UNITED STATES TAX COURT

ESTATE OF GREGORY T. MOUNT, DECEASED, ALLISON H. COOK, EXECUTOR & ALLISON H. COOK,	)	
Petitioners,	)	
v.	)	Docket No. 17390-09
COMMISSIONER OF INTERNAL REVENUE,	)	Filed Electronically
Respondent.	)	

RESPONDENT'S OPPOSITION TO PETITIONERS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO THE APPLICABILITY OF TREASURY REGULATION § 1.170A-14(g)(6) TO INSURANCE PROCEEDS RESULTING FROM A CASUALTY, HAZARD, OR ACCIDENT OR THE PROCEEDS OF CONDEMNATION IN NEW YORK

RESPONDENT, pursuant to the Court's order of August 17, 2011, submits this opposition to petitioners' Motion for Partial Summary Judgment as to the Applicability of Treasury Regulation § 1.170A-14(g)(6) to Insurance Proceeds Resulting from a Casualty, Hazard, or Accident or the Proceeds of Condemnation in New York pursuant to Tax Court Rule 121(b), and respectfully requests that the Court deny petitioners' motion on the grounds that petitioners have failed to show that the undisputed facts warrant a conclusion of law in their favor.

IN SUPPORT THEREOF, respondent respectfully states:

1. Petitioners filed a Motion for Partial Summary Judgment as to the Applicability of Treasury Regulation § 1.170A-14(g)(6) to Insurance Proceeds Resulting from a Casualty, Hazard or Accident or the Proceeds of Condemnation in New York

(hereinafter the "Motion for Partial Summary Judgment") on August 11, 2011.

2. On August 17, 2011, the Court ordered respondent to file a response to the Motion for Partial Summary Judgment by September 8, 2011.

3. On September 2, 2011, respondent filed a motion for enlargement of time to respond to the Motion for Partial Summary Judgment to October 3, 2011, which motion was granted by the Court on September 8, 2011.

4. The Lender Agreements executed on behalf of Citimortgage, Inc. ("Citimortgage) and Citibank, N.A. ("Citibank") each state, in part:

> The Mortgagee/Lender and its assignees shall have a prior claim to all insurance proceeds as a result of any casualty, hazard or accident occurring to or about the Property and all proceeds of condemnation, 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.

5. The language in the Lender Agreements is nearly identical to the language used in the lender agreements examined previously by the Court in Kaufman v. Commissioner, 134 T.C. 182 (2010), Kaufman v. Commissioner, 136 T.C. No. 13 (2011), and 1982 East, LLC v. Commissioner, T.C. Memo. 2011-84.

6. Petitioners' Motion for Partial Summary Judgment should be denied because it contains no legal arguments, and the arguments made in Petitioners' Memorandum of Law in Support of Petitioners' Motion for Partial Summary Judgment as to the Applicability of Treasury Regulation § 1.170A-14(g)(6) to Insurance Proceeds Resulting from a Casualty, Hazard, or Accident or the Proceeds of Condemnation in New York makes legal arguments that are unavailing.

7. Filed with this Opposition to Petitioners' Motion for Partial Summary Judgment is Respondent's Memorandum of Law in Support of Respondent's Objection to Petitioners' Motion for Partial Summary Judgment as to the Applicability of Treasury Regulation § 1.170A-14(g)(6) to Insurance Proceeds Resulting from a Casualty, Hazard, or Accident or the Proceeds of Condemnation in New York (hereinafter "respondent's Memorandum").

8. Respondent's legal arguments in opposition to Petitioners' Motion for Partial Summary Judgment are contained in respondent's Memorandum.

9. Petitioners have failed to demonstrate that the undisputed facts require a judgment on the law in their favor.

WHEREFORE, respondent requests that Petitioners' Motion for Partial Summary Judgment be denied.

