

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

YA GLOBAL INVESTMENTS, LP F.K.A.)		
CORNELL CAPITAL PARTNERS, LP, ET AL.,)		
)		
Petitioner(s),)		
)		
v.)	Docket No. 14546-15,	28751-15.
)		
COMMISSIONER OF INTERNAL REVENUE,)		
)		
Respondent)		

ORDER

Respondent has moved in limine to exclude the expert report and testimony of petitioners' expert witness Charles R. Lundelius. Petitioners object. We will deny the motion.

Background

This case is set for trial. Respondent identifies as an issue for trial the fair market value as of December 31, 2009, of YA Global Investments, LP's (YA Global's) interest in Compass Resources Limited (Compass), an Australian mining company.

Petitioners have submitted Mr. Lundelius' expert report. They represent that he is an expert in the valuation of securities. In his report, Mr. Lundelius reports that he is managing director of the Capital Markets Accounting Practice at Berkley Research Group, LLC. He further reports that he is a Certified Public Accountant, that he is accredited in Business Valuation, and that he has been certified in Financial Forensics by the American Institute of Certified Public Accountants.

He reports that he was "retained by counsel for Petitioners * * * to provide an opinion regarding the values of certain of YA Global investments in Compass * * * for the taxable years 2009 - 2011." Specifically, he states that he was asked "to determine the nature of the Compass asset that was valued by a third party,

Valuation Research Corporation ("VRC")" and that "was used to determine the value reported by YA Global of its interest in Compass as of December 31, 2009".

He reports the following summary of his conclusions.

YA Global held Series A convertible debentures ("Convertible Debt") in Compass in January 2009, when the company entered into voluntary administration [apparently a method for dealing with an entity's insolvency] in Australia. The Convertible Debt provided for payment by Compass to YA Global of interest and principal on loans and advances, as well as the option for YA Global to convert the debt into Compass stock.

By operation of the insolvency process, control of Compass passed from its board of directors to the administrator. Concurrent with the change in control, Compass was no longer required to honor the payment terms of YA Global's Convertible Debt when Compass entered into voluntary administration.

Form a valuation perspective, upon Compass entering into voluntary administration, the Convertible Debt was rendered worthless. At that point, YA Global was merely a creditor in the insolvency proceeding based on the seniority of the Convertible Debt, and any conversion rights had ceased to exist.

Valuations of the Compass investment performed by YA Global by VRC were valuations of the possibility that YA Global would be able to acquire a new interest in Compass as a result of its status as a creditor in the insolvency proceeding, not valuations of the Compass Debt or other Compass securities.

Mr. Lundelius states that his "findings * * * were reached after review of the documents available and from utilizing knowledge and expertise * * * [he] obtained based on * * * [his] years of experience."

Respondent grounds his motion on three claims:

(1) Mr. Lundelius purports to opine on the nature and value of a convertible debenture, which purportedly was affected by the operation of Australian law, even though he is not an expert in

Australian law, (2) the report does not provide sufficient analysis to show how Mr. Lundelius reached his conclusions, and (3) the report contains unreliable, irrelevant and speculative conclusions in that it opines on and critiques parts of a valuation report of which Mr. Lundelius was not the author and which valuation report has not been offered as an expert report in this case.

Petitioners respond that they are offering Mr. Lundelius as a valuation expert, not an expert on Australian law. They add that he does not purport to be an expert on Australian law and does not have to be one for the purpose of his report, which addresses the basis for VRC's evaluation of YA Global's investment in Compass in 2009. They argue that the Court is capable of determining whether any part of his report or testimony is speculative or unreliable.

Discussion

Mr. Lundelius assumption that the entry of Compass into voluntary administration in Australia worked a moratorium on the contractual remedies of Compass's creditors does involve assumptions about the legal rights of Compass's creditors and others. Nevertheless, we agree with petitioners that valuation experts often are called upon to determine the value of rights in property that are given substance by rules of law, i.e., a tenancy in common or copyright. If Mr. Lundelius's understanding of voluntary administration in Australia erroneous, we assume that respondent will be prepared to correct him if his report is received into evidence as his direct testimony and respondent undertakes cross examination.

And respondent will have a like opportunity to show that Mr. Lundelius's analysis is insufficient. Respondent has not persuaded us that Mr. Lundelius's report is unreliable, irrelevant, and speculative. We will have ample opportunity to exercise our gatekeeper authority after Mr. Lundelius is accepted as an expert, his report is proffered as his direct testimony, and respondent exercises his right to voir dire. See Fed. R. Evid. 702; Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

On the premises stated, it is

ORDERED that the motion is denied.

(Signed) James S. Halpern
Judge

Dated: Washington, D.C.
October 9, 2020