United States Tax Court
Washington, DC 20217

Paul Puglisi & Ann Marie Puglisi, et. al.,	)		
	)		
Petitioners	)		
	)	Docket No. 4796-20,	4799-20,
v.	)	4826-20,	13487-20,
	)	13488-20,	13489-20.
Commissioner of Internal Revenue,	)		
	)		
Respondent	)		

O R D E R

In statutory notices of deficiency ("SNODs") issued to the petitioners in these six related cases, the IRS determined tax deficiencies and penalties totaling over $2.7 million, on the basis of "captive insurance" issues. Petitioners challenged those determinations by commencing these cases. The IRS eventually determined to concede the amounts of tax at issue (except for about 2 percent that petitioners conceded) and to concede the penalties. Petitioners refused to enter a stipulated decision to that effect, so the Commissioner filed a motion for entry of decision in each of the six cases, reflecting his concessions. The amounts as determined in the SNODs and as proposed in the Commissioner's motions for entry of decision are as follows:

Docket Number	Year	SNOD Tax Deficiency	SNOD Penalty	Motion Deficiency/ (Overpayment)
4796-20	2015	$562,309	$224,924	$18,587
	2016	84,881	33,952	0
4799-20	2015	563,172	225,269	18,587
	2016	84,880	33,953	0
4826-20	2015	564,785	225,914	18,587

Served 10/29/21

	2016	84,881	33,952	0
13487-20	2018	64,247	12,849	(3)
13488-20	2018	64,691	12,938	0
13489-20	2018	61,422	12,284	0
		$2,135,268	$612,715	$55,758

Petitioners object to the motions for entry of decision, urging that "the interests of justice demand that these cases continue towards trial" (Doc. 21 at 17)[1] so that there can be "a resolution on the merits for Petitioners" (Doc. 21 at 31); and they argue that we should reject the Commissioner's concessions. We will accept the Commissioner's concessions.

Background

Petitioners' farms and transactions

For purposes of the pending motions for entry of decision, we assume (without deciding) petitioners' summary of their operations and the transactions at issue, as follows (footnotes omitted):

> Petitioners are the owners of Puglisi Egg Farms of Delaware, LLC, a privately-held egg farm in Delaware with over 1.2 million egg-producing hens. The farm primarily sells eggs to retailers, such as grocery stores and restaurants, in the mid-Atlantic region. Given the nature of its operations, Puglisi Egg Farms of Delaware, LLC sought to insure against fortuitous risks, such as avian influenza, for which insurance coverage was unavailable in the commercial marketplace. The company had sought out insurance from its longstanding commercial insurance broker and an insurance brokerage firm that specializes in insurance for agricultural businesses in the United States.

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[1]Unless otherwise noted, a citation in this order to a "Doc." refers to a document so numbered in the Tax Court docket record of the first-filed case--Paul & Ann Marie Puglisi v. Commissioner, No. 4796-20--and the pinpoint citations refer to the page numbers as typed on the documents.

> The company eventually turned to Oxford Risk Management Group LLC to help it further evaluate its risks, form and manage a captive insurance company, and obtain insurance for its risks.
>
> Like hundreds of other companies, Puglisi Egg Farms of Delaware, LLC purchased insurance from Series A of Oxford Insurance Company LLC (Series A), an insurance fronting carrier licensed by the Delaware Department of Insurance. Through a reinsurance agreement with Series A, Petitioners' captive insurance company--Series KF of Oxford Insurance Company LLC (Series KF)--reinsures (1) twenty percent of all approved claims of Puglisi Egg Farms of Delaware, LLC, and (2) its quota share of eighty percent of all approved claims of unrelated entities that are insured by Series A, Series Protected Cell 1 of Oxford Insurance Company TN LLC (SPC 1), or Series 1 of Oxford Insurance Company NC LLC (Series 1), through an interindemnity agreement between Series A and these other insurance fronting carriers. Since it began participation in this captive insurance arrangement in December of 2015, Puglisi Egg Farms of Delaware, LLC has filed five claims for losses that were covered by Series A and not covered by its commercial insurance carrier. Puglisi Egg Farms of Delaware, LLC continues to purchase insurance from Series A, and Series KF continues to reinsure risk and losses of Series A and the other insurance fronting carriers. [Doc. 21 at 1-3.]

