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IN THE
INDIANA TAX COURT

PEDCOR INVESTMENTS-1990-XIII, L.P.,)
PEDCOR INVESTMENTS-1994-XXI, L.P.,)
PEDCOR INVESTMENTS, LLC,)
)
Petitioners,)
)
v.) Cause No. 49T10-0206-TA-64
)
FRANKLIN TOWNSHIP ASSESSOR,)
JOHNSON COUNTY,)
)
Respondent.)

ON APPEAL FROM THREE FINAL DETERMINATIONS OF
THE INDIANA BOARD OF TAX REVIEW

NOT FOR PUBLICATION
May 9, 2007

FISHER, J.

Pedcor Investments-1990-XIII, L.P., Pedcor Investments-1994-XXI, L.P., and Pedcor Investments, LLC (collectively, Pedcor) appeal three final determinations of the Indiana Board of Tax Review (Indiana Board) valuing its real property for the March 1, 1995, 1996, and 1997 assessment dates (the years at issue). The sole issue for the Court to decide is whether the Indiana Board erred in denying Pedcor's low-income housing project an obsolescence depreciation adjustment.

FACTS AND PROCEDURAL HISTORY

Pedcor owns Lakeview Apartments in Franklin, Indiana. There are two sections to this complex: Phase I consists of 160 apartments; Phase II consists of 64 apartments. A portion of the units in Phase I, and all the units in Phase II, are low-income housing and qualify for tax credits pursuant to Section 42 of the Internal Revenue Code (the LIHTC Program).[1]

Under the LIHTC program, Pedcor received approximately $2.7 million in tax credits to award to investors, over a ten-year period, who provided financing for Phases I and II. In exchange for these tax credits, Pedcor agreed to rent 60% of the units in Phase I, and 100% of the units in Phase II, to individuals whose income was 60% or less of the area's median gross income (adjusted for family size) and subject to Indiana

[1] Federal law provides numerous tax incentives to encourage the production of affordable housing for low-income individuals, including the Low Income Housing Tax Credit (LIHTC) Program at issue here. *See generally* 26 U.S.C. § 42 (2005). The LIHTC Program authorizes individual states to issue federal income tax credits to developers as an incentive for the acquisition, rehabilitation, or new construction of affordable rental housing. In Indiana, this program is administered by the Indiana Housing Finance Authority (IHFA).

To qualify for LIHTCs, a project must reserve a portion of its rental units for use by low-income households only, with rents on those units limited to a percentage of qualifying income. Furthermore, the use of the property is restricted by deed to low-income housing for at least fifteen years. In the event that a project does not comply with such restrictions, the credits are subject to recapture.

After the state allocates the tax credits to a project's developers, the credits are usually sold to private investors in a limited partnership. The money paid for the credits is used as equity financing to make up the difference between a project's development costs and the non-tax credit financing expected from rental income. In turn, the private investors are able to use the tax credits to offset their federal income tax liabilities, claiming the credits for each year of a ten-year period as long as the imposed rental restrictions are met. If a property eligible for § 42 credits is sold, the subsequent owner of the property is entitled to the future tax credits associated with the property.

Housing Finance Authority (IHFA) rental guidelines. Pedcor agreed to abide by these rental restrictions for a period of 30 years.

For the March 1, 1995 assessment date, the Johnson County Board of Review (BOR) assigned the improvements in Phase I an assessed value of $1,209,800. Believing this value to be too high, Pedcor appealed the assessment to the State Board of Tax Commissioners (State Board), claiming that Phase I was entitled to an economic obsolescence adjustment.

For the March 1, 1996 and March 1, 1997 assessment dates, the BOR assigned the improvements in Phase II an assessed value of $348,200 and $457,900 respectively. Pedcor appealed each of these assessments to the State Board as well, claiming that, like Phase I, Phase II was also entitled to an economic obsolescence adjustment.

On April 11, 2001, the State Board conducted one administrative hearing on all three of Pedcor's appeals. On April 23, 2002, the Indiana Board issued three final determinations denying Pedcor's requests for economic obsolescence.[2]

Pedcor filed an original tax appeal on June 4, 2002. The Court heard the parties' oral arguments on November 21, 2003. Additional facts will be supplied as necessary.

