



John P. Barrie
 Direct: 212 541 1184
 Fax: 212 361 9890
 jbarrie@bryancave.com

October 2, 2009

VIA FEDEX

Judge Thomas B. Wells
 United States Tax Court
 Room 432
 400 Second Street, NW
 Washington, DC 20217

Re: 1982 East, LLC, Solomon D. Asser, Tax Matters Partner, Petitioner, v.
 Commissioner of Internal Revenue, Respondent
 Docket No. 30052-08
 Trial Session - New York, NY (Manhattan) – October 19, 2009
Submission of Pretrial Memorandum For Petitioner

Dear Judge Wells:

Pursuant to your Standing Pretrial Order, enclosed please find the Pretrial Memorandum for Petitioner. A copy of same is being served with this letter, by facsimile and US Mail, to Respondent's counsel.

Sincerely,



John P. Barrie

JPB:klt
 Enclosures

cc: Judge David Laro
 Clerk of the Court
 Michael D. Wilder, Attorney for Respondent

Bryan Cave LLP
 1790 Avenue of the Americas
 New York, NY 10104 3300
 Tel: (212) 541-2000
 Fax: (212) 541-4830
 www.bryancave.com

- Chicago
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Trial Calendar: New York, New York

Date: October 19, 2009

PRETRIAL MEMORANDUM FOR PETITIONER

NAME OF CASE:

1982 East, LLC, Solomon D. Asser, Tax
Matters Partner, Petitioner, v.
Commissioner of Internal Revenue,
Respondent

DOCKET NO. (S):

30052-08

ATTORNEYS:

Petitioner: John P. Barrie

Respondent: Michael D. Wilder

Tel..No.: 212-541-1184

Tel. No.: 917-421-4669

AMOUNTS IN DISPUTE:

Year(s) / Period (s)

Deficiencies/Liabilities

Additions/Penalties

2004

TEFRA proceeding – Disallowance
of a charitable deduction in the
amount of \$6,570,000 with respect
to a donation of a qualified historic
preservation easement

Section 6662 overvaluation
penalty proposed

STATUS OF CASE:

Probable Settlement _____

Probable Trial _____

Definite Trial X

CURRENT ESTIMATE OF TRIAL TIME:

Three to Four days

MOTIONS YOU EXPECT TO MAKE:

No pre-trial motions currently under consideration, although the parties have reserved the right to object to any of the stipulated facts on the basis of materiality and/or relevancy, and Petitioner may file a motion on that basis with respect to certain of the stipulated facts.

Petitioner has been advised that Respondent may file a Motion in Limine to seek to exclude Anthony Robin's Expert's Report, which motion, if filed, Petitioner will file a response in opposition thereto.

Respondent's counsel also advised Petitioner for the first time on September 30, 2009, that Respondent might file a motion to amend its answer to raise a new issue – to challenge the section 704 allocation made by the partnership with respect to the donation, which motion, if filed, will be opposed by Petitioner as untimely.

STATUS OF STIPULATION OF FACTS

Completed _____ In Process X

ISSUES:

Respondent has determined that 1982 East LLC is not entitled to a charitable contribution deduction (as described below), and that even if this Court determines that the requirements for the deduction have been satisfied, that the contribution had a zero value. Issues:

1. Whether 1982 East LLC was entitled to a charitable deduction in an amount at least equal to \$6,570,000 with respect to its contribution of an historic preservation and unused development rights easement (the "Easement") to the National Architectural Trust, Inc. (now known as Trust for Architectural Easements, Inc.) (the "Trust"), a qualified section 501(c)(3) organization and a qualified organization within the meaning of section 170(h)(3) of the Internal Revenue Code of 1986, as amended and in effect with respect to calendar year 2004 (the "Code), and, specifically, whether (a) the contribution satisfied all of the technical requirements for a deduction under section 170 of the Code and the applicable Treasury Regulations (Regulation sections 1.170A-13 and 1.170A-14) and (b), assuming satisfaction of these requirements, whether the Easement had

a fair market value of at least \$6,570,000 on the date of the donation (December 30, 2004), as claimed by 1982 East LLC on its 2004 Tax Return.

2. In the event the Court determines a deduction is not allowable, or determines a different value for the contribution, whether a penalty under section 6662 of the Code should have been proposed, and if properly proposed, whether the penalty should have been abated because Petitioner satisfied the reasonable cause exception under section 6664 of the Code.

