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DISCOVERY AGAINST THE UNITED STATES IN CIVIL TAX PROCEEDINGS

Converse Murdoch

I. INTRODUCTION

This Article is intended as an exposition of the present state of the law with respect to the rights of taxpayers to pretrial discovery against the United States in civil tax proceedings. The article is not intended as an exposition of all rules having to do with discovery against the United States in all civil litigation. However, to the extent decisions in nontax cases are applicable by analogy, they will be mentioned and discussed. No attempt will be made to set forth the law regarding discovery in criminal proceedings.

As a matter of fairness to readers, the author proposes to state at this point some of his predilections and philosophies in the hope that a confession of the author's biases will enable the reader to better understand his comments regarding the present rules and to judge the value of his recommendations.

It is one of the author's tenets that since the United States has waived its sovereign immunity from suit and has agreed to submit its tax controversies with its citizens to decisions by independent judges, the Government and the taxpayer should appear before the courts as equal litigants in all respects. 1

Unless there is an overpowering reason to give the Government a procedural preference in tax litigation, the Government and the taxpayer should have like responsibilities to each other and to the courts. It is

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1. In Bank Line v. United States, 163 F.2d 133, 138 (2d Cir. 1947), Judge Augustus Hand observed:
   It has been the policy of the American as well as of the English courts to treat the government when appearing as a litigant like any private individual. Any other practice would strike at the personal responsibility of governmental agencies which is at the base of our institutions.

See also O'Riley, Discovery Against the United States: A New Aspect of Sovereign Immunity, 21 N.C. L. REV. 1, 13 (1942) where the author observed:
   On the other hand, unnecessary insistence upon unlimited privileges for a "favored suitor" might be "an unjust and tyrannical exercise of power." A Government whose rights are without measure is worse than one whose rights are no greater than those of its citizens.

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submitted that any rule which tends to give the Government a procedural advantage over taxpayers involves some derogation of due process which should be accepted only on the basis of some clearly defined policy consideration and a showing of necessity. In no event should a procedural preference be given to the Government merely because, absent such preference, the Government might experience difficulty in winning a lawsuit or in defeating a claim by a taxpayer. Once it has been determined that the Government is enjoying a procedural advantage over taxpayers, a continuation of such preference should never be based on the often voiced argument that "the Government always does things that way."

A second of the author's basic tenets is that the procedural rules applicable in tax litigation (as in all litigation) should be fashioned with a view to securing an early and full disclosure of all facts having a bearing on the issues. This is not to say that an advocate for either a taxpayer or the Government is to be criticized if he fails to immediately and voluntarily disclose to his opponent or the court all information about the case of which he has knowledge or even if he hopes to surprise his opponent at trial and to thereby gain an advantage. It is to say that the courts, in promulgating rules and in deciding cases, and the Congress, in enacting laws, should do so having in mind the ultimate objective of an expeditious and complete disclosure of all relevant facts with a minimum of annoyance and expense. It is not suggested that the players in the "game" of tax litigation should be required to expose their hand to their opponent as soon as the cards are dealt. It is suggested, however, that those who frame the rules with respect to the "game" should do so with the object of having all cards played as soon as possible and exposed face up.

In urging procedural rules which will tend toward early and full disclosure, the author is not urging the abandonment of long-recognized privileges such as the attorney-client confidential communications privilege or the state secrets privilege. Certain rules, having the effect of preventing full disclosure, have been developed because it has been learned through long experience that involuntary disclosures under certain circumstances can lead to greater evils than those attendant on the banning of such disclosures. There is no question that the privilege against self-incrimination tends to conceal from disclosure much information which would be highly relevant and often dispositive of litigated issues. Nonetheless, long and bitter experience has shown that the evils associated with extracting self-incriminating evidence from a person far outweigh the evils associated with a suppression of such evidence.
II. **Availability of Discovery Procedures — Dependent upon Forum**

In income, estate, and gift tax cases, a taxpayer ordinarily has a choice of three forums in which to litigate. He can petition the Tax Court for a redetermination of a deficiency proposed by the Commissioner of Internal Revenue, or he can sue for refund in either the appropriate United States District Court or in the United States Court of Claims. In the case of taxes other than income, estate, and gift, the taxpayer's choice is between a district court or the Court of Claims. There are myriad factors which influence a taxpayer or his counsel in the selection of a forum in which to litigate tax liabilities, and the availability of pretrial discovery is an important one to be taken into account.

Generally, a suit for refund in a district court furnishes the greatest opportunities for pretrial discovery because the procedures in tax refund suits are governed by the Federal Rules of Civil Procedure. The principal rules having to do with pretrial discovery are rule 16 (pretrial conferences), rule 26 (depositions upon oral examination or written interrogatories), rule 27 (perpetuation of testimony before commencement of an action or pending appeal), rule 34 (orders to parties for production, inspection and copying of documents), and rule 36 (demands for admissions). The application of these rules, and the satellite procedural rules in the multitude of civil litigation which is handled by the United States district courts, has produced a great body of decisional law. In general, the Federal Rules of Civil Procedure are extremely liberal with respect to pretrial discovery matters.

Proceedings in the Court of Claims are not governed by the Federal Rules of Civil Procedure. However, the Court of Claims has adopted its own rules of procedure which, in many respects, closely parallel the Federal Rules of Civil Procedure. The principle Court of Claims rules involving pretrial discovery are rule 18 (securing production of documents and information in the possession of the Government in order to frame an adequate petition), rule 30 (pretrial discovery depositions through oral examination or written interrogatories), rule 38 (having to do with the scope of discovery), rule 39 (having to do with a "call" upon a Government department or agency or any other party for information or papers), rule 40 (production of documents for inspection and copying), rule 42 (requests for admissions), rule 43...

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2. **Int. Rev. Code of 1954, § 6213** [hereinafter references to the 1954 Code will be by section only].
3. **28 U.S.C. § 1346(a) (1964)**.

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Civil Tax Proceedings

(prettrial orders, including orders for admissions and examinations of financial records and stipulations and agreements between parties), and rule 44 (prettrial conferences). As with the Federal Rules of Civil Procedure, the Court of Claims discovery rules are liberal and obviously were designed to compel early and full disclosure of facts. In the district courts, most prettrial discovery is accomplished without the necessity of securing an order of the court. An exception to this is rule 34, which requires an order after a motion showing good cause for the production by a party of documents. By contrast, the Court of Claims discovery procedures require parties to initiate the action by seeking an order of the court. Nonetheless, in practice, aside from the slight delay occasioned by the necessity of securing Court of Claims orders for initiation of discovery, there is very little practical difference between the workings of a district court and the Court of Claims in the matter of prettrial discovery.

Because of the much greater aggregate volume of litigation handled by the federal district courts and because of the narrower spectrum of cases handled by the Court of Claims, the Court of Claims has not developed the great body of decisional law with respect to its discovery rules as has developed under the Federal Rules of Civil Procedure. Accordingly, if certainty with respect to the availability of prettrial discovery is important in selecting a forum for tax litigation, the lawyer charged with the responsibility of making the selection can proceed into a district court with the greater assurance which comes from numerous judicial pronouncements regarding the scope of the discovery rules.

As in the case of the Court of Claims, the Tax Court of the United States does not operate under the Federal Rules of Civil Procedure. The Tax Court has adopted its own rules of procedure. However, unlike the rules of the Court of Claims, the Tax Court rules with respect to discovery do not parallel the discovery provisions in the Federal Rules of Civil Procedure. On the contrary, the Tax Court rules do not expressly mention prettrial discovery and there is a dearth of published materials with respect to the matter of prettrial discovery in Tax Court proceedings.

For a number of years, the Tax Court granted motions for perpetuation of testimony in advance of the initiation of a proceeding in

5. The Court of Claims has delegated to its various Commissioners the power to act for the court in most matters pending before them. See Ct. Cl. R. 4.
6. The Tax Court’s authority to promulgate procedural rules is found in § 7453.
7. In Starr v. Commissioner, 226 F.2d 721, 722 (7th Cir. 1955), cert. denied, 350 U.S. 993 (1956) aff'g 13 C.C.H. Tax Ct. Mem. 277 (1954), the court observed that the failure of the Tax Court rules to permit prettrial discovery did not amount to an unconstitutional denial of due process.
the Tax Court; that is, prior to the filing of a petition for redetermination of a deficiency. So far as can be determined, these orders of the Tax Court permitting perpetuation of testimony in advance of the formal commencement of a Tax Court proceeding were not publicly reported and certainly were not officially reported.

On April 20, 1961, the Tax Court, in an unpublished order, granted a motion by the Commissioner of Internal Revenue to perpetuate the testimony of a director of a corporate taxpayer at a time when the taxpayer had not filed a petition in the Tax Court. The Government there pointed out that the corporate director whose deposition was desired was suffering from cancer and was expected to live only a short time. The taxpayer petitioned the Sixth Circuit Court of Appeals for review of the order of the Tax Court, and in *Louisville Builders Supply Co. v. Commissioner*, the court of appeals reversed the Tax Court, holding that the Tax Court was without authority to issue such an order. The court of appeals, after observing that the Tax Court is a creature of congressional enactment and an "independent agency in the Executive Branch of the Government," stated: "its [the Tax Court's] powers must be limited to what has been given to it by specific Act of Congress and by its own rules adopted pursuant to Congressional authority, § 7453 . . . plus such powers as may be inherent in it as such agency and as such quasi judicial body."

