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*August 1979*

ALL TAX DECISIONS, COURT ACTIONS, REVENUE RULINGS ISSUED EACH MONTH ARE SUMMARIZED IN THE DEPARTMENT COVERING THE POINT AT ISSUE

WG&L

TAX STRATEGY, NEWS OF THE REVENUE SERVICE

# Effective tax procedures

EDITED BY MARTIN M. LORE, LL.B., CPA, & LAURENCE GOLDFEIN, LL.M.

## *Forum shopping has distinct advantages in seeking declaratory judgments on exemption*

*by* **PETER WINSLOW** *and* **ROBERT ASH**

*Depending on whether the declaratory judgment sought is from a denial of initial qualification of a revocation of exempt status, the choice of Tax Court, D.C. District Court or Court of Claims may be crucial for the organization. The authors analyze the developing trends in this area and the possibility of other approaches.*

SECTION 7428 GRANTS an organization denied tax-exempt status under Section 501(c)(3) the right to seek a declaratory judgment that the Service's adverse administrative determination was improper. Jurisdiction in Section 7428 cases is not limited to the Tax Court, as in other declaratory judgment proceedings;[1] an action may be filed in either the Tax Court, the Court of Claims,[2] or the D.C. District Court. Since Section 7428 was enacted, there has been considerable speculation as to whether the nature of the proceedings in the Court of Claims and D. C. District Court will parallel that in the Tax Court.[3] The tax bar has been particularly interested in whether a trial *de novo* would be available in the Court of Claims or the D.C. District Court, even though the Tax Court proceedings are generally limited to a review of the administrative record. The initial cases brought under Section 7428 are beginning to determine the scope of review in the various courts. Although these cases indicate that the courts will usually follow the Tax Court's lead in limiting the proceedings to a review of the administrative record, they do not foreclose all incentives to forum shop in declaratory judgment cases.

### *Initial qualification cases*

*Tax Court.* One important area where declaratory judgment actions in the Tax Court differ from ordinary tax cases is the scope of admissible facts. Tax Court Rule 217(a) provides that disposition of an action for declaratory judgment involving an organization's initial qualification for exempt status under Section 501(c)(3) ordinarily will be made on the basis of the administrative record. The administrative record, as defined in Rule 210(b)(11), essentially includes all written correspondence between the Service and the organization seeking exemption. Only upon a showing of good cause will any party be permitted to introduce evidence in the Tax Court other than that submitted to the Service during the administrative process and contained in the administrative record.

The Rules Committee's note accompanying Rule 217(a) indicates the Tax Court's desire to limit the scope of review. It states: ". . . there do not appear to be at this time any circumstances under which a trial will be held except as to disputed jurisdictional facts or to resolve disagreement between the parties as to the contents of the administrative record. It is expected that the Court's function will be merely to adjudicate whether the Commissioner's determination is erroneous . . . upon the basis of the materials contained in the administrative record upon which the determination of the Commissioner was based." The same note further explains that the "good cause" exception to this general rule was included ". . . merely out of an abundance of caution to provide for the possibility of a trial on other facts or the presentation of evidence in the event that a situation not now contemplated might arise in which a trial would be appropriate."

The Tax Court's decisions to date reflect the court's desire strictly to limit review to the administrative record. In *Houston Lawyer Referral Service, Inc.*, 69 TC 570 (1978), the organization sought to introduce into evidence information orally furnished to Service representatives at conferences held during the administrative consideration of the case. In an opinion reviewed by the entire court, the Tax Court stated that the oral information did not constitute part of the administrative record. Moreover, the organization's neglect in failing to furnish the Service a written record of the data orally presented was considered insufficient "good cause" to justify going outside of the administrative record. The Tax Court also upheld its rules denying a *de novo* hearing, relying primarily on the legislative history of Section 7428.[4] The Committee Reports state that Section 7428 was not intended to remove from the Service the responsibility for ruling on exempt status; instead, the court's function is to review the Service's administrative determination. In the Tax Court's view, a rule allowing oral testimony to be introduced for the first time in court would be contrary to the congressional intent in enacting the declaratory judgment remedy, for it would permit an applicant to circumvent the administrative process by withholding information from the Service. Such a rule was also considered contrary to the requirement of exhaustion of administrative remedies found in Section 7428(b)(2).

