United States Tax Court

167 T.C. No. 9

AIRBNB, INC. & SUBSIDIARIES,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 12423-24. Filed September 2, 2026.

P and R filed competing Motions for Discovery Protective Order Pursuant to Rule 103, which have since been amended. R attached to his Motion for Discovery Protective Order, and to his Response to P's Motion for Discovery Protective Order, Declarations by R's chosen expert witness for the case.

P filed two Motions to Strike, requesting that we strike the Declarations primarily on the grounds that they are improper expert witness reports that do not meet the requirements of Tax Ct. R. Prac. & Proc. 143(g).

Held: The requirements of Tax Ct. R. Prac. & Proc. 143(g) do not apply to declarations submitted in support of a pretrial discovery motion.

Held, further, P's Motions to Strike will be denied.

Mark T. Roche and *Scott H. Frewing*, for petitioner.

David B. Flassing, *Charles A. S. Wiseman*, and *Charles E. Buxbaum*, for respondent.

Served 09/02/26

OPINION

TORO, *Judge*: This deficiency case concerns principally section 482.[1] Petitioner, Airbnb, Inc. & Subsidiaries (Airbnb), challenges the Commissioner's determination to increase Airbnb's income by $4,195,858,428 with respect to the resources, capabilities, and rights that Airbnb made available on December 31, 2013, to an affiliate registered under the laws of Ireland and tax resident in Jersey.

As is common for this type of case, the parties anticipate conducting extensive discovery. And, as parties often do in these circumstances, Airbnb moved for a discovery protective order. The Commissioner likewise moved for a discovery protective order. The competing Motions led to the dispute we resolve here.

In support of his Motion for a Discovery Protective Order Pursuant to Rule 103, and in opposition to Airbnb's Motion for a Discovery Protective Order, the Commissioner submitted two Declarations from Monty G. Myers (Declarations).[2] Mr. Myers has 48 years of software development experience and is the founder and chief executive officer of a project-oriented, custom software solution delivery and management company based in Austin, Texas. The Commissioner has engaged Mr. Myers "to provide independent expert consulting and analysis in [the Commissioner's] dispute with [Airbnb]." Resp't's Mot. for Disc. Prot. Order, Ex. 2, at 2 (hereinafter First Decl.).

Airbnb has moved to strike both Declarations. It maintains that they (1) function as improper expert reports; (2) violate the Court's Rules governing expert disclosures, specifically Rule 143(g); (3) offer impermissible legal opinions and advocacy; and (4) rely on orders from cases bearing no resemblance to this case.

The Motions to Strike raise an issue of first impression concerning the application of Rule 143(g). As we explain below, Airbnb's reliance on Rule 143(g) is misplaced. We also conclude that striking the Declarations is not an appropriate remedy here. But we will disregard the Declarations to the extent they offer legal opinions. We will defer

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[1] Unless otherwise indicated, statutory references are to the Internal Revenue Code, Title 26 U.S.C. (I.R.C.), in effect at all relevant times, and Rule references are to the Tax Court Rules of Practice and Procedure.

[2] For convenience, we will refer to the individual declarations as the First Declaration and Second Declaration, respectively.

further evaluation of the Declarations until we resolve the competing Motions for Discovery Protective Orders in due course.

Background

The following facts are derived from the parties' pleadings and Motion papers. They are stated solely for the purpose of ruling on the Motions before us and not as findings of fact in this case. *See Rowen v. Commissioner*, 156 T.C. 101, 103 (2021) (reviewed).

Airbnb provides an online marketplace through which registered users who wish to offer travel services can connect and transact with users seeking to book accommodations. Airbnb, Inc., is a corporation organized under Delaware law and has its principal place of business in San Francisco, California.[3]

The software that Airbnb uses to operate its business is a key aspect of the transfer pricing dispute in this case. On April 10, 2026, Airbnb filed a Motion for Discovery Protective Order Pursuant to Rule 103, which was subsequently amended. Airbnb says that its source code and other technical materials are sensitive and should be accessed by the Commissioner only through a clean room,[4] to be established in Airbnb's offices or the offices of its counsel.

The Commissioner filed his own Motion for Discovery Protective Order Pursuant to Rule 103 on the same day. It too was subsequently amended.[5] As relevant here, the Commissioner contends that the clean room should be established in Austin, Texas—where Mr. Myers is

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[3] Absent stipulation to the contrary, *see* I.R.C. § 7482(b)(2), appeal of this case would lie to the U.S. Court of Appeals for the Ninth Circuit, *see* I.R.C. § 7482(b)(1).

[4] As the parties have used the term, a "clean room" is a secured room to which access is limited and from which removal of documents or materials is permitted only in certain circumstances. This usage does not incorporate any decontamination protocols or standards that may be common in fields such as electronics manufacturing. *See generally Yearout Mech. & Eng'g, Inc. v. Commissioner*, T.C. Memo. 2008-217, 2008 WL 4346331, at *1 n.3 (describing clean rooms in the semiconductor manufacturing industry).

