No. 03-184

In the Supreme Court of the United States

CLAUDE M. BALLARD AND MARY B. BALLARD,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
EILEEN J. O'CONNOR
Assistant Attorney General
KENNETH L. GREENE
STEVEN W. PARKS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

When a case is assigned to a Special Trial Judge of the Tax Court, the Special Trial Judge is to make a "report, including findings of fact and opinion, to the Chief Judge, and the Chief Judge will [then] assign the case to a Judge or Division of the Court." Tax Ct. R. 183(b). The Judge to whom the case is thus assigned "may adopt the Special Trial Judge's report or may modify it or may reject it in whole or in part * * * ." Tax Ct. R. 183(c). The questions presented in this case are:

1. Whether the Due Process Clause requires that the "original" report of the Special Trial Judge be disclosed to the parties.

2. Whether 26 U.S.C. 7482(a), which authorizes appellate review of Tax Court decisions, requires that the "original" report of the Special Trial Judge be disclosed to the parties.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

In the Supreme Court of the United States

No. 03-184

CLAUDE M. BALLARD AND MARY B. BALLARD,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 321 F.3d 1037. The opinion of the Tax Court (Pet. App. 19a-306a) is unofficially reported at 78 T.C.M. (CCH) 951.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 2003. The petition for rehearing was denied on May 5, 2003. Pet. App. 307a. The petition for a writ of certiorari was filed on August 4, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Claude Ballard was a senior vice-president of Prudential Life Insurance Co. of America. Acting with another vice-president of that company named Robert Lisle and a tax attorney named Burton Kanter, petitioner participated in a scheme in which persons seeking to do business with Prudential paid kickbacks for such business to Kanter. Kanter then funneled more than $3 million of that money to petitioner through a complex web of corporations, partnerships and trusts. Pet. App. 2a-4a. Petitioner received these kickback payments through a number of devices —such as deposits by Kanter into a corporation controlled by petitioner, sham loans by Kanter to petitioner, and sham consultant payments to members of petitioner's family. *Id.* at 4a.

Petitioner failed to report the kickbacks he received as income on his federal income tax returns. After discovering the kickbacks, the Commissioner issued notices of deficiency to petitioner, Kanter and Lisle for the resulting income tax deficiencies and civil fraud penalties. Pet. App. 5a.

2. Petitioner, Kanter and Lisle each sought review of the Commissioner's determinations in the Tax Court. Pet. App. 19a.

After their cases were consolidated in the Tax Court, the Chief Judge assigned them to be heard by Special Trial Judge D. Irvin Couvillion pursuant to 26 U.S.C. 7443A(b)(4). After a lengthy trial, the Special Trial Judge submitted a report on these consolidated cases to the Chief Judge as required by Tax Court Rule 183(b). The cases were then referred by the Chief Judge to Tax Court Judge Howard A. Dawson for decision. Pet. App. 5a-6a, 311a. On December 15, 1999, the Tax Court

issued an opinion in the consolidated cases which states that "[t]he Court agrees with and adopts the opinion of the Special Trial Judge, which is set forth below." *Id.* at 33a. This opinion of the Tax Court sustained the major portion of the deficiencies and penalties determined by the Commissioner.

3. Petitioner, along with Kanter and Lisle, thereafter filed a motion seeking access to "all reports, draft opinions or similar documents, prepared and delivered to the Court pursuant to Rule 183(b)." Pet. App. 6a. In the alternative, they asked the Tax Court to make a copy of such materials a part of the record in the case. *Ibid.*; App., *infra*, 1a. The Tax Court denied this motion, stating that (*id.* at 2a):

> In reviewing the Special Trial Judge's report, Judge Dawson gave due regard to the fact that Special Trial Judge Couvillion evaluated the credibility of witnesses, as reflected in the Memorandum Findings of Fact and Opinion (T.C. Memo. 1999-407), and he treated the findings of fact recommended by the Special Trial Judge as being presumptively correct. * * * [T]he provisions of section 7443A(b)(4) and Rule 183 were followed by the Court.

