

UNITED STATES TAX COURT
WASHINGTON, DC 20217

PA

DONALD L. BREN,)	
)	
Petitioner(s),)	
)	
v.)	Docket No. 20942-16.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

This case is set for trial in Los Angeles, California, at a special trial session commencing December 12, 2018. On November 9, 2018, petitioner filed a Motion in Limine seeking to exclude from evidence the report of respondent’s expert, Robert Shea Perdue, as a result of his deliberate discarding of documents and deletion of electronic records of information he investigated but disregarded in reaching the conclusions set forth in his report. Respondent’s response to that motion was filed November 26, 2018.

A telephone conference call was held among the parties and the Court on November 28, 2018. At that time respondent’s counsel reported Mr. Perdue’s request that he not be required to testify before April 2019 because of various family catastrophes recently occurring. The Court indicated an inclination to grant the Motion in Limine but had planned to have voir dire of Mr. Perdue conducted at the commencement of the trial before ruling on the Motion in Limine. In view of Mr. Perdue’s apparent unavailability, however, the Court decided to grant the Motion in Limine upon receipt of an additional filing by petitioner and agreement that Mr. Perdue’s deposition would be marked as an exhibit in this case (not to be received in evidence).

Respondent’s response posits extreme situations where a prospective expert might investigate or review material that is not reduced to paper or electronic methods of preservation. Respondent ignores the facts of this situation where the expert admittedly destroyed materials after deciding to reject their use in his analysis. Data considered and rejected may be as significant as data considered

and adopted. Deliberate omission and rejection of data and the reasoning of the analysis are the essence of cross-examination of an expert witness, and impairing cross-examination by destroying rather than producing such materials is inherently prejudicial to the adverse party. In this case, the explanation of why the expert deviated from previously expressed opinions deserves careful examination. Under these particular circumstances, it is not necessary to address other cases and their similarities or distinctions.

As discussed during the conference call, the effect of granting the Motion in Limine is to eliminate the necessity of certain rebuttal witnesses and to moot questions about an attachment to the Perdue report and respondent's objections in the Second Stipulation of Facts to items concerning Perdue's earlier appraisals of certain properties. In effect the basis for the increased deficiency claimed by respondent is also eliminated. Petitioner still bears the burden of proof with respect to the deficiency determined in the statutory notice. The time spent at trial will best be focused on the reliability of petitioner's expert's opinion. The parties were advised that if the trial cannot be concluded during the time originally set, it may be continued into the regular session of the Court the following week but not before Wednesday, December 19, 2018.

On November 28, 2018, petitioner's Reply to Response to Motion in Limine to Exclude the Expert Witness Reports of Robert Shea Perdue was filed. Upon due consideration and for cause, it is hereby

ORDERED that petitioner's Motion in Limine filed November 9, 2018, is granted.

**(Signed) Mary Ann Cohen
Judge**

Dated: Washington, D.C.
November 29, 2018