IRS examination

Again, we assume correct the following description by petitioners of the IRS's examination of their tax returns:

> Since 2017, Petitioners have been under the Internal Revenue Service's (IRS's) microscope for their companies' participation in the captive insurance arrangement. The IRS conducted an intensive examination of the insured (Puglisi Egg Farms of Delaware, LLC), the fronting insurance carrier (Series A), and the captive insurance

> company (Series KF).[2] The IRS used template information document requests (IDRs) with hundreds of questions and subparts and requests for documents resulting in the production of thousands of documents (comprising tens of thousands of pages). The IRS then followed up with summonses for information that substantially overlapped with the information that had already been produced in response to the IDRs. [Doc. 21 at 3.]

Disallowances in the SNODs

In December 2019 the IRS issued to petitioners SNODs for 2015 and 2016, and in November 2020 the IRS issued to petitioners SNODs for 2018. (No deficiencies were determined for 2017 against the petitioners in these six cases. See Doc. 16 at 4.) The SNODs disallowed deductions claimed on petitioners' tax returns, determined deficiencies of tax, and determined liabilities for penalty. The SNODs disallowed deductions for "Other Deductions: Insurance" for all three years (2015, 2016, and 2018), with the following explanation:

> It is determined that the purported insurance and/or reinsurance transactions lack economic substance, that the substance of the transactions do not comport with their form, and that the various steps involved in the transactions were engaged in for no purpose other than to avoid or evade taxes.
>
> Alternatively, you did not establish that the above expenses claimed on your tax return were ordinary and necessary to your business.
>
> Further, it is determined that the amounts disallowed were not paid to an insurance company and that they were not paid for insurance. [Doc. 1 at 46; see also No. 13488-20, Doc. 1 at 33 of 37]

The SNODs for 2015 and 2016 (but not 2018) preceded that text with the caption "Insurance Expenses: Captive Insurance" and also included the following:

> Insurance Expenses

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[2]A few facts about this captive insurance carrier, Series KF of Oxford Insurance Co., LLC, are included below, but it is not a party in these consolidated cases.

> Since you did not establish that the expense on your tax return was paid or incurred during the tax able year and that the expense was ordinary and necessary to your business, we have disallowed the amount shown. [Doc. 1 at 46.]
>
> Other Deductions: Management Fee Expense
>
> The management fees deducted are disallowed because you did not establish that [sic] were ordinary and necessary business expenses and deductible in the year claimed. [Doc. 1 at 46.]

Penalties in the SNODs

The SNODs for 2015 and 2016 determined liabilities for 40 percent penalties with the following explanation:

> It is determined that all of the underpayment of tax is a disallowance of claimed tax benefits by reason of a transaction lacking economic substance (within the meaning of I.R.C. § 7701(o)) or failing to meet the requirements of any similar rule of law. It also is determined that all of the underpayment of tax is attributable to one or more nondisclosed noneconomic substance transactions. Consequently, there is added to the tax an amount equal to 40 percent of such underpayment of tax pursuant to I.R.C. § 6662. [Doc. 1 at 27]

(Those SNODs for 2015 and 2016 determined 20 percent penalties in the alternative.)

The SNODs for 2018 determined liabilities for 20 percent penalties with the following explanation:

> We have charged you a penalty due to a disallowance of claimed benefits by reason of a transaction lacking economic substance or failing to meet the requirements of any similar rule of law. The penalty is 20 percent of the portion ofthe underpayment attributable to one or more noneconomic substance transactions. The reasonable cause exception does not apply to any portion of an underpayment that is attributable to one or more noneconomic substance

> transactions. (For transactions entered into on or after March 31, 2010). [No. 13488-20, Doc. 1 at 29 of 37.]

(Those SNODs for 2018 also stated alternative grounds supporting 20 percent penalties.)

Tax Court petitions

The petitions in the cases involving 2015 and 2016 were filed in March 2020, and the petitions in the cases involving 2018 were filed in December 2020.

In addition, two petitions were filed for petitioners' captive insurance carrier, Series KF of Oxford Insurance Co., LLC v. Commissioner, Nos. 4798-20 (filed in March 2020) and 13486-20 (filed in December 2020). SNODs issued to Series KF for 2015-2018 had determined tax deficiencies totaling over $610,000, plus 20 percent penalties. Those two cases were related to the six cases that are the subject of this order, but were not consolidated with these six. (As is noted below, the two Series KF cases were later resolved by stipulated decisions.)