The Government argued that there were two sources of authority for the Tax Court's order for perpetuation of testimony in advance of a formal proceeding. First, it was argued that Tax Court Rule 45, which deals with depositions, contemplated the taking of pre-petition depositions. The cited rule, after setting forth the time limitations applicable to applications for the taking of depositions, concludes: "Provided, further, that under special circumstances, and for good cause shown, the court may otherwise order." The Government pointed to the just-quoted language as support for the proposition that the rule contemplated pre-petition depositions. The court of appeals rejected this argument and stated that the quoted proviso was intended only to give the court authority to vary the otherwise stated time limitations with respect to filing of applications for the taking of depositions. The Government asserted as the second basis for the Tax Court's authority to issue the challenged order the provision of section 7453 of the Internal Revenue Code of 1954, which states:

The proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure
Civil Tax Proceedings

(other than rules of evidence) as the Tax Court may prescribe and in accordance with the rules of evidence applicable in trials without a jury in the United States District Court of the District of Columbia.

The Government argued that the matter of taking a pre-petition deposition to perpetuate testimony was either (1) a procedural matter other than one relating to evidence — in which case Tax Court Rule 45 supported the Tax Court's action — or (2) it was a matter involving a rule of evidence in which case the provision of the District of Columbia Code allowing the District Court for the District of Columbia to grant petitions for perpetuation of testimony was applicable in the Tax Court by adoption as an evidentiary rule pursuant to section 7453.

The court of appeals observed that even if Tax Court Rule 45 and the just-cited section of the District of Columbia Code could form the basis for the order for a pre-petition deposition for the perpetuation of testimony, nonetheless the rule and the section of the District of Columbia Code did not expressly provide for discovery proceedings either before or after the institution of a proceeding.

The Government also relied on section 7456(a) as authority for the Tax Court order. That section provides in part that: "For the efficient administration of the functions vested in the Tax Court . . . any judge of the Tax Court . . . may . . . require . . . the taking of a deposition before any designated individual competent to administer oaths under this title." The taxpayer argued that the just-quoted statute was only applicable to cases pending in the Tax Court by virtue of the prior filing of a petition for a redetermination of a deficiency asserted in a statutory notice of deficiency. The court of appeals rejected the Government argument on this point as follows:

However, we decline to hold that a Tax Court judge's right to require "the taking of a deposition" comprehends procedural authority to order the pre-proceeding and pre-trial taking of a deposition to discover and perpetuate testimony. Where such authority exists in our state and federal courts, it is specifically provided by rule or statute.12

Read literally, the opinion of the Sixth Circuit in the Louisville case casts serious doubt on the authority of the Tax Court to order discovery depositions even after the filing of a petition for redetermination. Under the particular facts of the Louisville case, however, the

12. 294 F.2d at 341.
comments of the court of appeals regarding the authority of the Tax Court, under its then existing rules, to order pretrial discovery depositions after the filing of a petition is pure *dicta*. The *Louisville* case involved an attempt by the Tax Court to order depositions before the court had acquired jurisdiction of the case by the normal method. All that was necessary for the court of appeals to decide was that there was no statute or rule expressly allowing such pre-petition depositions. In any event, there is nothing in the holding of the court which would expressly preclude the Tax Court from now amending its rules to at least permit post-petition pretrial discovery depositions.

Following the reversal of the Tax Court in the *Louisville* case, a taxpayer filed a petition in the Tax Court to perpetuate the testimony of a doctor who was familiar with the financial and medical history of a decedent.13 There, in connection with the audit of the estate tax return, Internal Revenue agents were proposing to assert that certain of decedent's transfers were transfers in contemplation of death. The petitioner alleged that the Internal Revenue Service had not yet issued a statutory notice of deficiency and, therefore, he was unable to petition the Tax Court for a redetermination. Under these circumstances, the petitioner requested that the court order the taking of a pre-petition deposition of the doctor. The Commissioner moved to deny the petitioner's application and the matter was set down for argument before Chief Judge Tietjens. Counsel for the taxpayer did not participate in the argument. During the course of the argument, Chief Judge Tietjens noted that the taxpayer's petition conformed to a practice which had been followed by the Tax Court for a number of years. Government counsel agreed that in prior cases the Tax Court had allowed such petitions but argued that in the light of the *Louisville* decision of the Sixth Circuit there was now a serious question as to whether such prior practice was authorized. Chief Judge Tietjens held that in view of the ruling of the Sixth Circuit in the *Louisville* case, the Tax Court would deny the petition.

*Daniel A. Robida*14 was a Tax Court proceeding involving the issue of whether the petitioner was entitled, under section 911, to exclude certain income received in Germany. The Tax Court intriguingly described the petitioner's German income as follows:

This "tax exempt" income was reported by petitioner on his returns as having been earned income abroad as a sales promoter and instructor in the operation of machines under the terms of an

employment agreement with Service Games Ltd. of Gotenda, Tokyo. On the return for 1961 petitioner's services under the agreement were described as "repairs of machines by soliciting, teaching and practicing the diagnosing and the manipulating of machines." Service Games Ltd. was a manufacturer of slot machines.\textsuperscript{15}

The Government had computed asserted deficiencies on a net worth basis. The taxpayer's original counsel withdrew from the case before trial and at the trial the taxpayer acted as his own counsel. The taxpayer testified that German officials had seized all of his records which would have enabled him to prove the correct amount of his income and that the Internal Revenue Service had, in turn, received these records from the German officials. The Tax Court made the following comment about this situation:

These allegations are unsupported by the record, except for the petitioner's own testimony, and what they [the taxpayer's records seized by German officials and turned over to the United States authorities] would have shown, had they been available, is nebulous. The taxpayer had the burden of proof, and the impossibility of proving a material fact does not relieve him of that burden.\textsuperscript{16}

The case went to the Court of Appeals for the Ninth Circuit,\textsuperscript{17} where the Government "in the interests of complete fairness" moved that the case be remanded to the Tax Court for further but limited proceedings. The court of appeals, after describing the seizure of the taxpayer's records by the German officials, stated:

The respondent [Commissioner of Internal Revenue] admits that the Revenue Service, through other agencies of the United States, obtained a portion of petitioner's records from the German police. These records were not made available to petitioner prior to the hearing in the Tax Court. It is because of this that the respondent has moved for remand.\textsuperscript{18}

In light of the court of appeals' statement that the Government itself conceded that it had certain of the taxpayer's records, there is a certain irony associated with the Tax Court's dismissal of the taxpayer's contention in this regard as being unsupported except by the

\textsuperscript{15} Id. at 452.
\textsuperscript{16} Id. at 455.
\textsuperscript{17} Robida v. Commissioner, 371 F.2d 518 (9th Cir. 1967).
\textsuperscript{18} Id.
\textsuperscript{19} Id.
taxpayer's own testimony. The court of appeals granted the Government's motion for a remand, but went on to say:

We believe, however, that there should not be a sharp limitation upon further proceedings. It will be appropriate for petitioner to *engage in discovery proceedings* to the end that he may obtain all of his necessary personal records or that the respondent may attempt to make a satisfactory showing as to why records not in its possession, if such records exist, have not been obtained or cannot be obtained.\(^\text{20}\)

It is interesting to contrast the opinion of the Sixth Circuit in the *Louisville* case, where the court of appeals strictly construed the jurisdiction of the Tax Court in what it perceived to be discovery proceedings, with the opinion of the Ninth Circuit in the *Robida* case, in which the appellate court indicated that discovery proceedings were essential to enable the taxpayer to adequately prepare his case for trial.

A recently settled Tax Court proceeding involved a taxpayer known as Rose Kennedy. That case appears to contain the seeds of new growth with respect to discovery in the Tax Court. In the *Rose Kennedy*\(^\text{21}\) case, the Government had asserted sizable income tax deficiencies based upon alleged gambling income. The taxpayer charged that the Government's deficiency contention was in large part based upon evidence secured by the Chicago Police Department in a manner which the state courts of Illinois had said constituted an illegal search and seizure. The taxpayer's counsel filed a motion to suppress any illegally obtained evidence in the hands of the Government, to compel the production of evidence in the Government's hands in order to enable the taxpayer to determine whether it was illegally obtained, and to take the discovery deposition of the examining revenue agent in order to determine what materials in their files were tainted evidence. Judge Dawson ordered the holding of a pretrial hearing at which time the taxpayer was to have the opportunity to take the testimony of the examining revenue agent with a view to discovering facts relevant to the possible suppression of evidence in the Government's hands. The case was settled on a basis which apparently amounted to a complete taxpayer victory. As a result, there will be no published opinion. However, the actions taken by the trial judge in that case promise to break new ground in the field of discovery in Tax Court cases.

The situations facing the taxpayers in the *Robida* and the *Rose Kennedy* cases point up the practical necessity of the Tax Court estab-

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\(^{20}\) Id. at 519 (emphasis added).

\(^{21}\) T.C. Dkt. 4945-66 (filed 1966).
lishing effective pretrial discovery for taxpayers. As the Tax Court observed in the Robida case, the taxpayer there had the burden of disproving the correctness of the Commissioner’s determination. As it developed, at least some of the evidence which was essential for the taxpayer’s case was in the Government’s possession. Absent a right in the taxpayer to engage in discovery proceedings, it was a practical impossibility for the taxpayer to adequately prepare for a trial at which he had the burden of proof. Under such circumstances, to insist that the taxpayer must wait until trial and then and there attempt to build his case by examining government agents is unrealistic. In the absence of pretrial discovery, a taxpayer, in such a situation, has no assurance that the Government will have any revenue agents present at the trial and subject to examination by the taxpayer. Even if some revenue agents are produced by the Government at the trial (despite the absence of a government burden of proof), the taxpayer can have no advance assurance that there will be present in the courtroom and subject to his examination all of the Internal Revenue Service personnel who have materials which would enable him to carry his burden of proof. Further, assuming that at the hearing the Government produced all of its personnel who had any information about the case, there would still be no assurance that such government personnel would have with them all records and files which would enable the taxpayer to establish his case. Lastly, even assuming that the Government produced at the trial all of its personnel having knowledge of the facts and all documents and records having any bearing on the case, it is obvious that the trial would become needlessly protracted if it was necessary to interrupt and give the taxpayer or his counsel adequate time for careful study of the records. Thus, under circumstances such as were present in the Robida case, pretrial discovery proceedings are a must if the taxpayer is to be given a meaningful day in court and if the business of the court is not to be disrupted by an attempt to do during a trial session what can better be done during a pretrial discovery proceeding.

