

petitioner's principal place of business was [REDACTED]

[REDACTED] New York [REDACTED]

3. In the Notice of Final Partnership Administrative Adjustment ("FPAA") upon which this case is based, respondent disallowed a noncash charitable contribution of a qualified conservation easement in the amount of [REDACTED] for taxable year 2003. Exhibit 1-R. Respondent also determined an accuracy-related penalty pursuant to I.R.C. § 6662(h) (valuation overstatement) in the amount of 40% of the underpayment, and alternatively, an accuracy-related penalty pursuant to I.R.C. § 6662(a) and (b) (substantial understatement of tax, or negligent or disregarded rules or regulations) in the amount of 20% of the underpayment. Exhibit 1-R.

Façade Easement Donation

4. The Partnership owned the parcel of land at the southwest corner of Lexington Avenue and East 51st Street, in New York City, as improved by the 49-story steel-framed office building sometimes known as the General Electric Building, having an address at 570 Lexington Avenue, New York, New York (the "Property"). Petition ¶ 8(a).

5. The Property was nominated for individual landmark status in the National Park Service's National Register of Historic Places in December, 2003, and became listed on the National Register on January 28, 2004. The Property was

designated a New York City landmark in July, 1985, by the New York City Landmarks Preservation Commission. Petition ¶ 8(b).

6. On December 16, 2003, the Partnership signed a document entitled "Conservation Easement" ("Conservation Easement Deed") with the National Architectural Trust ("NAT"), pursuant to which Partnership granted a façade easement on the Property to NAT. NAT accepted the agreement on December 29, 2003. Exhibit 2-R. The Conservation Easement Deed was recorded with the New York Department of Finance, Office of the City Register on January 15, 2004. Exhibit 2-R.

7. At the time the Partnership and the NAT entered into the Conservation Easement Deed, NAT was a qualified organization within the meaning of I.R.C. § 170(h)(3). Petition ¶ 8(c).

8. The stated purpose of the Conservation Easement Deed is to:

assist in preserving a historically important land area or a certified historic structure and in preserving open space for the scenic enjoyment of the general public.

Exhibit 2-R, Article I.D, pg. 1.

9. Written descriptions and photographs of the Façade were identified being contained in Exhibit B of the Conservation Easement, but were explicitly not attached to the document as recorded with the City of New York. Exhibit 2-R, Article I.F, pg. 2.

10. The Conservation Easement Deed provides in relevant part that "[w]ithout the express written consent of the Grantee

[NAT], which consent may be withheld in the sole discretion of the Grantee," the Grantor (i.e., the Partnership) may not alter, construct or remodel the existing Façade or place signs or markers on the building which would materially alter or change the condition, materials or appearance of the Façade, or undertake any exterior extension of existing improvements or erect any new or additional improvements. Exhibit 2-R, Article II.A., pg. 2 (emphasis added).

11. The Conservation Easement further provides:

Grantee covenants and agrees that it will not transfer, assign or otherwise convey its rights under this Easement except to another "qualified organization" described in section 170(h)(3) of the Internal Revenue Code of 1986 and controlling Treasury regulations, that agrees, as part of such transfer, to continue to implement the Grantor's intended conservation purposes, provided, however, that nothing herein contained shall be construed to limit the Grantee's right to give its consent (e.g. to changes in a principal exterior of the Façade) or to abandon some or all of its rights hereunder.

Exhibit 2-R, Article IV.B., pp. 5-6 (emphasis added).

12. Transamerica Life Insurance and Annuity Company

("Transamerica") held a mortgage on the Property with respect to a [REDACTED] loan from Transamerica to the Partnership. Exhibit 3-R ("Agreement of Consolidation, Spreader and Modification of Mortgage and Security Agreement" dated as of May 17, 2001).

13. Under the Transamerica mortgage, Transamerica, as mortgagee, had a right in its sole and absolute discretion, to either apply insurance proceeds or condemnation proceeds to the

balance of the loan or disburse them for purposes of repair or reconstruction, or to remedy the effects of the condemnation, unless the mortgagor, under the terms of the Transamerica mortgage, had the right to use the proceeds to rebuild the improvements. Exhibit 3-R, Section 8.3, pg. 22-23.

14. A representative of Transamerica executed a so-called "Lender Agreement" on December 18, 2003 for "the sole and limited purpose of subordinating its rights in the Property to the right of the Grantee, its successors or assigns, to enforce the conservation purposes of this easement in perpetuity". Exhibit 2-R, pg. 10). The Lender Agreement is attached to the Conservation Easement as recorded. Exhibit 2-R.

15. The Lender Agreement however provides that Transamerica's subordination was subject to conditions and stipulations, including the acknowledgment that:

The Mortgagee/Lender and its assignees shall have a prior claim to all proceeds of casualty insurance, and shall be entitled to same in preference to Grantee until the Mortgage/the Deed of Trust is paid off and discharged, notwithstanding that the Mortgage/the Deed of Trust is subordinate in priority to the Easement.

Exhibit 2-R, pg. 10.

Tax Reporting and FPA

16. On the Partnership's 2003 U.S. Return of Partnership Income, the Partnership reported a charitable contribution, in the amount of [REDACTED] which included [REDACTED], for the

contribution of the Conservation Easement, and a cash payment of ██████████ to the NAT. Exhibit 4-R, Schedule K, Statement 4, and Form 8283.

17. As noted above, respondent disallowed the contribution of ██████████ in an FPAA dated March 30, 2009. Exhibit 1-R.

18. In the petition, petitioner alleged, *inter alia*, that respondent erred in disallowing the deductions claimed for the charitable contribution of the façade easement on the Property. Petition ¶ 7(a).

Grounds for Partial Summary Judgment

19. Respondent respectfully states that counsel of record has reviewed the administrative file and, on the basis of the review of the file and the pleadings, concludes that there remains no genuine issue of material fact for trial upon the issue of whether the Partnership satisfied the provisions of I.R.C § 170(h), Treas. Reg. § 1.170A-14(a) and 1.170A-14(g)(6) requiring that to be eligible for a deduction, the conservation purpose of a conservation easement must be protected "in perpetuity." More specifically, as more fully described in respondent's Memorandum of Law, respondent requests partial summary judgment on the following grounds:

- ◆ The conservation purpose is not granted and protected in perpetuity because the NAT is not entitled to a proportionate share of the proceeds in the event the easement is extinguished, as required by Treas. Reg. § 1.170A-14(g)(6). See Kaufman v. Commissioner, 134 T.C. No. 9 (April 26, 2010).

- ◆ The Conservation Easement Deed allows changes in the façade inconsistent with a conservation purpose and allows the NAT to abandon the deed altogether, and thus is not in conformity with I.R.C. § 170(h)(4)(A) and Treas. Reg. § 1.170A-14(g)(1).
- ◆ The conservation purpose is not granted or protected in perpetuity because terms that are critical to the enforcement of the deed are not attached to the deed or recorded. Therefore, it cannot bind subsequent purchasers under New York State law, and thus it does not protect the conservation purpose of preserving the façade "in perpetuity," under the requirement of I.R.C. § 170(h)(1)(C) and (5)(A). See Herman v. Commissioner, T.C. Memo. 2009-205

20. A ruling in favor of respondent would have the effect of fully disposing of the issue of whether the Partnership was entitled to claim a charitable contribution for the Conservation Easement. Respondent has additional alternative grounds supporting the disallowance of the contribution, which based on a ruling in favor of the respondent, the Court would not need to address.

21. Petitioner objects to the granting of this motion.

WHEREFORE, it is prayed that this motion be granted.

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Date: June 17, 2010

By: _____

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