United States Tax Court

T.C. Memo. 2022-22

PICKENS DECORATIVE STONE, LLC, ECO TERRA 2016 FUND, LLC, TAX MATTERS PARTNER,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 13614-20. Filed March 17, 2022.

Ethan J. Vernon, *Robert B. Gardner III*, *Anson H. Asbury*, and *Lauren T. Heron*, for petitioner.

Stephen A. Haller and *Phillip A. Lipscomb*, for respondent.

MEMORANDUM OPINION

LAUBER, *Judge*: This is a syndicated conservation easement case. The Internal Revenue Service (IRS or respondent) disallowed the charitable contribution deduction claimed for the easement by Pickens Decorative Stone, LLC (Pickens), and determined penalties. Currently before the Court is respondent's Motion for Partial Summary Judgment (Motion). Respondent contends that the deduction was properly disallowed because the easement's conservation purpose was not "protected in perpetuity." *See* § 170(h)(5)(A).[1] Separately, respondent contends that the IRS complied with the requirements of section 6751(b)(1) by securing timely supervisory approval of the penalties. We will deny the

[1] Unless otherwise indicated, all statutory references are to the Internal Revenue Code, Title 26 U.S.C., in effect at all relevant times, all regulation references are to the Code of Federal Regulations, Title 26 (Treas. Reg.), in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

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[*2] Motion on the section 170(h)(5)(A) question but grant it with respect to section 6751(b)(1).

Background

The following facts are derived from the joint Stipulation of Facts, the parties' motion papers, and the exhibits and declarations attached thereto. They are stated solely for purposes of deciding respondent's Motion and not as findings of fact in this case. *See Sundstrand Corp. v. Commissioner*, 98 T.C. 518, 520 (1992), *aff'd*, 17 F.3d 965 (7th Cir. 1994).

Pickens is a Georgia limited liability company (LLC) organized in December 2015. Pickens is treated as a partnership for Federal income tax purposes, and its tax matters partner is Eco Terra 2016 Fund, LLC (petitioner), likewise a Georgia LLC. Pickens had its principal place of business in Georgia when the Petition was timely filed. Absent stipulation to the contrary, appeal of this case would lie to the U.S. Court of Appeals for the Eleventh Circuit. *See* § 7482(b)(1)(E).

In December 2015 Barnes Land & Investments, LLC (BLI), purchased a 163-acre tract in Pickens County, Georgia, for $490,010. On December 22, 2015, BLI contributed this land to Pickens. On December 29, 2016, after petitioner solicited investors through a private placement memorandum, Pickens granted to the Foothills Land Conservancy (Foothills) a conservation easement over most of the property.

Pickens timely filed Form 1065, U.S. Return of Partnership Income, for its 2016 tax year. On that return it claimed a charitable contribution deduction of $24,700,000 for the donation of the conservation easement.

The easement deed recites the conservation purposes and generally prohibits commercial or residential development. But it reserves certain rights to Pickens, including the rights to engage in forestry and recreational activities such as hiking, camping, hunting, fishing, and horseback riding. In connection with these recreational activities, Pickens reserved the right to build fences, bridges, and trails. Pickens also reserved the right to construct barns, sheds, and facilities "for the generation of renewable electrical power."

However, Pickens did not reserve unconditional rights. Paragraph 4 of the deed prohibits Pickens from engaging in any activity that would be "inconsistent with the purpose of th[e] Easement (including the Conservation Purposes)." To ensure that Pickens's exercise of a

[*3] reserved right would not impair any conservation purpose, paragraph 6 requires Pickens to seek Foothills's prior consent. If Foothills did not respond to such a request within 30 days, Foothills would be deemed to have granted approval "EXCEPT WHERE the requested action is clearly prohibited by the terms of th[e] Easement or would result in an adverse effect on the Conservation Purposes." If Foothills subsequently determined that a conservation purpose was at risk, it could (under certain circumstances) take "immediate action to prevent or mitigate" damage.