Tax Court proceedings

We assume that (as petitioners allege[3]) that "[o]nce the cases moved into the Tax Court, Petitioners responded to over 200 discovery requests (with approximately 125 subparts), and produced more than 1,000 additional documents (comprising nearly 10,000 pages)." (Doc. 21 at 3.) We also assume that "[p]etitioners incurred fees for hundreds of hours of legal work during Respondent's examinations, and thousands of hours of legal work to prepare these cases for trial. * * * But Petitioners appear unable to recoup these costs because of the technical limitations of I.R.C. section 7430." (Doc. 21 at 22.)

In April 2021, the parties filed a "First Stipulation of Settled Issues" (Doc. 10) in the three cases involving 2015 and 2016. (There would be no "Second".) The stipulation provided as follows:

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[3]The Commissioner disputes petitioners' description of discovery, the time spent on it, and the appropriateness of the Commissioner's handling of the case and of his concession (see Doc. 24 at 3-6, 18-19), but for purposes of this order we accept petitioners' version of the events.

> The below signed parties agree to this First Stipulation of Settled Issues. All stipulated facts, opinions, or applications of law to fact shall be conclusive for purposes of these cases and for no other purposes.
>
> 1. The parties agree that Three Puglisi Brothers, Inc. is entitled to a deduction for Other Deductions: Management Fee Expense in the amount of $2,573,025.00 for taxable year 2015 rather than the $2,698,255.00 reported on its Form 1120S for taxable year 2015.
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> 2. The parties agree that Three Puglisi Brothers, Inc. is entitled to deductions for Other Deductions: Insurance in the amounts of $652,776.00 and $148,788.00 for taxable years 2015 and 2016, respectively. The remaining amounts of Other Deductions: Insurance reported by Three Puglisi Brothers, Inc. on its Forms 1120S for taxable years 2015 and 2016, which relate to amounts paid to Series A of Oxford Insurance Company LLC, remain in dispute.
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> 3. The amounts addressed by the parties in paragraphs one and two above shall flow through to Petitioners in accordance with their pro rata share of Three Puglisi Brothers, Inc.'s items of income, loss, deduction, or credit as described in Treas. Reg. § 1.1366-1.

After this stipulation had been filed, the remaining adjustments in the SNODs at issue were the disallowance of deductions claimed by petitioners for payments made by their LLC to Series A with respect to insurance policies. Petitioners proposed a pretrial schedule that included 90 days for discovery, deadlines for the filing of expert witness reports, and they stated that, for trial on that remaining issue, they "expect that their expert and factual witnesses will require 64 hours of trial time, inclusive of Respondent's cross-examinations." (Doc. 18 at 11-13.)

In June 2021 stipulated decisions were entered in the two Series KF cases, redetermining deficiencies of 50 cents of tax for each year and zero penalties (as opposed to the SNODs determinations of $610,000 in tax plus 20 percent penalties).

Motions for entry of decision

On May 21, 2021 (i.e., not long before the stipulated decisions in the Series KF cases), the Commissioner filed in each of the six consolidated cases a motion for entry of decision, which stated:

> RESPONDENT MOVES, pursuant to the provisions of Tax Court Rule 50, that the Court enter decisions in each of the cases at dockets 4796-20, 4799-20, 4826-20, 13487-20, 13488-20, and 13489-20 in accordance with the attached proposed decision documents (attached hereto as Exhibits B through G) * * *.
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> In support thereof, respondent respectfully states:
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> 1. As reflected herein and Respondent's Status Report filed with the Court on May 13, 2021 [Doc. 14], respondent has offered to concede all of the adjustments to income and the penalties set forth in the notices of deficiency upon which the cases * * * are based that were not resolved by way of (1) petitioners' concessions in the Petitions * * * or (2) the First Stipulation of Settled Issues filed with the Court on April 13, 2021 [Doc. 10]* * *. As set forth in Respondent's Status Report filed with the Court on May 13, 2021, petitioners have been unwilling to enter into respondent's proposed Decision documents or respondent's proposed Second Stipulation of Settled Issues * * * that incorporate respondent's proposed concessions. * * * [Doc. 16 at 1-3.]

(Petitioners filed a response in opposition (Doc. 21); the Commissioner filed a reply (Doc. 24); petitioners filed a sur-reply (Doc. 29); and the Commissioner filed a further response (Doc. 33).)