WILLIAM J. WILKINS
Chief Counsel
Internal Revenue Service

Date: OCT 0 3 2011 By: _____

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MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S OPPOSITION TO PETITIONERS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO THE APPLICABILITY OF TREASURY REGULATION § 1.170A-14(g)(6) TO INSURANCE PROCEEDS RESULTING FROM A CASUALTY, HAZARD, OR ACCIDENT OR THE PROCEEDS OF CONDEMNATION IN NEW YORK

Pursuant to Rule 121(b), respondent submits this Memorandum of Law in Support of Respondent's Opposition to Petitioners' Motion for Partial Summary Judgment as to the Applicability of Treasury Regulation § 1.170A-14(g)(6) to Insurance Proceeds Resulting from a Casualty, Hazard, or Accident or the Proceeds of Condemnation in New York, filed simultaneously herewith. Petitioners filed a Motion for Partial Summary Judgment as to the Applicability of Treasury Regulation § 1.170A-14(g)(6) to Insurance Proceeds Resulting from a Casualty, Hazard, or Accident or the Proceeds of Condemnation in New York ("the Motion") on August 11, 2011, requesting summary judgment upon the issue of whether petitioners' conservation contribution deduction for contribution of a façade easement to the National Architectural Trust ("the Trust") is disallowed under Treas.

Reg. § 1.170A-14(g)(6). Petitioners have failed to show that the undisputed facts warrant a conclusion as a matter of law in their favor. Therefore, the Motion should be denied.

I. STANDARDS FOR SUMMARY JUDGMENT

Petitioners do not provide a standard for summary judgment in the Motion or in the memorandum of law they filed in support of the Motion (Petitioners' Memorandum).[1] Summary judgment may only be granted where there is no genuine issue of material fact and a decision may be rendered as a matter of law. Tax Court Rule 121(b); Naftel v. Commissioner, 85 T.C. 527, 529 (1985). The moving party bears the burden of proving that there are no genuine disputes as to any material fact and that it is entitled to judgment on the substantive issues as a matter of law. Celotex Corp v. Catrett, 477 U.S. 317, 323 (1986). The non-moving party may not rest on the allegations or denials in pleadings but must "set forth specific facts showing that there is a genuine issue for trial." Dahlstrom v. Commissioner, 85 T.C. 812, 820-21 (1985); Tax Court Rule 121(d). In deciding a motion for summary judgment, the Court construes all facts and

[1] Petitioners also state that this issue "warrants review by the full court." Review by the Court is by statute a matter for the Chief Judge, pursuant to I.R.C. § 7460(b). That statute contemplates review of a report of a division. There is neither statutory provision nor precedent for a motion, rather than a report, to be reviewed by the Court.

views all inferences drawn from the evidence in a light most favorable to the party opposing the motion. Espinoza v. Commissioner, 78 T.C. 412, 416 (1982) (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)). Summary judgment is a "'drastic remedy' to be cautiously invoked and used sparingly" in cases where there is no genuine issue as to any material facts. Espinoza, 78 T.C. at 416, quoting United States v. Bosurgi, 530 F.2d 1105, 1110 (2d Cir. 1976).

II. PETITIONERS' CONTRIBUTION OF A FAÇADE EASEMENT FAILS TO COMPLY WITH TREAS. REG. § 1.170A-14(g)(6).

I.R.C. § 170(a) allows a deduction for charitable contributions made during the taxable year. A charitable contribution is a contribution or gift to or for the use of an entity described in I.R.C. § 170(c).

I.R.C. § 170(f)(3) generally disallows a charitable contribution deduction for the donation of a partial interest in property, except when that contribution is a "qualified conservation contribution", remainder interest in a residence or farm, or an undivided portion of an entire interest. I.R.C. § 170(h)(1) and Treas. Reg. § 1.170A-14(a) describe a qualified conservation contribution as a contribution of a qualified real property interest to a qualified organization exclusively for conservation purposes. Under I.R.C. § 170(h)(4)(A)(iv), the

"preservation of an historically important land area or a certified historic structure" is a conservation purpose. The conservation purpose must be protected in perpetuity. I.R.C. § 170(h)(5)(A); Treas. Reg. § 1.170A-14(g).

