20 Recent IRS Enforcement Actions in Conservation Easement Disputes: Awareness and Preparation Are Key

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This article explains the rules related to conservation easement donations, long-standing support by Congress for corresponding tax enticements, and 20 recent enforcement actions by the IRS designed to halt what it considers abusive taxpayer behavior.

There is so much misinformation, hyperbole, distortion, chest-thumping, and other "noise" surrounding conservation easement disputes nowadays that it is difficult to get to the truth. Most rational people agree on a few things, though. These include that Congress has expressly incentivized donations of real property interests to charity for over 50 years, increasing numbers of taxpayers have pooled their interests recently to take advantage of this tax benefit, and the Internal Revenue Service ("IRS"), convinced that some taxpayers are inappropriately exploiting the system, has implemented a long list of tactics to challenge what it calls syndicated conservation easement transactions ("SCETs"). However, there is considerable disagreement about whether the IRS's actions have gone too far, undermining both congressional intent and public confidence in the integrity of tax enforcement procedures.

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Overview of Conservation Easement Donations and Tax Deductions

Taxpayers who own undeveloped real property have several choices. For instance, they might (i) hold the property

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for investment purposes, selling it when it appreciates sufficiently, (ii) determine how to maximize profitability from the property and do that regardless of the negative effects on the local environment, community, or economy, or (iii) voluntarily restrict certain future uses of the property, such that it is protected forever for the benefit of society. The third option, known as donating a "conservation easement," not only achieves the goal of environmental protection, but also triggers another benefit, tax deductions for donors.[1]

As one would expect, taxpayers cannot donate an easement on any old property and claim a tax deduction; they must demonstrate that the property was worth protecting. A donation has an acceptable "conservation purpose" if it meets at least one of the following requirements: (i) it preserves land for outdoor recreation by, or the education of, the general public; (ii) it preserves a relatively natural habitat of fish, wildlife, or plants, or a similar ecosystem; (iii) it preserves open space (including farmland and forest land) for the scenic enjoyment of the general public and will yield a significant public benefit; (iv) it preserves open space (including farmland and forest land) pursuant to a federal, state, or local governmental conservation policy and will yield a significant public benefit; or (v) it preserves a historically important land area or a certified historic structure.[2]

Taxpayers memorialize the donation to charity by filing a public Deed of Conservation Easement or similar document ("Deed"). In preparing the Deed, taxpayers often coordinate with the land trust to identify certain limited activities that can continue on the property after the donation, without interfering with the Deed, without prejudicing the conservation purposes, and, hopefully, without jeopardizing the tax deduction.[3] These activities are called "reserved rights." The IRS openly recognizes, in its own Conservation Easement Audit Techniques Guide ("ATG"), that reserved rights are ubiquitous.[4]

The IRS will not allow the tax deduction stemming from a conservation easement unless the taxpayer provides the land trust, before making the donation, "documentation sufficient to establish the condition of the property at the time of the gift."[5] This is called the Baseline Report. It may feature several things, including, but not limited to, (i) survey maps identifying the property lines and other contiguous or nearby protected areas, (ii) a map of the area drawn to scale showing existing man-made improvements or incursions, vegetation, flora and fauna, animal breeding and roosting areas, migration routes, land use history, and distinct natural features, (iii) an aerial photograph of the property taken as close as possible to the date of the donation, and (iv) on-site photographs taken at various locations on the property.[6]

The value of the conservation easement is the fair market value ("FMV") of the property at the time of the donation.[7] The term FMV ordinarily means the price on which a willing buyer and willing seller would agree, if neither party were obligated to participate in the transaction, and if both parties had reasonable knowledge of the relevant facts.[8] The best evidence of the FMV of an easement would be the sale price of other easements that are comparable in size, location, etc. The IRS recognizes, though, that it is difficult, if not impossible, to find comparable sales of properties encumbered by easements.[9] Consequently, appraisers often must use the before-and-after method instead.

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1 Section 170(f)(3)(B)(iii); Reg. 1.170A-7(a)(5); Section 170(h)(1); Section 170(h)(2); Reg. 1.170A-14(a); Reg. 1.170A-14(b)(2).

2 Section 170(h)(4)(A); Reg. 1.170A-14(d)(1); S. Rep't No. 96–1007, at 10 (1980).

3 Reg. 1.170A-14(b)(2).

4 IRS, *Conservation Easement Audit Techniques Guide* (rev. 11/4/2016), page 23; *see also* Reg. 1.170A-14(e)(2) and (3).

5 Reg. 1.170A-14(g)(5)(i).

6 *Id.*

7 Section 170(a)(1); Reg. 1.170A-1(c)(1).

8 Reg. 1.170A-1(c)(2).

9 *Conservation Easement Audit Techniques Guide, supra* note 4, at page 41.

10 *Id.*

11 Olson v. United States, 292 U.S. 246, 255 (1934).

12 Esgar Corp., 744 F.3d 648, 659 n.10 (CA-10, 2014).

13 *Id.* at 657.

14 Symington, 87 TC 892, 896 (1986).

15 *See Conservation Easement Audit Techniques Guide, supra* note 4, at pages 24-30; IRS Publication 1771, *Charitable Contributions—Substantiation and Disclosure Requirements*; IRS Publication 526, *Charitable Contributions*; Section 170(f)(8); Section 170(f)(11); Reg. 1.170A-13; Notice 2006-96; TD 9836.

16 Tax Reform Act of 1969, P.L. No. 91-17, section 201 (1969); U. S. House of Representatives, Tax Reform Act of 1969, 91st Cong., 1st Sess., Rep't No. 91-782 (12/21/1969); *See also* Tax Reform Act of 1976, P.L. No. 94-455, section 2124(e) (1976); *See also* Tax Reduction and Simplification Act of 1977, P.L. No. 95-30, section 309 (1977). Notably, the IRS first recognized tax deductions for charitable contributions of partial interests in real property several years earlier, in 1964. *See* Rev. Rul. 64-205.

17 Tax Treatment Extension Act, P.L. No. 96-541, section 6(a) (1980); U.S. Senate, Tax Treatment Extension Action of 1980, 96th Cong., 2d Sess., Rep't No. 96-1007 (9/30/1980).

18 U.S. Senate, Tax Treatment Extension Action of 1980, 96th Cong., 2d Sess., Rep't No. 96-1007 (9/30/1980), pg. 9.

19 Pension Protection Act, P.L. No. 109-280, sections 1206 and 1219.

20 Food, Conservation, and Energy Act, P.L. No. 110-246, section 15302 (2008); Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act, P.L. No. 111-312, section 723 (2010); American Taxpayer Relief Act, P.L. No. 112-240, section 206 (2013); Tax Increase Prevention Act, P.L. No. 113-295, section 106 (2014).

21 Protecting Americans from Tax Hikes Acts, P.L. No. 114-113, section 111 (2015).

22 U.S. House of Representatives, Committee on Ways and Means, Subcommittee on Select Revenue Measures, Hearing, 96th Cong., 1st Sess., Rep't Serial No. 96-55 (11/9/1979), pg. 83.

23 U.S. Senate, Committee on Finance, "The Tax Code and Land Conservation: Report on Investigations and Proposals for Reform," June 8, 2005, as published in Tax Notes Doc. 2005-13563 (statement by Steven T. Miller); *See also* U.S. Senate, Committee on Finance, "Report of Staff Investigation of the Nature Conservancy (Volume I)," 109th Cong., 1st Sess., Rep't 109-27 (June 2005), pg. 23 of Executive Summary (stating that the committee "is concerned about valuation abuses and difficulties as it relates to noncash contributions in general [and] about the potential abuse of the appraisal method utilizing the 'subdivision development' analysis for contributions of conservation easements"); U.S. Treasury Department, "General Explanations of the Administration's Fiscal Year 2013 Revenue Proposals," Feb. 2012, pg. 140 (proposing the elimination of conservation easements on golf courses because the related tax deductions supposedly are "excessive," "not narrowly tailored to promote only bona fide conservation activities," "particularly susceptible to overvaluation," and "difficult and costly for the IRS to challenged inflated golf course deductions").

24 U.S. Senate, Committee on Finance. Syndicated Conservation Easement Transactions, 116th Cong., 2nd Sess., Senate Rep't 116-44 (August 2020), pg. 1; *See also* Conservation Easement Incentive Act of 2015, Senate 330, 114th Cong.; Joint Committee on Taxation, General Explanation of Tax Legislation Enacted in 2015, JCS-1-16 (March 2016).

This means that an appraiser must determine the highest and best use ("HBU") of the property *and* the corresponding FMV twice. First, the appraiser calculates the FMV as if the property were put to its HBU, which generates the "before" value. Second, the appraiser identifies the FMV, taking into account the restrictions on the property imposed by the conservation easement, which creates the "after" value.[10] The difference between the "before" value and "after" value of the property, with certain other adjustments, produces the value of the donation.

A property's HBU is the most profitable use for which it is adaptable and needed in the reasonably near future.[11] The term HBU also means the use of property that is physically possible, legally permissible, financially feasible, and maximally productive.[12] Importantly, valuation in the easement context does not depend on whether the owner has actually put the property to its HBU in the past.[13] The HBU can be *any* realistic potential use of the property.[14] Common HBUs are construction of a residential community, creation of a mixed-use development, or mining.

