Conservation Easement Battles: The IRS Uses "Syndication Expenses" and Forms 8283 to Disallow Charitable Deductions

By Hale E. Sheppard*

Hale E. Sheppard continues to analyze important issues related to conservation easement battles, including the IRS's newest attack focused on Form 8283, basis, and treatment of "syndication expenses."

I. Introduction

The IRS has been attacking partnerships that donate conservation easements for several decades, with its most recent wave of enforcement actions gaining momentum with the announcement of a broad "compliance campaign" in 2016. The major problem, according to the IRS, is overvaluation of easements. However, the IRS often centers its challenges not on valuation, but rather on "technical" violations in one of the many documents that partnerships must file with the IRS to report a conservation easement donation, such as Form 8283 (*Noncash Charitable Contributions*).

The IRS takes the stance that any error or omission in connection with Form 8283, regardless of how minor, merits a deduction of $0. The IRS has recently added new layers to this argument. It now contends that some partnerships are not properly accounting for "syndication expenses," which leads to unwarranted deductions and/or inaccurate basis information on Form 8283, which impairs the IRS's ability to detect non-compliance, which justifies complete disallowance of charitable deductions. This article analyzes issues relevant to this expanded position by the IRS.

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II. Overview of Conservation Easement Donations

Taxpayers who own undeveloped real property have several choices. For instance, they might (i) hold the property for investment purposes, selling it when it appreciates sufficiently, (ii) determine how to maximize profitability from the property and then do that, regardless of the negative effects on the local environment, community, and economy, or (iii) donate an easement on the property to a charitable organization, such that it is protected forever for the benefit of society.

The third option, known as donating a "conservation easement," not only achieves the goal of environmental protection, but also triggers another benefit, tax deductions for donors. Taxpayers generally must donate their entire legal interest in a particular piece of property, not just part of their interest, in order to qualify for a tax deduction.[1] This is a critical concept, as taxpayers who own all attributes of a piece of real property (*i.e.*, they own it in "fee simple") do not donate the property outright to a charitable organization in the easement context. Instead, they retain ownership of the property, but convey an easement on such property to an independent organization with the ability, capacity, willingness, and resources to safeguard the property forever. This is usually a land trust. Provided that the easement, which is just a partial interest in property, constitutes a "qualified conservation contribution," taxpayers are entitled to the tax deduction.[2]

As one would expect, taxpayers cannot donate an easement on any old property and claim a tax deduction; they must demonstrate that the property is worth protecting. A donation has an acceptable "conservation purpose" if it meets at least one of the following requirements: (i) It preserves land for outdoor recreation by, or the education of, the general public; (ii) It preserves a relatively natural habitat of fish, wildlife, or plants, or a similar ecosystem; (iii) It preserves open space (including farmland and forest land) for the scenic enjoyment of the general public and will yield a significant public benefit; (iv) It preserves open space (including farmland and forest land) pursuant to a federal, state, or local governmental conservation policy, and will yield a significant public benefit; or (v) It preserves a historically important land area or a certified historic structure.[3]

Taxpayers memorialize the donation to charity by filing a public Deed of Conservation Easement ("Deed"). In preparing the Deed, taxpayers often coordinate with the land trust to identify certain limited activities that can continue on the property after the donation, without interfering with the Deed, without prejudicing the conservation purposes, and, hopefully, without jeopardizing the tax deduction.[4] These activities are called "reserved rights." The IRS openly recognizes, in its Conservation Easement Audit Techniques Guide ("ATG") and elsewhere, that reserved rights are ubiquitous in Deeds.[5]

The IRS will not allow the tax deduction stemming from a conservation easement unless the taxpayer provides the land trust, before making the donation, with "documentation sufficient to establish the condition of the property at the time of the gift."[6] This is called the Baseline Report. It may feature several things, including, but not limited to, (i) the 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, vegetation, 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 appropriate scale taken as close as possible to the date of the donation, and (iv) on-site photographs taken at various locations on the property.[7]

The value of the conservation easement is the fair market value ("FMV") of the property at the time of the donation.[8] 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.[9] The IRS explains in its ATG that the best evidence of the FMV of an easement would be the sale price of other easements that are comparable in size, location, usage, etc. The ATG recognizes, though, that it is difficult, if not impossible, to find comparable sales.[10] Consequently, appraisers often must use the before-and-after method instead. This means that an appraiser must determine the highest and best use ("HBU") of the property *and* the corresponding FMV twice. First, the appraiser calculates the FMV if the property were put to its HBU, which generates the "before" value. Second, the appraiser identifies the FMV, taking into account the restrictions on the property imposed by the easement, which creates the "after" value.[11] The difference between the "before" value and "after" value, with certain other adjustments, produces the value of the easement donation.

As indicated above, in calculating the FMV of property, appraisers and courts must take into account not only the current use of the property, but also its HBU.[12] A property's HBU is the most profitable use for which it is adaptable and needed in the reasonably near future.[13] The term HBU has also been defined as the use of property that is physically possible, legally permissible, financially

feasible, and maximally productive.[14] Importantly, valuation in the easement context does not depend on whether the owner has actually put the property to its HBU in the past.[15] The HBU can be *any* realistic potential use of the property.[16] Common HBUs are construction of a residential community, creation of a mixed-use development, or mining.

Properly claiming the tax deduction stemming from an easement donation is surprisingly complicated. It involves a significant amount of actions and documents. The main ones are as follows: The taxpayer must (i) obtain a "qualified appraisal" from a "qualified appraiser," (ii) demonstrate that the land trust is a "qualified organization," (iii) obtain a Baseline Report adequately describing the condition of the property at the time of the donation, (iv) receive from the land trust a "contemporaneous written acknowledgement," both for the easement itself and for any endowment/stewardship fee donated to finance perpetual protection of the property, (v) complete a Form 8283 and have it executed by all relevant parties, including the taxpayer, appraiser, and land trust, (vi) assuming that the taxpayer is a partnership, file a timely Form 1065, enclosing Form 8283 and the qualified appraisal, and (vii) send all the partners their Schedules K-1 (Partner's Share of Income, Deductions, Credits, etc.) and a copy of Form 8283.[17]

III. Common "Technical" Arguments by the IRS

The IRS has been advancing a series of attacks on partnerships donating conservation easements, and the list continues to expand. These include so-called "technical" arguments.[18]

Revenue Agents and other IRS personnel often follow the ATG when conducting examinations.[19] The ATG contains a "Conservation Easement Issue Identification Worksheet." It sets forth a large number of technical challenges (*i.e.*, those not related to the valuation of the conservation easement) that the IRS might raise, including the following reasons for completely disallowing an easement-related tax deduction:

- The donation of the easement lacked charitable intent, because there was some form of quid *pro quo* between the partnership and the land trust.
- The donation of the easement was conditioned upon receipt by the partnership of the full tax deduction claimed on its Form 1065.
- The land trust failed to issue a "contemporaneous written acknowledgement" letter.
- The appraisal was not attached to the Form 1065 filed by the partnership.
- The appraisal was not prepared in accordance with the Uniform Standards of Professional Appraisal Practice.
- The appraisal fee was based on a percentage of the easement value.
- The appraisal was not timely, in that it was not sufficiently proximate to the making of the donation or the filing of the Form 1065 by the partnership.
- The appraisal was not a "qualified appraisal."
- The appraiser was not a "qualified appraiser."
- The Form 8283 was missing, incomplete, or inaccurate.
- Not all appraisers who participated in the analysis signed Form 8283.
- The Baseline Report insufficiently described the condition of the property.
- The conservation easement was not protected in perpetuity.
- Any mortgages or other encumbrances on the property were not satisfied or subordinated to the easement before the donation.
- The Deed contains an improper clause regarding how the proceeds from sale of the property upon extinguishment of the easement would be allocated among the partnership and the land trust.
- The Deed contains an amendment clause, which, in theory, might allow the parties to modify the donation, after taking the tax deduction, in such a way to undermine the conservation purposes.
- The Deed contains a merger clause, as a result of which the fee simple title and the easement might end up in the hands of the same party, thereby undermining the ability to protect the property forever.
- The Deed was not timely filed with the proper court or other location.
- The land trust was not a "qualified organization."
- The land trust was not an "eligible done."
- The property lacks acceptable "conservation purposes" for any number of reasons, including the habitat is not protected in a relatively natural state, there are insufficient threatened or endangered species on the property, the habitat or ecosystem to be protected is not "significant," the public lacks physical or visual access to the property, the conservation purposes do not comport with a clearly-delineated government policy, the easement allows uses that are inconsistent with the conservation purposes, the partnership has "reserved rights" that interfere with or destroy the conservation purposes, etc.[20]