The Tax Court once again maintained the integrity of the administrative record in *The Church in Boston,* 71 TC 102 (1978). In that case, the organization sought to introduce into evidence additional facts that developed after the Service rendered its final adverse determination. Relying on *Houston Lawyer Referral Service,* the Tax Court held that good cause for admission of this evidence did not exist and that the organization's proper remedy was to file a new application for exemption with the Service and submit the additional factual material at that time.[5]

In one narrow area the Tax Court has indicated it will allow an organization in an initial qualification case to introduce evidence beyond that included in the administrative record. This could occur where the Service, in defending the declaratory judgment action, relies on grounds for denying tax exempt status which were not asserted during the administrative consideration. The Committee note to Tax Court Rule

213(b) indicates that going outside the administrative record in such cases may be justified because the taxpayer has not been accorded a fair opportunity to rebut the Service's contentions at the administrative level. The court's rules further provide that any such additional representations will be deemed true for the purposes of the case.

The importance of providing the taxpayer with an opportunity to rebut the Service's arguments with factual data was recently demonstrated in *People's Translation Service/Newsfront International,* 72 TC No. 5. In that case, the Service argued for the first time in its reply brief that the petitioner, an organization that published a bi-weekly bulletin of translations from the foreign press, was not entitled to exempt status as an educational organization because it failed to present a sufficiently full and fair exposition of the relevant facts. The court refused to consider this argument because it was not made by the Service at the administrative level and the petitioner had no occasion to furnish material in rebuttal. It is interesting to note that the Tax Court did not apply the suggestion of the Rules Committee and provide the petitioner with the opportunity to supplement the administrative record with factual material demonstrating the educational value of its bulletin. Instead, the court stated that under the circumstances it would be inappropriate to consider the Service's new argument. This suggests that in initial qualification cases, the Tax Court will only entertain new arguments of the Service that are asserted in its answer; it will not consider grounds for denial of exempt status set forth for the first time in the Service's reply brief.

*D.C. District Court.* In the district courts a declaratory judgment action is an established proceeding in which the plaintiff is ordinarily granted a *de novo* hearing with a full right to a jury trial.[6] Since the D.C. District Court has not issued rules specifically dealing with Section 7428 actions, it is arguable that the preexisting declaratory judgment rules should be followed and a jury trial be granted in initial qualification cases. This approach has not been adopted, however, in the first cases to consider the scope of review in Section 7428 actions in the D. C. District Court. In *Southwest Virginia Professional Standards Review Organizations, Inc., DC* D. C., 10/13/78, Judge June Green favorably cited the *Houston Lawyer Referral Service* case and held that the scope of review would be limited to the administrative record. The implications of Judge Green's opinion go well beyond the ultimate holding on the scope of review issue, however. The judge followed the Tax Court case not only because she considered it consistent with Congress' purpose in creating the declaratory judgment remedy, but also because she concluded that the legislative history compelled the D.C. District Court and the Court of Claims to apply the Tax Court rules in the interest of uniformity of procedure.[7] *Southwest Virginia* indicates that the D.C. District Court intends to keep forum shopping in Section 7428 actions to a minimum.[8]

This intention was reflected again by Judge Harold Greene in *Virginia Professional Standards Review Foundation,* DC D. C., 1/24/79. In that case, the organization submitted with its motion for summary judgment a number of documents which were not considered by the Service in making its determination and were not part of the administrative record. Judge Greene refused to consider the additional materials, noting that supplementation of the record would circumvent the statutory requirement of exhaustion of administrative remedies. Judge Greene also reiterated that Congress desired that the Court of Claims and D. C. District Court draw upon the Tax Court's expertise in this area and follow its rules of practice.

