

UNITED STATES TAX COURT
WASHINGTON, DC 20217

MEDTRONIC, INC. & CONSOLIDATED)	
SUBSIDIARIES,)	
)	
Petitioner(s),)	
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v.)	Docket No. 6944-11.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
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Respondent)	
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ORDER

On August 16, 2018, the U.S. Court of Appeals for the Eighth Circuit issued its opinion vacating and remanding our decision for further proceedings. Medtronic, Inc. & Consolidated Subsidiaries v. Commissioner, 900 F.3d 610 (2018), vacating and remanding T.C. Memo. 2016-112. Pursuant to the Eighth Circuit’s remand issued on October 12, 2018, this Court ordered the parties to file a joint written status report stating their views as to the actions this Court should take on remand in accordance with the opinion and judgment of the Eighth Circuit. On December 3, 2018, the parties filed a joint status report indicating that the parties agree that it is necessary to provide the Court with supplemental briefing to address the issues raised by the Eighth Circuit. However, the parties disagree as to whether the record should be reopened before submitting briefs to this Court.

The Eighth Circuit remanded the case for further consideration in light of the views set forth in its opinion. See id. at 615. It stated: “[t]he [T]ax [C]ourt determined that the Pacesetter agreement was an appropriate CUT [comparable uncontrolled transaction] because it involved similar intangible property and had similar circumstances regarding licensing. We conclude that the [T]ax [C]ourt’s factual findings are insufficient to enable us to conduct an evaluation of that determination.” Id. at 614. The Eighth Circuit stated that we did not provide the

following: (1) sufficient detail as to whether the circumstances of the settlement between Pacesetter and Medtronic US were comparable to the licensing agreement between Medtronic and Medtronic Puerto Rico, and whether the Pacesetter agreement was one created in the ordinary course of business, (2) an analysis of the degree of comparability of the Pacesetter agreement's contractual terms and those of the Medtronic Puerto Rico licensing agreement, (3) an evaluation of how the different treatment of intangibles affected the comparability of the Pacesetter agreement and the Medtronic Puerto Rico licensing agreement, and (4) the amount of risk and product liability expense that should be allocated between Medtronic US and Medtronic Puerto Rico. See id. at 614-615. The Eighth Circuit "deem[s] such findings to be essential to our review of the [T]ax [C]ourt's determination that the Pacesetter agreement was a CUT, as well as necessary to our determination whether the [T]ax [C]ourt applied the best transfer pricing method for calculating an arm's length result or whether it made proper adjustments under its chosen method." Id. at 615.

On January 17, 2019, petitioner filed a motion to reopen the record to admit expert testimony addressing whether the Pacesetter agreement is an appropriate CUT, considering comparability of circumstances, contractual terms, and intangibles. Petitioner's motion stated that it is not moving to reopen the record with respect to the amount of risk and product liability expense that should be allocated between Medtronic US and Medtronic Puerto Rico because the record is already sufficient to make additional factual findings on that issue.

On March 1, 2019, respondent filed an objection to petitioner's motion to reopen the record. However, respondent requested that if the Court grants petitioner's motion to reopen the record, the Court should allow the parties to admit supplemental expert evidence addressing whether: (1) the Pacesetter agreement is a CUT, (2) the CUT method using the Pacesetter agreement or the Comparable Profits Method (CPM) is the best method, and (3) the Tax Court made proper adjustments under its chosen method.

On March 22, 2019, petitioner filed a reply to respondent's objection. On March 27, 2019, respondent filed a sur-reply to petitioner's reply to objection to petitioner's motion to reopen the record. Considering the guidance provided by the Eighth Circuit as to the scope of the remand, petitioner's motion to reopen the record, and the parties' responses, we will exercise our discretion to reopen the record to a limited degree to permit expert testimony. See Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 331 (1971).

Expert testimony will be allowed to address the following:

- (1) whether the Pacesetter agreement is a CUT;
- (2) whether this Court made appropriate adjustments to the Pacesetter agreement as a CUT;
- (3) whether the circumstances between Pacesetter and Medtronic US were comparable to the licensing agreement between Medtronic and Medtronic Puerto Rico and whether the Pacesetter agreement was an agreement created in the ordinary course of business;
- (4) an analysis of the degree of comparability of the Pacesetter agreement's contractual terms and those of the Medtronic Puerto Rico licensing agreement;
- (5) an evaluation of how the different intangibles affected the comparability of the Pacesetter agreement and the Medtronic Puerto Rico licensing agreement;
- (6) an analysis that contrasts and compares the CUT method using the Pacesetter agreement with or without adjustments and the CPM, including which method is the best method.

The expert testimony described above should not be duplicative of the existing record's expert testimony. The parties will have the opportunity to submit supplemental briefs after further evidentiary proceedings are conducted. The supplemental briefs will address the issue of the amount of risk and product liability expense that should be allocated between Medtronic US and Medtronic Puerto Rico, and other issues to be discussed and determined following the conclusion of further evidentiary proceedings.

On April 2, 2019, the parties filed a joint status report which provided an update on mediation discussions. The joint status report indicated that the parties are willing to discuss mediation after the Court rules on petitioner's motion to reopen the record.

In consideration of the foregoing, it is

ORDERED that petitioner's motion to reopen the record is granted in that the record is reopened solely to receive expert testimony regarding the issues specifically described above. It is further

ORDERED that on or before June 3, 2019 the parties shall file a joint status report on the then-present status of discussions regarding mediation.

**(Signed) Kathleen Kerrigan
Judge**

Dated: Washington, D.C.
May 3, 2019