The ATG encourages creativity, explaining to IRS personnel that the checklist should not serve as a limitation. Indeed, it states that "[t]his worksheet is *not* an all-inclusive list of potential issues for donations of conservation easements [and] users *should review* IRC Section 170, DEFRA Section 155, the corresponding Treasury Regulations, Notice 2006-96, and case law."[21]

IV. Syndication Expenses—Overview of Applicable Law

Code Sec. 707(c) allows a partnership to deduct certain "guaranteed payments" to partners. This provision states, in particular, that payments to partners for services shall be considered as made to non-partners, but only for purposes of Code Sec. 61(a) (relating to items of gross income) and Code Sec. 162(a) (relating to deductions of business expenses). Based on this language in Code Sec. 707(c), it became "common practice" for limited partnerships to automatically deduct, as business expenses, payments that it made to general partners for services rendered in connection with the organization and/or syndication of partnerships, regardless of whether such payments actually met the requirements under Code Sec. 162.[22]

The IRS disagreed with this practice and took steps to halt it. For instance, the IRS issued Rev. Rul. 75-214, indicating that, for purposes of Code Sec. 707, payments made to partners for services on behalf of a partnership may only be deducted if they would otherwise be deductible had they been made to non-partners.[23] Despite Rev. Rul. 75-214 and certain Tax Court decisions in favor of the IRS on similar issues, Congress believed that the law was still vague:

> [T]he law is not entirely clear that, to be deductible, guaranteed payments must meet the same tests under Section 162(a) as if the payments had been made to a person who is not a member of the partnership. A contrary conclusion would allow partnerships to obtain current deductions for capital expenditures (including organizational expenses and the expenses of selling partnership interests), even though all other types of taxpayers would be required to capitalize the same expenditures.[24]

In light of this ambiguity, Congress made some changes, including the enactment of new Code Sec. 709, as part of the Tax Reform Act of 1976. The legislative history explains that Congress felt that it was not reinventing the wheel by introducing Code Sec. 709, but rather elucidating the law already in effect: "Since the committee believes that these provisions merely declare and clarify existing law, they apply to all taxable years to which the Internal Revenue Code of 1954 applies."[25]

Code Sec. 709(a) generally provides that neither a partnership nor any of its partners can deduct amounts paid "to promote the sale of (or to sell) an interest in such partnership."[26] However, a partnership can make an affirmative election to currently deduct certain "organizational expenses," and claim the remainder over time.[27] In the context of conservation easements, and for purposes of this article, it is critical to distinguish between "organizational expenses" and "syndication expenses."

The term "organizational expenses" means costs that are incident to the creation of a partnership, chargeable to capital account, and if spent in connection with a partnership with an ascertainable life, they would be amortized over such life.[28] Legal fees for services related to the organization of a partnership, such as negotiation and preparation of a partnership agreement, accounting fees, and filing fees are "organizational expenses" for these purposes.[29] On the other hand, certain items do *not* qualify as "organizational expenses," regardless of the manner in which the partnership itself characterizes them. These consist of (i) expenses connected with acquiring assets for the partnership or transferring assets to the partnership, (ii) expenses related to the admission or removal of partners, other than at the time the partnership is first organized, (iii) expenses pertaining to a contract about the operation of the trade or business of the partnership, and (iv) "syndication expenses."[30]

For their part, "syndication expenses" encompass those paid in connection with "the issuing and marketing of interests in the partnership."[31] The regulations provide specifics, stating that these expenses consist of (i) brokerage fees, (ii) legal fees of the underwriter, placement agent and/or issuer (*i.e.*, the partnership or its general partner) for securities advice and/or for advice pertaining to the adequacy of tax disclosures in the prospectus or placement memorandum for securities law purposes, (iii) accounting fees for preparation of representations to be included in the offering materials, and (iv) printing costs of the prospectus, placement memorandum, and other selling and promotion materials.[32] The regulations emphasize that syndication expenses, unlike organizational expenses, cannot be partially deducted through an election under Code Sec. 709(b); they "must be capitalized."[33]

For the non-accountants reading this article, the term "capitalize" generally means to record an item as an asset, rather than an expense, meaning that it will appear on the partnership's balance sheet, instead of its income

statement. Depending on the item in question, the partnership might then depreciate the item; that is, deduct its total cost, bit by bit, over its entire useful life. In some instances, where an item is not depreciable, the capitalized cost will not offset income or gain until the partnership ultimately sells or otherwise disposes of it.

V. Review of Relevant Authorities

To understand the IRS's current strategies regarding alleged syndication expenses, one must first possess some historical knowledge. This article summarizes, below, several important authorities in chronological order.[34]

A. *Cagle* (1974)

The Tax Court decided *Cagle* shortly before Congress enacted Code Sec. 709 in order to rectify perceived abuses by partnerships of the "guaranteed payments" rules.[35] The case is noteworthy because it fortified the general rule that, in order to be currently deductible by a partnership, certain payments to partners, including those labeled as management fees, must meet the ordinary and necessary business expense standard of Code Sec. 162.

The taxpayers in *Cagle* were limited partners in a partnership formed for purposes of developing and operating a commercial property. The partnership signed a management agreement with the general partner, through his sole proprietorship, whereby he was paid $90,000 in 1968 for providing various services. The Tax Court noted that the general partner performed the following services: He prepared a feasibility study, which included financial predictions, market potential, and project costs; He worked with architects on preliminary plans; He coordinated with general contractors regarding architecture and construction; and He arranged financing.[36] The Tax Court underscored the fact that "[n]o portion of the management fee was for managing the property after it was completed."[37]

On its 1968 Form 1065, the partnership deducted the "management fee" and reported a loss, the distributive share of which flowed to the partners. They reported such losses on their 1968 Form 1040 (*U.S. Individual Income Tax Return*). The IRS audited and disallowed the loss on grounds that the management fee was not currently deductible because it was not an ordinary and necessary business expense.[38]

The Tax Court explained that, regardless of whether the payments in question fall under Code Sec. 707(a) (dealing with payments to partners who are not acting in their capacity as partners) or under Code Sec. 707(c) (addressing "guaranteed payments" to partners), the result is the same: The payments must meet Code Sec. 162 in order for the partnership to deduct them.[39] The Tax Court then analyzed some of the specific services performed by the general partner, among them preparing the feasibility study. The Tax Court concluded that the related costs constituted a capital expenditure because the feasibility study was only the first step in the development of a capital asset (*i.e.*, a commercial rental property) and its benefits would extend well beyond 1968, the year in which the study was done.[40]

B. Rev. Rul. 75-214 (1975)

The limited partnership scrutinized in Rev. Rul. 75-214 was formed to acquire, develop, and sell real property. The limited partners supplied most of the necessary cash through a public offering. The partnership agreement indicated that one of the general partners would handle all matters and pay all costs related to the organization of the partnership and the sale of partnership interests. The partnership paid the general partner for his services, supposedly in organizing the partnership, and deducted such expense.

The IRS stated that the language in Code Sec. 707(c), that a payment to a partner for services shall be considered as made to a non-partner, but only for purposes of Code Secs. 61 and 162, "should *not* be interpreted to mean that *every* payment to a partner for services is deductible by the partnership under Code Sec. 162(a)."[41] After citing to *Cagle* and another case, the IRS concluded in Rev. Rul. 75-214 that "even though the payments to the general partner for his services rendered in organizing the limited partnership are payments described in Section 707 of the Code, they are not deductible by the partnership under Section 162 because they constitute capital expenditures within the meaning of Section 263."[42]

C. *Kimmelman* (1979)

The taxpayer in *Kimmelman* was a limited partner in five partnerships, all of which were formed to purchase real property, hold it for appreciation and resale as industrial or residential property, and lease it to winegrowers in the meantime.[43] The limited partnerships paid the general partner a "general partner fee" and a "management fee." The limited partnerships deducted such payments on their Forms 1065 for 1971 and 1972, and the taxpayer claimed his distributive share of the losses on his corresponding Forms 1040.

