

**UNITED STATES TAX COURT
WASHINGTON, DC 20217**

HABITAT GREEN INVESTMENTS, LLC,)		
MM BULLDAWG MANAGER, LLC,)		
TAX MATTERS PARTNER, ET AL.,)		
)		
Petitioner(s),)		
)		
v.)	Docket No. 14433-17,	14434-17,
)	14435-17.	
COMMISSIONER OF INTERNAL REVENUE,)		
)		
Respondent)		

ORDER

In these three related cases, petitioner MM Bulldawg Manager, LLC (“MMBM”), is the tax matters partner (“TMP”) for three entities--i.e., for Habitat Green Investments, LLC (“Habitat Green”), in No. 14433-17, for Turtle River Properties, LLC (“Turtle River”), in No. 14434-17, and for Green Creek, LLC (“Green Creek”), in No. 14435-17. We refer to the three entities collectively as “the LLCs”. In December 2013 each of the LLCs executed a deed declaring a conservation easement in favor of a charitable organization, the Georgia Land Trust, Inc. (“the Grantee”); and on its tax return for that year--Form 1065, “U.S. Return of Partnership Income”--each LLC claimed, pursuant to section 170(h) of the Internal Revenue Code (26 U.S.C.), a noncash charitable contribution deduction. By notices of final partnership administrative adjustment (“FPAA”) issued to the LLCs in March and April 2017, the Commissioner disallowed the deductions and determined accuracy-related penalties under section 6662. On June 29, 2017, MMBM timely mailed for each LLC a petition for readjustment of partnership items under section 6226, challenging these determinations.

In each case the Commissioner filed a motion for partial summary judgment (Doc. 17) on the issue of whether the LLC is entitled to the deduction. The Commissioner contends that each easement failed to satisfy the requirement of

section 170(h)(5)(A) that the conservation purpose of the contribution be protected in perpetuity, because the deed fails to provide the Grantee with the proportionate share of the entire proceeds to which it should be entitled upon extinguishment. (The deeds at issue exclude from the Grantee's share the portion of proceeds attributable to post-gift improvements to the property.) MMBM has filed in each case a response in opposition and a cross-motion (Doc. 20), to which the Commissioner has filed a reply (Doc. 24). In each of the three cases, the undisputed material facts on this issue, as set forth in the parties' filings, are equivalent to the facts in Oakbrook Land Holdings, LLC, v. Commissioner, 154 T.C. __, __ (slip op. at 3) (May 12, 2020) (citing Oakbrook Land Holdings, LLC v. Commissioner, T.C. Memo. 2020-54, for a fuller statement of the facts relevant to the easement at issue in the court-reviewed opinion), and Hewitt v. Commissioner, T.C. Memo. 2020-89 (June 17, 2020), and we will follow the reasoning of the opinions in those cases and will grant the Commissioner's motions.

Background

The following facts are not in dispute.

The LLCs and their property

MMBM and the LLCs are all limited liability companies formed in November 2013 under the laws of the state of Georgia. Each LLC is a TEFRA partnership for federal income tax purposes. At the time MMBM filed the petitions, each LLC had its principal place of business in Georgia.

Sometime at or after its formation and no later than December 31, 2013, each LLC had come to own a portion of property "near Georgia's barrier islands, i.e., 'the Golden Isles' in Glynn County", Georgia: Habitat Green owned 258 acres; Green Creek owned 269 acres; and Turtle River owned 380 acres.

The easements

On December 31, 2013, each LLC executed a deed of Conservation Easement ("the Deed") with respect to the majority of its acreage (in each case, at least 95%) in favor of Georgia Land Trust, Inc. ("GLT") as Grantee. The Deeds were recorded on that date. Each LLC's easement purported to be made for several of various conservation purposes enumerated in Section 170(h)(4)(A)(ii) ("the

protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem”), and Section 170(h)(4)(A)(iii) (“the preservation of open space * * * where such preservation is: (I) for the scenic enjoyment of the general public; (II) pursuant to a clearly delineated Federal, State or local governmental conservation policy, and will yield a significant public benefit”). We assume for purposes of this order that each easement had a “conservation purpose” as so defined.

Possible improvements under the Deeds

Each Deed prohibits (in para. 3(d)) improvements to the protected property except as specifically provided in the “Reserved Rights” of the Grantor. All three Deeds (in para. 4(b)) specifically reserved the right to engage in types of permitted “Forestry” on the property (except in certain riparian buffer areas). In connection with that forestry, each deed allows (in para. 3(j)) “construction of woods roads and firebreaks” and (in para. 3(i)) “utilities constructed in order to carry out Forestry allowed herein.... Such utilities may include alternative energy sources, such as solar panels or wind generators”.