[5] On May 20, 2026, the Commissioner filed a Second Motion to Amend his Motion for Discovery Protective Order. We have deferred acting on the Commissioner's Second Motion to Amend.

Since the filing of both sets of Motions and their amendments, the parties reached agreement on the treatment of nontechnology proprietary and confidential information, and on August 14, 2026, we issued an Order governing its protection.

located—and that the category of information subject to clean room procedures should be narrower than proposed by Airbnb.

In support of his Motion for Discovery Protective Order and his response to Airbnb's Motion for Discovery Protective Order, the Commissioner attached the Declarations. The First Declaration states that Mr. Myers has, "for the last 20+ years, . . . served as an expert witness/consultant in more than a hundred software-related cases." First Decl. 4.

The Declarations set out Mr. Myers's view on how the clean room should operate and which materials it should include. They further maintain that "the terms petitioner insisted on for the [protective order] are generally unreasonable and are onerous and inefficient relative to numerous other Federal Court [protective orders] I've worked under in software litigation matters." First Decl. 11; *see also* Resp't's Resp. to Pet'r's Mot. for Disc. Prot. Order, Ex. 1, at 22 (hereinafter Second Decl.) (referring to Airbnb's proposed terms as "onerous" and opining that they "hinder discovery" and "create[] significant opportunities for frequent disagreements" between the parties). They also state Mr. Myers's opinion that protective orders "have been generally weaponized to the point of substantially undermining reasonable processes and efficiency in software and technology litigation." First Decl. 17; *see also* Second Decl. 9–10 ("This level of complexity and unreasonable scope is precisely the type of 'weaponization' of discovery that I described in the [First Declaration] . . . .").

Airbnb filed a Motion to Strike the Declaration of Monty G. Myers on April 20, 2026, requesting that we strike the First Declaration from the record. On May 20, 2026, Airbnb filed a second Motion to Strike, asking that we strike the Second Declaration.

Airbnb contends that the Declarations (1) function as improper expert reports, (2) violate the requirements of Rule 143(g), (3) offer legal opinions and advocacy that are impermissible under Rule 702 of the Federal Rules of Evidence, and (4) rely on protective orders from cases that are irrelevant to this case. The Commissioner argues that Rule 143 and Rule 702 of the Federal Rules of Evidence are inapplicable to the Declarations and that the Declarations do not offer improper legal opinions.

Discussion

Rule 52 provides that the Court may strike "any redundant, immaterial, impertinent, frivolous, or scandalous matter" from, as relevant here, "briefs, documents, or any other papers or responses filed with the Court."

Motions to strike are generally disfavored by federal courts. *Clay v. Commissioner*, 152 T.C. 223, 234 (2019) (first citing *Estate of Jephson v. Commissioner*, 81 T.C. 999, 1001 (1983); and then citing *Allen v. Commissioner*, 71 T.C. 577, 579 (1979)), *aff'd*, 990 F.3d 1296 (11th Cir. 2021). "A motion to strike should be granted only when the allegations have no possible relation to the controversy. When the court is in doubt whether under any contingency the matter may raise an issue, the motion should be denied." *Id.* (quoting *Estate of Jephson*, 81 T.C. at 1001). And "a motion to strike will usually not be granted unless there is a showing of prejudice to the moving party." *Id.* (quoting *Estate of Jephson*, 81 T.C. at 1001).

Airbnb's primary argument is that the Declarations are expert witness reports subject to the requirements of Rule 143(g). In Airbnb's view, the Declarations do not comply with those requirements and therefore must be stricken.

Rule 143(g) does not apply here. Rule 143 provides evidentiary rules for trials before this Court. It is found in Title XIV of the Tax Court Rules of Practice and Procedure, titled "Trials."[6] The Rule itself is titled "Evidence," and Rule 143(a) explains how "[t]rials before the Court will be conducted." Moreover, Rule 143(g), by its terms, applies to "any party who calls an expert witness."

There has been no trial in this case. The Commissioner has not yet firmly identified the expert witnesses he intends to call at trial. And the Declarations focus on pretrial procedural matters, not the underlying substantive questions at issue in this case. Thus, Rule 143

[6] Absent a specific instruction to the contrary, *e.g.*, I.R.C. § 7806(b), titles and headings are "'tools available for the resolution of a doubt' about the meaning of a statute," *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (quoting *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 529 (1947)); *accord Abdo v. Commissioner*, 162 T.C. 148, 163 (2024) (reviewed). The same is true with respect to our Rules.

is inapplicable to the Declarations,[7] and the requirements of Rule 143(g) do not provide grounds for striking the Declarations.[8]

Airbnb also argues that the Declarations should be stricken because they provide "legal conclusions and advocacy, not proper expert testimony to assist the trier of fact." Pet'r's First Mot. 7.

