UNITED STATES TAX COURT

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

MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' RULE 193 MOTION WITH RESPECT 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

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PRELIMINARY STATEMENT[1]

On August 11, 2011, Petitioners filed Petitioners' Motion. Petitioners' Motion is premised on the Local Law Exception, defined below. Neither Kaufman v. Commissioner, 134 T.C. No. 34 (2011)(on appeal) nor 1982 East LLC v. Commissioner, T.C. Memo. 2011-84 address the Local Law Exception. On December 7, 2011, this Court entered an Order that denied Petitioners' Motion. The Court's denial of Petitioners' Motion does not address the Local Law Exception.

The parties were ordered to present oral argument on November 23, 2011. On November 18, 2011, Petitioners filed a statement pursuant to T.C. Rule 50(c) in lieu of oral argument. Both Petitioners' Motion and Petitioners' Rule 50(c) Statement (sometimes collectively "Petitioners' Submissions") explain why Citimortgage's reservation of a prior claim to insurance and/or condemnation proceeds in New York does not violate the provisions of Treas. Reg. § 1.170A-14(g)(6). Specifically, Petitioners' submissions demonstrate that:

1. In New York, insurance proceeds are not proceeds for the purposes of Treas. Reg. § 1.170A-14(g)(6);

[1] Unless otherwise stated, capitalized terms used in this memorandum of law are the terms defined in Petitioners' Motion.

2. In New York, condemnation is not a "judicial proceeding" that extinguishes an easement within the meaning of Treas. Reg. § 1.170A-14(g)(6);

3. In New York, a proceeding pursuant to N.Y. Real Prop. Act. L. § 1951 is the only "judicial proceeding" that extinguishes an easement within the meaning of Treas. Reg. § 1.170A-14(g)(6); and

4. In New York, the Local Law Exception[2] applies to the payment of proceeds from a sale, exchange or involuntary conversion subsequent to a N.Y. Real Prop. Act. L. § 1951 proceeding. Therefore, insurance and/or condemnation proceeds are not "proceeds" within the meaning of Treas. Reg. § 1.170A-14(g)(6).

The material facts necessary to decide Petitioners' Motion are not in dispute. See Motion, Ex. B at 4:6-13; see also Resp. Response to Pet. Mot. at 3, ¶9. This suggests that Petitioners' Motion was denied based on a conclusion that Petitioners are not entitled to judgment as a matter of law. See T.C. Rule 121(b).

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[2] The Local Law Exception is defined in Petitioners' Motion as the exception in Treas. Reg. § 1.170A-14(g)(6)(ii) that provides that the regulation is applicable, "**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.**" (emphasis added).

The primary issue raised in Petitioners' Motion is a controlling question of law that determines whether Petitioners' donation to the Trust is a "qualified conservation contribution." See IRC § 170(h)(2)(C); Treas. Reg. § 1.170A-14(g)(6). If the Court concludes that Respondent is correct, as a matter of law, then it would be imprudent for Petitioners and other similarly situated New York-based Trust donors to proceed to trial on the qualified conservation contribution issue. A decision on Petitioners' motion will likely prevent Petitioners and other New York donors from incurring unnecessary expenses for potentially fruitless litigation.[3]

Thus, to the extent that the Court's December 7, 2011 order is based on the conclusion that Petitioners are incorrect as a matter of law, Petitioners respectfully request that the Court amend its December 7, 2011 Order to include a statement that Petitioners' Motion raised a controlling issue of law over which there is a substantial ground for differences of opinion and that

[3] As discussed in Point II, infra, a "qualified conservation contribution" must be substantiated with a "qualified appraisal" unless failure to obtain such an appraisal is due to reasonable cause. A trial would be necessary to decide this issue. See Motion, Exhibit A at 2. However, if Petitioners are incorrect as a matter of law on the issue raised in Petitioners' Motion, such trial would be both fruitless and unnecessarily expensive.

an immediate appeal of the issue may materially advance the ultimate termination of litigation in this case.

RELEVANT FACTS

The facts necessary to decide Petitioners' Motion are not in dispute. See Motion, Ex. B at 4:6-13; see also Resp. Response to Pet. Mot. at 3, ¶9. Those facts are set forth in Petitioners' Motion and in the Memorandum of Law in support of Petitioners' Motion. To avoid duplication, Petitioners incorporate those facts by reference herein.

ARGUMENT

POINT I

INTERLOCUTORY APPEAL IS APPROPRIATE FOR A NOVEL QUESTION OF LAW THAT MAY AFFECT THE OUTCOME OF OTHER SIMILARLY SITUATED LITIGANTS

Appeal of this case lies with the United States Court of Appeals for the Second Circuit. See IRC § 7482(b)(1). IRC § 7482(a)(2)(A) and T.C. Rule 193 provide that a party may appeal an interlocutory order when the order includes a statement that a controlling issue of law is involved over which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of litigation.

