Levine, Alan (OCFO)

From: Matthew Hicks [mhicks@capdale.com]
Sent: Tuesday, October 09, 2012 5:56 PM
To: Hawkins Karen L; Feldman Janice R; dcharnas@mcguirewoods.com; Levine, Alan (OCFO); Tgreaves@Reedsmith.com; stjcarluzzo@ustaxcourt.gov; sscohen@farrmiller.com; mcd@mdurney.com; aasbury@asburylawfirm.com; Conroy William F; mary.monahan@sutherland.com; Charles Ruchelman; kblair@kblairlaw.com; Cooper Matthew S; jabrams@crowell.com; Christine.K.Lane@us.pwc.com; ckundra@kundrataxlaw.com
Subject: Stats on Tax Court Amicus Motions
Attachments: List of Motions with Amicus Brief.pdf

All:

I spoke to someone at the Tax Court and was able to get the following stats on amicus motions for the last 25 years or so.

Motions with Amicus Brief in Description	
Total Cases with Amicus Brief	91
Total Motions with Amicus Brief	132
Total Motions Granted	48
Total Motions Denied	14
Total Motions Ordered	70

I am told that the total motions count is higher than the total cases count because there could be multiple motions within a case. A list of the motions is attached.

Three things to notice. First, not every motion captured on the attached list is a motion to file an amicus brief. In some cases, a brief has already been filed, and the motion relates to that. For purposes of the following analysis, however, I assumed that all entries on the list were motions to file an amicus brief.

Second, amicus practice in the last ten years has been anemic: less than 2 motions a year. Here's a distribution by year of the motions contained on the attachment.

Number of Motions w/"Amicus Brief" in the Caption Description

Year	#
1978	1
1984	1
1985	3
1987	13
1988	10
1989	4
1990	2

1991	10
1992	9
1993	4
1994	6
1995	14
1996	11
1997	7
1998	4
2000	9
2001	1
2002	2
2005	4
2008	5
2009	1
2010	2
2011	3
2012	6

Third, only 14 out of 132 amicus motions in the last 25 years or so have been denied. This means that nearly 9 out of 10 amicus motions have been granted (or only 1 in 10 was denied). Four of those denials came in the last ten years, though, so it has been slightly harder to get an amicus motion granted recently (4 of 5 have been granted; 1 of 5 have been denied).

Regards,
Matt

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<- -> To ensure compliance with requirements imposed by the IRS, we inform you that, unless specifically indicated otherwise, any tax advice contained in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code, or (ii) promoting, marketing, or recommending to another party any tax-related matter addressed herein. This message is for the use of the intended recipient only. It is from a law firm and may contain information that is privileged and confidential. If you are not the intended recipient any disclosure, copying, future distribution, or use of this communication is prohibited. If you have received this communication in error, please advise us by return e-mail, or if you have received this communication by fax advise us by telephone and delete/destroy the document. <-->

U.S. TAX COURT
RECEIVED
FEB 23 2009

UNITED STATES TAX COURT

LARRY E. TUCKER,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 3165-06L
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent.	)	

RESPONDENT'S NOTICE OF OBJECTION TO THE CENTER FOR THE FAIR ADMINSTRATION OF TAXES' MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

RESPONDENT OBJECTS to the Center for the Fair Administration of Taxes' Motion for Leave to File Brief as Amicus Curiae.

IN SUPPORT THEREOF, respondent respectfully states:

1. On February 19, 2009, attorney A. Lavar Taylor, on behalf of the Center for the Fair Administration of Taxes, filed a motion for leave to file brief as amicus curiae in this case.

2. Whether the amicus should be heard in this case is a matter within the court's discretion. Erwin v. Commissioner, T.C. Memo 1986-474. In exercising its discretion, the court should consider whether the amicus curiae makes any "credible argument" that the parties before the court cannot "fully and completely address all aspects" of the case. Id.

3. The court may also consider whether the amicus "may be more knowledgeable than a party as to facts underlying particular arguments" or whether the amicus is in a "superior position" to inform the court of the effect of its decision on interests other than those of the parties. Id.; see also F.R.A.P. 29(b). In addition, the court has taken into account whether "proffered information is timely, useful, or otherwise helpful" when the amicus brief was lodged with the court before it ruled on the attendant motion for leave. Trump Village Section 3, Inc. v. Commissioner, T.C. Memo 1995-281 (denying motion for leave to file brief as amicus curiae).