The Tax Court emphasized that "Petitioners appear not to appreciate the distinction between the special trial judges' authority to hear cases and prepare proposed findings and opinions under [26 U.S.C. 7443A(b)(4)] and their lack of authority actually to decide those cases, which is reserved exclusively for judges of the Tax Court." App., *infra*, 3a (quoting *Freytag* v. *Commissioner*, 501 U.S. 868, 874 (1991)). The Tax Court concluded that, "[i]n any event such materials are confidential and not subject to production because they relate to

the internal deliberative processes of the Court. Cf. Sec. 7460(b)." App., *infra*, 3a.

Petitioner then filed a second motion requesting that the Special Trial Judge's report be included in the record under seal. That motion was also denied by the Tax Court. Pet. App. 6a.

4. Petitioner then moved for reconsideration or for a new trial. Pet. App. 6a-7a. Attached to this motion was an affidavit of Randall G. Dick, counsel for Kanter. In that affidavit, Dick stated that he had been informed by two or three unnamed judges of the Tax Court that Special Trial Judge Couvillion had recommended in his "original" report that the kickback "payments made by 'the [persons seeking to do business with Prudential] were not taxable to the individual petitioners and that the fraud penalty was not applicable." *Id.* at 7a, 309a.

The Tax Court denied that motion in an order signed by Chief Judge Thomas B. Wells, Judge Dawson, and Special Trial Judge Couvillion. The court stated that "[t]he only official Memorandum Findings of Fact and Opinion by the Court in these cases is T.C. Memo. 1999-407, filed on December 15, 1999, by Special Trial Judge Couvillion, reviewed and adopted by Judge Dawson, and reviewed and approved by former Chief Judge Cohen." Pet. App. 314a-315a. The Tax Court stated that the alleged statements purportedly made to Dick were thus "irrelevant and immaterial." *Id.* at 314a. The court further stated that (*id.* at 315a):

> Judge Dawson states and Special Trial Judge Couvillion agrees, that, after a meticulous and time-consuming review of the complex record in these cases, Judge Dawson adopted the findings of fact and opinion of Special Trial Judge Couvillion, that Judge Dawson presumed the findings of fact recom-

mended by Special Trial Judge Couvillion were correct, and that Judge Dawson gave due regard to the circumstance that Special Trial Judge Couvillion evaluated the credibility of witnesses.

5. Petitioner, along with Kanter and Lisle, then filed petitions for mandamus in the Eleventh, Seventh, and Fifth Circuits, respectively, in which they sought orders directing Judge Dawson and the Tax Court to provide them with a copy of the "original" report prepared by Special Trial Judge Couvillion. In the alternative, they sought an order directing the Tax Court to describe any changes made to the initial report submitted by Special Trial Judge Couvillion. The petitions for writs of mandamus were denied. *In re Ballard*, No. 00-14762-H (11th Cir. Oct. 23, 2000); *In re Investment Research Associations & Sub. and Burton W. and Naomi R. Kanter*, No. 00-3369 (7th Cir. Dec. 15, 2000); *In re Estate of Robert W. Lisle*, No. 00-60637 (5th Cir. Sept. 18, 2000).

6. After the entry of final decisions, petitioner appealed to the Eleventh Circuit, Kanter appealed to the Seventh Circuit, and Lisle appealed to the Fifth Circuit. All three of these courts of appeals rejected the assertion that the proceedings in the Tax Court denied the taxpayers the due process of law. Pet. App. 1a-18a; *Kanter* v. *Commissioner*, 337 F.3d 833 (7th Cir. 2003); *Lisle* v. *Commissioner*, 341 F.3d 364 (5th Cir. 2003).