The IRS selected Pickens's return for examination and in July 2019 assigned the case to Revenue Agent (RA) Beverly Parker. In April 2020, as the examination neared completion, RA Parker recommended assertion of penalties against Pickens under sections 6662 and 6662A. Her recommendations to this effect were set forth in a civil penalty approval form. Supervisory RA Adam Wooten digitally signed the approval form on April 21, 2020, as the "immediate supervisor . . . of the individual who made the initial determination of the penalties." Mr. Wooten also signed RA Parker's case activity record as her group manager and noted that he "completed [the] case review."

On July 9, 2020, RA Parker mailed petitioner a packet of documents including Form 4605–A, Examination Changes, and Form 886–A, Explanation of Items, which set forth her proposed adjustments and penalty recommendations. One month later, on August 21, 2020, the IRS issued petitioner a notice of final partnership administrative adjustment (FPAA) disallowing the charitable contribution deduction and determining penalties. Petitioner timely petitioned this Court for readjustment of the partnership items.

Discussion

A. *Summary Judgment Standard*

The purpose of summary judgment is to expedite litigation and avoid costly, unnecessary, and time-consuming trials. *See FPL Grp., Inc. & Subs. v. Commissioner*, 116 T.C. 73, 74 (2001). We may grant partial summary judgment regarding an issue as to which there is no genuine dispute of material fact and a decision may be rendered as a matter of law. *See* Rule 121(b); *Sundstrand Corp.*, 98 T.C. at 520. In deciding whether to grant partial summary judgment, we construe factual materials and inferences drawn from them in the light most favorable to the nonmoving party. *Sundstrand Corp.*, 98 T.C. at 520. Where

[*4] the moving party properly makes and supports a motion for summary judgment, "an adverse party may not rest upon the mere allegations or denials of such party's pleading" but must set forth specific facts, by affidavit or otherwise, showing that there is a genuine dispute for trial. Rule 121(d).

B. *Analysis*

1. "*Protected in Perpetuity*"

The Internal Revenue Code generally restricts a taxpayer's charitable contribution deduction for the donation of "an interest in property which consists of less than the taxpayer's entire interest in such property." § 170(f)(3)(A). But there is an exception for a "qualified conservation contribution." § 170(f)(3)(B)(iii), (h)(1). For the donation of an easement to be a "qualified conservation contribution," the conservation purpose must be "protected in perpetuity." § 170(h)(1)(C), (5)(A); *see TOT Prop. Holdings, LLC v. Commissioner*, 1 F.4th 1354, 1362 (11th Cir. 2021); *PBBM-Rose Hill, Ltd. v. Commissioner*, 900 F.3d 193, 201 (5th Cir. 2018).

The regulations set forth detailed rules for determining whether this "protected in perpetuity" requirement is met. Of importance here are the rules governing the "[p]rotection of conservation purpose where [the] taxpayer reserves certain rights." *See* Treas. Reg. § 1.170A-14(g)(5); *see also id.* subpara. (1). If a donor reserves rights on the land underlying an easement, the donor must provide the donee with certain documentation (e.g., surveys, maps, and aerial photographs) before effecting the donation. *Id.* subpara. (5)(i). "[T]he donor must agree to notify the donee, in writing, before exercising any reserved right . . . which may have an adverse impact on the conservation interests . . . ." *Id.* subdiv. (ii). And the deed of easement must authorize "the donee to enter the property at reasonable times for the purpose of inspecting the property . . . [and] to enforce the conservation restrictions by appropriate legal proceedings" if necessary. *Ibid.* These requirements are "designed to protect the conservation interests associated with the property . . . [that] could be adversely affected by the exercise of the reserved rights." *Id.* subdiv. (i).