Properly claiming the tax deduction from an easement donation is surprisingly complicated. It involves a significant amount of actions and documents. The main ones are as follows: The taxpayer must (i) obtain a "qualified appraisal" from a "qualified appraiser," (ii) demonstrate that the land trust is a "qualified organization," (iii) obtain a Baseline Report adequately describing the condition of the property at the time of the donation and the reasons why it is worthy of protection, (iv) complete a Form 8283 (Noncash Charitable Contributions) and have it executed by all relevant parties, (v) assuming that the taxpayer is a partnership, file a timely Form 1065, enclosing Form 8283 and the qualified appraisal, (vi) receive from the land trust a "contemporaneous written acknowledgement," both for the easement itself and for any endowment/stewardship fee donated to finance perpetual protection of the property, and (vii) send all the partners their Schedules K-1 (Partner's Share of Income, Deductions, Credits, etc.) and a copy of Form 8283.[15]

Congressional Actions

Congress has generally recognized the deductibility of a partial interest in real property for more than five decades, since 1969.[16] Then, in 1980, Congress enacted Section 170(h), thereby allowing landowners to claim a tax deduction for the donation of conservation easements.[17] It provided the following explanation for codifying this environmental and financial benefit:

> The committee believes that the preservation of our country's natural resources and cultural heritage is important, and the committee recognizes that conservation easements now play an important role in preservation efforts . . . [T]he committee found it appropriate to expand the type of transfers which will qualify as deductible contributions in certain cases where the contributions are likely to further significant conservation goals without presenting significant potential for abuse.[18]

Section 170(h) has been modified and enhanced several times since its introduction. For instance, in 2006, Congress added a definition of "qualified appraiser," lowered the threshold at which the IRS could assert penalties based on erroneous appraisals, and made the tax deduction even more appealing to taxpayers by allowing them to deduct up to 50 percent of their adjusted gross incomes (instead of 30 percent) and to carry forward unused deductions for up to 15 years (instead of five years).[19] Congress later extended these enhanced benefits several times, from 2008 through 2014.[20] It made them permanent in 2015.[21]

The IRS and/or Treasury Department has cautioned Congress every step of the way about potential abuses in the conservation easement context. For instance, the Treasury Department urged Congress not to be hasty in enacting Section 170(h) in 1980, urging it to postpone approval of conservation easement donations and the related deductions to allow for more analysis. Congress rejected this notion on the following grounds:

> Although we appreciate the Treasury's position, and its wish for more time, we wish to note that conservation easements have been in existence for over fifteen years, and apparently no major abuses have come to light during that interval which would be sufficient to suggest that the Congress should abandon the use of the federal income tax laws to encourage donations of partial interests in real property for conservation and preservation purposes.[22]

Similarly, shortly before the enhancement of Section 170(h) in 2006, a high-ranking IRS official stated the following at a Senate hearing:

> Conservation easements are becoming a matter of greater concern and attention at the [IRS]. From a practical point of view, we are primarily concerned about two aspects: first, whether the easements are being created exclusively for conservation purposes; second, whether the appraisals that determine the value of the deduction are reasonable as opposed to fanciful and inflated.[23]

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Congress has steadily championed conservation easements and the corresponding tax benefits, despite its awareness of the potential valuation and other challenges. Indeed, even a recent report by the Senate Finance Committee, highly critical of SCETs, was forced to acknowledge that "the conservation-easement tax incentive under [Section 170(h)] has enjoyed broad bipartisan support."[24]

Specialized IRS Enforcement Actions

Notwithstanding the widespread backing by Congress described above, the IRS, along with the Department of Justice ("DOJ"), have insisted on attacking partnerships involved in SCETs or substantially similar transactions ("SSTs")

the past several years. The enforcement methods that the IRS and DOJ employ in this area far exceed those utilized in normal situations. Below is a partial list, which continues to grow at a fast clip.

Labeling Donations "Listed Transactions"

The IRS issued Notice 2017-10 in late December 2016, labeling SCETs and SSTs as "listed transactions."[25] This triggered the need for various parties to file Forms 8886 (Reportable Transaction Disclosure Statement) and Forms 8918 (Material Advisor Disclosure Statement), providing the IRS lots of details that it could utilize in its enforcement activities.[26] The IRS threatened in Notice 2017-10 to assert penalties against "participants" under Section 6707A for unfiled Forms 8886, against "material advisors" under Section 6707 for missing Forms 8918, and against "material advisors" under Section 6708 for unfulfilled record-maintenance requirements.[27]

Implementing a Compliance Campaign

The IRS launched a "compliance campaign" centered on SCETs and SSTs, devoting dozens of specialized Revenue Agents and other IRS personnel to the cause.[28]

Attacking "Technical" Flaws, Not Valuation

The IRS has consistently stated that the main problem with SCETs and SSTs is inflated valuations.[29] However, the IRS's primary focus in tax disputes thus far has been on "technical" flaws, that is, supposed problems with the Deed, Baseline Report, Qualified Appraisal, Form 8283, or other documents affiliated with donations.[30] To the dismay of many in the land conservation field and legal community, the Tax Court has ruled in the IRS's favor on technical issues in several cases over the past few years.[31] Below is a partial list of the technical challenges pursued by the IRS, as derived from the cases and the ATG:[32]

- The donation of the easement lacked charitable intent, because there was some form of *quid pro quo* between the partnership and the charitable organization.
- The donation of the easement was conditioned on receipt by the partnership of the full tax deduction claimed on its Form 1065.
- The land trust failed to issue a "contemporaneous written acknowledgement" letter.
- The appraisal was not attached to the Form 1065 filed by the partnership.
- The appraisal was not prepared in accordance with the Uniform Standards of Professional Appraisal Practice.
- The appraisal fee was based on a percentage of the easement value.
- The appraisal was not timely, in that it was not sufficiently proximate to the making of the donation or the filing of the Form 1065 by the partnership.
- The appraisal was not a "qualified appraisal."
- The appraiser was not a "qualified appraiser."
- The Form 8283 was missing, incomplete, or inaccurate.
- Not all appraisers who participated in the analysis signed Form 8283.
- The Baseline Report insufficiently described the condition of the property.
- The conservation easement was not "granted" in perpetuity.
- The conservation easement was not "protected" in perpetuity.
- Any mortgages or other encumbrances on the property were not satisfied or subordinated to the easement before the donation.

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[25] Notice 2017-10, 2017-4 IRB 544 (12/23/2016).

[26] *Id.*

[27] *Id.*

[28] IR-2019-182, 11/12/2019, "IRS Increases Enforcement Action on Syndicated Conservation Easements"; Parillo, "IRS Is Building Up Its Easement Toolbox," 2019 Tax Notes Today Federal 222-6 (Nov. 15, 2019).

[29] IRS Chief Counsel Memorandum AM-2020-010 (10/5/2020), 2020 Tax Notes Today Federal 197-42 (Oct. 5, 2020) (explaining that the "promoters obtain an appraisal that purports to be a qualified appraisal . . . but that generally inflates the value of the conservation easement based on unreasonable conclusions about the development potential of the real property").

[30] For more information about the categories of arguments raised by the IRS in easement cases, *see* Sheppard, "IRS Challenges 'Commercial Forestry' in Conservation Easement Disputes: Getting to the Root of the Matter," ___ Taxes—The Tax Magazine ___ (2020); Sheppard "Conservation Easement Disputes and the Tax Practitioner Privilege under Section 7525," 105 Practical Tax Strategies 16 (August 2020); Sheppard, "Civil Suit Emphasizes Critical Role of Notifications by Tax Matters Partners in Conservation Easement and Other Tax Disputes," ___ Journal Of Tax Practice & Procedure ___ (2020); Sheppard, "Analyzing Five Obscure IRS Actions in 2020 with Serious Implications for Conservation Easement Disputes," 133 JTAX 11 (July 2020); Sheppard, "Conservation Easement Enforcement: IRS Quietly Eliminates Procedural Protections for Appraisers," 132 JTAX 17 (May 2020); Sheppard, "Conservation Easements, Partners, and Qualified Amended Returns?" 166(3) Tax Notes Federal 373 (2020); Sheppard, "Conservation Easements, Legitimate Risks, and Tax Result Insurance," 31 Taxation of Exempts 10 (January/February 2020); Sheppard, "Conservation Easements, Recent *Mayo Clinic* Case, and Expanded Defenses to IRS Attacks on 'Conservation Purpose,'" 131 JTAX 6 (December 2019); Sheppard, "Fee Simple Charitable Donations Instead of Conservation Easements" 31 Taxation of Exempts 11 (November/December 2019); Sheppard, "Conservation Easements, 'Substantially Similar' Transactions, and the Reach of Notice 2017-10," 131 JTAX 19 (October 2019); Sheppard, "Making 'Qualified Offers' in Partnership Disputes: Extreme Positions by the IRS in Conservation Easements Cases Might Backfire," 22(5) Journal Of Passthrough Entities 71 (2019); Sheppard, "Conservation Easements, Partnerships, Risks, and Profitability: U.S. Government Takes Contradictory Positions in Tax and Securities Cases," 16(3) Journal Of Taxation Of Financial Products 49 (2019); Sheppard, "*Champions Retreat*: Conservation Easements, 'Significant' Preservation and Issues Unaddressed," 131 JTAX 23 (July 2019); Sheppard, "*Pine Mountain Preserve* and Conservation Easements: A Victory in Disguise for Taxpayers?" 130 JTAX 22 (May 2019); Sheppard, "Conservation Easements, Notice 2017-10, Injunction Action, and the Potential Reach of Return Preparer Penalties under Section 6694," 21(1) Journal Of Tax Practice & Procedure 23 (2019).

