

CC-2005-017

September 27, 2005

Subject: Interim Procedures for "Ballard"
Type Issues

Cancel Date: Upon incorporation
into the CCDM

On August 19, 2005, the Tax Court issued orders in approximately 120 cases (or groups of cases to the extent there are related dockets) that were previously tried by Special Trial Judges under T.C. Rule 183(a). A number of the cases were petitioned in the 1980's, and a number of the opinions issued in these cases date back to the early 90's, if not earlier. In each of these cases, the draft opinions of the Special Trial Judges (the Special Trial Judges' reports pursuant to Rule 183(b)) were adopted by one of the Tax Court's regular/senior judges and issued as opinions of the court. This is the process that was the subject of the Supreme Court's recent opinion in Ballard v. Commissioner, 544 U.S. ___, 125 S. Ct. 1270 (2005).

In each order, after referring to the Ballard opinion, the court states that it is attaching a copy of the Special Trial Judge's draft opinion to its order. In all but three of the orders, the court notes the decision in the case is final under section 7481 and remains in full force and effect. The remaining three orders do not contain the finality language, and relate to cases that are still pending in the Tax Court or are on appeal.

The orders and attached draft opinions were previously sent to the local field offices under normal procedures by the Docket, Records and User Fee Branch. We expect that at least some petitioners may file motions to vacate decisions based on the claim that the Special Trial Judge's draft opinion was unfavorably changed, possibly to the extent of affecting the outcome of the case, prior to being issued as a reported opinion by the court. Even in cases in which the draft opinion appears to be identical to the court's official opinion, motions to vacate or motions for a new trial may be filed on the basis that there was a denial of due process or that other defects existed in the manner in which the case was decided.

To facilitate our ability to respond properly to any motions that may be filed by affected petitioners, the following procedure should be followed in each case in which a Ballard-type order and draft opinion of a Special Trial Judge has been served:

Filing Instructions: Binder _____

NO: Circulate ___ Distribute ___ to: All Personnel ___ Attorneys ___ In: _____

Other _____

Electronic Filename: _____ Original signed copy in: CC:FM:PM:P _____

1. Each case subject to a Ballard-type order is to be immediately assigned to a field attorney. In order to be prepared to file a meaningful response to any motion filed by affected petitioners within the time prescribed by the court, the assigned attorney or other appropriate field office employee is to take immediate steps to have the closed legal file for the case retrieved from local closed files facilities or the appropriate Federal Records Center. If the closed legal file has been destroyed pursuant to our standard retention schedule or cannot otherwise be located after a diligent search has been conducted, this information should be communicated as soon as possible to attorney Jennifer Breen in Administrative Provisions and Judicial Practice Branch 3.
2. A Procedure and Administration attorney will review the draft opinion and compare it to the official opinion filed by the Tax Court, and will prepare a written report. If the draft opinion and the official opinion are consistent on all issues, this will be stated in the written report and no additional review will be required at this time. In each of the remaining cases, using sound judgment, the Procedure and Administration attorney will describe in the written report the variations between the draft opinion and the official opinion, other than insignificant stylistic or grammatical differences between the two documents. In addition, the written report will identify any material in the official opinion not appearing in the draft opinion, such as a discussion of additional bases in support of the court's holding, or any material previously included in the draft opinion that was omitted from the official opinion.
3. If a motion is filed by a petitioner or representative in response to an August 19th Ballard-type order, for example, a motion to vacate the decision or a motion for a new trial, the field attorney assigned to the case should immediately notify Jennifer Breen.

Additionally, if a petitioner files a pleading citing Ballard, e.g., a petition, or files any motion citing Ballard in support of the motion, the field attorney assigned to the case should immediately notify Jennifer Breen.

APJP Branch 3 will coordinate the review and any potential response by the Office of Chief Counsel for any matter subject to these procedures. Procedure and Administration will monitor the orders and other documents served daily by the court to determine if any Ballard-type issues are being raised by petitioners.

Questions regarding this Notice may be directed to Jennifer Breen at 202-622-7950.

/s/
Deborah A. Butler
Associate Chief Counsel
(Procedure & Administration)