4. Petitioner and respondent are fully capable of adequately addressing the issues and CFAT makes no credible argument otherwise. Both parties have already filed two well developed memoranda of law on the issue and will be filing additional memoranda on or before February 27, 2009 as ordered by the court. Both parties will also have the opportunity to respond to the opposition's memorandum on or before March 20, 2009. Further, while its Director's tax controversy experience is extensive, the newly organized CFAT is unlikely to be more knowledgeable about the arguments in this case or be in a superior position to address the issues. CFAT has not provided credentials that suggest it has any expertise or insight

regarding the Appointments Clause or that it can provide any related useful or helpful information not otherwise provided by the parties.

5. Granting leave for the filing of an amicus brief by an entity that has not demonstrated peculiar expertise on the issues presented, and the probable need to permit the parties to file responses, will delay rather than advance "the just, speedy, and inexpensive determination" of this case. Tax Court Rule 1(d).

WHEREFORE, it is prayed that the motion by the Center for the Fair Administration of Taxes for leave to file brief as amicus curiae be denied.

CLARISSA C. POTTER
Acting Chief Counsel
Internal Revenue Service

Date: FEB 23 2009

By: Matthew Lucey

MATTHEW D. LUCEY
Attorney
(Procedure & Administration)
Tax Court Bar No. LM0533
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LYDIA A. BRANCHE
Associate Area Counsel (Manhattan, Group 1)
(Small Business/Self-Employed)

Docket No. 3165-06L

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing NOTICE OF OBJECTION was served on the proposed amicus curiae and on petitioner by mailing the same on February 23, 2009 in postage paid wrappers addressed as follows:

A. Lavar Taylor
Adjunct Professor of Law
Chapman University School of Law
Director, Center for the Fair Administration of Taxes
6 Hutton Centre, Suite 880
Santa Ana, CA 92707

Carlton M. Smith
Cardozo School of Law - Director
Tax Clinic
55 Fifth Ave.
New York, New York, 10003

Date: FEB 23 2009

MATTHEW D. LUCEY
Attorney
(Procedure & Administration)
Tax Court Bar No. LM0533

AMENDED EFFECTIVE 5/5/2011

RULE 151. BRIEFS

2**(a) General**: Briefs shall be filed after trial or submission of a case, except as otherwise directed by the presiding Judge or Special Trial Judge. In addition to or in lieu of briefs, the presiding Judge or Special Trial Judge may permit or direct the parties to make oral argument or file memoranda or statements of authorities. The Court may return without filing any brief that does not conform to the requirements of this Rule.

3**(b) Time for Filing Briefs:** Briefs may be filed simultaneously or seriatim, as the presiding Judge or Special Trial Judge directs. The following times for filing briefs shall prevail in the absence of any different direction by the presiding Judge or Special Trial Judge:

(1) *Simultaneous Briefs:* Opening briefs within 75 days after the conclusion of the trial, and answering briefs 45 days thereafter.

(2) *Seriatim Briefs:* Opening brief within 75 days after the conclusion of the trial, answering brief within 45 days thereafter, and reply brief within 30 days after the due date of the answering brief.

A party who fails to file an opening brief is not permitted to file an answering or reply brief except on leave granted by the Court. A motion for extension of time for filing any brief shall be made prior to the due date and shall recite that the moving party has advised such party's adversary and 25 whether or not such adversary objects to the motion. As to the effect of extensions of time, see Rule 25(c).

(c) Service: Each brief shall be served upon the opposite party when it is filed, except that, in the event of simultaneous briefs, such brief shall be served by the Clerk after the corresponding brief of the other party has been filed, unless the Court directs otherwise. Delinquent briefs will not be accepted unless accompanied by a motion setting forth reasons deemed sufficient by the Court to account for the delay. In the case of simultaneous briefs, the Court may return without filing a delinquent brief from a party after such party's adversary's brief has been served upon such party.

(d) Number of Copies: A signed original and two copies of each brief, plus an additional copy for each person to be served, shall be filed.

(e) Form and Content: All briefs shall conform to the requirements of Rule 23 and shall contain the following in the order indicated:

(1) On the first page, a table of contents with page references, followed by a list of all citations arranged alphabetically as to cited cases and stating the pages in the brief at which cited. Citations shall be in italics when printed and underscored when typewritten.

