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by Hale E. Sheppard

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Hale E. Sheppard (hale.sheppard@chamberlainlaw.com) is a shareholder in the tax controversy section of Chamberlain Hrdlicka in Atlanta.

In this article, Sheppard argues that in issuing Notice 2023-30, the IRS did only the bare minimum called for by Congress in the SECURE 2.0 Act and failed to deliver the broad and clear guidance for syndicated easement transactions that has been promised for years.

I. Introduction

The IRS has been using claims of technical problems as its primary weapon in attacking so-called syndicated conservation easement transactions (SCETs). This often means identifying alleged shortcomings in a deed or similar instrument. To eliminate tax disputes centered on technicalities and get focused on critical issues (like valuation), groups have been asking the IRS to issue guidance for years. They have urged the IRS to publish a model/sample deed or to provide some other clear language that taxpayers could use, confident that doing so would prevent IRS challenges after the fact.

The IRS did not rise to the occasion voluntarily. Indeed, it did not release what it considers acceptable deed language until Congress forced it to do so by enacting the SECURE 2.0 Act in December 2022.[1] The IRS, in accordance with the congressional mandate, released Notice 2023-30, 2023-17 IRB 1, four months later. Does the safe harbor language offered by the IRS help reduce the massive backlog of SCET cases pending in the Tax Court or provide comprehensive instructions to taxpayers potentially donating easements in the future? No, Notice 2023-30 addresses only the two deed clauses specified by Congress and then severely restricts the types of donations that might benefit.

This article explains the IRS's definition of SCETs, the main aspects of the SECURE 2.0 Act, two relevant easement clauses, the history of prior requests for a model/sample deed, and the disappointingly narrow content of Notice 2023-30.

II. Cursing Certain Easement Donations

In December 2016 the IRS announced in Notice 2017-10, 2017-4 IRB 544, that it intended to challenge what it calls SCETs on grounds that they supposedly constitute tax-avoidance transactions that involve serious overvaluations.[2] Notice 2017-10 claimed that SCETs involve the following four steps:

> (1) "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."
>
> (2) "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."
>
> (3) "The pass-through entity that holds the real property contributes a conservation

[1] The SECURE 2.0 Act is a component of the Consolidated Appropriations Act, 2023 (P.L. 117-328).

[2] Notice 2017-10, preamble and section 1.

easement . . . to a tax-exempt entity [like a land trust] and allocates, directly or through one or more tiers of pass-through entities, a charitable contribution deduction to the investor."

(4) "Following that contribution, the investor reports on his or her federal income tax return a charitable contribution deduction with respect to the conservation easement."[3]

III. Congress Intervenes

Congress introduced new rules in the SECURE 2.0 Act. That legislation identified types of easement donations that will be ineligible for tax deductions, three exceptions to the general disallowance rule, future safe harbors, and related items.

A. General Disallowance Rule

The SECURE 2.0 Act added a new standard for conservation easement donations, section 170(h)(7). This provision generally states that a partnership will not be entitled to any tax deduction if the amount of the conservation easement donation exceeds two and a half times the aggregate relevant basis of the partners in the partnership (the 2.5 times rule).[4] To be clear, the new law is not imposing a maximum, or limiting a deduction to a certain amount. It serves to fully disallow a donation whose value surpasses the threshold.

B. Three Exceptions

Congress created three carveouts to the 2.5 times rule. First, historic preservation easements are not covered, provided that taxpayers satisfy special reporting duties (historic preservation exception).[5]

Second, the 2.5 times rule is inapplicable when all, or substantially all, the interests in the partnership making the easement donation are held, either directly or indirectly, by "an individual and members of the family of such individual," (family limited partnership exception).[6]