In the present case, the court of appeals emphasized that the fact that the order of the Tax Court was signed by the Special Trial Judge, as well as by the reviewing judge and the chief judge, demonstrates "that the report adopted by the Tax Court accurately reflected [the Special Trial Judge's] findings and opinion." Pet. App. 10a. Responding to the affidavit of the taxpayer's

counsel, who asserted that the opinion underwent changes prior to its final adoption by the Tax Court, the court stated that (*id.* at 9a-10a):

> Even assuming [this] affidavit to be true and affording Petitioners-Appellants all reasonable inferences, the process utilized in this case does not give rise to a due process concern. While the procedures used in the Tax Court may be unique to that court, there is nothing unusual about judges conferring with one another about cases assigned to them. These conferences are an essential part of the judicial process when, by statute, more than one judge is charged with the responsibility of deciding the case. And, as a result of such conferences, judges sometimes change their original position or thoughts. Whether Special Trial Judge Couvillion prepared drafts of his report or subsequently changed his opinion entirely is without import insofar as our analysis of the alleged due process violation pertaining to the application of Rule 183 is concerned. Despite the invitation, this court will simply not interfere with another court's deliberative process.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Petitioner asserts that his right to due process was violated when he has not given a copy of the "original" report of the special trial judge. Petitioner claims that he has a due process right to examine the "original" report (Pet. i, 7-27) because a special trial judge assigned to hear a case is the "fact-finder" (Pet. 3,

7-9, 11, 20, 22, 24) whose findings are to be reviewed under a "clearly erroneous" standard (Pet. 7, 9, 14, 17-20). Petitioner further contends that the special trial judge proposed findings that he owed no deficiencies and that the Tax Court disagreed with those proposed findings and persuaded the special trial judge to change his mind through assertedly impermissible "ex parte" communications with the Special Trial Judge (Pet. 7, 14, 20-23). Finally, petitioner asserts (Pet. 9, 23-24) that it is necessary to include the "original" report of the Special Trial Judge in the record so that the court of appeals may review the decision of the Tax Court "in the same manner and to the same extent as decisions of the district courts" (26 U.S.C. 7482(a)). Each of these contentions lack merit.

a. Sections 7443A(b)(1)-(3) and (c) of the Internal Revenue Code permit the chief judge to assign particular types of cases—which are ordinarily small cases—to be heard and decided by special trial judges. 26 U.S.C. 7433A(b)(1)-(3), (c). At the time relevant to this case, Section 7443A(b)(4) of the Code (now subsection (b)(5)) authorized the chief judge to assign "any other proceeding" to special trial judges for hearing and recommended decision only. 26 U.S.C. 7443A(b)(5). Any decision in this latter category of cases must be entered by a regular Tax Court judge. The present case, involving the concealed kickback income received by petitioner, was assigned to the special trial judge only for hearing and recommended decision under this statute. App., *infra*, 1a.

The Internal Revenue Code does not prescribe procedures to be employed by the Tax Court in its use of special trial judges. Instead, Congress has authorized the Tax Court to adopt rules prescribing such procedures. 26 U.S.C. 7443A(a), 7453. Rule 183 of the Tax

Court was adopted pursuant to this authority. That Rule neither authorizes nor requires disclosure to the parties of the reports and recommendations prepared by special trial judges. Instead, in light of the requirement that cases that are assigned only for hearing by a special trial judge must ultimately be decided by a regular judge of the Tax Court (26 U.S.C. 7443A(c)), Rule 183 notes that the reports prepared by the special trial judge merely "recommend" findings and that the judge to whom the chief judge assigns the case "may adopt the Special Trial Judge's report or may modify it or may reject it in whole or in part, or may direct the filing of additional briefs or may receive further evidence or may direct oral argument, or may recommit the report with instructions." Tax Ct. R. 183(c).

A judge of the Tax Court to whom a case is ultimately assigned may thus either (i) adopt or abandon the special trial judge's report in its entirety or (ii) modify or otherwise use the special trial judge's report as a step in the fact-finding process. Under Tax Court Rule 183, as well as under the deliberative processes of courts generally, communications between the judges (and special trial judges) to whom a case is assigned for disposition are not produced or disclosed to the parties. Pet. App. 2a-3a. See *Goetz* v. *Crosson*, 41 F.3d 800, 805 (2d Cir. 1994), cert. denied, 516 U.S. 821 (1995); *United States* v. *Crouch*, 566 F.2d 1311, 1316 (5th Cir. 1978); *In re Cook*, 49 F.3d 263, 265 (7th Cir. 1995); *Fayerweather* v. *Ritch*, 195 U.S. 276, 306-07 (1904). As the court of appeals emphasized in this case, "there is nothing unusual about judges conferring with one another about cases assigned to them." Pet. App. 9a.

