 CLC

UNITED STATES TAX COURT
WASHINGTON, DC 20217

ESTATE OF RICHARD F. CAHILL, DECEASED, PATRICK CAHILL, EXECUTOR,	)	
Petitioner,	)	
v.	)	Docket No. 10451-16.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

O R D E R

This case is before the Court on the estate's motion in limine, filed April 5, 2017, to exclude the expert report of Francis X. Burns titled "Valuation of Four Promissory Notes as of December 12, 2011". On April 28, 2017, respondent filed a response. On May 17, 2017, the estate filed a reply.

We conduct these proceedings in accordance with the Federal Rules of Evidence, as interpreted by the Court of Appeals for the Ninth Circuit, to which this case is appealable absent a stipulation to the contrary. See Interim Rule 143(a), United States Tax Court Press Release 4 (Mar. 28, 2016), www.ustaxcourt.gov/press/032816.pdf; sec. 7482.[1, 2]

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[1]Unless otherwise indicated, section references are to the Internal Revenue Code, as amended. Rule references are to the Tax Court Rules of Practice and Procedure.

[2]Sec. 7453 was amended on December 18, 2015, to provide: "Except in the case of proceedings conducted under section 7436(c) or 7463, the proceedings of the Tax Court and its divisions shall be conducted * * * in accordance with the Federal Rules of Evidence." Pursuant to this provision the Court follows the Federal Rules of Evidence as applied by the U.S. Court of Appeals to which a case is appealable. Battat v. Commissioner, 148 T.C. ___, ___ (slip op. at 20-21) (Feb. 2, 2017). Sec. 7453 as amended is effective for "proceedings commenced after the date of the enactment of this Act and, to the extent that it is just and practicable, to

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With respect to expert testimony, this Court has a "gatekeeping" duty requiring us to determine that an expert's testimony "both rests on a reliable foundation and is relevant to the task at hand" before it may be admitted. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597 (1993). The Court has broad discretion in carrying out this gatekeeping role. See, e.g., Beech Aircraft Corp. v. United States, 51 F.3d 834, 842 (9th Cir. 1995); Neonatology Assocs., P.A. v. Commissioner, 115 T.C. 43, 85 (2000), aff'd, 299 F.3d 221 (3d Cir. 2002).

The proponent of expert testimony has the burden of showing that the testimony meets the requirements of rule 702 of the Federal Rules of Evidence,[3] United States v. 87.98 Acres of Land More or Less in the County of Merced, 530 F.3d 899, 904 (9th Cir. 2008), although petitioner, as the moving party here, has the burden on this motion to exclude.

I. Information Relied On

The estate contends that the Burns report should be excluded as irrelevant or unhelpful because Mr. Burns relied on irrelevant facts and data, namely, information that allegedly would not have been available to a hypothetical buyer and seller as of the valuation date. The estate argues that neither a hypothetical seller nor a hypothetical buyer of the notes at issue would have been able to access certain information about the financial situations of the issuers of the notes for purposes of valuing the notes.[4]

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[2](...continued)
all proceedings pending on such date." Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, div. Q, sec. 425(b), 129 Stat. at 3125. This case was commenced after sec. 7453 was amended.

[3]Fed. R. Evid. 702 provides that a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

[4]We note that the estate has failed to demonstrate any barrier to accessing this information. The estate argues that the notes did not provide for access to
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The estate cites First Nat. Bank of Kenosha v. United States, 763 F.2d 891, 894 (7th Cir. 1985) for the proposition that "[i]nformation that the hypothetical willing buyer could not have known is obviously irrelevant" to valuation. But First Nat. Bank of Kenosha was discussing the rule that "subsequent events are not considered in fixing fair market value, except to the extent that they were reasonably foreseeable at the date of valuation". Id. The information the Burns report relies on would not appear to be information of subsequent events, i.e., events occurring after the valuation date. Instead, the information at issue would appear to be information that existed as of the valuation date. Consequently, First Nat. Bank of Kenosha and other cases relating to the subsequent events rule are generally inapplicable.

A hypothetical willing buyer and seller are presumed to have "reasonable knowledge of relevant facts" affecting the value of property at issue. Sec. 20.2031-1(b), Estate Tax Regs.; Estate of Kollsman v. Commissioner, T.C. Memo. 2017-40, at *23. Additionally, both hypothetical parties are presumed to have made a reasonable investigation of the relevant facts. See Estate of Kollsman v. Commissioner, at *23.

Consistent with these principles, section 20.2031-1(b), Estate Tax Regs., "define[s] fair market value, in effect, as the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts. Court decisions frequently state in addition that the hypothetical buyer and seller are assumed to be able, as well as willing, to trade and to be well informed about the property and concerning the market for such property." Rev. Rul. 59-60, sec. 2.02, 1959-1 C.B. 237 (emphasis added); see also, e.g., Estate of O'Connell v. Commissioner, 640 F.2d 249 (9th Cir. 1981) (citing with approval Rev. Rul. 59-60), aff'g in part, rev'g in part, T.C. Memo. 1978-191; Propstra v. United States, 680 F.2d 1248, 1252 (9th Cir. 1982) (same); Estate of Newhouse v. Commissioner, 94 T.C. 193, 217 (1990) (noting that Rev. Rul. 59-60 "has been widely accepted as setting forth the appropriate criteri

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information, but the mere absence of a legal right to acquire information in the terms of the notes does not imply that such information was unobtainable or unknown, nor would it be sufficient to overcome the presumptions discussed in the next few paragraphs.

a to consider in determining fair market value"); Estate of True v. Commissioner, T.C. Memo. 2001-167 (same), aff'd, 390 F.3d 1210 (10th Cir. 2004).

