UNITED STATES TAX COURT
WASHINGTON, DC 20217

OCONEE LANDING PROPERTY, LLC, OCONEE LANDING INVESTORS, LLC, TAX MATTERS PARTNER,	)	
Petitioner(s),	)	
v.	)	Docket No. 11814-19.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

O R D E R

This is one of many cases in this Court involving charitable contribution deductions for conservation easements. Currently before the Court are cross-motions for partial summary judgment filed by the Internal Revenue Service (IRS or respondent) and by petitioner.

Respondent urges that no deduction is allowed because the conservation purpose is not "protected in perpetuity." See sec. 170(h)(5)(A).[1] In support of that outcome respondent relies on a regulation providing that, if the easement is extinguished and the property is sold, the charitable grantee must be entitled to a proportionate share of the sale proceeds. See sec. 1.170A-14(g)(6), Income Tax Regs. Respondent contends that the deed of easement fails this test under Coal Prop. Holdings, LLC v. Commissioner, 153 T.C. 126 (2019). Petitioner opposes respondent's motion and has filed its own motion urging that the regulation is invalid.

We find that disputes of material fact prevent us from granting respondent's motion. After petitioner filed its motion, the Court issued its opinion in Oakbrook

[1]Unless otherwise indicated, all statutory references are to the Internal Revenue Code (Code) in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure. We round all monetary amounts to the nearest dollar and all acreage to the nearest acre.

SERVED Aug 18 2020

Land Holdings, LLC v. Commissioner, 154 T.C. __ (May 12, 2020), upholding the validity of the regulation. We will accordingly deny petitioner's cross-motion.

Background

The following facts are drawn from the petition, the parties' motion papers, and the attached declarations and exhibits. See Rule 121(b). These facts are stated solely for the purpose of ruling on the pending motions, not as findings of fact in this case. See Sundstrand Corp. & Consol. Subs. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994).

Oconee Landing Property, LLC (Oconee), is a Georgia limited liability company (LLC) organized in November 2015. Its tax matters partner is Oconee Landing Investors, LLC (petitioner), likewise a Georgia LLC. Each is treated as a partnership for Federal income tax purposes, and each had its principal place of business in Georgia when the petition was filed.

Carey Station Manager, LLC (CSM), acquired a 1% membership interest in Oconee by contributing cash of $34,000. On December 21, 2015, Carey Station, LLC (CS), acquired a 99% interest in Oconee by contributing a 356-acre tract of land (Property) in Greene County, Georgia. On December 23, 2015, petitioner purchased a 97% interest in Oconee from CS for $2,440,000. The same day, petitioner made a $1.3 million cash contribution to Oconee.

Eight days later, on December 31, 2015, Oconee donated a conservation easement over the Property to the Georgia Alabama Land Trust, Inc. (GALT or grantee), a "qualified organization" under section 170(h)(3). The deed of easement was recorded the same day. Oconee at that point was owned 97% by petitioner, 2% by CS, and 1% by CSM.

The easement deed recites the parties' intent that the Property "be preserved in perpetuity in substantially its present state as existing at the time of this Conservation Easement." The deed prohibits any form of residential, commercial, or industrial development as well as exploration for or extraction of oil, gas, or minerals. The deed states that there were no existing structures or man-made features on the Property when the easement was granted, and it generally prohibits construction on the Property "of any buildings, structures (including mobile homes), or other improvements."

Oconee reserved the rights to engage in forestry and recreational activities on the Property, including hunting, shooting, boating, fishing, camping, hiking, biking, and horseback riding. In connection with the latter Oconee reserved the right to "construct, repair, relocate, and remove small 'Recreational-Only Structures' * * * such as deer stands, hunting blinds, emergency shelters, [and] play structures for children." The deed prohibits the use of such structures for residential purposes, bars the construction of utilities to serve such structures, and provides that the area of such structures within the Property could not exceed 150 square feet.

