Champions Retreat: Conservation Easements, "Significant" Preservation and Issues Unaddressed

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This is a noteworthy case, not so much for the issue it addresses, but rather for the long list of topics that the Tax Court did not cover.

Given the ease with which the IRS now identifies partnerships that make conservation easement donations, given the issuance by the IRS of Notice 2017-10 and the resulting characterization of many donations as "listed transactions," and given that the IRS now appears to systematically deny deductions and assert high penalties based on supposed technical violations and appraisal shortfalls, easement-related disputes, including Tax Court trials, will be on the rise. Among the likely attacks by the IRS in such cases is that the easements do not have a sufficient "conservation purpose." In other words, the IRS will argue that the taxpayers are entitled to a deduction of $0 because, well, the land in question is not worth saving, at least not when it involves payment by the U.S. government in the form of large tax benefits.

The IRS advanced this position in a recent case, *Champions Retreat Golf Founders, LLC.*[1] Those who merely skim the case will conclude, incorrectly, that it constitutes just another instance of the Tax Court deciding that taxpayers cannot double dip, first by building a luxurious, private, for-profit, operating golf course, and then by claiming significant tax deductions on grounds that such course is good for nature, the general public, or both. This article demonstrates that *Champions Retreat* offers the easement industry many more lessons than that.

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Overview of Conservation Easements and Pertinent Issues

In order to understand *Champions Retreat* and some of its interesting issues, one must first have a basic understanding of the applicable rules and terminology.

What is a Qualified Conservation Contribution?

Taxpayers generally may deduct the value of a charitable donation that they make during a year.[2] However, taxpayers are not entitled to deduct a donation of property if it consists of less than their entire interest in such property.[3] One important exception is that taxpayers can deduct a donation of a partial interest in property (instead of an entire interest) provided that it constitutes a "qualified conservation contribution."[4] To meet this critical definition, taxpayers must show that they are (i) donating a qualified real property interest ("QRPI"), (ii) to a qualified organization, (iii) exclusively for conservation purposes.[5]

> **Taxpayers can deduct a donation of a partial interest in property (instead of an entire interest) provided that it constitutes a "qualified conservation contribution."**

What is a QRPI?

A QRPI can be one of several things, including a restriction, granted in perpetuity, on the use of a particular piece of real property.[6] These can be known by many names, among them "conservation easement," "conservation restriction," and "perpetual conservation restriction."[7] Regardless of what you call them, QRPIs must be based on legally enforceable restrictions (such as those memorialized in a Deed of Conservation Easement filed in the appropriate public record) that will prevent uses of the property, forever, which are inconsistent with the conservation purpose of the donation.[8] Stated differently, a donation is not treated as "exclusively for conservation purposes," unless the conservation purposes are "protected in perpetuity."[9]

The IRS will not disallow a tax deduction merely because the interest granted to the charitable organization might be defeated in the future as a result of some act or event, provided that, on the date that the easement is granted, it appears that the possibility that such act or event will take place is "so remote as to be negligible."[10] For instance, the fact that state law requires use restrictions, like conservation easements, to be rerecorded every 30 years to remain in force does not, alone, make easements non-perpetual.[11] Another example is where a taxpayer donates land to a city government for as long as such land is used as a park. If, as of the date of the donation, the city plans to use the land for a park, and the possibility that it could be used for another purpose is negligible, then the donation is considered perpetual and the taxpayer is entitled to a deduction.[12]

For What Purposes Can Land Be Conserved?

A contribution has an acceptable "conservation purpose" if it meets one or more of the following requirements: (i) It preserves land for outdoor recreation by, or the education of, the general public; (ii) It protects 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.[13] These conservation categories are examined further below.

Outdoor recreation by, or the education of, the general public. Examples of conservation purposes falling into this category include preservation of a water area for public boating or fishing and preservation of property for a public nature or hiking trail.[14] Such preservation will be insufficient, though, unless the recreation or education is "for the substantial and regular use of the general public."[15]

Relatively natural habitat of fish, wildlife, plants, or similar ecosystem. When analyzing natural habitats, the fact that they have been altered to some extent by human activity will not result in the disallowance of the tax deduction if the fish, wildlife, and/or plants continue to exist there in a "relatively natural state."[16] Preservation of a lake formed by a man-made dam or a salt pond formed by a man-made dike would still have an acceptable conservation purpose, provided that such lake or pond were a nature feeding area for a wildlife community that entailed "rare, endangered, or threatened native species."[17]

"Significant" habitats and ecosystems include, but are not limited to, (i) habitats for rare, endangered, or threatened species of animal, fish, or plants, (ii) natural areas that represent high quality examples of a terrestrial or aquatic community, such as islands that are undeveloped or not intensely developed where the coastal ecosystem is relatively intact, and (iii) natural areas that are included in, or contribute to, the ecological viability of a local, state, or national park, nature preserve, wildlife refuge, wilderness area, or other similar conservation area.[18]

The fact that public access to the conserved property is limited does not trigger a disallowance of the charitable deduction related to the easement.[19] Indeed, taking it a step further, the regulations state that "a restriction on all public access" to the habitat of a threatened native species would not cause an easement donation to be non-deductible.[20]

The IRS provides its personnel the following guidance in the Conservation Easement Audit Techniques Guide ("ATG") regarding easements designed to protect a natural habitat:

The determination of what specifically meets this conservation purpose test is based on the facts and circumstances of the specific case. In *Glass v. Commissioner*, 124 T.C. 258 (2005), *aff'd*, 471 F.3d 698 (6th Cir. 2006), the taxpayer donated two easements that restricted the development of a fraction of a 10-acre parcel of residential property. The Tax Court held that the conservation purpose of natural habitat was satisfied where the conservation easements were placed on property that has possible places to create or promote a relatively natural habitat of plants or wildlife, and the easements were held exclusively for conservation purposes as required by IRC § 170(h)(5) because they were granted to a land trust in perpetuity.

However, in *Atkinson v. Commissioner*, TCM 2015-236, involving conservation easements over operating golf courses, the Tax Court distinguished the *Glass* case and held that the easements did not protect a relatively natural habitat. In so holding, the Tax Court reasoned, among other things, that the golf courses' use of pesticides and other chemicals could injure or destroy the ecosystem of the easement property. The Tax Court's reliance on the [IRS's] expert reports and testimony in *Atkinson* demonstrates the importance of expert evidence in these types of "protecting natural habitat" cases.[21]

Open space for scenic enjoyment, plus significant public benefit. The donation of a QRPI to preserve open space (including farmland and forest land) will meet the conservation purposes test, if such preservation is for the scenic enjoyment of the general public *and* will yield a significant public benefit.[22]

Open space for scenic enjoyment: Generally speaking, preservation belongs here if development of the property would either (i) impair the "scenic character" of the local rural or urban landscape, or (ii) interfere with a "scenic panorama" that can be enjoyed from a park, nature preserve, road, body of water, trail, or historic structure or land, and such area or transportation way is open to, or utilized by, the public.[23]

The regulations indicate that this notion of "scenic enjoyment" will be based on all the facts and circumstances relevant to a particular easement donation.[24] They also recognize that regional variations (in terms of topography, geology, biology, and cultural and economic conditions) call for flexibility in analyzing "scenic enjoyment."[25] The following factors, among others, might be considered: (i) The compatibility of the land use with other land in the vicinity; (ii) The degree of contrast and variety provided by the visual scene; (iii) The openness of the land; (iv) Relief from urban closeness; (v) The harmonious variety of shapes and textures; (vi) The degree to which the land use maintains the scale and character of the urban landscape to preserve open space, visual enjoyment, and sunlight for the surrounding area; (vii) The consistency of the proposed scenic view with a methodical state scenic identification program, such as a state landscape inventory; and (viii) The consistency of the proposed scenic view with a regional or local landscape inventory made pursuant to a sufficiently rigorous review process, especially if the donation is endorsed by an appropriate state or local governmental agency.[26]

To satisfy this conservation purpose, it suffices that there is visual (instead of physical) access to the property or across the property by the general public.[27] Moreover, the regulations indicate that "the entire property need not be visible to the public . . . although the public benefit from the donation may be insufficient to qualify for a deduction if only a small portion of the property is visible to the public."[28]

A tax deduction for preservation of open space for scenic enjoyment of the general public will be disallowed if the easement permits a "degree of intrusion or future development that would interfere with the essential scenic quality of the land . . . ."[29]

Significant public benefit: All contributions made to preserve open space must yield a "public benefit," and such benefit must be "significant."[30] One must examine all the relevant facts and circumstances to determine whether safeguarding open space will trigger a "public benefit."[31] The IRS considers the following 11 items in making a determination: (i) the uniqueness of the property to the area, (ii) the intensity of land development in the vicinity of the property (both existing development and foreseeable trends of development), (iii) the consistency of the proposed open space use with public programs (whether federal, state, or local) for conservation in the region, including programs for outdoor recreation, irrigation or water supply protection, water quality maintenance or enhancement, flood prevention and control, erosion control, shoreline protection, and protection of land areas included in, or related to, a government approved master plan or land management area, (iv) the consistency of the proposed open space use with existing private conservation programs in the area, as evidenced by other land, protected by easement or fee ownership, in close proximity, (v) the likelihood that development of the property would lead or contribute to degradation of the sce-

