Background

The Tax Court’s procedures at issue in Ballard were surely unusual — a feature that worked to the Tax Court’s detriment. Under Rule 183, the Tax Court may assign some high-value cases (those that exceed $50,000) for trial before STJs. Unlike Tax Court judges, who are appointed by the president for 15-year terms, STJs are inferior officers hired by the chief judge of the Tax Court to assist the court and serve at the chief judge’s leisure. Following the completion of the trial, the STJ compiles and submits a report with his proposed findings of fact and conclusions of law. The Tax Court judge assigned to the case then reviews the STJ’s report, which he may adopt, modify, reject in whole or part, or recommit to the STJ with instructions.

Before 1983, Tax Court Rule 182 — the precursor to Rule 183 — required that the STJ’s report, like that of a magistrate judge or administrative law judge, be disclosed to the parties, who then had the right to file objections to the report with the Tax Court judge assigned to the case. Moreover, the rule directed the Tax Court judge reviewing the STJ report that “[d]ue regard shall be given to the circumstances that the Special Trial Judge had the opportunity to evaluate the credibility of the witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct.”

In 1983, however, the Tax Court amended Rule 182, which it renumbered as Rule 183, deleting the requirement that the STJ’s report be disclosed to the parties and that the parties be entitled to file objections to the report. Strikingly, the Tax Court provided no explanation for this significant change in the STJ process. Furthermore, since then the Tax Court has taken the position (unspecified in the rule) that the STJ reports are not part of the record, so that even the U.S. Court of Appeals and the Supreme Court are kept in the dark as to what the STJ originally found and concluded. In a move whose significance was unappreciated at the time, however, the Tax Court did

3Compare 26 U.S.C. sections 7443(b), (e) (providing for appointment of Tax Court judges by the president for 15-year term) with 26 U.S.C. section 7443A(a) (providing for appointment of STJs by the chief judge of the Tax Court); see also Freytag v. Commissioner, 501 U.S. 868, 881 (1991) (holding that STJs are “inferior officers” within meaning of Appointments Clause).
4Tax Ct. R. 183(c).
6Tax Ct. R. 182(d), 60 T.C. 1150 (1973); see also Stone v. Commissioner, 865 F.2d 342, 345-47 (D.C. Cir. 1989) (interpreting pre-1983 version of Rule 182 to require Tax Court judge to apply “clearly erroneous” standard to STJ’s proposed findings of fact).
8Although the Supreme Court thought there was no clear mandate in Rule 183 to withhold the STJ’s report from the record, see Ballard, 125 S.Ct. at 1275 (attributing refusal to include report in record to Tax Court judges), Chief Justice William H. Rehnquist in dissent thought that, by requiring only that the STJ “submit” his report rather than “file” it, the 1983 change authorized the Tax Court to refrain from including it in the record. See id. at 1288 (Rehnquist, C.J., dissenting); see also Leandra Lederman, “Transparency and Obfuscation in Tax Court Procedure,” Tax Notes, Mar. 22, 2004, p. 1539 (adopting same interpretation of 1983 rule change).

Special Trial Judges After Ballard: A Call for Reform

By Norman R. Williams

In early March, the U.S. Supreme Court issued its decision in Ballard v. Commissioner, wreaking havoc on the Tax Court and its use of special trial judges (STJs). In certain, high-value tax cases, STJs serve a function akin to that performed by magistrate judges in the U.S. district courts — STJs conduct the trial and prepare a report, which is reviewed by a Tax Court judge who has ultimate decisional authority to render judgment. In Ballard, the Supreme Court invalidated the Tax Court’s clandestine adjudicatory process in which the STJ’s report was concealed from both parties and appellate courts alike and held that Tax Court Rule 183 requires the Tax Court to include the STJ’s report in the record. The Court, however, stopped short of expressly requiring the Tax Court to distribute the STJ’s report to the parties and to allow them to file objections to the STJ’s report. In so doing, the Supreme Court created a novel and confusing hybrid adjudicatory process that is sure to dissatisfy both the Tax Court and its use of special trial judges (STJs). In

6Tax Ct. R. 183(a). In other, lower-value tax proceedings, the STJ may be invested with decisional authority. 26 U.S.C. sections 7443A(b)(3), (c); Tax Ct. R. 182.
adopted the opinion of the Special Trial Judge, which is set

even appellate courts.

Surprisingly, the secretive process remained unchallenged by litigants before the Tax Court. Part of the explanation for the tacit acceptance derived from the fact that the Tax Court judges routinely and uniformly purported to adopt the STJ’s opinion—since 1983, not one Tax Court opinion expressly overruled or modified the STJ’s opinion. The practice evidently lulled attorneys into believing that Tax Court judges simply ratified and accepted the STJ’s report.

That belief was shattered by the events in the Ballard case. The Ballard case involved three taxpayers, and the IRS sent multiple notices of deficiency to them and, in 1994, additionally charged that the taxpayers’ actions were fraudulent. The IRS sought more than $30 million, including penalties and interest. The taxpayers sought redetermination of their liability in the Tax Court. Under Rule 183, the chief judge of the Tax Court assigned the case for trial before Special Trial Judge D. Irvin Couvillion. Judge Couvillion presided over a five-week trial in 1994, and posttrial briefing was completed a year later. At some point—the record is unclear—Judge Couvillion submitted his report to the Tax Court, and, in September 1998, his report was assigned to Tax Court Judge Howard A. Dawson Jr. for review. Ten months later, in December 1999, Judge Dawson found the taxpayers guilty of tax fraud and assessed tax penalties. Judge Dawson’s opinion stated that the court “agrees with and adopts the opinion of the Special Trial Judge, which is set forth below.” What followed was a 600-page document, ostensibly from Judge Couvillion.

And so everyone thought until several months later, when two Tax Court judges (neither of whom had been involved in the Ballard case) approached counsel for one of the taxpayers and informed him that Judge Couvillion had originally found in favor of the taxpayers and that Judge Dawson had rewritten several critical sections of the STJ’s report, including sections discussing the credibility of various witnesses. Based on those statements, the taxpayers repeatedly moved for access to the STJ’s original report to be included in the record. The Tax Court attempted to reassure the taxpayers (in conclusory terms parroting the language of Rule 183) that “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 Couvillon were correct, and . . . Judge Dawson gave due regard to Judge Couvillion’s credibility findings.”

The three taxpayers appealed the Tax Court’s decision, and three different circuits upheld the Tax Court’s decision to keep the original report secret, concluding that the Tax Court’s 1983 amendment of Rule 183 was intended to establish a collaborative adjudicatory process in which the STJ and Tax Court judge consulted one another regarding the decision and that, consequently, the original STJ report was an internal deliberative document to which the parties had no right of access. Only Judge Cudahy in the Seventh Circuit was troubled by the Tax Court’s refusal to include the STJ report in the record, which he thought violated the Due Process Clause of the Fifth Amendment and various federal statutes governing the Tax Court.

The Supreme Court’s Decision

Before the Supreme Court, the taxpayers pressed several constitutional and statutory challenges to the Tax Court’s decision to keep the original STJ report secret. The Court did not address those challenges; rather, by a 7-2 margin, the Court held that Rule 183 itself required the STJ’s original report to be included in the record.

Writing for the majority, Justice Ruth Bader Ginsburg rejected the claim that Rule 183 established a collaborative process in which the STJ and Tax Court judge jointly and in secret prepared the final opinion of the court. “Nowhere in the Tax Court’s Rules,” the Court noted, “is this joint enterprise described.” To the contrary, Rule 183 contemplated a more formal, independent relationship between STJs and Tax Court judges, such as that between magistrate judges and district court judges or between administrative law judges and their home agency. In particular, the Court noted that, even after the 1983 amendment, Rule 183 still obligated the Tax Court judge to give “due regard” to the fact that the STJ had the opportunity to evaluate witness credibility and to accord a presumption of correctness to the STJ’s findings of

125 S.Ct. at 1281; see also Estate of Kanter v. Commissioner, 337 F.3d 833, 876, Doc 2003-17426, 2003 TNT 144-33 (7th Cir. 2003) (Cudahy, J., concurring in part and dissenting in part) (observing that he could not find a single instance in which a Tax Court judge has not agreed with and adopted an STJ’s report).
13125 S.Ct. at 1277.
14Id. at 1277-78.
fact.20 As the Court emphasized, that formalized deference to the STJ report negated the existence of a collaborative process, much less one in which the Tax Court judge could secretly overrule the STJ and rewrite the STJ’s report.21

Having established that Rule 183 created a formalized review process for STJ reports, the Court then took the logical step and held that the STJ’s report must be included in the record of the case. Only in that way could the appellate court ensure that the Tax Court judge had complied with Rule 183. Indeed, Justice Ginsburg was sharp in her criticism of the Tax Court’s approach: ‘The Tax Court’s practice of not disclosing the special trial judge’s original report, and of obscuring the Tax Court judge’s mode of reviewing that report, impedes fully informed appellate review of the Tax Court’s decision.’22

What remained less than clear, however, was what the Tax Court was actually supposed to do with STJ reports. Frustratingly, the majority did not provide much guidance. The Court’s repeated reference to the need to have effective appellate review obviously pointed to the requirement that the Tax Court include the STJ’s report in the record. Beyond that, however, the Court’s opinion was silent. The Court did not, for example, suggest that the STJ’s report had to be distributed to the parties before the Tax Court’s decision in the case or that the parties were entitled to file exceptions to the STJ’s report. On the other hand, the majority did not expressly rule out such procedural relief.

The ambiguity in the majority’s opinion was noted by Justice Anthony M. Kennedy, who, joined by Justice Antonin Scalia, filed a concurring opinion. Justice Kennedy agreed that the text of Rule 183 precluded the secretive, collaborative process that the Tax Court evidently was using.23 Moreover, he expressed doubt that the Tax Court could properly provide for a process in which the STJ and the Tax Court judge secretly collaborated on the court’s decision, at least as long as the Tax Court judge was required to defer to the STJ’s fact-finding.24 Unlike the majority, however, Justice Kennedy seemed to think that the Tax Court was obligated to disclose the STJ’s report to the parties, at least at some point:

Rule 183’s requirement of deferece 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.25

At the same time, though, Justice Kennedy declared that “[i]ncluding the original findings of fact in the record on appeal would make that possible.”26 Thus, Justice Kennedy seemed to be suggesting that the Tax Court could comply with Rule 183 by including the STJ’s report in the record (at some unspecified point in the proceedings), at least as long as the parties had access to the record and the STJ’s report in particular.27

Chief Justice William H. Rehnquist, joined by Justice Clarence Thomas, dissented. As an initial matter, Chief Justice Rehnquist did not think the meaning of Rule 183 was properly before the Court, but, even if it was, he thought the Tax Court’s interpretation of the rule was reasonable.28 He noted that Rule 183 spoke only of the STJ’s report, not the STJ’s original report. Consequently, he thought it reasonable for the Tax Court to read Rule 183 as allowing for a collaborative process in which the STJ and the Tax Court judge consulted one another in preparing the STJ’s final report.29 ‘If the special trial judge changes his report [as part of this process], then the new version becomes ‘the Special Trial Judge’s report.’”29

In short, because Judge Couvillion had signed the report included in the Tax Court’s decision, that was the STJ’s report required by Rule 183.31 Moreover, on that view of Rule 183, there could be no conceivable basis to allege a violation of Rule 183 or impediment to effective judicial review because Tax Court Judge Dawson had “adopted” the STJ’s report.32 Chief Justice Rehnquist, however, did not expressly address whether Rule 183 would require the STJ’s original report to be included in the record or disclosed to the parties in those cases in which the Tax Court judge did not adopt the STJ’s report.

An Uncertain Mandate

The Supreme Court should be applauded for rejecting the clandestine adjudicatory process pursued by the Tax

20Id. at 1287.
21Id.
22In Ballard, the taxpayers at one point moved the Tax Court to include the STJ’s report in the record under seal on the ground that, even if they could not see the report, at least the appellate court would have access to it. See 125 S.Ct. at 1278. Incredibly, the Tax Court denied even that modest request for relief. Post-Ballard, however, Justice Kennedy’s acknowledgement that the parties must have access to the report would certainly preclude the Tax Court from sealing the STJ’s report so as to bar the parties’ access to it.
23Id. at 1290. (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.”)
24Id. at 1289.
25Id.
26Id. at 1289-90.
Court. That said, the Supreme Court’s resolution of the case leaves the Tax Court and attorneys who practice before it in an uncertain and ultimately jurisprudentially unstable predicament. The most immediate problem with Ballard is the Court’s failure to detail exactly what the Tax Court must do with STJ reports. According to the majority opinion, the fatal defect was the Tax Court’s failure to include the original STJ report in the record. Only by including the report in the record, Justice Ginsburg reasoned, could the appellate court ensure that the Tax Court judge had given “due regard” to the STJ’s opinion. At the same time, however, Rule 183 is clear on its face that the parties are not entitled to see the STJ’s report or file objections to the report. Thus, the Court essentially read Rule 183 to create a hybrid decisional process: The original STJ report need not be distributed to the parties on filing, but it had to be included in the record at some point so that the appellate court reviewing the Tax Court decision could ensure that the Tax Court judge had complied with the due regard requirements of Rule 183.

Unfortunately, it is not that easy to split the duty to include the STJ’s report in the record from the duty to disclose the report to the parties. Such a formal distinction quickly begins to collapse because the very basis for requiring the STJ report to be included in the record is so that the appellate court can assess whether the Tax Court judge violated Rule 183 by improperly overturning the STJ’s findings. Unless the appellate court is to perform that task sua sponte and without the assistance of briefing by the parties — which was surely not the Supreme Court’s intention — it is the responsibility of the parties to raise that challenge and identify specifically how the Tax Court violated the rule. Obviously, that cannot be done without access to the STJ report.35 Thus, the Supreme Court’s holding that the STJ report must be part of the record ineluctably leads to the conclusion that the parties must have access to the report in some fashion.

Justice Kennedy in his concurrence suggested that it might suffice for the Tax Court merely to include the STJ’s report in the record and allow the parties at their own expense to review and copy the STJ’s report in the record.34 To be sure, the parties have the right to access the record and copy pertinent parts at their own expense.35 Thus, the Tax Court may not seal the STJ’s report or otherwise prevent the parties from accessing it. At the same time, however, there is something troubling about the notion that, although the parties have the right to see the STJ’s report, the Tax Court can refuse to provide them with a copy of it and require that they travel to the clerk’s office in Washington to see it. Even if neither the Court nor Justice Kennedy thought that Rule 183 required the Tax Court to serve or otherwise provide a copy of the STJ’s report to the parties, that is surely the better course for the Tax Court to follow.36

Equally problematic, the Court gave no indication as to when the STJ’s report must be included in the record. The Court seemed to believe that it was the U.S. Court of Appeals that would act as the primary enforcer of Rule 183,37 in which case it would suffice merely for the STJ’s report to be included in the record sometime before the filing of the record with the court of appeals.38 Yet, Rule 183 is directed to the Tax Court itself. Adopted by the Tax Court, Rule 183 presumably should be enforced by the Tax Court. Indeed, it would be unusual to have a procedural mandate that is to be enforced exclusively by the appellate courts.39 Moreover, there is a procedural mechanism available to the parties for enforcing Rule 183 in the Tax Court: The Tax Court rules expressly authorize posttrial motions for reconsideration or to revise a decision of the court.40

Now, here’s the rub: For the Tax Court to enforce Rule 183, the parties must have access to the STJ’s report while the Tax Court proceedings are ongoing. Of course, Rule 183 does not require that disclosure (and it was amended in 1983 evidently so as to avoid such disclosure), but it would be foolhardy at this point for the Tax Court to refuse to provide counsel with access to or copies of the STJ report while the case is pending in the Tax Court. Such a course of action would be viewed as nothing more than an illegitimate attempt to handicap litigants’ ability to enforce Rule 183, which is exactly what got the Tax Court into trouble in Ballard in the first place. Thus, once one accepts (as the Court held) that Rule 183 can be effectively enforced only by including the STJ report in the record, one is led inevitably to the conclusion that the Tax Court must provide the parties with access to the STJ report sometime during the pendency of the Tax Court proceedings.41

At the earliest, the STJ’s report could be disclosed when it is submitted to the Tax Court for review. That was the pre-1983 regime. At the latest, the report could be disclosed when the Tax Court judge issues his or her

33125 S.Ct. at 1287 (Kennedy, J., concurring).
34Id.
3526 U.S.C. section 7461(a) (providing that “all reports of the Tax Court . . . shall be public records open to the inspection of the public”); Tax Ct. R. 12(b) (providing for copying of Tax Court records after decision).
36Cf. 5 U.S.C. section 555(e) (requiring notice of decision to be given to parties in administrative proceedings); Fed. R. Civ. P. 53(f) (requiring master to serve copy of report on parties); Fed. R. Civ. P. 72(b) (requiring clerk to mail copies of magistrate judge’s report to parties); Fed. R. App. P. 36(b) (requiring the clerk to serve on parties copies of judgment and opinion of court).
37See, e.g., 125 S.Ct. at 1283, 1284 (discussing need for “appellate court” or “reviewing court” to have access to STJ’s report).
38See Fed. R. App. P. 11(b)(2) (requiring Tax Court to forward record to court of appeals when record is “complete”).
39See Tele-Communications Inc. v. Commissioner, 104 F.3d 1229, 1233, Dec 97-2940, 97 TNT 20-7 (10th Cir. 1997) (noting that, generally, issues must be presented to Tax Court before it can be raised on appeal).
40Tax Ct. R. 161 and 162.
41Kanter, 337 F.3d at 888 (Cudahy, J., concurring in part and dissenting in part) (suggesting that, while due process required inclusion of STJ report in record, it did not require disclosure of report to public before release of Tax Court’s final decision); see also Tax Ct. R. 12(b) (providing for copying of Tax Court records after the decision is issued).
decision. Only in that way would there still be time, though little of it, for the parties to seek postdecision relief under Rule 161 or Rule 162. Or, of course, the report could be disclosed at some point between those two events. Post-Ballard, it remains up to the Tax Court — or, more likely the Tax Court judge assigned to review the STJ’s report — to determine when within those parameters to release the STJ’s report. Although one would hope that the STJ’s report would be released to the parties on its filing with the Tax Court — after all, what conceivable purpose is there in withholding its release — there is nothing in Ballard or the Tax Court rules that require distribution at such an early time.

So where does this leave litigants before the Tax Court? The Tax Court has yet to announce how it intends to proceed in the wake of Ballard. Hopefully, that guidance will be forthcoming soon, because a uniform policy is desperately required rather than leaving it to the unguided vagaries of each Tax Court judge. Until the Tax Court adopts some formal policy regarding the disclosure of STJ reports, however, counsel should seize on the implicit invitation made by the Supreme Court to demand a copy of (or at least access to) the original STJ report. That demand should be made no later than the time at which the Tax Court judge releases his opinion, if not before.

Lastly, that the parties are entitled to the STJ’s report at some point does not mean that the parties have the right to file objections to that report with the Tax Court. Nothing in the Supreme Court’s opinion cast doubt on the propriety of the Tax Court’s 1983 amendment deleting the parties’ right to file exceptions to the STJ’s report. Moreover, the need to ensure that the Tax Court judge complies with the due regard requirement of Rule 183 does not in any way imply the need for the right to file objections to the STJ’s report — after all, it is the Tax Court judge’s compliance with Rule 183, not the STJ’s actions, that is at issue. Thus, post-Ballard, Rule 183 obligates the Tax Court to include the original STJ report in the record, which by implication requires the report to be disclosed to the parties in some manner, but the parties have no right to file exceptions to that report in cases in which the parties receive the report before the Tax Court’s decision.

A Need for Reform

Obviously, Rule 183 creates an unusual, hybrid adjudicatory process. Parties are entitled to see the STJ’s report, but they cannot argue to the Tax Court judge before decision what the judge must do in light of the report. Only after the Tax Court judge has released the decision of the court may the parties argue — either to the Tax Court itself in a postdecision motion or to the court of appeals as part of the appeal of the Tax Court’s decision — which proposed findings by the STJ are erroneous and which STJ’s findings must be accepted pursuant to Rule 183(c). While the process is obviously superior to that used by the Tax Court for the past two decades, it is still far from the best process available.

Specifically, the Tax Court should amend Rule 183(c) to return to the pre-1983 regime and allow parties the right to file exceptions to the STJ report.

The important point to keep in mind in assessing whether to return to the pre-1983 regime is that, after Ballard, the parties are entitled to see the STJ’s original report and contest the Tax Court judge’s compliance with Rule 183. That is, they are entitled to argue over the extent to which the Tax Court was obligated to accept the STJ’s proposed findings of fact. Thus, the question is not whether to allow the parties to raise arguments regarding the applicability of Rule 183 to the STJ’s report but when to allow those arguments to be aired, predecision or postdecision.

Considerations of fairness and efficiency both point in favor of allowing those arguments to be pressed before the Tax Court’s decision rather than after that decision is composed and issued. Under the current, post-Ballard regime, the parties have the right to seek enforcement of Rule 183 at the earliest only in postdecision motions for reconsideration or relief from the Tax Court decision. From the parties’ perspective, however, that posthoc relief is hardly equivalent to the right to file exceptions to the report before decision because a postdecision motion for reconsideration is subject to a higher burden of persuasion than a predetermination of statements of exceptions. Moreover, by the time that postdecision motions are filed, the Tax Court judge no longer will have a neutral position regarding the STJ’s proposed findings of fact but will have already committed himself to a particular position, which he may be hesitant to alter. Thus, by the time that the Tax Court judge issues the decision in the case, there are both legal and practical factors favoring decisional inertia.

At the same time, however, the Tax Court gains little to nothing from the hybrid process of the Supreme Court’s making; rather, the process entails significant adjudicatory costs, most notably the waste of time and court resources. Postponing the parties’ right to file briefs regarding the STJ’s report until after the Tax Court issues its decision obviously leaves the Tax Court judge in a difficult position. The judge must sort out by himself without the aid of briefing by the parties which elements of the STJ report he must accept and which he must reject. Moreover, there must be a certain degree of fear and loathing accompanying the task because the Tax Court judge knows that, once the decision is released, he will in almost all certainty be confronted with a postdecision motion for reconsideration arguing either that he violated Rule 183 or that he accepted an erroneous factual finding that he was under no obligation to accept under Rule 183 or both. Allowing predecisional briefing in the

42See Tax Ct. R. 12(b).

43Westbrook v. Commissioner, 68 F.3d 868, 879, Doc 95-10430, 95 TNT 224-5 (5th Cir. 1995) (holding motion for reconsideration generally denied in absence of unusual circumstances or substantial error); Vaughn v. Commissioner, 87 T.C. 164, 166-67 (1986) (holding motion for reconsideration rests within the discretion of the court and will not be granted unless unusual circumstances or substantial error is shown); Estate of Egger v. Commissioner, 92 T.C. 1079, 1083 (1989) (holding that motion to vacate decision shall be granted only in the interest of justice).
form of a statement of exceptions (and responses thereto) would help guide the Tax Court judge’s decision in a more focused and efficient fashion. Indeed, it is at least somewhat telling that, in Ballard, it took Judge Dawson more than a year (and may have taken as much as four years) to issue his opinion after receiving STJ Covillian’s report.

Of course, amending Rule 183 to return to the pre-1983 regime would entail more (though only marginally more) procedural formality than the post-Ballard system. In theory, parties would get two bites at the apple: They could file exceptions to the STJ’s report, and then, after the Tax Court judge issues his decision, they could initiate another round of review by filing postdecision motions for reconsideration. While that is possible in theory, it is unlikely to occur often in practice. There would be no obligation to file those postdecision motions so as to preserve the Rule 183 claim for appeal if a statement of exceptions had been filed, and purely repetitive or frivolous motions would be deterred through the threat of sanctions. In any event, the Tax Court, in amending Rule 183 in 1983, never suggested that the process was so prone to abuse or waste of court resources to warrant its rejection.

In comparison to the post-Ballard hybrid system, the benefits of the pre-1983 regime are manifest and substantial. However, the Tax Court, although it must surely dislike the hybrid system foisted on it by the Supreme Court, may be inclined to respond not by providing for more procedural formality (as argued above) but rather less. Specifically, the Tax Court might be predisposed to delete the due regard requirement and presumption of correctness for STJ reports, which would presumably eliminate the Ballard-imposed need for the court to provide copies of the STJ report to the parties and include it in the record. Moreover, the Tax Court could do so without consulting attorneys who practice before the court. Unlike the case with the Federal Rules of Civil Procedure or local rules of court, the Tax Court need not seek public comment on proposed changes to its rules.

The Tax Court, however, should refrain from embarking on such a course of action. As the Supreme Court noted and expressed concern regarding, it would be unusual to have a process in which an inferior officer of the court conducts the trial and then collaborates with the judge of the court in drafting the decision. In almost every other context in which some official serves as the trial-conducting adjunct for an adjudicatory body — like magistrate judges or administrative law judges — the adjunct’s report is provided to the parties, made public, and included in the record. Indeed, parties are entitled to file exceptions to a magistrate judge’s report, even though the district court judge reviews that report de novo.

Moreover, even apart from the procedural custom of other courts and agencies, there would be a great danger in creating a collaborative process in which one of the two adjudicators is an inferior officer who serves at the leisure of the chief judge. As the Supreme Court noted in Ballard, the notion of collaboration implies equality among the judges, which is not the case with respect to STJs and Tax Court judges. Rather, STJs may be unprepared to risk the ire of the Tax Court judge (and thereby potentially risk their employment) by challenging the judge’s proposed decision. And, even if those fears are overblown, pursuing such an amendment would obviously enmesh the Tax Court in years of protracted litigation whether such an unbalanced and novel collaborative process is consistent with the federal statutes governing the Tax Court or due process. Although the Supreme Court did not pass on those questions in Ballard, its tone indicated its misgivings about the validity of such a process.

In sum, to endorse Ballard’s condemnation of the Tax Court’s clandestine STJ adjudicatory process is not to approve of the hybrid adjudicatory process created by the Supreme Court’s interpretation of Rule 183. There is an obvious need for the Tax Court to amend Rule 183 and restore an STJ process that is transparent, fair to the parties, and efficient to conduct. The sooner, the better — for all concerned.

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4426 U.S.C. section 6673(a) (authorizing imposition of sanctions on both taxpayer and counsel in appropriate circumstances).

45Though the Tax Court did not explain the basis for the 1983 rule change, the taxpayers in the Ballard case speculated that the rule change was made precisely so as to avoid scrutiny of the Tax Court judge’s decisions altering proposed findings of fact made by the STJ. See Lederman, supra note 8 at 1540 n.13. To the extent that is true, the Supreme Court’s decision requiring that the Tax Court judge’s proposed decision be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Tax Court may prescribe.”)

47125 S.Ct. at 1284.

48See 5 U.S.C. section 557(c) (administrative law judges); 28 U.S.C. section 636(b)(1)(C) (magistrate judges).


51125 S.Ct. at 1285 and n.16. On that basis, the Court contrasted the STJ process with the en banc Tax Court review process in which the full Tax Court reviews the legal determinations of a Tax Court division and in which case the division’s report is excluded from the record. 26 U.S.C. section 7460(b).