UNITED STATES TAX COURT
WASHINGTON, DC 20217

BELAIR WOODS, LLC, EFFINGHAM MANAGERS, LLC, TAX MATTERS PARTNER,	)	**SR**
Petitioner(s),	)	
v.	)	Docket No. 19493-17.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

O R D E R

On January 6, 2020, the Court issued its Opinion (154 T.C. No. 1) holding that the Internal Revenue Service (IRS or respondent) met the supervisory approval requirements of section 6751(b)(1) with respect to penalties asserted in this case under section 6662(c), (d), and (h).[1] On February 5, 2020, petitioner filed a Motion to Certify For Interlocutory Appeal the supervisory approval issue. On March 12, 2020, respondent filed a response objecting to the granting of the motion. We will deny the motion.

This case involves a charitable contribution deduction claimed by Belair Woods, LLC (Belair), for a conservation easement. The IRS issued a timely notice of final partnership administrative adjustment disallowing that deduction in its entirety and determining four alternative penalties. To date, the Court has issued two opinions addressing issues presented by this case: Belair Woods, LLC v. Commissioner (Belair I), T.C. Memo. 2018-159, and Belair Woods, LLC v. Commissioner (Belair II), 154 T.C. No. 1 (Jan. 6, 2020).

In Belair I we addressed the question whether Belair, in its reporting for the charitable contribution deduction, had complied with the requirements of section 1.170A-13(c), Income Tax Regs. Ruling on cross-motions for partial summary

[1]All statutory references are to the Internal Revenue Code in effect for the tax year at issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

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judgment, we held that petitioner had failed to comply, either strictly or substantially, with the regulatory requirement that it include with its return a fully completed "appraisal summary" on Form 8283, Noncash Charitable Contributions. But we found that genuine disputes of material fact existed as to whether Belair had "reasonable cause" for failing to comply with these requirements. See sec. 1.170(f)(11)(A)(ii)(II), Income Tax Regs. Specifically, we noted that questions of fact existed as to whether "Belair could reasonably rely on legal advice relayed to it indirectly" and whether it actually relied in good faith on advice it received. Belair I, T.C. Memo. 2018-159, at *24.

In Belair II we ruled on a second round of cross-motions for summary judgment as to whether the IRS had secured timely supervisory approval, as required by section 6751(b)(1), for the penalties it asserted. Respondent conceded that approval was untimely as to the section 6662(e) penalty. As to the other three penalties, the Court held that the IRS complied with section 6751(b)(1) because it secured written supervisory approval before issuing the notice that "formally notified Belair that the Examination Division had completed its work and, after considering Belair's arguments, had made a definite decision to assert [those three] penalties." Belair II, 154 T.C. at __ (slip op. at 23).[2]

The Opinion of the Court in Belair II was joined by seven Judges; one Judge concurred in the result only and seven Judges dissented. On January 9, 2020, we issued an Order granting in part each party's motion for summary judgment. On February 5, 2020, petitioner moved that we amend our Order to include a statement certifying for interlocutory appeal our determination that the Commissioner met the supervisory approval requirement with respect to the penalties asserted under section 6662(c), (d), and (h).

Section 7482(a)(2)(A) permits this Court to certify an interlocutory order for immediate appellate review only if we conclude that "a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation." See Rule 193(a); Kovens v. Commissioner, 91 T.C. 74, 77 (1988); N.Y. Football Giants, Inc. v. Commissioner, T.C. Memo. 2003-28. Certification of an interlocutory order for immediate appeal is an excep-

[2]Currently pending before the Court is a third motion for partial summary judgment in which respondent contends that the conservation purpose underlying Belair's easement was not "protected in perpetuity." See sec. 170(h)(5)(A).

tional measure that courts employ sparingly. See Gen. Signal Corp. v. Commissioner, 104 T.C. 248, 251 (1995); Kovens, 91 T.C. at 78.

Before certifying an order under section 7482(a)(2) the trial judge must confirm that the order involves a "controlling question of law" and that "substantial ground for difference of opinion" exists as to the correctness of the determination underlying the order. Kovens, 91 T.C. at 77. The judge must also ascertain whether an immediate appeal will "materially advance the ultimate termination of the litigation." Ibid. In assessing these factors the Court must weigh the policies favoring the "avoidance of piecemeal litigation and dilatory and harassing appeals." Id. at 78. We do not believe that the supervisory approval issue involves a "controlling question of law" or that immediate appeal of this issue would "materially advance the ultimate termination of the litigation."

A "controlling question of law" must be a pure issue of law that "the court of appeals 'can decide quickly and cleanly without having to study the record.'" McFarlin v. Consseco Services, LLC, 381 F.3d 1251, 1258 (11th Cir. 2004) (quoting Ahrenholz v. Board of Trustees of the Univ. of Illinois, 219 F.3d 674 (7th Cir. 2000)). A "controlling question" is not simply "a question which if decided erroneously would lead to a reversal on appeal." Kovens, 91 T.C. at 79. Rather, the question must be one that is "serious to the conduct of the litigation." Ibid. The requirement that an immediate appeal "materially advance the ultimate termination of the litigation" means that resolution of the controlling legal question "would serve to avoid a trial or otherwise substantially shorten the litigation." McFarlin, 381 F.3d at 1259.

The supervisory approval question is not serious to the overall conduct of this litigation going forward. That question relates only to the penalties; it has no relevance in deciding whether Belair is entitled to a charitable contribution deduction for the easement. Regardless of the outcome on the penalties, further proceedings (either by trial or summary judgment) will be necessary to decide whether Belair satisfied all the requirements for a charitable contribution deduction, including the requirement that the conservation purpose underlying the easement be "protected in perpetuity." See sec. 170(h)(5)(A).

Nor would an immediate appeal avoid or meaningfully shorten the litigation. If our holding on the supervisory approval issue were reversed upon interlocutory appeal, petitioner would not be liable for accuracy-related penalties. That would avoid the need for Belair to call tax professionals and other witnesses at trial with a view to establishing a "reliance on professional advice" defense to those penalties.

See 1.6664-4(b), Income Tax Regs. But in Belair I we held that material disputes of fact exist as to whether Belair had "reasonable cause" for failing to comply with the Form 8283 reporting requirements. See sec. 170(f)(11)(A). That failure would be relevant in determining Belair's entitlement to a charitable contribution deduction. See sec. 1.170A-13(c)(2)(i)(B), Income Tax Regs. The individuals who advised petitioner on that point likely overlap with (or are the same as) the individuals who advised petitioner with respect to preparation of its tax return generally. Thus, the same witnesses will likely need to testify at trial, on essentially the same subject matter, regardless of whether the supervisory approval issue is subjected to an interlocutory appeal. We accordingly find that an interlocutory appeal would protract, rather than shorten, the proceedings necessary to resolve all the issues in this case.

In consideration of the foregoing, it is

ORDERED that Petitioner's Motion to Certify For Interlocutory Appeal, filed February 5, 2020, is denied.

(Signed) Albert G. Lauber
Judge

Dated: Washington, D.C.
March 19, 2020