The right to seek interlocutory review was established by Congress in order to avoid protracted litigation.[4] Weber v. United States, 484 F.3d 154, 159 (2d. Cir. 2007). In the Second Circuit interlocutory appeals are granted in "exceptional circumstances." See Klinghoffer v. S.N.C. Achille Lauro et al., 921 F.2d 21, 25 (2d. Cir. 1990). This includes cases that involve circumstances that are consistent with the Congressional purpose for enacting IRC § 7482(a)(2), including a desire to:

> avoid waste of trial time at the trial court level through an opportunity to review orders before fruitless litigation and wasted expense.

General Signal, 104 T.C. at 251, quoting Kovens, 91 T.C. 74, 76-77 (1988). Furthermore, issues that are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated" are suitable for interlocutory appeal.[5] See Kovens,

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[4] Because the language of T.C. Rule 193 and IRC § 7482(a)(2)(A) is essentially the same as the language of 28 USC § 1292(b), this Court has referred to judicial decisions that interpret 28 USC § 1292(b) for guidance. See Kovens v. Commissioner, 91 T.C. 74, 77 (1988).

[5] In addition to the qualified conservation contribution issue, this case involves the deductibility of Petitioners' cash contribution to the Trust and Respondent's assertion of additions to tax pursuant to IRC § 6662. These issues are independent of the qualified conservation contribution issue.

91 T.C. at 78, quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

Consistent with these objectives, the Second Circuit has certified novel questions that have not been addressed by the appellate court and that are likely to have precedential value for a large number pending cases. See e.g. Brown v. Bullock, 294 F.2d 415, 417 (2d Cir. 1961). Moreover, the controlling question does not need to resolve all issues in a pending case. See e.g. Junco v. Eastern Air Lines, Inc., 399 F.Supp. 666, 667 (S.D. N.Y. 1975), aff'd without opinion 538 F.2d 310 (2d. Cir. 1976). Rather, interlocutory appeal can be granted for an issue that can obviate potential relief and where efforts to obtain additional evidence would not be helpful. Id.

As discussed in Points II and III, infra, New York law is relevant to whether Petitioners' donation of a real property interest to a qualified charitable organization satisfies the requirements of Treas. Reg. 1.170A-14(g)(6). Respondent disagrees. If Respondent is correct, as a matter of law, a trial to determine whether Petitioners' properly substantiated their deduction would be fruitless and result in wasted resources for both parties and the Court.

Moreover, this issue affects more than 500 New York-based donors to the Trust whose donations are memorialized by similarly worded conservation deeds and lender agreements. The issue of whether the Local Law Exception applies in New York has not been addressed by this Court.[6] Because this case presents a novel issue of law that affects a large group of similarly situated taxpayers, Petitioners respectfully submit that the issue raised in Petitioners' Motion is suitable for interlocutory appeal pursuant to T.C. Rule 193 and IRC § 7482(a)(2)(A). See Bullock, 294 F.2d at 417.

POINT II

WHETHER NEW YORK LAW APPLIES TO THE INTERPRETATION OF TREAS. REG. § 1.170A-14(g)(6) IS A CONTROLLING QUESTION OF LAW THAT MAY MATERIALLY ADVANCE THE TERMINATION OF LITIGATION IN THIS CASE

For purposes of T.C. Rule 193 and IRC § 7482(a)(2)(A), an issue is controlling when it is "serious to the conduct of litigation." See e.g. Kovens, 91 T.C. at 79. A deduction for a conservation easement is sustained when the donation constitutes a "qualified conservation contribution" pursuant to IRC § 170(h)

[6] Respondent contends that 1982 East LLC v. Commissioner, T.C. Memo. 2011-84 is issue determinative. As discussed in Petitioners' Submissions, the taxpayers in that case did not raise the "Local Law Exception." Because the "Local Law Exception" issue was not decided by the Court, the case is not controlling.

and the donor substantiated the donation with a "qualified appraisal."[7] Because failure to satisfy either requirement would be fatal to a claimed deduction, each question is serious to the conduct of litigation.

A Court may address either question in the manner it deems appropriate. Compare 1982 East LLC v. Commissioner, T.C. Memo. 2011-84(The court focused on the contribution's satisfaction of the "exclusively for conservation purposes" requirement) with Scheidelman v. Commissioner, T.C. Memo. 2010-151(on appeal)(The court focused on the qualified appraisal requirement). However, it would be inadvisable for a party to proceed to trial on either issue if that party is wrong, as a matter of law, with respect to the other issue. See e.g. Junco, 399 F.Supp. at 667(Interlocutory appeal is suitable for issues that can preclude requested relief and where a trial would not be helpful).

