UNITED STATES TAX COURT
WASHINGTON, DC 20217

BRANNAN SAND & GRAVEL CO., LLC, J. CURTIS MARVEL, TAX MATTERS PARTNER,	)	
Petitioner,	)	
v.	)	Docket No. 27474-16.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

O R D E R

On September 24, 2018, the parties filed a Joint Motion For Leave to Submit Case Under Rule 122 with respect to the disputed issue arising from Respondent's determination that the $200,000 deduction claimed by Brannan Sand & Gravel Company LLC (Partnership) on the return filed for the Partnership's tax year 2010 for charitable contributions failed to qualify as an allowable deduction under section 170 or any other section of the Internal Revenue Code for that tax year. This case was reassigned to the undersigned on January 28, 2020.

Upon review of the briefs of the parties, it appears that they dispute complicated issues, including but not limited to: whether certain materials attached to the partnership return constituted a qualified appraisal of the property donated; whether other technical requirements concerning the contents of a return reporting a charitable deduction (on Form 8283) were satisfied; whether the claimed contribution was part of a quid pro quo transaction; or whether the transaction should be treated as a bargain sale so that part of the value of the property is treated as a deductible contribution. These issues are made more difficult because of the relatively unusual property involved, that is, water storage rights.

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Rule 122(b), Tax Court Rules of Practice and Procedure, provides:

> The fact of submission of a case, under paragraph (a) of this Rule, does not alter the burden of proof, or the requirements otherwise applicable with respect to adducing proof, or the effect of failure of proof.

The Notice of Final Partnership Administrative Adjustment (FPAA) for 2010 in this case determined "that the deduction of $200,000 claimed on the return for contributions, fails to qualify as an allowable deduction under section 170, or any other section of the Internal Revenue Code." The Commissioner's notice is entitled to a presumption of correctness, and generally as to any deduction, petitioner bears the burden of proof. Rule 142(a); INDOPCO, Inc. v. Commissioner, 503 U.S. 79, 84 (1992); New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934).

(Section 7491(a) provides that the burden of proof may shift when a taxpayer introduces credible evidence and satisfies other conditions. In the case of a partnership, section 7491(a) applies only if the taxpayer is described in section 7430(c)(4)(A)(ii). Sec. 7491(a)(2)(C). The parties have not addressed section 7491(a) and there is no evidence as to whether the taxpayer qualifies under section 7430(c)(4)(A)(ii). Petitioner has not argued that the burden has shifted here.)

Although they argue at length about the issues mentioned above, the parties have not addressed the basic requirement that a taxpayer claiming a contribution deduction must establish the fair market value of the property donated. Section 1.170A-1(c), Income Tax Regs. There appears to be no evidence, credible or otherwise, that the water storage rights in issue had a value of $4,000 per acre-foot - $200,000 for 50 acre-feet - as of the date of the alleged contribution.

With respect to the issue of whether the materials relied on by petitioner constitute a qualified appraisal, the parties stipulated:

> Attached is a copy of the valuation opinion prepared by Timothy J. Flanagan with a report date of August 30, 2011. This letter states that it must be read in conjunction with Mr. Flanagan's letter of January 9, 2008, and his letter of September 7, 2005. Respondent specifically notes that this stipulation is limited to the authenticity of these documents, but expressly does not stipulate to any one of these

documents as a "qualified appraisal," as that term is defined in Treas. Reg. § 1.170A-13(c)(3).

The "valuation opinion" is based on the author's experience as a litigator and purportedly comparable transactions indicating a price per acre-foot of $3,500 to $4,000. He gives no indication that he is familiar with the details of the interrelated transactions entered into by the partnership or why he would choose the high end of the range for the water storage rights here in issue. There are inadequate explanations of whether the identified transactions involved a willing buyer and a willing seller and thus are an indication of fair market value. In other words, there is no comparison to the comparables except by general geographic area.

The parties argue about the qualifications of the author of the opinion to provide an appraisal. However, whether or not he is qualified with respect to the property in issue, there are serious questions about the reliability or admissibility of his opinion in the absence of an adequate discussion of the specific circumstances in which the water storage rights were donated. Respondent criticizes the opinion at length in contending that it does not constitute a "qualified appraisal". Whether or not a qualified appraisal, the valuation opinion has not been received as evidence and might not qualify if offered at trial. Expert opinions that disregard relevant facts affecting valuation are rejected. See Boltar, L.L.C. v. Commissioner, 136 T.C. 326, 335 (2011); Estate of Newhouse v. Commissioner, 94 T.C. 193, 244 (1990); Estate of Hall v. Commissioner, 92 T.C. 312, 338 (1989); Chiu v. Commissioner, 84 T.C. 722, 734-735 (1985). Cf. Jacobsen v. Deseret Book Co., 287 F.3d 936, 952–954 (10th Cir. 2002) (holding that incomplete expert reports that do not comply with rule requiring pretrial disclosure should be stricken and can only be cured if sufficient time remains before trial).

In any event, we cannot consider opinions that are not received in evidence as proof of fair market value. See Van Der Aa Invs., Inc. v. Commissioner, 125 T.C. 1, 6-7 (2005) (indicating that an appraisal report would be inadmissible as evidence of fair market value if the author did not testify and make himself available for cross-examination); Evans v. Commissioner, T.C. Memo. 2010-207 and cases there cited.

There is certainly no evidence in the record for petitioner's alternative claim that a bargain sale occurred. Thus there is no indication of appropriate allocation of value in such an event.

Rule 149(b) provides:

> Failure to produce evidence, in support of an issue of fact as to which a party has the burden of proof and which has not been conceded by such party's adversary, may be ground for dismissal or for determination of the affected issue against that party. Facts may be established by stipulation in accordance with Rule 91, but the mere filing of such stipulation does not relieve the party, upon whom rests the burden of proof, of the necessity of properly producing evidence in support of facts not adequately established by such stipulation. As to submission of a case without trial, see Rule 122.

In the interest of judicial economy, the Court may decide a dispositive issue without addressing all of the issues and arguments presented by the parties. If one issue is dispositive, an opinion's discussion of other issues is dictum. This may be an appropriate case for application of Rule 149(b) to decide that the partnership is not entitled to the $200,000 charitable contribution deduction claimed because petitioner has failed to prove the fair market value of the water storage rights transferred. Upon due consideration and for cause, it is hereby

ORDERED that on or before March 9, 2020, the parties shall show cause, if any they have, why the remaining issue in this case should not be decided against petitioner and in favor of respondent under Rule 149(b), Tax Court Rules of Practice and Procedure, by reason of petitioner's failure to present evidence in support of the charitable deduction claimed on the partnership's 2010 return.

(Signed) Mary Ann Cohen
Judge

Dated: Washington, D.C.
February 7, 2020