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1 TCM 2018-146.
2 Section 170(a)(1); Reg. 1.170A-1(a).
3 Section 170(f)(3)(A); Reg. 1.170A-7(a)(1).
4 Section 170(f)(3)(B)(iii); Reg. 1.170A-7(a)(5).
5 Section 170(h)(1).
6 Section 170(h)(2); Reg. 1.170A–14(a); Reg. 1.170A–14(b)(2).
7 Reg. 1.170A–14(b)(2).
8 Reg. 1.170A–14(g)(1); Turner, 126 TC 299, 311 (2006).
9 Section 170(h)(5)(A); Reg. 1.170A-14(e)(1).
10 Reg. 170A–14(g)(3).
11 *Id.*
12 Reg. 170A–1(e).
13 Section 170(h)(4)(A); Reg. 170A–14(d)(1); S. Rept. 96–1007, at 10 (1980).
14 Reg. 170A–14(d)(2)(i).
15 Reg. 170A–14(d)(2)(ii).
16 Reg. 170A–14(d)(3)(i).
17 *Id.*
18 Reg. 170A–14(d)(3)(ii).
19 Reg. 170A–14(d)(3)(iii).
20 *Id.*
21 Internal Revenue Service, Conservation Easement Audit Techniques Guides (Rev. 11/4/2016), pg. 18.
22 Reg. 1.170A–14(d)(4)(i)(B).
23 Reg. 1.170A–14(d)(4)(ii)(A).
24 *Id.*
25 *Id.*
26 *Id.*
27 Reg. 1.170A–14(d)(4)(ii)(B).
28 *Id.*
29 Reg. 1.170A–14(d)(4)(v).
30 Reg. 1.170A–14(d)(4)(iv)(A).
31 *Id.*

nic, natural, or historic character of the area, (vi) the opportunity for the general public to use the property or to appreciate its scenic values, (vii) the importance of the property in preserving a local or regional landscape or resource that attracts tourism or commerce to the area, (viii) the likelihood that the donee will acquire equally desirable and valuable substitute property or property rights, (ix) the cost to the donee of enforcing the terms of the conservation restriction, (x) the population density in the area of the property, and (xi) the consistency of the proposed open space use with a legislatively mandated program identifying particular parcels of land for future protection.[32]

The preservation of an ordinary tract of land would not, alone, yield a "significant public benefit."[33] However, preservation, in conjunction with other factors, or preservation of a unique land area for public use, would create a significant public benefit.[34] The regulations contain the following example on this point:

> [T]he preservation of a vacant downtown lot would not by itself yield a significant public benefit, but the preservation of the downtown lot as a public garden would, absent countervailing factors, yield a significant public benefit. The following are other examples of contributions which would, absent countervailing factors, yield a significant public benefit: The preservation of farmland pursuant to a state program for flood prevention and control; the preservation of a unique natural land formation for the enjoyment of the general public; the preservation of woodland along a public highway pursuant to a government program to preserve the appearance of the area so as to maintain the scenic view from the highway; and the preservation of a stretch of undeveloped property located between a public highway and the ocean in order to maintain the scenic ocean view from the highway.[35]

The IRS provides another example in the ATG, as follows:

> Significant public benefit includes the preservation of a unique natural land formation for the enjoyment of the general public or the preservation of woodland along a well-traveled public highway to preserve the appearance of the area so as to maintain the scenic view from the highway.[36]

The fact that public access to the conserved property is limited does not trigger a disallowance of the charitable deduction related to the easement.

The regulations explain that, because the degrees of "scenic enjoyment" offered by a variety of open space easements are subjective and are not as easily delineated as are increasingly specific levels of governmental policy, the "significant public benefit" of preserving a "scenic view" must be independently established in all cases.[37]

Open space pursuant to a government conservation policy, plus significant public benefit. Donating a QRPI to preserve open space (including farmland and forest land) will have an acceptable conservation purpose if such preservation is done pursuant to a clearly delineated federal, state, or local governmental conservation policy *and* will yield a significant public benefit.[38]

Open space pursuant to a government conservation policy: The purpose of this standard is to protect the types of property identified by representatives of the general public (i.e., government officials) as worthy of preservation or conservation.[39] In terms of degree, the regulations state that a "general" declaration of conservation goals by a "single" government official or legislative body is not enough, but it is not necessary that a governmental conservation policy be a "certification program" that identifies particular properties.[40] A taxpayer will meet this standard if it makes a donation that furthers a specific, identified conservation project, including, but not limited to, (i) preservation of land within a state or local landmark district that is locally recognized as being significant to that district, (ii) preservation of a wild or scenic river, (iii) preservation of farmland pursuant to a state program for flood prevention and control, or (iv) protection of the scenic, ecological, or historic character of land that is contiguous to, or an integral part of, the surroundings of existing recreation or conservation sites.[41]

A conservation program does not need to be funded in order to satisfy this standard; however, it must involve a significant commitment by the government regarding the program.[42] An example would be a program granting preferential taxes or zoning for property considered protection-worthy.[43]

The fact that a federal, state, or local government agency (or a related commission, authority, or body) has accepted an easement tends to demonstrate a clearly delineated governmental policy, but it, alone, is insufficient.[44] The regulations underscore that a rigorous review process by the governmental agency supports the existence of a clearly delineated governmental policy.[45] For instance, in a state where the government has formed an environmental trust to accept property that meets certain conservation purposes, and such trust employs a review process requiring approval from the highest officials in the state, acceptance of a property by the trust fortifies the necessary governmental policy.[46]

Limited public access to the property would not cause the tax deduction to be disallowed, unless the conservation purpose of the donation would be "undermined or frustrated" as a result of such access restrictions.[47] For example, a donation in conformity with a governmental policy to protect the "scenic character" of land near a river necessitates public access to the same extent as a donation aimed at preserving open space (including farmland and forest land) for the scenic enjoyment of the general public.[48]

According to the regulations, no tax deduction for preservation of open space pursuant to a clearly delineated governmental conservation policy will be permitted if the easement allows a "degree of intrusion or future development that would interfere with the . . . governmental conservation policy that is being furthered by the donation."[49]

Significant public benefit: As explained above, all donations of QRPI made to preserve open space, including those done pursuant to a governmental conservation policy, must yield a "significant public benefit."[50]

The regulations acknowledge that making a donation in accordance with a "clearly delineated governmental policy," and ensuring that such donation generates a "significant public benefit," are two separate requirements, which must be independently met.[51] The more specific the governmental policy, the more likely the governmental decision to accept an easement, alone, will tend to show that a "significant public benefit" exists.[52] Below is an example of these concepts:

> [W]hile a statute in State X permitting preferential assessment for farmland is, by definition, governmental policy, it is distinguishable from a state statute, accompanied by appropriations, naming the X River as a valuable resource and articulating the legislative policy that the X River and the relatively natural quality of its surrounding be protected. On these facts, an open space easement on farmland in State X would have to demonstrate additional factors to establish "significant public benefit." The specificity of the legislative mandate to protect the X River, however, would by itself tend to establish the significant public benefit associated with an open space easement on land fronting the X River.[53]

Finally, the regulations recognize that, in certain situations, an open space easement might be for "scenic enjoyment" ***and*** be done pursuant to a "clearly delineated governmental policy."[54] An example would be the preservation of a scenic view that has been identified as part of a scenic landscape inventory by a rigorous governmental review process.[55]

Historic preservation. The last category of conservation purposes is historic preservation. Generally, the donation of a QRPI to preserve a "historically important land area" or a "certified historic structure" is acceptable.[56] In cases where the preservation of a building or property within a "registered historic district" allows future development on the site, a tax deduction will be available only if the terms of the restrictions demand that such development conform to all standards (federal, state, and local) for construction or rehabilitation.[57]

In this context, the term "historically important land area" means (i) an independently significant land area including any related historic resources that meets the National Register Criteria for Evaluation, (ii) any land area within a registered historic district including any buildings on the land area that can reasonably be considered as contributing to the significance of the district, and (iii) any land area (including related historic resources) adjacent to a property listed individually in the National Register of Historic Places in a case where the physical or environmental features of the land area contribute to the historic or cultural integrity of the property.[58]

The term "certified historic structure" means any building, structure, or land area that is (i) listed in the National Register, or (ii) located in a registered historic district and is certified by the Secretary of the Interior to the Secretary of the Treasury as being of historic significance to the district.[59] For these purposes, the term "structure" encompasses any structure, regardless of whether it is depreciable, such that easements on private residences might qualify.[60] In terms of timing, the regulations state that a structure will be considered a "certified historic structure" if it was certified either when the transfer was made or by the deadline (including extensions) for filing the U.S. tax return of the donor for the taxable year in which the donation was made.[61]

In order to meet this conservation purpose, a certain amount of visual public access to the relevant property must exist.[62] When it comes to a "historically important land area," it is not necessary that the entire property be visible to the public, but the public benefit might be insufficient to qualify for a tax deduction if only a small portion of the property is visible.[63] In situations where the "certified historic structure" is not visible from a public way (because, for example, the structure is hidden from view by a wall or shrubbery, the structure is too far away, or interior characteristics and features of the structure are the subject of the easement), then the terms of the easement must be such that the general public is given the opportunity, on a regular basis, to view the characteristics and features of the property that are preserved to the extent consistent with the nature and condition of the property.[64]

In deciding the type and amount of public access required, the regulations identify several factors to consider, including (i) the historical significance of the donated property, (ii) the nature of the features that are the subject of the easement, (iii) the remoteness or acces-

