

MINUTES OF THE JULY 1960 MEETING OF THE
ADVISORY COMMITTEE ON APPELLATE RULES

A volunteer meeting of the Advisory Committee on Appellate Rules was convened in the Conference Room of the United States Court of Appeals for the District of Columbia Circuit, United States Courthouse, Washington, D. C., on July 12, 1960, at 10:00 a.m., for the purpose of drafting a report relative to a proposed rule governing review of decisions of the Tax Court of the United States. The following members of the Committee were present:

E. Barrett Prettyman, Chairman

Robert Ash

Willard W. Gatchell

J. Edgar Murdock

Mr. Samuel D. Slade appeared but was unable to remain for the meeting.

Also present were your secretary, Aubrey Gasque; Carl H. Imlay, Attorney, Administrative Office of United States Courts; Howard Locke, Clerk of the Tax Court; and Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit.

The Chairman called the meeting to order, and advised the members present that the purpose of this meeting was to draft a proposed report and rule relating to the review of decisions of the Tax Court of the United States, which report and rule would then be circulated among the full membership of the Committee for final action. The Chairman suggested that if approval of the report and rule to be drafted could be obtained without the necessity of a special meeting of the full Committee at a later date, further action on the proposed report and rule could be taken by correspondence.

A composite work draft of the rule governing review of Tax Court decisions prepared for the meeting by Mr. Carl H. Imlay was then placed before each member. This draft had been prepared by taking the American Bar Association draft submitted to the Committee by Mr. Robert Ash, and interlineating or adding various proposals or alternative proposals submitted by the members in their letters to the Chairman. Each person present also had a complete file of the letters of the members offering suggestions relating to the proposed rule, a compilation of the text of the rules of the various circuits relating to tax appeals and charts showing

in graphic form special requirements of the various circuits in respect to review of tax cases, and also the requirement of the various circuits pertaining to printing of the record and preparation of briefs in the Court of Appeals.

The group then proceeded to draft a rule by reading the work draft line by line and suggesting amendments, deletions, and additions to the work draft.

1. The Issue of whether a "Petition for Review" or "Notice of Appeal" should be adopted

There was an extended initial discussion as to the nature of the "Petition for review" which Section 7483 of the Internal Revenue Code of 1954 requires to be filed in taking an appeal from a decision of the Tax Court. It was observed that if the document is in the nature of a true "petition" to the Court of Appeals, similar to the document initiating review of decisions of many administrative agencies (as, for example, review of Federal Trade Commission decisions under 15 U.S.C. 45(c)) it would seem proper that it be filed in the Court of Appeals. On the other hand, if the Committee is free to provide that a notice of appeal be filed as in appeals from District Court decisions, that document would appropriately be filed in the Tax Court.

The consensus was that Tax Court proceedings are quite different from the proceedings of regulatory commissions and that Tax Court proceedings more closely approximate district court proceedings. As in district court proceedings, the document initiating the appeal has always been filed in the Tax Court, and a supercedas bond has been posted in that court. Other differences between tax and administrative appeals discussed included the fact that in appeals from decisions of regulatory commissions, the Commission itself appears to defend its decision on appeal, whereas in Tax Court proceedings, the Internal Revenue Service handles the case until an appeal is docketed, when the Department of Justice takes the appeal over on behalf of the Government.

A vote was taken on the question put by the Chairman as to whether the Committee should follow the "petition" procedure as in administrative appeals, or whether the new rule should bring tax court appeals into conformity with other appeals by providing for the filing of a "notice of appeal" in the Tax Court. The latter course was unanimously approved by voice vote.

It was also agreed during discussion that the option was available to the Committee under 28 U.S.C. 2074, to adopt the "Notice of appeal" procedure in the new rule.

Accordingly, the term "petition for review" as it appeared in the caption and throughout the text of the work draft, was changed to "notice of appeal".

2. Review, How Taken; Paragraph (a) of Final Draft

It was decided to provide for the filing of an original and two conformed typewritten copies of the notice of appeal so that there would be a copy available for service on the Department of Justice, and one on the other party.

It was also decided to describe the period after the decision of the Tax Court in which the notice of appeal must be filed, as simply "three months" rather than "calendar months", or "90 days". It was observed that the statute (26 U.S.C. 7483) describes the period as "within 3 months after the decision is rendered", a term which is clear enough without elaboration.

As a matter of form it was decided to describe the decision as being "entered", rather than "rendered", since a Tax Court decision is dated as of the time the clerk enters it on the docket under 28 U.S.C. 7459(a) and (c), and the term "enters" is in current use in the Tax Court.