For purposes of this order, we assume petitioners' characterization of the Commissioner's motions, to this extent:

> Although Respondent has had the benefit of most of Petitioners' responses and documents for years, Respondent has now concluded that he wants to abandon the tax deficiencies asserted in his notices of deficiency, apparently because he recognizes that Petitioners' cases are not the litigation vehicles that he wants to use to present his theories to this Court. But while Respondent is willing to abandon the

> asserted deficiencies, he is not willing to concede the inaccuracy of his determinations underlying the adjustments * * *. [The motions for entry of decision make a] strategic attempt to "concede" the overall amounts at issue, in order to avoid an adverse ruling on the specific determinations in the notices of deficiency * * *.
>
> Respondent's approach leaves Petitioners without the relief they sought by filing the Petitions in the Tax Court. The deductibility of the insurance premiums paid to Series A is a recurring issue, because Petitioners' business relies on the insurance coverage provided by Series A and continues to purchase it every year. Furthermore, there are hundreds of other business owners that pay insurance premiums to Series A and the other insurance fronting carriers and are reinsured in part by Series KF. Many of these entities are currently under IRS examination.[4]
>
> Although Series A is an insurance company licensed by the Delaware Department of Insurance, the IRS still contends (notwithstanding its purported "concession" here) that Series A is not an insurance company for Federal income tax purposes. Petitioners and similarly situated taxpayers need clarity on whether their insurance premiums are deductible for their current and future tax return filing obligations. [Doc. 21 at 3-5.]

The Commissioner's reply, however, includes this offer: "To the extent that petitioners are concerned about respondent disallowing any payments that Puglisi Egg Farms made to Series A of Oxford with respect to any Actual Net Loss

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[4]Petitioners elaborate as follows: "If this Court were to accept Respondent's purported 'concession,' Respondent might continue to disallow Petitioners' deductions in future years--forcing them to return here at great (and duplicative) expense. [But see Doc. 24 at 14, quoted above.] Respondent will undoubtedly litigate another case involving the same captive insurance arrangement, most likely one in which the taxpayers are less able to defend against the Commissioner's vast resources, spurious allegations, and arbitrary disallowances. This future case could result in less nuanced precedent without regard to Petitioners' particular facts, but it would nonetheless have direct repercussions to Petitioners themselves--repercussions that are most unfair given that Petitioners are here themselves ready to zealously defend their tax reporting position." (Doc. 21 at 22.)

Insurance Policies during taxable years 2019 and 2020, respondent is willing to enter into a closing agreement that stipulates that he will not challenge the deductibility of any such payments." (Doc. 24 at 14.)

But petitioners persist in their objection. Their responses to the motions for entry of decision include repeated complaints about the Commissioner's "refusing to comply with discovery requests", and petitioners intend to conduct discovery and (we infer) expect to file motions to compel. (Consistent with that inference, petitioners have already filed in each case a "Motion to Review the Sufficiency of Answers or Objections to Request for Admissions" (Doc. 30) at the same time they filed their sur-reply (Doc. 29) in opposition to the motion for entry of decision.) And, of course, petitioners expect to conduct a trial at which they will put on testimony of "expert and factual witnesses" that, with the Commissioner's cross-examination, "will require 64 hours of trial time". (Doc. 18 at 12.)

Petitioners want the Court, before entering decision, to issue an opinion making findings and holdings in their favor. (See Doc.21 at 26 ("warrant an opinion from the court"), 28 ("warrant an opinion"), 31 ("an opinion would provide clarity"); Doc. 29 at 6 ("an opinion from this Court would serve as a significant precedent"), 11 ("An opinion on the merits in these cases will provide for judicial economy because it will give clear guidance for this Court to follow").) In particular, petitioners seek an opinion that renders "a ruling on the specific determinations in the notices of deficiency"--i.e., that decides whether "Series A is * * * an insurance company for Federal income tax purposes" and whether "insurance premiums [paid to Series A] are deductible". (Doc. 21 at 4-5.)

Discussion

I. A decision in a deficiency case

A. The nature of a deficiency

Stated simply, a deficiency is an amount--in particular, "the amount by which the tax imposed * * * exceeds * * * the amount shown as the tax by the taxpayer upon his return". Sec. 6211(a). The IRS is authorized by section 6212(a) to "determine[]" a deficiency in a taxpayer's income tax and to send the taxpayer notice of that deficiency (an SNOD). (Section 7522(a) requires that the SNOD "shall describe the basis for * * * the tax due".) The taxpayer is then entitled to "file a petition with the Tax Court for a redetermination of the deficiency." Sec. 6213(a).