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32 *Id.*
33 Reg. 1.170A-14(d)(4)(iv)(B).
34 *Id.*
35 *Id.*
36 Internal Revenue Service, Conservation Easement Audit Techniques Guides (Rev. 11/4/2016), pg. 20.
37 Reg. 1.170A-14(d)(4)(vi)(B).
38 Reg. 1.170A-14(d)(4)(i).
39 Reg. 1.170A-14(d)(4)(iii)(A).
40 *Id.*
41 *Id.*
42 *Id.*
43 *Id.*
44 Reg. 1.170A-14(d)(4)(iii)(B).
45 *Id.*
46 *Id.*
47 Reg. 1.170A-14(d)(4)(iii)(C).
48 *Id.*
49 Reg. 1.170A-14(d)(4)(v).
50 Reg. 1.170A-14(d)(4)(iv)(A).
51 Reg. 1.170A-14(d)(4)(vi)(A).
52 *Id.*
53 *Id.*
54 Reg. 1.170A-14(d)(4)(vi)(C).
55 *Id.*
56 Reg. 1.170A-14(d)(5)(i).
57 *Id.*
58 Reg. 1.170A-14(d)(5)(ii).
59 Reg. 1.170A-14(d)(5)(iii).
60 *Id.*
61 *Id.*
62 Reg. 1.170A-14(d)(5)(iv)(A).
63 *Id.*
64 *Id.*

sibility of the site of the donated property, (iv) the possibility of physical hazards to the public visiting the property, (v) the extent to which public access would be an unreasonable intrusion on any privacy interests of individuals living on the property, (vi) the degree to which public access would impair the preservation interests which are the subject of the donation, and (vii) the availability of opportunities for the public to view the property by means other than visits to the site.[65]

Normally, the amount of access granted to the public is determined with reference to the amount of access permitted by the terms of the easement document, as prepared by the donor, instead of the amount of access actually provided by the organization that received the easement.[66] If, however, the donor is aware of anything indicating that the amount of actual access that the easement recipient will provide the public is "significantly less" than the amount of access permitted under the easement document, then the amount of public access is determined with reference to the smaller amount.[67]

All contributions made to preserve open space must yield a "public benefit," and such benefit must be "significant."

Can Taxpayers Still Use the Protected Property?

A taxpayer can retain certain "reserved rights," still make a qualified conservation contribution, and thus qualify for the tax deduction. However, in keeping something for themselves, taxpayers must ensure that the reserved rights do not unduly conflict with the conservation purposes.[68] The IRS openly recognizes in the ATG that reserved rights are ubiquitous, explaining the following about taxpayer holdbacks:

> All conservation easement donors reserve some rights to the property. Depending on the nature and extent of these reserved rights, the claimed conservation purpose may be eroded or impaired to such a degree that the contribution may not be allowable. A determination of whether the reserved rights defeat the conservation purpose must be determined based on all the facts and circumstances.[69]

The ATG later provides some examples for IRS personnel about reserved rights, including the following:

> Taxpayers are permitted to reserve some development rights on a portion of the property, such as construction of additional homes or structures, installation of utilities, and building of fences or roads, provided that the conservation purposes are protected. Depending on the facts and circumstances, retention of these rights may result in disallowance [of the charitable contribution tax deduction related to the easement].[70]

The regulations provide yet more specifics about reserved rights and uses that might be inconsistent with the conservation purpose of an easement.

> [A] deduction will not be allowed if the contribution would accomplish one of the enumerated conservation purposes but would permit destruction of other significant conservation interests . . . . However, this requirement is not intended to prohibit uses of the property, such as selective timber harvesting or selective farming if, under the circumstances, those uses do not impair significant conservation interests . . . . A use that is destructive of conservation interests will be permitted only if such use is necessary for the protection of the conservation interests that are the subject of the contribution . . . . A donor may continue a pre-existing use of the property that does not conflict with the conservation purposes of the gift.[71]

What Is an Easement Worth?

Generally, a deduction for a charitable contribution is allowed in the year in which it occurs.[72] If the contribution consists of something other than money, then the amount of the contribution normally is the fair market value ("FMV") of the property at the time the taxpayer makes the donation.[73] For these purposes, the term FMV ordinarily means the price on which a willing buyer and willing seller would agree, with neither party being obligated to participate in the transaction, and with both parties having reasonable knowledge of the relevant facts.[74]

Reg. 1.170A-14(h)(3) ("Easement-Valuation-Methods Regulation") provides special rules for calculating a deduction stemming from the donation of a conservation easement, which is a partial (not a full) interest in property. The relevant portion of the Easement-Valuation-Methods Regulation, broken down to enhance readability, is set forth below:[75]

> [<u>Sentence 1</u>] The value of the contribution under Section 170 in the case of a charitable contribution of a perpetual conservation restriction is the [FMV] of the perpetual conservation restriction at the time of the contribution.
>
> [<u>Sentence 2</u>] If there is a substantial record of sales of easements comparable to the donated easement (such as purchases pursuant to a governmental program), the [FMV] of the donated easement is based on the sales prices of such comparable easements.
>
> [<u>Sentence 3</u>] If no substantial record of market-place sales is available to use as a meaningful or valid comparison, as a general rule (but not necessarily in all cases) the [FMV] of a perpetual conservation restriction is equal to the difference between the [FMV] of the property it encumbers *before* the granting of the restriction and the [FMV] of the encumbered property *after* the granting of the restriction.
>
> [<u>Sentence 4</u>] The amount of the deduction in the case of a charitable contribution of a perpetual conservation restriction covering a portion of the contiguous property owned by a donor and the donor's family (as defined in Section 267(c)(4)) is the difference between the [FMV] of the entire contiguous parcel of property before and after the granting of the restriction.

> [Sentence 5] If the granting of a perpetual conservation restriction . . . has the effect of increasing the value of any other property owned by the donor or a related person, the amount of the deduction for the conservation contribution shall be reduced by the amount of the increase in the value of the other property, whether or not such property is contiguous.

The IRS provides the following summary and hints about valuation to its personnel in the ATG. It explains that the best evidence of FMV of an easement is the sale price of easements comparable to the easement in question, but, "in most instances, there are no comparable easement sales."[76] Appraisers, therefore, often must use the before-and-after method. The ATG acknowledges that this effectively means that an appraiser must determine the highest and best use ("HBU") *and* the corresponding FMV of the relevant property *twice:* (i) first, without regard to the easement, which generates the before value, and (ii) again, taking into account the restrictions on the property imposed by the easement, which creates the after value.[77]

As indicated in the preceding paragraph, in deciding the FMV of property, appraisers and courts must take into account not only the current use of the property, but also its HBU.[78] A property's HBU is the highest and most profitable use for which it is adaptable and needed, or likely to be needed, in the reasonably near future.[79] The term HBU has also been defined as the reasonably probable use of vacant land or improved property that is physically possible, legally permissible, financially feasible, and maximally productive.[80] Importantly, valuation does not depend on whether the owner has actually put the property to its HBU.[81] The HBU can be any realistic, objective potential use of the property.[82]

The Easement-Valuation-Methods Regulation provides additional guidance in situations where the appraiser uses the before-and-after method, described in Sentence 3, above. It states the following:[83]

> If before and after valuation is used, the [FMV] of the property before contribution of the conservation restriction must take into account not only the current use of the property but also an objective assessment of how immediate or remote the likelihood is that the property, absent the restriction, would in fact be developed, as well as any effect from zoning, conservation, or historic preservation laws that already restrict the property's potential highest and best use.
>
> Further, there may be instances where the grant of a conservation restriction may have no material effect on the value of the property or may in fact serve to enhance, rather than reduce, the value of the property. In such instances, no deduction would be allowable.
>
> In the case of a conservation restriction that allows for any development, however limited, on the property to be protected, the [FMV] of the property after contribution of the restriction must take into account the effect of the development. . . .
>
> Additionally, if before and after valuation is used, an appraisal of the property after contribution of the restriction must take into account the effect of restrictions that will result in a reduction of the potential [FMV] represented by [HBU] but will, nevertheless, permit uses of the property that will increase its [FMV] above that represented by the property's current use.

The regulations contain a dozen illustrations of how values of donated property should be determined, at least from the IRS's perspective. Below is a simple example in the conservation easement context:

> C owns Greenacre, a 200-acre estate containing a house built during the colonial period. At its [HBU], for home development, the [FMV] of Greenacre is $300,000. C donates an easement (to maintain the house and Greenacre in their current state) to a qualifying organization for conservation purposes. The [FMV] of Greenacre after the donation is reduced to $125,000. Accordingly, the value of the easement and the amount eligible for a deduction under Section 170(f) is $175,000 ($300,000 less $125,000).[84]

How Do Taxpayers Prove the Condition of the Property at Donation Time?

In situations involving the donation of a QRPI where the donor reserves certain rights whose exercise might impair the conservation purposes, the tax deduction will not be allowed unless the donor "makes available" to the easement-recipient, before the donation is made, "documentation sufficient to establish the condition of the property at the time of the gift."[85] This is generally called the Baseline Report.

The Baseline Report "may" (but not "must") include (i) the appropriate survey maps from the U.S. Geological Survey, showing the property line and other contiguous or nearby protected areas, (ii) a map of the area drawn to scale showing all existing man-made improvements or incursions (e.g., roads, buildings, fences, or gravel pits), vegetation and identification of flora and fauna (e.g., locations of rare species, animal breeding and roosting areas, and migration routes), land use history, and distinct natural features, (iii) an aerial photograph of the property at an appro-

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65 Reg. 1.170A–14(d)(5)(iv)(B).