WITNESS(ES) YOU EXPECT TO CALL: (Name and brief summary of expected testimony)

Petitioner expects to call the following witnesses:

1. **Solomon Asser** who, as the tax matters partner, is the Petitioner in this case. Mr. Asser is also a managing member of 1982 East LLC, has various degrees, including degrees from Columbia University in Urban Planning and Urban Design and Architecture. His thesis was historic preservation in New York City. He designs and renovates buildings in New York City. Mr. Asser will testify regarding the acquisition of the property located at 19 East 82nd Street, New York, NY (the "Property") in 2002, the decision to rehabilitate the Property, the decision to donate both an historic façade and unused development rights easement with respect to the Property to the Trust on December 30, 2004 (the "Easement"), and the diligence done in making the donation and satisfaction of the substantiation requirements to support the charitable deduction.
2. **Irwin Wiessman, CPA**, is a principal of Weissman & Rudnitsky CPAs PC and is the CPA who prepared the IRS Form 1065 Partnership Tax Return for 1982 East LLC (the "2004 Tax Return"). Mr. Wiessman, as the return preparer, will testify regarding the preparation of the 2004 Tax Return.
3. **Heather Massler** is the Director of Operations and Stewardship with the Trust. She will testify regarding the purposes, operations and structure of the Trust, the acceptance of donations of qualified easements in general and specifically with respect to the Property by the Trust, the monitoring of easements by the Trust generally and with respect to the Property, the differences between the restrictions imposed by the Easement and her understanding of the restrictions and protections imposed by the New York City Landmarks Law and related New York City landmarks and zoning rules and regulations as enforced by the Landmarks Preservation Commission of the City of New York ("LPC"), both generally and with respect to the Property, and the Trust's enforcement rights for violations of the easements.
4. **William Neeley** is the Deputy Director, Preservation, for the Landmarks Preservation Commission of the City of New York ("LPC"), **Lily I. Fan** is the Director of Enforcement for LPC, and **John Weiss** is Deputy Counsel to the LPC. One or more of these individuals will testify regarding the operation of the LPC in general, the duties of the LPC staff and the scope of authority of the Commissioners of the LPC, the differences between the LPC and the Trust, the application of the New York City Landmarks Law by the LPC generally and with respect to the Property, whether changes or additions could have been made to the Property absent the

Easement, the process for approving same, and the enforcement of these rules and regulations by the LPC.

5. Anthony Robins is an architectural historian and historic preservation consultant specializing in New York City, with more than 30 years experience. He was formerly on the staff of the LPC, as a Deputy Director of Research and then as Director of Survey. He has prepared an expert's report analyzing the differences in application of the New York City Landmarks Law and related rules and regulations by the LPC and the restrictions imposed by the Easement, both generally and with respect to the Property.

6. Jerome Haims, a principal of Jerome Haims Realty, Inc., is a qualified appraiser with an expertise in the valuation of façade easements and transferable development rights ("TDRs") in New York City. He prepared the initial two appraisals which provided the basis for the amount of the charitable deduction claimed by 1982 East LLC on the 2004 Tax Return and who subsequently prepared a retrospective appraisal report to confirm the fair market value of the Easement as of the date of donation (December 30, 2004), which report also addresses the issues raised by the IRS examining agent with respect to the original appraisal reports.

7. Michael Ehrmann, a principal of Jefferson & Lee Appraisals, Inc., is a qualified appraiser with an expertise in the valuation of façade easements and TDRs in New York City. He prepared a retrospective appraisal of the Easement finding that the Easement had a fair market value of \$6,975,000 at the time of the donation to the Trust (December 30, 2004), thus confirming that the fair market value of the Easement at the time of the donation was at least \$6,570,000 (the amount claimed on the 2004 Tax Return).

8. David West, AIA, is an architect and principal of Goldstein, Hill & West Architects, LLP, who has an expertise in the utilization of TDRs. He has prepared an expert's report confirming the feasibility of using the TDRs on either the Property or an adjoining property if the TDRs had not been extinguished by the Easement.

9. Stanley H. Goldstein, PE, is an engineer and principal of Goldstein Associates Consulting Engineers PC and has an expertise in the utilization of TDRs. He has prepared an expert's report confirming the structural feasibility of using the TDRs on the adjacent property located at 1100 Madison Avenue if the TDRs had not been extinguished by the Easement.

10. Robert Knakal is a licensed New York real estate broker and is the chairman of Massey Knakal Realty Services, a firm specializing in the sale of properties in New York City, including transactions involving the transfer and/or retention of TDRs and properties burdened with historic preservation easements. He has prepared an expert's report regarding the utilization of TDRs generally and specifically with respect to the Property and the impact of easements on the transfer of properties in the Upper East Side of Manhattan, including with respect to the Property.

SUMMARY OF FACTS:

1982 East LLC is a New York limited liability company, treated as a partnership for federal income tax purposes, which was formed to acquire the Property in 2002 with the view to do a complete renovation of the Property and convert the Property from a commercial/residential space to a "mansion" single family townhome.

The Property, a certified historic structure, is located in the Metropolitan Museum Historic District and a C5-1 zoning district within the Special Madison Avenue Preservation District, and is subject to the landmarks and zoning rules and regulations of New York City.

