

Background

In 2010 Dasher's Bay donated a conservation easement to the National Wild Turkey Federation, Inc. The deed of easement, in relevant parts, provided:

5.9 Perpetuity. This Conservation Easement gives rise to a real property right and interest immediately vested in the Grantee. The burdens of this Easement will run with the Protected Property and will be enforceable against the Grantor and all future owners in perpetuity during their respective periods of such ownership.

* * * * *

5.12 Limitations on Extinguishment. * * * Unless otherwise required by applicable law at the time, in the event of any sale of all or a portion of the Protected Property (or any other property received in connection with an exchange or involuntary conversion of the Protected Property) after such termination or extinguishment, and after the satisfaction of prior claims and net of any costs or expenses associated with such sale, **Grantor and Grantee shall divide the proceeds from such sale (minus any amount attributable to the value of improvements made by Grantor after the effective date of the Easement, which amount is reserved to Grantor) in accordance with their respective percentage interests in the fair market value of the Protected Property**, as such percentage interests are determined under the provision of paragraph Section 5.13, adjusted, if necessary, to reflect a partial termination or extinguishment of the Easement. * * *

5.13 Percentage Interests. For purposes of this paragraph, the parties hereto stipulate that as of the effective date of this Easement, the Easement and the restricted fee interest in the Protected Property each represent a percentage interest in the fair market value of the Protected Property. Said percentage interests shall be determined by the ratio of the value of the Easement on the effective date of this Easement to the value of the Protected Property, without deduction for the value of the Easement, on the effective date of this Easement. The values on the effective date of this Easement shall be those values used to calculate the deduction for federal income tax purposes

allowable by reason this Easement, pursuant to Section 170(h) of the Code. For purposes of this paragraph, the ratio (as finally determined in accordance with the preceding sentence) of the value of the Easement in proportion to the value of the Protected Property unencumbered by the Easement shall remain constant, and the percentage interests of Grantor and Grantee in the fair market value of the Protected Property thereby determinable shall remain constant (except to reflect any such amendment).

(Emphasis added.)

Dasher's Bay filed Form 1065, U.S. Return of Partnership Income, for 2010 reporting the conservation easement as a deductible partner-level charitable contribution of \$8,619,000.¹ It reported no partnership-level income or deductions. Along with this return, Dasher's Bay filed Form 8283, Noncash Charitable Contributions, describing the contribution. Item 5(f) on Form 8283 requests the donor's cost or adjusted basis in the contributed property. In item 5(f), Dasher's Bay responded:

A declaration of the taxpayer's basis in the property is not included in Section B, Part 1, 5(f) of the attached Form 8283 because of the fact that the basis of the property is not taken into consideration when computing the amount of the deduction. Furthermore, the taxpayer has a holding period in the property in excess of 12 months and the property otherwise qualifies as "capital gain property".

Dasher's Bay did not provide a numerical answer in box 5(f) on Form 8283.

On November 27, 2017, the Commissioner sent Dasher's Bay Management Group, LLC, the Tax Matters Partner of Dasher's Bay, a notice of final partnership

¹All monetary amounts are rounded to the nearest dollar.

administrative adjustment (FPAA). The FPAA determined an adjustment to income in the amount of \$8,619,000 resulting from denial of the charitable contribution deduction. In the FPAA, the Commissioner claimed Dasher's Bay did not establish that the contribution satisfied the requirements of section 170, or if it met those requirements, the value of the contributed property.

After receiving the FPAA, Dasher's Bay timely filed its petition disputing the Commissioner's determinations. At that time, the principal place of business of Dasher's Bay was in Georgia. Dasher's Bay now moves for summary judgment on the following issues: (1) whether Private Letter Ruling 200836014 (Sept. 5, 2008) is binding on the Commissioner under Auer v. Robbins, 519 U.S. 452 (1997); (2) whether section 1.170A-14(g)(6)(ii), Income Tax Regs., is invalid under SEC v. Chenery Corp., 332 U.S. 194 (1947); (3) whether the deed of easement satisfies the perpetuity requirement of section 170(h)(5); (4) whether Dasher's Bay has met the relevant substantiation requirements including reporting of cost basis; and (5) whether Dasher's Bay has complied with the substantiation requirements of section 170(f).²

²Unless otherwise indicated, all statutory references are to the Internal Revenue Code (Code) in effect for the year at issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

Discussion

We have jurisdiction to review the adjustments made in an FPAA when a tax matters partner files a timely petition under section 6226(a). The Commissioner's determinations set forth in an FPAA are generally presumed correct and the taxpayer bears the burden of showing otherwise.³ The tax matters partner for Dasher's Bay filed a timely petition granting us jurisdiction to review the Commissioner's determinations in the FPAA. Dasher's Bay bears the burden of proving those determinations incorrect.