B. The nature of a deficiency case

A deficiency case in the Tax Court is not a review of agency action pursuant to the Administrative Procedure Act, 5 U.S.C. sec. 551 et seq. See Ax v. Commissioner, 146 T.C. 153 (2016). A deficiency case is not a TEFRA partnership case under former section 6226 (now repealed), in which the court "shall have jurisdiction to determine * * * items". Sec. 6226(f) (emphasis added); see also Petaluma FX Partners, LLC v. Commissioner, 131 T.C. 84, 90-94 (2008), aff'd in part, rev'd in part and remanded, 591 F.3d 649 (D.C. Cir. 2010), and supplemented, 135 T.C. 581 (2010).

Rather, after the IRS "determines" a deficiency, the Tax Court "redetermin[es] * * * the deficiency" in a deficiency case. In doing so, the Tax Court may "consider * * * facts with relation to the taxes for other years", but only "as may be necessary correctly to redetermine the amount of such deficiency" for the year actually at issue; that is, the Tax Court "shall have no jurisdiction to determine whether or not the tax for any other year * * * has been overpaid or underpaid". Sec. 6214(b). Likewise, the deficiency court "has no jurisdiction to determine the correctness of the disallowance" that does not affect the deficiency. Herbst Dept. Store v. Commissioner, 7 B.T.A. 1150, 1150 (1927). Rather, the point in a deficiency case is to "redetermine the amount" of the deficiency determined in the SNOD as to a particular taxpayer for a particular year, not to publish commentary on the law or to offer assistance on matters other than the deficiency before the Court.

C. The nature of a decision

A Tax Court "decision" is equivalent to a district court "judgment". In the statutory language applicable to the Tax Court, the "decision" in a deficiency case is an "order specifying the amount of the deficiency", sec. 7459(c); and a "report", see sec. 7459(a), is the Court's opinion that may explain its decision. The Tax Court makes its "decision * * * in accordance with the report" or opinion. Sec. 7459(a).

II. Analysis

The Commissioner has filed a motion for entry of decision; and in this case, there is no dispute about the correct amounts of the redetermined deficiencies in petitioners' income tax for the years at issue. They are the amounts proposed in

the Commissioner's motion, and petitioners do not contend otherwise. Thus, it would seem that we are now able to enter decision, i.e. an "order specifying the amount of the deficiency", see sec. 7459(c). But petitioners object. Their objection is not that they want a decision in an amount different from what the Commissioner proposes; rather, they want the Court first to issue an opinion and only then to enter (the same) decision. We are persuaded that the Commissioner's position is correct.

A. Jurisdiction

We begin by noting that the question is not whether we have jurisdiction over the case after the Commissioner made his concession. We do have jurisdiction. As we have observed:

> [I]t is not the existence of a deficiency but the Commissioner's determination of a deficiency that provides a predicate for Tax Court jurisdiction. * * * Indeed, were this not true, then the absurd result would be that in every case in which this Court determined that no deficiency existed, our jurisdiction would be lost.

Hannan v. Commissioner, 52 T.C. 787, 791 (1969). Rather, "[h]aving acquired jurisdiction, this Court has the authority and responsibility to enter a decision on the merits." LTV Corp. v. Commissioner, 64 T.C. 589, 591 (1975); see also Bowman v. Commissioner, 17 T.C. 681, 685 (1951) ("A litigant in a matter before a court of competent jurisdiction who brings the other party into court is entitled to an ultimate judgment, and the opposing party cannot defeat the jurisdiction of the court by a waiver or disclaimer on his part"). The question is not whether we may decide this case, but how.

B. Petitioners' entitlement to decisions

We next note that the question is not whether petitioners are entitled to decisions in their favor. They are. Two opinions on which petitioners attempt to rely to resist the Commissioner's motion are inapposite--Vigon v. Commissioner, 149 T.C. 97, 112 (2017), and Hotel Conquistador, Inc. v. United States, 220 Ct. Cl. 20, 33 (1979)--and can be briefly set aside: Vigon was a collection due process case that the Commissioner asked the Tax Court to dismiss as moot (although retaining the right to reassess the underlying liabilities), and Hotel Conquistador was a refund suit that the Government asked the Court of Claims to dismiss for

lack of jurisdiction after proferring checks to pay the refunds sought (although retaining the possibility of later suing the taxpayer for erroneous refund).