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[2] On December 31, 2001, the legislature abolished the State Board of Tax Commissioners (State Board). 2001 Ind. Acts 198 § 119(b)(2). Effective January 1, 2002, the legislature created the Indiana Board of Tax Review (Indiana Board) as "successor" to the State Board. IND. CODE ANN. §§ 6-1.5-1-3; 6-1.5-4-1 (West 2007); 2001 Ind. Acts 198 § 95. Consequently, when a final determination was issued on Pedcor's appeal in April of 2002, it was issued by the Indiana Board.

STANDARD OF REVIEW

This Court gives great deference to final determinations of the Indiana Board when it acts within the scope of its authority. *Wittenberg Lutheran Vill. Endowment Corp. v. Lake County Prop. Tax Assessment Bd. of Appeals,* 782 N.E.2d 483, 486 (Ind. Tax Ct. 2003), *review denied*. Consequently, the Court will reverse a final determination of the Indiana Board only if it is:

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> (2) contrary to constitutional right, power, privilege, or immunity;
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> (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory jurisdiction, authority, or limitations;
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> (4) without observance of procedure required by law; or
>
> (5) unsupported by substantial or reliable evidence.

See IND. CODE ANN. § 33-26-6-6(e)(1) - (5) (West 2007). The party seeking to overturn the Indiana Board's final determination bears the burden of proving its invalidity. *Osolo Twp. Assessor v. Elkhart Maple Lane Assocs. L.P.*, 789 N.E.2d 109, 111 (Ind. Tax Ct. 2003).

DISCUSSION

Pedcor argues on appeal that the Indiana Board improperly denied the improvements in Phase I and Phase II economic obsolescence adjustments during the years at issue. Specifically, Pedcor contends that it presented a prima face case at the administrative hearing that Phase I was entitled to a 3.49% economic obsolescence adjustment for the 1995 assessment, and that Phase II was entitled to a 0.72% economic obsolescence adjustment for the 1996 assessment and a 3.89% adjustment

for the 1997 assessment year.[3] Pedcor maintains that because the Assessor did not dispute or challenge its evidence, the Indiana Board's final determinations denying the adjustments are not supported by substantial evidence and therefore invalid.

Real property in Indiana is assessed on the basis of its "true tax value." IND. CODE ANN. § 6-1.1-31-6(c) (West 2007). During the years at issue, a commercial improvement's true tax value was equal to its reproduction cost (as calculated under the State Board's assessment regulations) less any physical and/or obsolescence depreciation present therein. *See* 50 IND. ADMIN. CODE 2.2-10-7(f) (1996) (repealed 2002). Obsolescence depreciation was defined as either the functional or economic loss of value to a property. 50 I.A.C. 2.2-10-7(e). For instance, functional obsolescence

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[3] In the alternative, Pedcor asks that Phase I receive an annual obsolescence adjustment each year, from 1995 to 2024, in the amount of 8.62%, and that Phase II receive an annual obsolescence adjustment each year, from 1996 to 2025, in the amount of 27.65%. (*See* Cert. Admin. R. at 410, 1140, 1558-59.) Pedcor derived these figures by averaging the amount of obsolescence it alleges will be present in the subject properties during the 30-year rental restriction term. (*See* Cert. Admin. R. at 410, 1140, 1558-59.)