Treas. Reg. § 1.170A-14(g)(6)(i) provides:

> If a subsequent unexpected change in the conditions surrounding the [easement-encumbered] property . . . can make impossible or impractical the continued use of the property for conservation purposes, the conservation purpose can nonetheless be treated as protected in perpetuity if the restrictions are extinguished by judicial proceeding and all of the donee's proceeds . . . from a subsequent sale or exchange of the property are used by the donee organization in a manner consistent with the conservation purposes of the original contribution.

Treas. Reg. § 1.170A-14(g)(6)(ii) provides that, for a deduction to be allowed for the donation of a conservation easement,

> at the time of the gift the donor must agree that the donation of the perpetual conservation restriction gives rise to a property right, immediately vested in the donee organization, with a fair market value that is at least equal to the proportionate value that the perpetual conservation restriction at the time of the gift, bears to the value of the property as a whole at that time.

Moreover, if an extinguishment occurs, Treas. Reg. § 1.170A-14(g)(6)(ii) provides that:

> the donee organization, on a subsequent sale, exchange, or involuntary conversion of the subject property, must be entitled to a portion of the proceeds at least equal to that proportionate value of

> the perpetual conservation restriction, unless 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.

A. Petitioners' contribution fails to meet the requirements of Treas. Reg. § 1.170A-14(g)(6)(ii) because the Lender Agreements expressly reserve for Citimortgage, Inc. and Citibank, N.A. prior rights to insurance and condemnation proceeds.

The Lender Agreements at issue in this case state, in part:

> The Mortgagee/Lender and its assignees shall have a prior claim to all insurance proceeds as a result of any casualty, hazard or accident occurring to or about the Property and all proceeds of condemnation, 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.

See Petitioners' Motion, Exhibit A. Consequently, the Citimortgage, Inc. ("Citimortgage"), and the Citibank, N.A. ("Citibank"), (collectively the "Citi banks") Lender Agreements, executed by an Assistant Vice President of Citimortgage on April 21, 2004, on behalf of Citimortgage and Citibank, reserve for the Citi banks prior claims to all insurance and condemnation proceeds until the mortgages on the encumbered property are paid in full. These clauses of the Lender Agreements authorize the Citi banks to step in front of the Trust to collect insurance and condemnation proceeds. As a result, the Trust could fail to receive its proportionate share of the proceeds as required by Treas. Reg. § 1.170A-14(g)(6).

i. This Court has ruled in prior cases that language nearly identical to the language used in the Citi banks Lender Agreements fails to satisfy Treas. Reg. § 1.170A-14(g)(6)(ii).

In Kaufman v. Commissioner, 134 T.C. 182, 185-87 (2010), the Court granted respondent's motion for summary judgment on the issue of whether a mortgagee's prior claim to "all proceeds of condemnation and to all insurance proceeds as a result of any casualty, hazard, or accident occurring to or about the property" precluded a deduction for a conservation contribution. The Court held that the donee organization must be entitled to its proportionate share of future proceeds in the event the easement is extinguished. The language in the Lender Agreement in Kaufman was nearly identical to the language at issue in the present case.

The taxpayers in Kaufman petitioned the Court for reconsideration, which the Court denied. Moreover, in Kaufman v. Commissioner, 136 T.C. No. 13 (2011)(the "second Kaufman opinion"), the Court affirmed its prior holding. In the second Kaufman opinion, the Court held that the donee, after extinguishment of the easement, must have a right to a share of the proceeds of any subsequent sale, exchange, or involuntary conversion of the subject property, and that a contractual claim against the owners of the property was insufficient. Slip op.

at 25.