Paragraph 4(e) of the deed, captioned "Improvements," reserves to Oconee the right to construct a "nature trail," for use by hikers and bicyclists, in a 42-acre portion of the Property comprising hardwood forest. Any nature trail had to be made of permeable materials (gravel or mulch) and closed to motorized vehicles (except those necessary for people with disabilities, emergency response, and trail maintenance). The deed lists no other permissible improvements that Oconee could make to the Property.

The deed recognized the possibility that the easement might be extinguished at some future date. In the event the Property were sold following judicial extinguishment of the easement, paragraph 17 of the deed provided that "[a]ny and all prior claims shall first be satisfied by Grantor's portion of the proceeds before Grantee's portion is diminished in any way." Paragraph 19, captioned "Proceeds," specified that the grantee's share of any future proceeds would be 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.

Oconee timely filed Form 1065, U.S. Return of Partnership Income, for its 2015 tax year. On that return it claimed a charitable contribution deduction of $20,670,000 for its donation of the easement. The IRS selected Oconee's 2015 return for examination.

On April 4, 2019, the IRS issued Oconee a timely notice of final partnership administrative adjustment (FPAA) disallowing the charitable contribution deduction in full. The FPAA alternatively determined that, if any deduction were allow-

able, Oconee had not established that the FMV of the easement exceeded $1,420,560. The IRS determined a 40% "gross valuation misstatement" penalty under section 6662(h) and (in the alternative) a 20% accuracy-related penalty under other provisions of section 6662.

Petitioner timely petitioned this Court for readjustment of the partnership items, and the parties filed motions for partial summary judgment. Respondent contends that no deduction is allowable because the conservation purpose underlying the easement is not "protected in perpetuity." See sec. 170(h)(5)(A); sec. 1.170A-14(g)(6), Income Tax Regs. Petitioner opposes respondent's motion and has filed a cross-motion contending that the regulation governing judicial extinguishment is invalid.

Discussion

A. Summary Judgment Standard

The purpose of summary judgment is to expedite litigation and avoid costly, unnecessary, and time-consuming trials. See FPL Grp., Inc. & Subs. v. Commissioner, 116 T.C. 73, 74 (2001). We may grant partial summary judgment regarding an issue as to which there is no genuine dispute of material fact and a decision may be rendered as a matter of law. Rule 121(b); Elec. Arts, Inc. & Subs. v. Commissioner, 118 T.C. 226, 238 (2002). In deciding whether to grant summary judgment, we construe factual materials and inferences drawn from them in the light most favorable to the nonmoving party. Sundstrand Corp., 98 T.C. at 520.

B. Judicial Extinguishment

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 for a "qualified conservation contribution." Sec. 170(f)(3)(B)(iii), (h)(1). For the donation of an easement to be a "qualified conservation contribution," the conservation purpose must be "protected in perpetuity." Sec. 170(h)(5)(A).

The regulations set forth detailed rules for determining whether this "protected in perpetuity" requirement is met. Of importance here are the rules governing the mandatory division of proceeds in the event the property is sold following a judicial extinguishment of the easement. See sec. 1.170A-14(g)(6), Income Tax Regs. The regulations recognize that "a subsequent unexpected change in the con-

ditions surrounding the [donated] property * * * can make impossible or impractical the continued use of the property for conservation purposes." Id. subdiv. (i). Despite that possibility, "the conservation purpose can nonetheless be treated as protected in perpetuity if the restrictions are extinguished by judicial proceeding," and the easement deed ensures that the charitable donee, following sale of the property, will receive a proportionate share of the proceeds and use those proceeds consistently with the conservation purposes underlying the original gift.[2] Ibid. In effect, the "perpetuity" requirement is deemed satisfied because the sale proceeds replace the easement as an asset deployed by the donee "exclusively for conservation purposes." Coal Prop. Holdings, 153 T.C. at 136 (quoting sec. 170(h)(5)(A)).