The Tax Court addressed two significant issues in *Kimmelman*. The first was whether guaranteed payments

to partners pursuant to Code Sec. 707(c) were currently deductible, regardless of whether they met the business expense standards of Code Sec. 162. The Tax Court explained that this issue had previously been resolved, both in *Cagle* and the subsequent enactment of Code Sec. 709:

> In the committee reports accompanying the bill which eventually became the Tax Reform Act of 1976, our decision in *Cagle* was expressly approved and endorsed by the House Ways and Means Committee and the Senate Finance Committee, both as a statement of what the law was prior to 1976, and as a statement of what the law should be "There is absolutely no indication that Congress intended to depart from the well-established distinction between ordinary and necessary business expenses and capital expenditures, and we are altogether confident that if Congress had wished to make capital expenditures deductible, it would have done so clearly. Accordingly, we conclude that *Cagle* was correctly decided, and we shall adhere to and follow our holding in that case."[44]

The second issue in *Kimmelman* was the proper tax treatment of certain fees that the partnership paid its general partners. The IRS, of course, claimed that the fees were not currently deductible. In deciding in favor of the IRS, the Tax Court stated that the general partners "performed substantial services in connection with the organization and syndication of the partnerships," including identifying the property, inspecting it, researching the title, negotiating the terms, advertising the investment, circulating the prospectus, otherwise locating potential investors, and handling the escrow accounts.[45] The Tax Court noted that the general partners performed most of these services before the partnerships were organized, and they received no commissions for the sales of partnership interests. Based on these facts, the Tax Court ruled that supposed management fees were really syndication expenses, which had to be capitalized.[46]

D. Rev. Rul. 81-153 (1981)

The organizer of the limited partnership discussed in Rev. Rul. 81-153 was its general partner. He entered into discussions with investment advisors and tax advisors to get their assistance in selling partnership interests. The advisors could not, or would not, accept "commissions" or "finder's fees" for their work. Therefore, the organizer agreed that the partnerships would pay them a "rebate" of eight percent of the cash portion of the amount paid by investors for limited partnership interests. For instance, an investor paid $1,000 in cash for a partnership interest, along with a promissory note. The partnership "rebated" $80 to the investor, who, in turn, paid his advisor $80 for "time spent reviewing the prospectus."[47]

The IRS determined in Rev. Rul. 81-153 that the limited partnership could not deduct the $80 because it was not an organizational expense, but rather "in substance a commission for the sale of a partnership interest under Section 709(a)."[48] The IRS provided the following support for its conclusion:

> On the facts presented in this case, the amounts rebated by [the limited partnership], or the discounts allowed by [the limited partnership], were payments, by the limited partnership to the advisor, for services rendered. [The investor] was merely a conduit through which [the advisor] was paid the commission by [the limited partnership]. The services for which [the advisor] was being compensated related solely to the sale of interests and not to the organization of the partnership. Furthermore, even if an expense were, for federal income tax purposes, paid by [the investor], the payment would not entitle [the investor] to a deduction because the payment would be for an obligation of [the limited partnership] and not for an obligation of [the investor].

E. *Wedland* (1982)

The relevant issue in *Wedland* was the treatment of $100,000 paid by the partnership, supposedly for legal fees.[49] The Tax Court recognized that a portion of the fees was for legal work, while the remainder was for tax advice. It also emphasized that, to the extent that the fees related to selling partnership interests, they were non-deductible syndication costs.[50] Because the taxpayers had the burden of proof and they failed to present evidence to support the proper allocation of fees, the Tax Court held that the entire $100,000 must be capitalized.[51]

F. *Surloff* (1983)

Surloff deals with ability of partnerships to claim certain losses triggered by what the IRS and Tax Court characterized as "syndicated coal tax shelters."[52] Each of the partnerships paid an attorney for (i) advising the promoter about the formation of the partnerships, (ii) preparing the offering prospectus, (iii) drafting the tax opinion letter, (iv) negotiating with the landowner for the acquisition of the property, and (v) talking with representatives of potential

investors about the economic and tax consequences of investing in the partnerships.[53]

The partnerships argued that the fees pertained to tax advice, and they were entitled to a deduction under Code Sec. 162. The IRS countered that they were syndication costs that must be capitalized. The Tax Court explained as follows in ruling in favor of the IRS:

> We think it is clear that the fees paid to [the attorney], even to the extent he allocated them to tax advice, were incurred to promote the sale of the partnership interests and must therefore be capitalized. The tax opinion letter was an integral part of the offering prospectus and was certainly included therein to facilitate the sale of partnership interests. Indeed, we doubt that any investor would have purchased interests in the partnerships had there not been representations made regarding the tax advantages of doing so. [The attorney's] meeting with the offeree-representatives and potential investors to explain the financial and tax ramifications prior to their investing in the partnerships was only a continuance of the efforts to sell partnership interests. In addition, we note that the partnerships themselves incurred the expense prior to their formation. The majority of the services appear to have gone into the preparation of the tax opinion letter which informed potential investors in general of the tax consequences of investing in the partnerships. It does not appear that the tax advice was directed to the individual needs of the various investors, but rather was incurred by the partnerships solely as an aid in selling partnership interests. Thus, we hold that the expense was a partnership expense incurred in selling partnership interests and is not deductible.[54]

G. *Flowers* (1983)

Like *Surloff*, described immediately above, *Flowers* dealt with whether amounts that the partnerships allegedly paid for tax advice should be deducted or capitalized.[55] The Tax Court supplied the following analysis in ruling that the fees were non-deductible syndication expenses:

> With respect to the amount deducted for tax advice on the 1976 partnership return, [the taxpayers] failed to prove that such amount was not incurred to promote the sale of the limited partnership interests. It appears that a large amount, if not all of this expense, was incurred for purposes of obtaining the tax opinion letter which accompanied the offering prospectus. Section 709(a) provides that no deduction shall be allowed to a partnership or to any partner for amounts paid or incurred to organize a partnership or to promote the sale of an interest in such partnership. Since [the taxpayers] failed to prove that the tax advice was incurred for a purpose other than to promote the sale of the limited partnership interests it cannot be deducted.[56]

H. *Johnsen* (1984)

The analysis in *Johnsen* centered on payments by partnerships to a law firm and an investment firm.[57] The law firm prepared and reviewed partnership documents, filed formation documents with the secretary of state, and issued a non-tax legal opinion. It issued two invoices, one of which indicated that it rendered legal and tax advice regarding tax aspects of proposed partnership transactions.[58] For its part, the investment firm sold the limited partnership interests and received a commission from the partnership of around 10 percent. The investment firm also was involved with the formation of the limited partnership, discussions about potential transactions, and tax ramifications of various structures. The investment firm issued two invoices to the partnership, one for "selling and organizational expense," and the other for "consulting and tax advisory services."[59] The IRS audited and disallowed all such expenses.

The IRS has indicated its intention of auditing everything that it considers a syndicated conservation easement transaction. In doing so, the IRS will use many different lines of attack, including various "technical" arguments, to justify the complete disallowance of charitable deductions.

At trial, both the law firm and investment firm tried to divide items into deductible and non-deductible fees, asking the Tax Court to accept their after-the-fact allocation. The Tax Court made two general observations. The first was that the regulations under Code Sec. 709

state that legal fees related to preparation of partnership agreements are "organizational expenses," while "legal fees to the underwriter or placement agent" are "syndication expenses" that must be capitalized.[60] The Tax Court also indicated that the cost of a tax opinion letter that is included with an offering memorandum is not deductible because it "is incurred to promote or facilitate the sale of the partnership interests advertised in the memorandum."[61]

Partnerships and their advisors need to be cognizant of this new IRS stance as they engage in the inevitable battles over conservation easement donations going forward.

