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]

CHIEF JUSTICE REHNQUIST, with whom JUSTICE THOMAS joins, dissenting.

The Court reverses the judgments of the Courts of Appeals on the ground that Tax Court Rule 183 does not "authorize the practice that the Tax Court now follows." *Ante*, at 22.[1] I disagree. The Tax Court's compliance with

[1] It bespeaks the weakness of the taxpayers' arguments that the Court hinges its conclusion on an argument not even presented for our consideration. See Tr. of Oral Arg. 46 (Deputy Solicitor General Hungar noting that compliance with Rule 183 was not included within the questions presented). This Court does not consider claims that are not included within a petitioner's questions presented. See this Court's Rule 14.1(a); *Yee* v. *Escondido,* 503 U. S. 519, 535–538 (1992). Two of the taxpayers' three claims included in the four questions presented do not even mention Rule 183, instead claiming violations of due process, U. S. Const., Art. III, and governing federal statutes, 26 U. S. C. §§7459, 7461, and 7482. The only question presented that mentions Rule 183 is limited to asking whether Rule 183 requires the Tax Court

its own Rules is a matter on which we should defer to the interpretation of that court. I therefore dissent.

The Tax Court interprets Rule 183 not to require the disclosure of the report submitted by the special trial judge pursuant to paragraph (b) when the Tax Court judge adopts the special trial judge's report. In 1983, the Tax Court amended the Rule to eliminate the requirement that the special trial judge's submitted report be disclosed to the parties so that they could file exceptions before the Tax Court judge acted on the report. See Tax Ct. Rule 183 note, 81 T. C. 1069–1070 (1984). The 1983 amendment also changed the Rule to require that the special trial judge "submit" his report to the Chief Judge instead of "file" it, see Tax Ct. Rule 182(b), 60 T. C. 1150 (1973), thereby removing the initial report from the appellate record. See Fed. Rule App. Proc. 10(a)(1) (requiring the record on appeal contain "the original papers and exhibits *filed* in the district court" (emphasis added)).[2]

Consistent with these amendments, in an opinion signed by Judge Dawson, Special Trial Judge Couvillion, and Chief Judge Wells, the Tax Court held that disclosure of the Rule 183(b) report was not required in these cases because "[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."

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to uphold findings of fact made by a special trial judge unless they are "'clearly erroneous.'" Kanter Pet. for Cert. (i). Nor was this argument contained within the taxpayers' certiorari petitions or in their briefs submitted to the Courts of Appeals. See *Lopez* v. *Davis,* 531 U. S. 230, 244, n. 6 (2001). Only by failing to abide by our own Rules can the Court hold that the Tax Court failed to follow its Rules.

[2] By contrast, a "magistrate shall *file* his proposed findings and recommendations . . . with the court and a copy shall forthwith be mailed to all parties." 28 U. S. C. §636(b)(1)(C) (emphasis added).

Order of Aug. 30, 2000, in No. 43966–85 etc. (TC), App. to Kanter Pet. for Cert. 102a (hereinafter Order of Aug. 30, App. to Kanter Pet. for Cert.).[3] The Commissioner's brief makes clear that any changes that might exist between the special trial judge's initial opinion and his final opinion "would presumptively be the result of the [special trial judge's] legitimate reevaluation of the case." Brief for Respondent 11; accord, Brief for Appellee in No. 01–17249 (CA11), pp. 92–93; Brief for Appellee in No. 01–4316 etc. (CA7), pp. 122–123. Thus, consistent with its practice during the more than 20 years since Rule 183 was adopted in its current form, the Tax Court interprets Rule 183 as not requiring disclosure of "any preliminary drafts of reports or opinions." Order of Apr. 26, 2000, in No. 43966–85 etc. (TC), App. to Kanter Pet. for Cert. 109a.