Petitioners argue in the Motion that Kaufman is inapplicable here because there are differences between the laws of Massachusetts and New York. They assert that they do not concede, as the Kaufman taxpayers did, that there are any circumstances under which the proceeds discussed in Treas. Reg. § 1.170A-14(g)(6) would be paid to the mortgagee in preference to the Trust. Although petitioners discuss New York law in the Motion, they do not discuss Massachusetts law or show how New York law requires different outcomes than the ones reached in the Kaufman opinions.

This Court has considered the application of Treas. Reg. § 1.170A-14(g)(6)(ii) to a property located in New York in 1982 East, LLC v. Commissioner, T.C. Memo. 2011-84. The relevant terms of the Lender Agreement at issue in 1982 East, as quoted in the Court's opinion, are identical to those in the present case. In 1982 East, the Court held that the lender agreement failed to satisfy Treas. Reg. § 1.170A-14(g)(6) because the donee "was not guaranteed a proportionate share of the proceeds in the event of casualty or condemnation." The Court in 1982 East specifically rejected the argument made by the taxpayers in that case that New York Real Prop. Acts. Law § 1951(2) and the deed guaranteed the donee's right to receive proceeds under

Treas. Reg. § 1.170A-14(g)(6)(ii) (see discussion in Section II.A.iv, below).

This Court has already decided in Kaufman that language nearly identical to the language contained in the Lender Agreement violates Treas. Reg. § 1.170A-14(g)(6)(ii), and petitioners have not distinguished their case from 1982 East, another New York case involving a New York City façade easement.

ii. The Lender Agreements' reservations to the Citi banks of priority rights to insurance proceeds violates Treas. Reg. § 1.170A-14(g)(6)(ii).

Petitioners also argue that the portion of the Lender Agreements reserving prior rights for the mortgagees to insurance proceeds is irrelevant to Treas. Reg. § 1.170A-14(g)(6)(ii) in the State of New York. In support of their position, petitioners note that the donors under the Conservation Deed of Easement in the present case have an affirmative duty to rebuild the building if it is totally or substantially destroyed. Petitioners' position is without merit.

Whether the Conservation Deed of Easement contains such a requirement is irrelevant. In the event that the façade is destroyed, the conservation purpose of the Deed is defeated, regardless of whether or how the façade is rebuilt. The Conservation Deed of Easement protects the historic façade on

the property as of the date of the donation. A rebuilt façade, whether a replica of the original or not, is no longer the historic façade that the Conservation Deed of Easement was designed to protect. For this reason, Treas. Reg. § 1.170A-14(g)(6) seeks to preserve the conservation purpose of the Conservation Deed of Easement, even in the event of destruction of the façade, by ensuring that the donee will receive its proportionate share of the insurance proceeds following the destruction and will use those proceeds for the conservation purposes of the original contribution.

Petitioners also argue that the complete destruction of the encumbered property is not a circumstance under which the easement would be extinguished under New York law. Petitioners state that the extinguishment of a conservation easement in New York State is governed by New York Environmental Conservation Law § 49-0307. While destruction of the property is not listed among the reasons for extinguishment in N.Y. Envtl. Conserv. L. § 49-0307, this section does list "a proceeding pursuant to section nineteen hundred fifty-one of the real property actions and proceedings law." N.Y. Envtl. Conserv. L. § 49-0307(b). N.Y. Real Prop. Acts. Law § 1951(2) allows for a court proceeding to extinguish an easement

if the court shall find that the restriction is of no

> actual and substantial benefit to the persons seeking its enforcement . . . either because the purpose of the restriction has already been accomplished or, by reason of changed conditions or other cause, its purpose is not capable of accomplishment.

Damages may be awarded pursuant to an action under N.Y. Real Prop. Acts. Law § 1951(2) (See further discussion of N.Y. Real Prop. Acts. Law § 1951(2) in Section I.A.iv, below).

