

**UNITED STATES TAX COURT**  
**WASHINGTON, DC 20217**

JONATHAN C. BLOCH,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 9028-18.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

**ORDER**

This case was commenced in May 2018 and was set for trial at the Court’s Boston session beginning March 11, 2019. Petitioner Jonathan C. Block represents himself. On February 25, 2019, the parties filed a joint motion to submit this case for decision under Rule 122 without a trial. The motion (Doc. 9) stated:

3. The pleadings are closed and the parties are in agreement that this case does not require a trial for the submission of evidence.
4. The parties also agree that the case may be submitted on the basis of the pleadings and the facts recited in the attached stipulation, which is being filed concurrently with this motion.

The preamble to the attached stipulation (Doc. 10) states: “either party may introduce other and further evidence not inconsistent with the facts herein stipulated.”

The Court granted the joint motion by order of February 26, 2019 (Doc. 11), and set a briefing schedule.

On April 10, 2019, Mr. Bloch filed his opening brief (Doc. 12), and filed with it, in support of his position, three affidavits (Docs. 13-15) that are not in the stipulation of facts. Looking solely at the joint motion, one would suppose that

**SERVED Apr 15 2019**

Mr. Bloch was not entitled to submit affidavits, since the motion seems to state that the agreed-upon record of the case consists of the pleadings and the stipulation. On the other hand, looking solely at the stipulation, one would suppose that Mr. Bloch might have been entitled to submit “other and further evidence”.

We do not know what the parties’ actual intention was as to the submission of supporting affidavits, nor whether they shared a common understanding. Affidavits are, by their nature, hearsay, and they are therefore generally not admissible into evidence. See Fed. R. Evid. 802. However, an affidavit may be received into evidence if the other party does not object. And parties submitting a case under Rule 122 could include in their stipulation an affidavit that they agree is to be received in lieu of live testimony. (Sometimes the parties stipulate that, if called as a witness, the affiant would testify as indicated in his affidavit.) The stipulation may state that the other party does not stipulate to the truth of the content of the affidavit but agrees that the affiant would so testify if called. Where an affidavit is submitted in such a manner under Rule 122, it does become evidence in the case; but Rule 122(b) warns the parties that submitting the case under that rule does not alter the burden of proof. Thus, a party deciding whether to agree to submit his case under Rule 122 and to rely on affidavits (rather than obtaining live testimony at a trial) should consider that the written affidavit--not presented by in-person testimony, and not subject to cross-examination--may simply not be persuasive and may therefore not succeed in carrying the party’s burden of proof.

The Commissioner’s answering brief is due May 26, 2019. It is therefore

ORDERED that immediately upon receiving this order, and in any event no later than April 19, 2019, each of the parties shall telephone the Chambers Administrator of the undersigned judge at 202-521-0850 for the purpose of scheduling a telephone conference among the parties and the Court, so that they can discuss further proceedings.

**(Signed) David Gustafson  
Judge**

Dated: Washington, D.C.  
April 12, 2019