66 Reg. 1.170A–14(d)(5)(iv)(C).

67 *Id.*

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

69 Internal Revenue Service, Conservation Easement Audit Techniques Guide (Rev. 11/4/2016), pg. 23.

70 Internal Revenue Service, Conservation Easement Audit Techniques Guide (Rev. 11/4/2016), pg. 63.

71 Reg. 1.170A-14(e)(2) and (3).

72 Section 170(a)(1).

73 *Id.*; Reg. 1.170A-1(c)(1).

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

75 Reg. 1.170A-14(h)(3)(i).

76 Internal Revenue Service, Conservation Easement Audit Techniques Guide (Rev. 11/4/2016), pg. 41.

77 Internal Revenue Service, Conservation Easement Audit Techniques Guide (Rev. 11/4/2016), pg. 41.

78 Stanley Works & Subs., 87 TC 389, 400 (1986); Reg. 1.170A–14(h)(3)(i).

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

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

81 *Id.*, page 657.

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

83 Reg. 1.170A-14(h)(3)(ii).

84 Reg. 1.170A-14(h)(4). Example 7.

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

priate scale taken as close as possible to the date of the donation, and (iv) on-site photographs taken at appropriate locations on the property.[86] If the easement contains restrictions regarding a particular natural resource, such as water or air quality, then the condition of the resource at or near the time of the donation must be established.[87] The Baseline Report "must be accompanied by a statement signed by the donor and a representative of the [easement-recipient] clearly referencing the [Baseline Report] and in substance" confirming that the property description and the natural resources inventory are accurate.[88] The ATG seconds this notion, stating that "[t]he baseline study must be signed by the donor and donee."[89]

The fact that a federal, state, or local government agency (or a related commission, authority, or body) has accepted an easement tends to demonstrate a clearly delineated governmental policy, but it, alone, is insufficient.

How Do Taxpayers Claim an Easement-Related Tax Deduction?

Properly claiming the tax deduction triggered by an easement donation is, well, 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 easement-recipient is a "qualified organization," (iii) obtain a timely Baseline Report, generally from the easement-recipient, describing the condition of the property at the time of the donation and the reasons for which it is worthy of protection, (iv) complete a Form 8283 (Noncash Charitable Contributions) and have it executed by all relevant parties, including the taxpayer, appraiser, and easement-recipient, (v) assuming that the taxpayer is a partnership, file a timely Form 1065, enclosing Form 8283 and the qualified appraisal, (vi) receive from the easement-recipient a contemporaneous written acknowledgement, both for the easement itself and for any endowment/stewardship fee donated to finance the perpetual protection of the property, (vii) ensure that all mortgages on the relevant property have been subordinated before granting the easement, and (viii) send to all partners their Schedule K-1 (Partner's Share of Income, Deductions, Credits, etc.) and a copy of the Form 8283.[90]

Analysis of the Case

The main facts, legal/tax positions, and decisions by the Tax Court in *Champions Retreat* are discussed below.[91]

Background and Main Events

Champions Retreat Golf Founders, LLC ("Partnership") acquired about 463 acres in 2002 for purposes of building a golf course. The property is located near Augusta, Georgia, and located along the Savannah River and an offshoot, the Little River. Sumter National Forest is located on the other side of the Savannah River, about 700 feet away.

The Partnership initially raised $13.2 million to build the golf course by selling 66 residential lots in a development called Founders Village. It borrowed heavily, too. Each lot in Founders Village came with a lifetime membership at the golf club. Construction of the golf club was completed in June 2005. It is located in a development called the Reserve, which is private, accessible only through a security gate manned around the clock. The golf club occupies about 366 of the 463 acres, and features three nine-hole courses, a pro shop, restaurant, locker room, cart storage facility, driving range, and paved parking lot.

The Partnership was not profitable initially. Therefore, after learning of the decision in *Kiva Dunes, LLC,* where the Tax Court upheld a charitable tax deduction stemming from the placement of a conservation easement on an operating golf course, the accountant for the Partnership proposed doing the same thing on the entire property, including the golf course.[92] The idea was to attract additional investment, such that the Partnership could reduce the balance of its construction-related debt from years earlier.

Apparently, in exploring this idea, a conservation biologist with the land conservancy to which the easement was eventually granted ("Land Trust") did an initial survey of the property in late 2009, finding that it was worthy of conservation.

The financing was done through Kiokee Creek Preservation Partners, LLC ("Kiokee Creek"), a partnership formed in September 2010. Most of the partners in Kiokee Creek, who contributed total capital of $2.7 million, were clients of the accountant. These funds were then contributed to the Partnership in exchange for a 15% ownership interest in the Partnership and a special allocation of the charitable deduction.

The conservation biologist with the Land Trust analyzed the property again in November 2010, shortly after the money had been raised. He concluded, as he had earlier, that the property, including the golf club, had characteristics making it conservation-worthy.

On December 16, 2010, the Partnership donated an easement to the Land Trust that covered about 349 acres, the Deed of Conservation Easement was properly recorded soon thereafter, on December 29, 2010, and the Land Trust provided the contemporaneous written acknowledgement of the easement donation on February 7, 2011. The 349 acres donated covered 25 of the 27 total holes on the three golf courses, most of the remaining two holes, and the driving range. It did not cover the pro shop, restaurant, locker room, cart storage facility, paved parking lot, or various residential developments nearby.

The conservation biologist from the Land Trust returned to the property a third time, on May 12, 2011, which was more than four months after the Partnership had granted the easement. The idea, apparently, was for the biologist to have an opportunity to observe the natural features of the property at different times/seasons throughout the year. All three visits by the biologist were cited in his Baseline Report, even though the last one occurred after the placement of the easement.

The Deed of Conservation Easement identified three conservation purposes, namely, (i) protection of a relatively natural habitat of fish, wildlife, or plants, or a similar ecosystem, (ii) preservation of open space for the scenic enjoyment of the general public, while yielding a significant public benefit, and (iii) preservation of open space pursuant to a federal, state, or local governmental conservation policy, while yielding a significant public benefit.

The Deed of Conservation Easement imposed several restrictions on the Partnership with respect to the golf course. These consisted of the following. First, it restricted the ways in which the Partnership could use the easement area, including the types of structures that it could build. Second, it required the Partnership to use "the best environmental practices then prevailing in the golfing industry" in maintaining the golf club, to keep records relating to such maintenance, and to submit an annual maintenance report to the Land Trust. Third, it prevented the Partnership from removing surface or ground water, live or dead trees, or any other raw materials. Fourth, it stopped the Partnership from placing signs, outdoor advertising, or any new roads. Fifth, it forced the Partnership not to manipulate a creek or pond, allow chemical discharge to flow into a creek or pond, clear vegetation within 100 feet of a creek or pond, or cause soil erosion or sedimentation into a creek or pond. Sixth, it prohibited the Partnership from dividing the easement area into lots. Finally, it obligated the Partnership to notify the Land Trust in writing before it exercises any reserved right in a way that might impair the conservation purposes.

As is true with most cases of easements, there were several exceptions to the restrictions, described above, in the Deed of Conservation Easement. For example, the Partnership can build structures covering up to 10,000 square feet on the easement area, and it can remove trees and vegetation, and it can shift features of the golf courses (including fairways and greens), as part of the building process. Moreover, the Partnership has the right to widen by 10 feet and then pave an existing road. The Partnership can also remove any tree, whether it be standing or fallen, that is within 30 feet of a playable area on the golf course. Lastly, and importantly to the case, the Partnership can maintain in manicured condition all golf course play areas, including the lakes, creeks, ponds, and other water areas that are an integral part of the golf course. The list of reserved rights entails the ability to use chemicals.

The Tax Dispute Begins

The Partnership claimed a charitable deduction of $10,427,435 on its 2010 Form 1065, 98.8% of which was allocated to Kiokee Creek, even though it held only a 15% ownership interest. An audit ensued, at the end of which the IRS issued a notice of Final Partnership Administrative Adjustment ("FPAA") fully disallowing the charitable deduction on two main grounds. The IRS first claimed that the Partnership had one or more technical violations of the requirements under Section 170. Even if the Partnership complied with Section 170, the IRS claimed that the deduction was worthless because the Partnership had failed to establish that the value exceeds $0.

Decision by the Tax Court

The Partnership filed a timely Petition disputing the FPAA, the case was litigated, and the Tax Court rendered its decision. Its analysis was solely focused on one issue; that is, whether the conservation easement meets at least one of the acceptable conservation purposes. As explained above, the Partnership claimed that the easement triggered a tax deduction because it (i) protects a relatively natural habitat of fish, wildlife, or plants, or a similar ecosystem, (ii) preserves open space for the scenic enjoyment of the general public, while yielding a significant public benefit, and (iii) preserves open space pursuant to a federal, state, or local governmental conservation policy, while yielding a significant public benefit. First the IRS, and then the Tax Court, disagreed with these assertions by the Partnership.