If the protected façade were entirely destroyed, N.Y. Real Prop. Acts. Law § 1951(2) could be used to judicially extinguish the easement because the easement's "purpose [would] not [be] capable of accomplishment," since the façade it protected would no longer exist. If the easement were so extinguished, the donee would be entitled to damages under N.Y. Real Prop. Acts Law § 1951(2). However, these damages were found to be inadequate in 1982 East. There is nothing to guarantee that damages will be equal to the proportionate fair market value of the extinguished easement, as required by Treas. Reg. § 1.170A-14(g)(6)(ii).[2] Similarly, if subsequent to an extinguishment under N.Y. Real Prop. Acts. Law § 1951(2), insurance proceeds

[2] In fact, there is nothing to guarantee that damages will be awarded at all. See Angerman v. City of White Plains, 6 A.D.3d 559, 775 N.Y.S.2d 874 (N.Y.A.D. 2 Dept. 2004) (finding that defendant easement holder was not entitled to an inquest on damages to determine the value of an extinguished easement and holding that the easement holder had failed to establish damages in quantifiable terms and, as such, was not entitled to any damages).

were paid, the Trust might not receive its proportionate share under the Lender Agreements, thwarting the purpose of Treas. Reg. § 1.170A-14(g). This failure of the Lender Agreements to preserve the Trust's prior right to insurance proceeds is in violation of Treas. Reg. § 1.170A-14(g)(6)(ii).

iii. The Lender Agreement's reservation to the Citi banks of priority rights to condemnation proceeds violates Treas. Reg. § 1.170A-14(g)(6)(ii).

Petitioners argue in their Memorandum that the Lender Agreements' reservations to the Citi banks of priority rights to condemnation proceeds does not violate Treas. Reg. § 1.170A-14(g)(6)(ii). They assert that, under New York's Eminent Domain Procedure Law, condemnation proceeds are paid prior to the transfer of property to the state and prior to extinguishment of the easement. Treas. Reg. § 1.170A-14(g)(6)(ii) does not apply, petitioners claim, because it refers to a "subsequent sale, exchange, or involuntary conversion of the subject property."

This is a distinction without a difference. The purpose of Treas. Reg. § 1.170A-14(g)(6) is to ensure that the conservation purpose of the easement is protected in perpetuity. The Internal Revenue Code and Treasury Regulations make clear, in numerous sections, that an easement donation is not deductible unless the easement protects real property in perpetuity. For example, I.R.C. § 170(h)(5)(A) provides that a "contribution

shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity." Furthermore, I.R.C. § 170(h)(2)(C) states that "a restriction (granted in perpetuity) on the use which may be made of the property" is a qualified real property interest. Similarly, Treas. Reg. § 1.170A-14(a) states that a conservation purpose must be protected "in perpetuity" for the contribution to be eligible for a deduction. Moreover, under Treas. Reg. § 1.170A-14(b)(2), a qualified real property interest is a restriction "granted in perpetuity" on the use that may be made of real property, including an easement or similar interest under state law.

It makes no difference to the perpetuity of the easement whether the easement is extinguished before or after the condemnation proceeds are paid; what matters for purposes of Treas. Reg. § 1.170A-14(g)(6) is that the Trust receives its proportional share of the proceeds. The Lender Agreements do not adequately protect the Trust in the event that a condemnation proceeding extinguishes the easement or a proceeding under N.Y. Real Prop. Acts. Law § 1951(2) has already extinguished the easement.

Petitioners also argue that under New York's Eminent Domain Procedure Law the trust will receive a "fair share" of the

condemnation proceeds. N.Y. Em. Dom. Proc. Law § 304(D). This argument is simply inadequate for purposes of Treas. Reg. § 1.170A-14(g)(6)(ii). New York's Eminent Domain Procedure Law only ensures that the Trust will receive some portion of the condemnation proceeds, not that it will receive the proportionate value to which it is entitled under Treas. Reg. § 1.170A-14(g)(6)(ii).

