

MAYER, BROWN, ROWE & MAW LLP'S
SUPREME COURT DOCKET REPORT
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Today the Supreme Court granted certiorari in and consolidated two cases of interest to the business community. Amicus briefs in support of the petitioners will be due on Thursday, June 10, 2004, and amicus briefs in support of the respondent will be due on Thursday, July 15, 2004. Any questions about this case should be directed to Philip Lacovara, 212-506-2585, in our New York office.

Tax Court — Procedures — Disclosure of Reports of Special Trial Judge. The Chief Judge of the United States Tax Court may appoint a “special trial judge” (“STJ”) to conduct the trial in any case. 26 U.S.C. § 7443. After the trial, the STJ submits a report, including findings of fact and opinions of law, to the Chief Judge, who then assigns the case to a Judge of the Court. Tax Court Rule 183(b). The assigned Judge may accept, reject, or modify the report in whole or in part, but is instructed to give “due regard” to the STJ’s “opportunity to evaluate the credibility of witnesses,” and to presume that the STJ’s findings of fact are correct. Tax Court Rule 183(c). The Supreme Court granted certiorari in and consolidated *Estate of Kanter v. Commissioner of Internal Revenue*, No. 03-1034, and *Ballard v. Commissioner of Internal Revenue*, No. 03-183, to decide whether the STJ’s original report to the Chief Judge must be disclosed to the parties and be made part of the record in an appeal from a decision of the Tax Court. The Court also will decide whether the STJ’s factual findings and credibility determinations are entitled to deference.

After conducting a five-week trial concerning the petitioners’ alleged underpayment of taxes, the STJ in this case submitted a report to the Chief Judge. The report was not made available to the petitioners, who thus had no opportunity to address the report’s proposed findings and conclusions. Thereafter, the Judge ruled that the petitioners were liable to pay millions of dollars in back taxes and penalties. Although the Judge purported to adopt the STJ’s report, petitioners’ attorneys learned that the original report had been modified substantially after its submission to the Chief Judge. Because they had not been given access to the report, however, the petitioners were unable to raise in the appeal any issue arising from the differences between the STJ’s original report and the final ruling. Both the Eleventh Circuit and the Seventh Circuit ruled that the petitioners were not entitled to access to the original report, reasoning that any changes that the STJ made to the report after conferring with the assigned Judge were part of the court’s deliberative processes, which need not be disclosed. *Estate of Kanter v. Commissioner of Internal Revenue*, 337 F.3d 833, 843-844 (7th Cir. 2003); *Ballard v. Commissioner of Internal Revenue*, 321 F.3d 1037, 1043 (11th Cir. 2003).

Supreme Court Docket Report

The Tax Court delegates to its special trial judges the trial of at least fifty complex tax cases per year. Accordingly, the Supreme Court's decision will be important to all businesses that litigate in the Tax Court.

Mayer, Brown, Rowe & Maw LLP is co-counsel to the petitioners in *Estate of Kanter*.

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