SUSPECT EXPERT APPRAISAL RISKS TOTAL TAXPAYER LOSS

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Numerous tax consequences flow from the value of property. Principal examples include charitable contribution deductions, estate taxes, and gift taxes. Absent a contemporaneous sale of the subject property to unrelated persons, an appraisal will usually be needed to compute the relevant tax. If the IRS disputes the value and the matter ends up in court, an expert will be needed to sustain the taxpayer's valuation. The government will often offer up its own competing appraisal, although it may instead be content with only attacking the taxpayer's expert and report.

A recent Tax Court case demonstrates the hazards of relying on a suspect expert or appraisal in tax litigation. In *Boltar LLC et al v. Comm.*, the issue was the valuation of a conservation easement for charitable deduction purposes. During trial, the Tax Court noted a host of problems with the valuation opinion of the taxpayer's expert. The government moved to exclude the expert's report and testimony as neither reliable nor relevant, under the authority of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). The expert's report and opinion was so problematic that the Court granted the motion.

A typical result in a case such as this will be a finding of value at or close to the value presented by the government, since there will be little or no admissible evidence to the contrary. Opportunities to shift the burden of proof on value to the government may also be lost. Thus, a taxpayer relying on a weak appraisal report or expert risks a total loss on the valuation issue.

Results such as this demonstrate that relying on an aggressive value during litigation enhances the risk of total loss. It also demonstrates the importance of properly vetting the expert and his appraisal to determine its credibility and correctness. Lastly, it suggests that using more than one expert or report may be an appropriate litigation strategy in the proper circumstances (although having differing values under those reports may create other litigation issues, and will also include litigation costs).

The taxpayer argued that the *Daubert* analysis should only apply in a jury trial (*Boltar* involved a non-jury trial). The Tax Court did not buy into that, holding that a *Daubert*-type exclusion can apply in a bench trial.

Boltar, LLC et al v. Comm., 136 TC No. 14 (4/5/2011)

Authored by Charles Rubin, Esq. Mr. Rubin is a Florida Bar Board Certified tax attorney with the firm of Gutter Chaves Josepher Rubin Forman Fleisher P.A. (www.floridatax.com) His practice focuses on protecting & enhancing individual, family & business wealth through: Planning to Minimize Taxes (U.S. & International) • Estate Planning, Charitable, Marital & Succession Planning • Business Structuring & Transactions • Trusts & Estates (Administration-Disputes-Drafting) • Creditor Protection. He can be reached at 561-998-7847 or at crubin@floridatax.com. This article was previously published at http://www.rubinontax.blogspot.com.