

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

IVAN NIKOLSKIY,	)	
	)	
Petitioner,	)	<b>ALS</b>
	)	
v.	)	Docket No. 26163-14.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	
	)	

**ORDER**

This matter is before the Court on petitioner’s Motion to Reopen the Record To Include Exhibits 14-P & 15-P and respondent’s Motion to Strike. As discussed below, we will deny petitioner’s motion and grant respondent’s motion.

This case was called from the calendar in New York, New York, on January 25, 2016. At that time, the parties submitted to the Court a stipulation of facts (with exhibits) and agreed that the case would be submitted for disposition by the Court without a trial under Rule 122.<sup>1</sup> Tara Krieger entered an appearance on behalf of petitioner. On January 27, 2016, the parties filed a Second Stipulation of Facts (with additional exhibits).

By Order dated February 25, 2016, the Court directed petitioner to file an opening brief on or before April 11, 2016, and respondent to file a reply brief on or before May 26, 2016. On February 26, 2016, Frank Agostino entered an appearance on behalf of petitioner.

On April 4, 2016, one week before petitioner’s opening brief was due to be filed, petitioner filed a motion to reopen the record (along with a Declaration executed by Ms. Krieger) seeking to add two exhibits to the stipulated record. Petitioner included a statement in the motion that counsel for respondent objected to the granting of the motion. By Order dated April 5, 2016, the Court directed

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<sup>1</sup> Rule references are to the Tax Court Rules of Practice and Procedure.

respondent to file a written Objection, if any, to petitioner's motion on or before April 12, 2016.

On April 7, 2016, Ms. Krieger called the chambers of the undersigned to inquire about the timing of the filing of petitioner's opening brief in the light of petitioner's pending motion to reopen the record. The undersigned's judicial assistant informed Ms. Krieger that *ex parte* communications with the Court should be avoided and that she should file an appropriate motion related to the filing of petitioner's brief.

On April 11, 2016, petitioner filed an opening brief which includes references to the exhibits that are the subject of petitioner's pending motion to reopen the record. Petitioner's brief states in pertinent part that "For our purposes, we assume the exhibits [that are subject of petitioner's motion to reopen the record] were admitted, and that they are now part of the Second Stipulation of Facts." On April 12, 2016, respondent filed an Opposition to petitioner's motion to reopen the record and a motion to strike the portions of petitioner's brief that refer to the disputed exhibits.

Reopening the record for the submission of additional evidence lies within the discretion of the Court. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 331 (1971). For the reasons set forth more fully in respondent's opposition to petitioner's motion, we will deny petitioner's motion to reopen the record.<sup>2</sup>

Petitioner's opening brief includes multiple references to two exhibits that are not part of the stipulated record in this case. *Ex parte* declarations and statements in briefs do not constitute evidence. Rule 143(c), Tax Court Rules of Practice and Procedure. Suffice it to say, petitioner's counsels' conduct in unilaterally treating their motion to reopen the record as having been granted by the Court was both unprofessional and unethical. Considering all the circumstances, the Court will strike petitioner's opening brief. The Court will

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<sup>2</sup>The Court notes that respondent does not dispute "petitioner's contention that the documents are authentic copies of what is in the public domain."

grant petitioner time to file either a motion for leave to submit a proper opening brief or another appropriate motion.<sup>3</sup>

Upon due consideration and for cause, it is

ORDERED that petitioner's motion to reopen the record is denied. It is further

ORDERED that respondent's motion to strike is granted in that petitioner's opening brief is stricken from the record. It is further

ORDERED that, on or before April 29, 2016, petitioner shall file a motion for leave to file an opening brief and lodge a proper opening brief or file an appropriate motion.

**(Signed) Daniel A. Guy, Jr.**  
**Special Trial Judge**

Dated: Washington, D.C.  
April 14, 2016

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<sup>3</sup> If petitioner now believes that the case should not have been submitted to the Court for disposition under Rule 122, the Court will grant him time to file an appropriate motion to calendar the case for trial.