Mr. Asser, a managing member of 1982 East, LLC, and who is very familiar with historic properties in New York City and the operation of the LPC, became aware of the possibility of donating a façade easement with respect to the Property, along with the extinguishment of the Property's otherwise available TDRs to a qualified organization such as the Trust, so as to preserve, in perpetuity, the historic façade of the Property and to permanently prevent any additional development through the use of the Property's TDRs, which could otherwise alter or otherwise adversely impact the Property and the immediate neighborhood's access to open air and light.

After discussions with the Trust beginning in 2003 with respect to the Property and diligence regarding same, 1982 East LLC decided to donate a façade and unused development rights easement to the Trust to preserve the Property as a historic certified structure and preserve the historic nature of the Property and the immediate neighborhood by preventing any loss of air and light exposure through the extinguishment of the Property's otherwise usable development rights, with the donation being finalized on December 30, 2004 (date of donation). The Easement was recorded with the Office of the City Register of the City of New York on June 10, 2005.

The Easement is a perpetual burden on the Property and was acknowledged by the lender to 1982 East LLC as required under the applicable Treasury Regulations. The Trust, as the a qualified donee, is required to enforce the provisions of the Easement in perpetuity.

The Easement provided meaningful restrictions and protections in excess of the restrictions and protections imposed by the New York City Landmarks Law, the C5-1 zoning district, the Special Madison Avenue Preservation District, and the related New York City landmarks and zoning rules and regulations.

There is no overlap of the historic preservation portion of the Easement and the unused development rights portion of the Easement. While the historic preservation portion of the Easement put limits on certain uses of the Property's TDRs with respect to the Property itself, that portion of the Easement does not prevent or prohibit the use of the TDRs on the Property itself or prevent the sale of all or a portion of the Property's TDRs to an owner of a qualified recipient property or other potential user of the TDRs. The Property's TDRs, if not extinguished

by the Easement, would also have been otherwise usable under the various applicable New York City landmarks and zoning rules and regulations.

In connection with the decision to make the donation, Mr. Asser engaged Jerome Haims, a qualified appraiser, to do an appraisal of the Easement in early 2004 and Mr. Haims completed that appraisal report in June of 2004. Because the Property was in process of a complete renovation, Mr. Asser was advised by Haims that the Property would have to be valued, as completed, on a prospective basis.

While the Property was valued on a prospective basis, because the date of the first appraisal report was more than 60 days before the date of the actual donation, Mr. Asser was advised by the Trust that 1982 East LLC needed an updated appraisal and a second appraisal was obtained from Mr. Haims, dated February 8, 2005, also based on a completed basis, to confirm the value of the Easement. Haims' prepared the appraisal reports with the belief that the reports satisfied all of the qualified appraisal rules set forth in the Treasury Regulations.

The fair market value of the façade portion of the Easement was based on Haims' experience with respect to the valuation of these types of historic preservation easements. The fair market value of the TDRs that were extinguished as part of the Easement was determined based on the transferability of the TDRs to the adjoining property located at 1100 Madison Avenue if the TDRs had not been extinguished.

Based on the Haims' appraisals, a deduction of \$6,570,000 was claimed by 1982 East LLC on the 2004 Tax Return (\$2,690,000 with respect to the façade portion of the Easement and \$3,880,000 with respect to the TDRs that were extinguished by the Easement).

1982 East LLC's 2004 Tax Return included the second page of Form 8283, relating to non-cash donations, reflecting the contribution of the Easement to the Trust on December 30, 2004, fully executed by both Haims, as the appraiser, and the Trust, as the donee, along with a complete copy of the February 8, 2005, appraisal report prepared by Haims.

Upon examination by the IRS, the charitable deduction was disallowed in full by the examining agent on the basis that the Haims appraisal did not comply with the qualified appraisal rules set forth in Treasury Regulation section 1.170A-13 and that the Easement had zero value because the Property was already subject to the restrictions and protections imposed by the New York City Landmarks Law, the C5-1 zoning district, the Special Madison Avenue Preservation District, and related New York City landmarks rules and regulations. The examining agent also proposed a 40% overvaluation penalty.

BRIEF SYNOPSIS OF LEGAL AUTHORITIES:

This case involves whether 1982 East LLC was entitled to claim a charitable deduction on its 2004 Tax Return in the amount of \$6,570,000 under section 170 of the Code (and specifically under section 170(h) of the Code) with respect to its contribution of the Easement to the Trust on December 30, 2004.

Respondent claims that the contribution did not satisfy all of the requirements under section 170(h) of the Code, that the appraisal report attached to the 2004 Tax Return was not a qualified appraisal, and that even if the Court determines that the requirements have been satisfied, the Easement had zero value on the date of the donation. Respondent has also imposed a valuation overstatement penalty under section 6662 of the Code.