Third, the 2.5 times rule does not affect any donation that satisfies a complex three-year holding period (three-year hold exception).[7] The SECURE 2.0 Act provides that a partnership enjoys immunity if it makes the donation at least three years after the latest of the following actions: (1) the last date on which the partnership acquired any portion of the property on which it later placed the easement; (2) the last date on which any direct partner obtained an ownership interest in the partnership; and (3) in situations involving a layered structure in which the ultimate partners hold an indirect interest in the donor partnership through an upper-tier partnership, the last date on which the upper-tier partnership secured an interest in the donor partnership, or the last date on which the ultimate partners invested in the upper-tier partnership.[8]

C. Safe Harbors on the Horizon

Congress mandated that the IRS quickly publish safe harbor deed language for extinguishment clauses and boundary line adjustments.[9] More information about these two troublesome aspects of easement donations is discussed later.

The SECURE 2.0 Act offers taxpayers that already donated an easement a limited opportunity to correct matters and thus avoid challenges by the IRS by replacing certain language in the deed. It generally says that donors can amend a deed to substitute certain safe harbor language if (1) the donor and donee (for example, land trust) sign and record the amended deed within 90 days of the date on which the IRS supplies the language, and (2) the effective date of

[3] *Id*. section 2.

[4] *Id*. section 605(a)(1). New section 170(h)(7)(A). The rules apply to subchapter S corporations and other passthrough entities in the same manner as they do to partnerships. *See id*. section 605(b). New section 170(h)(7)(F).

[5] *Id*. section 605(a)(1). New section 170(h)(7)(E). Transactions benefiting from the historic preservation exception have specific disclosure duties under SECURE 2.0. *See* new section 170(f)(19).

[6] *Id*. section 605(a)(1). New section 170(h)(7)(D).

[7] *Id*. section 605(a)(1). New section 170(h)(7)(C).

[8] *Id*.

[9] SECURE 2.0 Act, *supra* note 1, section 605(d)(1).

the amended deed relates back to the date of the original deed.[10]

Simple enough, right? Wrong. Congress complicates and restricts matters by inserting four exceptions. First, the general amendment rule does not apply when the original deed relates to a reportable transaction or an SCET described in Notice 2017-10.[11] Second, the general rule does not help any transaction that violates the new 2.5 times rule.[12] Third, no safe harbor language can be inserted when the IRS has disallowed a tax deduction stemming from an easement donation and the donor starts litigation in the Tax Court or other appropriate federal court to challenge the IRS before preparing and recording an amended deed.[13] Fourth, amendments are not feasible in situations in which the disallowance of an easement donation by the IRS triggered a tax underpayment to which a penalty applies under section 6662 (accuracy-related penalty) or section 6663 (civil fraud penalty), and (1) that penalty has been "finally determined" administratively, or (2) if the donor disputes the penalty in court, the relevant proceeding has concluded by way of a stipulated decision by the parties or a judgment that has become final.[14]

D. Additional Content

The SECURE 2.0 Act says that the IRS "shall" issue "regulations or other guidance," as necessary and appropriate, to carry out the purposes of the preceding rules.[15]

The SECURE 2.0 Act creates a penalty, too. It indicates that the IRS can impose a gross valuation misstatement penalty equal to 40 percent of the tax underpayment in situations in which a tax deduction triggered by an easement donation is disallowed because it does not comply with the new 2.5 times rule. Moreover, it clarifies that taxpayers cannot raise a reasonable cause defense, including reasonable reliance on qualified professionals, when trying to fend off this penalty.[16]

Congress tried to preemptively restrict strategic uses of the SECURE 2.0 Act by taxpayers. The new law says that "no inference is intended as to the appropriate treatment of [easement donations] made in taxable years ending on or before" the SECURE Act 2.0 takes effect.[17] It further indicates that "no inference is intended as to . . . any [easement donation] for which a deduction is not disallowed by reason of" the new 2.5 times rule.[18] In other words, Congress is trying to put the anticipatory kibosh on two arguments: (1) that the size of the return on investment should have no applicability whatsoever to easement donations made on or before December 29, 2022, the date on which the SECURE 2.0 Act was enacted, and (2) easement donations made afterward should be accepted by the IRS as long as they fall beneath the 2.5 times rule.

