

# Electronic Tax Trials: Taking Advantage of the Tax Court's Electronic (North) Courtroom

*By Alex E. Sadler and Jennifer A. Ray*

Alex E. Sadler and Jennifer A. Ray review the Tax Court's electronic evidence presentation technology and offer practical suggestions to help Tax Court litigants take maximum advantage of the technology.

The authors have recently participated in two extended electronic trials (two weeks and five weeks, respectively) in the Tax Court's Electronic (North) Courtroom in Washington, D.C. Both trials involved a taxpayer's entitlement to the Code Sec. 41 research credit for expenditures incurred in conducting research and development activities in large-scale manufacturing facilities. The trials involved complex factual issues requiring the introduction of thousands of documents, expert reports, summaries and demonstrative exhibits relating to technical scientific and financial concepts. The electronic presentation technology available in the Tax Court's Electronic (North) Courtroom enhanced the parties' ability to present this evidence and related witness testimony in an organized, efficient and persuasive manner.

Done right, courtroom presentation technology gives the tax litigant a significant advantage. It facilitates the efficient use of exhibits. It streamlines courtroom presentations. It sends the message that the litigant is organized and well prepared. It focuses the court's attention on the relevant parts of exhibits. It allows the relevant parts of documents, diagrams or demonstrative aids to be emphasized by highlighting, annotating and zooming. Drawing from the authors' experience in preparing for and conducting these electronic tax trials, this article reviews the Tax Court's electronic evidence presentation

technology and offers practical suggestions to help Tax Court litigants take maximum advantage of the technology. While the discussion below focuses on the Tax Court's Electronic (North) Courtroom, the suggestions are relevant to any complicated tax trial.

## **When Use of the Electronic (North) Courtroom Is Appropriate**

Electronic evidence presentation is not appropriate for every case. Generally, the more complex the matter, the greater the value of the presentation technology. For simple points, a flip chart or poster board might suffice. However, if the stakes involved are high and the subject matter is complex, an electronic courtroom presentation is a smart investment.

Although the Electronic (North) Courtroom is a useful resource for the litigant already in the Tax Court, it should not be a factor in choosing a forum to litigate a tax dispute. An electronic trial is available in most refund tribunals, although the parties may have to bear the expense of bringing the presentation equipment to the courtroom.

## **Basic Electronic (North) Courtroom Procedures**

The Tax Court's Electronic (North) Courtroom's evidence presentation system consists of (1) flat panel monitors on counsel tables and the judge's bench;

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(2) touch screen flat panel monitors with annotation ability on the podium and witness stand; (3) a large flat panel monitor for the gallery; (4) audio/video connections at the podium and counsel tables for laptop computers; (5) an electronic presentation camera (typically referred to as an “Elmo”); (6) a video printer; and (7) a VCR. This presentation technology enables litigants to present documentary evidence to the Court and witnesses electronically, as opposed to the cumbersome, time-consuming and distracting exercise of handing out paper copies or flipping through exhibit notebooks. Exhibits can be highlighted and annotated by the witness, the questioner or a courtroom operator. The touch screen at the witness stand allows witnesses to circle or underline the important sections of a document. The marked-up version of the exhibit can be printed on the video printer and marked as a new exhibit.

The Electronic (North) Courtroom is generally available for all types of Tax Court proceedings, including trials, hearings, and conferences, upon joint request of the parties and approval of the presiding judge. Use of the electronic courtroom is not limited to specific types of cases, but it is intended “only in cases where the technology equipment is appropriate to the proceedings.”<sup>1</sup> Parties who wish to use the courtroom should file a written “Joint Motion to Calendar in the Electronic (North) Courtroom.” If the case has already been assigned to a judge, the parties may orally request use of the courtroom. If the request is granted, the presiding judge will reserve the electronic courtroom and issue an order calendaring the proceeding.<sup>2</sup> Court proceedings in the electronic courtroom are open to the public unless otherwise ordered and are recorded and transcribed.<sup>3</sup>

Once the proceeding has been calendared, the parties must submit a completed Technology Equipment Request Form to the Tax Court’s Office of Information Services (OIS). This form provides basic information regarding the case, the proceeding, and the parties’ anticipated equipment needs. It may be submitted jointly or separately, but must be received at least 30 days before the first day of the calendared proceeding. Counsel also must call the OIS to schedule a training session for all attorneys, legal assistants, consultants or other individuals who might use the

equipment. No person is allowed to use the technology equipment in the Electronic (North) Courtroom unless he or she has received the OIS training.<sup>4</sup>

## **Taking Maximum Advantage of the Electronic (North) Courtroom**

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For the well-prepared Tax Court litigant, the Electronic (North) Courtroom’s evidence presentation system streamlines and enhances arguments and witness

examinations. While it is still advisable to have at least one paper copy of all exhibits on hand in the courtroom, the technology equipment eliminates the need to bring extra copies or to prepare cumbersome exhibit binders. The equipment also eliminates the need for counsel to walk

paper copies of exhibits to the witness and clerk, and for witnesses to flip through pages of lengthy documents. All of these procedures necessitated by paper exhibits interrupt the flow of the advocate’s courtroom presentation, whether in an argument or an examination, and ultimately reduce the presentation’s effectiveness.

To take full advantage of this resource, counsel must know in advance of the courtroom presentation which documents he or she intends to use as exhibits, identify the parts of the exhibits to be emphasized and integrate the exhibits into the argument. All of these tasks must be completed sufficiently in advance of the trial or hearing to allow the exhibits to be loaded into an electronic presentation software program, to annotate the portions of the exhibits to be emphasized in the proceeding and to review the examination with the witness or moot the argument with client and colleagues.

Following are seven practical suggestions that will enable the Tax Court litigant and his team to take maximum advantage of the technology equipment available in the Electronic (North) Courtroom. The suggestions are presented sequentially from pretrial exhibit preparation through the courtroom presentation.

### **1. Identify All Potential Exhibits**

The party must first identify all documents to be used at the trial or hearing. All records produced

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during pretrial discovery, materials cited in expert reports and third-party sources such as relevant treatises should be reviewed. It is preferable to be over-inclusive in identifying potential trial exhibits. While there is usually no penalty for identifying an exhibit that is never used at trial, failure to identify a document might preclude the document's use at trial for other than impeachment purposes. The Tax Court's Standing Pretrial Order provides in pertinent part: "Any documents or materials which a party expects to utilize in the event of trial (except solely for impeachment), but which are not stipulated, shall be identified in writing and exchanged by the parties at least 14 days before the first day of the trial session."<sup>5</sup> The Tax Court will enforce the Standing Pretrial Order by striking exhibits not properly identified in advance of trial.<sup>6</sup> This practice is generally the same in federal district courts.<sup>7</sup>

## 2. Stipulate to All Potential Exhibits

Stipulations are "the bedrock of Tax Court practice."<sup>8</sup> The Tax Court requires that parties use stipulations to streamline factual and evidentiary issues before trial, including the identification of all trial exhibits.<sup>9</sup> This differs from practice in most federal district courts, where stipulations are typically used to identify only joint exhibits, and the parties exchange separate exhibit lists identifying all other exhibits they might use at trial. Tax Court Rule 91 requires the parties to stipulate to all exhibits as to which there is no dispute as to authenticity.<sup>10</sup> Objections on grounds of relevance and hearsay may be noted in the stipulation, but are not regarded as just cause for refusal to stipulate to a document.<sup>11</sup> Stipulated exhibits must be identified in separately paragraphs, numbered serially, and identified by a "P" if offered by the petitioning taxpayer (e.g., 1-P), "R" if offered by the IRS (e.g., 2-R) and "J" if offered jointly (e.g., 3-J).<sup>12</sup> Stipulated documents must either be annexed to or filed with the stipulation.<sup>13</sup>

## 3. Notify Your Opponent of Any Potential Nonstipulated Exhibits

If a party foresees the potential need to use a document at trial that, for whatever reason, has not been stipulated, it should inform the opposing party of the document in writing, and provide a copy of the document if it has not previously been provided, at least 14 days before the first day of trial absent an order to the contrary.<sup>14</sup> This may be done with a simple letter. As a precautionary matter, it is a good

practice to send a letter to opposing counsel by the court-specified deadline identifying broad categories of documents (e.g., "all documents produced by the parties in discovery," "all documents identified in petitioner's expert reports," etc.) that might possibly be used at trial.

## 4. Prepare Demonstrative Aids and Summaries

In factually complex cases, summary charts and demonstrative aids such as drawings, diagrams and time lines are invaluable for distilling and simplifying difficult concepts and illustrating and explaining witness testimony. Such pedagogical devices are extremely useful in complex tax trials. Summaries and demonstrative exhibits have the added benefit of making witness examinations, opening statement and arguments more efficient and engaging.<sup>15</sup>

The evidentiary rules governing summaries and demonstrative aids are straightforward. The Federal Rules of Evidence apply in Tax Court trials.<sup>16</sup> A summary of voluminous documents is admissible under Federal Rule of Evidence 1006 as long as the summary is accurate and the underlying documents are too voluminous to be conveniently examined in court, are admissible in evidence and were made available to the opposing party for inspection at a reasonable time and place.<sup>17</sup> Generally, a Rule 1006 summary can be admitted in place of the underlying documents.<sup>18</sup> Demonstrative aids are admissible so long as they are a substantially fair and accurate representation of the subject matter depicted.<sup>19</sup>

In the Tax Court's Electronic (North) Courtroom, summaries and demonstrative exhibits are displayed on the monitors on the bench, witness stand and counsel tables, so they are easily woven into courtroom presentations. Demonstratives can even be animated if the stakes are large enough to justify the cost. However, preparing demonstrative exhibits requires considerable advance thought and effort. In the Code Sec. 41 research credit trials mentioned above, the authors worked closely with graphic artists to develop demonstrative aids, such as scaled visual drawings of mechanical equipment, process flow diagrams, schematics of scientific concepts, organizational charts of corporate departments and time lines showing the chronological ordering of events. The electronic presentation of these exhibits greatly enhanced the flow, interest and understandability of witness testimony regarding complex scientific and financial subject matters.

## 5. Load Electronic Copies of Exhibits into a Trial Presentation Software Program

To be presented electronically in the courtroom, the exhibits, demonstrative aids and summaries must first be loaded into a trial presentation software program.<sup>20</sup> Dedicated trial presentation products include TrialDirector®, Sanction® and Exhibitor®. Trial presentation programs are designed to display and manipulate a variety of different document formats at the same time and are optimized to meet the needs of litigators. Counsel can either purchase a program or work through an outside trial consulting vendor. A trial consultant can assist you with loading exhibits into a litigation database, setting up the courtroom equipment, preparing demonstrative exhibits, dealing with any technical problems and operating the presentation technology.

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## 6. Retain a Proficient Courtroom Operator

Electronic courtroom presentation technology is only as good as the person operating it. A technology professional proficient with the technology is critical to the overall presentation and makes a tremendous difference in the courtroom. Whether the operator is someone on your staff or an outside trial consultant, he or she should be well trained with the technology. During the course of the trial, the operator will work very closely with the client, counsel, witnesses and others and will become an important member of the litigation team. Accordingly, counsel should take the time to interview potential operators to assess the depth of their in-court experience and request and contact references who have worked with the operators in a trial.

## 7. Make an Effective Courtroom Presentation

The courtroom operator's job is to follow the presenter's cues, both written and oral. To ensure a

seamless courtroom presentation, the attorney should prepare a detailed outline of the argument or witness examination for the operator to follow. Most attorneys prepare an outline before any courtroom presentation, regardless of whether exhibits are being presented electronically. To assist the courtroom operator, the outline should identify the exhibits to be used by exhibit numbers, the pages to be covered by page or Bates numbers and the specific parts of the exhibit to be highlighted or annotated. The out-

line enables the operator to have the exhibits ready before the presentation and to know when to have them ready to display on the courtroom monitors.

As with most aspects of litigation, practice makes perfect. Before making the presentation, the attorney should review the

outline with the operator and rehearse the presentation, ideally more than once. This gives the operator the opportunity to ask questions and ensures that the presenter and operator are on the same page. It also allows the operator to highlight, annotate or enlarge the relevant excerpts of exhibits in advance of the trial or hearing. If the presentation is a direct examination, it is good practice for the questioner, operator and witness to review the examination. This allows the witness to get comfortable with using the exhibits electronically and the operator to become familiar with the exhibits to be used. If the presenter needs to stray from the prepared presentation during trial, the presenter or an assistant can prompt the operator.

## Conclusion

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The satisfying part, of course, is actually using the electronic presentation technology in the courtroom. An effective courtroom presentation, whether an argument or witness examination, appears simple and seamless in the courtroom. Yet, as shown above it requires substantial advance preparation and coordination. The practice tips set forth above will assist Tax Court litigators in taking maximum advantage of the Tax Court's Electronic (North) Courtroom.

## ENDNOTES

- <sup>1</sup> *Guidelines for the Use of the Tax Court's Electronic (North) Courtroom 3* (May 17, 2004), available at [www.ustaxcourt.gov/press/051704\\_Electronic\\_Courtroom.pdf](http://www.ustaxcourt.gov/press/051704_Electronic_Courtroom.pdf).
- <sup>2</sup> *Id.*, at 3–4.
- <sup>3</sup> *Id.*, at 5.
- <sup>4</sup> *Id.*, at 4–5.
- <sup>5</sup> Tax Ct. Standing Pretrial Order 2–3 (Feb. 10, 2003), available at [www.ustaxcourt.gov/press/021003.pdf](http://www.ustaxcourt.gov/press/021003.pdf).
- <sup>6</sup> See, e.g., *J. Montoro*, 73 TCM 3113, Dec. 52,107(M), TC Memo. 1997-281: “Respondent’s failure to exchange the documents led to the type of surprise that the pretrial order and Rule 91 were designed to prevent. We conclude that [the exhibits] are not admissible.” (Internal citations omitted.) *Exxon Corp.*, 63 TCM 2067, Dec. 48,005(M), TC Memo. 1992-92: “We find that respondent is attempting to convince the Court to receive, under the guise of impeachment, material that was intended to be used as substantive evidence and that was not exchanged properly under the procedures set out in the Standing Pre-trial Order.”
- <sup>7</sup> See Fed. R. Civ. P. 16(c)(2)(G); James W. Moore et al., 2 MOORE’S MANUAL: FEDERAL PRACTICE AND PROCEDURE §§18.05[6][a], 18.63[4] (2000).
- <sup>8</sup> *Branerton Corp.*, 61 TC 691, 692, Dec. 32,479 (1974).
- <sup>9</sup> Tax Ct. R. 91(a); *L. Bussell*, 89 TCM 1032, Dec. 55,987(M), TC Memo. 2005-77: “Rule 91(a) requires that all parties stipulate all facts and documents to the fullest extent possible.”
- <sup>10</sup> Tax Ct. R. 91(a).
- <sup>11</sup> *Id.*
- <sup>12</sup> Tax Ct. R. 91(b).
- <sup>13</sup> *Id.*
- <sup>14</sup> Tax Ct. Standing Pretrial Order 1–2.
- <sup>15</sup> Kenneth S. Broun, 2 MCCORMICK ON EVIDENCE §214 (6th ed. 2006): “The potential of these aids for giving clarity and adding interest to spoken statements has brought about their widespread use.” MANUAL FOR COMPLEX LITIGATION (Third) §21.492 (1995): “Voluminous or complicated data should be presented at trial, whenever possible, through summaries, including compilations, tabulations, charts, graphs, and extracts.”
- <sup>16</sup> Tax Ct. R. 143(a); see also *B.W. McCampbell Est.*, 61 TCM 2263, Dec. 47,260(M), TC Memo. 1991-141.
- <sup>17</sup> See Fed. R. Evid. 1006; *H. Wapnick*, 83 TCM 1245, Dec. 54,652(M), TC Memo. 2002-45; *C. Tashjian*, 56 TCM 847, Dec. 45,216(M), TC Memo. 1988-566. Regarding the last requirement, two Federal Circuit Courts of Appeal have recently found that provision of documents or summaries one month before trial is a “reasonable time.” *Jamieson*, 427 F3d 394, 410–11 (6th Cir. 2005) (provision of documents timely when opposing party received notice of last summary one month before trial); *Fidelity Nat’l Title Ins. Co. v. Intercounty Nat’l Title Ins. Co.*, 412 F3d 745, 753 (7th Cir. 2005) (provision of hundreds of thousands of documents to opposing party 30 days before trial was “reasonable”).
- <sup>18</sup> *Weaver*, 281 F3d 228, 232 (D.C. Cir. 2002).
- <sup>19</sup> Kenneth S. Broun, 2 MCCORMICK ON EVIDENCE §214 (6th ed. 2006); Edward J. Imwinkelried, EVIDENTIARY FOUNDATIONS §4.07(2) (5th ed. 2002).
- <sup>20</sup> Before documentary exhibits and demonstrative aids can be loaded into a trial presentation software program, they first must be converted into an acceptable electronic format. The best formats are .tiff and .jpeg. While PDF files must also be converted, Excel and PCX files can be loaded directly into many presentation software programs.

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