Respondent does not contend that the easement deed explicitly violates any of the regulatory requirements mentioned above. Rather, respondent faults the deed for including a "deemed consent" provision, which allegedly renders Foothills "powerless to prevent [an] inconsistent

[*5] use" if it does not respond to a request from Pickens within 30 days. According to respondent, an easement deed with a "deemed consent" provision cannot satisfy the "protected in perpetuity" requirement because the donee is stripped of its "perpetual right to prevent uses of the property that are inconsistent with the . . . conservation purposes." *Cf. Hoffman Props. II, LP v. Commissioner*, 956 F.3d 832, 834 (6th Cir. 2020) (holding that a deemed consent provision impaired the conservation purpose where the donor could exercise rights "in a manner contrary to" regulations promulgated by the Secretary of the Interior).

Petitioner replies that the deed "does not confer an unconditional right" but rather allows Pickens to exercise only those rights that would be consistent with the conservation purposes. *See Glade Creek Partners, LLC v. Commissioner*, T.C. Memo. 2020-148, 120 T.C.M. (CCH) 285, 291 n.9 (considering a "deemed consent" provision nonproblematic in such circumstances). As petitioner notes, paragraph 6(b) prohibits Pickens, notwithstanding any "deemed consent," from engaging in any activity that "would result in an adverse effect on the Conservation Purposes . . . in any material respect." Petitioner further contends that, if Foothills subsequently concluded that Pickens's action threatened a conservation purpose, Foothills could seek to "enjoin [the] violation" and "require restoration of the Property" to the status quo ante.

On the basis of the record that currently exists, petitioner seems to have the stronger argument regarding the proper construction of the deed. However, in a case such as this, we do not think the "deemed consent" issue can be decided as a matter of law. Foothills may be deemed to have consented to the exercise of certain rights, but only if it has failed to respond to notices from Pickens over a period of time. Foothills's internal procedures and past practice may shed light on whether this is likely to happen. In any event, the question whether the exercise of a right to which consent is deemed given would impair any conservation purpose presents factual questions ill-suited to summary adjudication. For these reasons we conclude that the better course of action is to deny respondent's Motion on this point.

2. *Penalty Approval*

Section 6751(b)(1) provides that "[n]o penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination." In a TEFRA case such as this, supervisory approval generally must be obtained before the IRS issues

[*6] an FPAA to the partnership.[2] *See Palmolive Bldg. Inv'rs, LLC v. Commissioner*, 152 T.C. 75, 83 (2019). If supervisory approval is obtained by that date, the partnership must establish that the approval was untimely, i.e., "that there was a formal communication of the penalty before the proffered approval" was secured. *See Frost v. Commissioner*, 154 T.C. 23, 35 (2020).[3]

The joint Stipulation of Facts includes a copy of the civil penalty approval form by which RA Parker recommended assertion of penalties against Pickens. RA Parker's group manager, Mr. Wooten, signed the approval form on April 21, 2020, as her "immediate supervisor." RA Parker's case activity record—also included in the joint stipulation—shows that Mr. Wooten supervised her during the Pickens examination. We thus conclude that Mr. Wooten was RA Parker's "immediate supervisor" for purposes of section 6751(b)(1). *See Sand Inv. Co. v. Commissioner*, 157 T.C. __, __ (slip op. at 11) (Nov. 23, 2021) (holding that the "immediate supervisor" is "the person who supervises the agent's substantive work on an examination").

The definite decision to assert penalties was communicated to Pickens in the FPAA. The IRS issued that document on August 21, 2020, four months after RA Parker secured supervisory approval from Mr. Wooten. Respondent accordingly contends that approval of these penalties was timely secured.[4] *See Frost*, 154 T.C. at 35.

Petitioner concedes that, "[u]nder normal circumstances," Mr. Wooten's approval would be regarded as timely under section 6751(b)(1). But petitioner notes that the IRS in 2017 had issued a public notice advising that participants in syndicated easement transactions risked certain penalties. *See* Notice 2017-10, 2017-4 I.R.B. 544, 546 (classifying "syndicated conservation easement transactions" as reportable transactions subject to penalties). Petitioner asserts that Notice 2017-10 and

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[2] Before its repeal, TEFRA (the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, §§ 401–407, 96 Stat. 324, 648–71) governed the tax treatment and audit procedures for many partnerships, including Pickens.