b. It has, moreover, long been settled that, in cases in which due process requires a trial-type hearing, findings may be made by an officer who has "heard" the

evidence in the sense of having reviewed and considered the evidence. Due process does not mandate that the officer charged with making the findings and decision also have personally observed the testimony in the case. In *Morgan* v. *United States*, 298 U.S. 468 (1936), this Court explained that, while "[t]he one who decides must hear," this does not require personal observation of the witnesses (*id.* at 481-482) (emphasis added):

> Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense. And *to give the substance of a hearing*, which is for the purpose of making determinations upon evidence, *the officer who makes the determinations must consider and appraise the evidence which justifies them.*

In *Morgan*, the examiner who personally heard the testimony declined to prepare a tentative report that could then be subjected to argument and exceptions before the Secretary to whom the authority to enter the decision had been given by Congress. *Id.* at 475-476. In rejecting the contention that such a procedure was required, this Court stated that, "while it would have been good practice to have the examiner prepare a report and submit it to the Secretary and the parties, and to permit exceptions and arguments addressed to the points thus presented * * * we cannot say that that particular type of procedure was essential to the validity of the hearing * * * ." *Id.* at 478. Similarly, in *Utica Mutual Insurance Co.* v. *Vincent*, 375 F.2d 129, 131 (2d Cir.), cert. denied, 389 U.S. 839 (1967), the court rejected the contention that, "when there are issues of

credibility * * * no determination of fact may be made unless the decider has either seen the witnesses himself or has been furnished with a report as to credibility by another." The court stated that "[e]ven on issues where due process requires a 'trial type' hearing, the due process clause makes no such inexorable command." See *NLRB* v. *Mackey Radio & Tele. Co.*, 304 U.S. 333, 350-351 (1938).

In the analogous circumstance in which a case that has been tried by one judge of the Tax Court is then reviewed by the full Tax Court, Congress has made clear since the very origins of that court that the "original" opinion of the judge who presided at trial is to be excluded from the record.[1] Revenue Act of 1928, ch. 852, § 601, 45 Stat. 791 (codified at 26 U.S.C. 7460(b)). And, the courts of appeals have consistently rejected the contention that these procedures contravene due process. *Estate of Varian* v. *Commissioner*, 396 F.2d 753 (9th Cir.), cert. denied, 393 U.S. 962 (1968); *Heim* v. *Commissioner*, 251 F.2d 44 (8th Cir. 1958). See *Towers* v. *Commissioner*, 247 F.2d 233 (2d Cir. 1957), cert. deneid, 355 U.S. 914 (1958); *Halle* v. *Commissioner*, 175 F.2d 500, 504 (2d Cir. 1949), cert. denied, 338 U.S. 949 (1950); *Seaside Improvement Co.* v. *Commissioner*, 105 F.2d 990, 992 (2d Cir.), cert. denied, 308 U.S. 618 (1939).

c. Contrary to petitioner's contention, a regular judge of the Tax Court is not to limit his review of recommended findings of a special trial judge through

---

[1] There is no merit to petitioner's assertion (Pet. 16, 18 n.15) that *Universal Camera* v. *NLRB*, 340 U.S. 474 (1951), supports his contention that an "original" report of a special trial judge must be included in the record. In *Universal Camera*, it was the governing statute that required that an examiner's report be included in the record. *Id.* at 493. In the present case, neither 26 U.S.C. 7443A nor Rule 183 contains such a requirement.

application of a "clearly erroneous" or other deferential standard of review. The requirement of Rule 183 that "due regard" be given to the proposed findings of the special trial judge does not effectively transfer the authority to make decisions in such cases from the regular trial judges to the special trial judges. Congress has not granted authority to the chief judge of the Tax Court to allow special trial judges to decide cases that must be assigned to regular judges for decision. Regular judges are therefore not to defer to, or apply a "clearly erroneous" standard in reviewing, the proposed findings of special trial judges in such cases. See, *e.g.*, *Colorado* v. *New Mexico*, 467 U.S. 310, 317 (1984) (in reviewing exceptions to findings of a special master, the special master's findings "deserve respect and a tacit presumption of correctness" but "the ultimate responsibility for deciding what are correct findings of fact remains with us"); *Kanter* v. *Commissioner*, 337 F.3d at 843-844.[2]