Further, the Lender Agreements state that the Citi banks are entitled to "a prior claim to . . . all proceeds of condemnation, and shall be entitled to same in preference to Grantee until the Mortgage/the Deed of Trust is paid off and discharged." Thus, under the terms of the Lender Agreements, the Citi banks could be entitled to usurp some or all of the share of the condemnation proceeds that should be paid to the Trust. As a result, the Lender Agreements fail to adequately protect the Trust in the event of condemnation for purposes of Treas. Reg. § 1.170A-14(g)(6). See Kaufman, 134 T.C. at 186, stating that the requirement of Treas. Reg. § 1.170A-13(g)(6) "is not conditional." The donee "must be entitled" to its share of the proceeds. Id.

iv. The Lender Agreements do not adequately protect the Trust in the event of an action under N.Y. Real Prop. Acts. Law § 1951(2).

Under N.Y. Real Prop. Acts. Law § 1951(2), a court may

extinguish an easement "if the court shall find that the restriction is of no actual and substantial benefit to the persons seeking its enforcement . . . either because the purpose of the restriction has already been accomplished or, by reason of changed conditions or other cause, its purpose is not capable of accomplishment." Damages may be awarded pursuant to an action under N.Y. Real Prop. Acts. Law § 1951(2).

Petitioners argue that Treas. Reg. § 1.170A-14(g)(6) applies only to the proceeds of an action under N.Y. Real Prop. Acts. Law § 1951(2), and that the Lender Agreements do not mention such proceeds. While it is true that the Lender Agreements do not reserve for the Citi banks prior rights to the proceeds of an action under N.Y. Real Prop. Acts. Law § 1951(2), it is incorrect to conclude that Treas. Reg. § 1.170A-14(g)(6) applies only to such proceeds. Moreover, if the easement is extinguished by such an action, the Citi banks would have prior rights to future insurance and condemnation proceeds, in violation of Treas. Reg. § 1.170A-14(g)(6)(ii).

As a preliminary matter, respondent objects to petitioners' use of the term *cy pres* throughout their Memorandum. The term *cy pres* is never used in the Conservation Deed of Easement, nor has respondent found any case law referring to *cy pres* in proceedings under N.Y. Real Prop. Acts. Law § 1951(2). The only

Tax Court case petitioners cite on the subject of *cy pres* is Kaufman v. Commissioner, 136 T.C. No. 13, where the Court says of the drafters of Treas. Reg. § 1.170A-14 that "[t]hey understood that forever is a long time and provided what appears to be a regulatory version of *cy pres* to deal with unexpected changes that make the continued use of the property for conservation purposes impossible or impractical." Kaufman, 136 T.C. No. 13. The Court in Kaufman likened Treas. Reg. § 1.170A-14(g)(6) to *cy pres;* but it did not claim that the regulation was intended to operate on the proceeds of a state *cy pres* action.

Cy pres in New York refers specifically to the power of certain courts to reform a disposition made to a charitable trust in order to best effectuate the disposition's charitable purpose where literal application of the disposition's terms is impractical or impossible. N.Y. Est. Powers & Trusts Law § 8-1.1(c)(1); Matter of Abrams, 151 Misc.2d 1056, 1060 (1991). N.Y. Real Prop. Acts. Law § 1951(2) permits an easement to be extinguished where its purpose has already been achieved through outside means or where achievement of its purpose is impractical or impossible and allows for the potential payment of damages to the holder of the extinguished easement.

Petitioners seek to create an identity between proceedings

under N.Y. Real Prop. Acts. Law § 1951(2) and Section IV.C. of the Conservation Deed of Easement that does not exist. Petitioners also seek, by repeated use of the term *cy pres* in its original and redefined context, to bolster their claim that Treas. Reg. § 1.170A-14(g)(6) was written as a de facto *cy pres* provision and was intended to apply only to proceeds from actions under laws like N.Y. Real Prop. Acts. Law § 1951(2).