In three companion cases issued concurrently with this one, this Court has rejected Pedcor's attempts to measure obsolescence for a particular year by averaging the obsolescence alleged to be present in the property over an extended period of time in the future. *See Pedcor Investments-1996-XXV, L.P. v. Jackson Twp. Assessor,* Cause No. 49T10-0205-TA-56, slip op. at 8 (Ind. Tax Ct. filed May 9, 2007) (rejecting an obsolescence calculation based on an average of obsolescence allegedly present in the subject property during the ten years the property was eligible to receive the tax credits); *Pedcor Investments-1994-XVII, L.P. v. Portage Twp. Assessor,* Cause No. 49T10-0206-TA-65, slip op. at 8 (Ind. Tax Ct. filed May 9, 2007) (rejecting an obsolescence calculation based on an average of obsolescence allegedly present in the subject property during the 30 years the property was subject to the rental restrictions); *Pedcor Investments-1995-XXIII, L.P. v. Portage Twp. Assessor,* Cause No. 49T10-0206-TA-66, slip op. at 9 n.7 (Ind. Tax Ct. filed May 9, 2007) (also rejecting an obsolescence calculation based on an average of obsolescence allegedly present in the subject property during the 30 years the property was subject to the rental restrictions). Accordingly, Pedcor's attempt to do the same in this case is rejected. As a result, this opinion will only evaluate whether Pedcor presented evidence sufficient to establish its claims of 3.49%, 0.72% and 3.89% for the years at issue.

(or a loss of value resulting from factors internal to the property) could be caused by the fact that an improvement had limited use due to an irregular or inefficient floor plan, inadequate or unsuited utility space, or an excessive/deficient load capacity. *See* 50 I.A.C. 2.2-10-7(e). In contrast, economic obsolescence (or a loss of value resulting from factors external to the property) could be caused by the fact that an improvement was located in an inappropriate area, subject to inoperative or inadequate zoning ordinances or deed restrictions, or constructed for a need which has subsequently been terminated due to actual or probable changes in economic or social conditions. 50 I.A.C. 2.2-10-7(e).

This Court has previously held that in order to make a prima facie case for obsolescence at the administrative level, a taxpayer must present probative evidence that 1) identifies the causes of the obsolescence from which its property suffers and 2) quantifies the amount of obsolescence to which it believes it is entitled. *See Clark v. State Bd. of Tax Comm'rs,* 694 N.E.2d 1230, 1238 (Ind. Tax Ct. 1998). More specifically, however, the Court has explained that when identifying causes of obsolescence, the taxpayer's probative evidence must show how the alleged causes result in an actual loss of value to its property (i.e., how the property's ability to generate income is affected). *See Miller Structures, Inc. v. State Bd. of Tax Comm'rs*, 748 N.E.2d 943, 953-54 (Ind. Tax Ct. 2001). The Court has also explained that, in quantifying obsolescence, the taxpayer must use generally recognized appraisal methods for calculating the market value of an improvement, converting the obsolescence as determined thereunder into a percentage to be applied against the

property's true tax value.[4] *See Clark,* 694 N.E2d 1230, 1242 n.18 (footnote added). *See also Lacy Diversified Indus., Ltd. v. Dep't of Local Gov't Fin.,* 799 N.E.2d 1215, 1223 (Ind. Tax Ct. 2003); *Inland Steel Co. v. State Bd. of Tax Comm'rs,* 739 N.E.2d 201, 211 (Ind. Tax Ct. 2000), *review denied*; *Canal Square Ltd. P'ship v. State Bd. of Tax Comm'rs,* 694 N.E.2d 801, 806-07 (Ind. Tax Ct. 1998).

During the administrative hearing in this case, one of Pedcor's vice-presidents, Ms Maureen Hougland, testified that the rental restrictions imposed on the units in Phase I and Phase II were causing obsolescence because they negatively impacted their ability to generate income.[5,6] To support this claim, Hougland testified that while Pedcor was able to charge rents of $473 and $549 per month for the non rent-restricted

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[4] One method in particular has been frequently utilized by Indiana taxpayers – and approved by this Court – to quantify obsolescence: determine the property's market value under the cost approach; determine the property's market value under the income capitalization approach; convert the difference (which typically represents obsolescence) to a percentage to be applied against the property's true tax value. *See Hometowne Assocs., L.P. v. Maley,* 839 N.E.2d 269, 275 (Ind. Tax Ct. 2005) (citations omitted).

[5] This Court has held that rental restrictions like the ones at issue in this case may very well cause economic obsolescence. *See Pedcor Investments-1990-XIII, L.P. v. State Bd. of Tax Comm'rs,* 715 N.E.2d 432, 437 (Ind. Tax Ct. 1999). Nevertheless, the Court has also held that any economic obsolescence occurring as a result of such rental restrictions must be measured in light of the value of the federal tax credits awarded to the project's investors. *See id. See also Hometowne Assocs.,* 839 N.E.2d at 279 n.17 (Court advocates an approach whereby the burdens of participating in the LIHTC program are balanced against the benefits).

[6] The Court notes that, at one point in its brief to this Court, Pedcor claimed that vacancies and higher operating costs were also contributing causes of obsolescence in Phases I and II. (*See* Pet'r Br. at 1.) Nevertheless, the remaining portion of Pedcor's brief provides no further explanation or analysis of that claim. (*See* Pet'r Br.) Furthermore, the administrative record reveals that Pedcor provided no evidence during the administrative hearing demonstrating that its vacancies and operating costs were higher than those in non-restricted apartment complexes. As a result, the Court deems the claim waived.

one-bedroom and two-bedroom units Phase I, it charged approximately $413 and $475 per month for the identical rent-restricted units in Phase I. (*See* Cert. Admin. R. at 408, 1552-53.) In turn, Pedcor explains that Hougland then presented a quantification "done in accordance with standard principles of appraisal" which converted Phase I's loss of income to an obsolescence adjustment of 3.49% for the 1995 assessment year.[7] (Pet'r Br. at 11-12.) Pedcor maintains that because the Assessor did not dispute or challenge this evidence at the administrative hearing, the Indiana Board improperly denied Pedcor the relief to which it claims it is entitled. (*See* Pet'r Br. at 7-8, 12, 16.) The Court, however, must disagree.

The Court has repeatedly reminded taxpayers that, as part of making a prima facie case, "[i]t is the taxpayer's duty to walk the [State Board, the] Indiana Board and this Court through every element of its analysis." *See Fidelity Fed. Sav. & Loan v. Jennings County Assessor,* 836 N.E.2d 1075, 1082 (Ind. Tax Ct. 2005) (quoting *Clark v. Dep't of Local Gov't Fin.,* 779 N.E.2d 1277, 1282 n.4 (Ind. Tax Ct. 2002). *See also*

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[7] During the administrative hearing, Hougland never discussed the rental rates for Phase II. (*See* Cert. Admin. R. at 1540-68.) A separate worksheet in the administrative record indicates that Pedcor charged monthly rents of $440 (one bedroom), $485 (two bedroom), and $620 (three bedroom) for the rent-restricted units in Phase II. (*See* Cert. Admin. R. at 1138.) While the worksheet compares these rates to "market rents" of $520, $560, and $780, there is no accompanying explanation or discussion as to what Pedcor used for its comparison. (*See* Cert. Admin. R. at 1138.)

Likewise, while Hougland generally explained her obsolescence quantification for Phase I (*see* Cert. Admin. R. at 1552-57), her testimony regarding her obsolescence quantification for Phase II primarily consisted of the statement "basically our [quantification] on this is exactly the same [however] the numbers are different because they are different properties[.]" (*See* Cert. Admin. R. at 1558-59.) Not surprisingly, Pedcor's brief filed with this Court provides no additional information. (*See* Pet'r Br.)

As a result, the remainder of this opinion will simply address Pedcor's claim as it relates to Phase I. Similarly, this Court's analysis with respect to Pedcor's claim on Phase II will be "exactly the same" even though "the numbers are different because they are different properties."

Davidson Indus. v. State Bd. of Tax Comm'rs, 744 N.E.2d 1067, 1071 (Ind. Tax Ct. 2001). Consequently, this Court has rejected, as non-probative, evidence such as mathematical calculations and photographs that have not been accompanied by an explanation. *See Indian Indus., Inc. v. Dep't of Local Gov't Fin.,* 791 N.E.2d 286, 289-90 (Ind. Tax Ct. 2003); *Heart City Chrysler v. State Bd. of Tax Comm'rs,* 714 N.E.2d 329, 333 (Ind. Tax Ct. 1999). Likewise, the Court has frequently reminded taxpayers that, in making their presentations, conclusory statements do not constitute probative evidence. *See, e.g., Whitley Prods., Inc. v. State Bd. of Tax Comm'rs,* 704 N.E.2d 1113, 1119 (Ind. Tax Ct. 1998), *review denied.* To its detriment, Pedcor has failed to heed these reminders.

During the administrative hearing, Hougland presented a three-page worksheet quantifying the obsolescence present in Phase I for the 1995 tax year at 3.49%. (Cert. Admin. R. at 408-10.) Hougland arrived at the 3.49% after she:

> 1) multiplied the difference in rental income between the non rent-restricted apartments in Phase I and the rent-restricted apartments in Phase I by the total number of rent-restricted units in Phase I to arrive at an annual rent loss of $56,670;
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> 2) reduced the annual rent loss of $56,670 to $51,414 to account for a "standard industry" vacancy of 5% and a management fee of 4.5%;
>
> 3) converted the annual rent loss of $51,414 to "a present value" of $589,729 by applying a "10.5[% capitalization rate] for the entire [30 year] period;"

> 4) reduced the $589,729 by $392,897 (Hougland's valuation of the unused tax credits)[8] to arrive at an obsolescence figure for the 199 assessment year of $196,832; and then
>
> 5) divided the $196,832 by $5,635,019 (Hougland's "estimated appraised value" of the property) to arrive at an obsolescence adjustment of 3.49% for the 1995 assessment year.

(*See* Cert. Admin. R. at 408-10 (footnote added).) In presenting this quantification, however, Hougland failed to adequately explain every element of her analysis.

For instance, Hougland stated that her quantification was made pursuant to "generally accepted appraisal methods."[9] (*See* Cert. Admin. R. at 1555 (footnote added).) Nevertheless, Hougland was required *to lay some foundation* at the administrative hearing that her methodology was indeed pursuant to generally accepted appraisal methods, especially considering that the methodology in her quantification differed from that typically used in Indiana to quantify obsolescence (*see* fn. 4 *supra*).[10] Without laying such foundation, Hougland's statement is nothing more than a conclusion, and conclusory statements do not constitute probative evidence. *See Whitley Prods.,* 704 N.E.2d at 1119*. See also Inland Steel,* 739 N.E.2d at 220 (stating

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[8] In calculating the value of the tax credits, Hougland indicated that while Pedcor initially received approximately $1 million in tax credits for Phase I over the course of a ten-year period, as of the March 1, 1995 assessment date, eight years of those credits remained for use. (*See* Cert. Admin. R. at 407-08.) Hougland's indicated that the credits were purchased for $0.55 on the dollar and therefore were only worth $392,897 as of March 1, 1995. (See Cert. Admin. R. 408.)

[9] More specifically, Hougland merely stated that "an appraiser would utilize this method" and that her methodology was "based on generally accepted appraising methods." (Cert. Admin. R. at 1555.)

[10] To that end, Hougland could have (as an example) referred the State Board to copies of appraisal articles, treatises, etc., that validated the use of her methodology.

that in applying a discount factor in a calculation, the taxpayer did not explain what the factor represented, how it was calculated or why it was the appropriate factor to use; as a result, taxpayer's "testimony does not prove that the use of the [discount factor] is a generally accepted appraisal technique[and e]ven though [the taxpayer] is a recognized appraisal expert, his testimony, without explanation, is conclusory and therefore lacks probative value as to quantification").

In another example, Hougland states that, in step three of her quantification, she converted the annual rent loss of $51,414 into "a present value at 10.5%" of $589,729. While Hougland admitted "we all need mathematical degrees to do this" (*see* Cert. Admin. R. at 1556), at no point during the administrative hearing, however, did she provide an explanation as to how this was done. Indeed, the only explanation she provided with respect to this mathematical calculation was

> So we have to compute a present value. We used a 10.5% cap rate, which in normal in the industry, and we also assumed a 3% rent growth, which has been the history of the property when you look at the rent history, which is include in here also. So, as of 1995 we can get our dollar amount. We have to go through on that and calculate that out to a 30 year period, which is the period the tax credits are in effect.