In this case, the "qualified appraisal" issue involves genuine issues of material fact.[8] The issue raised in

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[7] IRC § 170(f)(11) provides that a taxpayer's failure to obtain a "qualified appraisal" is excused to the extent that such failure is due to reasonable cause and not willful neglect.

[8] On July 5, 2011, this Court entered an order that denied Petitioners' Motion for Partial Summary Judgement on the "qualified appraisal" issue because "there are genuine issues of
(continued...)

Petitioners' Motion does not have facts in dispute. See Motion, Ex. B at 4:6-13; see also Resp. Response to Pet. Mot. at 3, ¶9. Even though a trial would be necessary to resolve the "qualified appraisal" issue, such trial would be fruitless with respect to the Treas. Reg. § 1.170A-14(g)(6) issue. See Junco, 399 F.Supp. at 667.

POINT III

THERE IS A SUBSTANTIAL DIFFERENCE OF OPINION WHETHER NEW YORK LAW IS RELEVANT TO AN ANALYSIS OF TREAS. REG. § 1.170A-14(g)(6)

A question presents a substantial difference of opinion when it involves serious and unsettled legal issues. See Kovens, 91 T.C. at 80. There is a difference of opinion on whether New York law is relevant to the applicability of Treas. Reg. § 1.170A-14(g)(6).

A qualified conservation contribution is an interest in real property that is created under state law. N.Y. Envtl. Conserv. L. § 49-0301 et. seq. Absent federal law to the contrary, state law governs the creation of legal interests and rights in property. See e.g. Estate of Gamble v. Commissioner, 69 T.C. 942, 948 (1978). The Internal Revenue Code defines the taxation of rights

[8](...continued)
material fact in dispute with respect to that issue." See Motion, Ex. A at 2.

created under state law. Id. Therefore, a provision like Treas. Reg. § 1.170A-14(g)(6), which applies to real property rights must be analyzed in tandem with state law. See e.g. Schottenstein v. Commissioner, 75 T.C. 451, 462 (1980). Respondent's contention that New York law is irrelevant to the interpretation of Treas. Reg. § 1.170A-14(g)(6) is misplaced. Treas. Reg. § 1.170A-14(g)(6) provides that a donor must create an interest in real property that is immediately vested in a donee. In New York, this right is enforceable pursuant to N.Y. Envtl. Conserv. L. § 49-0301 et. seq. The Trust's ability to recover damages as a result of a "judicial extinguishment" of an easement (N.Y. Real Prop Act L. § 1951(2)) and its standing to seek damages from condemnation (N.Y. Em. Dom. L. §§ 103, 501, 503) or insurance (N.Y. Ins. L. § 3401) are also determined pursuant to New York law. These determinations are fundamental to the applicability of Treas. Reg. § 1.170A-14(g)(6).

Contrary to Respondent's view, Treas. Reg. § 1.170A-14(g)(6) cannot be interpreted in isolation of state law. This is evident from Treas. Reg. § 1.170A-14(g)(6)'s conditional applicability on whether "**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." (emphasis added).

Moreover, Respondent's reliance on Kaufman and 1982 East LLC is equally misplaced. The Local Law Exception in New York was not raised by the taxpayers in either case. See Kaufman v. Commissioner, 134 T.C. No. 13 (2011)(on appeal) and 1982 East, LLC v. Commissioner. T.C. Memo. 2011-84. Furthermore, as discussed in more detail in Petitioners' Submissions, there are critical differences between Massachusetts and New York law which would impact the analysis of whether the Local Law Exception applies.[9]

Because the issue raised in Petitioners' Memo is a novel issue that has not been addressed by the court and a decision on this issue will impact the litigation of similarly situated New York-based Trust donors, the issue is suitable for interlocutory appeal. See Bullock, 294 F.2d at 417.

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[9] In Massachusetts a conservation easement may be released in whole or in part pursuant to Mass. Gen. L. ch. 184 § 32. In Massachusetts an easement holder may retain rights in the formerly encumbered property following a proceeding pursuant to Mass. Gen. L. ch. 184 § 32. By contrast, under New York law, the contrary is true; in New York an easement is "completely extinguished" in a cy pres proceeding. Compare N.Y. Real Prop. Act. L. § 1951(2) with Mass. Gen. L. ch. 184 § 32.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court amend its December 7, 2011 order to include a statement that Petitioners' Motion involved a controlling question of law for which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation in this case.

Respectfully submitted,

Dated: Hackensack, NJ
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