**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 24 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ROBERT GROVE STONE, as Successor Trustee of the J. Ralph and Lois Stone Trust Agreement Dated January 5, 1990; GARY RALPH STONE, as Successor Trustee of the J. Ralph and Lois Stone Trust Agreement Dated January 5, 1990,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 07-17068

D.C. No. CV-06-00259-TEH

**MEMORANDUM**[*]

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Argued and Submitted March 9, 2009
San Francisco, California

Before: **McKEOWN** and **IKUTA**, Circuit Judges, and **BLOCK**,[**] Senior District Judge.

[*] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

[**] The Honorable Frederic Block, Senior United States District Judge for the Eastern District of New York, sitting by designation.

Robert Grove Stone and Gary Ralph Stone, on behalf of the estate of Lois Stone (the "Estate"), appeal the district court's judgment awarding an estate-tax refund in the amount of $53,932.60. The district court found that the Estate was entitled to claim a 5% fractional-interest discount when valuing its undivided 50% interest in a nineteen-painting art collection. The Estate argues that a larger discount is appropriate. We have jurisdiction, *see* 28 U.S.C. § 1291; reviewing for clear error, *see Sammons v. Comm'r*, 838 F. 2d 330, 333 (9th Cir. 1988), we affirm.

"A taxpayer seeking a tax refund bears the burden of proving that the assessment was incorrect *and* proving the correct amount of the tax owed." *Ray v. United States*, 762 F.2d 1361, 1362 (9th Cir. 1985) (emphasis added). As a corollary, the Estate "b[ore] the burden of showing that a [fractional-interest] discount [was] appropriate *and* the amount of any such discount." *Estate of Busch v. Comm'r*, 79 T.C.M. (CCH) 1276, 2000 WL 4400, at *11 (T.C. 2000) (emphasis added). The Tax Court, which routinely deals with questions of valuation, has not hesitated to reject a fractional-interest discount altogether where that burden was not met. *See, e.g.*, *Estate of Pudim v. Comm'r*, 44 T.C.M. (CCH) 1425, 1982 WL 10901, at *1 (T.C. 1982) ("Although the value of an undivided interest in property may under some circumstances be less than the owner's proportionate interest in the entire property, . . . [o]n the record before us, we find that petitioner has not

met its burden of proof."); *see also Estate of Clapp v. Comm'r*, 47 T.C.M. (CCH) 504, 1983 WL 14708, at *1 (T.C. 1983); *Estate of Iacono v. Comm'r*, 41 T.C.M. (CCH) 407, 1980 WL 3847, at *1 (T.C. 1980).

At trial, the Estate sought a 44% fractional-interest discount, which was proposed by its appraiser, Carsten Hoffmann ("Hoffmann"). The district court was persuaded that *some* discount was appropriate, and thus rejected the government's initial contention that no discount should apply. However, it found that the Estate had not supported its request for a 44% discount (subsequently lowered to 36% after supplemental briefing) by a preponderance of the evidence, and chose a value – 5% – that had been conceded by the government.

Treas. Reg. § 20.2031-1(b) requires the government to value a fractional interest at the price on which a hypothetical willing buyer and willing seller would agree, and this may often reflect a discount based on fractional ownership. *See Propstra v. United States*, 680 F.2d 1248, 1251 (9th Cir. 1982). But the taxpayer still bears the burden of proof. In this case, the court simply concluded that the evidence offered by the Estate was neither probative nor convincing. In opting not to credit Hoffmann's report and testimony, the district court cited, *inter alia*, Hoffmann's total lack of experience with the art market; the dissimilar motives driving purchasers to acquire art, on one hand, and real estate or limited-partnership shares, on the other; and the unreasonably low appreciation rate and

unreasonably high present-value discount rates Hoffmann used in his cost-of-partition analysis. We cannot say the district court clearly erred in adopting the government's 5% discount rate and rejecting the Estate's.

The Estate argues that the trial court's refusal to accept Hoffmann's real-estate and limited-partnership data "treated the lack of . . . data [regarding real-world sales of fractional interests in art] as a barrier to valuation" in violation of *Bank of California, Nat'l Ass'n v. Commissioner*, 133 F.2d 428 (9th Cir. 1943), and its progeny. However, those cases hold only that the absence of a real-world market for a given asset does not make that asset *valueless* for estate-tax purposes, and that a district court must "assum[e] a hypothetical market" in which the asset could be sold so that it can be valued. *Shackleford v. United States*, 262 F.3d 1028, 1033 (9th Cir. 2001). The district court did not conclude that the Estate's fractional interest could not be valued or that it was valueless; rather, the district court envisioned a hypothetical market, as our precedents require, and determined a hypothetical fair-market value that reflected a discount. *Bank of California* and *Shackleford*'s "hypothetical market" rule did not require the district court to accept Hoffmann's real-estate and limited-partnership data as sufficient to meet the Estate's burden of proving a discount – let alone a discount greater than 5%.

Finally, the Estate argues that the district court applied the "unity of ownership" principle – i.e., the "assum[ption] that the interest held by the [E]state

[would] ultimately be sold [together] with the other undivided interest" – in violation of *Propstra*, 680 F.2d at 1251-52. We disagree. The district court appropriately cited and followed *Propstra*; its passing reference to co-owners was not a basis for its decision.

**AFFIRMED.**