However, in footnote 7 of his opinion, Judge Greene left the door open to supplementation of the administrative record. The judge noted that had he not considered the record adequate to permit a decision on the merits, in favor of the organization, he might have concluded that the organization had shown "good cause" for supplementing the record, within the meaning of Tax Court Rule 217 (a), because "there was here no administrative record as such or a well-reasoned quasi-judicial agency decision but only a ruling following a conference followed by a letter." This statement implies that Judge Greene might allow a trial *de novo* in cases where the Service's adverse ruling was not made after a quasi-judicial hearing. This reflects a considerable expansion of the "good cause" exception as applied in the Tax Court cases, and thus might influence an organization that wishes to supplement the administrative record to opt for litigation in the district court. However, the statement also shows a misunderstanding of the Service's ruling procedures and, as a result, it is questionable whether the issue raised by Judge Greene will be decided in favor of an organization seeking exempt status.

In ruling on an application for exemption, the Service never conducts a quasi-judicial proceeding, but instead normally accepts as true factual representations submitted by the organization without making an independent investigation. These unverified facts usually constitute the major portion of the administrative record on which the Service bases its determination.

This system generally works to the benefit of the applying organization in that it allows for a relatively rapid administrative determination and, more importantly, permits the organization to shape the record from which the Service will rule. This system also allows a newly-formed organization to obtain exempt status based on operational projections that are assumed to be true and accurate when placed in the administrative record.[9] In enacting the declaratory judgment remedy, Congress did not intend to alter this ruling process by requiring an adversary hearing, nor did Congress intend to permit an organization to withhold relevant information from the Service and then to present it

[1] See Sections 7476, 7477, 7478.

[2] S. 678, the proposed Federal Courts Improvement Act of 1979, introduced on 3/15/79, would among other changes remove from the Court of Claims all jurisdiction over tax cases, including declaratory judgment actions under Section 7428.

[3] See McGovern, *The new declaratory judgment provisions for 501(c)(3) organizations: How it works,* 47JTAX 222 (October, 1977); Roady, "Declaratory judgments for 501(c)(3) status determinations: End of "harsh regime," 30 *Tax Lawyer* 765 (1977).

[4] H. Rep't No. 94-658, 94th Cong., 1st Sess., 282 (1975); S. Rep't No. 94-938, 94th Cong., 2d Sess. 585 (1976).

[5] See also *General Conference of the Free Church of America,* 71 TC No. 82; *B.S.W. Group, Inc.,* 70 TC 352, n.3 (1978); *est of Hawaii,* 71 TC No. 96.

[6] Fed. R. Civ. P, Rule 57.

[7] H. Rep't No. 94-658, *supra* note 4 at 285.

[8] Judge Pratt expressed a similar view in *Prince Edward School Foundation,* DC D. C., 4/18/79.

[9] See *Aid to Artisans, Inc.,* 71 TC 202 (1978).

[10] *Zeeman,* 275 F. Supp. 235 (SD N.Y., 1967), *aff'd and rem'd on other issue* 395 F.2d 861 (CA-2, 1968).

[11] See *People's Translation Service/Newsfront International,* 72 TC No. 5.

[12] See *Thompson,* 71 TC 32 (1978).

[13] See *Prince Corp.,* 67 TC 318 (1976).

[14] The proposed Federal Courts Improvement Act of 1979, *supra* note 2, would create one circuit court to which all tax cases, including declaratory judgments, would be appealed.

[15] *Flora,* 362 U.S. 145 (1960).

[16] Sections 4221(a) (5), 4221(d) (5), 4253(i).

for the first time in a Section 7428 proceeding. Rather, the nature of the declaratory judgment action is properly limited to a review of the Service's determination which is based in turn on the administrative record. The absence of a record established in quasi-judicial hearing should not be sufficient "good cause" to allow for supplementation of the administrative record as Judge Greene implies.

In *Big Mama Rag, Inc.*, DC D. C., 4/30/79, Judge Sirica once again announced the intention of the D.C. District Court to follow the Tax Court rules. However, the judge added a new semantic twist to the controversy concerning *de novo hearings* in Section 7428 cases. He pointed out that the legislative history and Tax Court practice in Section 7428 cases indicate that the court is to review the Service's decision *de novo*. However, in its review, the court need not consider evidence other than the administrative record in initial qualification cases.

