IRS Win in Golf Course Easement Case Overturned

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The Eleventh Circuit has vacated a Tax Court decision that a taxpayer wasn't entitled to a $10.4 million deduction for donating a conservation easement over a private Georgia golf course.

The Tax Court's conclusion that the taxpayer, Champions Retreat Golf Founders LLC, didn't contribute the easement "for the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem" was wrong as a matter of law, the Eleventh Circuit held in a May 13 opinion.

"This is a big win for conservation," Champions' attorney, Vivian D. Hoard of Fox Rothschild LLP, told *Tax Notes*.

Anson H. Asbury of the Asbury Law Firm, who wasn't involved in the case, called the decision "a pleasant surprise." Coming one day after the Tax Court handed the IRS a major victory in another easement case, *Oakbrook Land Holdings LLC v. Commissioner* (T.C. Memo. 2020-54), the appeals court's decision in *Champions Retreat* "is a shot in the arm for taxpayers," he said.

"The Eleventh Circuit is essentially saying, 'If the Tax Court is presented with a robust factual background but chooses to disregard significant facts, then it's our role as courts of appeal to question why the Tax Court did that,'" Asbury said.

Searching for a Purpose

The Eleventh Circuit was reviewing a September 2018 decision (T.C. Memo. 2018-146) that upheld the IRS's denial of a $10.4 million charitable contribution deduction because the easement didn't satisfy the conservation purpose requirement of section 170(h).

Champions built a private golf course on 366 acres of a 463-acre tract of undeveloped land near Augusta it acquired in 2002. By 2009 the golf course was struggling financially because of the recession. Aware of the Tax Court's decision in *Kiva Dunes Conservation LLC v. Commissioner* (T.C. Memo. 2009-145) allowing a charitable contribution deduction for a conservation easement over an Alabama golf course, Champions' accountant suggested that the company donate an easement to attract additional investment.

Kiokee Creek, a Georgia partnership comprising 15 partners, was formed in September 2010 as an investment vehicle for the donation. The partnership contributed $2.7 million to Champions in November 2010 in exchange for a 15 percent ownership interest and special allocation of the charitable deduction, and in December 2010 Champions donated an easement to the North American Land Trust. The easement covers 348 acres, which consists of undeveloped land and the golf course.

On its 2010 partnership return, Champions claimed a $10.4 million charitable contribution deduction, 99.8 percent of which was allocated to Kiokee Creek. The IRS disallowed the deduction, asserting that the easement didn't satisfy the section 170 requirements or, alternatively, that the easement didn't have a value greater than zero.

Agreeing with the IRS, the Tax Court held that Champions wasn't entitled to the deduction because it failed to show that the easement was made "exclusively for conservation purposes" under section 170(h)(4). The court rejected Champions' argument that the easement protects a relatively natural habitat of fish, wildlife, or plants, or a similar ecosystem; preserves open space for the scenic enjoyment of the general public that will yield a significant public benefit; and preserves open space under a federal, state, or local governmental conservation policy that will yield a significant public benefit.

Finding Fault With the Tax Court

Two of the three judges who heard the appeal — Eleventh Circuit Judge Charles R. Wilson and U.S. District Court Judge Robert L. Hinkle (sitting by designation) — held that the Tax Court erred in its conclusion that the easement doesn't protect a relatively natural habitat of fish, wildlife, or plants, or a similar ecosystem.

The majority noted that reg. section 1.170A-14(d)(3)(ii) states that qualifying habitats and ecosystems include, but aren't limited to, "habitats for rare, endangered, or threatened species of animal, fish, or plants" and "natural areas which are included in, or which contribute to, the ecological viability of a local, state, or national park, nature preserve, wildlife refuge, wilderness area, or other similar conservation area."

The majority pointed out that those standards may be satisfied even if there is a golf course on part of the conserved property because the code requires only a "relatively natural habitat . . . or similar ecosystem," not that the land itself be relatively natural. It also noted that reg. section 1.170A-14(d)(3)(i) states that a deduction is available even if the land "has been altered to some extent by human activity," as long as "the fish, wildlife, or plants continue to exist there in a relatively natural state."

"The record establishes without genuine dispute that this property is home to abundant species of birds, some rare, to the regionally declining southern fox squirrel, and to a rare plant species, the denseflower knotweed," the majority wrote.

While the parties focused much of their arguments on where the various bird species are placed on conservation priority lists, the majority said the key issue isn't "precisely which bird ranks precisely where on one or more of these lists, but the more general question whether the presence of these many species, including some of substantial conservation concern, shows that the property is a significant habitat for 'rare, endangered, or threatened species.'"

According to the majority, the presence of so many species of birds on the conserved property "plainly" shows that it is a significant habitat. The majority found that the Tax Court made a critical factual error by not counting birds that were seen by only one of Champions' two experts, even if the bird was also spotted by the IRS's expert.

"The court did this despite explicitly crediting the testimony of both Champions experts," the majority wrote. "The court offered no explanation for this approach, and we can conceive of none."

The majority also faulted the Tax Court for ignoring birds that were heard but not seen, saying, "The court did not explain how a bird could be heard if not present on or at least near the property."

"The Tax Court's implicit finding that the only birds on the property were those seen by both Champions experts is clearly erroneous," the majority wrote. "More importantly, the Tax Court's conclusion that Champions did not contribute this easement 'for the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem' — a conclusion based in part on the clearly erroneous finding of fact — is wrong as a matter of law."

The majority added that "were it not for the presence of a golf course on part of this property, the assertion that contributing an easement over property with this array of species does not qualify as a conservation purpose would be a nonstarter."

The majority further concluded that while one could debate whether a private golf course satisfies the "scenic enjoyment" standard, the natural areas covered by Champions' easement "surely do."

"And the golf course, whose most prominent feature visible from a canoe or kayak on the river is the trees, detracts only a little, if at all," the majority added.

After concluding that Champions is entitled to a charitable contribution deduction, the majority remanded the case to the Tax Court to determine the proper amount of the deduction.

Concurrence and Dissent

Judge Britt Grant said she agreed with the majority that Champions is entitled to a deduction, but only on the ground that the easement preserves an open space for the public's scenic enjoyment.

According to Grant, Champions' easement might not qualify as a "relatively natural habitat" under section 170(h)(4)(A)(ii). "The man-made golf course takes up more than 80 percent of the easement," she noted. "In making the course, Champions used non-native grasses, one of which requires the use of large fans to keep it cool in the hot Georgia sun. And to maintain the course, Champions pumps anywhere from 70,000 to 600,000 gallons of water a day out of the Little River."

That Champions coats its golf course with chemicals is also problematic, Grant said.

"Although the majority finds comfort in Champions' pledge to follow the golf industry's best environmental practices, we have little information about what those practices are, or how they stack up to other standards," Grant wrote.

The presence of so many species of birds and other animals "cannot hide that a lot of the easement is highly developed and at least somewhat hazardous to certain species," Grant said.

"As thorny as this 'natural habitat' question is, we could spare ourselves the trouble of solving it," Grant said. "After all, we could limit our decision to holding that the easement qualifies for a

deduction as an open, scenic space. That is the course I would take."

The taxpayer in *Champions Retreat Golf Founders LLC v. Commissioner*, No. 18-14817 (11th Cir. 2020), was represented by Hoard and Brian Gardner of Fox Rothschild and Donald P. Boyle Jr. of Taylor English Duma LLP.