Rev. Rul. 59-60 correctly emphasizes that the hypothetical buyer and seller are both presumed (1) to be willing to buy or sell at arm's length, (2) not to be under any compulsion to buy or sell, and (3) to have a reasonable grasp of all facts and circumstances relevant to the property. "The applicable case law directs the trial court to consider all relevant information". Estate of O'Connell v. Commissioner, 640 F.2d at 251 (emphasis added).

Additionally, Rev. Rul. 59-60, sec. 2.03, points out that with respect to closely held corporations "little, if any, trading i[n] the shares takes place. There is, therefore, no established market for the stock and such sales as occur at irregular intervals seldom reflect all of the elements of a representative transaction as defined by the term 'fair market value.'" Accordingly, "in the valuation of the stock of closely held corporations or the stock of corporations where market quotations are either lacking or too scarce to be recognized, all available financial data, as well as all relevant factors affecting the fair market value, should be considered." Id., sec. 4.01 (emphasis added). These statements recognize that, for assets for which no market exists, fair market value is determined on the basis of all the facts and circumstances as of the valuation date. The parties appear to agree that, as in the closely held corporation situation, there was little or no market for the notes at issue in this case. Therefore, we must consider all relevant factors affecting the value of those notes.[5] As information going to whether the issuers would be able to pay their debts is obviously relevant to the value of the notes at issue, any such information must be considered.[6]

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[5]To be clear, we note that the potential difficulty of ascertaining certain information in a particular context might, of course, be reflected in a discount of some kind, such as a discount for lack of marketability. But the estate's motion does not dispute the correctness of the adjustment for lack of marketability calculated by Mr. Burns, nor would a dispute as to the correctness of Mr. Burns' conclusions in that regard provide a basis for excluding his testimony as a whole.

[6]Of course, such information may be entitled to more or less importance depending on the circumstances, but such considerations go to weight and not admissibility.

In its reply the estate cites Smith v. United States, 923 F. Supp. 896 (S.D. Miss. 1996), for the proposition that information that was obtained from a third party by deposition cannot be imputed to the hypothetical buyer and seller. The estate's reliance on Smith is misplaced.

In Smith, an estate tax refund case, the parties disputed the fair market value of certain notes owned by decedent (as of the decedent's date of death in 1988). A third-party company was potentially liable for the notes. In 1995 the United States deposed an officer of the company, who testified as to his then-present understanding, i.e., his understanding as of the date of the deposition (in 1995), of the company's position with respect to (1) the company's liability for the notes, (2) the priority of the notes (as compared to other debts of the company), (3) the terms of the note, such as whether there was a prepayment provision, etc., and (4) certain other facts, such as the structure of the company and whether payments on the note had been timely, all as of the date of the deposition.

As the court in Smith recognized, the opinion of a company's officer as to legal positions that the company may have taken after the valuation date was obviously irrelevant to valuation (except to the extent such positions would have been reasonably foreseeable as of the valuation date), because those positions had not been taken as of the valuation date. The court in Smith noted that, during a period roughly contemporaneous with the valuation date, the company had taken the position that it was responsible for the notes. The court (properly) did not exclude that contemporaneous position from its analysis. The court observed that "information that was obtained, or unable to be obtained * * * [as of the valuation date] is the only information relevant to the valuation of the note in issue." Smith v. United States, 923 F. Supp. at 904 (emphasis added). According to Smith, then, information that existed but was unobtainable would be relevant. Far from being authority for the result the estate seeks, Smith undercuts the estate's position.

The facts and data which the estate contends were improperly relied upon by Mr. Burns represent information about the third-party debtors as of the valuation date of decedent's death (such as, for example, whether the debtors were solvent as of that date)--information which the estate appears to acknowledge was known to the estate as of the valuation date. In fact, the estate attached to its return a valuation report which appears to take into account information similar to the sort of information the estate claims Mr. Burns improperly relied on. Because the estate's original valuation report demonstrates that the information existed as of the valuation date, and because information about the ability of the issuer to pay its

debt is clearly relevant, it was not improper for Mr. Burns to consider such information in forming his expert opinion.

For these reasons, we conclude that the estate has failed to show that Mr. Burns relied on irrelevant facts and data.

II. Bias

The estate also contends that the Burns report should be excluded because Mr. Burns was allegedly biased. The estate contends that because Mr. Burns examined certain documents provided by the IRS, he was influenced to such an extent that his report would not be helpful to the Court. We have reviewed the documents provided by the parties and conclude that whatever evidence of bias there may be would go to weight and not admissibility.

For these reasons, it is

ORDERED: That the estate's motion in limine to exclude the expert report of Francis X. Burns titled "Valuation of Four Promissory Notes As of December 12, 2011", dated April 5, 2017, is denied.

(Signed) Michael B. Thornton
Judge

Dated: Washington, D.C.
June 18, 2018