Under Rule 121(a), either party may move for summary judgment regarding all or any part of the legal issues in controversy. The purpose of summary judgment is to expedite litigation and avoid unnecessary and time-consuming trials.⁴ We grant summary judgment only if there is no genuine dispute as to any material fact.⁵ The party moving for summary judgment bears the burden of demonstrating that there is no genuine dispute as to any material fact.⁶ In deciding whether to grant summary judgment, the factual materials and the inferences

³Rule 142(a); Welch v. Helvering, 290 U.S. 111, 115 (1933).

⁴Fla. Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988).

⁵Rule 121(b); Naftel v. Commissioner, 85 T.C. 527, 529 (1985).

⁶Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994).

drawn from them must be considered in the light most favorable to the nonmoving party.⁷

A. The Perpetuity Requirement.

Section 170 generally allows a deduction for a charitable contribution, and subsection (f) provides exceptions to the deduction. One such exception applies to the situation when the donor contributes less than his entire interest in his property.⁸ Section 170(f)(3)(B)(iii) allows a donation of a partial interest of property when the property is a “qualified conservation contribution”. Subsection (h) defines “qualified conservation contribution” as “a contribution -- (A) of a qualified real property interest, (B) to a qualified organization, (C) exclusively for conservation purposes.”⁹ A contribution is not “exclusively for conservation purposes unless the conservation purpose is protected in perpetuity.”¹⁰

The regulations provide “a single—and exceedingly narrow—exception to the requirement that a conservation easement impose a perpetual use restriction.”¹¹ This exception is provided in the “extinguishment” regulation of section 1.170A-14(g)(6)(ii):

⁷FPL Group, Inc. v. Commissioner, 115 T.C. 554, 559 (2000).

⁸Sec. 170(f)(3)(A).

⁹Sec. 170(h)(1).

¹⁰Sec. 170(h)(5)(A).

¹¹Belk v. Commissioner, 774 F.3d 221, 225 (4th Cir.2014), aff’g 140 T.C. 1 (2013).

[A]t the time of the gift the donor must agree that the donation of the perpetual conservation restriction gives rise to a property right * * * with a fair market value that is at least equal to the proportionate value that the perpetual conservation restriction at the time of the gift, bears to the value of the property as a whole at that time. * * * [T]hat proportionate value of the donee's property rights shall remain constant. * * * [When the unexpected change occurs, the donee] must be entitled to a portion of the proceeds at least equal to that proportionate value of the perpetual conservation restriction * * *.¹²

Section 1.170A-14(g)(6)(ii) requires that when property is no longer used for conservation purposes and is disposed of, the deed of easement must grant the donee a right to the proceeds equal to the proportionate value of the easement at the time of the gift in relation to the value of the property as a whole at the time of the gift.

The deed of easement granted to Dasher's Bay does not comply with section 1.170A-14(g)(6)(ii). The deed of easement granted by Dasher's Bay permits the donor to adjust the proportion of proceeds for the value of improvements made by the donor. Nothing in the statute or regulations permits such an adjustment. Because the deed of easement does not fit the "exceedingly narrow" exception provided in the extinguishment regulation, the easement does not meet the perpetuity requirement.

¹²Sec. 1.170A-14(g)(6)(ii), Income Tax Regs.

1. Dasher's Bay Argues it Complied with the Extinguishment Regulation.

Dasher's Bay argues that its deed of easement complies with the extinguishment regulation because the Commissioner previously allowed a deduction of a similar deed in Private Letter Ruling 200836014.

Private Letter Rulings are written for specific taxpayers and other taxpayers may not rely on them as precedent.¹³ Courts are not required to consider private letter rulings;¹⁴ however, they may provide useful guidance.¹⁵

This Court is not bound to follow a position taken by the Internal Revenue Service in Private Letter Ruling 200836014. Further, we do not find the ruling useful in interpreting the perpetuity requirement at issue as the primary questions analyzed in that ruling were whether the easement “qualifie[d] as a donation for the protection of an environmental system under section 170(h)(4)(A)(ii), and preservation of certain open space under section 170(h)(4)(A)(iii).”¹⁶ While the easement provided for the payment of proceeds to the donee in the event of an extinguishment event “represent[ing] a percentage interest in the fair market value of the Protected Property []less an amount attributable to the value of a permissible

¹³Sec. 6110(k)(3)

¹⁴Abdel-Fattah v. Commissioner, 134 T. C. 190, 202 (2010).

