the words, analysis, and opinions in the report are the expert's own work and a reflection of the expert's own expertise.

The trial judge bears a special gatekeeping obligation to ensure that any and all expert testimony is relevant and reliable. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999); Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993). Thus, the admissibility of expert testimony is within the sound discretion of the trial judge. United States v. Gutman, 725 F.2d 417, 424 (7th Cir. 1984).

To avoid the possibility that the Tax Court will exclude all or a portion of an expert witness report signed by nontestifying experts, Counsel attorneys must produce as witnesses all of the experts who prepared the report.

If you have a case where expert reports have already been submitted to the court signed by multiple experts and you have not identified as witnesses all of the signing expert witnesses, please contact APJP, Branch 3, for guidance. Any additional questions about the provisions of this Notice should be directed to Julie A. Jebe at (202) 622-7950.

_____/s/_____
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(Procedure and Administration)