This analysis is not a departure from the previous cases denying a *de novo hearing*. The judge was simply explaining that the court could reach its own conclusion on the facts in the administrative record without according special weight to the Service's determination beyond its usual presumption of correctness.

Judge Sirica went on to state that the court is not prevented from considering additional evidence outside of the administrative record (presumably if good cause is shown), but in doing so it must be cognizant of the specific requirement that the plaintiff have exhausted its administrative remedies. To meet this requirement, the organization must have satisfied "all appropriate procedural requirements of the Service." Thus, the judge concluded that if the Service has requested the plaintiff to supply all necessary information, the plaintiff is foreclosed by the exhaustion requirement from later introducing evidence before the district court that could have been produced at the time of the Service's request, but was not.

*Court of claims.* The Court of Claims also appears inclined to follow the Tax Court rules. In *Animal Protection Institute, Inc.*, Ct. Cls. Trial Div., 9/19/78, the taxpayer filed a declaratory judgment action alleging that the Service's revocation of its exempt status was erroneous. At an early stage in the proceeding a dispute arose with respect to the nature of the issue in a Section 7428 action. In resolving this dispute, Trial Judge Miller concluded that Congress intended that the Court of Claims conform its practice to that of the Tax Court, particularly with respect to the burden of proof. This is significant because the allocation of the burden of proof in the Tax Court is not the same as in the Court of Claims. In ordinary tax refund suits the burden of proof rests on the taxpayer even when the Government asserts a counterclaim and even where the Government alleges grounds for defense not set forth in the notice of deficiency.[10] In contrast, Tax Court Rule 217(c) imposes the burden of proof in declaratory judgment cases on the organization only as to grounds set forth in the Service's notice of determination in which exempt status is denied or revoked. As to other grounds, the burden of proof rests on the Service; if the Service fails to issue a notice of determination, it bears the burden of proof on all issues relating to the merits of the case.[11] Trial Judge Miller declined to adopt the traditional Court of Claims burden of proof rule. Instead, he followed the Tax Court and placed the burden of proof on the Government to the extent it relied upon grounds to support its revocation that were not stated in the determination letter. Thus, the Court of Claims, like the D. C. District Court, appears to be applying the Tax Court rules in the interest of procedural uniformity.

In one respect the *Animal Protection Institute* decision goes beyond the Tax Court rules and case law, however. The Tax Court rules limit admissible evidence in initial qualification cases to the administrative record, but they do not expressly restrict the legal arguments that may be made in opposition to the IRS's administrative determination. Judge Miller ruled, however, that the organization could not advance arguments in opposition to the Service's revocation which were not urged in the administrative proceedings on the theory that administrative remedies have not been exhausted with respect to such newly-asserted grounds. Because the Tax Court and the D.C. District Court are likely to reach the same result, an organization seeking a Section 501(c)(3) ruling should be sure that the administrative record contains all alternative legal arguments supporting its claim to exempt status, in addition to all relevant factual data.[12]

In a more recent case the Court of Claims has suggested another consideration that could influence strongly the choice of forum. In *Northern California Central Services, Inc.*, Ct. Cls., 1/24/79, the court held that a cooperative hospital service organization was entitled to exempt status. The Government had argued that the plaintiff was not organized as a public charity because its articles of incorporation did not preclude member hospitals from substantial involvement in attempts to influence legislation. The court rejected this argument, holding that under the circumstances any indirect benefit from hypothetical legislative activities of members would be insubstantial. More important, the court noted that even if a member hospital had engaged in substantial legislative activities, the court ". . . could have taken care of the matter under [its] equitable powers by conditioning [its] declaration of exemption on abstention . . . from future efforts to influence legislation."

It is doubtful whether Congress intended to confer such equitable powers on the court. The legislative history of Section 7428 contains no indication that conditional declaratory relief was contemplated. In fact, one can argue by negative inference that because Section 7477 specifically gives the Tax Court jurisdiction to render declaratory judgments setting forth the terms and conditions upon which a Section 367 transfer will be deemed not to have a tax avoidance purpose, the absence of similar language in Section 7428, enacted at the same time, means that Congress did not intend to confer similar jurisdiction under that Section.

