

United States Tax Court

T.C. Memo. 2022-17

JESSICA WALTERS,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

DAVID W. WALTERS AND JEAN T. WALTERS,
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket Nos. 13060-15, 13097-15.

Filed March 7, 2022.

Robert B. Gardner III and Vivian D. Hoard, for petitioners.

John T. Arthur, Ashley Y. Smith, and Courtney S. Bacon, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

WELLS, *Judge*: Respondent determined the following deficiencies in petitioners' Federal income tax and accuracy-related penalties pursuant to section 6662(a)¹ for their 2011 and 2012 tax years (years in issue).

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

Served 03/07/22

[*2]

<i>Docket No.</i>	<i>Year</i>	<i>Deficiency</i>	<i>Penalty § 6662(a)</i>
13060-15	2011	\$13,159	\$2,632
	2012	2,750	---
13097-15	2011	76,910	15,382
	2012	1,543	---

In issue in these cases are (1) whether a mutually owned partnership was engaged in for-profit activities during the years in issue and (2) whether petitioners are liable for penalties under section 6662(a).

FINDINGS OF FACT

Petitioner Jessica Walters (petitioner daughter) resided in North Carolina when she timely filed her petition, and petitioners David Walters (petitioner husband) and Jean Walters (petitioner wife) resided in Georgia when they timely filed their petition. Petitioners are all partners of D&J Properties (sometimes referred to as the partnership), a Georgia partnership, with petitioner wife and petitioner husband each holding a 47.4% interest and petitioner daughter holding a 5.2% interest. Petitioner husband serves as the managing partner of the partnership.

I. *Petitioner Husband and Petitioner Wife's La-Z-Boy Stores*

After establishing three successful businesses in Michigan during the late 1970s and early 1980s, petitioner husband and petitioner wife were presented with the opportunity of establishing La-Z-Boy, Inc., furniture stores in the Atlanta, Georgia, area. Petitioner husband and petitioner wife sold their businesses in Michigan and in 1986 opened two La-Z-Boy stores in Georgia. By 1988 they had opened two more La-Z-Boy stores.

In 1990, after analyzing where customers lived in relation to the stores' locations, petitioner husband and petitioner wife jointly purchased a stand-alone building (i.e., not physically attached to a

times, and all Rule references are to the Tax Court Rules of Practice and Procedure. Monetary amounts are rounded to the nearest whole number.

[*3] shopping complex) to house a La-Z-Boy store closer to where customers lived. Over the next several years petitioner husband and petitioner wife continued to expand the La-Z-Boy business and opened several stand-alone La-Z-Boy stores in Georgia. D&J Properties owned three buildings that housed the La-Z-Boy stores. At the time, the La-Z-Boy stores produced approximately \$20 million in annual revenue.

II. *Petitioner Husband's and Petitioner Daughter's Environmental Experience*

The United States Green Building Council (USGBC) was established during the 1990s and led the development of a rating system for environmentally friendly (eco-friendly or green) buildings. The rating system later became known as Leadership in Energy and Environmental Design (LEED) certification. Petitioner husband became aware of LEED early on and took time to learn about the various LEED methods for efficient building design. During the construction of one stand-alone store, petitioner husband incorporated various LEED methods to make the building more eco-friendly.

In 1994 petitioner husband invested in Waste Alternative, a private company that focused on removing plastic waste from Florida streams, and he subsequently joined its board of directors. Petitioner husband remained on the board for three years until the company was successfully sold for a profit.

As green construction organizations developed over the years, petitioner husband followed the industry, attending several seminars. Through these seminars petitioner husband became acquainted with what was required to obtain certification of a building under LEED standards. Over the last ten years, petitioner husband has guest-lectured at Western Carolina University in their construction management program.

In the late 1990s petitioner daughter received her undergraduate degree in environmental science and political science. After receiving her degree, petitioner daughter obtained her law degree from a school that offered a focus on environmental law. During law school, petitioner daughter interned at the Carolina Mountain Land Conservancy where she met various individuals, including land developers, who invested in eco-friendly developments.

[*4] III. *Transition to Eco-Friendly Commercial and Residential Construction/Consulting Business*

After completing law school, petitioner daughter expressed her wish not to enter into the furniture store business with petitioner husband and petitioner wife. In 2004 petitioners considered transitioning D&J Properties into an eco-friendly commercial and residential construction/consulting business by entering the green real estate market. As part of that plan, the partnership sold its La-Z-Boy furniture stores but retained ownership of the three stand-alone buildings that housed the stores.