The Tax Court refused to allow any deductions for fees paid to the law firm because (i) based on the "extremely sketchy" evidence presented about the types of services performed, the Tax Court could not determine if the allocation between tax advice and organizational expenses was accurate, and (ii) even if some of the fees were allocable to tax advice, which normally would be deductible, they become non-deductible when the tax advice consists of materials to be included in the investment offering.[62]

The Tax Court had a similar analysis regarding the investment firm and its attempt to allocate the majority of the fees to "tax advisory services." The Tax Court indicated that the partnership created a "meager record" that was "totally insufficient" to determine the accuracy of the fee allocation. Moreover, the Tax Court explained that "it is clear from the record that [the investment firm] was primarily responsible for promoting and selling the limited partnership interests to its clients."[63]

I. Rev. Rul. 85-32 (1985)

The organizer in Rev. Rul. 85-32 formed a limited partnership with the goal of purchasing and managing hotels. As part of the public offering of the partnership interests, the organizer arranged for the printing of prospectuses.

The IRS determined in Rev. Rul. 85-32 that the printing costs were "an amount paid to promote the sale of partnership interests," such that they were non-deductible under Code Sec. 709(c). The IRS summarized its holdings as follows: "A partnership may not amortize syndication costs incurred in connection with the sale of limited partnership interests [and] the syndication costs are expenses chargeable by the partnership to capital account."[64]

J. *Estate of Thomas* (1985)

The partnership in *Estate of Thomas* paid an "equity placement fee" to a national brokerage firm to act as its exclusive sales agent of limited partnership interests.[65] The Tax Court characterized such fee as a "sales commission," and the parties agreed that "fees incurred by partnerships for syndication of their shares are nondeductible expenses that must be capitalized."[66]

K. *Egolf* (1986)

The taxpayer in *Egolf* was the general partner of a limited partnership engaged in oil and gas drilling.[67] According to the partnership agreement, the general partner was solely responsible for paying all organization and syndication expenses, including significant commissions and fees to broker-dealers for selling limited partnership interest, and the partnership would pay the general manager a "management fee." The general partner reported the management fee on Schedule C to his Form 1040 and then deducted all expenses that he effectively paid on behalf of the limited partnership on the same Schedule C. The limited partnership, for its part, deducted the management expenses paid on its Form 1065.

The Tax Court agreed with the IRS's disallowance of the deductions based on the following reasoning:

> The 1978-Partnership Agreement before us was structured in an attempt to avoid the strictures of Section 709. Instead of directly bearing nondeductible capital costs of organization and syndication, the 1978-Partnership Agreement required [the general partner] to bear these costs. The 1978-Partnership reimbursed [the general partner] for his services to the partnership, including organization and syndication costs, with the management fee, for which it claimed a current deduction. [The general partner] then reported the entire amount of the management fee as ordinary income. To complete the circle, [the general partner] claimed a deduction under Section 162 for all of the organization and syndication costs incurred by [the general partner] on behalf of the 1978-Partnership as an expense of [his] trade or business of organizing drilling program limited

> partnerships … If we were to respect the form of the above transactions, the 1978-Partnership would have succeeded in currently deducting organization and syndication costs by indirectly paying them to [the general partner] under the guise of management fees. Further, the transaction would have had no ill effects on [the general partner]. The management fee income [he] reported representing reimbursement for the organization and syndication costs of the 1978-Partnership would have been offset by deductions for legal fees and commissions incurred in organizing and syndicating interests in the partnership. Such a result would circumvent the letter and intent of Section 709.[68]

L. *Driggs* (1986)

The taxpayers in *Driggs* purchased limited interests in a partnership that held software for computer-assisted language translation.[69] The general partner promoted the sale of the limited partnership interests via a private placement memorandum. According to the memorandum, the general partner would get 10 percent of the total investment raised as an "organization fee."[70] From this amount, the general partner had to pay commissions, fees, and other expenses of the offering. The memorandum specifically stated that the partnership would pay other expenses, such as legal, accounting, printing, and state securities registration.[71] The partnership deducted the "organization fee," and the limited partners claimed losses flowing from the partnership attributable, in part, on such deductions.[72]

At trial, the taxpayers conceded that a portion of the "organization fee" was for syndication expenses and that an "exact tracing" was unfeasible.[73] They suggested an after-the-fact allocation by reviewing all partnership payments and then applying certain ratios. The Tax Court ruled that the entire "organization fee" was a non-deductible expense because of insufficient evidence.[74]

M. *Finoli* (1986)

The limited partnership in *Finoli* was established in order to construct, operate, and maintain a television system.[75] The partnership hired an attorney to prepare a tax opinion explaining the federal income tax consequences to the partnership and its partners in connection with the proposed investment.[76] The partnership claimed losses for several years, and the case focused on whether an individual partner could claim his distributive share of such losses.

The Tax Court classified as non-deductible syndication expenses commissions paid for the sale of partnership interests, certain consulting fees, and legal bills related to the tax opinion.[77] With respect to the tax opinion, the Tax Court held that all related fees "were incurred to promote or facilitate the sale of the partnership interests, and constitute syndication expenses and are, therefore, not deductible."[78]

N. Rev. Rul. 88-4 (1988)

The limited partnership in Rev. Rul. 88-4 hired a tax attorney to prepare a tax opinion, the conclusions of which were featured in the prospectus used to sell partnership interests. The legal fees covered researching, analyzing, developing, and drafting of the tax opinion. The IRS explained that federal and/or state securities laws generally require that the prospectus or private placement memorandum concerning a syndicated partnership contain a tax opinion or a tax segment describing the consequences to potential partners. The IRS also pointed out that "the presence of a tax opinion in an offering of partnership interests is viewed as an important promotional feature which is useful in marketing the interests to investors."[79] The IRS concluded as follows in Rev. Rul. 88-4:

> The fee paid by a syndicated limited partnership for the tax opinion used in connection with the preparation of the partnership prospectus is a syndication expense that may not be amortized under Section 709(b) of the Code or deducted under Section 162(a) or Section 212(3). The [syndication] fee must be capitalized by the partnership.[80]

O. *Brown* (1988)

In *Brown*, the Tax Court addressed, among other things, the proper treatment of certain expenses related to a limited partnership claiming investment tax credits, including a tax opinion letter.[81] It concluded that "the purpose of the [tax opinion] was for convincing and comforting investors in connection with the marketing of limited partnership units [and] such purpose is one of syndication, not organization."[82]

P. Rev. Rul. 89-11 (1989)

The general partner in Rev. Rul. 89-11 entered into an agreement with an underwriter to undertake a best-efforts

public offering of limited partnership interests.[83] He paid certain costs toward the syndication. Ultimately, the effort was unsuccessful and abandoned.

The IRS explained in Rev. Rul. 89-11 that syndication costs might be paid in a number of different ways, such as directly by the partnership, indirectly through a general partner, or by investors paying a sales commission at the time of purchasing a partnership interest. The IRS ruled that "the cost of marketing partner interests are syndication costs, regardless of who pays the costs," and they must be capitalized.[84] The IRS further clarified that Code Sec. 709 "precludes the allowance of a deduction for partnership syndication expenses regardless of whether the syndication effort was successful."[85]

Q. *Diamond* (1989)

One of the disputes in *Diamond* centered on the appropriate treatment by a limited partnership of certain legal expenses.[86] The taxpayer tried to allocate the expenses between securities advice and tax advice, but the Tax Court suggested that such division was irrelevant because the taxpayer failed to prove that "any portion of those fees [was] allocable to expenses other than for promotion of the sale of the partnership interests."[87] The Tax Court further explained that legal fees fall into the category of non-deductible syndication expenses when a tax opinion is "an integral part of the offering prospectus and was included therein to facilitate the sale of partnership interests."[88]

R. *Ball* (1989)

The limited partnership in *Ball* was formed for purposes of developing and operating an apartment building.[89] In order to raise more capital, one of the general partners consulted broker-dealers experienced with syndicated investment projects, particularly government-subsidized deals. After conducting a "thorough review," the broker-dealers agreed to acquire essentially all the partnership interests through their own special-purpose limited partnership. They then planned to sell interests, at a premium, to investors who were primarily interested in tax benefits.[90]

The activities of the broker-dealers consisted of interacting with the construction company, visiting the proposed site, analyzing reports by third parties, making cost and revenue projections, working with their attorneys and accountants to form the partnerships, preparing an offering memorandum, presenting the deal to proposed investors, verifying the financial qualifications of investors, monitoring the progress of the project, and performing routine administrative tasks.[91] The partnership agreement classified the amounts paid to the broker-dealers as a "management fee." The partnership deducted them on its Form 1065, which helped to create the loss that flowed to the limited partners. The IRS disallowed the loss, and Tax Court litigation ensued.