IV. Easement Extinguishment and Boundaries

As explained earlier, the SECURE 2.0 Act offers safe harbor language for just two types of clauses in a deed, namely, extinguishment clauses and boundary line adjustment clauses.[19] These need a little context.

A. Extinguishment Clauses

Taxpayers must donate conservation easements in perpetuity, but nothing lasts forever. Mindful of this, the regulations recognize that post-donation changes in conditions can make it impossible or impractical to continue conserving the property at some point.[20] This occurs, for instance, when the government approaches a taxpayer years after it donates a conservation easement, and offers to purchase part of the protected land for purposes of installing a power line or constructing a road. If the taxpayer refuses, the government forces the sale through a process called condemnation. The government effectively

[10] *Id.* section 605(d)(2)(A).

[11] *Id.* section 605(d)(2)(B)(i). The term "reportable transaction" is defined in section 6707A(c)(1).

[12] *Id.* section 605(d)(2)(B)(ii).

[13] *Id.* section 605(d)(2)(B)(iii).

[14] *Id.* section 605(d)(2)(B)(iv).

[15] *Id.* section 605(a)(1). New section 170(h)(7)(G).

[16] *Id.* section 605(a)(2). New section 6662(b)(10), new section 6662(h)(2)(D), and amended section 6664(c)(2).

[17] *Id.* section 605(c)(2).

[18] *Id.*

[19] SECURE 2.0 Act, *supra* note 1, section 605(d)(1).

[20] Reg. section 1.170A-14(g)(6)(i).

takes the property from the taxpayer, but must pay for it. The question thus becomes, who gets the sales proceeds? The taxpayer, which still owns the property; the land trust, which holds the conservation easement on the property; or both, following some formula? The regulations mandate the use of a formula, which is far from clear.[21]

The Tax Court ruled in favor of the IRS in several cases on grounds that the extinguishment clause in the deed did not fully comport with the convoluted regulations.[22] This technical violation led to taxpayers getting a tax deduction of $0 for donating an easement, regardless of its true value. Things began to change over time. For instance, the Eleventh Circuit held in *Hewitt*[23] that the IRS had broken the law when it came to addressing extinguishment clauses. It ruled that the IRS had contravened the Administrative Procedure Act in construing the relevant regulation.

B. Boundary Line Adjustment Clauses

The IRS has also challenged several cases using the argument that the specific limits of the easements were not sufficiently defined in the deeds; taxpayers could change certain internal or external boundaries after the donation, substitute one property for another, construct a home on one of several potential sites, and more.[24]

V. Not a New Idea

Various parties have long asked the IRS to issue model language for deeds to avoid triggering unintentional technical flaws, unrelated to conservation purposes and unrelated to valuation.[25] One of those parties is the national taxpayer advocate, whose reports to Congress underscore that the IRS has engaged in aggressive enforcement actions, resulting in hundreds of partnerships filing petitions with the Tax Court.[26] Below are some of the NTA's recommendations:

> Develop and publish guidance to provide safe harbors and/or sample easement provisions to provide taxpayers with examples of how they may construct a conservation easement deed that satisfies the statutory requirements and prevent unnecessary litigation.[27]
>
> Develop and publish additional guidance that contains sample easement provisions to assist taxpayers in drafting deeds that satisfy the statutory requirements for qualified conservation contributions, particularly the perpetuity requirements for those conservation easements that incentivize land preservation for future generations.[28]

The official response by the IRS was that it shares the goal of preventing unnecessary litigation by making it easier for taxpayers to prepare deeds that comply with applicable rules, and that it was drafting sample clauses for taxpayers but had not completed them yet because of "other workload priorities."[29] The IRS slightly modified its stance a few years later. In responding to yet another suggestion by the NTA that the IRS release sample deeds to ensure compliance and avoid costly squabbles, the IRS said that it theoretically believed in the cause, had previously released two items of informal guidance, planned to issue more informal guidance, and would "consider publishing formal guidance containing sample clauses, while

[21] Reg. section 1.170A-14(g)(6)(i) and (ii).