---

[2] Prior to the adoption of the Tax Court's current rules, one court of appeals had held that the recommended findings of special trial judges of the Tax Court should be reviewed by a judge of the Tax Court under a clearly erroneous standard. *Stone* v. *Commissioner*, 865 F.2d 342 (D.C. Cir. 1989), rev'g *Rosenbaum* v. *Commissioner*, 45 T.C.M. (CCH) 825 (1983). As the Fifth Circuit pointed out in *Freytag* v. Commisisoner, 904 F.2d 1011 (1990), aff'd, 501 U.S. 868 (1991), however, *Stone* was decided under the prior rules of the Tax Court that provided that litigants were to be furnished with copies of special trial judges' proposed findings and conclusions and then given an opportunity to take exception thereto, with only the exceptions to be reviewed by a regular judge of the Tax Court. 904 F.2d at 1015 n.8. By eliminating those procedures, the Tax Court Rules now make it clear that review by a regular judge of a special trial judge's report is not an appellate review but is an exercise of the regular trial judge's original fact-finding authority. *Ibid.*

2. Petitioner also errs in asserting that Tax Court Rule 183 violates his rights to due process because it departs from "traditional practice" and common law (Pet. 12-13). At common law, tax controversies were resolved in a branch of the "court of exchequer" and were not "judicial controversies * * * according to the ordinary course of the common law or equity." *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 282 (1855). The Exchequer was analogous to an administrative agency. 9 W. Holdsworth, *A History of English Law* 239 (7th ed. 1926)); A. Carter, *A History of the English Courts* 51 (1944). Unlike litigation that must be assigned to an Article III court for adjudication, tax cases may be resolved in Article I legislative courts, for they are "public rights" cases which "Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Crowell* v. *Benson*, 285 U.S. 22, 51 (1932), *quoting Murray's Lessee*, 59 U.S. (18 How.) at 284; see *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 68, 70 n.22 (1982); *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929). There is thus no "traditional practice" or "common law" requirement that Tax Court judges operate in a manner precisely identical to Article III courts. Instead, "the Chief Judge [may] assign *any* Tax Court proceeding, regardless of complexity or amount, to a special trial judge for hearing and the preparation of proposed findings and written opinion." *Freytag* v. *Commissioner*, 501 U.S. at 877.

3. Petitioner claims, in the alternative (Pet. 24-25), that an "original" report of a special trial judge must be provided to the parties and included in the record in order for a court of appeals properly to review a decision of the Tax Court. Under 26 U.S.C. 7482(a), the

courts of appeals are to review "decisions" of the Tax Court "in the same manner and to the same extent" as decisions of the district courts in civil actions tried without a jury. The report of a special trial judge, however, is plainly *not* the "decision" of the Tax Court. 26 U.S.C. 7459; Tax Ct. R. 183(b). It is the decision of the Tax Court, not the recommendation of the special trial judge, that is the subject of the appellate jurisdiction of the courts of appeals.

Moreover, as the court of appeals emphasized in this case, "[t]he record reveals, and we accept as true, that the underlying report adopted by the Tax Court *is* Special Trial Judge Couvillion's." Pet. App. 10a (emphasis added). The Tax Court made that same factual determination in rejecting the identical arguments raised by petitioner in the proceedings below. App., *infra*, 2a; see pages 4-5, *supra*. These factual determinations, "concurred in by two lower courts" (*Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982)), do not warrant review by this Court. *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985).[3]

---

[3] Petitioner's insistent claim that the opinion agreed to and adopted by the Tax Court was not the opinion of the special trial judge is refuted by the record. Even assuming that the special trial judge had a view of petitioner's case at the time he submitted his "original" report that differed from the views that are reflected in the opinion ultimately entered in the case, it does not follow that the opinion adopted by the Tax Court was not, in fact, the opinion of the special trial judge. To the contrary, the opinion of the Tax Court (Pet. App. 33a) and an order signed by Special Trial Judge Couvillion himself (*id.* at 7a) make clear that the opinion of the court *does* accurately set forth the opinion reached by Special Trial Judge Couvillion. It is, of course, possible that Judge Couvillion may have revised his views of the case during the deliberative process, but "there is nothing unusual about judges conferring with one another about cases assigned to them * * * [a]nd, as a result

4. Petitioner asserts that the Tax Court routinely makes changes to the "original" reports prepared by special trial judges without telling the parties. Petitioner claims (Pet. 9-10) that this is evidenced by the absence of any indication in 765 cases decided since 1984 (when the Tax Court rules were changed to their current form) that the "original" report had been amended before its adoption by the Tax Court. During the period from 1976 through 1984, however, when parties were provided copies of reports of special trial judges and afforded an opportunity to file exceptions thereto (see note 2, *supra*), there were only six cases (out of approximately 680 decisions) in which the Tax Court did not adopt the opinion of the special trial judge. And, in only one of those opinions did the reviewing judge of the Tax Court disagree with or "reverse" the special trial judge. See *Kansas City So. Ry.* v. *Commissioner*, 76 T.C. 1067 (1981); *Narver* v. *Commissioner*, 75 T.C. 53 (1980); *Hilton* v. *Commissioner*, 74 T.C. 305 (1980); *La Fargue* v. *Commissioner*, 73 T.C. 40 (1979); *Richard* v. *Commissioner*, 69 T.C. 750 (1978); *C. Blake McDowell, Inc.* v. *Commissioner*, 67 T.C. 1043 (1977).[4] There is thus no factual basis for petitioner's unsupported assertion that when (as in the present case) the Tax Court issues an opinion that adopts the report of a special trial judge, it fails accu-

---

of such conferences, judges sometimes change their original position or thoughts." *Id.* at 9a.

[4] In several other cases (14 out of approximately 680 cases involving special trial judges that were decided between 1976 and 1984), the Tax Court adopted the opinion of the special trial judge with modifications that were, in most instances, described as "minor." See *Ocean Sands Holding Corp.* v. *Commissioner*, 41 T.C.M. (CCH) 1, 2 (1980).

rately to set forth the view of the special trial judge in the case.

Nor do the communications that occur among judges with a collaborative responsibility represent prohibited ex parte communications. As the Tax Court emphasized in this case, internal communications among judges and special trial judges are part of the internal deliberative process of the court. App., *infra*, 3a. As the court of appeals correctly observed, "there is nothing unusual about judges conferring with one another about cases assigned to them * * * [a]nd, as a result of such conferences, judges sometimes change their original position or thoughts" (Pet. App. 9-10a). See *Checkosky* v. *SEC*, 23 F.3d 452, 489-490 (D.C. Cir. 1994) ("[i]n agencies as in courts, votes are not final until decisions are final; and decisions do not become final until they are released, accompanied by an explanation of the reasons for the result"; "the exchange of draft opinions can and does change votes"). This form of collaborative judicial process, whether in the Tax Court or in other courts in which a shared decisional process occurs, does not violate due process.

5. The only appellate decisions that have addressed the questions presented in this case are fully in accord with the decision of the Eleventh Circuit in this case. The Seventh Circuit in *Kanter*, *supra*, and the Fifth Circuit in *Lisle*, *supra*, both rejected the assertion that the special trial judge procedures of Rule 183 violate the due process rights of taxpayers. In *Kanter*, the court concluded that Tax Court Rule 183(b) does not require disclosure of a special trial judge's "original" report and does not create a two-tier, appellate type relationship between a special trial judge and regular judge of the Tax Court. 337 F.3d at 843-844, 879-884. The court further held that the Rule does not require a

regular judge to review recommendations of a special trial judge under a clearly erroneous standard and does not prohibit collaboration between a special trial judge and regular judge. *Id.* at 840-844, 877- 879.

In concluding that due process does not require that a copy of the special trial judge's "original" report be provided to taxpayers, the Seventh Circuit in *Kanter* noted and agreed with the reasoning adopted by the Eleventh Circuit in this case. 337 F.3d at 843-844, 878-879. The Fifth Circuit reached the same conclusion in *Lisle*, 341 F.3d at 384. There is thus no conflict among the circuits nor other reason to warrant certiorari in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
EILEEN J. O'CONNOR
Assistant Attorney General
KENNETH L. GREENE
STEVEN W. PARKS
Attorneys

OCTOBER 2003

APPENDIX

UNITED STATES TAX COURT
Washington, D.C. 20217

Docket Nos. 43966-85,712-86, 45273-86, 1350-87, 31301-87, 33557-87, 3456-88, 30830-88, 32103-88, 27444-89, 16421-90, 25875-90, 26251-90, 20211-91, 20219-91, 21555-91, 21616-91, 23178-91, 24002-91, 1984,92, 16164-92, 19314-92, 23743-92, 26918-92, 7557-93, 22884-93, 25976-93, 25981-93

INVESTMENT RESEARCH ASSOCIATES LTD., AND SUBSIDIARIES, ET AL, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ORDER

On April 20, 2000, petitioners filed a document entitled Motion for Access to Original Special Trial Judge Report Prepared Under Rule 183(b) and a supporting Memorandum of Points of Authorities. The motion seeks access to "all reports, draft opinions or similar documents prepared and delivered to the Court pursuant to Rule 183(b)". If the motion is denied, petitioners request that the Court certify the issue for an interlocutory appeal pursuant to Rule 193, Tax Court Rules of Practice and Procedure. In the alternative, petitioners have requested that "a copy of the requested materials be made part of the record herein for review by the Circuit Court of Appeals".

These consolidated cases were assigned by the Chief Judge to be heard by Special Trial Judge Couvillion pursuant to section 7443A(b)(4), Internal Revenue Code, and Rule 183(a). They were heard in Chicago, Illinois. After a lengthy trial, consisting of testimonial and voluminous documentary evidence, and the filing of briefs (totaling 4,768 pages with respect to 41 litigated issues), Special Trial Judge Couvillion submitted his report containing findings of fact and opinion pursuant to Rule 183(b), which ultimately became the Memorandum Findings of Fact and Opinion (T.C. Memo. 1999-407) filed on December 15, 1999.

In accordance with Rule 183(c), the Chief Judge referred the cases to Judge Dawson for review and, if approved, for adoption. In reviewing the Special Trial Judge's report, Judge Dawson gave due regard to the fact that Special Trial Judge Couvillion evaluated the credibility of witnesses, as reflected in the Memorandum Findings of Fact and Opinion (T.C. Memo. 1999-407), and he treated the findings of fact recommended by the Special Trial Judge as being presumptively correct.

The report of the Special Trial Judge, as adopted by Judge Dawson, was then submitted to and reviewed and approved by the Chief Judge, who directed that it be filed as the Court's Memorandum Findings of Fact and Opinion. Thus the provisions of section 7443A(b)(4) and Rule 183 were followed by the Court. See *Freytag v. Commissioner*, 501 U.S. 868, 871-875(1991), affg. 904 F.2d 1011, 1014-1015 (5th Cir. 1990); *Erhard v. Commissioner*, 46 F.3d 1470, 1475-1476 (9th Cir. 1995), which involved identical procedures.

Contrary to petitioners' assertion, the procedures pertaining to United States magistrate judges under 28

U.S.C., Sec. 636(b)(1) in hearing nonjury civil cases are different from those governing special trial judges under section 7443A(b)(4), I.R.C. and Rule 183. In particular, consent of the parties is not required in cases heard by special trial judges; and there is no requirement under Rule 183 that the findings of fact and opinion of a special trial judge be served on the parties and made subject to objections before being assigned to a judge for review and adoption. The Supreme Court expressly stated in *Freytag v. Commissioner*, 501 U.S. at 874:

> Petitioners appear not to appreciate the distinction between the special trial judges' authority to hear cases and prepare proposed findings and opinions under subsection (b)(4) and their lack of authority actually to decide those cases, which is reserved exclusively for judges of the Tax Court.

Therefore, petitioners' motion requesting access to any internal Court documents, including any preliminary drafts of reports or opinions, documents, memorandums or notes by judges, special trial judges or employees of the Court, will be denied. In any event such materials are confidential and not subject to production because they relate to the internal deliberative processes of the Court. Cf. Sec. 7460(b); *Estate of Varian v. Commissioner*, 396 F.2d 753, 754-755, n.2 (9th Cir. 1968), affg. 47 T.C. 34 (1966); *Heim v. Commissioner*, 251 F.2d 44, 48 (8th Cir. 1958), affg. 27 T.C. 270 (1956).

Petitioners next contend that the denial of their motion for production of documents requires the Court to certify the issue for the interlocutory appeal pur-

suant to section 7482(a)(2), I.R.C., and Rule 193, Tax Court Rules of Practice and Procedure.

Section 7482(a)(2) provides in pertinent part:

> (a) Jurisdiction.—
>
> (2) Interlocutory orders.—
>
> (A) In general.—When any judge of the Tax Court includes in an interlocutory order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals may, in its discretion, permit an appeal to be taken from such order, if application is made to it within 10 days after the entry of such order.
>
> * * *

In sum, certification of an order pursuant to section 7482(a)(2) is appropriate where the judge verifies that the order: (1) Involves a controlling question of law, (2) with respect to which there is a substantial ground for difference of opinion, and (3) an immediate appeal from that order may materially advance the ultimate termination of the litigation. Failure to meet any one of the three requirements is grounds for denial of certification. See *General Signal Corp. v. Commissioner*, 104 T.C. 248, 251 (1995), citing *Kovens v. Commissioner*, 91 T.C. 74, 77 (1988).

As explained in *Kovens v. Commissioner*, *supra* at 78, the proper application of section 7482(a)(2) requires

a balancing of the policies favoring interlocutory appeals, i.e., avoidance of wasted trial and harm to litigants, against the policies underlying the so-called final judgment rule, i.e., avoidance of piecemeal litigation and dilatory and harassing appeals. In *Kovens*, we observed:

> If the avoidance of wasted trial is taken as the sole guide, a multitude of interlocutory opinions will become appealable. This is contrary to the intent of the draftsmen and proponents of 28 U.S.C. sec. 1292(b) (1958) and section 7482(a)(2), who were of the view that interlocutory orders should be granted only in exceptional cases. See 3 U.S. Code Cong. & Admin. News, at 5255, 5259, 5260-5261 (1958). Such a desire to limit availability of this process to exceptional cases reflects a strong policy in favor of avoiding piecemeal review and its attendant delay and waste of time. * * * [Id.]

Petitioners contend that these cases involve a controlling question of law for which there is a substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation. We disagree. We are not persuaded that there are substantial grounds for difference of opinion on the points raised in petitioners' motion. Likewise, the issues presented and decided in *Investment Research Associates, Ltd., and Subsidiaries, et al. v. Commissioner*, T.C. Memo. 1999-407, do not justify certification for immediate appeal. Final decisions in those cases have not yet been entered by this Court. In our view an immediate appeal on the issues raised in petitioners' motion would not materially advance the ultimate termination of the litigation in these cases, but

rather prolong it, thus defeating the purpose of section 7482(a)(2).

Considering all of the circumstances, and balancing the policies underlying section 7482(a)(2) against the final judgment rule, these cases do not represent the type of exceptional cases warranting an interlocutory appeal. Consequently, we will deny petitioners' request for certification for an interlocutory appeal.

Finally, for reasons previously stated, we will deny petitioners' request that copies of any of the requested materials be made a part of the record in these cases for review by the Circuit Court of Appeals. See *Estate of Varian v. Commissioner*, *supra*.

Accordingly, after due consideration, it is **ORDERED**:

1. That petitioners' Motion for Access to Original Special Trial Judge Report Prepared Under Rule 183(b) is denied in all respects.

2. That petitioners' request to certify this issue for an interlocutory appeal pursuant to section 7482(a)(2), I.R.C., and Rule 193, is denied.

3. That petitioners' request that a copy of the requested materials be made a part of the record in these cases for review by the Circuit Court of Appeals is denied.

/s/ HOWARD A. DAWSON, JR.
HOWARD A. DAWSON, JR.
Judge

Dated: Washington, D.C.
April 26, 2000