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

ROBERT G. TAYLOR, II,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 400-13.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

This case is before the Court on petitioner's Motion to Vacate or Revise Pursuant to Rule 162 filed January 24, 2020.[1]

Background

I. Respondent's Motions to Compel

On December 1, 2014, the Court held a hearing in Houston, Texas, on respondent's October 14, 2014, Motion to Compel Production of Documents and Motion to Compel Responses to Interrogatories. At the hearing, the parties filed a Stipulation of Settled Issues as to certain issues, settling all the issues in the case except the casualty loss and the accuracy-related penalty for 2008. Even though the parties had settled a significant amount of issues, respondent was still seeking information and documentation on how petitioner calculated the casualty loss claimed on his 2008 tax return. Petitioner was still seeking information from his insurance company on the final reimbursement for damages his property sustained from Hurricane Ike.

On January 6, 2015, the Court held a further hearing in Houston, Texas, on respondent's above-referenced motions to compel. At the further hearing, the parties lodged a First Stipulation of Facts with exhibits attached and contained

[1]Unless otherwise indicated, all Rule references are to the Tax Court Rules of Practice and Procedure, and all section references are to the Internal Revenue Code in effect for the years in issue.

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therein was a post-Hurricane Ike retrospective appraisal of the value of petitioner's property that was completed on July 20, 2009. At that time, petitioner had not yet obtained an appraisal of the value of petitioner's property pre-Hurricane Ike. Respondent expressed concern over the retrospective appraisal failing to take into consideration the general decline in market value. Petitioner requested time to "rehabilitate the report". The Court denied respondent's motions to compel without prejudice.

In a status report to the Court on September 29, 2015, the parties informed the Court that petitioner provided to respondent a retrospective appraisal of the value of petitioner's property pre-Hurricane Ike. The pre-Hurricane Ike retrospective appraisal was attached to the status report.

II. Petitioner's Late Expert Witness Reports and Respondent's Motion in Limine

This case was set for trial at the December 5, 2016, Houston, Texas, Trial Session of the Court. On Friday, November 18, 2016, 13 days late and 17 days before the trial session, petitioner mailed to the Court an expert witness report providing a retrospective appraisal of the value of petitioner's property pre-Hurricane Ike, a new expert witness report providing a retrospective appraisal of the value of his property post-Hurricane Ike, an expert witness report providing an appraisal of the value of petitioner's trees lost in Hurricane Ike, a paired sales analysis summary, and other documents supplementing those reports. With the exception of the pre-Hurricane Ike retrospective appraisal, all of the documents were received by the Court for the first time approximately 15 days before the trial session. Additionally, petitioner had not previously provided the paired sales analysis summary to respondent.

On November 21, 2016, respondent filed a Motion in Limine to exclude petitioner's expert witness reports on the grounds that petitioner did not comply with Rule 143(g). Respondent relied on the fact that petitioner did not mail the expert witness reports within the time prescribed in Rule 143(g).

III. Pretrial Conference and Trial

The Court set this case for a pretrial conference on December 6, 2016, and for trial on December 7, 2016. The Court also ordered petitioner to file a response to respondent's Motion in Limine at the December 6, 2016, pretrial conference.

At the pretrial conference, the Court and the parties discussed the Motion in Limine and petitioner's proposed expert witness reports. Petitioner indicated that he did not intend to offer all the submitted reports into evidence during trial. The Court adjourned the pretrial conference and directed the parties to discuss and report how they planned to proceed.

On December 7, 2016, at the start of the trial, the parties informed the Court that they reached an agreement on how they planned to proceed with petitioner's proposed expert witness reports. Respondent requested that his Motion in Limine be denied and reserved his objections on the proposed expert witness reports until they were utilized during trial.

