

Legislative Recommendation #47**Authorize the Tax Court to Sign Subpoenas for the Production of Records Held by a Third Party Prior to a Scheduled Hearing****SUMMARY**

- *Problem:* The Tax Court’s pre-trial discovery powers are more limited than those of other federal courts. As a result, litigants often must attend pre-trial conferences solely to request or obtain books, records and other key documents, and pre-trial discussions may be delayed or impeded, increasing the likelihood cases that otherwise would be settled must go to trial.
- *Solution:* Authorize the Tax Court to issue third-party subpoenas prior to a scheduled hearing.

PRESENT LAW

IRC § 7456(a) authorizes the Tax Court to issue subpoenas for the “production of all necessary returns, books, papers, documents, correspondence, and other evidence, from any place in the United States at any designated place of hearing...” The Tax Court interprets IRC § 7456(a) as permitting it to issue subpoenas to produce documents by a third party only at trial sessions, at depositions, and at pre-trial conferences.¹ The Tax Court does not believe it has the authority to issue a subpoena directing a third party to produce records in advance of a trial session to facilitate pre-trial discovery.

REASONS FOR CHANGE

Efficient pre-trial discovery is an important means of limiting litigation and promoting settlement between the parties. Rule 45 of the Federal Rules of Civil Procedure (FRCP) allows for the use of subpoenas to secure pre-trial discovery of documents, including third-party documents to be produced prior to the scheduling of any hearing or deposition. The Tax Court, however, is governed by Tax Court Rules rather than the FRCP. Unlike FRCP Rule 45, the analogous Tax Court rule (Tax Court Rule 147) does not provide for the use of subpoenas to enforce delivery of documents prior to a hearing, such as a deposition or a trial.

The Tax Court’s authority was addressed in *Johnson v. Commissioner*.² In that case, the IRS issued a third-party subpoena to Bank of America for the production of documents. The taxpayer assented to the subpoena. Likewise, Bank of America expressed a willingness to comply, but not before the date specified in a properly authorized subpoena.

The IRS filed a motion asking the Tax Court to permit it to issue a subpoena directing Bank of America to produce the requested documents “prior to” the date of the scheduled trial session. The motion stated that obtaining the documents in advance of the scheduled trial might obviate the need for Bank of America to appear at the trial and facilitate settlement discussions with the taxpayer that might eliminate the need for a trial. The Tax Court stated that the IRS’s position was “not unreasonable” and that production of the documents might benefit all parties. Nevertheless, it concluded that it lacked the authority to issue such a subpoena. Under IRC § 7456(a), the Tax Court concluded it could only authorize a third-party subpoena for the production of documents on the hearing date.

¹ *Johnson v. Comm’r*, Docket No. 17324-18 (T.C. Dec. 26, 2019).

² *Id.* During the COVID-19 pandemic, the Tax Court held remote (virtual) sessions, and as part of the rules governing remote proceedings, it allowed parties to subpoena third-party witnesses to produce documents via a remote document subpoena hearing at a date in advance of the remote trial. U.S. Tax Court, *Subpoenas for Remote Proceedings* (Aug. 27, 2020), https://www.ustaxcourt.gov/resources/zoomgov/subpoenas_for_remote_proceedings.pdf. As the pandemic has waned, the court is discontinuing remote sessions. It does not appear the court is applying these procedures to in-person sessions.

Recognizing the potential benefits arising from earlier document delivery, the Tax Court's order discussed several workarounds the litigants could employ to secure the documents before trial. The National Taxpayer Advocate believes this should not be necessary. There is no good reason the authority of the Tax Court should be more limited than the authority of other federal courts to issue subpoenas that would allow the parties to engage in pre-trial discovery to resolve or narrow issues without the need for judicial involvement.

RECOMMENDATION

- Amend IRC § 7456(a) to expand the authority of the Tax Court to issue subpoenas directing the production of records held by a third party prior to a scheduled hearing.³

³ A similar recommendation was proposed on the Procedurally Taxing blog in January 2020. See William Schmidt, *Serving Subpoenas: Designated Orders 12/23/19 to 12/27/19*, PROCEDURALLY TAXING, <https://procedurallytaxing.com/serving-subpoenas-designated-orders-12-23-19-to-12-27-19/> (Jan. 29, 2020).