(2) A statement of the nature of the controversy, the tax involved, and the issues to be decided.

(3) Proposed findings of fact (in the opening brief or briefs), based on the evidence, in the form of numbered statements, each of which shall be complete and shall consist of a concise statement of

essential fact and not a recital of testimony nor a discussion or argument relating to the evidence or the law. In each such numbered statement, there shall be inserted references to the pages of the transcript or the exhibits or other sources relied upon to support the statement. In an answering or reply brief, the party shall set forth any objections, together with the reasons therefor, to any proposed findings of any other party, showing the numbers of the statements to which the objections are directed; in addition, the party may set forth alternative proposed findings of fact.

(4) A concise statement of the points on which the party relies.

(5) The argument, which sets forth and discusses the points of law involved and any disputed questions of fact.

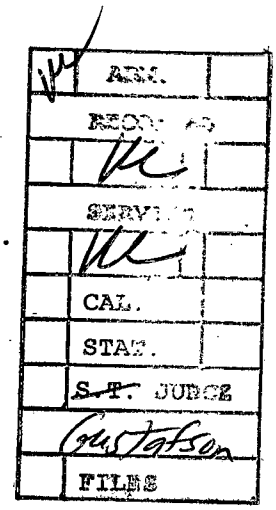
(6) The signature of counsel or the party submitting the brief. As to signature, see Rule 23(a)(3).

assigned
T. Gustafson

UNITED STATES TAX COURT

WASHINGTON, DC 20217

LARRY E. TUCKER,)
)
Petitioner,)
)
v.) Docket No. 3165-06L.
)
COMMISSIONER OF INTERNAL REVENUE,)
)
Respondent,)



O R D E R

This case is an appeal, pursuant to section 6330(d)(1), of a Supplemental Notice of Determination issued by the Office of Appeals of the Internal Revenue Service (IRS). By order dated January 16, 2009, the Court ordered the parties to file supplemental memoranda on February 27, 2009, and reply memoranda on March 20, 2009. On Friday, February 20, 2009, the Court received a "Motion for Leave to File [Memorandum[1]] as *Amicus Curiae*" from A. Lavar Taylor, Esquire, as the director of the "Center for the Fair Administration of Taxes" (CFAT). CFAT asks to file a memorandum addressing the motion to remand that is now pending in this case. Respondent served an objection on February 23, 2009. CFAT served its memorandum on February 26, and it arrived at Court on February 27, 2009.

By the time the motion (received on February 20) was actually delivered to the chambers of the undersigned Judge, he was in Philadelphia presiding at a calendar of cases. He did not see the motion until his return on Thursday, February 26--the same day that CFAT was serving its memorandum. Thus, CFAT's delay in moving for leave put the Judge in the position either of denying the motion and rendering futile the work of CFAT's students and attorneys, or of avoiding that circumstance but thereby in effect rewarding the delay. CFAT explains that it was created for the purpose of participating as an amicus, and the Court therefore urges its personnel to adopt a practice of giving courts more than a few days to rule on motions for leave and to

[1]Under Tax Court Rule 151, a "brief" is a post-trial filing; and equivalent pretrial filings are customarily referred to as memoranda.

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refrain from substantial work on a memorandum until it has been informed that its memorandum may be filed.

Notwithstanding CFAT's delay, the Court will grant the motion in an exercise of its discretion. Of course, neither CFAT nor Mr. Taylor will become a party in the case. The Clerk will be directed to serve this order on the *amicus*, but no similar instructions will be given as to future orders in this case.

Respondent now apparently has two opponents whose positions he must address in the 20-page supplemental memorandum that he may file on or before March 20, 2009, pursuant to the Court's order of January 16, 2009. If, as respondent argued in his objection, the *amicus* cannot add much to the argument in the case, then the additional memorandum by the *amicus* may not affect respondent's own argument. However, if, after review of the *amicus*'s memorandum, respondent perceives that the current 20-page limitation is unreasonable, counsel may initiate a telephone conference call to request leave to file a longer memorandum. The undersigned judge expects to be in his chambers the week of March 9-13, 2009.