Through connections petitioner daughter made at her internship with the conservancy, petitioners became aware of Balsam Mountain Preserve (BMP). BMP is a low-density housing development in the mountains of North Carolina that places particular emphasis on land conservation. The development sells its landowners club memberships which include access to a golf course, tennis courts, a restaurant, hiking and mountain biking trails, horseback riding, and an educational facility that offers hikes and lessons on fly-fishing and on flora and fauna identification. In addition to private residences BMP has ten cottages, featuring geothermal water and solar heating systems, where prospective owners may stay.

In February 2006 the partnership purchased a lot in BMP. In May 2006 contractors involved in building green structures met with petitioners to inspect the BMP property and begin plans to build a green home (Balsam Home) on the lot. Throughout the home design process, petitioner husband met with a landscape architect regarding grading and vegetation plans for the entire property. In May 2007 the partnership signed a contract with a general contractor for the construction of Balsam Home.

Balsam Home was constructed with various eco-friendly systems and materials. In 2008, while still under construction, Balsam Home received the Energy Star Qualified Home Certificate, which certified that the home met energy standards established by the United States Environmental Protection Agency. Balsam Home was completed in 2009 and was awarded the USGBC LEED for Homes Gold Certificate (the highest LEED certification for homes) in April 2010. Balsam Home has (among other things) a wine cellar, a dry sauna, a putting green, indoor and outdoor fireplaces, a dog wash, and a fully functional greenhouse.

[*5] At the beginning of construction in 2006, D&J Properties secured a construction loan for Balsam Home. In 2009 the construction loan was converted to a permanent loan, and the lending bank required that the permanent loan list the names of petitioner husband and petitioner wife (rather than D&J Properties) as the borrowers. In 2014, in accordance with the request of petitioner husband and petitioner wife, the loan was retitled and D&J Properties was listed as the borrower.

As construction neared completion D&J Properties received an invitation from BMP to participate in a “Fall Festival of Color” held the last weekend of October 2009. In an email to the contractors who had worked on Balsam Home, petitioner husband explained that, as part of the invitation, he would moderate a panel which would consist of the various contractors who had worked on Balsam Home. Petitioner husband also explained that at an open house at Balsam Home:

current [BMP] property owners and sales prospects will tour the home and have the opportunity to speak with key subs and members of our team. We [the partnership] have also invited various folks from local, regional, and national media to join us and have prepared an editorial/pictorial press kit for their publications.

Petitioner husband signed the email “D&J Properties, c/o Dave Walters [petitioner husband].”

In October 2010, petitioner husband worked with a reporter at the *Atlanta Journal-Constitution* on an article on Balsam Home, although it is unclear whether the article was ultimately published. From 2010 and until at least the time of trial, D&J Properties advertised as a green company in the *Western North Carolina Green Building Directory* and listed Balsam Home as D&J Properties’ address. D&J Properties also engaged in other marketing campaigns that highlighted Balsam Home and its features.

From the time Balsam Home was completed, petitioners kept the house open for tours. The partnership depicted Balsam Home as a model show home in advertisements and interviews. Individuals viewing the home would see the various certificates awarded to Balsam Home prominently displayed on the entryway walls. Additionally, pamphlets about green construction and a book highlighting the various green construction features of Balsam Home were placed on a coffee table for viewers. When petitioners were at their respective personal

[*6] residences, the broker in charge of BMP had access to and would provide tours of Balsam Home.

The upkeep of Balsam Home is labor intensive; the various features of the home do not permit the home to remain unattended for extended periods. Petitioners employed a landscaping crew to assist with maintenance but performed most of it themselves. Additionally, petitioner husband occasionally used the golf course.

Petitioners paid for memberships with BMP (which permitted them access to the golf course and the restaurant). Records for 2010 show that petitioners chose the more expensive of two memberships (which provided access to the golf course) and that petitioners listed petitioner wife's mother and petitioner husband's father on the membership agreement. Membership invoices for 2006 and 2007 are addressed to petitioner husband and petitioner wife with D&J Properties listed directly below their names.