[3] Although the Commissioner does not bear a burden of production with respect to penalties in a partnership-level proceeding, a partnership may raise section 6751(b) as an affirmative defense. *See Dynamo Holdings Ltd. P'ship v. Commissioner*, 150 T.C. 224, 236–37 (2018).

[4] Because RA Parker secured supervisory approval on April 21, 2020, we need not decide whether the "initial determination" to assert penalties was embodied in the Form 4605–A and the Form 886–A (both dated July 9, 2020) or the FPAA (dated August 21, 2020).

[*7] related IRS pronouncements "constitute[d] Respondent's formal communication of his unequivocal intent to assert all penalties in all [syndicated easement] transactions."

We are not persuaded. We have repeatedly held that an examining agent need only secure supervisory approval "before the first formal communication *to the taxpayer* of penalties." *Frost*, 154 T.C. at 32 (emphasis added); *see Belair Woods, LLC v. Commissioner*, 154 T.C. 1, 15 (2020) (holding that an "initial determination" is embodied in the document by which the IRS "formally notifies the taxpayer . . . [of its] unequivocal decision to assert penalties"). Our inquiry thus "turns on the timing of the IRS communication to the taxpayer against whom the penalties are being asserted." *Excelsior Aggregates, LLC v. Commissioner*, T.C. Memo. 2021-125, at *16.

An IRS announcement directed to the public at large cannot constitute "the first formal communication *to the taxpayer* of penalties." *Frost*, 154 T.C. at 32 (emphasis added). Moreover, because the IRS did not select Pickens's return for examination until July 2019, it could not possibly have "determined" any penalties against Pickens in 2017. The "initial determination" of a penalty occurs when the IRS makes "an unequivocal decision to assert penalties." *See Belair Woods*, 154 T.C. at 15. The IRS could not have made an unequivocal decision to assert penalties against Pickens before reviewing its return to determine if there existed an "understatement." *See Thompson v. Commissioner*, 155 T.C. 87, 92 (2020) (holding than an IRS communication did not reflect an "initial determination" where it did not notify the taxpayers that the IRS exam team "had completed its work").

Assuming arguendo that supervisory approval was timely, petitioner contends that Mr. Wooten "did not have the information necessary to personally approve penalties." Petitioner asserts that Mr. Wooten signed the penalty approval form before RA Parker transmitted certain documents to the "penalty team." According to petitioner, this creates a dispute of fact as to whether Mr. Wooten meaningfully reviewed RA Parker's recommendations before supplying his approval.

Petitioner misapprehends the requirements of section 6751(b). That provision is captioned "Approval of Assessment," not "Explanation of Assessment." As we have said before: "The written supervisory approval requirement . . . requires just that: written supervisory approval." *Raifman v. Commissioner*, T.C. Memo. 2018-101, 116 T.C.M. (CCH) 13, 28. We have repeatedly rejected any suggestion that a penalty approval

[*8] form must "demonstrate the depth or comprehensiveness of the supervisor's review." *Belair Woods*, 154 T.C. at 17. Thus, a "group manager's signature on the Civil Penalty Approval Form is sufficient to satisfy the statutory requirements." *Ibid.*

The record confirms that RA Parker secured timely supervisory approval from Mr. Wooten. Petitioner has offered no evidence to controvert this fact. Quite the contrary: Petitioner has stipulated that the copies of the case activity record and penalty approval form, as executed by Mr. Wooten, are "true and accurate." There being no genuine dispute of material fact on this point, we will grant respondent's Motion with respect to penalty approval.

To reflect the foregoing,

An order will be issued granting in part and denying in part respondent's Motion for Partial Summary Judgment.