1. Donor Improvements

The deed provides that, if the Property is sold following judicial extinguishment of the easement, GALT's share of the proceeds will be determined by multiplying the Property's fair market value (FMV)--an amount presumably equal to the sale proceeds--by a fraction. That fraction is "the ratio of the value of the Conservation Easement at the time of th[e] conveyance to the value of the Property at the time of th[e] conveyance without deduction for the value of the Conservation Easement." This fraction is consistent with the formula set forth in the regulation. See sec. 1.170A-14(g)(6)(ii), Income Tax Regs.

Before applying the regulatory apportionment fraction, however, Oconee's deed--like the deed in Coal Prop. Holdings--reduces the multiplicand (viz., the sale proceeds) by "any increase in value after the date of th[e] grant attributable to improvements." See Coal Prop. Holdings, 153 T.C. at 138 (alteration in original). Any such increase would be attributable to appreciation in the value of the improvements existing when the easement was granted, plus the FMV of any new improvements that the donor later made to the property. We held in Coal Prop. Holdings that reducing the grantee's share in this way violated the "granted in perpetuity" requirement because it prevented the grantee from receiving its full proportionate share of the sale proceeds. Id. at 137-140.

---

[2]The regulation creates an exception to the "proportionate share" rule where "state law provides that the donor is entitled to the full proceeds from the conversion without regard to the terms of the prior perpetual conservation restriction." Sec. 1.170A-14(g)(6)(ii), Income Tax Regs. Petitioner does not contend that this exception applies here.

In Coal Prop. Holdings the improvements existing when the easement was granted "included 20 natural gas wells, two cell phone towers, various roads, and various electricity installations." Id. at 138. The donor reserved the right to make future improvements, including utility installations, roads, and driveways "for vehicular access to areas of the Property on which the existing and additional structures and related ancillary improvements are and may be constructed." Ibid. These existing and contemplated future improvements had obvious value. Cf. Englewood Place, LLC v. Commissioner, T.C. Memo. 2020-105, at *10 n. 4 ("[T]he deed reserved to * * * [the donor] the right to make post-contribution improvements to the conserved area, including the rights (for example) to construct barns, sheds, roads, a residential driveway, and utilities (including water, septic, and power lines)."); Maple Landing, LLC v. Commissioner, T.C. Memo. 2020-104, at *10 n. 4 (same); Riverside Place, LLC v. Commisioner, T.C. Memo. 2020-103, at *10 n. 4 (same); Village at Effingham v. Commissioner, T.C. Memo. 2020-102, at *10 n. 4 (same).

Oconee's deed recites that no structures or man-made features existed on the Property when the easement was granted. There thus appear to have been no pre-existing improvements. If Oconee had reserved no right to make any future improvements, the Property could not possibly enjoy "any increase in value after the date of th[e] grant attributable to improvements." The donor improvements clause would then be empty verbiage that could not cause GALT to receive less than its full proportionate share of any future sale proceeds.

As it is, Oconee reserved the right to make one (and only one) improvement to the Property--a nature trail, composed of mulch or gravel, for use by hikers and bicyclists. It also reserved the right to "construct, repair, relocate, and remove small 'Recreational-Only Structures' * * * such as deer stands, hunting blinds, emergency shelters, [and] play structures for children." The surface area devoted to such structures could not exceed 150 square feet.

Petitioner may be able to establish that such future improvements would not increase the FMV of the Property or that any increase in value would be truly de minimis. In that event petitioner may plausibly contend that the "donor improvements" clause would not cause GALT to receive less than its proportionate share of the proceeds in the event the Property were sold following judicial extinguishment of the easement. Viewing the facts and inferences to be drawn from the facts in the light most favorable to petitioner, we conclude that a genuine disputes of material

fact dictate that we deny respondent's motion for partial summary judgment on this point.