Petitioners also registered six cars with BMP: the company vehicle for D&J Properties, and one vehicle each for petitioner husband, petitioner wife, petitioner daughter, petitioner wife's mother, and petitioner husband's father. There were two landline phone numbers connected to Balsam Home. As of the time of trial, one landline number, which was not advertised as the phone number for D&J Properties, contained the following voicemail: "Hello, you've reached the Walters. Leave a message and we'll call you back." At the driveway entrance for Balsam Home a sign reads "Walters 4900."

Petitioners placed wine in the Balsam Home wine cellar, and a photo from 2014 shows about eight bottles of wine stored there. Additionally, the 2014 photos show two bikes stored in the garage/storage area and clothing in the primary bedroom closet. During 2011 and 2012 petitioners maintained a DirecTV account for Balsam Home.

Petitioner husband averaged 11 days per month at Balsam Home in 2011 and 6 days per month between January and October 2012. The record does not specify how often petitioner husband was at Balsam Home in November and December of 2012 nor how often petitioner wife or petitioner daughter was at Balsam Home during the years in issue. Petitioners often visited Balsam Home during holiday weekends.

[*7] IV. *D&J's Other Endeavors*

D&J Properties was involved in discussions for projects other than Balsam Home. These projects, or project conceptions, included a hotel and club development, several development projects at BMP, the development of some cottages, and a refurbishment project. According to its records, D&J Properties was involved with some of these projects for periods ranging from one day to two years. However, nothing in the record suggests that any of these projects graduated from planning into development, or, if they did, that D&J Properties was involved in the development.

V. *Petitioners' Business Records*

Petitioners kept separate books for each D&J Properties project. When writing checks for the business, petitioners would include a numerical code to identify which property the expense was associated with. Petitioners met with their accountant quarterly to review the partnership's financial statements. The partnership's business credit card records reflect expenses for multiple car and gas payments in Georgia, pharmacies, a PGA Golf Tournament, travel to Michigan, a vet bill, and over \$18,000 for Atlanta Braves season tickets.

VI. *D&J Properties' Finances*

D&J Properties did not realize a profit from its green contracting/consulting work from its inception through the years in issue. D&J Properties reported net rental real estate income of \$413,379 for 2009, \$448,864 for 2010, \$471,666 for 2011, and \$78,831 for 2012 on its tax returns. During the years in issue D&J Properties still owned the three stand-alone buildings in Georgia.

By the end of 2012 only one of the properties owned by D&J Properties had a tenant. In 2013, after borrowing money from petitioner husband's father to avoid foreclosure, D&J Properties sold one of the Georgia properties. In 2014 D&J Properties sold another Georgia property. At the time of trial D&J Properties owned one building in Georgia, which had been vacant since December 2011 except for a temporary tenant during Halloween each year.

As of 2014 petitioner husband and petitioner wife reported on a loan application that their joint monthly income was around \$42,000 and that they held over \$3 million in assets comprising their partnership

[*8] interests in D&J Properties (the titleholder of Balsam Home) and their personal residence.

OPINION

The main issue in these cases is whether D&J Properties was engaged in a for-profit green construction/consulting business through the construction and promotion of Balsam Home, as petitioners contend, or whether petitioners used Balsam Home for personal use and enjoyment, as respondent contends. We will review first which party bears the burden of proof and then decide whether the partnership was engaged in a for-profit activity. Because we hold below that the partnership engaged in a for-profit activity, we need not decide whether petitioners should be liable for penalties under section 6662(a).

I. *Burden of Proof*

As a general rule, the Commissioner's determination of a taxpayer's liability in a notice of deficiency is presumed correct, and the taxpayer bears the burden of proving that the determination is incorrect. Rule 142(a); *Welch v. Helvering*, 290 U.S. 111, 115 (1933). In certain circumstances, if the taxpayer introduces credible evidence with respect to any factual issue relevant to ascertaining the proper tax liability, then section 7491(a)(1) shifts the burden of proof to the Commissioner. *See Higbee v. Commissioner*, 116 T.C. 438, 440–41 (2001). At trial and in their opening posttrial brief, petitioners contend that they met the requirements of section 7491 and that the burden, therefore, should shift to respondent. Because we decide this case on the preponderance of the evidence, we need not decide which party has the burden of proof. *See Knudsen v. Commissioner*, 131 T.C. 185, 189 (2008), *supplementing* T.C. Memo. 2007-340.