¹⁵Dover Corp. v. Commissioner, 122 T.C. 324, 341 n. 12 (2004).

¹⁶Priv. Ltr. Rul. 200836014 (Sept. 5, 2008).

improvement made by the Grantors”, the Private Letter Ruling did not discuss permissible improvements any further.¹⁷

We follow the precedent of the Court of Appeals to which this case may be appealed.¹⁸ This case is appealable to the Eleventh Circuit. The Eleventh Circuit follows decisions of the former Fifth Circuit handed down on or before September 30, 1981.¹⁹ Decisions made by the Fifth Circuit after 1981 may be persuasive to but are not binding on the Eleventh Circuit.²⁰

The Fifth Circuit addressed whether an easement deed failed to protect the contribution at issue in perpetuity in PBBM-Rose Hill.²¹ The deed at issue there provided:

[I]f “any cause or circumstance gives rise to the extinguishment of [the easement]...then [the donee], on any subsequent sale, exchange or involuntary conversion of the Conservation Area, shall be entitled to a portion of the proceeds of sale equal to the greater of” the fair market value of the easement around the date of the deed, or a defined share of the amount of proceeds remaining after both the “actual bona fide expenses” of the sale and the “amount attributable to improvements constructed upon the Conservation Area pursuant to” the reserved rights, if any, are deducted.²²

¹⁷Priv. Ltr. Rul. 200836014.

¹⁸Golsen v. Commissioner, 54 T.C. 742, 757 (1970), aff’d, 445 F.2d 985 (10th Cir. 1971).

¹⁹See Bonner v. Pritchard, 661 F.2d 1206, 1209 (11th Cir. 1981).

²⁰Stein v. Reynolds Sec., Inc., 667 F.2d 33, 34 (11th Cir. 1982).

²¹PBBM-Rose Hill, Ltd. v. Commissioner, 900 F.3d 193 (5th Cir. 2018).

²²PBBM-Rose Hill, Ltd. v. Commissioner, 900 F.3d at 199.

The Fifth Circuit held that the plain language of the extinguishment regulation allows the donee only a portion of the proceeds equal to the proportionate value; it does not allow a subtraction for improvements.²³ We agree with the Fifth Circuit's reasoning and interpretation.

2. Dasher's Bay Argues the Regulation is Invalid.

As an alternative argument to their assertion that they complied with section 1.70A-14(g)(6)(ii), Dasher's Bay argues the regulation is invalid.

When testing the validity of a regulation, we generally look to the two-part test established under Chevron, U.S.A., Inc.²⁴. The first prong of that test is "whether Congress has directly spoken to the precise question at issue."²⁵ If Congress has not spoken to the precise question at issue, the second prong requires the Court to determine whether the regulation "is based on a permissible construction of the statute."²⁶ The Supreme Court later clarified that courts must treat Treasury regulations with the same deference as other agencies' regulations and that regulations promulgated under specific grants and regulations promulgated under general grants are not treated differently.²⁷

²³PBBM-Rose Hill, Ltd. v. Commissioner, 900 F.3d at 207-208.

²⁴Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

²⁵Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. at 842.

²⁶Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. at 843.

²⁷Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 55-56 (2011).

The regulation is valid under Chevron. The Commissioner had authority to issue regulations giving meaning to the phrase “protected in perpetuity” under step one of the Chevron analysis. Section 170(h) defines a qualified conservation contribution. Section 170(h)(1)(C) requires a qualified conservation contribution be exclusively for conservation purposes. Section 170(h)(5)(A) states a contribution is not exclusively for conservation purposes, and is therefore not a qualified conservation contribution, unless “the conservation purpose is protected in perpetuity.” Congress gives us no further description of the requirement “protected in perpetuity.”

Treasury provides a permissible construction of that phrase in section 1.170A-14.²⁸ Treasury reasonably interpreted the “protected in perpetuity” requirement of section 170(h)(5)(A). Section 1.170A-14(a) repeats the requirement that the conservation purpose be protected in perpetuity; section 1.170A-14(g) elaborates on what it means to protect a contribution in perpetuity. The regulation describes extinguishment of conservation easement as “a

²⁸The regulation was first proposed in 1983 to conform the regulations under section 170 to changes Congress made to the statute. Qualified Conservation Contribution, 48 Fed. Reg. 22940-01 (May 23, 1983) (to be codified at 26 C.F.R. pts. 1, 20, & 25). These proposed rules stated that Section 309 of the Tax Reduction and Simplification Act of 1977 “eliminated the deductibility of term easements for conservation purposes and required that such easements be perpetual in order to qualify for a deduction under section 170.” Qualified Conservation Contribution, 48 Fed. Reg. 22940-01. In response to this change in the law, Treasury proposed the rule that is now section 1.170A-14(g)(6)(ii), Income Tax Regs.

subsequent unexpected change in the conditions surrounding the property * * * [that makes] impossible or impractical the continued use of the property for conservation purposes”.²⁹ It is appropriate for Treasury to provide for disposal and distribution of proceeds upon extinguishment of the perpetuity requirement based on values at the time of the contribution.