[22] *See, e.g., Belk v. Commissioner*, 774 F.3d 221 (4th Cir. 2014), *aff'g* 140 T.C. No. 1 (2013); *PBBM-Rose Hill Ltd. v. Commissioner*, 900 F.3d 193 (5th Cir. 2018); *Carroll v. Commissioner*, 146 T.C. 196 (2016); *Coal Property Holdings LLC v. Commissioner*, 153 T.C. 126 (2019); *TOT Property Holdings LLC v. Commissioner*, No. 5600-17, Bench Opinion (T.C. 2019); *Oakbrook Land Holdings LLC v. Commissioner*, 154 T.C. 180 (2020).

[23] *Hewitt v. Commissioner*, 21 F.4th 1336 (11th Cir. 2021); *see also Glade Creek Partner LLC v. Commissioner*, No. 21-11251, at 6 (11th Cir. 2022).

[24] *See, e.g., Belk*, 774 F.3d 221; *Balsam Mountain Investments LLC v. Commissioner*, T.C. Memo. 2015-43; *Bosque Canyon Ranch LP v. Commissioner*, T.C. Memo. 2015-130; *BC Ranch II LP v. Commissioner*, 867 F.3d 547 (5th Cir. 2017); and *Pine Mountain Preserve LLLP v. Commissioner*, 151 T.C. 247 (2018).

[25] Kristen A. Parillo, "Yellen and Rettig Asked to Clarify Easement Rules," *Tax Notes Federal*, Feb. 1, 2021, p. 804 (noting that various groups have asked the IRS to issue "model language to avoid unnecessary litigation").

[26] National Taxpayer Advocate, "Annual Report to Congress 2020," at 216-219 (2021).

[27] NTA, "Annual Report to Congress 2019," at 203 (2020).

[28] NTA, "Annual Report to Congress 2020," *supra* note 26, at 219.

[29] NTA, "Annual Report to Congress 2019," *supra* note 27, Appendix 1, at 194-195.

continuing to balance guidance priorities as a whole."[30]

VI. Congressionally Mandated Safe Harbors

The IRS, in accordance with the explicit decree by Congress, issued safe harbor language within 120 days of the enactment of the SECURE 2.0 Act.[31] It published Notice 2023-30, which begins by emphasizing that it only addresses extinguishment clauses and boundary line adjustment clauses, and does not pertain to any other deed amendments.[32] Closely tracking the rules set forth in the SECURE 2.0 Act, Notice 2023-30 explains the procedures for amending an original deed. It says, in particular, that an amended deed must be signed by the donor and donee and recorded by July 24, 2023.[33] It then clarifies that an amended deed will be treated as effective (for purposes of section 170, the SECURE 2.0 Act, and Notice 2023-30) as of the date on which the original deed was recorded, "regardless of whether the amended [deed] is effective retroactively under relevant state law."[34]

Notice 2023-30 discusses the four exceptions to the general amendment rule, echoing the earlier guidelines established in the SECURE 2.0 Act.[35] In other words, it does not offer additional color when it comes to the four exceptions to amending deeds but does unveil the magic words. The safe harbor language for extinguishment clauses is as follows:

> Pursuant to Notice 2023-30, Donor and Donee agree that, if a subsequent unexpected change in the conditions surrounding the property that is the subject of a donation of the perpetual conservation restriction renders impossible or impractical the continued use of the property for conservation purposes, the conservation purpose can nonetheless be treated as protected in perpetuity if (1) the restrictions are extinguished by judicial proceeding and (2) all of Donee's portion of the proceeds (as determined below) from a subsequent sale or exchange of the property are used by the Donee in a manner consistent with the conservation purposes of the original contribution.
>
> Donor and Donee agree that the donation of the perpetual conservation restriction gives rise to a property right, immediately vested in Donee, with a fair market value that is at least equal to the proportionate value that the perpetual conservation restriction, at the time of the gift, bears to the fair market value of the property as a whole at that time. The proportionate value of Donee's property rights remains constant, such that if a subsequent sale, exchange, or involuntary conversion of the subject property occurs, Donee is entitled to a portion of the proceeds at least equal to that proportionate value of the perpetual conservation restriction, unless state law provides that the donor is entitled to the full proceeds from the conversion without regard to the terms of the prior perpetual conservation restriction.[36]

Notice 2023-30 then supplies the following safe harbor language for clauses addressing boundary line adjustments:

> Pursuant to Notice 2023-30, Donor and Donee agree that boundary line adjustments to the real property subject to the restrictions may be made only pursuant to a judicial proceeding to resolve a bona fide dispute regarding a boundary line's location.[37]

In recognition of the fact that different deeds use different terminology, Notice 2023-30 offers taxpayers some degree of flexibility. It indicates that, when substituting the safe harbor language described above, donors can use grantor and grantee, instead of donor and donee. Notice 2023-

[30] NTA, "Objectives Report to Congress: Fiscal Year 2022," Appendix 1, at 144 (2021).

[31] Parillo, "IRS Issues Easement Safe Harbor Language via Notice," *Tax Notes Federal*, Apr. 17, 2023, p. 495; IRS, "Treasury, IRS Issue Safe Harbor Deed Language for Extinguishment and Boundary Line Adjustment Clauses," IR-2023-73 (Apr. 10, 2023).

[32] Notice 2023-30, section 1.02.

[33] *Id*. section 3.01.

[34] *Id*. section 3.03.

[35] *Id*. section 3.02.

[36] *Id*. section 4.01.

[37] *Id*. section 4.02.

30 adds that taxpayers can also use the terms easement, servitude, and restriction interchangeably, provided that they all refer to a qualified real property interest, as defined in section 170 and the underlying regulations.[38]

VII. Conclusion

Taxpayers, attorneys, land trusts, the national taxpayer advocate, and others have been asking, if not imploring, the IRS to issue a comprehensive model/sample deed for years. The idea is that donors of conservation easements would follow the guidance, perhaps begrudgingly, in exchange for certainty that the IRS could not raise deed-based technical attacks afterward. In this manner, many easement disputes could be avoided, and those not averted would center on critical issues, such as whether a property is worthy of conservation and its value. Groups also hoped that the IRS would allow safe harbor language to broadly apply to all deeds — past and future — because this would serve to reduce the massive number of pending Tax Court cases and narrow the points of contention.

Unfortunately, Notice 2023-30 offers only language and amendment opportunities for extinguishment clauses and boundary line adjustment clauses. Moreover, it lists several situations that cannot reap any benefit whatsoever. These consist of past transactions involving SCETs, transactions that violate the 2.5 times rule, transactions that are pending in court, and transactions that have already been resolved, administratively or judicially, when disallowance of the donation triggered an accuracy-related penalty or civil fraud penalty.

The SECURE 2.0 Act says that the IRS "shall" issue "regulations or other guidance" as necessary and appropriate to carry out the rules. It also ordered the IRS to publish safe harbor language regarding two deed clauses within 120 days of enactment.

It is true that, in issuing Notice 2023-30, the IRS did exactly what Congress instructed in the SECURE 2.0 Act. It is equally true that the IRS did nothing more, despite the green light from Congress to issue regulations or other guidance to implement the law. In other words, the IRS did the minimum required, despite calls from groups for a comprehensive model/sample deed, and despite repeated assurances from the IRS over the years that broad guidance was in the works. The IRS's unwavering public stance has been that the real issue in conservation easement disputes is valuation, but the narrow scope and exclusionary tone of Notice 2023-30 seem inconsistent with that position. ■

[38] *Id.* section 4.03.