II. *For-Profit Business*

Generally, taxpayers may deduct business-related and investment expenses. *See* §§ 162, 212. However, under section 183(a), taxpayers may not deduct expenses for an activity “if such activity is not engaged in for profit.”² When a partnership is involved in a section 183 analysis, the existence of the requisite profit objective is determined at the partnership level. *Brannen v. Commissioner*, 78 T.C. 471, 505 (1982), *aff'd*, 722 F.2d 695 (11th Cir. 1984). The analysis typically

² The limited exceptions to section 183(a) under subsection (b) are unapplicable to these cases.

[*9] focuses on the actions of the partners who manage the affairs of the partnership and upon whom other partners rely to make partnership decisions. *See id.* at 504–05. Therefore, whether the construction and maintenance of Balsam Home by D&J Properties constituted a for-profit activity depends on whether the partnership, through the actions of its managing partners, had a bona fide profit objective or intent. *See id.*

Treasury Regulation § 1.183-2(b) provides a nonexclusive list of objective factors to be considered in deciding whether an activity is engaged in for profit. *Allen v. Commissioner*, 72 T.C. 28, 33 (1979). The factors are: (1) the manner in which the taxpayer carries on the activity; (2) the expertise of the taxpayer or the taxpayer’s advisors; (3) the time and effort expended by the taxpayer in carrying on the activity; (4) the expectation that assets used in the activity may appreciate in value; (5) the success of the taxpayer in carrying on other similar activities; (6) the taxpayer’s history of income or loss with respect to the activity; (7) the amount of occasional profits, if any, which are earned; (8) the financial status of the taxpayer; and (9) whether elements of personal pleasure or recreation are involved. Treas. Reg. § 1.183-2(b). No single factor is determinative, and all facts and circumstances should be considered. *Id.*; *see also Abramson v. Commissioner*, 86 T.C. 360, 371 (1986). Moreover, we do not resolve the issue of profit objective by simply comparing the number of factors indicating profit objective with those indicating the lack of such an objective. Treas. Reg. § 1.183-2(b). We will separately address each factor below.

A. *Manner in Which the Taxpayer Carried On the Activity*

The fact that the taxpayer carries on the activity in a businesslike manner and maintains complete books and records may indicate that the activity was engaged in for profit. *Id.* subpara. (1).

Petitioners contend that the record clearly demonstrates that the partnership carried on Balsam Home (and, more broadly, its green construction consulting business) in a businesslike manner. Petitioners point to the display of accolades, pamphlets, and books detailing Balsam Home’s green features for individuals touring Balsam Home as evidence that the home was run in a businesslike manner as a show home rather than a private residence. Furthermore, petitioners cite the partnership’s accounting method of coding each expense to the correct business project and consistent meetings with an accountant as support for their position.

[*10] Respondent, on the other hand, contends that D&J Properties was an alter ego and that petitioners' spending was not businesslike because there were too many personal purchases. For support, respondent points to car maintenance and gas bills, the PGA Golf Tournament, Atlanta Braves season tickets, a vet bill, and pharmacy charges (among others) that were purchased with the partnership's business credit cards. Respondent contends that further examples of petitioners' using Balsam Home and the amenities at BMP for personal pleasure rather than business include (1) purchasing the more expensive BMP club membership, (2) including petitioner husband's father and petitioner wife's mother on the membership form, and (3) maintaining a phone line with a voicemail for petitioners by name (rather than just D&J Properties).

The businesslike handling of Balsam Home is unclear. Although D&J Properties marked each expense on its business records with a numerical code, it was never fully explained what the code numbers represented or, more importantly, why expenses that appear personal in nature were deemed to be business expenses. On the other hand, Balsam Home always stood ready for tours—the accolades, pamphlets, and books were on continual display, and the BMP broker in charge had access to and provided tours of Balsam Home. Additionally, Balsam Home was consistently advertised as a show home through marketing and communications.

While the partnership's books are replete with what might appear on their face to be personal purchases, the partnership maintained thorough records which might support a conclusion that it operated Balsam Home in a businesslike manner. The thoroughness of the records would have allowed the partnership to abandon unprofitable operating methods or improve its techniques in the future, which is consistent with having a bona fide profit objective. *See* Treas. Reg. § 1.183-2(b)(1). Moreover, Balsam Home continually stood ready for tours and was held out to be a green residential show home. Considering the foregoing, we conclude that this factor is neutral.

B. *The Expertise of the Taxpayer or the Taxpayer's Advisors*

A taxpayer's expertise, research, and study of an activity, as well as his consultation with experts, may be indicative of a profit objective. Treas. Reg. § 1.183-2(b)(2).