B. Substantiation Requirements.

Section 170(f)(11)(D) requires a taxpayer to attach to his return a qualified appraisal of property “for which a deduction of more than \$500,000 is claimed”. Section 1.170A-13(c)(4)(ii)(E) provides that an appraisal summary must include the adjusted cost or other adjusted basis of the property. Clear and unequivocal disclosure of basis on Form 8283 is necessary to alert the Commissioner if further information is needed.³⁰ Generally, failure to comply with these reporting requirements results in a denial of the conservation deduction.

1. Dasher’s Bay Argues it Complied with Reporting Requirements.

In its motion for partial summary judgment, Dasher’s Bay argues that it disclosed the basis of the property as required because it “listed the partnership’s basis in the Dasher’s Bay property, i.e., land, as \$919,994. 2010 Return at 5, Sched. L, attached as Respondent’s Exhibit B.” Dasher’s Bay also claims it provided the basis of the land because it listed the amount of the contribution and

²⁹Sec. 1.170A-14(g)(6)(i), Income Tax Regs.

³⁰Belair Woods, LLC v. Commissioner, T.C. Memo 2018-159, at *19-*20.

reported the difference between the value of the contribution and its cost basis in the land. Dasher's Bay concludes that this information "provided Respondent with ready information to determine Petitioner's cost basis in the donated property."

Strict compliance would have required Dasher's Bay to report the basis as a final calculation where it was requested on both the return and line 5(f) of Form 8283. Instead of reporting its cost basis on this line, Dasher's Bay attached an explanation stating why it was not reporting its basis. As we have previously stated "[a]sserting that one may ignore a requirement does not constitute strict compliance with it."³¹

Dasher's Bay does not argue it substantially complied with this requirement. However, we find that Dasher's Bay did not meet substantial compliance. In light of this Court's recent decision based on nearly identical relevant facts in Belair Woods, Dasher's Bay did not substantially comply with basis reporting. This basis reporting neither strictly nor substantially complied with the statute.

2. Dasher's Bay Argues the Regulation is Invalid.

Dasher's Bay next asserts that section 1.170A-13(c)(4)(ii)(E) is invalid. Dasher's Bay reasons the regulation is invalid because it fails the first prong of Chevron. Dasher's Bay argues Congress spoke directly on the question at issue when it directed Treasury to:

³¹Belair Woods, LLC v. Commissioner, T.C. Memo 2018-159, at *12.

prescribe regulations under section 170(a)(1) of the Internal Revenue Code of 1954, which require any individual, closely held corporation, or personal service corporation claiming a deduction under section 170 of such Code for a contribution described in paragraph (2) —

- (A) to obtain a qualified appraisal for the property contributed,
- (B) to attach an appraisal summary to the return on which such deduction is first claimed for such contribution, and
- (C) to include on such return such additional information (including the cost basis and acquisition date of the contributed property) as the Secretary may prescribe in such regulations.³²

According to Dasher's Bay, Treasury violated Congressional mandate when it issued regulations calling for the basis to be reported on the appraisal summary form attached to the return. Dasher's Bay cites Armstrong³³ for the proposition that an attachment to the return is not the same as the return. However, Armstrong does not support such a proposition, nor does it even discuss it.

We decline to find section 1.170A-13(c)(4)(ii)(E) invalid. Congress did not prohibit Treasury from requiring taxpayers to report information on an attached form when Congress stated the information should be reported on a return.

As we previously explained under Mayo, Chevron deference applies to all Treasury regulations promulgated, whether under either a general or a specific authority. Requiring the basis reporting to be made on a form attached to the return is a reasonable application of the congressional mandate to provide for reporting of the required information.

³²Deficit Reduction Act, Pub. L. No. 98-369, sec. 155, 98 Stat. at 691 (1984).

³³Armstrong v. Commissioner, 139 T.C. 468 (2012).

In light of the foregoing, it is

ORDERED that petitioner's motion for partial summary judgment filed November 3, 2018, is denied. It is further

ORDERED that jurisdiction is no longer retained by the undersigned. It is further

ORDERED that this case is restored to the general trial docket.

**(Signed) Ronald L. Buch
Judge**

Dated: Washington, D.C.
December 10, 2019