B. Prior Claims

Respondent contends that Oconee's deed has a second problem that was also present in Coal Prop. Holdings--namely, that the grantee's proceeds could be further reduced by the requirement that its share be calculated "after the satisfaction of prior claims." Coal Prop. Holdings, 153 T.C. at 130. "It is not necessarily unreasonable," we said, "for a deed to provide that prior claims may be paid from sale proceeds. What is unreasonable, and what violates the 'judicial extinguishment' regulation, is the requirement * * * that all prior claims be paid out of the [grantee's] * * * share of the proceeds, even if those claims represent liabilities of * * * [the grantor]." See id. at 145 n. 5 (emphasis omitted). Other deeds that we have considered possessed a similar defect. See Englewood Place, T.C. Memo. 2020-105, at *11 (providing that grantee's share would be determined "after the satisfaction of any and all prior claims"); Maple Landing, T.C. Memo. 2020-104, at *11 (same); Riverside Place, T.C. Memo. 2020-103, at *11 (same); Village at Effingham, T.C. Memo. 2020-102, at *11 (same).

The "prior claims" clause in Oconee's deed is meaningfully different. It provides that "[a]ny and all prior claims shall first be satisfied by Grantor's portion of the proceeds before Grantee's portion is diminished in any way." This provision appears quite favorable to GALT: Read literally, it means that Oconee's share of the proceeds will be used to discharge, not only claims originating from its own activities, but also claims originating from GALT's activities.

Respondent observes that GALT's share might nonetheless be invaded if Oconee's share were insufficient to satisfy all claims against the Property. But this scenario raises uncertain questions of fact, as well as questions of contract interpretation and state law that respondent has not addressed. For example, if the term "claims" as used in the deed means "claims against the Property in rem," state law might require that all such claims be defrayed from the proceeds as a condition of closing the sale. Viewing the facts and inferences to be drawn from the facts in the light most favorable to petitioner, we conclude that summary judgment is inappropriate on this question as well.

C. Validity of the Regulation

Citing a private letter ruling issued to another taxpayer in 2008, petitioner contends that respondent's position in this case "contradicts * * * [his] previous interpretation of the statute." We have previously rejected that submission.[3] Petitioner also contends that the "judicial extinguishment" regulation is arbitrary and capricious, urging that it was promulgated "without explanation or analysis" in violation of the requirements of the Administrative Procedure Act. We comprehensively addressed and rejected these arguments in a recent Court-reviewed Opinion. See Oakbrook Land Holdings, 154 T.C. at __ (slip op. at 15-33). We need not repeat that analysis here.

In consideration of the foregoing, it is

ORDERED that respondent's Motion for Partial Summary Judgment, filed January 28, 2020, is denied. It is further

ORDERED that petitioner's Motion for Partial Summary Judgment, filed April 3, 2020, is denied. It is further

---

[3]Petitioner draws our attention to Priv. Ltr. Rul. 200836014 (Sept. 5, 2008) (PLR), in which the IRS found unobjectionable an easement deed with a judicial extinguishment clause resembling that here. Petitioner contends that respondent's interpretation of the regulation as set forth in that PLR is binding on respondent under Auer v. Robbins, 519 U.S. 452, 461 (1997). Petitioner's argument ignores the fact that determinations embodied in a PLR "may not be used or cited as precedent." Sec. 6110(k)(3). We have previously found the PLR to have no persuasive force. See Coal Prop. Holdings, 153 T.C. at 143-144; Hewitt v. Commissioner, T.C. Memo. 2020-89, at *21 (concluding that the PLR "is neither persuasive nor relevant"). The U.S. Court of Appeals for the Fifth Circuit earlier reached the same conclusion. See PBBM-Rose Hill, Ltd. v. Commissioner, 900 F.3d 193, 207-208 (5th Cir. 2018), aff'g T.C. Dkt. No. 26096-14 (Oct. 7, 2016) (bench opinion).

ORDERED that, on or before September 17, 2020, the parties shall file a status report expressing their views as to the conduct of further proceedings in this case.

(Signed) Albert G. Lauber
Judge

Dated: Washington, D.C.
August 18, 2020