[*11] Petitioners contend that petitioner husband has extensive knowledge in “green building science” as displayed through the construction of the eco-friendly stand-alone building in Georgia and the various seminars he has taken over the years regarding eco-friendly construction. Petitioners also highlight the fact that they sought out various green experts within the construction world on behalf of the partnership to ensure Balsam Home would qualify for LEED certification.

Respondent contends, however, that petitioners do not have any particular expertise in eco-friendly residential construction. Respondent states that the seminars taken by petitioner husband were insufficient for him to qualify as an expert. Respondent also contends that petitioners did not sufficiently consult with individuals in the industry because they never consulted with successful eco-friendly consulting/construction businesses “regarding specifics of profitab[ility] or any other aspects of the industry.”

We conclude that petitioners’ individual knowledge in the eco-friendly construction field is sufficient for this factor to weigh in their favor, as petitioners used this knowledge to collectively further the business of the partnership. Petitioner daughter had years of formal education related to environmental conservation. Likewise, petitioner husband not only became acquainted with the LEED program when he first oversaw the construction of the stand-alone building in Georgia, but he also continued to take classes and immerse himself in understanding eco-friendly construction. Additionally, petitioners sought a number of experts in green construction (the builders employed to design and construct Balsam Home) and eco-friendly building certification (the experts who ensured Balsam Home would qualify for LEED certification). As Balsam Home was the center of their marketing efforts, such efforts furthered the business goals of the partnership. Taken together, these facts indicate that petitioners sought or acquired expertise that would enable D&J Properties to turn the operation of Balsam Home into a profitable activity. *See Golanty v. Commissioner*, 72 T.C. 411, 432 (1979) (explaining that taxpayers seek or acquire knowledge consistent with seeking a profit if they consult experts or educational texts to learn about the business side of an operation), *aff’d without published opinion*, 647 F.2d 170 (9th Cir. 1981). Accordingly, we conclude that this factor weighs in favor of the partnership’s having a profit objective.

[*12] C. *The Time and Effort Expended by the Taxpayer in Carrying On the Activity*

The fact that the taxpayer devotes much of his personal time and effort to carrying on an activity, particularly if the activity does not have substantial personal or recreational aspects, may indicate an intention to derive a profit. Treas. Reg. § 1.183-2(b)(3).

Petitioners contend that the countless hours of overseeing the construction of Balsam Home, advertising, meeting with real estate developers, attending seminars, hosting seminars, and ensuring Balsam Home received various residential green certifications all furthered D&J Properties' green real estate venture. Petitioner husband testified that petitioners continuously worked on Balsam Home while they were there, particularly doing outdoor work, so that it would be in working condition and ready to show. He further testified that when petitioners used the amenities at BMP (i.e., the restaurant or the golf course) it was to further the partnership's business relationship with either BMP or prospective builders. Petitioner husband testified that they often visited Balsam Home on holidays because more people would be at BMP during that time.

Respondent contends that petitioners were often at Balsam Home not to network but to enjoy the area, focusing on the fact that petitioners visited the area during holidays and that petitioner husband spent a substantial amount of time at Balsam Home. Respondent also contends that because petitioners hired landscapers for the property, petitioner husband's testimony regarding his outdoor work is false.

We find petitioner husband's testimony credible. We believe that although petitioners employed a landscaping crew to assist with maintenance, they performed most of the maintenance themselves. Additionally, petitioners' work in furtherance of D&J Properties' business was not limited to the upkeep of Balsam Home or spending time at BMP. Petitioners engaged with potential clients, consistently advertised in the *Western North Carolina Green Building Directory*, and attempted to have various articles published about Balsam Home and the green building industry. Petitioner husband's time dedicated to learning about eco-friendly building likewise shows that petitioners expended substantial time and effort in acquiring knowledge to develop the partnership's green consulting business. We conclude that this factor weighs in favor of the partnership's having a profit objective.

[*13] D. *Expectation That Assets Used in the Activity May Appreciate in Value*

An expectation that assets used in the activity may appreciate in value may be an indication of a profit objective. *Engdahl v. Commissioner*, 72 T.C. 659, 668 (1979); Treas. Reg. § 1.183-2(b)(4). Respondent concedes this factor, stating that because the asset (Balsam Home) is real estate, the expectation is that the home would appreciate in value.