[31] *See, e.g.*, Dasher's Bay at Effingham, LLC, Tax Court Docket No. 4078-18, Order, Dec. 10, 2019; Ogeechee River Preserve, LLC, Tax Court Docket No. 2771-18, Order, Dec. 10, 2019; Riverpointe at Ogeechee, LLC, Tax Court Docket No. 4011-18, Order, Dec. 10, 2019; River's Edge Landing, LLC, Tax Court Docket No. 1111-18, Order, Dec. 10, 2019; TOT Property Holdings, LLC, Tax Court Docket No. 5600-17, Order, Dec. 13, 2019; Railroad Holdings, LLC, TCM 2020-22; Oakhill Woods, LLC, TCM 2020-24; Hoffman Properties II, LP, Tax Court Docket No. 14130-15, Decision, May 6, 2019; Oakbrook Land Holdings, LLC, TCM 2020-54; Oakbrook Land Holdings, LLC, 154 TC No. 10 (2020); Woodland Property Holdings, LLC, TCM 2020-55; High Point Holdings, LLC, Tax Court Docket No. 10896-17, Order, May 15, 2020; Coal Property Holdings, LLC, 153 TC 126 (2019); Hewitt, TCM 2020-89; Lumpkin One Five Six, LLC, TCM 2020-94; Lumpkin HC, LLC, TCM 2020-95; Plateau Holdings, LLC, TCM 2020-93; Habitat Green Investments, LLC, Tax Court Docket No. 14433-17, Order, June 30, 2020; Turtle River

- The Deed contains an improper clause regarding how the proceeds from a forced sale of the property upon extinguishment of the easement (*i.e.*, by condemnation, eminent domain, or some other type of governmental taking) would be allocated among the partnership and the land trust.
- The Deed contains an amendment clause, which, in theory, might allow the parties to modify the donation, after taking the tax deduction, in such a way as to undermine the conservation purposes.
- The Deed contains a merger clause, as a result of which the fee simple title to the relevant property and the easement might end up in the hands of the same party, thereby undermining the ability to protect the property forever.
- The Deed was not timely filed with the proper court or other location.
- The land trust was not a "qualified organization."
- The property lacks acceptable "conservation purposes" for any number of reasons, including the habitat is not protected in a relatively natural state, there are insufficient threatened or endangered species on the property, the habitat or ecosystem to be protected is not "significant," the public lacks adequate access to the property, the conservation purposes do not comport with a clearly-delineated government policy, the easement allows uses that are inconsistent with the conservation purposes, the partnership has "reserved rights" that interfere with or destroy the conservation purposes, etc.[33]

Predetermined and Vague Conclusions

It appears that the IRS has implemented a practice of issuing audit reports and notices of Final Partnership Administrative Adjustments ("FPAAs") claiming that *all* partnerships that engaged in an SCET or SST should get a charitable deduction of $0 and should be severely penalized, *regardless* of the amount of pre-donation due diligence performed by the partnerships, strength of the conservation values, existence of multiple independent appraisals, etc.

Particularly galling to taxpayers is the fact that, in issuing FPAAs triggering many years of litigation, the IRS refuses to specify the factual, legal, or tax reasons for its attacks. Below is the language from an FPAA in a recent Tax Court case, which is representative of the stance that the IRS is taking in essentially all easement cases:

> It has not been established that all the requirements of I.R.C Section 170 have been satisfied for the non-cash charitable contribution of a qualified conservation contribution. Accordingly, the charitable contribution deduction is decreased by [the entire amount claimed by the partnership on its Form 1065].
>
> Alternatively, if it is determined that all the requirements of I.R.C Section 170 have been satisfied for all or any portion of the claimed non-cash charitable contribution, it has not been established that the value of the contributed property interest was greater than zero . . . Accordingly, the charitable contribution is decreased by [the entire amount claimed by the partnership on its Form 1065].

In addition to fully disallowing the easement-related deduction based on a combination of alleged technical and valuation issues, the IRS ordinarily proposes several alternative penalties, ranging in severity. These include negligence, substantial understatement of income tax, substantial valuation misstatement, gross valuation misstatement, or reportable transaction understatement penalty.[34] This is consistent with the ATG, which explains that an FPAA "will generally include a tiering of proposed penalties with multiple alternative positions."[35]

Attempts to Enjoin Activities

The DOJ has filed a Complaint in District Court seeking a permanent injunction against alleged organizers and appraisers, along with disgorgement of the proceeds that they obtained from their dealings with SCETs or SSTs.[36]

Name Calling

The IRS featured SCETs and SSTs on its "dirty dozen" list for several years.[37] These transactions were absent from the list for 2020, but the IRS indicated its plan to issue a series of separate press releases emphasizing "the illegal schemes and techniques" that taxpayers use "to avoid paying their lawful tax liability," including "fraudulent conservation easements."[38]

Congressional Inquiry

The Senate Finance Committee conducted an inquiry and issued a report in August 2020 suggesting that the SCETs and SSTs that it reviewed constituted "abusive tax shelters," understood as such by both organizers and partners.[39] However, the report did not offer any specific recommendations about how to address perceived problems, and it underscored that the Section 170(h) deduction should remain.[40] In this regard, the report explained that the Senate Finance Committee believes that Congress, the IRS, and Treasury Department "should take further action to preserve the integrity of the conservation-easement tax deduction."[41]

Warnings, Threats, and Rhetoric

The IRS has engaged in a media blitz, disseminating numerous threats and warnings recently via new releases, tax conference presentations, and quotes in articles. The IRS emphasizes that it is (i) pursuing promoters, appraisers, return preparers, material advisors, accommodating entities, charitable organizations,

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Properties, LLC, Tax Court Docket No. 14434-17, Order, June 30, 2020; Green Creek, LLC, Tax Court Docket No. 14435-17, Order, June 30, 2020; Harris, Tax Court Docket No. 24201-15, Order June 30, 2020; Village at Effingham, LLC, TCM 2020-102; Riverside Place, LLC, TCM 2020-103; Maple Landing, LLC, TCM 2020-104; Englewood Place, LLC, TCM 2020-105; Smith Lake, TCM 2020-17; Belair Woods, LLC, TCM 2020-12; Cottonwood Place, LLC, TCM 2020-115; Red Oak Estates, LLC, TCM 2020-116.

32 *Conservation Easement Audit Techniques Guide*, *supra* note 4.

33 *Id.* at pages 78-81.

34 Section 6662; Section 6662A.

35 *Conservation Easement Audit Techniques Guide*, *supra* note 4, at page 77.

36 *United States v. Zak, Clark, EcoVest Capital Inc., Solon, McCullough, and Teal*, Case No. 1:18-cv-05774, DC Ga, Complaint filed Dec. 18, 2018.

37 *See, e.g.,* IR-2019-47, 3/19/2019.

38 IR-2020-160, 7/16/2020.

39 U.S. Senate, Committee on Finance. Syndicated Conservation Easement Transactions, 116th Cong., 2nd Sess., Senate Rep't No. 116-44 (August 2020), pg. 105.

40 *Id.* at pages 4 and 105.

41 *Id.* at page 4.

and others, (ii) making referrals to the Office of Professional Responsibility ("OPR"), (iii) raising a long list of technical, procedural, legal, and tax arguments in disputes, while constantly trying to develop more, (iv) asserting all possible civil penalties, (v) conducting simultaneous civil examinations and criminal investigations, (vi) contracting with a significant number of appraisers from the private sector to handle the workload, and (vii) litigating a large number of cases in Tax Court.[42]

Pursuing Supposed "Promoters"

The IRS appointed a new "Promoter Investigations Coordinator," who is in charge of coordinating with the Civil Division, Criminal Investigation Division, Chief Counsel, and OPR to develop promoter enforcement, on both an individual and strategic level.[43]

The IRS can assert severe "promoter penalties" against people falling into various categories, namely, any person who (i) organizes, or assists in the organization of, a partnership or other entity, an investment plan or arrangement, or any other plan or arrangement,[44] (ii) participates directly or indirectly in the sale of ownership interests in any such entity, plan, or arrangement,[45] (iii) makes or furnishes, or causes another to make or furnish, a statement regarding the allowability of any deduction or credit, the excludability of any income, or the attainment of any other tax benefit by a taxpayer, and actually knows, or has reason to know, that such statement is materially false or fraudulent,[46] and/or (iv) makes or furnishes, or causes another to make or furnish, a "gross valuation overstatement" as to any material matter.[47] The IRS, likely at the behest of the new Promoter Investigations Coordinator, has recently initiated various "promoter investigations" of persons who organized partnerships that engaged in SCETs or SSTs.