Where, as in the Rose Kennedy case, the taxpayer is asserting that certain evidence in the hands of the Government was illegally obtained, a failure to grant pretrial discovery to the taxpayer is even more inhibitive to due process and conducive to disorganization in the court proceedings. There, the taxpayer made the serious charge that an Internal Revenue agent had used illegally procured evidence. Under such circumstances, it is most unlikely that at the time of trial the Government will come into the courtroom with the materials and personnel which will enable the taxpayer to prove that the evidence in the Government’s hands is tainted and, therefore, inadmissible. Again,
assuming that the Government produces at the trial all personnel and records which will enable the taxpayer to prove the illegality of the Government's evidence, it is not hard to imagine the disorganization of the Tax Court's trial calendar if one of the trials is diverted into a long hearing regarding the methods by which the Government's evidence was secured. Inquiries with respect to matters like this ordinarily result in one witness giving leads to other witnesses. These leads in turn require the examining party to follow-up with additional subpoenas and examinations. It is not conducive to the orderly trial of cases to insist on a procedure which requires such follow-up investigations and examinations thereby resulting in long hiatuses in the trial.

In summary, the situation with respect to the availability of discovery in the three principal tax litigation forums is as follows:

1. By virtue of the Federal Rules of Civil Procedure and the large body of decisional law developed by repeated interpretation and application of these rules in the many district courts, a district court refund suit furnishes the best opportunity for a full pretrial discovery by either the taxpayer or the Government.

2. The Rules of the Court of Claims, while providing for fairly liberal discovery procedures closely akin to those applicable in the district courts under the Federal Rules of Civil Procedure, do not have directly behind them a large body of decisional law comparable to that which has developed with respect to the Federal Rules of Civil Procedure. Thus, the Court of Claims must rank behind a district court as a forum in which a taxpayer or the Government can expect to achieve maximum pretrial discovery.

3. The Tax Court is the least desirable forum in terms of supplying opportunities for the taxpayer to engage in pretrial discovery. Nonetheless, on the basis of recent developments, it is to be anticipated that in the near future the Tax Court will, of its own volition, or by virtue of appellate court decisions, move toward a greater use of pretrial discovery procedures.

It is submitted that, notwithstanding the present absence of provisions in the Tax Court rules for pretrial discovery, all courts should provide for pretrial discovery in tax litigation. Moreover, liberal utilization of the currently extant procedures is particularly appropriate in federal tax litigation, for even where discovery rules are liberally administered, the taxpayer starts out in an underdog position. The reasons for these conclusions are based primarily on the administrative procedure that is utilized by the Internal Revenue Service.

In most nontax litigation, both sides embark upon judicial proceedings with roughly comparable knowledge (or roughly comparable ignorance, as the case may be) of the evidence and contentions of the
opponent. Such is not the case in the typical federal tax litigation. Most tax litigation reaches the courts only after there have been extended administrative proceedings including the Government's examination of a return filed by a taxpayer, an examination by the Internal Revenue Service of the taxpayer's books and records, a Government conducted examination (sometimes under oath, more often not) of the taxpayer and anyone else having knowledge of the facts, and the submission of protests and claims spelling out the taxpayer's contentions with respect to the facts and the law. Thus, in the majority of federal tax cases, the Government has extensive knowledge of the taxpayer's side of the case before a complaint or petition is ever filed through the use of the practical equivalents of all the available discovery techniques which ordinary litigants can utilize only after a lawsuit is started. The Government has the power during the course of an investigation to not only examine books and records of the taxpayer but also to subpoena the taxpayer and others to appear and give testimony under oath. No such investigatory power is available to a taxpayer prior to the commencement of an action, with the exception of the limited circumstances where, pursuant to rule 27 of the Federal Rules of Civil Procedure, a taxpayer may petition for the perpetuation of testimony in advance of starting a tax refund suit in a district court.

It can fairly be said that in tax litigation, the Government enters the lists with the advantage of having had the opportunity to or having actually engaged in what amounts to discovery, whereas the taxpayer, even positing the existence of discovery in the forum, has not had an opportunity for disclosure with respect to the facts known by the Government and the contentions of the Government until the litigation actually commences.

III. Scope of Discovery Against the Government

The following discussion is designed to outline the general procedures available for discovery in the federal district courts as well as the particular problems encountered in litigation with the Internal Revenue Service. As indicated earlier, the discovery available in the Court of Claims is, for practical purposes, equivalent to that available

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22. See §§ 7601-09. In United States v. McKay, 372 F.2d 174 (5th Cir. 1967), reversing and remanding an order of the District Court for the Middle District of Florida, the court of appeals held the Government was entitled to cause the production of an appraiser's report regarding valuation of unlisted stock included in a decedent's estate. The taxpayer resisted the summons to produce the appraisal report on the basis of the attorney-client and the attorney's work product privileges. The court of appeals expressed doubt that the attorney's work product privilege applies in an administrative investigation but held that even if the privilege is available in other than a judicial proceeding, the appraiser's report in the instant case was not protected by the privilege.
in the district courts. For this reason, discovery in the Court of Claims will not be specifically considered.

In 1942, the Government took the position that the provisions of the Federal Rules with respect to discovery were not applicable to the United States. However, in *United States v. General Motors Corp.* the district court disagreed and held that the Federal Rules are applicable to the United States except to the extent that the United States is expressly excepted from them, and the Government has long since conceded that the Rules of Civil Procedure dealing with discovery are applicable to the United States.

The words of rule 26 referring to discovery by deposition or interrogatory and the voluminous commentary about its provisions make it clear that it is intended to permit the broadest type of discovery. The rule expressly negates the idea that discovery must be limited to evidence which will be admissible at the trial by providing that discovery may be had for the purpose of gathering leads for the discovery of admissible evidence.

Rules 30 and 31 contemplate that a party wishing to make discovery by depositions involving oral testimony or written inter-

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23. 2 F.R.D. 528 (N.D. Ill. 1942). The Government had contended that where the Government was not expressly mentioned in a discovery rule, the rule was not applicable by virtue of the rule of construction to the effect that a statute which does not mention the sovereign by name is not applicable to the sovereign.


25. Rule 26 provides that any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. The rule states that the deponent:

may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts and that it is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.


(a) Notice of Examination: Time and Place. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party upon whom the notice is served, the court may for cause shown enlarge or shorten the time.

27. Rule 31. Depositions of Witnesses Upon Written Interrogatories

(a) Serving Interrogatories; Notice. A party desiring to take the deposition of any person upon written interrogatories shall serve them upon every other party with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within 10 days thereafter a party so served may serve cross interrogatories upon the party proposing to take the deposition. Within 3 days thereafter the latter may serve redirect interrogatories upon a party who has served cross interrogatories. Within 3 days after being served with
rogatories may do so without first securing an order of court. The
discovery process is initiated by a party merely giving formal notice in
writing to other parties to the action. In tax cases the time and place
for the taking of depositions is usually handled by informal agreement
between counsel. The informality of arranging depositions or serving
interrogatories under rules 26, 30 and 31 is to be contrasted with the
procedures under rule 34 for the production and copying of documents
where an order of court must be sought. 28

Rule 36 permits a party to serve on another party a written
request for admission of facts or the genuineness of attached copies of
documents. 29 In a sense rule 36 furnishes a form of discovery in that
it enables a taxpayer to confirm, in advance of trial, that the Govern-
ment does not intend to controvert obvious facts. However, unlike
discovery under rule 26, requests for admissions under rule 36 are
confined to facts and documents which are “relevant.” Accordingly,
rule 36 does not furnish a tool for discovering “irrelevant” information
which may lead to “relevant” evidence.

In tax litigation, requests for admissions under rule 36 are pe-
culiarily appropriate for purposes of getting into the record early in the

28. Rule 34 requires that a party make a motion showing “good cause” and
requesting an order of the court directed to a party to the proceeding “to produce
and permit the inspection and copying or photographing . . . of any designated doc-
ument, papers, books, accounts, letters, photographs, objects or tangible things not
privileged.” Fed. R. Civ. P. 34. Rule 34 permits the issuance of orders only to other
parties to the proceeding, whereas rule 26 permits the taking of the deposition of
either a party or a non-party.

29. Rule 36. Admission of Facts and Genuineness of Documents
(a) Request for Admission. After commencement of an action a party may
serve upon any other party a written request for the admission by the latter of the
genuineness of any relevant documents described in and exhibited with the
request or of the truth of any relevant matters of fact set forth in the request.
If a plaintiff desires to serve a request within 10 days after commencement of the
action leave of court, granted with or without notice, must be obtained. Copies of
the documents shall be served with the request unless copies have already been
furnished. Each of the matters of which an admission is requested shall be
deemed admitted unless, within a period designated in the request, not less than 10
days after service thereof or within such shorter or longer time as the court may
allow on motion and notice, the party to whom the request is directed serves upon
the party requesting the admission either (1) a sworn statement denying specific-
ally the matters of which an admission is requested or setting forth in detail the
reasons why he cannot truthfully admit or deny those matters or (2) written
objections on the ground that some or all of the requested admissions are
privileged or irrelevant or that the request is otherwise improper in whole or in
part, together with a notice of hearing the objections at the earliest practicable
time. If written objections to a part of the request are made, the remainder of the
request shall be answered within the period designated in the request. A
denial shall fairly meet the substance of the requested admission, and when good
faith requires that a party deny only a part or a qualification of a matter of
which an admission is requested, he shall specify so much of it as is true and
deny only the remainder. As amended Dec. 27, 1946, effective March 19, 1948.

(b) Effect of Admission. Any admission made by a party pursuant to such
request is for the purpose of the pending action only and neither constitutes an
admission by him for any other purpose nor may be used against him in any
other proceeding. Fed. R. Civ. P. 36(a) (b).
litigation fairly routine matters such as the copies of tax returns, correspondence between the taxpayer, his representatives and government representatives, revenue agents' reports which have been submitted to the taxpayer, statutory notices of deficiencies, and refund claims. Requests for admissions under rule 36 are also helpful in establishing amounts and dates of payment of taxes, deficiency assessments, interest, penalties, and the like, as well as jurisdictional facts such as the time of filing returns, times of payments of tax and claiming of refunds, and residence of the taxpayers.

It often happens that the Government in its pleadings will deny what, to the taxpayer, seems an incontrovertible fact, such as the date of filing a tax return or payment of a tax. The Government's denials of such allegations often stem from the fact that the Government's records show a slightly later date for the filing of a return or payment of a tax than do the taxpayer's records. This can arise because the taxpayer assumes that when he mails a return or a tax payment the date of filing or date of payment will be deemed to be the date of mailing or will not be more than a few days later. The Government's files, on the other hand, usually reflect the date when a clerk makes an entry in an official government form or impresses a date stamp. This can occur several days or even several weeks after the receipt of the return or payment check in the mail room of the particular Internal Revenue Service office involved. Usually the discrepancies between the dates shown on the taxpayer's records and those shown in the Internal Revenue Service records are minor. Resolution of this problem can often be accomplished by the taxpayer accepting the dates shown in government records and requesting an admission under rule 36 that the date shown in the Government's records is the date of filing or payment. Precipitate acceptance of a government record date for the filing of a document or the payment of a tax may be dangerous where the difference between the date shown in the taxpayer's records and that shown in the Government's records is significant in terms of periods of limitation or where the difference results in substantial differences in interest computations.

On the assumption that the taxpayer has been able to "clear out the underbrush" by securing satisfactory responses from the Government to requests for admissions under rule 36, the taxpayer is next faced with a decision as to whether he wishes to engage in further pretrial discovery proceedings and if so, what avenue of approach he intends to use.

Rule 34 requires that the taxpayer show good cause in order that his motion requesting the production of specific documents be granted.
In the normal course of events, discovery by an order to produce under rule 34 is subsequent to exhaustion of other discovery procedures. This is the practice because the framing of an adequate motion under rule 34 for the production of specific documents in the hands of the Government, often requires, as a practical necessity, that the taxpayer first proceed by oral deposition or written interrogatories pursuant to rule 26 in order to ascertain what significant documents are in the possession of the government.

A. Discovery of Information Known to Participants in the Internal Revenue Audit

In the usual case involving tax litigation in the district courts, the taxpayer is the plaintiff and the United States is the defendant. Although cases in which the United States is the plaintiff in a district court tax case are somewhat rare, they do arise in situations in which the United States is suing to quiet title to property where title is derived from the enforcement of a tax lien, to enforce a tax lien, to subject a decedent's property to a judgment for estate taxes, or for recovery of an erroneous refund.

The more usual case is a suit for the refund of federal taxes, in which the taxpayer is the plaintiff and, therefore, has the burden of proving that he has overpaid his taxes. It is not sufficient that the taxpayer prove that the Government was wrong in any particular with respect to the assessment and collection of the tax — the taxpayer must affirmatively prove the correct amount of taxes owed and that such correct amount is less than the amount assessed and collected by the Government.

Prior to a district court or Court of Claims refund suit an audit is generally conducted in which the Internal Revenue Service takes the position that there is a deficiency in tax attributable to a matter which the Internal Revenue Service and the taxpayer's representatives have discussed extensively. As to the particular matter which gave rise to the deficiency assessment, the taxpayer and his representative

30. See § 7402(e).
31. See § 7403.
32. See § 7404.
33. See § 7405.
34. See Lewis v. Reynolds, 284 U.S. 281, 283 (1932).
35. An exception to the burden of proof rule just stated is in cases in which the Government has asserted a fifty per cent civil fraud penalty under § 6653(b). There the Government has the burden of proof in the Tax Court, the district court, or the Court of Claims. See § 7454 (relating to the Tax Court); Armstrong v. United States, 354 F.2d 274 (Ct. Cl. 1965) and numerous cases collected in 10 J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 58(A) at 35 n.17 (1958) (as to district court refund suits).
generally have a fair idea of the facts upon which the Government relied in assessing the deficiency and of the legal theories behind the assessment. However, this is not always so. In any event, when the case reaches the refund suit stage, the taxpayer has no assurance that the Government intends to limit the issues of the suit to those that were the focus of the audit, because the service does not necessarily accept the proposition that the taxpayer's computation of tax was in all ways correct except with respect to the item which was the subject of controversy during the earlier audit. This is the situation in which the ordinary taxpayer-plaintiff finds himself at the beginning of a suit for refund in the district court or in the Court of Claims, and it is from this position that the taxpayer-plaintiff must begin to prepare for trial. Obviously, discovery with respect to the Government's case is helpful (if not essential) in enabling the taxpayer to adequately prepare for trial by determining the Government's position with respect to possible new bases for resistance to the refund claim or new theories to refute the taxpayer's position on the initial issue.

Generally, the taxpayer or his representatives know the identities of revenue agents, conferees, and technical advisors in the Appellate Division with whom they have discussed the case during audit stages. However, taxpayers and their representatives are not always aware of the identities of government representatives who have indirectly participated in the audits without ever having had direct contact with the taxpayer or his representative. Likewise, the taxpayer may be ignorant of persons in the Government, but outside of the Internal Revenue Service, or persons outside of the Government who have given information to the Internal Revenue Service with respect to the taxpayer's liabilities. Determinations of the identities of these persons would seem to be a proper subject for discovery pursuant to rule 26(b) and pursuant to Court of Claims Rules 30 and 38. In attempting discovery of the names of persons who have given information to the Government in connection with the determination of the taxpayer's liabilities, consideration must be given to the possible assertion by the Government of the privilege against revealing the identities of informers.

Assuming determination of the identities of persons who in some way participated in the tax audit, the taxpayer is next confronted with the problem of how far he may go in examining such persons by deposition or interrogatories or by requesting the production of documents prepared by, or in the hands of, government agents. There

37. See pp. 88-90 infra.
seems to be no question that the taxpayer is entitled to discover and confirm, by deposing the identified individuals, the fact that such individuals participated in the audit. Likewise, a taxpayer is entitled to discover the actions taken by the identified individuals, i.e., whether they wrote reports or conferred with others about the case and similar matters.

It is equally clear that the taxpayer is entitled to secure, by deposition, interrogatories, or by an order to produce served upon government agents, copies of statements given to government agencies by the taxpayer himself. The discovery of the agents' versions of a taxpayer's oral statements is especially important if there is any reason to believe that the agents' versions of the conversations will be materially different from the taxpayer's recollection of the statements. In cases in which the taxpayer's trial counsel has not participated in all stages of the audit, it is important to seek, through discovery, copies of all written statements given by the taxpayer or earlier representatives of the taxpayer to avoid being surprised at trial by the sudden production of statements given to the Internal Revenue Service, but forgotten by the taxpayer in discussing the case with his present counsel.

In the absence of some claim of privilege, the taxpayer would also be entitled to discover factual materials known to agents and others who participated in the audit and which were relied upon by the government agents in reaching decisions with respect to matters arising in the course of the audit.

B. Discovery of Internal Memoranda of the Internal Revenue Service Personnel

When the taxpayer attempts to secure discovery with respect to opinions, recommendations from one government agent to another, and similar matters, he is entering an area where the law is far from clear or settled. The courts have vacillated in their treatment of this question. One of the initial cases presenting this problem was the government contracts case of *Kaiser Aluminum & Chem. Corp. v. United States*, wherein Justice Reed (sitting by designation) held that the Government could not be compelled to produce advisory reports from subordinate government officials who made recommendations with

respect to agency actions. The court held that the memorandum of advice from a subordinate official was privileged.\(^{40}\)

In *Cenname v. Bingler*,\(^{41}\) an action for refund of cabaret taxes, the taxpayer moved pursuant to rule 34, for the production of a report of a revenue agent, a report of the Technical Division of the Appellate Staff, and a report of a second revenue agent. The Government resisted this demand and in opposition to it submitted an affidavit from the Acting Commissioner of Internal Revenue, asserting a formal claim of executive privilege as to the documents. The Government relied on the *Kaiser* case, among others, as supporting the proposition that the demanded documents were privileged. The district court wrote a very brief opinion, holding that the rule of the *Kaiser* case was applicable and denied the plaintiff’s motion.

In *Continental Distilling Corp. v. Humphrey*,\(^{42}\) a suit was instituted alleging that labelling regulations issued by the Alcohol and Tobacco Tax Division of the Bureau of Internal Revenue were discriminatory as between the plaintiff and competitive distillers. The plaintiff sought the deposition of the Director of the Alcohol and Tobacco Tax Division and issued a subpoena *duces tecum* requiring his production of a great number of writings in the files of the Bureau of Internal Revenue showing the background of the adoption of the challenged regulation. The district court refused to quash the subpoena requiring the appearance for deposition of the Director of the Alcohol and Tobacco Tax Division. The court observed that if in the course of the deposition questions were asked of the witness which the Government believed called for revelation of privileged or confidential matters, the availability of the privilege could be raised at that time. However, the court observed: “Plaintiff is not entitled to discovery of the mental operations by which defendants [officials of the United States Treasury Department] arrived at their opinions or made their judgments.”\(^{43}\)

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40. Justice Reed stated:
So far as the disclosure of confidential intra-agency advisory opinions is concerned, we conclude that they belong to that class of governmental documents that are privilege from inspection as against public interest but not absolutely.

41. *Id.* at 946-47.
42. 61-1 U.S. Tax Cas. ¶ 15,346 (W.D. Pa. 1961).
43. *Id.* at 241. The court quashed the subpoena *duces tecum* on the ground that the validity of such subpoena was to be tested on the same basis as a motion under rule 34 for the production of documents, and therefore, the moving party must show good cause for the production of the documents. The court determined that the plaintiff had failed to show such good cause.
E. W. Bliss & Co. v. United States\textsuperscript{44} presented a similar situation. The taxpayer sought production of transmittal letters to government employees pursuant to rule 34. The court denied the motion for production, stating that: "Good cause for the production of such documents has not been shown, and, in the circumstances of this case the Government’s claim of privilege is well taken."\textsuperscript{45} This statement implies either a misconstruction of the rule or an inexact reference to the Government’s defense as the assertion of a "privilege." By its terms rule 34 precludes production of any documents which are "privileged." Accordingly, under the rule, it should be irrelevant whether the moving party has shown "good cause" if the documents are privileged. A more rational basis for the court’s decision is that in proceedings of this kind the judge weighs the taxpayer’s need for production of advisory memoranda in the government files against the Government’s interests in preventing the taxpayer from seeing the internal memoranda.

The Court of Claims decision in the Kaiser case and the district court decisions in the Continental Distilling and E. W. Bliss cases represent the high water mark of government successes in protecting from disclosure intra-agency memoranda and opinions reflecting recommendations of government agents on the mere assertion of a public policy or executive privilege argument.

An interesting situation was presented in Campbell v. Eastland.\textsuperscript{46} During the pendency of a criminal investigation for alleged tax fraud, the taxpayer commenced a civil action for refund of income taxes. In connection with the civil proceeding, the district court ordered the Government to produce, pursuant to rule 34, the reports of special agents who participated in the criminal investigation. The court of appeals reversed on the ground that the taxpayer was merely engaging in a gambit to achieve discovery in a criminal case. However, the opinion of the court of appeals contains strong hints that if the criminal proceedings were over, the taxpayer might well be entitled to examine the agent’s reports in connection with a purely civil proceeding.

In light of recent cases, however, it appears that the trend of the decisions is toward liberality in permitting discovery of opinions expressed by government personnel in connection with tax audits.\textsuperscript{47}

\textsuperscript{44} 5 Fed. Rules Serv. 2d § 34.42, Case 1 (M.D. Ohio 1961).
\textsuperscript{45} Id.
\textsuperscript{46} 307 F.2d 478 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963) rev’d unreported district court decision (E.D. Tex. 1961).
\textsuperscript{47} Professor Moore analyzes this area by stating: "The weight of authority rejects questions calling for the opinions, legal conclusions or contentions of the deponent." After reciting specific instances of the just-quoted generality, it is stated: Most of the foregoing decisions give no reasoned explanation for their holdings, simply relying upon the proposition that questions as to matters of opinion, legal conclusions or contentions are improper. Insofar as the courts have at-
United States v. San Antonio Portland Cement Co. exemplifies this recent trend. A suit was instituted by the Government to recover an allegedly erroneous tax refund on the grounds that the refund was based on a rule for computation of depletion later rejected by the Supreme Court in United States v. Cannelton. In defending the suit for recovery of the refund, the taxpayer attempted to show that its refund had been subject to thorough review at all levels of the Internal Revenue Service and had been submitted to the Joint Committee on Internal Revenue Taxation. The taxpayer moved under rule 34 for the production of documents to enable it to "prepare its defense by determining the exact factual and legal basis on which the government claims the refund was erroneously paid." The Government resisted this motion on the ground that the documents demanded were protected by an "executive privilege," the attorney-client privilege, or came under the attorney's work product privilege. The demanded documents included memoranda between the various offices and officials of the Internal Revenue Service, including the Appellate Division, the Regional Counsel's office, the Audit Division of the national office, the engineer-revenue agent, the Office of the Chief Counsel, and the Commissioner of Internal Revenue. From the description of the documents set forth in the district court's opinion, it is obvious that the documents must have contained recommendations by, and opinions of, officials of the Internal Revenue Service.

The judge, after noting that he had examined the demanded documents in camera and had found that they revealed no military or state secrets and that their production would not threaten the national security in any way, explained:

It would be unconscionable, under the circumstances, for the Government to be permitted to prosecute this suit challenging its
own prior determination of defendant’s tax liability, and then invoke governmental or attorney-client privileges, or the attorney’s work-product doctrine, to deprive the defendant of matters which might be material to its defense. In this type of case the defendant should not be kept in the dark, but, on the contrary, a full disclosure should be made.\textsuperscript{54}

Such language indicates that the district judge’s decision to permit broad discovery of the Government’s files was considerably influenced by the fact that the Government was suing to recover a refund and was thus before the court in a substantially changed position from that taken when the refund was issued. The court undoubtedly felt that the reversal in direction on the part of the Government entitled the taxpayer to an explanation. Procedurally the \textit{San Antonio Portland Cement} case was atypical. In the usual tax case, the Government has generally maintained a consistent position throughout the controversy or, at least, has consistently taken the position that the taxpayer owes more tax than was reported on the original return.

\textit{United States v. Gates}\textsuperscript{55} was another suit for recovery of an allegedly erroneous tax refund involving the valuation of interests in family businesses. The defendant (taxpayer) moved under rule 34 to require the Government to produce documents prepared by the Internal Revenue Service dealing with valuations of a closely held corporation’s stock and past tax returns of various family members. The district court rejected the Government’s claim of the attorney’s work product privilege and granted the motion of the taxpayer. It is not possible to determine from the reported opinion the exact nature of the various documents which the taxpayer sought. However, it seems clear from the general description of the documents set forth in the court’s opinion that they involved intra-agency memoranda.

The district court judge in the \textit{Gates} case, like the judge in the \textit{San Antonio Portland Cement} case, was obviously influenced by the fact that the Government was the plaintiff seeking to reverse its prior action. Although this unusual context could have been used to limit the emerging trend of more liberal discovery, this was not the case. The \textit{Timken Roller Bearing Co. v. United States}\textsuperscript{56} case arose in the traditional posture of a taxpayer’s refund suit, and the taxpayer sought an order for the production of a miscellany of documents in the Government’s files.\textsuperscript{57} The Government resisted these motions on

\textsuperscript{54} 33 F.R.D. at 515.
\textsuperscript{55} 35 F.R.D. 524 (D. Colo. 1964).
\textsuperscript{56} 38 F.R.D. 57 (N.D. Ohio 1964).
\textsuperscript{57} These included reports and memoranda of the Appellate Division; control cards used in connection with the plaintiff’s income and excess profits tax returns;
the grounds that the taxpayer had failed to show "good cause" within the intendment of rule 34, that the information sought was protected under the "executive privilege" doctrine, and under a claim that "strong public policy prohibits the disclosure of the internal affairs of government agencies." 58

On the question of whether the taxpayer had shown "good cause," the Government argued that it had made available various Internal Revenue agents for oral depositions, and that the taxpayer could proceed by interrogatories to discover the criteria used by government agents in disallowing the challenged deductions. The court's answer to this argument was that a reading of the depositions indicated that the taxpayer was making no progress in eliciting from the government agents the information which it now sought through production of documents. Again addressing itself to the matter of the taxpayer's showing of "good cause" for the production of the documents, the Government argued that the taxpayer had the burden of proving that it had overpaid its taxes and that this burden was not satisfied merely by showing that the Government was in error in asserting additional taxes against the taxpayer. The court treated this as an argument by the Government that the materials sought contained evidence which was immaterial for purposes of the proceeding. The district judge stated that he agreed with the Government on the proposition that it was not a part of the taxpayer's burden in a tax refund suit to prove that the Internal Revenue Service acted in a capricious manner and, accordingly, that he agreed with the Government that the production of documents revealing the process of determination used by the Internal Revenue Service would not further the plaintiff's case. However, the judge went on to say that the Government's contentions and reasoning processes which might be revealed by the requested documents could lead to a discovery of the Government's possible bases for defense of the case and that, under the discovery rules, it was proper for the plaintiff to discover not only facts material to the presentation of his case, but also to discover facts which might be used by his opponent as a defense.

The Government argued that the reasoning used by an Internal Revenue agent in reaching his decision is irrelevant with respect to

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58. 38 F.R.D. at 60.
the issues in the case. The court disposed of this argument by observing that under the federal discovery rules it is not necessary that the moving party show that the evidence he seeks will be admissible. It is enough if the moving party shows that the materials he seeks may lead him to admissible evidence.

Turning to the Government's argument with respect to the "executive privilege," the court first observed that it was no longer open to question that the final determination of a claim of executive privilege was within the province of the court and beyond the powers of the representatives of the Executive Branch of the Government. The court then pointed out that the so-called "executive privilege" was a privilege designed to protect the secrecy of military information or state papers. It is submitted that it would be a rare case indeed where the opening of a federal tax audit file would reveal military or state secrets.

The court next turned to the Government's argument that it was contrary to public policy to reveal matters related to the internal management of government agencies. On this point, the court said:

Public policy decisions are essentially ad hoc decisions. They call upon the Judge to exercise a restrained discretion after weighing the supplicant interests before him. Of course, precedent is to be relied on as persuasive direction, but the court is at least partially released from the stricture of stare decisis.

The court dismissed as groundless the Government's assertion that the so-called "housekeeping" statute furnished a basis for a refusal of an employee of the executive branch to produce government files. The court observed that if the "housekeeping" statute had ever been operable as a defense against discovery of government files, the defense disappeared with the 1958 amendment to that Act which expressly provided that the Act was not to be considered as conferring on an executive department a privilege against disclosing matters to the public.

59. The court stated the executive privilege rule as follows:

We are not confronted here with a cloak of secrecy around military information or state papers. The foundation of executive privilege is the unfortunately necessary policy of fettering justice to promote national health. It is, in effect, a choice between the lesser of two evils: on the one hand, we have half-informed litigants who some times get justice, if at all, by accident; on the other hand, we might have disruptive publicity of documents, plans and policies which by their very nature must be secret to be effective. When such secrets relate to the very preservation of this nation, involving the formulation of national policy or the process of national defense there will be no exposure. But there is no claim here that such important matters are involved. Id. at 63.

60. Id. at 64.

61. Departmental regulations. The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it. 3 U.S.C. § 22 (1927).

In the course of the opinion in the *Timken Roller Bearing* case, the *Kaiser* case[^63] was distinguished on the ground that in *Kaiser* the plaintiff had not shown any need to examine the opinions and advices of the subordinate government officials. Having examined the extant discovery cases in the tax field[^64], the judge found "an almost equal division of authority"[^65] with respect to the Government's right to withhold files of the Internal Revenue Service. He concluded that the pro-government cases with respect to the privilege against discovery of Internal Revenue Service files were either distinguishable on their facts or were cases in which the taxpayer had failed to show a need for examination of the documents. The court thereupon ordered the demanded documents to be produced and ordered the revenue agent to answer questions relating to his criteria for disallowance of the taxpayer's deductions. The court temporarily excepted from the production order documents having to do with communications between the Internal Revenue Service and third parties. As to these, the court ordered an examination *in camera* to determine whether they involved the informer's privilege.

The court in *Timken Roller Bearing* found historical support for its ruling:

We find support for disclosure in the cry of certain irate Bostonians who once coined a phrase, which once had meaning, about "taxation without representation." The founders of this country rebelled against and divorced us from that system of tyrannical taxation by secret enactment. Does it make any difference to the taxpayer whether a levy is passed in secret, or that the execution of that levy is processed in secret? We think not. Therefore, if our decision be based on policy considerations, we find every reason in precedent and principle for formulating a policy of disclosure.[^66]

Recently, in *Lenske v. United States*,[^67] the Government secured the conviction of an attorney for criminal tax fraud. The court of appeals was obviously shocked by the methods used by the Government in investigating and prosecuting the defendant. Court of Claims Judge Madden, sitting by designation, wrote the opinion of the court of appeals which reversed the conviction. The reversal was, in large part, based upon the court's reaction to the special agent's memorandum to his

[^63]: See pp. 75-76 supra.
[^65]: 38 F.R.D. at 67.
[^66]: Id. at 69.
[^67]: 66-2 U.S. Tax Cas. ¶ 9,686 (9th Cir. 1966).
superiors recommending prosecution of the defendant. The memorandum listed the following as reasons for prosecution: representatives of the Federal Bureau of Investigation and the local police department had stated that they believed the defendant was a Communist; the defendant had participated in the formation of a local chapter of the Lawyers' Guild; the defendant entertained undesirable "thinking on the subject of Cuba, Laos, China, etc." The court concluded: "We reverse. This court will not place its stamp of approval upon a witch-hunt, a crusade to rid society of unorthodox thinkers and actors by using federal income tax laws and federal courts to put such people in the penitentiary. This court will not be so used."68

This decision by the Ninth Circuit stands for the proposition that the motive of the prosecuting authorities has some relevance in criminal tax proceedings. If the motives of government agents are relevant in criminal proceedings, there seems to be no sound reason why motives of government agents are not relevant in civil tax proceedings. Thus, if the taxpayer has reason to believe, or even suspect, that an agent of the Internal Revenue Service has recommended assessment of additional taxes or denial of his refund claim on the basis of a motive unconnected with the protection of the Government's revenue, the decision of the Ninth Circuit in Lenske indicates that the taxpayer is entitled to at least discover this fact. Thus, the discovery of ulterior motives of government employees may, in itself, be a basis for discovery of reports by revenue agents to their superiors or fellow agents.

Hopefully, it would be a rare case in which an official of the Internal Revenue Service would misuse his authority for the purpose of harassing a taxpayer or for some other purpose unconnected with the collection of revenue. However rare such an occurrence might be, it nonetheless seems appropriate that a taxpayer who suspects that an agent is acting for improper reasons should be given the opportunity to discover whether there is any basis for his suspicion, and the agent's reports and memoranda in the government files are possible sources of information about the agent's motives.

The decisions in cases in which taxpayers have sought discovery of government files and particularly those parts of files setting forth the

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68. Id. at 87,239.
69. Id. at 87,240.
70. Rulings in nontax cases with respect to discovery of intra-agency reports showing opinions, mental processes, and motives of government agents, like rulings on similar matters in tax cases, are not easy to reconcile. Cf., e.g., United States v. 50.34 Acres of Land, 12 F.R.D. 440 (E.D.N.Y. 1952) (refusing discovery of statements of government employee as to value in condemnation case); United States v. 90.57 Acres of Land, 30 F.R.D. 512 (W.D. Ark. 1962) (refusing discovery of government appraiser's report in condemnation action); United States v. 23.76 Acres of Land, 32 F.R.D. 593 (D. Md. 1963) (allowing discovery of basis of valuation by government appraiser in a condemnation case).
opinions and recommendations of government officials indicate the following general propositions regarding the attitudes of the courts:

1. Where the Government is the plaintiff (as in a suit to recover an allegedly erroneous refund), the courts tend to be extremely liberal in permitting taxpayer inspection of government files.

2. In cases in which the Government is the defendant, the courts are reluctant to order wholesale revelation of the contents of government files absent a convincing showing by the taxpayer that: (a) the Government is deliberately concealing certain facts from the taxpayer in order to hamper his preparation for trial; (b) the court is convinced that there may be information in the Government's files which will form the basis for a government defense at the trial; (c) the taxpayer has no other means of securing access to the information in the Government's files; or (d) the taxpayer can demonstrate a real possibility that he will be unprepared for trial, (including rebuttal of the Government's defense) unless he is given access to the requested documents.

A reading of a great number of trial court orders and opinions relating to pretrial discovery leads one to the conclusion that some of the decisions can only be explained on the basis that "deep down" the judge felt that the person opposing discovery was attempting to gain an unfair advantage over his opponent by concealing evidence, or that the party seeking discovery had an ulterior motive. Judges hearing motions with respect to discovery matters are much like the chancellors of whom it was said: "When the flush comes to the chancellor's cheek he is prepared to fashion his decree."

IV. PRIVILEGES EXEMPTING THE GOVERNMENT FROM DISCOVERY

The Federal Rules of Civil Procedure and the Court of Claims' Rules dealing with discovery all recognize that discovery is limited by overriding rules of privilege. As indicated by some of the prior discussion, the Government, like other litigants, frequently opposes discovery on the ground that the matter sought to be discovered is privileged.

A. The Executive Privilege

The Government, in resisting discovery, often alleges that the matter sought to be disclosed is protected by a so-called "executive

71. For an interesting public confession about judicial reactions of this sort, see Hutcheson, The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision, 14 CORNELL L.Q. 274 (1929).
As advanced by the Government in this context, “executive privilege” is an extremely plastic concept. When the Government opposes discovery on the grounds of “executive privilege,” it points to a number of foundations for the privilege and attempts to envelop within the privilege a great miscellany of information possessed by the executive departments of the Government.

The landmark case in the field of “executive privilege” is United States v. Reynolds, although it is interesting to note that the phrase “executive privilege” does not appear in the Supreme Court’s opinion. Reynolds involved a tort claim arising out of the crash of an Air Force plane engaged in a secret research project. The Government resisted the plaintiffs’ motion under rule 34 for the production of the Air Force’s official accident investigation reports and the statements of three crew members taken in connection with the official investigation of the crash which resulted in the deaths of the plaintiffs’ husbands. The original basis for the Government’s resistance to the motion for production was the Air Force regulations promulgated pursuant to the “housekeeping” statute which provided that the head of each executive department was authorized to prescribe regulations covering, inter alia, “the custody, use and preservation of the records, papers and property appertaining to it.” As previously indicated, if there was ever anything in the “housekeeping” statute upon which to base an executive privilege against disclosure of information, it has been obliterated by virtue of the 1958 amendment which added to the section the following: “This section does not authorize withholding information from the public or limiting the availability of records to the public.”

In the Reynolds case, the district court held that by virtue of the Federal Tort Claims Act, the Government had waived its executive privilege and it ordered the Government to produce the demanded documents for examination by the court so that the latter could determine whether they contained any privileged matters. The Government declined to show the demanded documents to the court and the district court thereupon entered an order pursuant to rule 37(b)(2)(i) to the

72. For an excellent and detailed discussion of this privilege, see Paubeneck & Sexton, Executive Privilege and the Court’s Right to Know — Discovery Against the United States in Civil Actions in Federal District Courts, 48 Geo. L.J. 486 (1960). See also Ashill & Snell, Scope of Discovery Against the United States, 7 Vand. L. Rev. 582 (1954); O’Riley, Discovery Against the United States: A New Aspect of Sovereign Immunity?, 21 N.C.L. Rev. 1 (1942).
73. 345 U.S. 1 (1953).
effect that the facts in the case with respect to the issue of negligence would be taken as established in the plaintiffs' favor by virtue of the Government's refusal to permit discovery. This decision of the district court was affirmed by the court of appeals.\footnote{Reynolds v. United States, 192 F.2d 987 (3d Cir. 1951).}

The Supreme Court in deciding the appeal was obviously concerned about the implications of the case.\footnote{United States v. Reynolds, 345 U.S. 1 (1953) (Justices Black, Frankfurter, and Jackson dissented).} The majority of the Court studiously avoided laying down any all-encompassing general rule with respect to the right of the executive branch to disclose, or refuse to disclose, materials, the revelation of which, in the opinion of the executive branch, would seriously interfere with national security or the conduct of foreign relations. The Court was obviously trying to avoid painting itself into a corner. Nonetheless, in Reynolds, the Supreme Court did expound some definite propositions with respect to the executive privilege. The Court made it clear that it was only considering a privilege against revealing military secrets — which the Court described as "a privilege which is well established in the law of evidence."\footnote{345 U.S. at 6-7.} The Court stated that the privilege must be asserted by the head of the executive department which has control over the matter and must be asserted "after actual personal consideration by that officer."\footnote{Id. at 8.} However, no dogmatic rule was laid down as to how far a court could go in forcing a disclosure to the court of matters for which the head of an executive department claimed a privilege. In describing this dilemma the court explained: "The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect."\footnote{Id.}

The Court stated the following as the rule governing how far the trial court must go in requiring the executive branch to disclose materials which it claims are privileged:

Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interests of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon...
an examination of the evidence, even by the judge alone, in chambers.

In the instant case we cannot escape judicial notice that this [1952 and 1953] is a time of vigorous preparation for national defense. . . . On the record before the trial court it appeared that this accident occurred to a military plane which had gone aloft to test secret electronic equipment. Certainly there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission. 3

The Court went on to weigh the plaintiffs' need to examine the demanded documents against the interests of the executive branch in preventing disclosure of vital military secrets. The synthesis of the decision in the Reynolds case was to tell the trial courts to weigh in each case the plaintiff's necessity against the apparent necessity for preservation of military secrets and, on the basis of how the scales balance, to then decide whether to require the executive branch to produce the demanded documents for examination by the judge. Thus, the Court laid down no fixed guidelines for the lower courts, but instead urged upon the trial courts a judicial weighing of the competing considerations presented when a citizen demands to know what is in the Government's files and the Government asserts that to reveal it would be detrimental to the national security.

In applying this analysis to the facts at hand in Reynolds the Supreme Court, after weighing the competing considerations, found that the right of the Government to protect military secrets, as asserted in that case, outweighed the necessity of the plaintiffs to examine the documents, especially in view of the offer of the Government to make three survivors of the crash available as witnesses.

A sometimes advanced basis for the assertion of the executive privilege is that to permit a court to order an official in the executive branch to produce documents or to give evidence would be violative of the separation of powers doctrine. This argument is generally coupled with citations to instances where the various departments in the executive branch have refused to comply with demands by congressional committees for the production of documents or the giving of testimony before congressional committees. An argument that the judicial branch (like the legislative branch) has no authority to compel disclosure of materials held by the executive branch, is completely dissipated, however, once the Government waives its sovereign immunity against suit.
and agrees to submit itself to the jurisdiction of its own courts.\footnote{Cf. Evans v. United States, 10 F.R.D. 255, 257-58 (W.D. La. 1950); Wunderly v. United States, 8 F.R.D. 356 (E.D. Pa. 1948).} If the issuance of a final judicial decree ordering a department in the executive branch to pay over money to a taxpayer is not violative of the separation of powers doctrine, it is difficult to understand how the doctrine is violated when, in the process of reaching a just decision with respect to whether the Government owes a taxpayer money, the court orders a department in the executive branch to produce evidence which will enable the court to reach a correct decision.

The decisions since \textit{Reynolds} have almost uniformly held that the so-called “executive privilege” relates only to the privilege against disclosure of matters bearing upon national security, military secrets, and secrets of state having to do with our relations with other governments.\footnote{See, e.g., Timken Roller Bearing Co. v. United States, 38 F.R.D. 57 (N.D. Ohio 1964); United States v. Gates, 35 F.R.D. 524 (D. Colo. 1964); United States v. San Antonio Portland Cement Co., 33 F.R.D. 513 (W.D. Tex. 1963).} It is justifiable to protect this type of material from discovery in tax litigation. However, instances in which this privilege will be properly applicable are certainly limited.

\textit{B. The Informer’s Privilege}

Like the so-called “executive privilege,” the privilege against revealing the identities of informers is peculiarly available to the Government. In \textit{Roviaro v. United States}\footnote{See In re Gurnsey, 223 F. Supp. 359 (D.D.C. 1963).} the Supreme Court described the informer’s privilege as “the Government’s privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law.”\footnote{353 U.S. 53 (1957).} It has been held that the informer’s privilege is applicable with respect to informants assisting in the enforcement of the non-criminal laws as well as to informants in criminal prosecutions.\footnote{Id. at 59.} As was made clear in the \textit{Roviaro} case, the privilege is not absolute and is one which is considerably circumscribed by exceptions and limitations. In \textit{Roviaro}, the informer, whose identity was sought by the criminal defendant, had been an actual participant in the alleged narcotic sale which formed the basis for the defendant’s indictment. Under those circumstances the Court held that the informer’s privilege was inapplicable. The Court also pointed out that the informer’s privilege does not bar disclosure of the contents of a communication from an informer where such disclosure will not reveal the identity of the informer. Also, where the identity of the informer has already been disclosed to those who would
"have cause to resent the communication," 89 the privilege is inapplicable. The most permeating exception to the informer’s privilege was stated by the Court in Roviaro, as follows:

A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer’s identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the government withholds the information, dismiss the action. 90

It is clear that in tax litigation the informer’s privilege may well be applicable and available to the Government as a basis for a refusal to divulge the identities and communications of persons who voluntarily come forward to inform the Government about violations of the Internal Revenue laws. Applying the informer’s privilege in a tax case, however, immediately raises the problem of who is an “informer.”

For purposes of the privilege, a person who, without any solicitation on the part of the Government, writes to or visits a government agent to reveal knowledge about another person’s violations of the Internal Revenue laws, would qualify as an informer. On the other hand, if the Government is already investigating the tax liabilities of a taxpayer and in the course of such investigation a government employee initiates an interview with a third party, it is doubtful that such third party could qualify as an informer for purposes of the privilege even though the person reveals information which might not have otherwise been available to the Government. Since a stated purpose of the informer’s privilege is to encourage citizens to come forward and communicate their knowledge regarding violations of the law to government officials, 91 the purpose would not be effectuated by extending the privilege to persons who do not come forward and voluntarily give information to the Government, but who must be sought out in the course of an investigation. 92 By a parity of reasoning it likewise would seem that the purpose of the privilege is not served by protecting the identity of persons who are employed either on a full-time or a part-time basis to report violations of Internal Revenue laws to the Government.

89. 353 U.S. at 60.
90. Id.
91. See id. at 59.
92. See Carrow, Government Nondisclosure in Judicial Proceedings, 107 U. Pa. L. Rev. 166, 182 (1958), where in describing the informer in the Roviaro case, the author pointed out: "By thus becoming a participant in the investigative process, the stated purpose of the informer privilege is, namely, the encouragement of private citizens to bring to the attention of law enforcement officers violations of law is dissolved."
These persons do not need the encouragement derived from a privilege against the revelation of their identities to do that for which they are hired.

In any event, in most tax litigation, as long as the content of the communication is available to a taxpayer under the aforementioned qualification to the informer's privilege, the assertion of the privilege should not present a practical barrier to the taxpayer in adequately framing and structuring his case.

C. The Attorney's Work Product Privilege

*Hickman v. Taylor* is the foundation of practically all present American rules with respect to the privilege which has come to be known as the "attorney's work product privilege." The holding of the Supreme Court in *Hickman v. Taylor* has been summarized by Professor Moore as follows:

1. Information as to facts of the case and statements of witnesses obtained by the adverse party's attorney are not within the common-law attorney-client privilege;
2. Even the broader policy against invasion of the attorney's privacy and freedom in the preparation of the case does not make them absolutely immune, but
3. The party asking for disclosure is bound to show that the situation is a rare one having exceptional features which make the disclosure necessary in the interests of justice; and
4. Where the party seeking discovery has obtained or is able to obtain the information asked for elsewhere, he has not met the burden.

The limits of the holding in *Hickman v. Taylor* have been the subject of considerable controversy and litigation and are likely to remain so. However, for purposes of applying the rule of *Hickman v. Taylor* in connection with discovery against the Government in civil tax litigation, there are certain clearly defined limits with respect to the attorney's work product privilege.

In the first place, the privilege is only applicable with respect to information secured by an attorney for a party in connection with preparation for litigation. The privilege is not applicable to the work product of a person not acting as an attorney in the course of securing information or materials, even though such person happens to be a lawyer. Thus, materials assembled by agents of the Federal Bureau of...
Investigation, while acting as investigating agents for the Department of Justice, are not protected under *Hickman* merely because some of the agents happen to be members of the bar. 95 Many Internal Revenue agents are members of the bar, however, unless they are acting in the role of attorneys for the Government and in connection with preparation for litigation, the materials gathered by such agents are not within the attorney's work product rule. On the other hand, the attorney's work product privilege is applicable to materials gathered by government agents acting under the express directions of government attorneys in connection with preparation for litigation to the same extent as if such materials had been gathered directly by the attorneys. 96 Any other rule would make the *Hickman* decision meaningless when applied to the Government in important litigation. The press of matters handled by government attorneys, coupled with the geographical problems faced by Department of Justice attorneys stationed in Washington, who are responsible for trials in courts scattered over the entire United States, means that the government attorneys must perforce rely on investigating agents throughout the United States to take statements and assemble materials needed at trial. Accordingly, the rule of *Hickman*, if otherwise applicable, applies to materials gathered by Internal Revenue agents at the direct request of Department of Justice or Internal Revenue Service attorneys, at least after the case has reached the litigation stages.

In the ordinary tax case, a government attorney enters the picture only after there has been considerable investigative work by regular or special agents of the Internal Revenue Service. Materials assembled by such agents prior to the case being assigned to a government attorney are not protected by the attorney's work product privilege. 97 On the other hand, the attorney's work product rule would probably be applicable in a situation where a government attorney had entered the case even though litigation had not yet commenced. Support for this proposition is found in *Connecticut Mutual Life Ins. Co. v. Shields*. 98 The court there extended the attorney's work product privilege to investigation reports prepared by an attorney working in the plaintiff's legal

97. See Burke v. United States, 32 F.R.D. 213 (E.D.N.Y. 1953) (holding that reports of investigation of an accident secured by post office personnel before an action was filed by the injured party were not protected under the work product of the attorney rule); Royal Exchange Assurance v. McGrath, 13 F.R.D. 150 (S.D.N.Y. 1952) (holding the attorney's work product privilege inapplicable to reports of an investigator for the Department of Justice prepared before the lawsuit was commenced).
department even though such reports were completed before an action was actually begun, but when the reports were prepared "with an eye towards litigation." Thus, if it becomes obvious to the government representatives during the course of an audit that litigation will ensue and if, at that point, an attorney (acting as such for the United States) enters the case, it would seem that the attorney's work product rule is thereafter applicable with respect to materials secured by the attorney in preparation for trial or secured by others under the attorney's direction.

The attorney's work product rule, however, does not operate retroactively. Thus, revenue agents' reports and similar materials prepared or assembled prior to the time that a government attorney entered the case cannot be brought under the umbrella of the attorney's work product privilege by the simple device of being later incorporated into the government attorney's file.

The Government normally uses its attorneys only during the later stages of an audit (i.e., after the non-attorney government personnel and the taxpayer's representative have been unable to settle the matter short of litigation). On the other hand, taxpayers are inclined to use attorneys at earlier stages of the audit. Since much of the government's investigative material has been assembled prior to the government attorney's entry into the case, the coverage of the work product privilege is much narrower in the case of a government file than in the case of the file of a taxpayer's representative.

D. Attorney-Client Privilege

Several years ago there was a furor caused by the later reversed decision of the district court in Radiant Burners, Inc. v. American Gas Ass'n. which cast doubt upon the availability of the attorney-client privilege to other than individual clients. However, the law in this area seems to have jelled to the point where it can be assumed that the attorney-client privilege is applicable to communications between government employees and attorneys employed by the Department of Justice and the Internal Revenue Service to the same extent as it is to communications between private individual clients and their attorneys. Accordingly, in tax litigation, it should be assumed that

99. Id. at 7.
102. In Vogel v. Gruaz, 110 U.S. 311 (1884), the Supreme Court held privileged communications between a private citizen and a prosecuting attorney with respect to
discovery with respect to confidential communications between government employees and government attorneys will be inhibited by the attorney-client confidential communications privilege. But, since the attorney-client privilege is limited to confidential communications between the client and the attorney, the privilege would not be available with respect to communications between government attorneys and persons who are not government employees. For example, communications between independent real estate valuation experts and government attorneys would not be protected by the attorney-client privilege.

The unavailability of the privilege in such a situation can be important to a taxpayer’s lawyer who believes an expert interviewed by the government attorney may have expressed opinions or knows facts adverse to the government’s contentions.

V. THE FREEDOM OF INFORMATION ACT

On July 4, 1966, the President approved the bill which is popularly known as the Freedom of Information Act. The Act is an amendment of section 3 of the Administrative Procedure Act having to do with the duty of executive departments to make available to the public materials in the files of the departments. The Act became effective July 4, 1967 — one year after its approval. While the Act is not directed specifically at discovery procedures, its provisions and the legislative history are certain to influence courts in deciding what information must be made available by the Government in connection with civil tax litigation.

It is beyond the scope of this article to set forth a complete exposition of the Freedom of Information Act. However, certain provisions of this Act will affect the availability of information in the possession of the Internal Revenue Service, and, therefore, to the extent relevant, the Act will be considered.
The provision of the Freedom of Information Act most likely to become involved in discovery proceedings in tax litigation is the new section 3(c) of the Administrative Procedure Act which provides, in part:

Every agency shall, upon request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute and procedure to be followed, make such records promptly available to any person.

Read literally, the foregoing would seem to permit any taxpayer, whether or not involved in litigation, to demand all "identifiable records" having to do with his own affairs. The Act, however, provides certain exemptions from the agency duty to furnish records. The principal exemptions likely to be significant in tax litigation are those exempting matters which are: "trade secrets and commercial or financial information obtained from any person and privileged or confidential" (this would seem to exempt information with respect to other taxpayers' affairs but not information with respect to the litigating taxpayers' own affairs); "inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency" (this exemption would seem to be no more than an attempt to incorporate in the statute existing rules with respect to information privileged from discovery in litigation); and "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party" (here again, the exemption seems to be no more than an attempt to adopt by reference the myriad privilege rules developed through litigation).

One might well suppose on the basis of the just-quoted exemptions that the Freedom of Information Act puts litigating taxpayers in exactly the same position that they occupied prior to the adoption of the Act. In the opinion of this writer, this is not the situation, and, to the contrary, the Freedom of Information Act will, in time, considerably affect the availability of discovery against the United States in tax cases.

The Act provides that any person refused access to agency records may file a complaint in the district court for the district in which the party resides, has his principal place of business, or in which the agency records are situate, to enjoin the agency from withholding agency

106. Section 3(e) (4).
107. Section 3(e) (5).
108. See pp. 75-84 supra. The case law developments regarding discovery will have continued and increased significance because of the relationship to section 3(e) (5).
109. Section 3(e) (7).
records and for an order for the production of the same. This provision alone can have startling effects in connection with pretrial discovery. The provision for securing district court orders for the production of agency records is not limited to situations in which there is litigation pending or even contemplated. This means that a form of pre-petition discovery can be secured well in advance of the commencement of litigation. More importantly, the provision can have the effect of permitting taxpayers who are litigating, or intend to litigate, their tax liabilities in the Tax Court to engage in a form of discovery which, to date, has been largely unavailable in Tax Court proceedings. All of these observations and possibilities will probably be tested in litigation soon after the Act becomes effective.

In terms of the effect on discovery proceedings in litigation with the United States, the comments in the committee reports are as important as the text of the Freedom of Information Act. The committee reports reflect an unmistakable determination on the part of Congress to insure that the executive departments make full disclosures of their affairs except to the extent specifically inhibited by the Act itself or by other clear-cut rules of law. If there was ever any doubt about the proposition, the committee reports accompanying the Freedom of Information Act make it abundantly clear that it is the intention of Congress, wherever there is doubt with respect to the duty of executive departments to disclose matters to the public, to resolve the doubt in favor of disclosure. It is submitted that the courts, in deciding issues with respect to the breadth of discovery, will be influenced by this clear statement of policy on the part of congressional committees concerned with the problems affected by the Act.

On July 1, 1967, the Treasury Department published regulations with respect to the applicability of the Freedom of Information Act to the records and proceedings of the Internal Revenue Service. The new regulations recite the prior practice of the Internal Revenue Service in connection with publication in the Federal Register, the Internal Revenue Bulletins, and elsewhere of rules, regulations, and procedures of the Internal Revenue Service. The tenor of the new regulation gives little encouragement to any hope that the Freedom of

110. Section 3(c)(6). An interesting question may be precipitated by the fact that a recently proposed regulation (proposed Treas. Reg. § 601.702(b)(9), 32 Fed. Reg. 9545 (1967)) provides for an administrative appeal to the Commissioner when a request for records is denied. A one month period is specified as the maximum time in which an appeal must be decided. It seems at least arguable that a district court would not feel compelled to apply the common law doctrine requiring exhaustion of administrative remedies in light of the clear mandate in the Act to expeditiously handle suits instituted pursuant to section 3(c)(6).


Information Act will cause the Internal Revenue Service to become more liberal in making information available to taxpayers. The regulation states that the Freedom of Information Act does not require that letter rulings to taxpayers be made available to other taxpayers. The announced basis for this position is that such letter rulings do not have "precedential significance." Tax practitioners who have been refused favorable rulings or who have received adverse rulings on the basis of prior unpublished letter rulings to other taxpayers will dispute the proposition that such prior rulings do not have "precedential significance."

Less than a month before the Freedom of Information Act became effective, the Treasury Department published Treasury Decision 6920 instructing Internal Revenue Service employees with respect to procedures to be followed in the event they are subpoenaed to produce Internal Revenue Service records or to testify regarding information with respect to the Internal Revenue Service. The thrust of this regulation is that, absent expressly decreed procedures to the contrary, Service employees who are so subpoenaed are to respectfully decline to give information or produce records until the matter is reviewed by the Commissioner. Compliance with T.D. 6920 will greatly impede the progress of pretrial discovery through examination of Internal Revenue personnel. Unless the courts step in and limit the application of T.D. 6920, it is easy to imagine that the practice of revenue agents "taking the 6920th" will become more commonplace than criminal defendants "taking the fifth."

VI Conclusion

If pretrial discovery of matters within the knowledge of the Government is important to the proper presentation of a taxpayer's case, a refund suit in a federal district court is the best route to follow, a refund suit in the Court of Claims ranks as a close second, and a proceeding in the Tax Court runs a poor third. Nevertheless, there are encouraging signs that the Tax Court, of its own volition, or as a result of appellate court decisions, may be moving in the direction of adopting modern discovery procedures.
Because of the practically plenary power of the Government to discover all facts with respect to a taxpayer's case during the audit stages, the courts should be liberal in permitting broad discovery of the Government's side of a tax case once litigation has commenced.

The trend of decisions in the field of civil tax litigation, as in all fields of civil litigation, is in the direction of ever broader pretrial discovery. Likewise, the courts, in passing on objections to discovery based on testimonial privileges, shy away from absolutes and incline toward weighing considerations which counter-balance assertions of privilege. The just-stated generalization regarding testimonial privileges is particularly true with respect to the privileges which are peculiar to the Government, i.e., the executive privilege and the informer's privilege.