E. *Success of the Taxpayer in Carrying On Similar or Dissimilar Activities*

The fact that the taxpayer has engaged in similar or dissimilar activities in the past and converted them from unprofitable to profitable enterprises may indicate that he is engaged in the present activity for profit, even though the activity is presently unprofitable. Treas. Reg. § 1.183-2(b)(5).

Petitioners contend that the success they had in establishing three profitable businesses in Michigan, selling those businesses, and then establishing multiple successful La-Z-Boy stores in Georgia along with constructing stand-alone buildings, supports their claim that the partnership entered the green real estate industry with a profit objective. Respondent contends that (1) petitioners themselves are not successful entrepreneurs, as they have not reported a profit from their business dealings in Georgia or for D&J Properties since 2009, and (2) petitioners were not seeking success in the green construction industry but, rather, wanted to use the losses to offset any gains they received from the commercial properties in Georgia.

We disagree with respondent. We do not find the lack of profit in the real estate business unreasonable or altogether surprising. As we further explain in our discussion of the sixth factor below, the partnership's business was in the real estate industry, which, starting in 2008, became a largely unprofitable industry because of the "Great Recession."

Regarding respondent's second point, we are persuaded that petitioners themselves have experience in successfully entering new markets, as evidenced by their selling their businesses in Michigan to start again in Georgia. Petitioners appear to have tried to replicate that success with D&J Properties when they sold their La-Z-Boy assets in 2004 and invested those funds in the green real estate market through

[*14] the partnership. Additionally, petitioner husband had success with an eco-friendly business when he sat on the board of Waste Alternative and the company was sold for a profit. We conclude that this factor weighs in favor of the partnership's having a profit objective.

F. *The Taxpayer's History of Income or Loss with Respect to the Activity*

A series of losses during the initial or startup stage of an activity may not necessarily be an indication that the activity lacks a profit objective. However, where losses continue to be sustained beyond the period which customarily is necessary to bring such an operation to profitable status, such continued losses, if not explainable, may be indicative that the activity is not engaged in with a profit objective. If losses are sustained because of unforeseen or fortuitous circumstances which are beyond the control of the taxpayer, such as depressed market conditions, such losses would not be an indication that the activity lacks a profit objective. Treas. Reg. § 1.183-2(b)(6).

The parties agree that the partnership has not realized a profit from its green residential construction/consulting business. Petitioners contend that this lack of profit is due to the unfortunate timing of the partnership's entering the green real estate market at the forefront of the "Great Recession." Respondent contends that the economic downturn, alone, is insufficient to support the notion that petitioners were in a business for profit.

Petitioner husband's interest and expertise in green and efficient business ventures began during the 1990s. Petitioners decided to transition into an eco-friendly commercial and residential construction/consulting business as early as 2004. The Great Recession began at the end of 2007. Balsam Home, the center of the partnership's marketing strategy, was not completed until 2009. Nothing in the record suggests whether the failure to generate a profit from 2004 until the Great Recession was due to the lack of profit objective or, in the alternative, to typical losses from the initial or startup stage of the partnership's transition to the green real estate market. Neither does the record illuminate whether the partnership was likely to become profitable after construction of Balsam Home were it not for the Great Recession. The record does not establish that the economic downturn alone explains the continued sustained losses, but neither can the effect of the economic downturn be ignored. We conclude that this factor is neutral.

[*15] G. *The Amount of Occasional Profits, if Any, Which Were Earned*

The amount and frequency of occasional profits earned from the activity may also indicate a profit objective. An opportunity to earn a substantial ultimate profit in a highly speculative venture is ordinarily sufficient to indicate that the activity is engaged in for profit even though losses or only occasional small profits are actually generated. Treas. Reg. § 1.183-2(b)(7).

Petitioners contend that while the partnership did not make a profit from its green real estate venture, a substantial ultimate profit from its various activities related to Balsam Home was expected. Petitioners point to discussions with clients suggesting that two of their projects had substantial earning potential. Respondent, however, contends petitioners have not provided any credible evidence for these anticipated profits. Respondent further contends that the communications and connections petitioners made on behalf of the partnership were only after Balsam Home was completed, thereby undermining their claim that a substantial profit opportunity existed when the partnership entered the green real estate market.