Searching for Fraud

In March 2020, the IRS announced that it had formed the new "Fraud Enforcement Office," whose leader will work closely with the new "Promoter Investigations Coordinator" described in the preceding paragraph.[48] No recent Tax Court decisions involving SCETs or SSTs feature claims by the IRS that the partnerships committed fraud. This makes sense because proving fraud would be difficult for the IRS, particularly when most partnerships (i) engaged in considerable due diligence before making an easement donation, (ii) relied on title reports, marketing studies, Baseline Reports, multiple valuations by independent appraisers, cost estimates, tax or legal opinions by attorneys, tax and information returns prepared by accountants, and more, (iii) claimed the easement deduction pursuant to Section 170(h), as enacted and expanded over the years by Congress, (iv) disclosed the donation to the IRS by filing Form 1065, Form 8283, Form 8886, Form 8918, and a qualified appraisal, (v) maintained all relevant tax, financial, and legal records, and (vi) fully cooperated with the IRS audit.[49]

While the IRS has not raised fraud in Tax Court battles, its counterpart, the DOJ, made allegations of fraudulent activity in its Complaint, mentioned above, seeking a permanent injunction of certain easement-related activities.[50] For instance, the DOJ claimed, without yet providing any proof, that the defendants "knew or had reason to know that the statements they made or furnished (and the statements they caused others to make or furnish) regarding the allowance of the deductions from the conservation easement syndicates or the securing of other tax benefits by reason of purchasing interests in the conservation easement syndicates *were false or fraudulent as to a material matter.*"[51]

The IRS, for its part, recently issued two Chief Counsel memoranda describing the methods by which the IRS can apply the civil fraud penalty against SCET partnerships subject to the special procedures enacted by the Tax Equity and Fiscal Responsibility Act ("TEFRA"), which reigned from 1982 through 2017, as well as those partnerships subject to the new procedures passed as part of the Bipartisan Budget Act ("BBA").[52] Among other things, the two memoranda explain that fraud is determined at the partnership level by analyzing the

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[42] IR-2019-182, 11/12/2019, "IRS Increases Enforcement Action on Syndicated Conservation Easements"; IR-2019-213, 12/20/2019, "IRS Continues Enforcement Efforts in Conservation Easement Cases Following Latest Tax Court Decision"; Richman, "Multiple Divisions Coming for Syndicated Conservation Easements," 2019 Tax Notes Today 220-3 (Nov. 13, 2019); Hoffman, "Conservation Easement Crackdown a Portent, Rettig Says," 2019 Tax Notes Today 221-9 (Nov. 14, 2019); Parillo, "IRS Is Building Up Its Easement Toolbox," 2019 Tax Notes Today 222-6 (Nov. 15, 2019); Parillo, "IRS Looking for Promoter Links as Easement Crackdown Grows," Tax Notes Today, Doc. 2019-47134 (Dec. 13, 2019); Parillo, "Syndicated Easement Players Getting Referred to OPR," 2020 Tax Notes Today Federal 223-5 (Nov. 18, 2020).

[43] Parillo. "IRS Assigns Point Person on Promoter Investigations," Federal Tax Notes Today Doc. 2020-6890 (Feb. 25, 2020).

[44] Section 6700(a)(1).

[45] Section 6700(a)(1).

[46] Section 6700(a)(2)(A).

[47] Section 6700(a)(2)(B). For these purposes, the term "gross valuation overstatement" means any statement regarding the value of any property or service if such value exceeds 200 percent of the correct amount, and the value is directly related to the amount of any deduction or credit under Chapter 1 (normal taxes and surtaxes) of the Internal Revenue Code to any participant. *See* Section 6700(b)(1).

[48] IRS News Release IR-2020-49 (3/5/2020).

[49] The Internal Revenue Manual shows the high standard that the IRS must meet: "Civil fraud penalties will be asserted when there is clear and convincing evidence to prove that some part of the underpayment of tax was due to civil fraud. Such evidence must show the taxpayer's intent to evade tax which the taxpayer believed to be owing. Intent is distinguished from inadvertence, reliance on incorrect technical advice, honest difference of opinion, negligence, or carelessness." IRM section 20.1.5.12.2 (10-01-2005). The courts consider a long list of factors in determining whether a taxpayer engaged in civil fraud. *See, e.g.,* Meier, 91 TC 273 (1988); Toushin, 223 F.3d 642 (CA-7, 2000); Bradford, 796 F.2d 303 (CA-9, 1986); Hicks Co., 56 TC 982 (1971).

[50] United States v. Zak, Clark, EcoVest Capital Inc., Solon, McCullough, and Teal, Case No. 1:18-cv-05774, DC, Ga, Complaint filed Dec. 18, 2018.

[51] *Id.* (emphasis added).

[52] IRS Chief Counsel Memorandum AM-2020-010 (10/5/2020) (called "Determining the Fraud Penalty in TEFRA Syndicated Conservation Easement Cases"); IRS Chief Counsel Memorandum AM-202044009 (10/23/2020) (called ""Determining the Fraud Penalty in BBA Syndicated Conservation Easement Cases").

[53] Richman. "IRS Talking to Prosecutors about Conservation Easements," 2020 Tax Notes Today Federal 223-6 (Nov. 18, 2020) (stating that the fight against SCETs "includes not only potential civil fraud penalties but also an open dialogue between the IRS and [DOJ] prosecutors").

[54] Instructions for Form 8886 (*Reportable Transaction Disclosure Statement*) (rev. Dec. 2019), p.1. The "What's New" portion of the Instructions for Form 8886 state that "[n]ew Lines 7b, 7c and 7d request total dollar amounts of your tax benefit(s), number of years of anticipated benefit, and your total investment or basis in the reportable transaction."

conduct and intent of those managing the partnership, such as the manager, TMP, or Partnership Representative, as appropriate. Because the memoranda were issued in response to "questions" from the National Fraud Counsel for the IRS, because the "questions" were extremely basic, and because the "questions" could have referenced all TEFRA and BBA partnerships instead of just those that engaged in SCETs, one might speculate that the two memoranda were intended by the IRS as a warning to partnerships and as a nudge to Revenue Agents to allege fraud or worse.[53]

Mandating More Disclosure

The IRS introduced a new Form 8886 in early 2020. It adds three new subparts to Line 7, all of which obligate a taxpayer to reveal yet more details about the tax benefits from participation in reportable transactions, like SCETs and SSTs.[54] The new, expanded Form 8886, unnoticed by most taxpayers and their advisors, should trigger some degree of concern. According to a recent IRS update to Congress, nine percent of Forms 8886 for 2017 and three percent for 2018 were incomplete, and the IRS warned that "[f]urther analysis and/or examination is being performed to determine if penalties [for incompleteness or inaccuracy] are appropriate."[55] New Lines 7b, 7c, and 7d on Form 8886 represent yet more chances for participants to get tripped up.

The IRS has frequently maintained, and the Tax Court has sometimes agreed, that relatively small problems with Forms 8283 (such as omitting one piece of information, providing required data only in an attachment, miscalculating the basis, or erroneously misstating the manner in which property was obtained) render them invalid.[56] Taxpayers are concerned that the IRS might apply the same line of argument to Forms 8886, too.

Swifter Summonses

The IRS issued a legal memo in February 2020 containing important changes to the audit process involving "listed transactions," such as SCETs and SSTs.[57] The normal Information Document Request ("IDR") enforcement process features "three graduated steps." Revenue Agents first issue a Delinquency Notice, followed by a Pre-Summons Letter, and, ultimately, a Summons.[58] This multi-layer process "is mandatory and has no exceptions."[59]

The IRS is streamlining matters in the context of SCETs and SSTs by eliminating the three-step process. Thanks to the recent IRS legal memorandum, the previous "mandatory" process is no longer required. Revenue Agents in the Large Business & International Division ("LB&I") will now adhere to swifter Summons procedures already obeyed by other IRS personnel.[60]

Doubling down on this mindset, the IRS issued another legal memorandum in November 2020, which provides guidance about the use of Summonses in the context of SCETs.[61] As explained later in this article, the IRS announced in September 2020 that it hopes to present as much crossover evidence as possible about partnerships, promoters, appraisers, accommodating parties, and others in related tax audits, investigations, and litigation. This controversial tactic has supposedly resulted in some taxpayers and other parties not cooperating with, or supposedly impeding, audits regarding SCETs and SSTs.[62] To counter this alleged behavior, the IRS legal memo instructs audit personnel to "use all available administrative tools," promptly issue Summonses, and if full compliance does not ensue, initiate Summons enforcement in the courts.[63]

Particularly galling to taxpayers is the fact that, in issuing Final Partnership Administrative Adjustments triggering many years of litigation, the IRS refuses to specify the factual, legal, or tax reasons for its attacks.

Neglecting the Facts

The IRS recently eradicated the acknowledgement-of-facts IDR process. Revenue Agents in LB&I have traditionally issued taxpayers an acknowledgement-of-facts IDR at the end of the audit process. The purpose was to ensure that both the taxpayers and the IRS agreed on the key facts, such that the dispute, before the Appeals Office and/or Tax Court, could focus largely or solely on legal/tax issues.[64] The IRS has underscored the benefits of the acknowledgement-of-facts IDR for years, suggesting that it facilitates resolution of issues during the audit

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[55] "Land Trust Alliance Calls for Action on Conservation Easements," 2020 Tax Notes Today Federal 38-9, Document 2020-7149 (Feb. 25, 2020) (see attached letter from IRS Commissioner Rettig to Senator Grassley, as Chairman of the Senate Finance Committee, dated February 12, 2020); Parillo. "No Notable Decrease in Syndicated Easement Deals," 2020 Tax Notes Today Federal 39-1, Document 2020-7321 (Feb. 27, 2020).

[56] *See, e.g.*, Belair Woods, LLC, TCM 2018-159; Cottonwood Place, LLC, Tax Court Docket No. 14076-17, Order dated Oct. 2, 2018; Red Oak Estates, LLC, Tax Court Docket No. 13659, Order dated Oct. 2, 2018; Evergreen Church Road, LLC, Tax Court Docket No. 8493-17, Order dated June 5, 2019; Dasher's Bay at Effingham, LLC, Tax Court Docket No. 4078-18, Order dated Dec. 10, 2019; River's Edge Landing, LLC, Tax Court Docket No. 1111-18, Order dated Dec. 10, 2019; Riverpointe at Ogeechee, LLC, Tax Court Docket No. 4011-18, Order dated Dec. 10, 2019; Ogeechee River Preserve, LLC, Tax Court Docket No. 2771-18, Order dated Dec. 10, 2019; Rock Creek Property Holdings, LLC, Tax Court Docket No. 5599-17, Order dated Feb. 10, 2020, n. 2; Oakhill Woods, LLC, TCM 2020-24.

[57] Tax Notes Doc. 2020-7524 (Feb. 25, 2020), consisting of LB&I-04-0220-004. This IRS guidance only applies to the Large Business & International Division, whose examination procedures differ from those used by the Small Business and Self-Employed Division.