In addition, each Deed (in para. 3(k)) allows “[s]mall private communication antennas and dishes ... used for radio and television communication on the Property ... [which] may be powered by alternative power sources such as solar panels or a small wind generator”. In para. 4(g), each Deed allows the owner “to construct and maintain firebreaks, woods roads, and footpaths for walking on the Property”.

For purposes of this order we assume that the reserved rights to make improvements to the protected property as set forth in the Deeds are consistent with the conservation purposes of the Deeds.

Extinguishment and proceeds

Each Deed contemplates the possibility that the easement could be extinguished by judicial proceedings. In the case of extinguishment or condemnation, paragraph 19 of each Deed provides the formula to calculate the proceeds that the Grantee would be entitled to receive. Each Deed provides in pertinent part:

19. Proceeds. This Conservation Easement constitutes a real property interest, immediately vested in Grantee at the time Grantor

conveys this Conservation Easement to Grantee, which, as required under Treas. Reg. § 1.170A-14(g)(6)(ii), the parties stipulate to have a current fair market value determined by multiplying the fair market value of the Property unencumbered by this Conservation Easement (minus any increase in value after the date of this Conservation Easement attributable to improvements) by the ratio of the value of the Conservation Easement at the time of this conveyance to the value of the Property at the time of this conveyance without deduction for the value of the Conservation Easement. The value of this Conservation Easement at the time of this conveyance, and the value of the Property at the time of this conveyance without deduction for the value of the Conservation Easement, shall be determined according to that certain property appraisal report, on file at the office of the Grantee, prepared on behalf of Grantor to establish the value of this Conservation Easement for purposes pursuant to § 170(h) of the Code. For the purposes of this Paragraph, the ratio of the value of the Conservation Easement to the value of the Property unencumbered by the Conservation Easement shall remain constant. [Emphasis added].

Tax returns and examinations

Each LLC claimed a noncash charitable contribution deduction on its 2013 Form 1065 for its donation of the conservation easement over its acreage. Habitat Green's claimed deduction was \$19,100,000; Green Creek's was \$19,637,000; and Turtle River's was \$28,500,000.

The IRS examined the returns. In March and April 2017, the IRS mailed to each of the LLCs and their TMP an FPAA that set forth the IRS's determination to disallow the full amount of that LLC's deduction for its contribution of the easement. The disallowance in each FPAA was based on (among other things) the IRS's determination that "[i]t has not been established that the claimed deduction meets all the requirements of Internal Revenue Code Section 170." The TMP timely mailed petitions to this Court.

Discussion

I. Summary judgment

The purpose of summary judgment is to expedite litigation and avoid unnecessary trials. Fla. Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). The Court may grant summary judgment when there is no genuine dispute as to any material fact and a decision may be rendered as a matter of law. Rule 121(b); Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994). In deciding whether to grant summary judgment, we draw factual inferences in the light most favorable to the non-moving party, Sundstrand Corp. v. Commissioner, 98 T.C. at 520--in this instance, the petitioner and its LLCs. The critical fact in each of these cases is simply the text of the Deed--in particular, the provision as to calculating the proceeds to be distributed in the event of extinguishment--and there is no dispute about what the Deeds say.

II. Deduction for qualified conservation contribution

Section 170(a)(1) allows a deduction for any charitable contribution made within the taxable year. If the taxpayer makes a charitable contribution of property other than money, the amount of the contribution is generally equal to the fair market value of the property at the time the gift is made. See 26 C.F.R. sec. 1.170A-1(c)(1), Income Tax Regs. The Code generally restricts a taxpayer's charitable contribution deduction for the donation of "an interest in property which consists of less than the taxpayer's entire interest in such property". Sec. 170(f)(3)(A). But there is an exception to this rule for a "qualified conservation contribution." Sec. 170(f)(3)(B)(iii).

Section 170(h)(1) defines a "qualified conservation contribution" as a contribution of a "qualified real property interest" to a "qualified organization" (which we assume GLT to be) "exclusively for conservation purposes." Under section 170(h)(2)(C), a "qualified real property interest" includes an interest in real property that is a restriction granted in perpetuity on the use of the real property. Section 170(h)(5)(A) provides that a contribution is not treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity.

In order to satisfy the statutory requirement that the conservation purpose be protected in perpetuity, any interest in the property retained by the donor must be subject to legally enforceable restrictions that will prevent uses of the retained

interest inconsistent with the conservation purpose of the donation. 26 C.F.R. sec. 1.170A-14(g)(1), Income Tax Regs.