While petitioners suggest that the green real estate market is highly speculative, the record does not support that conclusion. We have previously found that the residential real estate market is not highly speculative, *Pouemi v. Commissioner*, T.C. Memo. 2015-161, at *10, *aff'd per curiam*, 633 F. App'x 186 (4th Cir. 2016), and petitioners have not explained why they considered the green residential real estate market to be highly speculative. On the basis of the foregoing, we conclude that this factor favors respondent.

H. *The Financial Status of the Taxpayer*

Substantial income from sources other than the activity, particularly if the losses from the activity generate substantial tax benefits, may indicate that the activity is not engaged in for profit. Treas. Reg. § 1.183-2(b)(8).

Petitioners contend that neither the partnership nor its members had substantial income from other sources, indicating that the partnership sought profit specific to the Balsam Home green real estate venture. Petitioners draw attention to the fact that (1) by the end of 2012 only one of the partnership's three buildings in Georgia had a tenant, (2) in 2013 petitioners had to borrow money from petitioner

[*16] husband's father to avoid foreclosure on one of the properties, (3) in 2013 and 2014 the partnership had to sell two of the buildings, and (4) the remaining building had only periodic tenants once a year.

Respondent contends that petitioners themselves have amassed a large amount of wealth, which supports a conclusion that the partnership did not have a profit objective. Respondent points out that the successful La-Z-Boy stores brought in over \$20 million annually and that in 2014 petitioner husband and petitioner wife reported income of over \$40,000 per month and owned over \$3 million in assets.

Upon the initial construction of Balsam Home, petitioners were indeed benefiting from significant rental income from the partnership-owned Georgia properties and the deductions associated with Balsam Home allowed them to offset that income. However, that rental income was not steady during the years in issue. For instance, between 2011 and 2012 petitioners' net rental income decreased by nearly \$400,000. Additionally, petitioner wife credibly testified during trial that to make the monthly mortgage payments for Balsam Home, petitioner husband and petitioner wife had to use funds from their savings.

We agree that petitioner husband and petitioner wife's stated monthly income of \$40,000 supports respondent's contention that they had significant income to offset. However, we are unpersuaded by the reference to income derived from the sale of their La-Z-Boy stores in 2004, which occurred years before the construction of Balsam Home. Lastly, the over \$3 million in assets comprised their respective interests in Balsam Home (which was appraised at around \$3 million) and their personal residence. Overall, the facts of this case show a varying income, particularly over the years in issue. We conclude that this factor is neutral.

I. *Elements of Personal Pleasure or Recreation*

The presence of personal motives in the carrying on of an activity may indicate that the activity is not engaged in for profit, especially where there are recreational or other personal elements involved. Treas. Reg. § 1.183-2(b)(9).

Petitioners contend that the partnership did not build Balsam Home for their personal enjoyment and that all their trips to BMP were work related. During trial, petitioners testified that they did not go to Balsam Home for pleasure but to keep the house in operating condition so that it was always ready to show at a moment's notice. Petitioners

[*17] maintained that the only amenities they used at BMP were the restaurant and the golf course on three occasions for networking purposes. Additionally, petitioner husband testified he placed wine in the cellar to prepare Balsam Home to be photographed. The broker in charge at BMP testified that BMP has the most people present during holidays and that BMP governance does not allow business signage to be used in front of homes.

Respondent contends that petitioners built Balsam Home for personal pleasure and highlights the various amenities at Balsam Home and BMP. Respondent points to the facts that petitioners (1) listed all of their vehicles on the membership form, (2) included “the Walters” in the voicemail for one of the landlines and for the signage in front of the home (rather than D&J Properties), (3) stored wine bottles in the wine cellar, and (4) purchased an extensive cable package. Respondent points out that petitioner husband used the golf course at BMP.

We appreciate the fact that it can be difficult to separate from business use the pleasure an owner may receive from visiting a home in a mountain resort, particularly when attempting to prove a negative (that petitioners did not build or visit Balsam Home for their personal pleasure or recreation). Overall, the record neither supports nor refutes the presence of pleasure or recreation as a primary motivating factor in building and operating Balsam Home. We conclude that this factor is neutral.

III. *Conclusion*

The factors of this case support a conclusion that the partnership was engaged in a for-profit activity. We recognize that the partnership’s efforts were not perfectly executed, but its actions overall fall in favor of a conclusion that it was seeking a profit.

Because we find for petitioners on the for-profit issue, there are no deficiencies and hence no penalties under section 6662(a). We have considered the parties’ other arguments and have concluded that the arguments are either without merit or unnecessary to address.

Decisions will be entered for petitioners.