Relatively natural habitat. The regulations indicate that significant habitats and ecosystems encompass, among other things, (i) habitats for rare, endangered, or threatened species of animal, fish, or plants, (ii) natural areas that represent high quality examples of a terrestrial or aquatic community, and (iii) natural areas that are included in, or contribute to, the ecological viability of a park, nature preserve, wildlife refuge, wilderness area, or other similar conservation area.[93]

Rare, endangered, or threatened species: The Partnership argued that the easement area provides a habitat for several species, including birds, the southern fox squirrel, and the denseflower knotweed. The Tax Court agreed with the Partnership in that the concept of "rare, endangered, or threatened," which is not specifically defined in the regulations under Section 170, is not limited to those species listed under the Endangered Species Act of 1973.[94] After the Tax Court buoyed the spirits of the Partnership, it quickly dashed them, stating: "Nonetheless, we do not find a *sufficient presence* of rare, endangered, or threat-

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86 *Id.*

87 *Id.*

88 *Id.*

89 Internal Revenue Service, Conservation Easements Audit Techniques Guide (Rev. 11/4/2016), pg. 24.

90 See Internal Revenue Service, Conservation Easement Audit Techniques Guide (Rev. 11/4/2016), pgs. 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.

91 The author reviewed the following documents in preparing this portion of the article: Petition filed 2/23/2015; Answer filed 4/29/2015; Pre-Trial Memo for Respondent filed 10/7/2016; Pre-Trial Memo for Petitioner filed 10/7/2016; Respondent's Opening Brief filed 1/25/2017; Petitioner's Opening Brief filed 1/25/2017; Respondent's Answering Brief filed 3/13/2017; Petitioner's Answering Brief filed 3/13/2017; First Stipulation of Facts filed 10/25/2016; Joint Stipulation of Settled Issues filed 1/13/2017; *Champions Retreat Golf Founders, LLC*, TCM 2018-146.

92 Kiva Dunes, LLC, TCM 2009-145.

93 Reg. 170A–14(d)(3)(ii).

94 *Champions Retreat Golf Founders, LLC*, TCM 2018-146, p. 24.

ened species in the easement area to satisfy the conservation purpose requirement."[95]

Applying that notion to the first species, birds, the Tax Court explained that the experts observed several types of birds that were listed on the watchlist of one conservation group or another, but they were generally found within a lower threat level or listed as not a concern in the relevant region. The Tax Court underscored that none of the birds observed had been assigned the highest threat level by any of the conservation organizations.[96]

With respect to the southern fox squirrels, the Tax Court indicated that, while all the trial experts agreed that these creatures might be in decline, it could not conclude they fell into the category of rare, endangered, or threatened. Indeed, one conservation group indicated that the squirrels are secure on a global level, and they are still hunted legally in Georgia.[97]

Generally, the donation of a QRPI to preserve a "historically important land area" or a "certified historic structure" is acceptable.

The Tax Court next turned to the denseflower knotweed. The Tax Court acknowledged that the evidence presented at trial created uncertainty about the threat status of this plant in Georgia. Nevertheless, the Tax Court focused on the fact that the plant was found almost exclusively in a 26-acre area, which constitutes just 7.5% of the total easement area of 349 acres.[98] Assuming that the denseflower knotweed could grow in another similar area (i.e., undisturbed bottomland forest) in the easement area, these two parts together would comprise less than 17% of the total easement area. Moreover, underscored the Tax Court, one hole on the golf course is designed to drain into the only area were the plant was found, thereby introducing chemicals (e.g., fertilizers, pesticides, herbicides, and fungicides) into its habitat. Interpreting the expert testimony in a manner favorable to the Partnership, the Tax Court still held that the existence of the plant on less than 17% of the total easement area is insufficient to fully satisfy the conservation purpose of protecting a significant relatively natural habitat.[99]

The Tax Court summarized its decision that the golf course easement did not protect a relatively natural habitat in the following manner:

> [The Partnership] has presented evidence of only one rare, endangered, or threatened species with a habitat on the easement area—denseflower knotweed—and it inhabits just a small fraction of the easement area. To get around these facts, [the Partnership] would have us ignore the specific wording of the regulation and adopt a standard that includes *any species* of current or future conservation concern. This we cannot do . . . . We, therefore, conclude that [the Partnership] has not met the conservation purpose requirement by providing a "habitat for rare, endangered, or threatened species of animals, fish, or plants."[100]

High quality examples of a terrestrial or aquatic community: In terms of the water aspects of the easement area (including lakes, ponds, and creeks), one expert said that the ponds were high-quality aquatic environments. The Tax Court emphasized, however, that the chemicals used by the Partnership to maintain the golf course would damage such environments, regardless of whether the chemicals were applied directly or through runoff.[101] The Partnership countered that use of chemicals should not invalidate the conservation qualities because it complied with all applicable state rules in selecting and applying chemicals, and the Deed of Conservation Easement demands that the Partnership follow the best environmental practices in the golf industry.[102] The Tax Court stated the following in rejecting the Partnership's contention:

> We have no doubt that [the Partnership] aims to use the chemicals responsibly, but it did not establish that the best environmental practices in the golf industry are as good as or better than "the best environmental practices then prevailing for conservation, as might be expected if conservation was the purpose of the easement."[103]

Contributes to ecological viability: The Partnership also argued that the easement area is a relatively natural habitat because it constitutes a "natural area" that contributes to the ecological viability of Sumter National Forest, which is located across the Savannah River, about 700 feet away from the golf course. In short, the Partnership contended that the golf course was worthy of conservation because birds, insects, and pollen will travel back and forth to Sumter National Forest.[104] The Tax Court dismissed this argument on the following grounds:

> We also cannot conclude that the easement area is a natural area that contributes to the ecological viability of Sumter National Forest across the Savannah River. The experts disagreed as to how many species observed in the easement area have a range that spans the Savannah River or would even be capable of making the 700-foot flight across the river between the easement area and the national forest. And we are unable to conclude that the species we described above as of interest have a range so large. Because we find that the easement area [is not] a natural area that contributes to the ecological viability of Sumter National Forest, we find that [the Partnership's] contribution was not made for the conservation purpose of protecting a relatively natural habitat.[105]

The Tax Court agreed that Sumter National Forest is a "national park," but emphasized that the easement area does not constitute a "natural area," as required by the regulation.[106] The Tax Court then explained that, contrary to the claims by the Partnership, just having trees, vegetation, and species that inhabit them does not suffice to be a "natural area" when such trees and vegetation are heavily managed and manicured, as they are on and around the golf course.[107] The Tax Court went on to explain that, even if it were to hold that the areas between the fairways on the golf course resembling open pine woodlands were "natural areas" for these purposes, there is no guarantee that such areas will be adequately protected, because the Deed of Conservation Easement specifically permits the Partnership to remove any tree, standing or fallen, that is located within 30 feet of a playable area.[108]

Preservation of open space for the general public. As explained above, and as summarized by the Tax Court in *Champions Retreat*, to fall into the category of preservation of open space for the scenic enjoyment of the general public, it suffices that there is visual (instead of physical) access to the property or across the property by the general public.[109] Also, it is not necessary that the whole property be visible to the public.[110]

The Tax Court, even applying this flexible standard, determined that the conservation easement was insufficient because the public had no physical access to a private golf course protected by a gate and personnel, the only visual access would be from the two rivers running alongside the golf course, the river banks ranging from three to 10 feet high obstruct the views from the water, and there is ongoing legal uncertainty regarding whether the public can even utilize one of the two rivers, the Little River.[111]

Preservation of open space pursuant to governmental policy. The Partnership argued that it donated the easement to the Land Trust to preserve open space pursuant to a Georgia law directing the Georgia Department of Natural Resources and local governments to create minimum standards for protecting natural resources, the environment, and vital areas, including river corridors, and the local county's implementation of the Georgia Greenspace Program.[112] The Tax Court rejected this argument, explaining that the Georgia law cited by the Partnership does not support an "identified conservation project," and there is no evidence that the Georgia Greenspace Program designated the easement area as "worthy of protection for conservation purposes" or that the easement is held by the Land Trust under the Georgia Greenspace Program.[113] At trial, the Partnership further argued that the designation of the golf club as "open space" under the Columbia County Planning Commission's Vision 2035 plan shows that the donation was made pursuant to a local government conservation policy. The Tax Court acknowledged that Vision 2035 was produced pursuant to Georgia law, but pointed out that such law was focused on land development, not land conservation.[114] For these reasons, the Tax Court concluded that "the preservation of open space was not pursuant to a clearly delineated governmental conservation policy."[115]

Interesting and Obscure Issues in the Case

Nearly every case can teach some valuable lessons, if one is willing to make the effort to review all the underlying documents, not just the published Opinion by the Tax Court. *Champions Retreat* does not disappoint in this regard. Some of its obscure lessons are described below.

FPAA Is Devoid of Detail about Main IRS Positions

The FPAA issued by the IRS in *Champions Retreat* illustrates the standard approach by the IRS in recent easement cases, which is to fully disallow the easement-related deduction claimed by the relevant partnership based on "technical" arguments under Section 170 and its corresponding regulations, and then, as a backup plan, fully disallow the deduction for supposed valuation problems. The FPAA stated the following in this regard:

> 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 $10,427,435 for the tax year ended December 31, 2010.
>
> 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 for the tax year ended December 31, 2010. Accordingly, the charitable contribution is decreased by $10,427,435 for the tax year ended December 31, 2010.

