Graev: Adequate Disclosure or Tax Shelter?

To the Editor:

In our recent article, ''Tax Return Disclosures: What Is 'Adequate' and Why It Matters,'' *Tax Notes*, Jan. 2, 2017, p. 163, we discussed the varying standards of disclosure, particularly concerning Form 8275. In response, we received a thoughtful comment about the recent case of *Graev v. Commissioner*, 147 T.C. No. 16 (Nov. 30, 2016). On the surface, this is just another adequate disclosure case, but it actually suggests a more fundamental point about how disclosure can dovetail with statutory requirements for a deduction or other item.

Graev was a charitable contribution case involving a façade easement. The taxpayers in *Graev* evidently received a side letter from the National Architecture Trust confirming that it would refund the contribution of the façade easement if the charitable deduction was disallowed. The adequate disclosure issue was not that the taxpayers did not disclose the existence of the side letter, but that its terms and conditions created a contingency (a conditional gift) that could obviate a section 170 deduction entirely. See section 170(a)(1) (permitting a deduction for a charitable contribution only when ''payment . . . is made within the taxable year''). These terms were apparently not included in the deed of easement, nor were they relayed to the Graevs' tax preparer.

As a result, the Tax Court concluded that the taxpayers did not disclose enough information to alert the IRS to the potential controversy. Notably, the Tax Court also found missing the other prong for adequate disclosure: reasonable basis. The tax treatment of the contingency issue is more thoroughly addressed in the prior installment of the case, *Graev v. Commissioner*, 140 T.C. 377, 401 (2013):

> This case, unlike *O'Brien*, clearly presents the issue of whether the promised return of a charitable contribution upon the disallowance of the charitable contribution deduction can constitute a subsequent event the possibility of which, if not negligible, renders the deduction not allowable. . . . Given that non-negligible risk, Mr. Graev's contributions fell afoul of the section 170 regulations implementing the statutory requirements that a gift be effectively 'made', that it consist of an 'entire interest', and that it be a 'qualified conservation contribution.'

Given the unusual facts of *Graev* — and the arguably tax-shelter odor of the easement field in general — it is hard to say whether the case will influence when positions are deemed adequately disclosed. One reading of *Graev* may be that the taxpayers' disclosure was not adequate because there was *no disclosure* — none of the side letter's terms and conditions were referenced in the tax return or the deed of easement.

Sincerely,

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