Of Blimps and Appraisals and Judicial Grace

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examination of the filed return and the taxpayer has “reasonably and in good faith” failed to make the election. Rev. Rul. 92-85. Once made, the election is irrevocable. I.R.C. § 2032A(d)(1).

In order to avoid problems with the filing dates, the estate may make a protective election by following the procedures above. However, the election will require valuing the property at its fair market value. When it is determined that the estate qualifies for special-use valuation, the executor must file an additional notice of election within 60 days of the determination. This does not extend the time for payment of any tax. Treas. Reg. § 2032A-8(b).

While the timing issue can be seen as flexible (it allows various extensions), the question of “substantial compliance” with the regulations is one on which courts remain divided. Where the executor failed to attach a notice of election and recapture agreement to the estate tax return, the court disallowed the special-use valuation. Foss v. U.S., 865 F.2d 178 (8th Cir. 1989). Similarly, the court disallowed the special-use valuation where an executor attached the notice of election but failed to provide documentation to substantiate the special-use value as required by the regulations. Estate of Pauline Strickland v. C.I.R., 92 T.C. 16 (1989).

The cases and regulations cited above show that, due to the detailed nature of Section 2032A and implementing regulations, courts are reluctant to allow executors any leeway in providing the necessary documentation (except for previously mentioned automatic filing extensions). Therefore, in order to qualify for a valid election, the executor must attach a recapture agreement and the notice of election, paying particular attention to the factors outlined by Treasury Regulation Section 20.2032A-8(a)(3) for inclusion in the notice of election.

In summary, interpreting Section 2032A special-use valuation elections require that the executor ask two questions. First, is this a qualified property fulfilling all of the criteria outlined in the Internal Revenue Code Section 2032A? Second, have I substantially complied with the recordkeeping requirements in the attached notice of election and recapture agreement? If the answer to each of these questions is in the affirmative, the qualified property will be valued at its special-use value rather than its “highest and best use.”

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From The Bench

Of Blimps and Appraisals and Judicial Grace

On December 12, 1986, DeWayne and Karen Bond, residents of Albuquerque, New Mexico, donated two “thermal airships” (blimps) to the Maxie L. Anderson Foundation. In that same month, one Sid Cutter, who had spent his entire adult life in the aviation industry and amply satisfied the requirements of the Treasury regulations as to his “qualified appraiser” credentials, determined the fair market value of that contribution to be $60,000, based on salvage value.

Prior to the due date for the filing of the Bonds’ income tax return for 1986, Cutter completed portions of the Appraisal Summary — part of IRS Form 8283 — by describing the blimps, stating their appraised fair market value, summarizing their overall physical condition, and by attesting that he neither had any financial interest in the transaction nor any relationship that would cause a reasonable person to question his independence. Cutter failed to recite his appraisal qualifications, however, and, most notably, no separate written appraisal of the blimps, other than that reflected on Form 8283, was ever prepared.

In the fullness of time, as you might have guessed, the IRS commenced the audit rumpus. The examining agent’s deficiency notice asserted (among other claims of dereliction abandoned before trial) that the deduction could not be allowed because the taxpayers had failed to obtain and attach to their tax return a qualified appraisal, as required by Treasury regulation § 1.170A-13, promulgated pursuant to Congress’ direction in the Deficit Reduction Act of 1984.

Let us pause here to observe that the foregoing rather truncated version of the salient facts might modestly be characterized as severely deficient tax planning, whatever the ultimate result. That the Bonds’ unusual donation became the subject of a Tax Court autopsy is in itself a substantial financial (and perhaps emotional) setback, and the attorney who had the undeniable task of trying to salvage the salvage-based deduction without a written appraisal must have felt doubly cursed when she learned that Cutter had evidently mislaid his written computa-

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tions, schedules and notes on the Bonds’ donation. (Efforts to find them proved unavailing.)

Nonetheless, into the breach. The Commissioner contended that the taxpayers’ footfaults in regard to the information required by Form 8283 were fatal. The Bonds responded that they had “substantially complied” with the requirements of the law, and were therefore entitled to the tax benefits claimed. The parties moved for summary judgment by stipulating to all material facts, including the value of the blimps. Thus the case turned on whether the requirements of the Treasury regulations as to reporting requirements are “mandatory” or “directory.” If the former, procedural inattentiveness proves deadly. If the latter, then the Bonds’ substantial compliance would carry the day.

The Tax Court found that the taxpayers “met all the elements required to establish the substance or essence of a charitable contribution, but merely failed to attain and attach to their return a separate written appraisal containing the information specified in (the) regulations....” Substantial compliance was sufficient, and the “denial of a charitable deduction under these circumstances would constitute a sanction which is not warranted or justified.”

Lest our vicarious delight in the Bonds’ victory cause us to make more of this little story than it truly deserves, note that the blimps were donated in 1986, and the Tax Court decision was rendered in 1993. Justice is rarely delivered on the fast track. And the best tax case is no case at all. DeWayne Bond, 100 T.C._ No. 3 (1993).

— William T. Hutton

Questions & Answers

The questions below are based on actual problems faced by land trusts. Most originate from The Back Forty Research Service. Distinguishing facts have been changed to preserve the anonymity of the organizations and individuals involved.

The Back Forty welcomes your questions. Please send your questions to Questions & Answers, The Back Forty, Hastings College of the Law, 200 McAllister Street, San Francisco, California 94102.

Q Our land trust does business in areas that are pretty remote, and while the problem about to be described is purely hypothetical, we think about it annually as the end of the calendar year approaches. Suppose we plan to have a landowner donate a conservation easement comfortably before year-end, but, for one reason or another, end up doing a last-minute deal over the landowner’s kitchen table. We have brought along a notary, so that the deed is signed, sealed and delivered, but there is no hope of getting to the county records office before closing time on December 31. Does the failure to record cause the deduction to be pushed into the following year?

A No, the crucial deadline has been met — delivery of the deed. The land trust’s protection against a subsequent transferee will not be secured, however, until recording occurs. It would behoove you, under these circumstances, to be first in line at the county office when next it opens for business.

Q We are dealing with a partnership that acquired about 80 acres of beachfront property some four years ago, with the intent to secure development approvals and market the property. They have been frustrated at every turn, but despite their inability to gain the entitlements they seek, the property has roughly tripled in value, owing to its uniqueness and the tremendous development pressure in the area. The partners now appear willing to consider a bargain sale at a price equal to their original cost, provided that the appreciation in value may be considered a charitable contribution. How should they go about establishing their entitlement to a charitable deduction?