This behavior by the IRS is particularly problematic because (i) there is legal presumption that what the IRS claims in the FPAA is correct, (ii) taxpayers normally cannot "go behind the FPAA" and present evidence to the Tax Court related to the audit (such as the Examination Report, Summary Report, or Notice of Proposed Adjustments), which contain detail about the IRS's positions, and (iii) taxpayers ordinarily have the burden of proof during a Tax Court trial, meaning that they have the duty to present sufficient evidence to overcome the presumed correctness of the IRS, as reflected in its FPAA.[116] Thus, the reality is that—unless the IRS later identifies and/or narrows the issues that it is truly contesting via responses to discovery requests issued by the taxpayer during Tax Court litigation, a Stipulation of Facts, a Stipulation of Settled Issues, or a Pre-Trial Memorandum—the taxpayer is obligated to present evidence at trial that it satisfied every single requirement on an extremely long list to be granted a deduction for a "qualified

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95 *Id.*
96 *Id.*, page 25.
97 *Id.*, page 26.
98 *Id.*
99 *Id.*, page 27.
100 *Id.*, pages 27-28.
101 *Id.*, page 30.
102 *Id.*
103 *Id.*
104 *Id.*, page 28.
105 *Id.*, pages 30-31.
106 *Id.*, page 28.
107 *Id.*, page 29.
108 *Id.*, pages 29-30.
109 Reg. 1.170A–14(d)(4)(ii)(B).
110 *Id.*
111 *Champions Retreat Golf Founders, LLC*, TCM 2018-146, pg. 33.
112 *Id.*, page 34.
113 *Id.*, pages 34-35.
114 *Id.*, page 35.
115 *Id.*
116 Tax Court Rule 142(a); *Greenberg's Express, Inc.*, 62 TC 324 (1974).

conservation contribution" under Section 170. The magnitude of this endeavor is illustrated by the ATG, which contains a chart spanning four pages called the "Conservation Easement Issue Identification Worksheet."[117] This represents an enormous evidentiary burden on the Partnership, as well as an inefficient use of Partnership, IRS, and Tax Court resources.

Novel IRS Theories Found in the FPAA

The IRS has been threatening for years to raise various theories for attacking conservation easements. These are "novel" in the sense that they generally do not originate in Section 170 or its regulations, but rather in theories developed by the courts.

The IRS announced in Notice 2017-10 that it intended to challenge syndicated conservation easement transactions ("SCETs") on grounds that they supposedly constitute "tax-avoidance transactions" and involve overvaluations.[118] The IRS further stated in Notice 2017-10 that it might also attack SCETs based on the partnership anti-abuse rules, the economic substance doctrine, or other unspecified rules and doctrines.[119]

More recently, in a Complaint filed by the U.S. Department of Justice ("DOJ") in District Court in December 2018 seeking an injunction against certain individuals and entities in the easement industry, the DOJ alleged that the entities involved in SCETs are not true partnerships for federal tax purposes, they exist solely as a conduit to "sell" tax deductions, they are "shams," and they "lack economic substance."[120]

The IRS showed its willingness to raise novel positions in *Champions Retreat*, too. The FPAA, which was not described in detail in the Opinion issued by the Tax Court, argued that the Partnership engaged in "disguised sales" of tax deductions, the allocation of the charitable donation deduction to the partners related to the easement did not have substantial economic effect, each partner's deduction should be limited to the amount of his capital contribution to the Partnership (i.e., initial tax basis), and the allocations of ordinary business loss and interest income from the Partnership were incorrect and inconsistent with the terms of the pertinent Partnership agreements. Below is the specific language contained in the FPAA, which will help readers understand how the IRS presented multiple, alternative arguments, against which the Partnership was forced to defend itself.

In keeping something for themselves, taxpayers must ensure that the reserved rights do not unduly conflict with the conservation purposes.

> Alternatively, if it is determined that all of the requirements of I.R.C. Section 170 have been satisfied for all or any portion of the claimed non-cash charitable contribution and that the value of the contributed property was greater than zero, it is determined that the taxpayer made a disguised sale to Kiokee Creek Preservation Partners. Accordingly, the taxpayer's long-term capital gain is increased by $1,021,974 for the tax year ended December 31, 2010.
>
> Alternatively, if it is determined that all of the requirements of I.R.C. Section 170 have been satisfied for all or any portion of the claimed non-cash charitable contribution and that the value of the contributed property was greater than zero, and that the taxpayer did not make a disguised sale, it is determined that the tax/book capital accounts of the partners receiving the benefit of the charitable deduction are properly decreased under the rules of Treas. Reg. Section 1.704-1(b)(2)(iv) for the charitable contribution.
>
> Alternatively, if it is determined that all of the requirements of I.R.C. Section 170 have been satisfied for all or any portion of the claimed non-cash charitable contribution and that the value of the contributed property was greater than zero, and that the taxpayer did not make a disguised sale, it is determined that since the partnership's allocation of the charitable contribution did not have substantial economic effect, each partner's distributive share of the contribution is determined by the partner's interest in the partnership.
>
> It is determined that according to the partnership's operating agreement in effect when the partnership return was filed, each partner's distributive share of income, gain, loss, deduction, or credit is determined by the partner's interest in the partnership. Accordingly, the ordinary business loss of $510,335 and interest income of $908 allocated between Riverwood Land, LLC and Kiokee Creek . . . is reallocated to all partners in accordance with their interest in the partnership.

Arguments Conceded by the IRS

Despite the long list of initial challenges set forth in the FPAA issued to the Partnership in *Champions Retreat*, it is interesting that the IRS eventually decided to drop many of them. Specifically, the IRS conceded the following arguments that it raised in the FPAA or elsewhere: (i) The easement donation was not a QRPI; (ii) The Land Trust was not a "qualified organization;" (iii) The Partnership made a "disguised sale" of tax deductions to Kiokee Creek; (iv) The allocation of the easement-related deduction to the partners did not have substantial economic effect and thus should not be respected; (v) Each partner's deduction should be limited to the amount of his capital contribution to the Partnership; and (vi) The allocations of ordinary business loss and interest income from the Partnership were incorrect and inconsistent with the terms of the pertinent Partnership agreements.[121]

Arguments Never Addressed by the Tax Court

The Tax Court resolved the entire case by deciding just one issue; that is, that the donation of the easement by the Partnership lacked sufficient "conservation purpose" to meet the requirements of Section 170(h).[122] Consequently, the Tax Court was not required, and it did not feel compelled on its own, to address many other interesting issues, such as those described below. These augment the issues conceded by the IRS, together making a considerable list.

Did the open space create "significant" public benefit? The Tax Court determined that the easement neither preserved open space for the scenic enjoyment of the general public nor preserved open space pursuant to a federal, state, or local governmental conservation policy. The Tax Court, therefore, never analyzed whether such alleged preservation generated a "significant" public benefit.[123]

Did the reserved rights destroy the conservation purposes? The IRS argued in its Pre-Trial Memorandum that the easement allowed the Partnership to apply chemicals to maintain the golf course and to perform other acts that are harmful to the habitats of native species, such as cutting trees, intense mowing and grooming, constructing structures, clearing native vegetation, and more.[124] The IRS contended that the easement did nothing more than create an appearance of perpetual protection, but the reserved rights "completely vitiate many of the restrictions," the Partnership can exercise some of the reserved rights without regard for the conservation purposes, and the easement "serves to protect nothing more than a private golf course development."[125] The Tax Court never needed to address whether any of the reserved rights of the Partnership, as expressly described in the Deed of Conservation Easement, are inconsistent with the conservation purposes.[126]

Was the Baseline Report defective? As explained above, the Baseline Report is prepared, often by the land trust that might receive an easement, in order to document the condition of the property at or near the time of the donation.[127] The regulations state that the Baseline Report "must be accompanied by a statement signed by the donor and a representative of the [easement-recipient] clearly referencing the [Baseline Report] and in substance" confirming that the property description and the natural resources inventory are accurate.[128] The ATG contains a similar mandate, explaining that the Baseline Report "must be signed by the donor and donee."[129] The IRS took the position in its Pre-Trial Memorandum that the Baseline Report prepared by the Land Trust did not properly establish the condition of the property at the time of the donation, as required by the regulations, because it was not completed until about eight months *after* the Partnership had granted the easement and had filed its Form 1065 claiming the corresponding tax deduction.[130] Moreover, the IRS advanced the theory that the Baseline Report was invalid because a representative of the Partnership never signed it.[131] The strength of these two IRS arguments regarding Baseline Reports is unknown, as the Tax Court in *Champions Retreat* did not analyze them.

What was the easement donation worth? The last major issue in *Champions Retreat* that went untouched was the value of the easement donation. The Partnership claimed on its 2010 Form 1065 that the easement was worth $10,427,435, the IRS countered in its FPAA that it was worth $0, and, at trial, the expert for the IRS had a slight change of mind, estimating that the easement had a small value of $20,000. Regardless of the precise figures, the takeaway here is that there was a serious valuation disagreement between the Partnership and the IRS, which seems to be the norm nowadays in easement-related litigation.