In view of the foregoing, it is

ORDERED that the motion for leave submitted by A. Lavar Taylor, Esquire, for CFAT on February 20, 2009, shall be filed and is granted. The *amicus curiae* memorandum submitted on February 27, 2009, shall be filed as of this date. It is further

ORDERED that, in addition to regular service of this order on the parties, the Clerk shall also serve this order on the following:

A. Lavar Taylor, Esquire
Center for the Fair Administration of Taxes
6 Hutton Centre, Suite 880
Santa Ana, CA 92707

(Signed) David Gustafson
Judge

Dated: March 5, 2009
Washington, D.C.

Assigned = Gustafson DB

UNITED STATES TAX COURT

WASHINGTON, DC 20217

LARRY E. TUCKER,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 3165-06L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent,	)	

O R D E R

This case is an appeal, pursuant to section 6330(d)(1), of a Supplemental Notice of Determination issued by the Office of Appeals of the Internal Revenue Service (IRS). By order of December 1, 2009, the Court ordered the parties to file supplemental memoranda on "Finality Issues" and "Other Issues", with respondent to file by January 15, 2010, and petitioner to file by February 15, 2010. On January 5, 2010, the Court received a "Motion for Leave to File Supplemental Memorandum as *Amicus Curiae*" from A. Lavar Taylor, Esquire, as the director of the "Center for the Fair Administration of Taxes" (CFAT). CFAT asks to file a memorandum addressing the "Finality Issues". The motion advises that neither petitioner nor respondent objects to the motion for leave to file.

The Court will grant the motion, but neither CFAT nor Mr. Taylor will become a party in the case. The Clerk will be directed to serve this order on the *amicus*, but no similar instructions will be given as to future orders in this case.

In view of the foregoing, it is

ORDERED that the January 5, 2010, motion for leave to file is granted. By no later than February 15, 2010, the *amicus curiae* may submit a memorandum of no more than 20 pages addressing the "Finality Issues". It is further

ORDERED that, in addition to regular service of this order on the parties, the Clerk shall also serve this order on the following:

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A. Lavar Taylor, Esquire
Center for the Fair Administration of Taxes
6 Hutton Centre, Suite 880
Santa Ana, CA 92707

It is further

ORDERED that, in addition to regular service of his supplemental memorandum on the petitioner, respondent shall serve his supplemental memorandum on the *amicus curiae* at that same address given above.

(Signed) David Gustafson
Judge

Dated: January 7, 2010
Washington, D.C.

UNITED STATES TAX COURT
WASHINGTON, DC 20217

KVC

KEITH & ENA DUNFORD,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 30200-09.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

Trial of this case was conducted on February 28, 2012, in Chicago, Illinois. This case is currently submitted to the Court for decision. This order will direct the parties to file supplemental briefs.

At issue in this case are several deductions claimed by petitioners Keith and Ena Dunford as travel expenses under section 162. Section 162(a)(2) allows taxpayers to deduct travel expenses paid or incurred "while away from home in the pursuit of a trade or business". In order to claim a travel expense deduction, a taxpayer must show that his expenses are ordinary and necessary, that he was away from home when he incurred the expense, and that the expense was incurred in pursuit of a trade or business. Commissioner v. Flowers, 326 U.S. 465, 470 (1946).

In respondent's Opening Brief, he seems to assert (at 38) that the Dunfords may not deduct travel expenses under section 162(a)(2) because their recreational vehicle (RV) was their "tax home" for all or part of the tax years at issue--2005 and 2006--so that they were not "away from home" when they lived in the RV. As best we can tell, the Dunfords have not addressed this issue in their briefing. As a result, the Court would benefit from additional briefing on this issue. It is therefore

ORDERED that on or before October 18, 2012, each party shall file a supplemental brief stating its position regarding petitioner's "tax home" for tax years 2005 and 2006, and shall cite any record evidence and legal authority in support thereof. It is further

ORDERED that on or before November 8, 2012, each party may (but is not required to) file a supplemental reply brief responding to the opposing party's supplemental brief.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
September 27, 2012

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RM

UNITED STATES TAX COURT
WASHINGTON, DC 20217

KARL L. & DEBORAH MATTHIES,	)	
	)	
	)	
	)	
	)	
Petitioners,	)	
	)	
v.	)	Docket No. 22196-07.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