Although neither of these cases was a deficiency case, these two opinions do both stand for a proposition that is applicable to a deficiency case--i.e., that the taxpayer is entitled to a decision (or judgment) as to the liabilities at issue in the pending case.[5]

The Commissioner is not attempting in this case to avoid the entry of decisions against himself. On the contrary, he has moved for entry of decisions. Once entered, those decisions will become final under section 7481, and res judicata will attach. See Commissioner v. Sunnen, 333 U.S. 591, 598 (1948) ("if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is res judicata as to any subsequent proceeding involving the same claim and the same tax year"). Whether a Tax Court litigant is entitled to a decision (it is entitled) is a question different from whether the litigant is entitled to an opinion (it may or may not be entitled, as we now discuss).

C. The general rule against advisory opinions

The Commissioner correctly states: "The [Tax] Court has repeatedly declined to issue advisory opinions. See, e.g., LTV Corp. v. Commissioner, 64 T.C. at 595-596; Cape Fox Corp. v. Commissioner, T.C. Memo. 1992-363; Cigna Corp. v. Commissioner, T.C. Memo. 2012-266." (Doc. 24 at 3.) Preeminent among such cases is the first in his list. In LTV Corp. we stated, "courts will not gratuitously decide complex issues that cannot affect the disposition of the case before them", 64 T.C. at 595, and we entered decision, declining to issue an opinion where the deficiency was conceded. We reasoned as follows:

> Our responsibility is limited to redetermining the deficiency asserted for the years before us. If the respondent predicates a deficiency on understated income or overstated deductions (or some combination of the two) and the taxpayer claims that either additional depreciation,

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[5]See, to similar effect, Church of Scientology of Hawaii v. United States, 485 F.2d 313, 317 (9th Cir. 1973) ("the failure to resolve the legal issue results in adverse collateral consequences which would be resolved by a determination of the underlying issue").

> interest, or business expenses eliminate the asserted deficiency, the respondent's concession that any of these deductions (either alone or in combination) exist in sufficient magnitude to eliminate the deficiency results in a decision of no deficiency (if we accept respondent's concession, as we do here). We do not nevertheless determine whether all of the claimed deductions are available, or whether the claimed deductions (either alone or in combination) are actually in excess of the deficiency determined.
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> Since the net operating loss deduction provided by section 172 is simply one of the deductions provided by chapter 1 of subtitle A, it is difficult to see why the decision should be different here. It is unnecessary to determine which of the parties is correct as to specific deduction and income items making up their respective computations. The result is the same in either case: the deficiency as redetermined for the years before us is zero.

Id. at 593-594 (footnote omitted). The Tax Court's opinion in LTV Corp. was guided by (and quoted, id. at 594) the Supreme Court's opinion in California v. San Pablo & Tulare Railroad Co., 149 U.S. 308, 314 (1893), which held:

> [T]he State [of California] has obtained everything that it could recover in this case by a judgment of this court in its favor. The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. [Emphasis added here as in LTV Corp.]

So the Tax Court concluded in LTV Corp.:

> We, of course, do not have jurisdiction to render a monetary judgment, but simply determine the amount of the deficiency or overpayment. Burns, Stix Friedman & Co., 57 T.C. 392, 396 (1971). The only issue before us is the deficiency determined by respondent for 1965 and 1966. A decision of no deficiency in accordance with respondent's

> concession provides a complete victory for petitioner; a continuation of the proceedings 'cannot affect the result as to the thing in issue' in this case, and can add nothing other than an advisory opinion declarative of the size of a deduction petitioner may be able to use in some future years. [64 T.C. at 594-595; emphasis added.]

It is just so here. See also Greene-Thapedi v. Commissioner, 126 T.C. 1, 13 (2006) ("For us to undertake to resolve issues that would not affect the disposition of this case would, at best, amount to rendering an advisory opinion. This we decline to do").

