SUPREME COURT OF THE UNITED STATES

Nos. 03–184 and 03–1034

CLAUDE M. BALLARD, ET UX., PETITIONERS
03–184 *v.*
COMMISSIONER OF INTERNAL REVENUE

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

ESTATE OF BURTON W. KANTER, DECEASED, ET AL., PETITIONERS
03–1034 *v.*
COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[March 7, 2005]

JUSTICE KENNEDY, with whom JUSTICE SCALIA joins, concurring.

I concur in the opinion of the Court and note some points that may be considered in further proceedings, after the cases are remanded.

The Court is correct, in my view, in holding, first, that Tax Court Rule 183(c) mandates "that deference is due to factfindings made by the [special] trial judge," *ante*, at 12, and, second, that "it is the Rule 183(b) report . . . that Rule 183(c) . . . instructs the Tax Court to review and adopt, modify, or reject," *ante*, at 16.

The latter holding is supported by the most natural reading of the text of Rule 183. Accepting the Commissioner of Internal Revenue's contrary construction would require reading the word "report" in subdivisions (b) and (c) to mean two different things. One additional indication in the text, moreover, is contrary to the Commissioner's

position. Rule 183(c) authorizes the Tax Court judge to "recommit the report with instructions" to the special trial judge. Recommittal is generally a formal mechanism for initiating reconsideration or other formal action by the initial decisionmaker. See, *e.g.,* Fed. Rule Civ. Proc. 72(b) ("The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions"); Fed. Rule Civ. Proc. 53(e)(2) (amended 2003) ("The court after hearing may adopt the [special master's] report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions"); cf. *Kansas* v. *Colorado,* 543 U. S. ___, ___ (2004) (slip op., at 17) ("We accept the Special Master's recommendations and recommit the case to the Special Master for preparation of a decree consistent with this opinion"). Given that Tax Ct. Rule 183(c) provides a formal channel for the Tax Court judge to send a report back to the special trial judge for reconsideration, it is difficult to interpret the Rule to permit the informal process the Commissioner and the dissenting opinion defend here.

If the Tax Court deems it necessary to allow informal consultation and collaboration between the special trial judge and the Tax Court judge, it might design a rule for that process. If, on the other hand, it were to insist on more formality—with deference to the special trial judge's report and an obligation on the part of the Tax Court judge to describe the reasons for any substantial departures from the original findings—without requiring disclosure of the initial report, that would present a more problematic approach. It is not often that a rule requiring deference to the original factfinder exists, but the affected parties have no means of ensuring its enforcement.

That brings us to the questions of how these cases should be resolved on remand and how the current version of the Rule should be interpreted in later cases. As to the

former, this question is difficult because we do not know what happened in the Tax Court, a point that is important to underscore here. From a single affidavit, the majority extrapolates "a novel practice" whereby the Tax Court treats the initial special trial judge report as "an in-house draft to be worked over collaboratively by the regular judge and the special trial judge." *Ante*, at 14. I interpret the opinion as indicating that there might be such a practice, not that there is. The dissent, in contrast, appears to assume that any changes to the initial report were the result of reconsideration by the special trial judge or informal suggestions by the Tax Court judge. *Post*, at 4 (opinion of REHNQUIST, C. J.). Given the sparse record before us, I would not be so quick to make either assumption, particularly given that the Commissioner, charged with defending the Tax Court's decision, is no more privy to the inner workings of the Tax Court than we are.

Given the lingering uncertainty about whether the initial report was in fact altered or superseded, and the extent of any changes, there are factual questions that still must be resolved. If the initial report was not substantially altered, then there will have been no violation of the Rule. If, on the other hand, substantial revisions were made during a collaborative effort between the special trial judge and the Tax Court judge, the Tax Court might remedy that breach of the Rule in different ways. For instance, it could simply recommit the special trial judge's initial report and start over from there. More likely in these circumstances the remedy would be for the Tax Court to disclose the report that Judge Couvillion submitted on or before September 2, 1998.

This leads to the question of how Rule 183 should be interpreted in future cases. Rule 183's requirement of deference to the special trial judge surely implies that the parties to the litigation will have the means of knowing whether deference has been given and of mounting a

challenge if it has not. Thus, a reasonable reading of the Rule requires the litigants and the courts of appeals to be able to evaluate any changes made to the findings of fact in the special trial judge's initial report. Including the original findings of fact in the record on appeal would make that possible.

All of these matters should be addressed in the first instance by the Courts of Appeals or by the Tax Court.

With these observations, I join the Court's opinion.