Petitioners' Motion for Partial Summary Judgment conflates the damages that may be awarded under N.Y. Real Prop. Acts. Law § 1951(2) with the type of proceeds contemplated by Treas. Reg. § 1.170A-14(g)(6). Damages awarded under N.Y. Real Prop. Act. Law § 1951(2) have already been found to be an inadequate substitute for the proceeds that must be paid under Treas. Reg. § 1.170A-14(g)(6) in 1982 East.

Petitioners also claim that there can be no proceeds after extinguishment of an easement under New York law, because all proceeds are distributed prior to extinguishment, not after. By its plain language, however, Treas. Reg. § 1.170A-14(g)(6)(ii) contemplates the existence of proceeds after extinguishment; they are the proceeds from "a subsequent sale, exchange, or involuntary conversion of the subject property."

Actions of the type allowed by N.Y. Real Prop. Acts. Law § 1951(2) are exactly the reason that Treas. Reg. § 1.170A-

14(g)(6)(ii) requires that donation of an easement give rise to a property right vested in the donee. By creating a property right independent of the easement, a deed compliant with the regulations ensures that the donee will have a right to proportional compensation in the event of sale, exchange, or conversion of the property in perpetuity even after the easement is extinguished. Because the Conservation Deed of Easement at issue in this case creates no such property right, it runs afoul of Treas. Reg. § 1.170A-14(g)(6)(ii). The Trust is not guaranteed the right to its proportionate share of future proceeds. See Kaufman, 134 T.C. 182, 186 (2010), stating that there was no deduction where the "right of NAT to its proportionate share of future proceeds was . . . not guaranteed."

B. Petitioners failed to agree that the donation gives rise to a property right immediately vested in the Trust, as required by Treas. Reg. § 1.170A-14(g)(6).

A conservation contribution is not deductible unless the donor agrees that the donation gives rise to a property right, immediately vested in the donee organization, with a fair market value at least equal to the proportionate value that the easement, at the time of the gift, bears to the value of the property as a whole. Treas. Reg. § 1.170A-14(g)(6)(ii). Additionally, the contribution of an easement does not protect a

conservation purpose in perpetuity and, therefore, is not deductible as a qualified conservation contribution if, following judicial extinguishment of the easement, the donee organization is not entitled to its proportionate share of any proceeds arising from a sale, exchange, or involuntary conversion of the subject property. Id.

In this case, Article IV.C. of the Deed purports to provide the grantee with a right, in the event the easement is extinguished through a judicial decree, "to receive upon the subsequent sale, exchange or involuntary conversion of the Property, a portion of the proceeds from such sale, exchange or conversion equal to the same proportion that the value of the initial Easement donation bore the entire value of the property at the time of the donation . . . ." However, nowhere in the deed or any other document produced by petitioners do petitioners "agree that the donation gives rise to a property right, immediately vested in the donee organization", as required by Treas. Reg. § 1.170A-14(g)(6)(ii).

This issue was discussed in the second Kaufman opinion. Kaufman, 136 T.C. No. 13 (2011). Per the Court in the second Kaufman opinion:

> considering the 'property right' language in subdivision (ii) together with the term 'donee's proceeds' in subdivision (i), we think it the intent

> of the drafters of section 1.170A-14(g)(6) that the donee have a right to a share of the proceeds and not merely a contractual claim against the owner of the previously servient estate.

Kaufman, 136 T.C. No. 13.

There are no documents in the present case that grant a vested property right to the Trust. Petitioners' failure to agree that the donation gave rise to a property right immediately vested in the Trust is yet another reason that taxpayers did not donate a conservation contribution that meets the requirements of Treas. Reg. § 1.170A-14(g)(6)(ii).

III. CONCLUSION

For the reasons set out above, it would be inappropriate to determine on summary judgment that the donors complied with Treas. Reg. § 1.170A-14(g)(6).

Respondent requests the Petitioners' Motion be denied.

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