Because this interpretation of Rule 183 is reasonable, it should be accepted. An agency's interpretation of its own rule or regulation is entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock & Sand Co.,* 325 U. S. 410, 414 (1945); see also *United States* v. *Cleveland Indians Baseball Co.,* 532 U. S. 200, 219–220 (2001); *Martin* v. *Occupational Safety and Health Review Comm'n,* 499 U. S. 144, 150–157 (1991).[4]

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[3] See also Order of Aug. 30, App. to Kanter Pet. for Cert. 102a ("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, . . . Judge Dawson presumed the findings of fact recommended by Special Trial Judge Couvillion were correct, and . . . Judge Dawson gave due regard to the circumstance that Special Trial Judge Couvillion evaluated the credibility of witnesses"); Order of Apr. 26, 2000, in No. 43966–85 etc. (TC), *id.*, at 108a (noting that findings of fact and credibility assessments made by Special Trial Judge Couvillion were "reflected in the Memorandum Findings of Fact and Opinion (T. C. Memo. 1999–407)").

[4] Though the Tax Court is an Article I court and not an executive agency, *Freytag* v. *Commissioner,* 501 U. S. 868, 887–888 (1991), there

Notwithstanding the deference owed the Tax Court's legitimate interpretation of this Rule, the Court reads the Rule as requiring disclosure of the submitted report because paragraph (c) requires action on "the Special Trial Judge's *[initial]* report." See *ante*, at 16 (internal quotation marks omitted). To the contrary, Rule 183 mandates only that action be taken on "the Special Trial Judge's report." The Rule is silent on whether the special trial judge may correct technical or substantive errors in his original report after it is submitted to the Chief Judge and before the Tax Court judge takes action, either on his own initiative or by informal suggestion. Paragraph (c)'s use of the possessive "Special Trial Judge's report" is most naturally read to refer to the report authored and ascribed to by the special trial judge.[5] If the special trial judge changes his report, then the new version becomes "the Special Trial Judge's report." It is the special trial judge's signature that makes the report attributable to him. At the very least, it is not unreasonable or arbitrary for the Tax Court to construe the Rule as not requiring the disclosure of preliminary drafts or reports.[6] See *Estate of*

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is no reason why *Seminole Rock* deference does not extend to the Tax Court's interpretation of its own procedural rules. See *ante*, at 17 ("[T]he Tax Court is not without leeway in interpreting its own Rules").

[5] There can be no claim made that Tax Court Judge Dawson, and not Special Trial Judge Couvillion, wrote and controlled the content of the report. See, *e.g.*, Brief for Respondent 11 (noting that any changes to a special trial judge's report "would presumptively be the result of the STJ's legitimate reevaluation of the case"); Tr. of Oral Arg. 31 ("The only way it is possible for there to be a change is for the special trial judge himself to determine, in the exercise of his responsibility as a judicial officer, that he made a mistake"); Order of Aug. 30, App. to Kanter Pet. for Cert. 102a (indicating the adopted report was written "by Special Trial Judge Couvillion" and "adopted by Judge Dawson").

[6] Indeed, following the Court's interpretation that a Tax Court judge must act on the report submitted pursuant to paragraph (b), a Tax Court judge would be required to presume correct any factual findings that a special trial judge had disclaimed. For example, if the Special

Kanter v. *Commissioner*, 337 F. 3d 833, 841 (CA7 2003) ("[I]t is clear that the Tax Court's own rules do not require the report to be disclosed . . .").

Nor does the Court's claim that judicial review is impeded withstand scrutiny. Because paragraph (c) can be read, as the Tax Court does, to permit the adoption of the report authored and signed by the special trial judge, the Courts of Appeals both determined that Tax Judge Dawson expressly adopted Special Trial Judge Couvillion's report. *Id.*, at 840–841; *Ballard* v. *Commissioner*, 321 F. 3d 1037, 1038–1039 (CA11 2003). There can be no doubt that in *adopting* Special Trial Judge Couvillion's findings of fact as well as his legal conclusions in their entirety, Tax Court Judge Dawson complied with whatever degree of deference is required by Rule 183(c).