The amended regulations under section 402(a), as made final on August 29, 2005, provide that if a qualified plan transfers a life insurance contract (among various other types of property) to a plan participant or beneficiary before August 29, 2005, the excess of the fair market value of the contract over the value of the consideration received by the trust is "includible in the gross income of the participant or beneficiary under section 61. However, such a transfer of a life insurance contract * * * occurring before that date is not treated as a distribution for purposes of applying the requirements subchapter D of chapter 1 of subtitle A of the Internal Revenue Code". Sec. 1.402(a)-1(a)(1)(iii), Income Tax Regs. The parties agree that the Bellagio Partners, Inc., profit-sharing plan transferred ownership of the insurance policy to petitioner Karl L. Matthies on December 29, 2000. Notwithstanding the aforementioned regulatory provision, however, respondent argues that the purported bargain element in the sale of the life insurance contract to Mr. Matthies should be treated as a distribution taxable under section 402(a) of the Internal Revenue Code. In a footnote and without elaboration respondent's brief states: "The new rules [in the amended section 402(a) regulations] do not apply in this case." Petitioners have not addressed the applicability of the amended regulations.

For cause, it is

ORDERED that on or before January 8, 2010, the parties shall file supplemental briefs stating their views as to the

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applicability of the above-cited provision of section 1.402(a)-1(a)(1)(iii), Income Tax Regulations.

(Signed) Michael B. Thornton
Judge

Dated: Washington, D.C.
December 9, 2009

UNITED STATES TAX COURT
WASHINGTON, DC 20217

WHITEHOUSE HOTEL LIMITED PARTNERSHIP, QHR HOLDINGS-NEW ORLEANS, LTD., TAX MATTERS PARTNER,	)	
Petitioner,	)	
v.	)	Docket No. 12104-03.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

O R D E R

Our decision in this case was vacated and the cause remanded for further proceedings in accordance with the opinion of the U.S. Court of Appeals for the Fifth Circuit. Whitehouse Hotel Ltd. Pship. v. Commissioner, 615 F.3d 321 (5th Cir. 2010), revg. and remanding 131 T.C. 112 (2008). The Court has identified several issues for reconsideration and wishes the parties to submit supplemental briefs addressing those issues and suggesting, and addressing, other issues each believes the Court should consider.

Valuation Methods

On appeal, petitioner claimed that "the tax court erred by ignoring the income and replacement-cost valuation methods in favor of relying solely on the comparable-sales method." Id. at 333. The Court of Appeals stated: "On remand, the tax court should consider all three methods, including which may be applicable, in determining the easement's value." Id. at 335. The parties shall advise the Court as to how it erred, or did not err, in relying solely on the comparable-sales approach.

Highest and Best Use

On appeal, petitioner claimed that "the tax court miscomprehended the highest and best use of the Maison Blanche and Kress buildings". Id. at 335. Petitioner's expert, Mr. Roddewig had testified that the highest and best us of the Maison Blanche and Kress Buildings (the buildings) was as a Ritz-Carlton (luxury) hotel. Id. The Court of Appeals stated: "[O]n this issue, the tax court's decision can be construed in two ways: even if the highest and best use was as a Ritz-

Carlton, that had no effect on the property's value; or, a non-luxury hotel was the highest and best use." Id. at 335-336. The Court of Appeals continued: "[B]ecause we must remand for re-valuation, this highest-and-best-use issue necessarily comes into play and must be reconsidered." Id. at 336.

Specifically, the Court of Appeals stated, "to be reconsidered on remand is the tax court's rejecting the idea that luxury-hotel developers operate in a national marketplace--this is the theory upon which Roddewig relied to justify his price-point adjustments." Id. The court stated: "The tax court disagreed that luxury-hotel developers would pay more than local market price: "Without evidence of th[is] phenomenon more convincing that Mr. Roddewig's testimony, we will not take the risk of inaccuracy that those adjustments carry." Id. The court added that our "reasoning for rejecting this national-marketplace basis would seem to extend to * * * [our] decision not to consider the nonlocal comparables utilized by Roddewig", which decision, also, it directed we reconsider. Id.

Also, the Court of Appeals posed the question of whether there was a reasonable possibility that the buildings would be developed into a non-luxury hotel. Id.

The Court of Appeals stated that, on remand, we would have the opportunity to make additional, subsidiary findings or, if necessary, to modify our conclusions. Id. at 337.

In light of the Court of Appeals' various charges, we require from the parties the following.

