

CC-2006-004

October 26, 2005

Subject: CCDM 35.4.6.5 Protective Orders **Cancel Date:** Upon incorporation into CCDM

Purpose

This Notice clarifies the procedures governing motions for protective orders, including protective orders seeking to seal the record, in whole or in part, in Tax Court proceedings. The provisions set forth below replace the provisions currently in the CCDM on Protective Orders.

Protective Orders

35.4.6.5 Protective Orders

(1) All evidence received by the Tax Court is a matter of public record that is open to public inspection. Section 7461(a). Members of the general public have a legitimate interest in all stages of a judicial proceeding. Public access to judicial proceedings promotes public confidence in the fairness and integrity of the judicial proceedings. "The parties to a lawsuit are not the only people [with] a legitimate interest in the record compiled in a legal proceeding." *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 944 (7th Cir. 1999).

(2) Under section 7461(b), the Tax Court may prevent disclosure of trade secrets or other confidential information by sealing the record to be opened only as directed by the court. The Tax Court will not seal the record regarding trade secrets or other confidential information in every case. Rather, courts exercise their discretion in deciding whether to seal the record, balancing the public's right of access and the possibility of miscarriage of justice when the information sought to be protected is shown to be a trade secret or other confidential information. *Willie Nelson Music Company v. Commissioner*, 85 T.C. 914, 919-20 (1985). See *U.S. v. IBM*, 67 F.R.D. 40, 46 (S.D. N.Y. 1975); see also *Turick v. Yamaha Motor Corp.*, 121 F.R.D. 32, 35 (S.D. N.Y. 1988).

(3) T.C. Rule 103 provides that, upon motion by a party or other affected person and for good cause shown, the Tax Court may enter any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense. T.C. Rule 103 describes the types of protective orders the court may enter to achieve these purposes. A protective order generally protects against disclosure to the general public, not the litigants.

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(4) "Good cause" for granting a motion for protective order under T.C. Rule 103 exists when intervention by the court is necessary to prevent substantial abuse. As an example, a protective order may be appropriate when a discovery request is excessively burdensome, repetitive, or clearly intended to harass, embarrass, or distract the responding party from trial preparation. *Wooten v. Commissioner*, T.C. Memo. 1993-241 (petitioner's interrogatories unduly burdensome and irrelevant to the issues in the case). As another example, a protective order may be appropriate when a party serves formal discovery on the other party without first utilizing informal consultation or communications. *Schneider Interests, LP v. Commissioner*, 119 T.C. 151 (2002); *Branerton Corp. v. Commissioner*, 61 T.C. 691 (1974). Before seeking a protective order, attorneys should consider providing a partial response or objection, explaining the reason for doing so and offering to complete the response at the appropriate time.

(5) If petitioner's discovery request relates to matters that may cause concern to a nonparty, consideration should be given to informing the nonparty of the discovery request so that the nonparty may determine whether to object or otherwise seek relief. This notification can be provided by the petitioner or respondent to the nonparty. Any disclosure to the nonparty by or on behalf of respondent should comply with the requirements of section 6103. See IRM 11.3.1 and CCDM 37.1.2.

(6) A petitioner may respond to discovery by taking the position that the responsive information may not be provided until a protective order is entered by the Tax Court. In general, no agreement should be given that allows petitioner or an affected person to delay providing responsive information under the guise that responsive material will only be produced after issuance of a protective order. When interrogatories or a request for the production of documents are served and the petitioner files a motion seeking a protective order, after the petitioner's time to respond expires, a motion to compel under T.C. Rule 104 should be filed. The Tax Court typically will schedule the hearing on the motion to compel and petitioner's motion for protective order at the same time. If the motion to compel is not filed until the Tax Court acts upon the motion for protective order, there will be needless delay. Objections to petitioner's motion for a protective order should be addressed in a separate written statement.

(7) Any proposed agreement to a protective order under T.C. Rule 103 and /or section 7461 or any statement that there is no objection to the granting of a petitioner's motion for protective order must, in all instances, be referred to APJP Branch 3, and be pre-approved by the Associate Chief Counsel (Procedure & Administration), CCDM Exhibit 35.11.1-1, subject to the guidelines set forth below.

(8) In general, we will not agree to the filing of a joint motion for protective order to limit access to or seal the record at the request of a party or other affected person. The presumption of public access to case information is better served when the judge actually determines if good cause exists instead of signing off on the parties' agreement to seal the record. *Citizens First Nat'l Bank of Princeton*, at 946. This principle is equally applicable to internal access to case information within the Service as authorized by law. Permitting litigants to unilaterally limit access to or seal portions of the record, absent judicial determination, is contrary to law and amounts to giving each party carte blanche in deciding what part of the record can be kept secret. *Id.* at 945. Instead, the judge should be asked to independently determine whether the information is such that a protective order is appropriate under the circumstances.

(9) Any motion for protective order relating to return information at the discovery stage of the proceedings should generally be opposed because the motion is almost always premature.