Nonetheless, as long as the Court of Claims adheres to this construction of the statute, that court may prove to be the most favorable forum for Section 7428 litigation. The potential for securing or maintaining Section 501(c)(3) status through a conditional judgment appears to be almost unlimited if the court broadly applies its perceived equitable powers. For example, an organization faced with revocation of exemption due to inurement of income or political activity might arguably be able to prevent the revocation by agreeing to desist from that activity in the future.

The effect of such a judgment under Section 7428 (c) is unclear. That Section, intended to prevent the "drying up" of contributions to an organization whose Section 170(c)(2) status has been re-

voked, provides that contributions will be deductible within specified limits, even if the organization ultimately loses its declaratory judgment action; if it wins, however, contributions are not subject to the same limitation. If the Court of Claims begins to render conditional declaratory judgments, a question which could well arise is whether the conditional judgment should be considered a loss of the case for purposes of the Section 7428(c) limit on contributions.

*Revocation cases*

In light of the recent case law, it appears that procedural differences among the courts in initial qualification cases will be minimal. In cases involving revocations of exempt status, however, different considerations apply, and multiforum consistency may not be as pervasive.

The Service's handling of revocation cases is fundamentally different than the processing of requests for rulings on initial qualification. Unlike initial qualification cases, revocation cases typically arise from an audit of the organization's activities; the Service makes its own investigation into the facts, and does not accept necessarily the organization's representations. Because there is no body of facts accepted by both parties, a full trial on the merits should be available, with both parties free in introduce evidence beyond that contained in the administrative record. Thus, the Tax Court's rules specifically provide for a trial *de novo* in revocation cases under Section 7428.

Superimposed on this principle, however, is the statutory requirement that the organization exhaust its administrative remedies prior to proceeding under Section 7428. In the context of a revocation case, this means that, although evidence outside the administrative record is admissible, it must relate to legal arguments made by the organization during the Service's consideration of the case. This view was adopted by the Court of Claims in *Animal Protection Institute*.

Where a full trial on the merits is appropriate, it appears that either the organization seeking exempt status or the Government should be able to demand a jury trial in the D.C. District Court in a Section 7428 action. Thus, if a jury trial is desired in a revocation case, the D.C. District Court should be chosen as the litigating forum.

There are several procedural issues that may arise in revocation cases that are not dealt with in the Tax Court rules. In the absence of guidance from the Tax Court, it is possible that the courts could adopt different approaches. One issue concerns the nature of the declaratory judgment remedy in cases where the Service has revoked an organization's exempt status retroactively. In such cases organizations may allege that even if the revocation of exempt status was proper, the retroactivity of the Service's determination was not; that is, the organization may argue that the facts were different in one or more years covered by the retroactive ruling and that it qualified under Section 501(c)(3) during a limited period of time, or it may argue that the Service abused its discretion under Section 7805(b) in refusing to make the revocation prospective only.

It is not clear whether the courts have jurisdiction to consider these arguments in declaratory judgment actions. Jurisdiction under Section 7428(a) only applies to disputes concerning the Service's determination, or failure to make a determination, regarding an initial or continuing qualification for exempt status. The legislative history indicates that the enactment of Section 7428 was prompted by Congress' desire to afford organizations a vehicle for a prompt judicial determination of their current eligibility to receive deductible contributions. No such prompt judicial action is necessary, however, once it is determined that the Service's revocation was proper, for donors would no longer be entitled to a deduction for current contributions in any event. Thus, based on the purpose of Section 7428, the Service could take the position that disputing the retroactivity of a revocation and litigating specific tax years are not matters relating to the "continuing" qualification of the organization.

On the other hand, the courts may reject this argument and hold that "continuing" qualification refers to all periods since the time the exemption is first revoked and, therefore, that all years in which exempt status has been denied by the Service are at issue in a declaratory judgment action involving a revocation.

Another issue that inevitably will arise, particularly in prospective revocation cases, concerns the relevancy of certain evidence. Although either party may introduce evidence outside the administrative record to support its position, there is no clearly defined period to which this evidence must relate. Obviously, where exempt status has been revoked prospectively, the declaratory judgment remedy can apply only to future years. However, since the nature of the declaratory judgment action is a judicial review of the Service's administrative determination, the courts might take the view that the only facts which are relevant are those relating to the periods examined by the Service. To the extent the organization wishes a review of facts that have changed in years not covered by the audit, administrative remedies probably have not been exhausted, unless the changed facts were submitted to the Service and are included in the administrative record. In short, in prospective revocation cases, the organization may not be permitted to sidestep the administrative process and introduce evidence of a changed operation in order to obtain a favorable judgment.

The first revocation cases should be watched closely to determine how the courts rule on these unexplored procedural and jurisdictional issues. If different approaches are observed, forum shopping may be beneficial.

Another important aspect of litigation under Section 7428 which has yet to be resolved is the application of the 270-day rule. Section 7428(b)(2), which contains the jurisdictional requirement that an organization exhaust its administrative remedies, states that an organization requesting a determination ". . . shall be deemed to have exhausted its administrative remedies with respect to a failure by the Secretary to make a determination with respect to such issue at the expiration of 270 days after the date on which the request for such determination was made if the organization has taken, in a timely manner, all reasonable steps to secure such determination." When applicable, this rule may be highly beneficial, since it permits the organization to bring a declaratory judgment action in a "no ruling" situation and places upon the Government the burden of proof on the merits.

This 270-day rule is stated positively;

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the organization shall be deemed to have exhausted its administrative remedies at the expiration of the 270-day period. In contrast, the 270-day rule in Section 7476, relating to declaratory judgments concerning the qualification of retirement plans, is phrased in the negative: "A petitioner shall not be deemed to have exhausted his administrative remedies with respect to a failure by the Secretary to make a determination . . . before the expiration of 270 days after the request for such determination was made." It is clear that this difference in statutory language was deliberate, for Section 7477, added to the Code with Section 7428 as part of the Tax Reform Act of 1976, expresses the 270-day rule in the same manner as Section 7476. Arguably, this difference was intended to make the 270-day rule of Section 7428 more restrictive and thus more favorable to the organization than that of the other sections.

However, the rule in Section 7428(b)(2) applies only if the organization has taken, in a timely manner, all reasonable steps to secure the determination. The precise scope of this requirement is uncertain. In an unpublished order in *Bubbling Well Church of Universal Love,* TC Docket No. 6457-78x, 10/12/78, a petition for declaratory judgment filed after the expiration of the 270-day period, but only ten days after the Service received the organization's protest from a proposed adverse determination letter, was dismissed on the ground that the organization had not exhausted its administrative remedies. The organization's argument that the 270-day rule of Section 7428 is absolute was rejected, and it was held that the statute embodies a requirement that the Service have a reasonable time to act on information sent to it.[13] It remains to be seen whether the full Tax Court, or the Court of Claims or district court, will agree with this conclusion.

There are a number of additional procedural questions involving the scope of Section 7428 which have no clear answer in the legislative history or Tax Court rules and thus may be resolved differently by the courts having jurisdiction. One such issue is whether a declaratory judgment action may be brought by a Section 501(c)(3) organization which has requested a ruling concerning the effect of a proposed transaction on its exempt status and has been advised by the Service that the transaction would jeopardize that status. In *New Community Senior Citizen Housing Corporation,* 72 TC No. 34, the Tax Court granted the Service's motion to dismiss a Section 7428 action brought by an organization in this situation, despite the fact that the proposed transaction was consummated prior to the hearing on the motion to dismiss. The court held that the Service's ruling was not a "determination" within the meaning of Section 7428(a)(1)(A). In a revocation situation, the purpose behind the declaratory judgment remedy is to protect the organization's flow of deductible contributions pending judicial review of the Service's determination. The court concluded that because only an actual revocation threatens this flow, declaratory relief should not be available prior to revocation. The court also stated that it would be premature and unnecessary to review the Service's tentative position because the Service's ruling had not stated positively that the transaction would ever lead to revocation.

A similar issue may arise in cases concerning private foundation status. An organization may request a ruling that it is not a private foundation; the Service may agree as to the result, but base its ruling on a provision different from (and less favorable than) that relied on by the organization. A strong argument can be made by the Service that the organization in this situation has no recourse under Section 7428 because it has received a favorable ruling regarding its private foundation status and no "adverse determination" has been made. Again, however, the ambiguity of Section 7428 leads to the possibility that the courts will reach different results on this question.

### *Other factors*

Of course, the primary consideration in choosing the litigating forum in declaratory judgment actions is the anticipated treatment of the various courts on the merits of the case. Although Section 7428 has injected a new dimension into forum-shopping by providing jurisdiction in the D. C. District Court, the taxpayer's options are narrowed if the law in the Circuit Court encompassing the taxpayer's principal place of business is the most favorable;[14] the action must be filed in the Tax Court, and cannot be filed in the local district court. Since Section 7428 became effective in 1977, a significant number of declaratory judgment cases have been filed, primarily in the Tax Court. As these cases are decided, tax practitioners will have an easier time ascertaining the court that will be most receptive to their client's case. Other factors also should be considered, however. For instance, many practitioners may be reluctant to litigate in the Court of Claims either because the costs are traditionally higher in that court or because they are unfamiliar with the proper procedures. Similarly, the travel involved with filing in the D. C. District Court may make that court unattractive. Furthermore, the absence of rules specifically dealing with Section 7428 cases may drive tax practitioners away from the Court of Claims and the D. C. District Court and into the Tax Court.

Another important factor to consider is the anticipated speed with which the various courts will dispose of declaratory judgment cases. Preliminary indications are that the Tax Court has rendered its decisions more expeditiously than the other two courts.

### *Refund suits*

In deciding which litigating forum in which to file, the availability of the ordinary tax refund suit in the local district court should not be ignored, particularly in initial qualification cases when a trial before a local jury may be desired. Because an organization exempt from tax under Section 501(c)(3) is also exempt from FICA and FUTA taxes, a suit for refund of either of those taxes also will decide entitlement to Section 501(c)(3) status. Furthermore, since FICA and FUTA taxes are divisible, only a small payment (the tax due for one employee for one taxable period) is necessary in order to bring a refund action.[15] Similarly, an organization claiming exemption as an educational institution could use a payment of certain divisible excise tax as a litigating vehicle.[16] A suit for refund by a "friendly donor" is another alternative.

The refund alternative will seldom, if ever, be preferable, however, when the case involves a revocation of Section 170(c)(2) status. An organization depending upon contributions for support has little option other than to proceed under Section 7428, because if the organization ultimately loses its suit for exempt status, Section 7428(c) ensures the deductibility of contributions only if a declaratory judgment action was filed.

### *Conclusion*

Thus far it appears that the Court of

Claims and D.C. District Court are strongly influenced by a desire to follow the Tax Court rules and maintain procedural uniformity among the courts having jurisdiction to render declaratory judgments under Section 7428. As a result, it is doubtful whether an organization will obtain significant advantages from the choice of forum on procedural and jurisdictional issues in initial qualification cases, where the Tax Court rules regarding such actions are rather detailed. However, the Tax Court has not developed similarly specific rules regarding revocation cases, in which a trial *de novo* is available, and significant differences could develop between the courts which would encourage forum shopping for procedural reasons. Potentially the most significant factor in choice of forum could be the differing perceptions of the nature of the declaratory judgment remedy, as exemplified by the Court of Claims' statement in *Northern California Central Services* that it possesses equitable powers under Section 7428. Developments in this area should be watched particularly closely. ☆

## IRS testing limited disclosure procedures

THE DISCLOSURE of tax information to third parties was severely restricted under the Tax Reform Act of 1976. Several IRS districts are now in the process of testing taxpayer acceptance of a limited disclosure authorization form. Mailed with selected notices issued on individual income tax returns, Form 6032-AU, "Consent to Have IRS Disclose Tax Information to Another Person," when completed by the taxpayer will permit the Service to discuss the tax matter in question with a third party. The Service must have the completed form before the third party contacts the IRS.