Contrary to the Court's claimed distinctions, the statutory requirement that a Tax Court judge's initial opinion not be published when the Chief Judge directs that such opinion be reviewed by the full Tax Court is quite analogous to the Tax Court's interpretation of Rule 183. See 26 U. S. C. §7460(b); *Estate of Varian* v. *Commissioner*, 396 F. 2d 753 (CA9 1968). A Tax Court judge whose decision is being reviewed may dissent from the full court's decision. Similarly, the special trial judge may choose not to change his initial findings of fact and opinion. In order to distinguish §7460(b), the Court implies that Tax Court Judge Dawson exercised, or at least may have exercised, undue influence or improper control over Special Trial Judge Couvillion.[7] See *ante*, at 20. This Court generally

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Trial Judge, after submitting a copy of his report to the Chief Judge, found a critical typographical error that the Tax Court judge might not recognize as such, then the Tax Court judge would be required, under the Court's view, to defer to the report as initially drafted instead of a corrected version of the report.

[7]Any implication that Judge Dawson used his higher "rank" to exert improper influence or control is particularly inapt in these cases: Judge

does not assume abdication or impropriety, see *Freytag* v. *Commissioner,* 501 U. S. 868, 872, n. 2 (1991); *United States* v. *Morgan,* 313 U. S. 409, 422 (1941); *Fayerweather* v. *Ritch,* 195 U. S. 276, 306 (1904), and should not impugn the integrity of judges based on an unsubstantiated, non-specific affidavit.[8]

In sum, Rule 183 is silent on the question whether the report submitted to the Chief Judge pursuant to paragraph (b) must be the same report acted on by the Tax Court judge under paragraph (c). This Court should therefore defer to the Tax Court's interpretation of the Rule, as amended in 1983, allowing the disclosure of only the special trial judge's report that was adopted by the Tax Court judge.

As every Court of Appeals to consider the arguments has concluded, the taxpayer's statutory and constitutional arguments are not colorable. See *Estate of Lisle* v. *Commissioner*, 341 F. 3d 364, 384 (CA5 2003); *Estate of Kanter* v. *Commissioner*, *supra*, at 840–843; *Ballard* v. *Commissioner*, *supra*, at 1042–1043. I agree with those conclusions.[9]

Dawson, as a retired Tax Court judge recalled into duty by the Chief Judge, has absolutely no authority over Special Trial Judge Couvillion as both serve at the will of the Tax Court's Chief Judge. See 26 U. S. C. §§7443A, 7447(c).

[8]The mere absence of any post-1983 decisions in which a Tax Court judge disagreed with a special trial judge does not support the Court's broad charges. A similar degree of agreement was evident *prior* to 1983 when the special trial judge's report was filed and served on the parties, who had the opportunity to file exceptions. From 1976 to 1983, for example, less than one percent (6 out of 680) of special trial judge reports were not adopted by the Tax Court judge, only 1 case reversed the special trial judge, and only 14 cases involved adoption with mostly minor modifications. See Brief for Respondent 17–18, and n. 4.

[9]With respect to the taxpayers' statutory arguments, 26 U. S. C. §§7459 and 7461 require only the disclosure of reports adopted by the Tax Court and not those reports that are not adopted. See §§7459 ("shall be the duty of the Tax Court . . . to include in *its* report upon any proceeding its findings of fact or opinion or memorandum opinion"

For these reasons, I would affirm the Courts of Appeals.

(emphasis added)), 7461 ("[R]eports *of the Tax Court*" shall be public records) (emphasis added). Section 7482, which requires courts of appeals to review "decisions of the Tax Court" in the same manner as they review similar district court decisions, was passed to eliminate any special deference paid to Tax Court decisions, see *Dobson* v. *Commissioner,* 320 U. S. 489 (1943), does not portend to govern the record on appeal, cf. Fed. Rules App. Proc. 10 and 13, and addresses only the decisions of the Tax Court—not special trial judge reports.

As to their constitutional arguments, neither due process nor Article III requires disclosure. Disclosure of any report that has been abandoned by the special trial judge is in no way necessary to effective appellate review because the adoption of the special trial judge's report ensures that sufficient deference was given. Nor must all reports be disclosed in order for the Tax Court procedure itself to comport with due process. See *Morgan* v. *United States,* 298 U. S. 468, 478, 481–482 (1936).