3. Filing, the Meaning of; Paragraph (d) of Final Draft

It was decided to define filing, in respect to filing the notice of appeal, as meaning either the physical deposit of the notice of appeal, or mailing in accordance with the provisions of 26 U.S.C. 7502.

It was felt that the use of the word "filing" to include a physical deposit in the clerk's office would insure that the petitioner's duty is satisfied if he physically delivers the notice as required. Such provision would obviate any necessity for time-stamping or other formal act by the clerk, before the petitioner is deemed to have satisfied the filing requirement.

The provision for mailing was inserted to give effect in the rule to 26 U.S.C. 7502 which provides that such documents shall be timely filed when timely mailed.

It was decided to insert a specific reference to the office hours of the Tax Court to avoid any confusion as to when the notice can be filed during a given day. After discussion, the members agreed to make this period coextensive with the established work-day of the Tax Court. It was also decided to exclude week-ends and legal holidays as filing days, to avoid the necessity of the clerk's office having to stay open on those days.

4. When the Period of Filing Expires on Saturday, Sunday,
or Legal Holiday; Paragraph (e) of Final Draft

It was agreed that when the period for filing would expire on a Saturday, Sunday, or legal holiday in the District of Columbia, such period should automatically extend to and include the next regular filing day. It was pointed out in discussion that this provision, which conforms to 26 U.S.C. 7503, would also eliminate the necessity of keeping the clerk's office open on Saturday--a difficulty which presently exists in the District Courts, for which Saturday has not been excluded as a filing day in the Federal Rules of Civil Procedure.

5. Method of Executing Notice of Appeal; Paragraph (f)
of Final Draft

In view of the fact that the notice of appeal procedure had been previously adopted, it was agreed that the notice of appeal be headed and captioned as the proceeding is headed and captioned in the Tax Court.

6. Contents of Notice of Appeal; Paragraph (g) of Final Draft

For the same reason it was decided to eliminate information which is not appropriate to a notice of appeal.

After a vote, it was decided to eliminate a provision that venue be alleged in the notice of appeal. Mr. Ash pointed out that this issue is not usually a subject of contest, and that in any event, venue of the Court of Appeals is shown in the briefs. Mr. Locke observed that in those cases where there is a waiver of venue and another Court of Appeals is designated, pursuant to 26 U.S.C. 7482 (b)(2), the written stipulation would come up to the Court of Appeals with the record in any event.

It was decided, after a vote, to eliminate inclusion in the notice of appeal of a statement of the questions presented or an assignment of errors. The observation was made that if the questions must be listed at this juncture, attorneys would list a large number of general questions to avoid being later foreclosed from arguing any particular point. A statement of the questions involved would not, therefore, really pinpoint the real issues to be argued in the briefs. This, it was noted, has been the experience in the review of decisions of administrative agencies.

It was further decided to take out all allegations other than the name of the party taking the appeal, the date of entry of the decision appealed from, and the period or periods involved in the appeal. Also, it was decided to prepare a suggested form for notice of appeal to be attached to the rule.

7. Notification of the Filing of the Notice of Appeal;
Paragraph (h) of Final Draft

The alternative provision for mailing a copy of the notice of appeal "to the last-shown address of the party in any paper filed with the Tax Court in the proceeding in which the appeal is taken", was adopted on the suggestion of Judge Murdock as being the most accurate and realistic way of specifying the place to which a copy should be mailed to a party not represented by counsel.

8. Certification and Transmittal of Record by Clerk;
Paragraph (i) of Final Draft

A forty-day period for certifying and transmitting the record was provided, since that is the period presently allowed by all circuits except one.

It was decided to employ the term "record" rather than "papers", since the latter term would include the correspondence file, which it is not necessary to transmit to the Court of Appeals.

After discussion, it was agreed that the entire original record should be transmitted unless there is a written stipulation of the parties filed, specifying parts of the record to be omitted. It was felt that, as a general rule, no purpose is served by leaving part of the original record in the Tax Court.

Under the rule as drafted, the record transmitted would include, in addition to other documents, the briefs in the Tax Court. It was observed that important stipulations and concessions are frequently made in the briefs, and for that reason the trial briefs should be made available as part of the original record in the Court of Appeals unless the parties stipulate to omit them.

9. Return of Original Tax Court Record to That Court
After the Appeal is Disposed of; Paragraph (1) of
Final Draft

It was agreed that this language would insure the return of the original Tax Court record after all stages of appeal are concluded, including a possible appeal to the Supreme Court of the United States.

10. Adjournment

After further successive readings of the draft rule the meeting was adjourned by the Chairman at or about 3:00 p.m.

Respectfully submitted: