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American Federal Tax Reports

**FRGC INVESTMENT, LLC, ET AL. v. COMM., Cite as 93 AFTR 2d 2004-1434, Code Sec(s) 165; 7491; 162; 263, (CA9), 03/15/2004**

**FRGC INVESTMENT, LLC, ET AL., PETITIONERS-APPELLANTS v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE.**

**Case Information:**

[pg. 2004-1434]

<b>Code Sec(s):</b>	165; 7491, 162; 263
<b>Court Name:</b>	U.S. Court of Appeals, Ninth Circuit,
<b>Docket No.:</b>	No. 03- 70443,
<b>Date Decided:</b>	03/15/2004.
<b>Prior History:</b>	Tax Court, (2002)  TC Memo 2002-276,  RIA TC Memo ¶2002-276 (opinion by Cohen, J.), affirmed.
<b>Tax Year(s):</b>	Years 1997, 1998.
<b>Disposition:</b>	Decision against Taxpayer.
<b>Cites:</b>	, .

## HEADNOTE

### **1. Losses—abandonment loss—real property development—proof of abandonment.**

Tax Court properly determined that LLC wasn't entitled to abandonment loss for costs of allegedly abandoned real estate project: evidence showed that project [pg. 2004-1435] wasn't abandoned. Notably, plan was withdrawn before county board could vote on it so that denial wouldn't prevent resubmission within year; escrow wasn't cancelled until nearly 6 weeks later; project-related management and marketing fees continued to be paid during that lag time; and investors weren't given opportunity to vote on abandonment until following year. Also, whether IRS bore burden of proof under Code Sec. 7491 was irrelevant since preponderance of evidence was in its favor.

*Reference(s):* ¶ 1655.150(5) Code Sec. 165; Code Sec. 7491

### **2. Deductions—ordinary and necessary business expenses vs. capital costs—real property acquisition.** These issues weren't discussed on appeal.

*Reference(s):* ¶ 2635.02(50); ¶ 1625.019(5) Code Sec. 162; Code Sec. 263

## FRGCInvestment

## OPINION

Stephen E. Silver, Jason M. Silver, Walker Silver PLC, Scottsdale, AZ, for Petitioners-Appellants.

Charles S. Casazza, B. John Williams, Jr., Gary R. Allen, Frank P. Cihlar, Attorney, Richard Farber, Judith A. Hagley, Esq., DOJ-U.S. Department of Justice, Washington, DC, for Respondent-Appellee.

**United States Court of Appeals, Ninth Circuit,**

**Appeal from a Decision of the United States Tax Court.**

Before T.G. NELSON, GRABER, and W. FLETCHER, Circuit Judges.

## MEMORANDUM<sup>\*\*</sup>

**Judge:**

This case was not selected for publication in the Federal Reporter.

Please use FIND to look at the applicable circuit court rule before citing this opinion. (FIND CTA9 Rule 36-3.)

Tax Ct. No. 5443-01.

Petitioner **FRGC Investment**, LLC, appeals the tax court's denial of its petition for readjustment of its partnership filing for 1997. We affirm.

(1.) The tax court was not required to decide which party had the burden of proof under 26 U.S.C. § 7491. The court found that, whatever the burden of proof, the preponderance of the evidence favored the Commissioner. That being so, the burden of proof did not come into play; and for purposes of our decision we can assume, without deciding, that the Commissioner had the burden of proof.

(2.) Whether a taxpayer sustained an abandonment loss is a factual question. *A. J. Indus., Inc. v. United States*, 503 F.2d 660, 667 [34 AFTR 2d 74-5932] (9th Cir.1974). When an inquiry is essentially factual, our review is for clear error. *King v. Comm'r*, 857 F.2d 676, 678-79 [62 AFTR 2d 88-5661] (9th Cir.1988).

Even assuming that the Commissioner had the burden of proof, the tax court did not clearly err in finding that Petitioner did not abandon the real estate project in question. For example, James Mehen withdrew the plan before the county board could vote on it so that a denial would not prevent resubmission of the project within a year; Petitioner did not cancel escrow for nearly six weeks after the county board met, a period during which it continued to pay both Mehens for management and marketing services related to the project; and the investors were not given a chance to vote on whether to abandon the project until January 1998, when simultaneously they were presented with a third (and, this time, successful) purchase agreement for the real property.

AFFIRMED.

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\*\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

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