III. Proceeds from extinguishment

It is possible that an easement may be extinguished, and in such an instance the easement would not have lasted in perpetuity. However, the regulation provides that if an extinguishment does occur, the donation will nonetheless be deemed to have been in perpetuity if the proceeds of the extinguishment are paid to the donee organization and the donee uses them for its conservation purposes. Section -14(g)(6)(ii) of the regulation requires as follows:

[F]or a deduction to be allowed under this section, at the time of the gift the donor must agree that the donation of the perpetual conservation restriction gives rise to a property right, immediately vested in the donee organization, 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. * * * [T]he donee organization, on a subsequent sale, exchange, or involuntary conversion of the subject property, must be entitled to a portion of the proceeds at least equal to that proportionate value of the perpetual conservation restriction * * *. [Emphasis added.]

Under paragraph 19 of the Deeds at issue, the Grantee's share of any extinguishment proceeds is its proportionate share (established at the time of the gifts) multiplied not necessarily against the total proceeds but rather only against that portion of the proceeds that is not attributable to improvements made to the property after the gifts (i.e., in the words of the parenthetical in paragraph 19, "minus any increase in value after the date of this Conservation Easement attributable to improvements"). Petitioner does not dispute that the Deeds so provide.

IV. Analysis

The Commissioner contends that paragraph 19 of each Deed, which specifies the allocations of the proceeds of the sale of the property if the easement is ever extinguished, fails to protect the conservation purpose in perpetuity,

because the Deeds allow the Grantee no share of proceeds attributable to post-gift improvements. This Court agrees.

In Oakbrook Land Holdings, LLC v. Commissioner, 154 T.C. at ___, (slip op. at 9-33) (citing PBBM Rose-Hill, Inc. v. Commissioner, 900 F. 3d 193, 207 (5th Cir. 2018)), we upheld the validity of the Commissioner's interpretation of the regulation that is at issue here--i.e., that "the regulation does not permit that 'any amount, including that attributable to improvements, may be subtracted out' of the proceeds". In the concurrently issued opinion Oakbrook Land Holdings, LLC v. Commissioner, T.C. Memo. 2020-54, we held that a deed violates the "protected in perpetuity" requirement of section 170(h)(5), as interpreted in 26 C.F.R. sec. 1.170A-14(g)(6), Income Tax Regs., if the donee's share of the extinguishment proceeds is reduced by excluding the value of any improvements made by the donor after the date of gift. We reached the same conclusion in Hewitt v. Commissioner, T.C. Memo. 2020-89, where the deed at issue was equivalent to the Deeds at issue here. (The provision allocating the proceeds in the event of a judicial extinguishment in the deed in Hewitt contained language virtually identical to the critical parenthetical in paragraph 19 in the LLCs' Deeds).

Petitioner contends that we misconstrue the regulation and, in the alternative, that the regulation so construed would be invalid under the Administrative Procedure Act (APA), 5 U.S.C. sec. 553 (2018), and would not be entitled to deference under Chevron U.S.A., Inc. v. Natural Res. Defense Council, 467 U.S. 837 (1984). The Court addressed such challenges to the substantive and procedural validity of the regulation in Oakbrook Land Holdings, 154 T.C. at ___ (slip op. at 15-33), and we need not repeat the analysis here. In Hewitt, slip op. at *15-17 (and in the cases cited therein), we held that we strictly construe Section 1.170A-14(g)(6), Income Tax Regs.; and we held, slip op. at *19, that such construction requires in the context of allocating proceeds from an extinguishment that "the value of posteasement improvements may not be subtracted out of the proceeds before determining the donee's proportionate share."

Petitioner also contends that a factual issue makes summary judgment in the Commissioner's favor inappropriate here: Relying on a declaration of petitioner's expert appraiser, petitioner asserts that "[a]ny exercise of retained rights by [the LLC donor, such as making permitted improvements] would not alter the fair market value of the Conservation Easement". We assume this is true, but it is beside the point. As the Commissioner states, "the critical issue is not whether improvements would change the value of the conservation easement, but whether

improvements could change the value of the subject property as a whole.” Under the regulation as this Court applies it, the Grantee must be entitled to its proportionate share of the enhanced fair market value of the improved property, even if the fair market value of the easement is unaffected by the improvements.

For these reasons we hold that the Commissioner properly disallowed the deductions. It is therefore

ORDERED that the Commissioner’s motions for partial summary judgment are granted, and petitioner’s cross-motions are denied. It is further

ORDERED that on or before July 31, 2020, the parties shall file a joint status report (or if a joint report is not expedient, then separate reports) setting forth the issues remaining for trial and recommending a schedule for further proceedings.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
June 30, 2020