During trial respondent did not object to admitting petitioner's expert witness report providing a retrospective appraisal of the value of petitioner's property pre-Hurricane Ike or the new expert witness report providing a retrospective appraisal of the value of petitioner's property post-Hurricane Ike; the Court admitted those expert witness reports into evidence. Petitioner did not request that the other reports be admitted into evidence

IV. Court's Memorandum Findings of Fact and Opinion

On August 19, 2019, the Court filed its Memorandum Findings of Fact and Opinion (T.C. Memo. 2019-102). The parties had settled all the issues except for whether petitioner was entitled to casualty loss and liable for an accuracy-related penalty under section 6662(a) for 2008. The Court held that petitioner was not entitled to a casualty loss deduction for 2008, but was not liable for the accuracy-related penalty under section 6662(a) for 2008.

The Court has reviewed the record as a whole, especially petitioner's 2008 tax return and the real estate and personal property conveyance documents, in conjunction with petitioner's expert witness reports. The Court determined that

petitioner's expert had utilized parameters to form an opinion on the value of petitioner's property which included descriptions of fixtures, sculptures and antique stained glass windows and wall paneling. Petitioner either did not correct the report before submitting it to the court as evidence or petitioner had failed to inform his own expert witness that he had removed value from his fee simple property by transferring ownership of certain fixtures and sculptures to a trust, to include some portion of the stained glass windows in his dining room and wall paneling throughout the house. Nor did it appear that petitioner had disclosed to his own expert that he had originally purchased the subject property in an "as is" condition with no warranties.

The Court, therefore, could not rely on the expert witness reports to determine the fair market value of petitioner's property pre- and post-Hurricane Ike for purposes of determining a casualty loss deduction under section 165. Additionally, the Court was not persuaded by the petitioner's abandonment of his 2008 tax return casualty loss position to his litigation position provided by his expert witness that the house lost 95% of its value post-Hurricane Ike. Petitioner's ornate and architecturally significant house only reflected damage at best and described as proportionately minor according to insurance documents admitted into evidence. The damage and the subsequent repairs were fully reimbursed to the petitioner by his insurance company.

V. Petitioner's Motion to Vacate or Revise Decision Pursuant to Rule 162

On December 17, 2019, the parties' filed a Joint Computation for Entry of Decision without prejudice to the right to appeal. The decision was entered on December 18, 2019. On January 16, 2020, petitioner filed a Motion for Extension of Time to File a Motion to Vacate or Revise Decision, which the Court granted on January 21, 2020.

On January 24, 2020, petitioner filed a Motion to Vacate or Revise Decision Pursuant to Rule 162. In his motion, petitioner made three arguments. Petitioner first argued that the Court found his expert witness report not competent and, therefore, the Court erred in admitting the expert report into evidence because it was irrelevant. Petitioner relies on the Court's so-called "gatekeeping" authority laid out in Daubert v. Merrell Dow Pharms., Inc. (Daubert), 509 U.S. 579 (1993) and Kumho Tire Co. Ltd. v. Carmichael (Kumho Tire), 526 U.S. 137 (1999).

Petitioner then argued that he was "unjustly deprived of notice" that the expert witness report would be excluded under Daubert and that he was deprived of a reasonable opportunity to prepare for trial because of the lack of notice. Petitioner finally argued in his motion that the Court "conflates admissibility with credibility" because the Court found the expert witness credible, but the report "constructively inadmissible" "due to its methodology".

On March 6, 2020, respondent filed an Objection to Motion to Vacate or Revise Pursuant to Rule 162. Respondent argued in his objection that petitioner's contentions are not valid grounds for vacating the decision under Federal Rules of Civil Procedure Rule 60(b) and that petitioner's motion actually seeks reconsideration of the Court's opinion out of time. Respondent further argued that the U.S. Supreme Court affirmed the Tax Court's discretion to accept or reject testimony, including expert testimony, in Helvering v. Nat'l Grocery Co., 304 U.S. 282, 295 (1938), and that there is no subsequent case history to change the Court's discretion. Respondent also argues that declining to give weight to an expert witness' testimony is not the same as being "constructively inadmissible" and provided multiple examples of the Court admitting expert testimony and declining to give it weight.

Discussion

A party may file a motion to vacate or revise a decision of the Court within 30 days after the decision has been entered. Rule 162. The disposition of a motion under Rule 162 to vacate a decision rests within the Court's discretion, and such motions generally will not be granted absent a showing of unusual circumstances or substantial error, e.g., mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, or other reason justifying relief. See, e.g., Rule 1(b) (cross-referencing Federal Rules of Civil Procedure); Fed. R. Civ. P. 60(b); Brannon's of Shawnee, Inc. v. Commissioner, 69 T.C. 999 (1978); Brewer v. Commissioner, T.C. Memo. 2005-10; Kun v. Commissioner, T.C. Memo. 2004-273, aff'd, 157 F. App'x 971 (9th Cir. 2005).

Petitioner moved to vacate this Court's decision entered December 18, 2019, which reflected the joint computation for entry of decision, but the motion did not raise any issues related to the computation. The Court observes that petitioner's motion to vacate appears to be making arguments that would have been more

appropriate in a motion for reconsideration under Rule 161. Reconsideration of findings or opinion under Rule 161 serves the limited purpose of correcting substantial errors of fact or law and allows the introduction of newly discovered evidence that the moving party could not have introduced, by exercise of due diligence, in the prior proceeding. Westbrook v. Commissioner, 68 F.3d 868, 879-880 (5th Cir. 1995), aff'g per curiam T.C. Memo. 1993-634; Estate of Quick v. Commissioner, 110 T.C. 440, 441 (1998). The granting of a motion for reconsideration rests within the discretion of the Court, and the Court usually does not exercise its discretion absent a showing of unusual circumstances or substantial error. Estate of Quick v. Commissioner, 110 T.C. at 441; CWT Farms, Inc. v. Commissioner, 79 T.C. 1054, 1057 (1982), aff'd, 755 F.2d 790 (11th Cir. 1985). A motion for reconsideration under Rule 161--and a motion to vacate under Rule 162--is not the appropriate forum for tendering new legal theories to reach the end result desired by the moving party. Estate of Quick v. Commissioner, 110 T.C. at 441-442; Stoody v. Commissioner, 67 T.C. 643, 644 (1977).

Additionally, Rule 161 states that: "Any motion for reconsideration of an opinion or findings of fact * * * shall be filed within 30 days after a written opinion * * * [has] been served, unless the Court shall otherwise permit." The written opinion was filed on August 19, 2019, therefore, petitioner's request for the Court to reconsider its findings or opinion is woefully late. However, for the sake of completeness, the Court will address petitioner's arguments.

I. Daubert and Kumho Tire

Petitioner has not demonstrated any unusual circumstances or substantial error in his motion or provided the Court with newly discovered evidence. Indeed, petitioner's main argument is that the Court incorrectly admitted his expert witness report into evidence in violation of Daubert and Kumho Tire.

Under rule 702 of the Federal Rules of Evidence:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product

of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In Daubert, 509 U.S. at 597, the U.S. Supreme Court held that, under the Federal Rules of Evidence, the trial judge must ensure as a precondition to admissibility that any and all scientific testimony rests on a reliable foundation and is relevant. In Kumho Tire, 526 U.S. at 149, the Supreme Court extended this requirement to all expert matters described in Rule 702, Fed. R. Evid. Under Daubert and Kumho Tire, a trial court bears a "special gatekeeping obligation" to ensure that any and all expert testimony is relevant and reliable. Caracci v. Commissioner, 118 T.C. 379, 393 (2002). In exercising this function, trial judges have "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." Kumho Tire, 526 U.S. at 152; see also Haarhuis v. Kunnan Enters., Ltd., 177 F.3d 1007, 1014-1015 (D.C. Cir. 1999).

As the Court stated above, petitioner submitted his expert witness reports to the Court two weeks late. The Court gave the parties, especially petitioner, considerable leeway to determine how they wished to proceed with trial and utilize the expert witness reports. The Court determined the reliability of petitioner's expert witness report in conjunction with the record as a whole. Even though the Court chose not to rely on petitioner's expert witness report to determine the fair market value of petitioner's property pre- and post-Hurricane Ike, receipt of unreliable evidence is an imposition on the opposing party and on the trial process, not the party offering the report. See Laureys v. Commissioner, 92 T.C. 101, 127 (1989). In addition, the reliability of petitioner's expert witness reports failures largely reflected the lack of adequate disclosure of background information in the knowledge and control of petitioner.

II. Notice

When considering expert testimony, the Court is not required to follow the opinion of any expert if it is contrary to the Court's judgment. Estate of Deputy v. Commissioner, T.C. Memo. 2003-176 (citing Helvering v. Nat'l Grocery Co., 304 U.S. 282, 295 (1938), and Silverman v. Commissioner, 538 F.2d 927, 933 (2d Cir. 1976), aff'g T.C. Memo. 1974-285). The Court may adopt or reject expert

testimony in whole or in part. Estate of Davis v. Commissioner, 110 T.C. 530, 538 (1998).

Petitioner's argument that he would have provided additional evidence to buttress his claim for a casualty loss deduction or was unable to properly prepare for trial because he did not know the expert witness report would not be relied on is disingenuous. Petitioner was aware two years before trial that respondent was seeking information on the claimed casualty loss deduction. Respondent expressed his concerns in a January 2015 hearing that the expert witness report failed to take into account the general decline in market value. Additionally, petitioner was aware the day before trial that his expert witness reports may be excluded from evidence because of respondent's pending Motion in Limine to exclude them. A motion for reconsideration is also not a proper mechanism to rectify a failure of proof at trial. See Vincentini v. Commissioner, T.C. Memo. 2009-255, aff'd, 429 F. App'x 560 (6th Cir. 2011).

III. Credibility and Admissibility

The test for admissibility of expert testimony is whether the testimony will aid the trier of fact to understand the evidence or to determine a fact in issue. See Fed. R. Evid. 702; Sunoco, Inc. & Subs. v. Commissioner, 118 T.C. 181, 183 (2002). The proponent has the burden of showing that the expert testimony meet the requirements of rule 702 of the Federal Rules of Evidence. Trimmer v. Commissioner, 148 T.C. 334, 350-351 (2017) (citing In re Pfizer Inc. Sec. Litig., 819 F.3d 642, 658 (2d Cir. 2016)). Petitioner did not argue at trial that his expert witness report was inadmissible under rule 702 of the Federal Rules of Evidence. Additionally, "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi, 80 F.3d 1074, 1078 (5th Cir. 1996). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." Daubert, 509 U.S. at 595.

The Court found petitioner's expert witness credible and her report aided the Court in understanding the evidence. While the aid ultimately helped the Court find for respondent on whether petitioner was entitled to a casualty loss deduction,

the expert witness report does not become inadmissible because it did not have the desired effect for petitioner.

Finally, Rule 160 provides:

> "No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the Court or by any of the parties, is ground for granting a new trial or for vacating, modifying, or otherwise disturbing a decision or order, unless refusal to take such action appears to the Court inconsistent with substantial justice. The Court at every stage of a case will disregard any error or defect which does not affect the substantial rights of the parties."

Petitioner appears to be arguing that his substantial rights were affected by the Court admitting his expert witness report. The Court is not aware of and could not find any instance where a party has been unduly prejudiced by their own expert witness report being admitted into evidence.

Giving due regard to the representations contained in petitioner's motion and respondent's objection, it is

ORDERED that petitioner's January 24, 2020, Motion to Vacate or Revise Pursuant to Rule 162 is denied.

Petitioner is reminded of the Court's March 13, 2020, Order as it relates to the timing for an appeal. See also Rule 190.

(Signed) Elizabeth Crewson Paris
Judge

Dated: Washington, D.C.
July 17, 2020