Section 170(a) and (f) (3) of the Code permits the charitable deduction of a “qualified conservation contribution.” Congress, by the enactment of section 170(h), recognized the importance of preserving historic structures and specifically provided tax benefits – in the form of a charitable deduction – for easements that preserve, in perpetuity, an historically important land area or a certified historic structure. See, for example, Glass v. Commissioner, 124 T.C. 258 (2005), which provides a review of the legislative history supporting the deduction for these types of charitable contributions.

Section 170(h)(1) of the Code provides that a contribution of real property may constitute a qualified conservation contribution if the real property is a “qualified real property interest,” the donee is a qualified organization and the contribution is exclusively for conservation purposes.

Section 170(h)(2) of the Code provides that the term “qualified real property interest” means “a restriction (granted in perpetuity) on the use which may be made on the real property.”

Section 170(h)(4) further provides, in relevant part, that the term “conservation purpose” includes the preservation of a certified historic structure.

This court has held, in a number of cases, that the contribution of a façade easement on residential property that is a certified historic structure satisfies these rules, most recently in Simmons v. Commissioner, T.C. Memo. 2009-208, and similarly this Court has held that the transfer of TDRs satisfies these rules. See Dorsey v. Commissioner, T.C. Memo. 1990-242; compare Herman v Commissioner, T.C. Memo. 2009-205.

The contribution of the Easement to the Trust satisfied these rules.

The documentation attached to the 2004 Tax Return satisfied, in all material respects, the substantiation rules set forth in Treas. Reg. 1.170A-13.

Both 1982 East LLC and Haims believed at the time the appraisal report was prepared, and at the time the 2004 Tax Return filed, that all of these rules had been satisfied. Moreover, irrespective of whether there was complete technical compliance with all of the specific

requirements set forth in the Treasury Regulations, the Haims appraisal report, nevertheless, substantially complied with these rules, putting Respondent on full notice of the charitable deduction and the determination of the amount of the deduction. Haims subsequently prepared a retrospective appraisal report addressing the potential technical issues with the original reports raised by the IRS examining agent and confirmed the value claimed as charitable deduction by 1982 East LLC on the 2004 Tax Return.

This Court has held in the past that if a taxpayer has substantially complied with these rules, the taxpayer will be entitled to the charitable deduction. See, for example, Bond v. Commissioner, 100 T.C. 32 (1993); compare Hewitt v. Commissioner, 109 T.C. 258 (1997).

In addition, section 170(f)(11)(A)(ii)(II) of the Code provides that the failure to provide a “qualified appraisal” will not be a basis for denying the deduction if such failure “is due to reasonable cause and not willful neglect.”

This Court has previously acknowledged that no established market exists for determining the fair market value of historical preservation easements and has approved the use of the so-called “before and after” approach set forth in the Treasury Regulations to determine the value of historic preservation easements contributed to a qualified organization. See, for example, Hilborn v. Commissioner, 85 T.C. 677 (1985).

The fact that a property is subject to local preservation laws does not prevent a charitable deduction and this Court has previously allowed charitable deductions in such instances. See, for example, Simmons v. Commissioner, *supra*, and the cases cited therein.

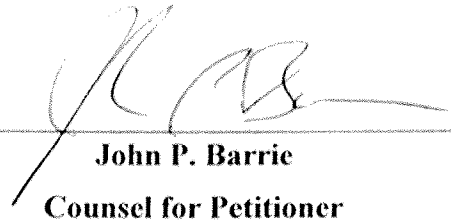
With respect to the proposed section 6662 penalty, section 6664 of the Code provides for abatement in the case of reasonable cause. This is a factual determination. Petitioner will establish at trial the factual evidence (including its reliance on information received from the Trust and its reliance on the Haims appraisals) for the Court to abate the proposed penalty. Cf. Dorsey v. Commissioner, *supra*.

EVIDENTIARY PROBLEMS:

None expected.

DATE:

Oct 2, 2009



John P. Barrie
Counsel for Petitioner

Return to: Judge Thomas B. Wells
Unites States Tax Court, Room 432
400 Second Street, N.W.
Washington, D.C. 20217
(202) 521-0790


Certificate of Service

This is to certify that a copy of the foregoing PRETRIAL MEMORANDUM FOR PETITIONER was served on Respondent by delivering same, by facsimile and US mail, on October __, 2009, addressed as follows:

MICHAEL D. WILDER
Attorney
(Large & Mid-Size Business)
Office of Division Counsel
Internal Revenue Service
33 Maiden Lane
12th Floor
New York, NY 10038-4518
Tel. No. 917-421-4669
Fax No. 917-421-3936

Dated: _____

10/21/09



John P. Barrie
Tax Court No. BJ1374