[58] IRM section 4.46.4.6.3 (12-13-2018) and IRM Exhibit 4.46.4-2.

[59] IRM Exhibit 4.46.4-2.

[60] Tax Notes Doc. 2020-7524 (Feb. 25, 2020), consisting of LB&I-04-0220-004.

[61] Lee, "IRS Emphasizes Summons Power in Conservation Easement Cases," 2020 Tax Notes Today Federal 222-3 (Nov. 17, 2020) (attaching a copy of the IRS legal memo whose express subject is "Use of Summons and Summons Enforcement in Syndicated Conservation Easement Cases, Reportable Transactions, and Other Abusive Tax Avoidance Transactions").

[62] *Id.*

[63] *Id.*

[64] IRM section 4.46.4.2 (12-13-2018) and IRM section 4.46.4.10 (12-13-2018).

phase, saves resources on both sides, avoids Appeals Officers referring cases back to Revenue Agents for further development, and allows the IRS to prepare the most comprehensive audit reports and FPAAs possible.[65]

These positive attributes notwithstanding, the IRS changed its tune in February 2020, when it issued a legal memorandum dictating that Revenue Agents who audit "listed transactions," like SCETs and SSTs, are not required from this point forward to send taxpayers acknowledgement-of-facts IDRs.[66] One might interpret this as disinterest by the IRS in getting the facts straight before pushing cases toward litigation.

Revoking Procedural Protections for Appraisers

The IRS has revoked procedural protections for appraisers, including those involved with valuing SCETs and SSTs. The Internal Revenue Manual ("IRM") has historically contained a multi-level review process designed to ensure that an appraiser had engaged in a serious degree of wrongdoing before assessing penalties, making referrals to OPR, etc.[67] The prior procedures required analysis by at least five experienced IRS employees (*i.e.*, the Revenue Agent, Examining Appraiser, Primary Review Appraiser, Secondary Review Appraiser, and Review Manager) before Section 6695A penalties could be assessed.[68]

However, the IRS issued a memorandum in January 2020 called "Interim Guidance on IRC 6695A Penalty Case Reviews" ("Interim Guidance") whose purpose was remarkably clear: "Eliminating the multi-tiered review process for IRC 6695A appraiser penalty cases."[69] Under the Interim Guidance, if an Examining Appraiser determines a gross valuation misstatement while, say, auditing an SCET, he or she simply needs to obtain written approval from his or her immediate supervisor and then notify the Revenue Agent that the Section 6695A penalty might apply.[70] Moreover, the Interim Guidance says that, while the decision to open a Section 6695A penalty case normally is based on the recommendation of an Examining Appraiser, Revenue Agents "should open" a case "whenever they [alone] determine penalty consideration is warranted."[71] Finally, the Interim Guidance states that Revenue Agents are solely responsible for assessing the Section 6695A penalty based on information obtained during the examination, preparing the related report, and closing the penalty case.[72]

In summary, the prior procedures required input by at least five experienced IRS employees before seeking Section 6695A penalties, whereas the Interim Guidance contemplates that a Revenue Agent, who likely has no training or education whatsoever in the field of valuation, make this decision alone, or with input from just one Examining Appraiser.

Polemical Settlement Initiative

Leveraging the momentum from its recent Tax Court victories based on flaws in Deeds, Baseline Reports, Forms 8283, and/or appraisals, the IRS issued a news release in June 2020 describing a potential path to resolution ("Settlement Initiative").[73] It then started sending offer letters to eligible partnerships. Opinions vary on the Settlement Initiative, of course, with many interpreting it as a big stick, as opposed to an olive branch, from the IRS.[74]

Those characterizing the Settlement Initiative as just another IRS enforcement tactic point to several things, including the fact that participation does not serve to limit or prohibit the IRS from later asserting criminal penalties, promoter penalties, appraiser penalties, return preparer penalties, or any other sanction. This is noteworthy because, when taxpayers normally execute a Form 906 (Closing Agreement) with the IRS, all matters covered thereby are considered "final and conclusive," unless there is a subsequent showing of fraud, malfeasance, or material misrepresentation by the taxpayer.[75]

Skeptics also underscore the differential treatment contemplated by the Settlement Initiative. So-called "Category One Partners" did one or more of the following in connection with an SCET or SST: organized, sold, or promoted it; prepared an appraisal; provided legal or tax advice; supplied return preparation services; or took actions making them "material advisors." They get hit with a charitable deduction of $0 and a 40 percent penalty, plus they must pay the entire amount right away. Thus, if Category One Partners participate in the Settlement Initiative, they are assuring themselves of the worst possible outcome, consistent with most FPAAs. By contrast, "Category Two Partners" can claim an ordinary tax deduction equal to the out-of-pocket costs paid to participate in the SCET or SST, which includes cash and other property contributed in exchange for partnership interests. Moreover, their penalties are not 40 percent of the tax underpayment, but rather 10

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[65] IRM section 4.46.4.10 (12-13-2018); IRS Publication 5125, *Large Business & International Examination Process* (2-2016).

[66] Tax Notes Doc. 2020-7524 (Feb. 25, 2020), consisting of LB&I-04-0220-004.

[67] IRM section 20.1.12.7 (12-18-2017).

[68] IRM section 20.1.12.7.4 (12-18-2017).

[69] Tax Notes Doc. 2020-3440 (Jan. 22, 2020), consisting of LB&I-20-0120-001.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] IR-2020-130, 6/25/2020; *See also* Sheppard, "Question Remain about Conservation Easement Settlement Initiative," 168(12) Tax Notes Federal 2219 (2020); Sheppard, "Conservation Easement Settlement Initiative: More IRS Guidance, More Uncertainty," 169(7) Tax Notes Federal 1085 (2020).

[74] Parillo. "Partner Buy-In Rule Could Spoil Some IRS Easement Settlement," Tax Analysts Doc. 2020-24312 (June 26, 2020); Parillo. "Criticism of Easement Settlement Deal Doesn't Worry IRS," 2020 Tax Notes Tax Federal 135-4, Doc. 2020-26950 (July 15, 2020).

[75] Section 7121(b).

[76] IR-2020-130 (6/25/2020).

[77] IR-2020-152 (7/13/2020).

[78] Section 7525(a)(1).

[79] Section 7525(a)(1); Section 7525(a)(2); Section 7525(a)(3); Section 7525(b); 31 U.S.C. section 330; and 31 C.F.R. section 10.3.

[80] *See, e.g.,* United States v. Microsoft Corporation et al., 125 AFTR2d 2020-547 (DC Wash., 2020).

[81] Reg. 601.106(b); *See also* Reg. 601.103(c)(1).

[82] Rev. Proc. 87-24; Prop. Reg. 601.106(e)(3)(i)(A).

[83] Rev. Proc. 87-24, section 2.08 (emphasis added).

[84] IRS Restructuring and Reform Act of 1998, P.L. 105-206, section 1001(4).

[85] IRM section 33.3.6 (08-11-2004).

[86] *Id.*

[87] *Id.*

percent to 20 percent, depending on their return-on-investment ratio.

This large disparity might put Category One Partners at odds with Category Two Partners, triggering anger, distrust, infighting, legal actions, etc. A cynic might speculate that this is exactly what the IRS intended, a classic divide-and-conquer strategy. This theory finds support in statements by the IRS, like the following:

> Taxpayers should note that the U.S. Tax Court has held in the government's favor in several opinions and orders in syndicated conservation easement cases. The IRS realizes that some promoters may tell their clients that their transaction is "better" than or "different" from the transactions previously rejected by the Tax Court and that it may be better for the client to litigate than accept this resolution. When deciding whether to accept the offer, the IRS encourages taxpayers to consult with independent counsel, meaning a qualified advisor who was not involved in promoting the transaction or handpicked by a promoter to defend it.[76]

> The IRS is aware that some promoters of these abusive transactions have downplayed the significance of the string of recent court decisions holding in the government's favor, arguing that their cases are somehow different or that those decisions might be reversed on appeal. These promoters ignore common sense and argue that the real dispute is about value, neglecting to explain how the reporting of short-term appreciation, often exceeding many multiples of reality, could possibly survive judicial scrutiny.[77]

Efforts to Undermine Privilege

The IRS has become more aggressive in its efforts to gather all potentially relevant data (including pre-donation communications involving accountants, appraisers, experts, and others), despite the fact that some might be confidential. This scenario often arises when partnerships decline to provide copies of correspondence with advisors on grounds that they are protected by the federally authorized tax practitioner ("FATP") privilege established in Section 7525.

This provision generally states that the protections that apply to communications between taxpayers and their attorneys extend to communications between taxpayers and FATPs.[78] However, Section 7525 clarifies that these expanded protections *only* apply to (i) "tax advice," not return-preparation and other services, (ii) provided by a person who qualifies as an FATP, such as a certified public accountant, enrolled agent, registered tax return preparer, and others, (iii) involving non-criminal matters, (iv) in connection with an administrative or judicial tax matter, where the IRS or DOJ is a party, and (v) not regarding "tax shelters."[79]

The IRS has started trying to overcome the FATP privilege in SCET and SST cases by arguing, among other things, that (i) the relevant advisors were not providing "tax advice" in the first place, (ii) even if they were offering "tax advice," the privilege was later waived when the relevant information was forwarded to third parties, (iii) SCETs and SSTs are "listed transactions" pursuant to Notice 2017-10 and thus "tax shelters," (iv) "a significant purpose" of the SCETs and SSTs is federal income tax avoidance, and (v) the advisors were involved in the "promotion" of the SCETs and SSTs, as this term is broadly defined in applicable caselaw.[80]

The IRS has taken steps to deprive partnerships that engaged in SCETs or SSTs of a chance to seek reconsideration of the issues by the Appeals Office before heading to litigation.

Depriving Partnerships of Review by the Appeals Office

The IRS has taken steps to deprive partnerships that engaged in SCETs or SSTs of a chance to seek reconsideration of the issues by the Appeals Office before heading to litigation.

Evolution of access. The IRS has declared that taxpayers have a "right" to seek review by the Appeals Office for many decades. Indeed, regulations issued more than five decades ago, in 1967, stated that when the IRS proposes tax adjustments, "the taxpayer has the right (and will be so advised by the district director) of administrative appeal to the Appeals organization."[81]

Later, in 1987, the IRS issued Rev. Proc. 87-24, which explains the following about universal review by the Appeals Office in situations involving cases docketed with the Tax Court: "Except in unusual circumstances, a docketed case is referred by Counsel to Appeals to reach a settlement with the taxpayer."[82] Rev. Proc. 87-24 contained an important caveat, though. It stated that certain high-ranking IRS attorneys could, after internal consultation, "determine that a case, or an issue or issues in a case, should *not* be considered by Appeals [and] in such a situation Appeals will forego settlement authority over such case or issues."[83]

In 1998, Congress passed the IRS Restructuring and Reform Act. That legislation required the IRS to "ensure an independent appeals function."[84]

A few years later, in 2004, the IRS issued guidance, which was incorporated into the IRM.[85] It featured yet more ways for the IRS to deprive taxpayers of a chance to seek reconsideration by the Appeals Office. The IRM explained that certain cases involve important, recurring legal issues that affect large numbers of taxpayers. In such instances, when there is a "critical need for enforcement activity," the IRS can "designate for litigation" the relevant cases "in the interest of sound tax administration" and for purposes of establishing legal precedent, conserving resources, and reducing costs.[86] The IRM indicated that this maneuver might be appropriate, for example, with "tax shelters."[87] If taxpayers have an issue that the IRS designates for litigation, they will not get an Examination Report, will not get a chance to file a Protest

Letter contesting the Examination Report, will not have a chance to present their side of the story to the Appeals Office before the IRS issues a Notice of Deficiency or FPAA, and will not have their cases routed back to the Appeals Office after they file a Petition with the Tax Court.[88]

In 2015, Congress enacted Section 7803(a), which mandates that the IRS Commissioner carry out his or her duties "in accord with taxpayer rights." Specifically, this provision explains that the IRS Commissioner must ensure that all IRS employees understand and act consistently with taxpayer rights granted throughout the Internal Revenue Code, including, but not limited to, "the right to appeal a decision of the [IRS] in an independent forum."[89]

The following year, 2016, the IRS issued Rev. Proc. 2016-22. It confirmed that the IRS attorneys generally will refer docketed cases to the Appeals Office for settlement consideration.[90] However, Rev. Proc. 2016-22, like earlier administrative guidance, contained disclaimers allowing the IRS to circumvent the Appeals Office in certain scenarios. It stated the following in this regard:

> Counsel will *not* refer to Appeals any docketed case or issue that *has been designated for litigation* by Counsel.[91]
>
> In limited circumstances, a docketed case or issue that *has not been designated for litigation* will *not* be referred to Appeals if Division Counsel or a higher level Counsel official determines that *referral is not in the interest of sound tax administration*. For example, Counsel may decide not to refer a docketed case to Appeals in cases involving a significant issue common to other cases in litigation for which it is important that the IRS maintain a consistent position.[92]

Congress then enacted Section 7803(e) as part of the Taxpayer First Act of 2019 ("TFA").[93] This provision accomplished several things of note. First, it created the so-called "Independent Office of Appeals."[94] Second, it explained that the purpose of the Independent Office of Appeals is to resolve federal tax disputes, without litigation, on a basis that is fair and impartial to the IRS and taxpayers, promotes consistent application of federal tax laws, and increases public confidence in the integrity and efficiency of the IRS.[95] Third, it generally provided that the resolution process, described in the preceding sentence, should be "available to all taxpayers."[96]

Most recently, in August 2020, the IRS issued a memorandum containing guidance about designation of cases for litigation, as required by the TFA.[97] The memorandum is technical and dense, of course. The most important aspect for purposes of this article is the description of the circumstances in which the IRS can deprive taxpayers of their general right to seek review by the Independent Office of Appeals. The memorandum suggests that some tax issues are susceptible to recurring compliance challenges, administrative guidance does not effectively address such issues, and audit personnel may request designation "where sound tax administration is best served" by forcing the Tax Court (or another appropriate court) to act as the heavy.[98] Importantly, the memorandum provides various examples of when "sound tax administration is best served by establishing judicial precedent," including situations where revoking access to the Independent Office of Appeals supposedly would (i) "stem the proliferation of abusive tax shelters or other significant noncompliance," (ii) reduce future compliance and dispute costs, for the IRS and other taxpayers, (iii) resolve issues where published IRS guidance has not resulted in what the IRS considers compliance, and/or (iv) obtain clarity where "there is a wide divergence between the IRS and taxpayer viewpoints on the law."[99]

Examples from IRS watchdog. The National Taxpayer Advocate ("NTA") issued reports in 2018 and 2019 claiming that the IRS was abusing its power by depriving taxpayers of their right to seek reconsideration by the Appeals Office (now rebranded as the Independent Office of Appeals) based on questionable proclamations of "sound tax administration."[100] The NTA offered the following illustration:

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88 *Id. See also* Sapirie, "The Increase in Cases Designated for Litigation," 150 Tax Notes 1223 (March 14, 2016) (indicating that the IRS had been designating a growing number of cases for litigation in the preceding years).

89 Section 7803(a)(3)(D) and (E), as enacted by Protecting Americans from Tax Hikes Act of 2015, P.L. 11-4-113 (2015); *See also* Joint Committee on Taxation. "Technical Explanation of the Protecting Americans from Tax Hikes Act of 2015, House Amendment #2 to the Senate Amendment to H.R. 2029," JCX-144-15 (12/17/2015).

90 Rev. Proc. 2016-22, sections 3.01 and 3.05.

91 Rev. Proc. 2016-22, section 3.03 (emphasis added).

92 *Id.* (emphasis added).

93 Taxpayer First Act of 2019. P.L. 116-25 (7/1/2019), section 1001; *See also* Joint Committee on Taxation. "Description of H.R. 1957, The Taxpayer First Act of 2019," JCX-15-19 (4/1/2019).

94 Section 7803(e)(1).

95 Section 7803(e)(3) (emphasis added).

96 Section 7803(e)(4).

97 IR-2020-188, 8/24/2020 (attaching a memorandum from the IRS Deputy Commissioner for Services and Enforcement, dated August 24, 2020, called "Interim Guidance on Designation of Cases for Litigation").

98 *Id.*

99 *Id.*

100 Taxpayer Advocate Service, 2018 Annual Report to Congress, volume one, pg. 360; Taxpayer Advocate Service, Fiscal Year 2019 Objectives Report to Congress, volume one, pg. 137.

101 Taxpayer Advocate Service, 2018 Annual Report to Congress, volume one, pg. 360.

102 Hancock County Land Acquisitions, LLC v. United States, Case No. 1:20-cv-3096-AT, U.S. District Court (N.D. Ga), Complaint for Declarative, Injunctive, and Mandamus Relief, dated July 25, 2020; Parillo, "DOJ: Taxpayer First Act Didn't Create Absolute Right to Appeals," 2020 Tax Notes Today Federal 224-8 (Nov. 19, 2020) (explaining and attaching Motion to Dismiss and Memorandum of Law in Support of Motion to Dismiss by the DOJ).

103 Section 6103(a).

104 Section 6103(b)(1).

105 Section 6103(b)(2)(D).

106 Section 6103(h)(1). The term "tax administration" means (i) the administration, management, conduct, direction, and supervision of the application of federal tax laws and treaties, (ii) the development of federal tax policy related to existing or proposed federal tax laws or treaties, and (iii) assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws or treaties. *See* Section 6103(b)(4)(A)(i); Section 6103(b)(4)(A)(ii); Section 6103(b)(4)(B).

107 Section 6103(h)(4)(A).

108 Section 6103(h)(4)(B).

109 Section 6103(h)(4)(C).

110 Section 6103(l)(4)(B).

> Taxpayer, a diversified business, enters into a transaction that the IRS believes to be suspiciously similar to a type of transaction that it has previously identified as a tax shelter. As a result, the IRS asserts large deficiencies and penalties against Taxpayer. Thereafter, Taxpayer files a [Protest Letter] with Appeals, arguing that the transaction in question is fundamentally different from the tax shelter transaction with which the IRS is attempting to equate it. Further, Taxpayer contends that, in addition to being distinguishable from a tax shelter, the transaction in question has a legitimate business purpose, and should not generate either tax deficiencies or penalties.
>
> The Office of Chief Counsel, however, unilaterally decides that Taxpayer should not have the opportunity to raise these arguments at Appeals. Instead, Counsel determines that the case should proceed directly to litigation on the basis of "sound tax administration."
>
> As a result, Taxpayer is unable to present its arguments to an independent third party within the IRS and is prevented from seeking the administrative case resolution it believes could be achieved. Instead, Taxpayer is forced to pursue its case in court, as a matter of public record, incurring substantial cost, delay, and ill-will for the IRS along the way.[101]

Occurrence in the SCET and SST context. Most people do not realize it, but the IRS has already started taking similar actions in cases involving SCETs and SSTs. A common technique is for a Revenue Agent to summarily inform a partnership, at the end of a long audit in which the partnership fully cooperated, that the IRS will not issue a Summary Report, not hold a Closing Conference, not provide a Notice of Proposed Adjustments, and thus not allow the partnership to obtain review by the Independent Office of Appeals before initiating tax litigation. This occurs, even though the partnership has granted, or has offered to grant, a reasonable extension of the assessment-period by signing a Form 872-P (Consent to Extend the Time to Assess Tax Attributable to Partnership Items). The Revenue Agent invariably cites "sound tax administration" in taking these actions, without providing any details. In short, unbeknownst to many, the IRS has started depriving some partnerships of pre-litigation access to the Independent Office of Appeals, without formally designating SCETs and SSTs for litigation. Some partnerships have challenged these IRS tactics in court.[102]

Using the Same Data in Different Contexts

The IRS announced in September 2020 that it hopes to present as much evidence as possible, relating to partnerships, promoters, appraisers, accommodating parties, and others, in overlapping tax audits, investigations, and litigation.

