...rt's decision and VACATE the contempt ...er against Mary Carol Cunningham.

Betty Ann FERGUSON, Petitioner–Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent–Appellee.

No. 90–4430

Summary Calendar.

United States Court of Appeals, Fifth Circuit.

Jan. 22, 1991.

Taxpayer filed petition. The United States Tax Court, Korner, J., dismissed for lack of prosecution, and appeal was taken. The Court of Appeals held that court abused its discretion in refusing testimony of taxpayer, who refused, on religious grounds, to swear or affirm.

Reversed and remanded.

1. Constitutional Law ⚬84(2)

Protection of free exercise clause ex...ds to all sincere religious beliefs; courts ... not evaluate religious truth. U.S.C.A. ...st.Amend. 1.

...itnesses ⚬227

...Court abused its discretion in refusing ...mony of witness who refused, on reli...s grounds, to swear or affirm, and who ...ead offered to testify accurately and ...pletely and to be subject to penalties ... perjury. U.S.C.A. Const.Amend. 1; Rules Evid.Rule 603, 28 U.S.C.A.

...liam S. Rose, Jr., Asst. Attys. Gen., Dept. of Justice, Tax Div., Washington, D.C., for respondent-appellee.

Appeal from a Decision of the United States Tax Court.

Before JOLLY, HIGGINBOTHAM, and JONES, Circuit Judges.

PER CURIAM:

Betty Ann Ferguson appeals the Tax Court's dismissal of her petition for lack of prosecution after she refused to swear or affirm at a hearing. We find the Tax Court's failure to accommodate her objections inconsistent with both Fed.R.Evid. 603 and the First Amendment and reverse.

I.

This First Amendment case ironically arose out of a hearing in Tax Court. Although the government's brief is replete with references to income, exemptions, and taxable years, the only real issue is Betty Ann Ferguson's refusal to "swear" or "affirm" before testifying at the hearing. Her objection to oaths and affirmations is rooted in two Biblical passages, Matthew 5:33–37 and James 5:12. The passages refer only to oaths and swearing, but Ms. Ferguson explains her objection to affirmations in her brief to this court:

> Appellant is forbidden to swear as evidenced by the Bible directive from her God, and since the word "oath" has become synonymous and interchangeable with the word "affirmation," and the word "swear" [has] become synonymous and interchangeable with the word "affirm," as is evidenced in 1 U.S.C. 1 and many other authorities, it is appellant's sincere belief that "affirmation" is just an "other oath" and "affirm" falls with "swear not *at all.*" Also, "affirmation" is the chosen form of those who denounce the very existence of God. Because of these things, "swear" and "affirm" ...

... preme Court of Louisiana in *Staton v. Faught*, 486 So.2d 745 (La.1986), as an alternative to an oath or affirmation:

> I, [Betty Ann Ferguson], do hereby declare that the facts I am about to give are, to the best of my knowledge and belief, accurate, correct, and complete.

Judge Korner abruptly denied her request, commenting that "[a]sking you to affirm that you will give true testimony does not violate any religious conviction that I have ever heard anybody had" and that he did not think affirming "violates any recognizable religious scruple." Because Ms. Ferguson could only introduce the relevant evidence through her own testimony, Judge Korner then dismissed her petition for lack of prosecution. She now appeals to this court.

II.

[1] The right to free exercise of religion, guaranteed by the First Amendment to the Constitution, is one of our most protected constitutional rights. The Supreme Court has stated that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972). *Accord Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 141, 107 S.Ct. 1046, 1049, 94 L.Ed.2d 190 (1987); and *Sherbert v. Verner*, 374 U.S. 398, 403, 83 S.Ct. 1790, 1793, 10 L.Ed.2d 965 (1963). The protection of the free exercise clause extends to all sincere religious beliefs; courts may not evaluate religious truth. *United States v. Lee*, 455 U.S. 252, 257, 102 S.Ct. 1051, 1055, 71 L.Ed.2d 127 (1982); and *United States v. Ballard*, 322 U.S. 78, 86–87, 64 S.Ct. 882, 886–887, 88 L.Ed. 1148 (1944).

Fed.R.Evid. 603, applicable in Tax Court under the Internal Revenue Code, 26 U.S.C. § 7453, requires only that a witness "declare that [she] will testify truthfully, by ... advisory committee notes accompanying Rule 603, Congress clearly intended to minimize any intrusion on the free exercise of religion:

> The rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required.

Accord Wright and Gold, *Federal Practice and Procedure* § 6044 (West 1990).

The courts that have considered oath and affirmation issues have similarly attempted to accommodate free exercise objections. In *Moore v. United States*, 348 U.S. 966, 75 S.Ct. 530, 99 L.Ed. 753 (1955) (per curiam), for example, the Supreme Court held that a trial judge erred in refusing the testimony of witnesses who would not use the word "solemnly" in their affirmations for religious reasons.

In *United States v. Looper*, 419 F.2d 1405, 1407 (4th Cir.1969), the Fourth Circuit held that the trial judge erred in refusing the testimony of a defendant who would not take an oath that referred to God. Specifically, Looper had told the trial judge, "I can't [take the oath] if it has God's name in it. If you ask me if I'll tell the truth, I can say that." The Fourth Circuit concluded that any form or statement that impressed on the mind and conscious of the witness the necessity for telling the truth would suffice as an oath citing proposed Rule 603. The opinion closed by advising trial judges faced with religious objections to an oath or affirmation "to make inquiry as to what form of oath or affirmation would not offend defendant's religious beliefs but would give rise to a duty to speak the truth." *Id.*

In *Gordon v. State of Idaho*, 778 F.2d 1397, 1400 (9th Cir.1985), the Ninth Circuit cited both *Moore* and *Looper* in reaching similar conclusion under Fed.R.Civ.P. 43(d), a provision parallel to Rule 603. Like Ms...