(Cert. Admin. R. at 1556-57.) (*See also* Pet'r Br. at 11 (providing even less explanation).) This does little to assist the Court in evaluating whether Pedcor's quantification sufficiently establishes its claim.[11]

In a similar fashion, Hougland explained that in step three of her quantification, she used a 10.5% capitalization rate to convert the property's annual rent loss to "a

[11] Indeed, without knowing *how* the number was derived, one cannot determine, at the very minimum, if Pedcor's "math" is correct.

present value"; in step five of her quantification, however, she used a 10% capitalization rate to ascertain the "estimated appraised value" of the property. (*See* Cert. Admin. R. at 408-09, 1555-56.) Hougland never provided any explanation as to how she derived those rates other than "10.5% [] is normal in the industry," nor did she offer any explanation as to why the rates differed. (Cert. Admin. R. at 1555-56.) The Indiana Board properly determined that without any type of explanation, Hougland's use of those capitalization rates was conclusory and therefore not probative of Pedcor's claim.[12] *See CDI, Inc. v. State Bd. of Tax Comm'rs,* 725 N.E.2d 1015, 1021 (Ind. Tax Ct. 2000) (stating that the Court will not rely on unsupported opinions) (footnote added).

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[12] Pedcor asserts that "[i]If the [Assessor] or the [State] Board [] found such testimony without basis, there was some obligation to challenge the testimony at the time of the hearing." (Pet'r Br. at 15.) Consequently, "[e]ven if the evidence we offer . . . is subject to attack, subject to objection, subject to exclusion . . . if it gets into evidence, then it is evidence, and it's evidence sufficient to make a prima facie case." (Oral Argument Tr. at 16-17.) The Court, however, disagrees.

Administrative hearings, unlike judicial proceedings, are conducted in an informal manner without recourse to Indiana's Rules of Evidence. IND. CODE ANN. § 4-21.5-3-25(b) (West 2007). Nevertheless, an administrative agency's findings "must be based upon the kind of evidence that is substantial and reliable." IND. CODE ANN. § 4-21.5-3-27(d) (West 2007). *See also* IND. CODE ANN. § 33-26-6-6(e)(5) (West 2007). To that end, an administrative law judge may use its "experience, technical competence, and specialized knowledge" in evaluating whether or not the admitted evidence is indeed substantial and reliable. A.I.C. § 4-21.5-3-27(d).

The duty of assessing the probative value of Pedcor's evidence rested with the Indiana Board, the trier-of-fact. This Court cannot say the Indiana Board erred when it deemed Hougland's testimony was insufficient to establish the propriety of her capitalization rates: it was nothing more than a conclusory statement.

CONCLUSION

This Court will find that an Indiana Board final determination is supported by substantial evidence if a reasonable person could view the record in its entirety and find enough relevant evidence to support the determination. *See Amax Inc. Through Amax Coal Co. v. State Bd. of Tax Comm'rs,* 552 N.E.2d 850, 852 (Ind. Tax Ct. 1990) (stating that "[s]ubstantial evidence is more than a scintilla[; i]t means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion") (citation omitted). Here, the Court cannot say, after reviewing the administrative record in its entirety, that the Indiana Board erred in denying Pedcor an obsolescence adjustment for the 1995, 1996, and 1997 tax years.[13] Accordingly, the Indiana Board's final determination is AFFIRMED.

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[13] Because Pedcor's evidence was not probative in the first instance (i.e., it did not sufficiently establish that it was entitled to an obsolescence adjustment for the years at issue), the burden to rebut or contradict that evidence never shifted. *See Osolo Twp. Assessor v. Elkhart Maple Lane Assocs. L.P.*, 789 N.E.2d 109, 111 (Ind. Tax Ct. 2003); *Lacy Diversified Indus., Ltd. v. Dep't of Local Gov't Fin.*, 799 N.E.2d 1215, 1218-19 (Ind. Tax Ct. 2003) (citation omitted); *Meridian Towers E. & W. v. Washington Twp. Assessor,* 805 N.E.2d 475, 479 (Ind. Tax Ct. 2003).