Taxpayer protections under Section 6103. Section 6103 generally requires the IRS to safeguard the confidentiality of "returns" and "return information."[103]

As one would expect, in the spirit of protecting sensitive data, the relevant definitions are broad. The term "return" means any original or amended tax return, information return, or claim for refund, including all corresponding schedules, attachments, statements, lists, etc.[104] For its part, the phrase "return information" encompasses the following: (i) a taxpayer's identity; (ii) the nature, source, or amount of a taxpayer's income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, taxes withheld, deficiencies, overassessments, or tax payments; (iii) whether the taxpayer's return was, is being, or will be examined or investigated; (iv) any other data received by, recorded by, prepared by, furnished to, or collected by the IRS with respect to a return or a determination of the existence of a liability of any person for any tax, penalty, interest, fine, forfeiture, or other imposition; (v) any part of a written determination (or any related background document) that is not open to public inspection; and (vi) a Closing Agreement or similar agreement, along with any relevant background data.[105]

There are several exceptions to the general prohibition against the IRS disclosing "returns" and/or "return information." Five exceptions are relevant to this article. First, IRS personnel ordinarily have access to returns and return information if their official duties require inspection or disclosure for "tax administration" purposes ("Tax Administration Test").[106] Second, IRS personnel can reveal a return or return information in a judicial or administrative proceeding, provided that such proceeding pertains to tax administration, and the taxpayer is a party to the proceeding ("Party Test").[107] Third, disclosure is permitted in a judicial or administrative proceeding related to tax administration, if "the treatment of an item reflected on [a third-party's return] is directly related to the resolution of an issue in the proceeding" ("Item Test").[108] Fourth, a return or return information of a third-party can be disclosed in a judicial or administrative proceeding related to tax administration, in situations where it "directly relates to a transactional relationship between a person who is a party to the proceeding and [the third-party] and directly affects the resolution of an issue in the proceeding" ("Transactional Test").[109] Fifth, outside the area of "tax administration," IRS personnel can disclose data when it will be used in, or in preparation for, an administrative action or proceeding under Circular 230, to the extent that such disclosure is necessary to advance or protect U.S. government interests ("OPR Assistance Test").[110]

In summary, Section 6103 ordinarily mandates that the IRS not disclose, in-

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ternally or externally, any taxpayer "returns" or "return information," as these concepts are broadly defined. However, the IRS might disregard the general non-disclosure rule when the situation meets the Tax Administration Test, Party Test, Item Test, Transactional Test, or OPR Assistance Test.

Three Chief Counsel Directives. The IRS issued a series of notices over the years about disclosure of data, and the effect of Section 6103, in the situations involving "tax shelter matters."

The first notice was Chief Counsel Directive 2006-003 ("First CCD").[111] Its purpose was to provide guidance regarding (i) disclosure under Section 6103 of returns and return information gathered by the IRS in civil examinations and other investigations of "tax shelter promoters" and "tax shelter investors," and (ii) disclosure of such data in judicial or administrative tax proceedings.[112] The IRS explained in the First CCD that, during the course of a promoter, criminal, and/or injunction investigation, the IRS often obtains information about not only the promoters, but also the investors. The First CCD indicated that this type of data often shows a "pattern or practice." For instance, it might show a "consistent lack of bona fide business purpose" among the investors in the same or substantially similar arrangements.[113] The IRS provided examples in the First CCD, demonstrating its position that, thanks to the Item Test and/or Transactional Test, it can disclose, in different proceedings, information about different taxpayers who participated in substantially similar transactions, involving the same promoter.

The IRS next issued Chief Counsel Directive 2006-006 ("Second CCD"), whose sole function was to supply additional definitions and examples of the principles described previously in the First CCD.[114]

After 15 years, in September 2020, the IRS decided to "supplement" the First CCD and Second CCD by issuing Chief Counsel Directive 2020-008 ("Third CCD").[115] Its purpose was to add five more examples, all of which pertain specifically to SCETs and SSTs.

Impact on SCET and SST disputes. The First CCD, Second CCD, and recent Third CCD aimed directly at SCETs and SSTs reveal that the IRS intends to cross-reference and multi-task to the greatest extent possible, (i) presenting evidence during income tax audits, criminal investigations, promoter actions, appraiser penalty examinations, injunction lawsuits, summons enforcement proceedings, OPR disciplinary hearings, and Tax Court litigation, (ii) about multiple unrelated partners, their relationships with alleged promoters, and pre-donation actions by various persons, (iii) in a manner that supposedly does not violate the general non-disclosure rules under Section 6103.[116]

Disqualifying or Punishing Prior Advisors

The IRS is attempting to limit the pool of tax and/or legal professionals that can defend partnerships that engaged in SCETs or SSTs.

During the early stages of an audit, Revenue Agents generally issue a broad IDR seeking a large number of documents, including, but certainly not limited to, copies of the relevant Forms 1065, Forms 8886, Forms 8918, tax or legal opinions issued to the partnership, Private Placement Memoranda, and other offering materials. If the professionals representing the partnership during the audit appear on any of these pre-easement-donation documents, the IRS often issues a follow-up IDR asking the following questions:

> Was [insert name of defense representative] or his/her firm involved in advising any partner, employee or representative of the partnership concerning the planning and/or execution of any part of the [SCET] at issue? If so, describe the nature and dates of that involvement.
>
> Was [insert name of defense representative] or his/her firm involved in marketing or promoting

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[111] IRS Chief Counsel Directive 2006-003 (10/25/2005).

[112] *Id.,* section 1.

[113] *Id.,* section 2.

[114] IRS Chief Counsel Directive 2006-006 (11/22/2005).

[115] IRS Chief Counsel Directive 2020-008 (9/8/2020); *see also* Parillo, "IRS Explains Contours of Disclosing Syndicated Easement Info," 2020 Tax Notes Today Federal 176-2 (Sept. 11, 2020).

[116] Notably, the First CCD, Second CCD, and Third CCD only focus on efforts by the IRS to circumvent the general non-disclosure rules in Section 6103. They are silent on a critical issue, which is how, precisely, the IRS plans to overcome a long list of prohibitions in the Federal Rules of Evidence and the Tax Court Rules of Practice and Procedure against introducing evidence that is irrelevant, unduly prejudicial, confusing, misleading, unfounded, unauthenticated, privileged, hearsay, limited in scope, etc. For information about potential evidentiary challenges for the IRS, *see* Larson, *Tax Evidence: A Primer on the Federal Rules of Evidence As Applied by the Tax Court,* 53 Tax Law 181 (1999); Larson, *Tax Evidence II: A Primer on the Federal Rules of Evidence As Applied by the Tax Court,* 57 Tax Law 371 (2004); Larson, *Tax Evidence III: A Primer on the Federal Rules of Evidence As Applied by the Tax Court,* 62 Tax Law 555 (2009); Larson, *A Practitioner's Guide to Tax Evidence, Second Edition*, American Bar Association Section of Taxation (2017).

[117] Section 10.29(a) of Treasury Department Circular 230. The typical IDR states the following in this regard: "State whether the partnership and partners have given informed consent in writing to the [insert name of defense representative] regarding a conflict of interest as described in Section 10.29(a) of Treasury Department Circular 230 and provide copies of all such written consents in accordance with Section 1029(c) of Treasury Department Circular 230."

[118] The typical IDR states the following in this regard: "If any responsive documents are withheld from production, provide a proper privilege log setting forth on a document-by-document basis (a) the specific grounds upon which you rely for withholding the document; (b) the date appearing on the document or the date the document was prepared if it has no date; (c) a description, the subject matter, a summary of the content, and the number of pages (or if electronic, the size) of the document withheld; (d) the identity of the author or preparer of the document; (e) the identity of the person to whom the document was addressed or directed or for whom it was prepared; (f) the identity of all persons who received the document or a copy thereof. If you claim common law or statutory privileges as the grounds for withholding the document, specify the type of privileges claimed and the legal and factual bases for the privileges."

[119] Tax Court Rules & Procedures 24(g)(1); *See also* American Bar Associate Model Rules of Professional Conduct 1.7 and 1.8; *See also* Tax Court Rules & Procedures 201(b) (stating that the Tax Court can require a practitioner "to furnish a statement, under oath, of the terms and circumstances of his or her employment in any case.")

[120] American Bar Association, Tax Section, Letter to Tax Court Chief Judge Foley, June 1, 2020.

[121] Tax Court Rules & Procedures 24(g)(2)(A).

[122] Section 7430(a).

[123] Section 7430(c)(4)(E)(i); Reg. 301.7430-7(a); Reg. 301.7430-7(b)(1).