The IRS argued in its Pre-Trial Memorandum that, at the time that the Partnership granted the easement in 2010, the relevant property was already subject to various recorded land "declarations" (i.e., restrictive covenants) that restricted its use to a golf course.[132] The declarations, which were apparently filed for the entire residential development and golf club property, were binding for 20 years, unless terminated in writing by the Partnership, at least 80% of the residents, and other parties. After the initial 20-year period, the use restriction would automatically renew, unless terminated by at least 50% of the relevant parties.[133] The IRS suggested to the Tax Court that it is "highly doubtful" that the Partnership could convince 80% of the property owners to convert the golf course into another residential development, when the main reasons for living there are access to a quality golf course and low population density.[134] Given the existence of the declarations when the Partnership donated the easement in 2010, the IRS concluded that the easement did not create any additional material limitations on the use of the golf course property.[135] The IRS summarized its positions in the following manner:

> This case is a textbook example of a situation where the grant of the easement has no material effect on the value of the property because of existing legal restrictions. [The Partnership] generates a deduction for the easement only by assuming that the Easement Area could be redeveloped into something other than a golf course [such as another residential subdivision]. However, in 2004, the Partnership had already decided that the Golf Course would be used exclusively for golf and executed a legal restriction prohibiting any other use unless 80 percent of the [relevant] landowners agree to terminate this restriction.[136]

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117 Internal Revenue Service, Conservation Easement Audit Techniques Guide (Rev. 11/4/2016), pgs. 78-81.

118 Notice 2017-10, Preamble and Section 1.

119 Notice 2017-10, Section 1.

120 *United States v. Nancy Zak, Claud Clark, EcoVest Capital Inc., Alan N. Solon, Robert M. McCullough, and Ralph R. Teal*, Case No. 1:18-cv-05774, D.C. N.D. Ga, Complaint filed 12/18/2018, pg. 47.

121 Champions Retreat Golf Founders, LLC, TCM 2018-146, pg. 21 and n. 1.

122 *Id.*, page 35.

123 *Id.*

124 Respondent's Pre-Trial Memorandum filed 10/7/2016, pg. 12. The IRS cited *Atkinson*, TCM 2015-236, in support of its argument.

125 Respondent's Pre-Trial Memorandum filed 10/7/2016, pg. 13.

126 Champions Retreat Golf Founders, LLC, TCM 2018-146, pgs. 35-36.

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

128 *Id.*

129 Internal Revenue Service, Conservation Easements Audit Techniques Guide (Rev. 11/4/2016), pg. 24.

130 Respondent's Pre-Trial Memorandum filed 10/7/2016, pg. 13-14.

131 *Id.*

132 *Id.*, page 6.

133 *Id.*

134 *Id.*, page 15.

135 *Id.*, pages 15-16.

136 Respondent's Simultaneous Opening Brief filed 1/25/2017, pgs. 101-102.

Can easements and similar instruments be amended? The IRS trotted out another interesting line of reasoning in *Champions Retreat* in the context of the valuation dispute. As explained above, the IRS argued that the easement donated in 2010 essentially had no value because the golf course, thanks to the declarations recorded years earlier, could only be used as a golf course, unless various contingencies occurred. The Partnership, on the other hand, explained that the declarations could have been overridden either (i) by obtaining the requisite vote of the Partnership, property owners, and others, or (ii) by the developer acting in accordance with the "development plan," which expressly allows for alterations during the "development period."[137] The IRS took the position that, under Georgia law, restrictive covenants, like the declaration relevant in *Champions Retreat*, are contractually binding on landowners and run with the land, and Georgia courts will enforce unambiguous restrictive covenants that are recorded, except in certain narrow circumstances, such as where they violate public policy.[138] The IRS then explained that the argument by the Partnership fails based on the following logic:

> [A]ny amendment to the development plan . . . during the development period . . . does *not* revoke the rights created pursuant to the [declaration]. [It] may be amended *only* in certain instances such as to cure any ambiguity or inconsistency or in cases where the amendment does *not* adversely affect the substantive rights of a [landowner]. It could *not* have been amended to remove the Use Restriction . . . .[139]

In other words, the IRS suggested to the Tax Court in *Champions Retreat* that neither the developer nor the Partnership could have amended the preexisting declaration to allow for the property to be used in some manner other than a golf course, like a residential subdivision as proposed by the Partnership's appraisers at trial. This is particularly interesting because the IRS took essentially the opposite approach in a very recent easement case, *Pine Mountain Preserve LLLP*.[140]

In *Pine Mountain*, the IRS challenged the amendment clauses in three different, identical Deeds of Conservation Easement.[141] The amendment clauses recognized that, when dealing with perpetuity, circumstances might arise that would justify modification of certain restrictions contained in easements, such that the partnership and the land trust had the mutual right "to agree to amendments to this Conservation Easement which are not inconsistent with the Conservation Purposes."[142]

Properly claiming the tax deduction triggered by an easement donation is complicated.

The IRS contended in *Pine Mountain* that the amendment clause would allow the parties to violate the perpetuity requirement, which necessarily means that the land trust would "be unfaithful to the charitable purposes on which its exemption rests."[143] This line of reasoning comports with the general guidance that the IRS provides to all its personnel in the ATG. It states that "[a]n easement deed will fail the perpetuity requirements . . . if it allows *any amendment or modification* that could adversely affect the perpetual duration of the restriction or conservation purposes."[144]

Citing to various cases in the facade easement and conservation easement arena, the Tax Court in *Pine Mountain* stated that it and various U.S. Courts of Appeal have rejected similar arguments by the IRS in the past. The Tax Court explained that easements involve a conveyance, which is a form of contract. Normally, parties to a contract can amend it, regardless of whether they explicitly reserve the right to amend in the contract itself. The Tax Court, grounded in the notion of the amendable contracts, explained that the amendment clause should be interpreted as "*a limiting provision*, confining the permissible subset of amendments to those that would not be 'inconsistent with the Conservation Purposes.'"[145] The Tax Court went on to point out how the IRS's far-reaching position would lead to absurd results; it would "prevent the donor of *any easement* from qualifying for a charitable deduction under Section 170(h) if the easement permitted amendments [and] we find no support for that argument in the statute, the regulations, the decided cases, or the legislative policy under the statute."[146]

In summary, it is interesting that the IRS has taken two contradictory positions in two recent easement cases. In *Champions Retreat*, where having an amendable declaration (i.e., restrictive covenant) would have been helpful to the taxpayer, the IRS argued that the declaration could not be amended, despite state law allowing amendments in certain situations, the "development plan" permitting alternations during the "development period," and the express terms of the declaration, which contemplated amendment upon receipt of enough votes. By contrast, in *Pine Mountain*, where having an amendable instrument would have favored the IRS, the IRS argued that the Deed of Conservation Easement could be amended, despite the fact that amendments could not occur unless the relevant land trust approved beforehand and they would not be inconsistent with the conservation purposes elucidated in the Deed of Conservation Easement. Most people understand the acceptability of arguing in the alternative; that is, raising a number of successive legal theories from which a court may select to support a position. However, they might find it difficult to comprehend why the IRS can take two conflicting legal positions, in the same court, on the same issue, based on the same precedent.

Listed Transaction Issue

The term "listed transaction" means a reportable transaction that is the same as, or substantially similar to, a transaction identified by the IRS (by notice, regulation, or some other form of published guidance) as a tax-avoidance transaction.[147] Pursuant to Notice 2017-10, issued by the IRS in December 2016, all SCETs that occurred on or after January 1, 2010, are considered listed transactions, such that participants, material advisors, and others are subject to additional reporting, due diligence, and record-keeping requirements.

Description of the targeted transaction. Notice 2017-10 broadly defines an SCET as follows:

> An investor receives promotional materials that offer prospective investors in a pass-through entity [such as a partnership] the possibility of a charitable contribution deduction that equals or exceeds an amount that is two and one-half times the amount of the investor's investment. The promotional materials may be oral or written . . . .[148]
>
> The investor purchases an interest, directly or indirectly (through one or more tiers of pass-through entities), in the pass-through entity that holds real property.
>
> The pass-through entity that holds the real property contributes a conservation easement encumbering the property to a tax-exempt entity and [then] allocates, directly or through one or more tiers of pass-through entities, a charitable contribution deduction to the investor.
>
> Following that contribution, the investor reports on his or her federal income tax return a charitable contribution deduction with respect to the conservation easement.

Forms 8886, Forms 8918, and substantially similar transactions. Notice 2017-10 requires taxpayers who "participate" in an SCET or a substantially similar transaction to file Form 8886 (Reportable Transaction Disclosure Statement). Notice 2017-10 also requires persons who are "material advisors" to an SCET or a substantially similar transaction to file Form 8918 (Material Advisor Disclosure Statement).

In this context, the term "substantially similar" includes any transaction that is expected to obtain the same or similar types of tax consequences and that is either factually similar or based on similar tax strategy.[149] The regulations indicate that the term "substantially similar" must be broadly construed in favor of disclosure to the IRS.[150]

Concept of participation. As indicated above, Notice 2017-10 requires taxpayers who "participate" in an SCET or in a substantially similar transaction to file Form 8886. For these purposes, a taxpayer has "participated" in an SCET if the taxpayer's tax return reflects the tax consequences or a tax strategy described in Notice 2017-10. For instance, a partner who receives a Schedule K-1 from a partnership that has engaged in an SCET is considered to have "participated" in the transaction.[151] Notice 2017-10 indicates that "participants" in SCETs include (i) investors/partners, (ii) the pass-through entity that actually engaged in the transaction, which includes any tier if the transaction is conducted through a tier-entity structure, and (iii) any other person whose tax return reflects tax consequences or a tax strategy described as an SCET.[152]

The regulations clarify that if a reportable transaction results in a loss that is carried back to a previous year, then the taxpayer must enclose Form 8886 with the application for tentative refund or amended return for the previous year.[153] By extension, if a taxpayer participates in an SCET in one year and carries forward a portion of the relevant charitable deduction to later years, then the taxpayer would be "participating" in the SCET in the later years and would thus need to file Forms 8886, as appropriate.