D. Discretion to reject a concession

The Tax Court's 1975 LTV Corp. opinion indicated that the litigation is over "if we accept respondent's concession, as we do here", 64 T.C. at 593, leaving open the possibility that in a given instance a Court might not accept a concession, and the case would proceed. Just such an instance arose the next year in McGowan v. Commissioner, 67 T.C. 599, 602 (1976), where "[t]he facts [we]re undisputed" and both parties asked for summary judgment ("But on Different Grounds", the Commissioner urged). Id. at 602. The Court recognized in McGowan that it was "traversing relatively uncharted waters by refusing to accept respondent's concession", id. at 605, but concluded that "judicial discretion to accept or reject an offered concession exists" and that "[o]nly our acceptance of either the concession or an agreed joint stipulated decision would remove the matter from issue", id. at 606. The McGowan Court therefore rejected the concession and proceeded to address the merits of the case.

Since McGowan there have been additional instances in which the Tax Court declined to accept concessions and proceeded to decide the merits. See, e.g., Jones v. Commissioner, 79 T.C. 668, 673 (1982) ("there is an element of discretion in deciding whether to avoid rendering a decision on the merits even where it is firmly established that the ultimate result will be no deficiency for the years before the Court"); Smith v. Commissioner, 78 T.C. 350 (1982) (where Respondent objected to taxpayers' attempted concessions, the taxpayers were not allowed to unilaterally prevent litigation of a test case). On the other hand, in other instances the Tax Court has accepted the concession. See, e.g., Cape Fox Corp. & Subs. v. Commissioner, 63 T.C.M. (CCH) 3184, 3186 (1992) ("We find that the best interests of justice will be served by exercising our discretion to accept

respondent's concession"). We therefore acknowledge that we have the discretion to accept or reject the Commissioner's concessions in these cases.[6]

We will accept the Commissioner's concessions. McGowan states an exception, and the general rule remains (as we stated in LTV Corp.) that we do not issue advisory opinions to resolve disputes that do not affect the ultimate outcome of the case before us, and here the undisputed outcome is known. That general rule serves well the current circumstances. Among these six consolidated cases, the three cases involving the latest year at issue--2018--were filed less than a year ago on December 30, 2020, and the Commissioner disclosed his intention to concede less than five months thereafter in status reports filed May 13, 2021. We see no culpable delay in the Commissioner's handling of this litigation. Moreover, this case, unlike McGowan, involves factual disputes that, as suggested by petitioners' own projections, would likely require discovery, motions to compel, and a lengthy trial involving fact and expert witnesses.

If it were true that the Commissioner's concessions in these cases are merely tactical and simply reflect that "Petitioners' cases are not the litigation vehicles that he wants to use to present his theories to this Court" (Doc. 21 at 4), then our exercising discretion to accept the concessions in these cases is, of course, without prejudice to our exercising discretion in the management of future "Series A" cases. However, if petitioners are among "hundreds of other companies * * * [that] purchased insurance from Series A of Oxford Insurance Company LLC"

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[6]If we have such discretion, then presumably our exercise thereof would, on appeal, be reviewed for abuse of that discretion. However, it is not obvious how such review would proceed. It is not the opinion but the "decision" of the Tax Court that may be appealed to the Court of Appeals. See secs. 7481-7483; Jennings v. Stephens, 574 U.S. 271, 277 (2015) (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984)) ("federal appellate courts, do[] not review lower courts' opinions, but their judgments"). If an appeal addresses an abuse of discretion that may have affected the amount of the district court judgment or of a Tax Court decision (such as an abuse of discretion in an order granting or denying a motion to amend a pleading or granting or denying a motion for a continuance), then one can imagine a reversal and remand to correct the error, possibly yielding a different judgment or decision; but if the appellant does not seek a decision different from what the Tax Court entered but rather seeks an opinion that would yield the very same decision, then it is difficult to conceive of the remand order that the appellate court would issue.

(Doc. 21 at 2; Doc. 24 at 4-5 & n.4), then we could not criticize petitioners, the "other companies", or Series A if they had coordinated their efforts and pursued the instant petitions because they were more promising than others as "litigation vehicles" for the taxpayers' position; nor can we criticize the Commissioner for conceding cases in which his position is weaker in order to devote his resources to litigating cases that are more promising for his position.

It is therefore

ORDERED that we exercise our discretion to accept the Commissioner's concessions in these cases. It is further

ORDERED that the cases at docket numbers 4796-20, 4799-20, 4826-20, 13487-20, 13488-20, and 13489-20 are no longer consolidated, and decisions will be entered in due course. It is further

ORDERED that petitioners' Motions to Review the Sufficiency of Answers or Objections to Request for Admissions are denied as moot.

(Signed) David Gustafson
Judge