UNITED STATES TAX COURT
WASHINGTON, DC 20217

ESTATE OF MICHAEL J. JACKSON, DECEASED, JOHN G. BRANCA, CO-EXECUTOR AND JOHN MCCLAIN, CO-EXECUTOR,	)	
Petitioner(s),	)	
v.	)	Docket No. 17152-13.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

O R D E R

This case was tried at a special session beginning on February 6, 2017, and the Jackson Estate has moved to strike the testimony of Weston Anson, the Commissioner's expert witness who testified about the value of some of the Estate's assets. Cross-examination did not go well in some respects for Mr. Anson, and the Commissioner forthrightly begins his response to the motion by stating:

> Respondent's expert, Weston Anson, did not tell the truth when he testified that he did not work on or write a valuation report for the IRS Examination Division in the third-party taxpayer audit.

What happened was that Mr. Anson lied about working on similar issues for the IRS in a case brought by the Whitney Houston Estate and then admitted to the lie when confronted by further questions and documentary evidence. The Jackson Estate's motion asks for an order to strike all of Mr. Anson's testimony, including all of his expert reports, as tainted by perjury.

We will assume the parties are familiar with the background facts.

SERVED Sep 29 2017

We will start first with the question of whether Mr. Anson's false testimony rises to the level of perjury, and here we will duck. Perjury is a criminal offense with elements above and beyond misrepresentation. It is governed primarily by two federal criminal statutes -- 18 U.S.C. §§ 1621, 1623 -- and this is not a criminal proceeding. We will instead simply find that Mr. Anson lied under oath because the parties don't dispute that he did.

So what is the proper remedy? The Jackson Estate argues that we should strike all of Mr. Anson's testimony from the record and treat this case like *Tucker v. Commissioner*, T.C. Memo 2017-183. In *Tucker* the taxpayer learned in cross-examination that the curriculum vitae (CV) that the expert witness had attached to his report was misleading, in that the expert had written that he was the managing partner of a hedge fund, but in reality had only been trading for his own account for several years. Trial Transcript at 541, *Tucker*, T.C. Memo 2017-183 (No. 12307-04). He also failed to disclose his consulting work for another company and left out two cases in which he had testified as an expert at trial. *Id.* at 541-44. We excluded the expert's testimony -- not for lying, but for violating Tax Court Rule 143(g). *Tucker*, T.C. Memo 2017-183, at *33 n.7; *see also* Trial Transcript, *supra*, at 553. We explained that the omission of the two cases was "clearly a breach of the rule" and we found no good cause for the omission. Trial Transcript, *supra*, at 553. We did, however, also express concern about the expert's lack of candor about his current employment. *Id.*

The Estate would like us to conclude that the situation here is just like the one in *Tucker.* And if striking the testimony of the only expert witness for the Commissioner means that the Commissioner will have no evidence in his favor on the key issues in the case? Well, deceit has its costs.

To understand *Tucker* fully, however, we need to look more closely at Tax Court Rule 143(g). This rule governs expert-witness reports and requires, among other things, that an expert's report contain "the witness's qualifications, including a list of all publications authored in the previous 10 years" and "a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition." In a part of the Rule that has no counterpart in the Federal Rules of Civil Procedure, however, there is a mandatory-sentencing provision for violations: Testimony will be excluded altogether "unless the failure is shown to be due to good cause and unless the failure does not unduly prejudice the opposing party." Tax Court Rule 143(g)(2).

Respondent admits that Mr. Anson omitted two items from the CV attached to his expert reports -- one case where he provided expert-witness testimony at a deposition and one publication he wrote -- but asserts that their omission was a mere clerical error. We believe him. Mr. Anson's CV discloses 100 cases where he acted as an expert witness in some capacity and more than 100 publications he's written, so the inadvertent exclusion of two is understandable and, we find, in good faith. The Jackson Estate makes no assertion that it was unduly prejudiced by their omission.

The Estate, however, does argue that the Commissioner violated Tax Court Rule 143(g) when it omitted from Mr. Anson's list of qualifications his work for a company called Domain Assets, LLC (Domain Assets). The Estate compares this to the expert's omission of his consulting work in *Tucker*. We find this case, however, to be distinguishable. Mr. Anson's expert report does not mention Domain Assets, but it does discuss his work for CONSOR Intellectual Asset Management, which is a d/b/a for Domain Assets. We won't read Tax Court Rule 143(g) to require the exclusion of Mr. Anson's testimony without some reason for treating the disclosure of a d/b/a as something other than the equivalent of the disclosure of the underlying business name.

The Jackson Estate's next argument is that Mr. Anson's testimony should be excluded because his lies reflect his bias in favor of the Commissioner. But bias generally goes to the weight of testimony, not its admissibility. *See United States v. Abonce-Barrera*, 257 F.3d 959, 965 (9th Cir. 2001); *Charter Oak Fire Ins. Co. v. Patterson*, 46 F. Supp. 3d 1361, 1374 (N.D. Ga. 2014) (citing *Adams v. Lab. Corp. of Am.*, 760 F.3d 1322, 1332 (11th Cir. 2014)); *see also Laureys v. Commissioner*, 92 T.C. 101, 129 (1989) (explaining that in valuation cases an expert may lose his usefulness when he merely becomes an advocate for a party's position); *Estate of Kollsman v. Commissioner*, 113 T.C.M. 1172, 1176, 1179 (2017) (deciding to discount the weight of an expert report tainted by a conflict of interest). Only when an expert report becomes absurd or "so far beyond the realm of usefulness" does bias make an expert report inadmissible. *See Boltar, L.L.C. v. Commissioner*, 136 T.C. 326, 335-36 (2011). That isn't the case here, so any bias that Mr. Anson's false statements may reflect will be accounted for in the weight given to his testimony.

The Jackson Estate also argues that we should use Rule 702 of the Federal Rules of Evidence to exclude Mr. Anson's testimony. Rule 702 sets out the admissibility requirements for an expert's opinion and is often viewed as requiring a trial court to act as a "gatekeeper" and exclude evidence that is not reliable. *See*

Esgar Corp. v. Commissioner, 103 T.C.M. 1185, *aff'd*, 744 F.3d 648 (10th Cir. 2014); *see also Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993). It is a "well-settled principle that the admission or exclusion of expert testimony is a matter ordinarily entrusted to the sound judicial discretion of the trial court." *Goodman v. Highlands Ins. Co.*, 607 F.2d 665, 668 (5th Cir. 1979). And there are certainly cases where courts have excluded an expert's testimony for lying about his background and qualifications. *See, e.g.*, *Alta Wind I Owner-Lessor C v. United States*, 128 Fed. Cl. 702, 706-07 (2016) (excluding an expert's testimony for intentionally omitting several publications from his expert report); *Contreras v. Sec'y of HHS*, 121 Fed. Cl. 230, 238-39 (2015) (finding it was manifest error for a special master not to exclude or discount the weight of an expert who repeatedly misrepresented that he was a licensed physician even though his license had been expired for almost 10 years), *vacated and remanded on other grounds*, 844 F.3d 1363 (Fed. Cir. 2017). There has to be some consequence for Mr. Anson's false testimony about his dealings with the IRS, but to in effect strip the Commissioner of any expert-testimony about the value of the Estate's assets because of Mr. Anson's parsimonious relationship with the truth about his dealings with the IRS in other cases seems to us too severe. A more proportionate remedy would be to discount the credibility and weight we give to his opinions. *See Contreras*, 121 Fed. Cl. at 239 (stating that "a rational approach is to diminish the weight of th[e] expert's testimony or to subject th[e] expert's testimony to stricter scrutiny").

The Estate also argues that we should throw out Mr. Anson's testimony under Rule 403 of the Federal Rules of Evidence because the probative value of his opinions is outweighed by their waste of time, given the size of the self-inflicted wounds to his credibility. This is an appeal to our general authority to exclude testimony when it would be efficient. But for the same reason we just gave for our ruling under Rule 702, we will not exclude Mr. Anson's testimony under Rule 403.

It is

ORDERED that petitioner's April 1, 2017 motion to strike the testimony of respondent's expert witness Weston Anson is denied.

(Signed) Mark V. Holmes
Judge

Dated: Washington, D.C.
September 29, 2017