[124] BASR Partnership v. United States, 130 Fed. Cl. 286, 119 AFTR2d 2017-614 (Fed. Cl. Ct. 2017); BASR Partnership v. United States, 915 F.3d 771 (CA-F.C., 2019); Hurford Investments No. 2, Ltd., Docket No. 23017-11, Tax Court Order, 12/21/18; Hurford Investments No. 2. Ltd., Tax Court Docket No. 23017-11, Order dated September 11, 2019.

> the [SCET] at issue to any investor or partner? If so, describe the nature and dates of that involvement.
>
> Identify all written tax opinions provided to the partnership or any partner in connection with the [SCET] at issue, including the date of the opinion and the individuals or firms who authored or contributed to the opinion. Identify the relationship, if any, between the individuals and firms identified and [insert name of defense representative]. Provide copies of all such written tax opinions.
>
> State whether [insert name of defense representative] organized, designed, promoted, or was otherwise involved in a different [SCET] or other real property charitable contribution transaction implemented by the partnership or its partners prior to [the year under audit]. Provide a description of all such transactions and identify the entities used by the partnership or its partners to carry out the transactions. Include all such transactions that were substantially similar to those described in IRS Notice 2017-10.

Why is the Revenue Agent making such inquiries? The answer is at least four-fold. First, the IRS is probing to determine if there is a "conflict of interest," which would render the defense representative ineligible to participate in the audit. Circular 230, which governs the behavior of various tax professionals before the IRS, generally provides that a practitioner shall not represent a client if (i) such representation will be directly adverse to another client, or (ii) there is a significant risk that the representation of one or more clients will be materially limited by the practitioner's personal interest or by his or her responsibilities to another client, a former client, or anyone else.[117]

Second, as explained above, the IRS is seeking ways to argue that the attorney-client privilege or FATP has been waived, such that it can access otherwise confidential communications between attorneys, accountants, potential partners, landowners, appraisers, experts, and others with respect to the donation of the conservation easement, valuation, and tax positions.[118]

Third, the IRS is playing the long game, creating the record necessary for the IRS to file a Motion to Disqualify Opposing Counsel during the Tax Court proceeding based on a couple theories. For instance, the IRS might contend that tax defense counsel has an insurmountable conflict of interest. The Tax Court Rules generally state that if an attorney was involved in planning or promoting a transaction, or if an attorney represents more than one person with differing interests with respect to any issue in a case, then he or she must either secure informed written consent from the affected clients, withdraw from the case, or take whatever other steps are necessary to obviate a conflict of interest.[119] Alternatively, the IRS might argue that, if tax defense counsel supposedly cured the problem by acquiring written consent from the affected parties, then he or she cannot hide behind the attorney-client privilege to protect all communications, with all clients, in all proceedings. The Tax Section of the American Bar Association recently underscored this issue when commenting on proposed changes to the Tax Court Rules:

> Counsel who was involved in planning, promoting, or operating an entity is sometimes the same counsel defending that transaction at the . . . examination stage, then at the . . . Independent Office of Appeals stage, and then before the Tax Court. This representation generally creates a conflict of interest between the lawyer and the client, including a possible conflict between the client and the lawyer's own self-interest. The conflict may be waivable with informed consent or it may not be waivable . . . . The [Tax] Section recommends that the Court provide safeguards when inquiring as to the circumstances of a waiver of a conflict of interest to ensure that compliance with Rule 24(g) does not come at the expense of either the client's attorney-client privilege protections or the confidentiality of client information.[120]

Finally, the IRS might contend that tax defense counsel is disqualified from defending the partners in Tax Court because he or she "is likely to be a necessary witness."[121]

The IRS has recently started arguing that many SCETs are so similar in fundamental ways that the Tax Court should deprive the partnerships of separate trials and their chance to have justice focused on just one situation in isolation.

Challenging Eligibility to Make Qualified Offers

Section 7430 generally provides that the "prevailing party" in any administrative proceeding before the IRS, or in any litigation that is brought by or against the U.S. government in connection with the determination, collection, or refund of any tax, penalty, or interest may be awarded reasonable administrative and/or litigation costs.[122] There is a lesser known, but often more effective, way for taxpayers to obligate the government to pay: making a "qualified offer." A taxpayer is treated as the "prevailing party" if the taxpayer's liability, as ultimately determined by a court, is the same as or less than the liability would have been if the government had accepted the qualified offer.[123] Stated differently, if the IRS ignores or rejects a qualified offer, the case goes to trial, and the court rules that the taxpayer's liability is equal to or less than the amount in the earlier qualified offer, then the IRS must reimburse the taxpayer's reasonable administrative and/or litigation costs.

Only two cases have addressed whether partnerships subject to the TEFRA proceedings, like most partnerships engaged in SCETs or SSTs, are able to make qualified offers.[124] Just one of these cases yielded a decision with precedential value, and it explained that TEFRA partnerships *are entitled* to file

qualified offers.[125] Despite the fact that both the Court of Federal Claims and the Federal Circuit Court of Appeals have supported the notion that partnerships can make qualified offers, and despite the fact that the contrary decisions by the Tax Court were issued in the form of non-precedential "Orders," the IRS seems entrenched in its traditional position, arguing as recently as September 2020, in a pending Tax Court case, that TEFRA partnerships are ineligible to file qualified offers, period.

In the relevant case, the partnership offered to settle based on the value of the conservation easement, as determined by the IRS's own appraiser during the audit, and as asserted by the IRS as one of its positions in the FPAA. The IRS's appraiser had accepted 84 percent of the value originally claimed by the partnership on its relevant Form 1065. Nevertheless, citing to a supposed technical flaw in the Deed, the IRS later issued an FPAA fully disallowing the easement-related deduction. In other words, in its FPAA, the IRS accepted 0 percent of the original value, not the 84 percent accepted by its own appraiser just months earlier.[126]

The partnership, recognizing the risks and costs associated with any Tax Court litigation regardless of how strong a case might be, proposed to conclude matters using the figures calculated by the IRS's appraiser. The partnership sent a qualified offer to the IRS. Did the IRS accept the offer, such that the IRS could immediately collect millions in tax revenue and interest, avoid spending significant taxpayer dollars in Tax Court litigation, reallocate its limited resources to other enforcement activities, and publicly label this as an IRS victory? No. Did the IRS outright reject the offer, as a confident party would do, thereby drawing a clear line in the sand as to when the fee-recoupment-clock started ticking? No. Instead, without mentioning the taxpayer-favorable decisions in the Court of Federal Claims and the Federal Circuit Court of Appeals, and without acknowledging that the Orders favoring the IRS in one Tax Court case have no precedential value, the IRS claimed that the settlement proposal by the partnership, grounded in the valuation by the IRS's own appraiser, did not constitute a "qualified offer." Below was the IRS's reasoning:

> In a TEFRA partnership proceeding, the tax treatment of a partnership item is determined at the partnership level. A reviewing court is not determining "the amount of the tax liability" (or a deficiency) of any partner, as would be necessary for the qualified offer rule to apply. After the TEFRA partnership proceeding concludes and become final, the tax liability of the partners can be determined at the partner level. It is in the partner-level proceedings (administrative and/or judicial) that

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the amount of a partner's tax liability is determined and in issue. Accordingly, a partnership cannot make a qualified offer in a partnership level proceeding under TEFRA because the qualified offer rule requires the judgment of the court to address the "liability of the taxpayer." The partnership is not a taxpayer, rather tax liabilities flow through to the partners, but the partners' liabilities are not at issue in the TEFRA proceeding.[127]

Trying to Consolidate Multiple Cases

Logic dictates that donations of conservation easements are all unique because they involve distinct properties, in multiple locations, with varying conservation purposes, proposing particular HBUs, relying on specialized data points to determine value, involving different partners, etc. The IRS has recently started challenging this stance, arguing that many SCETs are so similar in fundamental ways that the Tax Court should deprive the partnerships of separate trials and their chance to have justice focused on just one situation in isolation. To the disappointment of taxpayers, the Tax Court has accepted the IRS's reasoning in at least one recent case.

Specifically, in *Green Valley Investors, LLC*, the IRS filed a Motion with the Tax Court, asking it to consolidate four different cases for all purposes, including discovery, stipulation of facts, pre-trial briefing, trial, post-trial briefing, and opinion. The partnerships opposed the IRS's Motion, of course, contending that the four cases are factually and legally different and, thus, should be considered individually by the Tax Court. Siding with the IRS, the Tax Court agreed to consolidate the cases on the following grounds: (i) all partnerships were organized in the same state; (ii) the TMP is the same in all cases; (iii) the same attorneys represent all partnerships; (iv) all partnerships are seeking trial in the same city; (v) all cases involve SCETs; (vi) the legal issues in each case are the same; (vii) the conservation easements were all donated to the same land trust; (viii) all four properties are located in the same county; and (ix) the partnerships and the IRS intend to call many of the same witnesses and introduce much of the same documentary evidence.[128]

Conclusion

It would be hard to credibly argue that the actions by the IRS in recent years, focused on SCET and SSTs, are not extreme. Whether they exceed the IRS's enforcement authority will be a question for the federal courts, as well as the court of public opinion. While that issue evolves, partnerships that engage in SCETs or SSTs must be prepared to defend themselves against a growing list of IRS attacks.

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[125] See Sheppard, "Partnerships, Qualified Offers, and Conservation Easement Disputes: Analyzing Problems with the IRS's Positions, Now and Later," ___ Journal Of Tax Practice & Procedure ___ (2020).

[126] Little Horse Creek Property, LLC, Tax Court Docket No. 7421-19.

[127] *Id.*, letter from IRS counsel dated September 4, 2020 (internal citations omitted).

[128] Green Valley Investors, LLC, Tax Court Docket Nos. 17379-19, 17380-19, 17381-19, and 17382-19, Order dated November 10, 2020.