It is of course true that "an expert witness cannot give an opinion as to her *legal conclusion*, i.e., an opinion on an ultimate issue of law." *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058–59 (9th Cir. 2008) (quoting *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004)); *see also* Fed. R. Evid. 702(a) (providing that an expert may testify if his specialized knowledge "will help the trier of fact to understand the evidence or to determine a fact in issue"); *Sunoco, Inc. & Subs. v. Commissioner*, 118 T.C. 181, 183–84 (2002) (collecting authorities).

It is not evident that the Declarations should be read as offering legal conclusions. *See Nationwide Transp. Fin.*, 523 F.3d at 1059 (acknowledging that "a district court does not abuse its discretion in allowing experts to use legal terminology" and collecting cases in which a court of appeals "affirmed the district court's decisions to allow experts to refer to terminology from applicable law"); *Torres v. Cnty. of Oakland*, 758 F.2d 147, 151 (6th Cir. 1985) ("The best resolution of this type of problem is to determine whether the terms used by the witness have a separate, distinct and specialized meaning in the law different from that present in the vernacular."); *see also* Fed. R. Evid. 704 advisory committee's note to 1972 proposed rules (observing that opinion testimony designed to explore the applicability of legal criteria is permitted, relying on *McCormick on Evidence*). And, given that the Declarations relate only to the proper scope of a discovery protective

[7] Rule 143(c) underscores that "[e]x parte affidavits or declarations . . . do not constitute evidence."

[8] Even if Rule 143(g) were applicable to the Declarations, we might accept the Declarations despite their noncompliance with the Rule's requirements. Rule 143(g)(1) applies "[u]nless otherwise permitted by the Court upon timely request." Additionally, Rule 143(g)(3) provides that the Court may grant a request to permit an expert witness to testify without a written report when the expert witness testifies only with respect to industry practice. The bulk of Mr. Myers's statements appear to concern his view of standard protective order practices in the expert witness industry, so they might be acceptable without a written report under Rule 143(g)(3) in any event.

order governing technology issues, they do not appear to offer conclusions on any ultimate issues of law in this case.

But even if portions of the Declarations could be viewed as offering legal conclusions, it would not follow that they must necessarily be stricken. We could decline to rely on those portions without striking them.[9] *See Clay*, 152 T.C. at 236 (denying a motion to strike portions of the taxpayers' reply brief and noting that "[w]hether we deem [the taxpayers] to have abandoned the argument, strike the argument, or decide it on its merits . . . their argument is unavailing").

Nor has Airbnb demonstrated the type of prejudice that courts have found sufficient to strike material from the record. *See Estate of Jephson*, 81 T.C. at 1003 (describing the taxpayer's prejudice argument); *see also Hyde Ins. Assocs., Inc. v. Commissioner*, T.C. Memo. 1993-240, 65 T.C.M. (CCH) 2818, 2822–23 (denying the taxpayer's motion to strike and noting that the disputed matter was not prejudicial to the taxpayer); *Yamaha Motor Corp., U.S.A. v. Commissioner*, T.C. Memo. 1992-110, 63 T.C.M. (CCH) 2176, 2182–83 (declining to strike statements from the Commissioner's answer and noting that the taxpayer would not be prejudiced). Because we are free in this case to place no weight on any statements that improperly provide legal conclusions, it is unlikely that Airbnb would be prejudiced by their continued presence in the record—and Airbnb has not shown otherwise. *See United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005) ("There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself.").

Finally, in the procedural posture now before us, a decision not to strike declarations like those here does not leave a litigant without a remedy if the litigant views the declarations as lacking a factual foundation or otherwise lacking merit. In such a case, the litigant remains free to submit its own declarations or request an evidentiary hearing at which the author of the declarations might be cross-examined. *See, e.g.*, *Dynamo Holdings Ltd. P'ship v. Commissioner*, 143 T.C. 183, 185, 189 (2014). And the judge responsible for presiding at such a hearing would be free to specify the procedures to be followed with respect to that testimony, including, for example, that written

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[9] Likewise, Airbnb's argument that the Declarations refer to "inapposite" cases does not justify striking the Declarations. Pet'r's First Mot. 8. That Mr. Myers's past experience may not be directly analogous to this case does not render his statements "redundant, immaterial, impertinent, frivolous, or scandalous." Rule 52. Instead, this argument goes to the weight we should ultimately place on Mr. Myers's statements.

reports like those contemplated by Rule 143(g) be submitted ahead of time. *See, e.g.*, *Dynamo Holdings Ltd. P'ship*, 143 T.C. at 185, 189.

For all these reasons, we will deny Airbnb's Motions to Strike.[10]

We have considered all of the parties' arguments and, to the extent not discussed above, conclude they are irrelevant, moot, or without merit.

To reflect the foregoing,

An appropriate order will be issued.

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[10] We need not decide at this stage whether any of the statements presented in the Declarations are in some way improper. Mindful that "[e]ach courtroom comes equipped with a 'legal expert,' called a judge," *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C. Cir. 1997), we will disregard Mr. Myers's statements to the extent they offer legal opinions or advocacy when we ultimately decide the competing Motions for Discovery Protective Order that remain pending.