Form 6032-AU does not replace the power of attorney, Forms 2848 and 2848D, under which copies of subsequent notices are automatically sent to the person given the power. No future notices will be automatically sent to the third party designated on a Form 6032.

The test will end in September, and the use of the form is limited to it, so that additional forms are not available.

The practitioner newsletter issued by the San Francisco district for May, 1979, summarizes the current IRS position on the disclosure of information. A taxpayer must have photographic identification, or two items of identification without a photograph but that do contain the taxpayer's name and address, before the Service will discuss confidential tax information. A notice, bill or copy of the return in question should be brought into the office. If the taxpayer calls, the IRS will ask for name, address and Social Security number, amount of the expected refund or entity data and document locator number of the bill, notice or letter. If there is any doubt as to the taxpayer's identity, the Service will mail the information to the taxpayer's address of record.

Where third parties are involved, a power of attorney (Form 2848) or authorization and declaration (form 2848D) should be submitted, or any other written statement from the taxpayer which will clearly express the scope of the authority granted to the third party, and specifies the tax matter and taxable years or periods involved.

If a third party has a copy of a bill or notice, the IRS will provide explanatory information without receipt of a written authorization. If the third party calls the IRS, enough questions will be asked to insure that the third party does have a copy of the bill or notice. As long as the material discussed does not exceed the data already available in the bill or notice in the third party's possession, no disclosure is involved.

The IRS will generally limit the information provided to third parties in these circumstances to cases where the issues involve correcting an account (*e.g.*, resolving credits) or citing a specific law, rule or Regulation. If a case appears to involve a potentially controversial issue, or requires additional data, or the IRS is in doubt as to how to proceed, a written authorization will be required before any information is released.

Without written authorization, the Service will provide general information to a third party about the meaning of a notice or letter. It will not provide specific information such as data from the information data retrieval system (IDRS), microfilm, or tax returns. However, it will accept any information provided by the third party, such as cancelled check data, even though it will not yield any information on the balance due or the nature of the assessment.

Third parties include not only attorneys and accountants, but relatives. This will not apply to a husband and wife when both sign a joint return.

*Copies of returns.* Generally, the IRS will provide copies of a return, along with any schedules, lists, or other written statements which were filed by or on behalf of a taxpayer. Form 4506 should be submitted to request a copy of the return, and if available the document locator number should be included. If a third party is making the request, a copy of the authorization should be attached to Form 4506. ☆

## Dissolved corporation lacks capacity to litigate in TC

THE TAX COURT recently held in *Padre Island Thunderbird, Inc.*, 72 TC No. 37, that a corporation which was dissolved for failure to pay state franchise taxes may still be issued a deficiency notice by the Service but lacked the capacity to litigate its tax liability based upon that notice in the Tax Court.

The taxpayer was an Illinois corporation dissolved in November 1973 for failure to pay franchise taxes. In September, 1977, the IRS sent a notice of deficiency relating to the taxpayer's Federal income taxes for earlier years to his last known address.

The taxpayer argued that under state law, a claim against a dissolved corporation must be commenced within two years of dissolution. Thus, the Service's notice was untimely. The court disagreed. The period within which a deficiency notice can be issued and taxes assessed and collected are strictly matters of Federal law. The notice was properly issued and delivered under Section 6212.

The Service argued, however, that state law does apply to prevent the taxpayer from litigating the matter before the Tax Court because it had failed to pay its franchise taxes. The Service moved, therefore, to have the taxpayer's petition to the court dismissed.

The court again agreed with the Service. Under Tax Court Rule 60(c), the capacity of a corporation to litigate before the Tax Court is determined under state law. The cases in Illinois which have dealt with capacity to litigate have all held that such capacity is denied a corporation which has been dissolved for failure to pay franchise taxes until the taxes are paid. Here, even though there was an order reinstating retroactively the corporate status of the taxpayer, the franchise taxes had not been paid. Accordingly, although Fed-