UNITED STATES TAX COURT
WASHINGTON, DC 20217

OAKBROOK LAND HOLDINGS, LLC, WILLIAM DUANE HORTON, TAX MATTERS PARTNER,	)	
Petitioner(s),	)	
v.	)	Docket No. 5444-13.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

O R D E R

This case was considered by the Court conference and, in two opinions today, we interpret and uphold the validity of a Treasury regulation that governs the donation of conservation easements. *See Oakbrook v. Commissioner*, 154 T.C. No. 10 (2020); *Oakbrook Land Holdings, LLC v. Commissioner*, T.C. Memo. 2020-54.

Oakbrook moved on April 23, 2020 to supplement the record. In his brief addressing the validity of the regulation, the Commissioner argued that Treasury considered comments from the Nature Conservancy. Oakbrook continued to do research and found that the deeds used by the Nature Conservancy routinely had extinguishment-proceeds clauses with what it argues is language quite similar to the deed at issue in this case. It therefore asks us to reopen the record to add four deeds from the Nature Conservancy that have this language to support the argument that Oakbrook's deed doesn't violate the regulation.

The decision to reopen the record to admit additional evidence is within our discretion. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 331 (1971). Indeed, a trial "judge has broad discretion to reopen a case to accept additional evidence, and his decision will not be overturned absent an abuse of that

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discretion." *Hibiscus Assocs. Ltd. v. Bd. of Trs. of the Policemen & Firemen Ret. Sys. of the City of Detroit*, 50 F.3d 908, 917-18 (11th Cir. 1995) (citing *Zenith Radio Corp.*, 401 U.S. at 331).

Our discretion is not unbounded. As a threshold matter, we will not reopen the record "unless the evidence to be presented was not available for use at the original trial or could not have been obtained with reasonable diligence." *Snuggery-Elvis P'ship v. Commissioner*, 64 T.C.M. (CCH) 1128, 1132 (1992) (citing *Zenith Radio Corp.*, 401 U.S. at 332-33; *Purex Corp. v. Procter & Gamble Co.*, 664 F.2d 1105, 1109 (9th Cir. 1981); *Mayer v. Higgins*, 208 F.2d 781, 783 (2d Cir. 1953); *Glagola v. Commissioner*, 59 T.C.M. (CCH) 321 (1990)); *see also Cloes v. Commissioner*, 79 T.C. 933, 937 (1982) ("Proper judicial administration demands that there be an end to litigation and that bifurcated trials be avoided"); *Markwardt v. Commissioner*, 64 T.C. 989, 998 (1975) (It is our Court's "policy . . . to try all issues raised in a case in one proceeding and to avoid piecemeal and protracted litigation"). And we'll weigh a taxpayer's diligence against any possible prejudice to the Commissioner if we were to grant the motion to reopen the record. *See Garcia v. Woman's Hosp. of Tex.*, 97 F.3d 810, 814 (5th Cir. 1996) (trial court should consider "importance and probative value of the evidence, the reason for the moving party's failure to introduce the evidence earlier, and the possibility of prejudice to the non-moving party"). "Prejudice" in this context focuses on whether the submission after trial prevents the nonmoving party from examining and questioning the evidence as it would have during the proceeding. *Estate of Freedman v. Commissioner*, 93 T.C.M. (CCH) 1007, 1013 (2007); *Megibow v. Commissioner*, 87 T.C.M. (CCH) 987, 991 (2004).

Even if the taxpayer crosses that threshold, we would still deny it unless the evidence he seeks to add to the record is not merely cumulative or impeaching, is material to the issues involved, and probably would change the outcome of the case. *Butler v. Commissioner*, 114 T.C. 276, 287 (2000), *abrogated on other grounds by Porter v. Commissioner*, 132 T.C. 203 (2009).

This is where petitioner stumbles.

Oakbrook is trying to introduce this evidence for two reasons. The first is for a "parade of horribles" argument -- that the deed at issue here contains the same language found in many other deeds (specifically those authored by the Nature Conservancy) and if we find that this language violates the regulation many other deeds will also fail. As the opinions we issue today acknowledge, we already know that this language is quite common. James Wright, the executive director of

the Southeast Regional Land Conservancy, stated at trial that at least 85 other conservation easement deeds contain the same language. And an *amicus* in another case showed that there is reason to believe thousands of conservation easements have similar language. Brief for Land Trust Alliance, Inc. et al. as Amici Curiae Supporting Petitioners at 6, *PBBM-Rose Hill, Ltd. v. Commissioner*, 900 F.3d 193 (5th Cir. 2018) (No. 17-60276).

That makes this evidence merely cumulative. *See e.g.*, *Coleman v. Commissioner*, 57 T.C.M. (CCH) 493 (1989).

We note that the taxpayer also seems to reason that since Treasury, when promulgating the regulations at issues here, considered the Nature Conservancy's comments, then the Nature Conservancy's deed must be in compliance with the regulation. It is, however, the Nature Conservancy's *comments*, not its *practices*, that Treasury discusses. The proffered deeds therefore wouldn't change the outcome of the case. *See Butler*, 114 T.C. at 287.

It is therefore

ORDERED that the taxpayer's April 23, 2020 motion to supplement the record is denied.

(Signed) Mark V. Holmes
Judge

Dated: Washington, D.C.
May 12, 2020