The Tax Court held in favor of the IRS, explaining that whether the so-called management fee was deductible depends on the nature of the services provided by the broker-dealers, not the characterization of such fee in the partnership agreement. The Tax Court also noted that the evidence strongly suggested that the partnership paid the fee for "putting a deal together," and that the broker-dealers provided "substantial services in connection with the organization and syndication" of the partnership. Finally, with respect to proof, the Tax Court emphasized that the taxpayer introduced "no substantive evidence" about the extent or value of different services provided by the broker-dealers, such that no portion should be allocated to a deductible management fee.[92]

S. FSA 1998-162 (1998)

In FSA 1998-162, various investment banking firms purchased limited partnership units from the general partner, at a discounted price, in order to resell such units to the public at a higher price. The general partner reported capital gain from the sale of the units on its tax return, but deducted the "discount" as a business expense under Code Sec. 162. The IRS disallowed the deduction under Code Sec. 709(a) on the theory that, in reality, it constituted a non-deductible syndication expense:

> In substance, the taxpayer sold the [limited partnership] units directly to the ultimate investors through the underwriter agents. Secondly, the "discount" afforded the underwriters, in fact, constituted a non-deductible sales commission. Thus, the gross sales amount may not be reduced by the "discount."[93]

Citing its earlier guidance in Rev. Rul. 81-153, along with the Tax Court decision in *Egolf*, the IRS went on to state the following:

> [The general partner] funneled the commissions to the salesman [*i.e.*, the underwriters] through investors and this conduit should be ignored as it

was in the above ruling. The fact that [the general partner] also structured the sales to generate capital gain (to which it alleges Section 709 does not apply) should not change this result, since Section 709 is to be broadly construed and makes no exception for capital gain transactions. Thus, notwithstanding the form of the transaction, [*Egolf*] and Rev. Rul. 81-853 support treating the sales "discount" as a *de facto* commission for which Section 709 denies a deduction.[94]

VI. Sufficiency of Data on Form 8283

The most recent theory by the IRS for negating charitable deductions originating from easements, as examined in the next segment, centers on supposed non-compliance with the Form 8283 reporting requirements. Here, this article examines disclosure duties and prior cases wherein the taxpayer did, or did not, strictly or substantially comply with such duties.

A. General Rules

A taxpayer claiming a deduction for a charitable contribution of property exceeding $5,000 must (i) obtain a "qualified appraisal" of the property contributed, (ii) attach a completed "appraisal summary" to the tax return on which the taxpayer first claims the deduction, and (iii) maintain the records required by the regulations.[95] Form 8283 constitutes the "appraisal summary" for these purposes. Form 8283 must report to the IRS, among other items, the manner by which the taxpayer acquired the property (*e.g.*, purchase, gift, inheritance, or exchange), the approximate date on which the taxpayer acquired the property, and the taxpayer's cost or adjusted basis in the property.[96]

The regulations contain "special rules" related to Forms 8283. They create a degree of latitude for taxpayers in situations where information is unavailable:

> Manner of acquisition, cost basis and donee's signature. If a taxpayer has reasonable cause for being unable provide the information … (relating to the manner of acquisition and basis of the contributed property), an appropriate explanation should be attached to [Form 8283]. The taxpayer's deduction will not be disallowed simply because of the inability (for reasonable cause) to provide these items of information.[97]

These "special rules" are found in the IRS's Instructions to Form 8283, too. They provide that "if you have reasonable cause for not providing the information in columns (d) [date on which the donor acquired the property], (e) [the manner by which the donor acquired the property], or (f) [donor's cost or adjusted basis in the property], attach an explanation so your deduction will not automatically be disallowed."[98]

B. Substantial Compliance Doctrine

Courts have developed the "substantial compliance" doctrine, which dictates that a deduction will be allowed if the taxpayer shows that he substantially, though not fully, complied with the requirements. The critical question is whether the requirements at issue relate "to the substance or essence of the statute."[99] If so, then strict compliance is mandatory.[100] On the other hand, if the requirements are merely procedural or directory, then a taxpayer can fulfill them via substantial compliance.[101]

In *Bond*, the taxpayers donated two blimps to a charitable organization, and obtained a professional appraisal before doing so.[102] The appraiser created computations, schedules, and notes while preparing his appraisal, but was unable to produce these materials at trial. The appraiser completed Part II of Form 8283, which described the property as thermal airships, reported their value as $60,000, and summarized their condition as "2 thermal airships (blimps) in airworthy condition save required FAA annual inspections and fuel tanks."[103]

The Tax Court noted that the Form 8283 contained all the information required for a qualified appraisal, except that it lacked the appraiser's qualifications. The taxpayers provided those credentials to the IRS during the examination. Thus, the taxpayers had furnished the IRS all data required, and the Tax Court held that they had substantially complied with the regulation, despite the fact that the appraiser had not provided the taxpayers with a copy of the entire appraisal report. In reaching this decision, the Tax Court made the following observation:

> [W]e must examine section 170 to determine whether the requirements of the regulations are mandatory or directory with respect to its statutory purpose. At the outset, it is apparent that the essence of Section 170 is to allow certain taxpayers a charitable deduction for contributions made to

> certain organizations. It is equally apparent that the reporting requirements of [Treas. Reg. §1.170A-13] are helpful to [the IRS] in the processing and auditing of returns on which charitable deductions are claimed. *However, the reporting requirements do not relate to the substance or essence of whether or not a charitable contribution was actually made. We conclude, therefore, that the reporting requirements are directory and not mandatory*.[104]

The IRS argued that the express language of Code Sec. 170 requires taxpayers to adhere rigorously to the regulations. The Tax Court acknowledged that Code Sec. 170(a) states that "a charitable contribution shall be allowed as a deduction only if certified under [the corresponding] regulations," but explained that the fact that a tax provision "conditions the entitlement of a tax benefit upon compliance with [the IRS's] regulation does not mean that literal as opposed to substantial compliance is mandated."[105]

C. Cases Commonly Cited by the IRS

The IRS frequently relies on several cases in support of its efforts to disallow charitable deductions where data reported on Form 8283 is incorrect or incomplete, or it is missing altogether. This article discusses three such cases below.[106]

1. RERI Holdings I, LLC

In *RERI Holdings I, LLC*, the taxpayer provided no basis information whatsoever on its Form 8283; the relevant box was left utterly blank.[107] The Tax Court upheld the disallowance by the IRS of the charitable deduction based on the following rationale:

> The Form 8283 appraisal summary that [the partnership] attached to its 2003 return indicates that it acquired the [property] by purchase on March 22, 2002, but shows no amount in the space provided for the "Donor's cost or other adjusted basis." Thus, [the partnership's] Form 8283 did not satisfy the requirement of [the applicable regulations]. Moreover, because [the partnership's] omission of its basis in the [property] from the Form 8283 it attached to its 2003 return prevented the appraisal summary from achieving its intended purpose, [the partnership's] failure to meet the requirement [of the applicable regulations] cannot be excused by substantial compliance.[108]

2. Belair Woods, LLC

In *Belair Woods LLC*, the partnership donated a conservation easement and attached a Form 8283 to its Form 1065.[109] The Form 8283 did not report the taxpayer's basis in the property; rather, it referenced a statement attached to Form 8283, explaining the following to the IRS:

> A declaration of the taxpayer's basis in the property is not included in the attached Form 8283 because of the fact that the basis of the property is not taken into consideration when computing the amount of the deduction. Furthermore, the taxpayer has a holding period in the property in excess of 12 months and the property further qualifies as "capital gain property."[110]

The Tax Court determined that the partnership did not strictly comply or substantially comply with the regulations because (i) it intentionally filed an incomplete Form 8283, and (ii) instead of attaching a statement explaining why reasonable cause existed for not providing the basis data, as permitted by the regulations, the partnership merely indicated why, in its opinion, providing such data was unnecessary.[111]

The partnership argued that it had substantially complied with the applicable regulations, and thus the IRS should respect the charitable deduction, because the basis data was disclosed to the IRS elsewhere on its Form 1065. The Tax Court rejected this line of reasoning, explaining that the basis data must appear on Form 8283:

> The IRS reviews millions of returns each year for audit potential, and the disclosure of cost basis on the Form 8283 itself is necessary to make this process manageable. Revenue Agents cannot be required to sift through dozens or hundreds of pages of complex returns looking for clues about what the taxpayer's cost basis might be.[112]

3. Oakhill Woods, LLC

In *Oakhill Woods, LLC*, the partnership donated a conservation easement on property that might otherwise be transformed into a high-density residential community.[113] The partnership did not include the "cost or adjusted basis" on Form 8283. Instead, it wrote "see attachment" and attached a three-page letter, explaining, among other things, that the partnership was not providing basis

information because it was irrelevant to calculating the amount of the charitable deduction. At the end of the audit, the IRS issued a Summary Report indicating that the easement deduction would be $0 for various reasons, including the fact that the Form 8283 lacked the necessary "cost or adjusted basis." Within 90 days of receiving the Summary Report, the partnership provided basis information to the IRS.

Tax Court litigation began, and the IRS eventually filed a Motion for Partial Summary Judgment arguing that the deduction should be disallowed because the partnership failed to provide its basis on Form 8283. The Tax Court held that the partnership did not strictly comply with the regulations, did not substantially comply with the regulations, did not cure the problem by supplying basis data to the IRS in response to the issuance of the Summary Report, did not satisfy its reporting duty by providing basis information in places other than Form 8283, such as Schedule L (Balance Sheet Per Books) on Form 1065 and the appraisal, and did not prove that the regulations requiring basis information on Form 8283 are invalid.[114]

With respect to strict compliance, the Tax Court emphasized that the partnership enclosed an "intentionally incomplete" Form 8283 with its Form 1065, not one that was inaccurate or inadvertently blank:

> [The partnership] did not report its cost basis as the regulation requires and as Form 8283 directs. And the explanation that [the partnership] attached to that form, far from showing that it was unable to provide this information, simply asserted that the information was not necessary. In effect, [the partnership] asserted that taxpayers are free to ignore the requirement that they report cost basis. Asserting that one may ignore a requirement does not constitute strict compliance with it.[115]

The Tax Court then explained the following amid its analysis of the partnership's substantial compliance defense:

> The requirement to disclose "cost or adjusted basis" when that information is reasonably obtainable is necessary to facilitate the [IRS's] efficient identification of overvalued property. The cost of property typically corresponds to its FMV when the taxpayer acquired it. When a taxpayer claims a charitable contribution deduction for recently purchased property, a wide gap between cost basis and claimed value raises a red flag suggesting that the return merits examination. Unless the taxpayer complies with the regulatory requirement that he disclose his cost basis and the date and manner of acquiring the property, the [IRS] will be deprived of an essential tool that Congress intended him to have.[116]

VII. Newest IRS Attack Grounded in Accounting and Information-Reporting

The 19 authorities summarized earlier in this article demonstrate that determining which costs related to partnership investments are currently deductible and which constitute syndication expenses can be challenging, for taxpayers and tax professionals alike. Legitimate differences of opinion will exist, of course, and the Forms 1065 and Forms 8283 filed by partnerships donating easements will reflect such logical, honest differences. Indeed, it is conceivable that the same item might be construed in three unique ways (*i.e.*, as a currently deductible expense, capital asset, or input to basis) depending on the facts and circumstances, as well as the judgment of the individual preparing the relevant returns, forms, and statements. The IRS, as explained below, does *not* view the accounting and reporting disparities from the same perspective.

A. Seemingly Everything Is a Syndication Cost

The IRS has started issuing Summary Reports, Notices of Proposed Adjustments, and notices of Final Partnership Administrative Adjustments to many partnerships characterizing *all* the following items as nondeductible syndication costs: (i) Fees to appraisers for preliminary valuations, which were attached to private placement memoranda, prospectuses, or other offering documents; (ii) Legal and accounting fees linked to tax advice or tax opinions, which were referenced in, or attached to, marketing materials; (iii) Amounts paid to broker-dealers; (iv) Direct or indirect payments to accountants, financial advisors, and others for recommending the purchase of limited partnership interests to their clients, regardless of whether such payments are labeled as commissions, discounts, rebates, finder's fees, or something else; (v) Premiums for so-called tax audit and/or tax result insurance policies; (vi) Fees to

the agents or underwriters of such insurance policies; (vii) Costs of preparing feasibility studies, including economic projections, budgets, and marketing analyses; (viii) Compensation for negotiating financing; (ix) Fees for identifying potential property for purchase, inspecting it, and researching title issues; and (x) All amounts to alleged promoters or organizers, including those characterized as management, consulting, development, or due diligence fees.

B. "Basis Inflation" as Grounds for Easement Deductions of $0

To the extent that any of the alleged mischaracterizations of the preceding items by a partnership affect the information disclosed on Form 8283 (particularly the partnership's basis in the donated property), the IRS contends, based on *RERI Holdings*, *Belair*, and *Oakhill*, that the Form 8283 failed to comply with the applicable regulations, the violations cannot be cured by substantial compliance, and thus the tax deductions related to the conservation easement donation should be $0. Here is the domino theory that the IRS is now advancing: (i) The adjusted basis that the partnership reported on Form 8283 was incorrect and overstated because it included certain "syndication expenses" that should have been capitalized; (ii) The inclusion of "syndication expenses" in the adjusted basis was not the result of a good faith (yet erroneous) determination by accountants or other professionals, but rather a deliberate attempt to obscure payments to organizers or to reduce the disparity between the basis and the alleged value of the easement donation; (iii) This "basis inflation" deprives the IRS of an "essential tool" for detecting non-compliance, as underscored in *Oakhill*; and (iv) The conservation easement donation should be $0 because the partnership, by adding to basis certain amounts that the IRS believes were syndication expenses, failed to strictly or substantially comply with the reporting requirements of Form 8283.

Fortunately for partnerships, the Tax Court has recently cast some doubt on the strength of the IRS's new theory. In *Hewitt*, the taxpayer donated property to a land trust and claimed a charitable deduction on the corresponding Form 1040.[117] The taxpayer did not report his basis in the property on Form 8283 because was unable to determine it with accuracy. His father held a significant amount of property, he gifted a portion to his daughter (*i.e.*, the taxpayer's sister) decades ago, and she then gifted part of her portion to the taxpayer, also decades ago. Following standard operating procedure, the IRS audited and ultimately issued a Notice of Deficiency, proposing (i) a charitable deduction of $0, and (ii) a 40 percent penalty for "gross valuation misstatement" or, as an alternative, a 20 percent penalty for negligence. Tax Court litigation ensued.