Potential penalties. Notice 2017-10 contains multiple threats about potential downsides of non-compliance. Participants in SCETs could get hit in two main ways.

Notice 2017-10 warns that "participants" who are required to disclose an SCET by filing a Form 8886 but fail to do so will be subjected to penalties under Section 6707A. These come in two forms. First, if participants fail to file timely, complete Forms 8886, then the IRS generally can assert a penalty equal to 75% of the tax savings resulting from their participation.[154] In the case of a listed transaction, like an SCET, the maximum penalty for individual taxpayers is $100,000, while the maximum for entities is $200,000.[155] The minimum penalty is $5,000 for individuals and $10,000 for entities.[156] Importantly, in the case of a listed transaction, like an SCET, the IRS does not have authority to rescind or abate it.[157] Also, there is no "reasonable cause" exception to this penalty. Second, if a taxpayer participates in a reportable transaction (including listed transactions) and the IRS later disallows the benefits claimed, then the IRS can assess a penalty equal to 20% of the tax increase.[158] This penalty rate increases to 30% if the participant fails to file a Form 8886.[159]

Notice 2017-10 also indicates that if a "participant" fails to enclose a Form 8886 with a tax return, then the assessment period with respect to the tax return shall remain open until one year after the earlier of when the participant later files Form 8886, or when the material advisor provides the IRS with the required list of data about the SCET in

NOTES

137 See Respondent's Simultaneous Opening Brief filed 1/25/2017, pgs. 100-104; Petitioner's Simultaneous Opening Brief filed 1/25/2017, pgs. 115-118; Respondent's Simultaneous Answering Brief filed 3/13/2017, pgs. 72-79; and Petitioner's Simultaneous Answering Brief filed 3/13/2017, pgs. 82-84.

138 Respondent's Simultaneous Opening Brief filed January 25, 2017, pg. 103.

139 *Id.,* pages 103-104 (emphasis added).

140 Pine Mountain Preserve, LLLP, 151 TC No. 14 (2018), which addresses the "technical" issues regarding 2005, 2006, and 2007; Pine Mountain Preserve, LLLP, TCM 2018-214, which addresses only the easement valuation issue for 2007.

141 Pine Mountain Preserve, LLLP, 151 TC No. 14 (2018), which addresses the "technical" issues regarding 2005, 2006, and 2007; Pine Mountain Preserve, LLLP, TCM 2018-214, which addresses only the easement valuation issue for 2007.

142 Pine Mountain Preserve, LLLP, 151 T.C. No. 14 (2018), pg. 54.

143 *Id.,* pages 54-55.

144 Internal Revenue Service, Conservation Easement Audit Techniques Guide (Rev. 11/4/2016), pg. 13 (emphasis added).

145 Pine Mountain Preserve, LLLP, 151 TC No. 14 (2018), pg. 56 (emphasis in original).

146 *Id.,* pages 56-57 (emphasis added).

147 Section 6707A(c)(2); Reg. 1.6011-4(b)(2).

148 Reg. 301.6112-1(b)(3)(iii)(B).

149 Reg. 301.6011-4(c)(4).

150 *Id.*

151 Reg. 1.6011-4(e)(1).

152 Notice 2017-10, Section 3.

153 Reg. 301.6707A-1(c)(1) and (c)(2), Example 3.

154 Section 6707A(a), (b); Reg. 301.6707A-1(a).

155 Section 6707A(b)(2); Reg. 301.6707A-1(a).

156 Section 6707A(b)(3); Reg. 301.6707A-1(a).

157 Section 6707A(d)(1).

158 Section 6662A(a).

159 Section 6662A(c).

response to the written request from the IRS.[160] The regulations explain the types of taxes, penalties, and interest that the IRS might assess in situations involving an SCET and unfiled Forms 8886:

> If the period of limitations on assessment for a taxable year remains open under [Section 6501(c)(10)], the [IRS] has authority to assess any tax with respect to the listed transaction in that year. This includes, but is not limited to, adjustments made to the tax consequences claimed on the return plus interest, additions to tax, additional amounts, and penalties that are related to the listed transaction or adjustments made to the tax consequences. This also includes any item to the extent the item is affected by the listed transaction even if it is unrelated to the listed transaction . . . .[161]

Applicability to *Champions Retreat.* The easement in *Champions Retreat* was donated after January 1, 2010, which is the key date identified by the IRS in Notice 2017-10. Moreover, it involved (i) the formation in September 2010 of Kiokee Creek, an investment entity that raised $2.7 million, thanks primarily to the Rolodex of the accountant for the Partnership, (ii) the contribution of such funds to Partnership in exchange for a 15% ownership interest, (iii) the donation of the easement by the Partnership to the Land Trust shortly thereafter, in December 2010, (iv) the filing of a 2010 Form 1065 by the Partnership claiming a charitable deduction of $10,427,435, and (v) the allocation of nearly all such deduction to Kiokee Creek, and thus its partners. Based on these facts, the transaction likely fell into the category of a "listed transaction." Accordingly, even though it was not addressed, and should not have been addressed, by the Tax Court in the income tax dispute, one must assume that those affiliated with *Champions Retreat* were busy in early 2017 filing retroactive Forms 8886 and Forms 8918 with the IRS. If not, the applicable penalties would be imposed and, perhaps, disputed under different procedures.

The IRS Did Not Assert Penalties Against the Partnership

In a normal conservation easement case, where the IRS issues an FPAA arguing that a taxpayer is entitled to a deduction of $0 based first on "technical" arguments, and then on valuation issues, the IRS ordinarily proposes several alternative penalties, ranging in severity. These often include (i) negligence or disregard of rules and regulations, (ii) substantial understatement of income tax, (iii) substantial valuation misstatement, (iv) gross valuation misstatement, or (v) reportable transaction understatement penalty.[162] Indeed, one of the "audit tips" provided to IRS personnel in the ATG is that an FPAA "will generally include a tiering of proposed penalties with multiple alternative positions."[163]

Some penalties can be avoided if the taxpayer can demonstrate that there was "reasonable cause" for the violation.[164] Others will not be asserted if the value was based on a qualified appraisal by a qualified appraiser and the taxpayer made a good faith investigation of the value of the property.[165] Finally, under current law, certain penalties, like the one for making a gross valuation misstatement, cannot be overcome by evidence of "reasonable cause." It is mathematical in nature; that is, if the value of the easement/deduction originally claimed by the taxpayer on the Form 1065 (and enclosed Form 8283) exceeds the value ultimately determined by the Tax Court by a certain percentage, then the penalty applies, period.[166] For these reasons, the IRS routinely asserts a laundry list of potential penalties in the FPAA, regardless of how diligent the taxpayer was in conducting the easement transaction, obtaining appraisals, consulting specialized professionals, etc.

Given that the IRS issued an FPAA in *Champions Retreat* alleging that the easement deduction should be $0 based on various "technical" violations and supposed deficiencies with the appraisal, and given that the Partnership had claimed an easement-related deduction of $10,427,435 on its 2010 Form 1065, it is interesting that the IRS did not assert any type of penalty. It leads to the assumption that the IRS determined, during the audit process, that the Partnership had "reasonable cause" for its positions related to the easement. This assumption is fortified by one important phrase included by the Tax Court in its Opinion: "After our decision *Kiva Dunes Conservation, LLC*," in which the Tax Court upheld nearly the entire deduction on a golf-course easement and the IRS did not challenge the conservation purpose, the accountant for the Partnership proposed granting an easement on the golf course owned by the Partnership.[167]

Conclusion

Champions Retreat is a noteworthy case, not so much for the one issue it addresses (i.e., whether perpetually protecting an operating golf course is a sufficient conservation purpose), but rather for the long list of topics that it did not cover, as it was unnecessary for the Tax Court to do so. Of particular note was the decision by the IRS to drop the argument that the Partnership engaged in a "disguised sale" of tax deductions, along with its choice to advance a position that Deeds of Conservation Easement and similar instruments cannot be amended, which appears to be directly at odds with the IRS's stance in other recent easement cases, like *Pine Mountain.* In all events, taking into account the resources that the IRS is now directing toward easement situations and the extreme positions (legal, tax, technical, and/or procedural) that the IRS seems to be taking, there will be many more cases in the future covering the untouched and underdeveloped issues in *Champions Retreat.* ●

NOTES

160 Section 6501(c)(10).

161 Reg. 301.6501(c)–1(g)(7).

162 Section 6662; Section 6662A.

163 Internal Revenue Service, Conservation Easement Audit Techniques Guide (Rev. 11/4/2016), pg. 77.

164 Section 6664(c)(1); Section 6664(d)(1); Reg. 1.6664-4.

165 Section 6664(c)(3); Reg. 1.6664-4.

166 Section 6664(c)(3); Reg. 1.6664-4.

167 Champions Retreat Golf Founders, LLC, TCM 2018-146, pg. 5. Notably, in Kiva Dunes, TCM 2009-145, the Tax Court was not required to decide whether the taxpayer complied with the "conservation purpose" requirement of Section 170(h) because the IRS conceded the issue, leaving valuation as the focus: "After trial, respondent conceded on brief that [the partnership] is entitled to a Section 170(a)(1) charitable contribution deduction for 2002." *Id.* at pg. 2.