The parties shall advise the Court how, in each's argument addressing the value of the servitude (as that term is used in the Tax Court's report), the concept of highest and best use is relevant. The parties shall be specific; for instance, petitioner no doubt will advise the Court that the concept is relevant to Mr. Roddewig's price-point adjustments under the comparable sales approach. The parties shall identify any error in considering highest and best use that the Court made in disposing of each's arguments.

The parties shall provide the Court with specific references to the record or to authority on which the Court may rely supporting or contradicting Mr. Roddewig's opinion that luxury-hotel developers are willing to pay more for a piece of property than the local market demands. The parties shall provide similar references or authority addressing whether, if it exists, such practice is the norm and, in particular, whether a luxury-hotel developer of the buildings would pay more than the local, New Orleans market would demand.

The parties shall provide the Court with specific references to the record or to authority on which the Court may rely supporting or contradicting our decision not to rely on non-local sales in evaluating Mr. Roddewig's price-per-room and price-per-square-foot analysis.

The parties shall advise the Court, with specific references to the record, whether (or not) the record would support a finding that there was a reasonable possibility that the property would be developed into a non-luxury hotel.

The parties shall provide the Court with specific references to the record contradicting or supporting Mr. Roddewig's testimony that, in the absence of the claimed restriction on building atop the Kress Building, the highest and best use of that building (as part of the Ritz-Carlton development) would have included the addition of 60 rooms on top thereof. The issues to be addressed (with references to the record) include the following. Would it have been legally possible under either the City's or the historic district's rules to build atop the Kress Building? Was the addition physically possible and practicable? Would Ritz-Carlton have approved the addition? What would have happened to the air conditioning and other equipment located on the roof of the Kress Building? Would the net present value of the costs and revenues from the addition of those 60 rooms above the Kress Building been positive?

Kress Building

On appeal, petitioner claimed that the Tax Court "erred in failing to consider the effect of the historic-preservation facade easement on the contiguous Kress Building." Id. The Court of Appeals stated that we

> erred in declining to consider the Maison Blanche and Kress buildings' highest and best use in the light of both the reasonable and probable condominium regime and the reasonable and probable combination of those buildings into a single functional unit, both of which foreclosed the realistic possibility, for valuation purposes, that the Kress and Maison Blanche buildings could come under separate ownership. This combination affected the buildings' fair market value.

The Court of Appeals vacated our valuation and remanded for reconsideration of the servitude's value. Id. The Court of Appeals stated: "Louisiana law is applied for determining the rights transferred by the easement at issue." Id. at 329.

The parties shall address any change in the highest and best use of the buildings resulting from the condominium regime and the legal combination of the buildings into a single functional unit (together, the combination). The Court wishes to determine the expected economic consequence of the combination to an owner of the two buildings. The parties shall direct the Court to those portions of the record, if any, that indicate an expected change in the highest and best use of the buildings on account of the combination. If the record does indicate a change in the expected highest and best use of the buildings on account of the combination, the parties shall direct the Court to those portions of the record, if any, that show any expected change (positive or negative) in the fair market value of the buildings on account of the combination. The parties shall compare any claimed change in the value of the buildings on account of the expected combination to any claimed loss in value attributable to the Kress Building on account of the servitude. The Court wishes to determine whether it was to the economic advantage of an owner of the buildings to enter into the combination, thus, as contemplated by the Court of Appeals, foreclosing selling the Kress Building to an owner who, not also owning the Maison Blanche Building, would not be burdened by the servitude. In other words, did the combination increase the value of the buildings more than the claimed loss in value of the Kress Building on account of the servitude?

The parties shall set forth verbatim any language in the conveyance[1] creating the servitude that either claims prohibits the owner of the Maison Blanche Building from building atop the Kress Building or otherwise obscuring a view of the Maison Blanche Building (the claimed prohibitions). A party advocating such language shall state whether they rely on evidence extrinsic to the conveyance to make clear the claimed prohibitions and, if so, shall identify any such evidence in the record. The parties shall address whether, if extrinsic evidence is helpful or necessary to clarify the conveyance, it is appropriate and permissible for the Court to rely on such evidence to do so.