The Tax Court upheld the conservation easement deduction of $0 solely because of a "technical" violation centered on the so-called "extinguishment clause" in the Deed; therefore, it did not rule on the impact of missing basis data on Form 8283. With respect to penalties, the Tax Court determined that no "gross valuation misstatement" existed because the correct value of the donation was within the acceptable threshold. The Tax Court further held that the taxpayer had "reasonable cause" for any errors, such that negligence penalties were inapplicable. The Tax Court made three noteworthy rulings in this regard. First, it explained that the taxpayer wanted to preserve the property for his children in memory of his father, did not solicit or initiate a tax strategy, relied on an accounting firm, did not know or have reason to know that the easement deduction would be disallowed, relied in good faith on the original appraiser, reasonably relied on "conservation advice" from the land trust, and reasonably relied on an accounting firm to properly prepare Form 8283. Second, it held that the omission of basis information on Form 8283 generally does *not* prevent a "reasonable cause" defense to negligence penalties. Third, it stated the following about the effect on penalties of disallowing an easement deduction based solely on a "technical" issue:

> We disallowed the easement deduction because the deed did not satisfy technical requirements for a conservation easement deduction. We do not expect [the taxpayers] to understand these technical requirements. They made a sufficient good-faith effort to assess their tax liability and reasonably relied on professional advice when claiming the easement deduction.

C. "Basis Deflation" as Grounds for Easement Deductions of $0

On a related note, the IRS is attacking situations where a partnership erroneously states on Form 8283 that it obtained the relevant property via "purchase," instead of by a "contribution" by a partner, and that the acquisition date was when the partner originally bought the land, instead of when he later contributed it to the partnership

in exchange for an ownership interest.[118] Notably, these types of mistakes create "basis deflation" on Form 8283, meaning that the disparity on Form 8283 between the acquisition price and the donation value will be larger, presumably making it even easier for the IRS to detect a potential problem. The IRS, undeterred by its contradictory position about syndication fees causing "basis inflation," is seeking $0 deductions in cases of "basis deflation," too, rooted in alleged violations of Form 8283 reporting duties.

VIII. Conclusion

What are the main takeaways from this article? The IRS has indicated its intention of auditing everything that it considers a syndicated conservation easement transaction. In doing so, the IRS will use many different lines of attack, including various "technical" arguments, to justify the complete disallowance of charitable deductions. To the long list of existing arguments, the IRS is now adding challenges to Forms 8283 based on the supposed improper accounting for, and reporting of, syndication expenses. The IRS is broadly interpreting this concept, advancing the notion that anything even remotely associated with the issuance, marketing, or sale of limited partnership interests is a non-deductible syndication expense. The IRS is arguing further that errors in characterizing syndication expenses lead to inaccurate Forms 8283, which partnerships cannot rectify through "substantial compliance," and which warrant a tax deduction of $0. Partnerships and their advisors need to be cognizant of this new IRS stance as they engage in the inevitable battles over conservation easement donations going forward.

ENDNOTES

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1 Code Sec. 170(a)(1); Reg. §1.170A-1(a); Code Sec. 170(f)(3)(A); Reg. §1.170A-7(a)(1).

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

3 Code Sec. 170(h)(4)(A); Reg. §1.170A-14(d)(1); S. Rept. 96-1007, at 10 (1980).

4 Reg. §1.170A-14(b)(2).

5 Internal Revenue Service. Conservation Easement Audit Techniques Guide (Rev. 11/4/2016) p 23; *see also* Reg. §1.170A-14(e)(2) and (3).

6 Reg. §1.170A-14(g)(5)(i).

7 Reg. §1.170A-14(g)(5)(i).

8 Code Sec. 170(a)(1); Reg. §1.170A-1(c)(1).

9 Reg. §1.170A-1(c)(2).

10 Internal Revenue Service. Conservation Easement Audit Techniques Guide (Rev. 11/4/2016) p 41.

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

12 *Stanley Works & Subs.*, 87 TC 389, 400, Dec. 43,274 (1986); Reg. §1.170A-14(h)(3)(i) and (ii).

13 *Olson*, 292 US 246, 255 (1934).

14 *Esgar Corp.*, CA-10, 2014-1 USTC ¶50,207, 744 F3d 648, 659.

15 *Esgar Corp.*, CA-10, 2014-1 USTC ¶50,207, 744 F3d 648, 657.

16 *J.W. Symington*, 87 TC 892, 896, Dec. 43,467.

17 *See* Internal Revenue Service. Conservation Easement Audit Techniques Guide (Rev. 11/4/2016) pp 24–30; IRS Publication 1771, Charitable Contributions—Substantiation and Disclosure Requirements; IRS Publication 526, Charitable Contributions; Code Sec. 170(f)(8); Code Sec. 170(f)(11); Reg. §1.170A-13; Notice 2006-96, IRB 2006-46; T.D. 9836.

18 For more information about the various categories of arguments raised by the IRS in easement cases, see the following articles by the same author: Hale E. Sheppard, *Questions Remain About Conservation Easement Settlement Initiative*, 168 TAX NOTES FEDERAL 2219 (2020); Hale E. Sheppard, *IRS Challenges "Commercial Forestry" in Conservation Easement Disputes: Getting to the Root of the Matter*, TAXES 2020, at 33; Hale E. Sheppard, *Conservation Easement Disputes, Expansive Data Demands by the IRS, and Scope of the Tax Practitioner Privilege Under Section 7525*, 105 PRACTICAL TAX STRATEGIES 16 (2020); Hale E. Sheppard, *Civil Suit Emphasizes Critical Role of Notifications by Tax Matters Partners in Conservation Easement and Other Tax Disputes*, J. TAX PRACTICE & PROCEDURE, 2020, at 39; Hale E. Sheppard, *Five Obscure IRS Actions in 2020 with Serious Implications for Conservation Easement Disputes*, 133 J. TAXATION 11 (2020); Hale E. Sheppard, *Conservation Easement Enforcement: IRS Quietly Eliminates Procedural Protections for Appraisers*, 132 J. TAXATION 17 (2020); republished in 31 TAXATION OF EXEMPTS 13 (2020); and 47 J. REAL ESTATE TAXATION 19 (2020); Hale E. Sheppard, *Conservation Easements, Partners, and Qualified Amended Returns?* 166 TAX NOTES FEDERAL 373 (2020); Hale E. Sheppard, *Conservation Easements, Legitimate Risks, and Potential Issues Related to Tax Result Insurance*, 31 TAXATION OF EXEMPTS 10 (2020); republished in 47 J. REAL ESTATE TAXATION 31 (2019); Hale E. Sheppard, *Conservation Easements, Recent Mayo Clinic Case, and Expanded Defenses to IRS Attacks on "Conservation Purpose,"* 47 J. REAL ESTATE TAXATION 12 (2019); republished in 131 J. TAXATION 6 (2019); Hale E. Sheppard, *Fee Simple Charitable Donations Instead of Conservation Easements: Case on Mining Property Undercuts IRS's Core Positions*, 31 TAXATION OF EXEMPTS 3 (2019); Hale E. Sheppard, *Conservation Easements, Alleged Fraud by Appraisers, and the Potential Extension of Assessment-Periods for Partnerships*, J. TAX PRACTICE & PROCEDURE, 2019, at 19; Hale E. Sheppard, *Conservation Easements, "Substantially Similar" Transactions, and the Reach of Notice 2017-10*, 131 J. TAXATION 19 (2019); Hale E. Sheppard, *Making "Qualified Offers" in Partnership Disputes: Extreme Positions by the IRS in Conservation Easements Cases Might Backfire*, J. PASSTHROUGH ENTITIES, 2019, at 71; Hale E. Sheppard, *Conservation Easements, Partnerships, Risks, and Profitability: U.S. Government Takes Contradictory Positions in Tax and Securities Cases*, J. TAXATION OF FINANCIAL PRODUCTS, 2019, at 49; Hale E. Sheppard, *Champions Retreat: Conservation Easements, Clarifications on "Significant" Preservation, and Lessons from Issues Unaddressed by the Tax Court*, 46 J. REAL ESTATE TAXATION 12 (2019); republished in 131 J. TAXATION 23 (2019); Hale E. Sheppard, *Pine Mountain Preserve and Conservation Easements: Victory in Disguise for Taxpayers?* 130 J. TAXATION 22 (2019); Hale E. Sheppard, *Conservation Easements, Notice 2017-10, Injunction Action, and the Potential Reach of Return Preparer Penalties Under Section 6694*, J. TAX PRACTICE & PROCEDURE 23 (2019).

[19] Internal Revenue Service. Conservation Easement Audit Techniques Guide. (Rev. 11/4/2016).
[20] Internal Revenue Service. Conservation Easement Audit Techniques Guide. (Rev. 11/4/2016) pp 78–81.
[21] Internal Revenue Service. Conservation Easement Audit Techniques Guide. (Rev. 11/4/2016) pp 78–81 (emphasis added).
[22] Senate Report No. 94-938-Part I, 94th Congress, 2nd Session, June 10, 1976, p 3529; See also Senate Report 94-1236, 94th Congress, 2nd Session, September 14, 1976, p 421.
[23] *See also Cagle*, 63 TC 86, Dec. 32,828.
[24] House Report No. 94-658, 94th Congress, 1st Session, Nov. 12, 1975; *See also* Senate Report No. 94-938-Part I, June 10, 1976, p 3530.
[25] House Report No. 94-658, 94th Congress, 1st Session, Nov. 12, 1975.
[26] Code Sec. 709(a); Reg. §1.709-1(a).
[27] Code Sec. 709(b)(1); Reg. §1.709-1(b)(1). The IRS later changed the rules, via regulations, such that partnerships are automatically deemed to make the deduction election, unless they affirmatively elect to capitalize their organizational expenses. *See* Reg. §1.709-1(b)(2); T.D. 7891, 1983-1 CB 117; T.D. 9411, IRB 2008-34, 398, and T.D. 9542, IRB 2011-39, 411.
[28] Code Sec. 709(b)(3); Reg. §1.709-2(a).
[29] Reg. §1.709-2(a).
[30] Reg. §1.709-2(a).
[31] Reg. §1.709-2(b).
[32] Reg. §1.709-2(b).
[33] Reg. §1.709-2(b).
[34] Other relevant authorities exist, but this article does not specifically address them because they do not materially expand or enhance the key issues. *See, e.g., Fishman*, 51 TCM 738, Dec. 42,961(M), TC Memo. 1986-127; *Durkin*, 87 TC 1329, Dec. 43,548; *Law*, 86 TC 1065, Dec. 43,07; *Levin*, 87 TC 698, Dec. 43,406; *Tolwinsky*, 86 TC 1009, Dec. 43,075; *Isenberg*, 53 TCM 946, Dec. 43,949(M), TC Memo. 1987-269; *Schwartz*, 54 TCM 11, Dec. 44,090(M), TC Memo. 1987-381; *Vandenhoff*, 53 TCM 271, Dec. 43,738(M), TC Memo. 1987-116; *Vertin*, Dec. 43,799(M), 53 TCM 435, TC Memo. 1987-161; *Upham*, 57 TCM 508, Dec. 45,726(M), TC Memo. 1989-253; *Lieber*, 66 TCM 529, Dec. 49,243(M), TC Memo. 1993-391.
[35] *Cagle*, 63 TC 86, Dec. 32,828.
[36] *Cagle*, 63 TC 86, 89, Dec. 32,828.
[37] *Cagle*, 63 TC 86, 89, Dec. 32,828.
[38] *Cagle*, 63 TC 86, 90, Dec. 32,828.
[39] *Cagle*, 63 TC 86, 91, Dec. 32,828.
[40] *Cagle*, 63 TC 86, 96, Dec. 32,828.
[41] Rev. Rul. 75-214, 1975-1 CB 185 (emphasis added).
[42] Rev. Rul. 75-214, 1975-1 CB 185.
[43] *Kimmelman*, 72 TC 294, Dec. 36,056 (1979).
[44] *Kimmelman*, 72 TC 294, 303–304, Dec. 36,056 (1979).
[45] *Kimmelman*, 72 TC 294, 306, Dec. 36,056.
[46] *Kimmelman*, 72 TC 294, 306, Dec. 36,056.
[47] Rev. Rul. 81-153, 1981-1 CB 387.
[48] Rev. Rul. 81-153, 1981-1 CB 387.
[49] *Wedland*, 79 TC 355, Dec. 39,285.
[50] *Wedland*, 79 TC 355, 388, Dec. 39,285.
[51] *Wedland*, 79 TC 355, 389, Dec. 39,285.
[52] *Surloff*, 81 TC 210, 213, Dec. 40,419.
[53] *Surloff*, 81 TC 210, 219, 244–245, Dec. 40,419.
[54] *Surloff*, 81 TC 210, 219, 245–246, Dec. 40,419.
[55] *Flowers*, 80 TC 914, Dec. 40,112.
[56] *Flowers*, 80 TC 914, 943, Dec. 40,112.
[57] *Johnsen*, 83 TC 103, Dec. 41,359.
[58] *Johnsen*, 83 TC 103, 112, Dec. 41,359.
[59] *Johnsen*, 83 TC 103, 112–113, Dec. 41,359.
[60] *Johnsen*, 83 TC 103, 126, Dec. 41,359.
[61] *Johnsen*, 83 TC 103, 126, Dec. 41,359.
[62] *Johnsen*, 83 TC 103, 127, Dec. 41,359.
[63] *Johnsen*, 83 TC 103, 128, Dec. 41,359.
[64] Rev. Rul. 85-32, 1985-1 CB 186.
[65] *Estate of Thomas*, 84 TC 412, Dec. 41,943.
[66] *Estate of Thomas*, 84 TC 412, 440, Dec. 41,943.
[67] *Egolf*, 87 TC 34, Dec. 43,148.
[68] *Egolf*, 87 TC 34, 42–43, Dec. 43,148.
[69] *Driggs*, 87 TC 759, Dec. 43,419.
[70] *Driggs*, 87 TC 759, 762–763, Dec. 43,419.
[71] *Driggs*, 87 TC 759, 769, Dec. 43,419.
[72] *Driggs*, 87 TC 759, 769, Dec. 43,419.
[73] *Driggs*, 87 TC 759, 778, Dec. 43,419.
[74] *Driggs*, 87 TC 759, 778, Dec. 43,419.
[75] *Finoli*, 86 TC 697, Dec. 42,994.
[76] *Finoli*, 86 TC 697, 706, Dec. 42,994.
[77] *Finoli*, 86 TC 697, 742, Dec. 42,994.
[78] *Finoli*, 86 TC 697, 742, Dec. 42,994.
[79] Rev. Rul. 88-4, 1988-1 CB 264.
[80] Rev. Rul. 88-4, 1988-1 CB 264.
[81] *Brown*, 56 TCM 638, Dec. 45,167(M), TC Memo. 1988-527.
[82] *Brown*, 56 TCM 638, Dec. 45,167(M), TC Memo. 1988-527.
[83] Rev. Rul. 89-11, 1989-1 CB 179.
[84] Rev. Rul. 89-11, 1989-1 CB 179.
[85] Rev. Rul. 89-11, 1989-1 CB 179.
[86] *Diamond*, 92 TC 423, Dec. 45,49.
[87] *Diamond*, 92 TC 423, 446, Dec. 45,49.
[88] *Diamond*, 92 TC 423, 446–447, Dec. 45,49.
[89] *Ball*, 56 TCM 1289, Dec. 45,498(M), TC Memo. 1989-73.
[90] *Ball*, 56 TCM 1289, Dec. 45,498(M), TC Memo. 1989-73.
[91] *Ball*, 56 TCM 1289, Dec. 45,498(M), TC Memo. 1989-73.
[92] *Ball*, 56 TCM 1289, Dec. 45,498(M), TC Memo. 1989-73.
[93] FSA 1998-162.
[94] FSA 1998-162.
[95] Reg. §1.170A-13(c)(2)(i).
[96] Reg. §1.170A-13(c)(4)(ii)(E).
[97] Reg. §1.170A-13(c)(4)(iv)(C)(1).
[98] Form 8283 Instructions, p 5 (Dec. 2014).
[99] *Bond*, 100 TC 32, 40–41, Dec. 48,822.
[100] *Dunavant*, 63 TC 316, Dec. 32,871.
[101] *Dunavant* 63 T.C. 316, Dec. 32,871; *Columbia Iron & Metal Co.*, 61 T.C. 5 (1973).
[102] *Bond*, 100 T.C. 32, Dec. 48,822.
[103] *Bond*, 100 T.C. 32, Dec. 48,822.
[104] *Bond*, 100 T.C. 32, