***GlaxoSmithKline Holdings (Americas), Inc. v. Commissioner, 117 T. C. No. 1 (2001)***

The U. S. Tax Court granted a joint application by GlaxoSmithKline and the IRS Commissioner to perpetuate testimony of two former executives before a case officially commences, under Rule 82. The decision emphasizes the necessity of preserving crucial testimony due to the executives' advanced ages and the anticipated delay in trial, highlighting the court's discretion to prevent a failure of justice in complex tax disputes.

**Parties**

Plaintiff/Applicant: GlaxoSmithKline Holdings (Americas), Inc. (Glaxo), a holding company for a global pharmaceutical business headquartered in the United Kingdom. Defendant/Applicant: Commissioner of Internal Revenue (the Commissioner), representing the Internal Revenue Service of the United States.

**Facts**

Glaxo, a pharmaceutical holding company, has been under IRS examination since 1992 for its tax returns from 1989 to 1999. The Commissioner proposed adjustments to Glaxo's taxable income under section 482 of the Internal Revenue Code, which Glaxo disputed. Efforts to resolve the dispute through the advance pricing agreement program and the IRS Office of Appeals were unsuccessful. In 1999, Glaxo sought relief from double taxation for the years 1989 through 1997 under the U. S. - U. K. tax treaty's competent authority process, which is expected to be protracted. No notice of deficiency has been issued, and trial is not anticipated until 2005 or 2006. Glaxo and the Commissioner jointly applied to the Tax Court to perpetuate the testimony of Sir Paul Girolami and Sir David Jack, former Glaxo executives, due to their advanced ages (75 and 77 respectively), foreign residence, and the critical nature of their testimony to the section 482 adjustments. Both executives consented to the depositions, which were planned to be videotaped in Washington, D. C.

**Procedural History**

Glaxo and the Commissioner filed a joint application pursuant to Rule 82 of the Tax Court Rules of Practice and Procedure on May 7, 2001, to perpetuate the testimony of Sir Paul Girolami and Sir David Jack before the commencement of any case. The application was heard at the Tax Court's motions session in Washington, D. C. No objections were made to the application. The Tax Court, guided by judicial interpretations of Rule 27 of the Federal Rules of Civil Procedure, considered the application's merits and granted it on the basis that it could prevent a failure of justice.

**Issue(s)**

Whether the Tax Court should grant the joint application of Glaxo and the

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Commissioner to perpetuate the testimony of Sir Paul Girolami and Sir David Jack under Rule 82, given their advanced ages, foreign residence, and the anticipated delay in trial?

**Rule(s) of Law**

Rule 82 of the Tax Court Rules of Practice and Procedure allows for the taking of depositions before the commencement of a Tax Court case "to perpetuate testimony or to preserve any document or thing regarding any matter that may be cognizable in this Court. " The rule is derived from Rule 27(a) of the Federal Rules of Civil Procedure. To grant an application under Rule 82, the court must be satisfied that the perpetuation of the testimony may prevent a failure or delay of justice.

**Holding**

The Tax Court granted the joint application of Glaxo and the Commissioner to perpetuate the testimony of Sir Paul Girolami and Sir David Jack under Rule 82, finding that the perpetuation of their testimony could prevent a failure of justice due to their advanced ages, foreign residence, and the anticipated delay in trial.

**Reasoning**

The court's decision to grant the application was based on several key factors. First, it recognized that the dispute between Glaxo and the Commissioner over section 482 adjustments was likely to proceed to litigation, despite the absence of a notice of deficiency. Second, the court considered the significant risk that the testimony of Girolami and Jack would be lost due to their advanced ages (75 and 77 years old) and the potential for substantial delay in trial until 2005 or 2006. The court cited actuarial studies indicating a high probability that the executives might not survive or could suffer from mental impairment by the trial date. Third, the court distinguished this case from prior denials of Rule 82 applications, such as Reed v. Commissioner and Masek v. Commissioner, where the applicants failed to show a significant risk of lost testimony. In contrast, the court found that the current application satisfied the test articulated in Reed, which requires a showing that the testimony will, in all probability, be lost before trial. The court also noted that the application did not reflect an improper use of Rule 82 as a discovery device, as the proposed depositions were critical to the central issue of Glaxo's intercompany transfer pricing policies. Finally, the court referenced Texaco, Inc. v. Borda and DeWagenknecht v. Stinnes as analogous cases where depositions were granted to perpetuate testimony of elderly witnesses in the context of delayed trials.

**Disposition**

The Tax Court granted the joint application to perpetuate testimony before the commencement of a case, with appropriate terms and conditions to be set forth in the court's order. The court denied the applicants' request to include a discovery

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schedule in the order.

**Significance/Impact**

This decision underscores the Tax Court’s willingness to exercise its discretion under Rule 82 to prevent a failure of justice by perpetuating testimony in complex tax disputes. The ruling clarifies that the court will consider the age and health of potential witnesses, the likelihood of trial delays, and the critical nature of the testimony when evaluating such applications. The decision may encourage parties in similar situations to seek early preservation of testimony, particularly in cases involving elderly witnesses and protracted competent authority processes. The case also reinforces the distinction between the proper use of Rule 82 to perpetuate testimony and its improper use as a discovery tool, providing guidance for future applications under this rule.

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