Section 1.170A-14(b)(2), Income Tax Regs., provides in pertinent part: "A 'perpetual conservation restriction' is a restriction granted in perpetuity on the use which may be made of real property--including, an easement or other interest in real property that under state law has attributes similar to an

[1]The conveyance is the Act of Donation of Perpetual Real Rights * * *, which is an appendix to the Tax Court report underlying this case.

easement (e.g., a restrictive covenant or equitable servitude)." With respect to any language in the conveyance that a party believes creates the claimed prohibitions, the party shall set forth the authority under Louisiana law for considering the claimed prohibitions an interest in real property (rather than simply a contractual obligation not constituting an interest in real property), identifying in which property (the Maison Blanche Building or the Kress Building) the interest is created. The party shall also address the authority under Louisiana law that would allow the prohibitions to be enforced in perpetuity, particularly with respect to a subsequent owner of the Maison Blanche Building not a party to the conveyance.

Petitioner described the claimed prohibitions "as granting PRC a 'servitude of view'", which it further described as "'a servitude of the view of [the] Facade, including that visible from and above the former Kress Building side of the Facade.'" Whitehouse Hotel Ltd. Pship. v. Commissioner, 131 T.C. at 132. The parties shall inform the Court of any authority recognizing a servitude of view (as petitioner describes it) as a perpetual conservation restriction.

Gross Undervaluation Penalty

On appeal, petitioner claimed that the Tax Court "erred in upholding the gross undervaluation penalty." Whitehouse Hotel Ltd. Pship. v. Commissioner, 615 F.3d at 340-341. We had upheld the penalty on the ground that petitioner failed to prove that the partnership made a good faith investigation of the value of the servitude, thereby failing to satisfy the conditions of I.R.C. sec. 6664(c)(2). Whitehouse Hotel Ltd. Pship. v. Commissioner, 131 T.C. at 175. In particular, petitioner claimed that we erred by discrediting Mr. Drawbridge's testimony. Whitehouse Hotel Ltd. Pship. v. Commissioner, 615 F.3d at 342. The Court of Appeals stated:

> Under our court's precedent, Drawbridge may have been competent and credible as Whitehouse's representative to testify to facts within the limited partnership's knowledge. Such facts include whether Whitehouse relied on professional advice in filing its 1997 Form 1065. Drawbridge testified that it did.

The parties shall provide the Court with specific references to the record of testimony (or other evidence), if any, demonstrating a good faith investigation of the value of the servitude. To the extent a party relies on Mr. Drawbridge's knowledge of the relevant facts, the party shall refer us not only to his testimony evidencing that knowledge but also to that portion of the record that establishes the basis of his

knowledge; e.g., to whom he spoke, or what records he consulted, to establish his knowledge.

Among the facts to be determined is whether the partnership relied on professional advice in filing its 1997 Form 1065. The Court of Appeals stated that Mr. Drawbridge testified that it did. Id. We wish the parties to address Mr. Drawbridge's basis for that testimony. We further wish the parties to direct us to anything in the record that establishes the content of that advice. In particular, is there evidence that the professional advisors, on behalf of the partnership, made a good faith investigation of the value of the servitude and conveyed the result of that investigation to the partnership.

With respect to the partnership's 1997 Form 1065, the Court of Appeals stated:

> That form, which was admitted into evidence, states that it was prepared by Whitehouse's financial auditors. It may be that this is direct evidence Whitehouse relied on professional advice in the preparation of the tax form, and such preparation required evaluation of the reasonableness of the stated value of the easement. * * *

The parties shall advise the Court whether there is evidence in the record or other authority establishing that it was the duty of the financial auditor preparing Whitehouse's 1997 Form 1065 to evaluate the reasonableness of the stated value of a charitable contribution, and, if so, what that duty entailed (in other words, how did the auditor, or how should the auditor, have evaluated the reasonableness of the stated value).

Miscellaneous

The Court of Appeals stated: "When questioned at oral argument here, counsel for Whitehouse explained the condominium regime was recorded after the facade donation to comply with 'other provisions in the applicable treasury regulations' that required 'the facade donation actually be recorded in order to prime the construction mortgage'." Id. at 339. Petitioner shall identify the applicable treasury regulations that required that the conveyance actually be recorded in order to prime the construction mortgage.

In addition

The parties shall inform the Court of anything else relevant to our compliance with the mandate of the Court of Appeals.

The Court may order additional briefing and may order oral argument of the issues on remand.

It is therefore,

ORDERED that each party shall, on or before February 4, 2011, file with the Court, and serve on the other party, a supplemental brief addressing the issues set forth above.

(Signed) James S. Halpern
Judge

Dated: Washington, D.C.
December 16, 2010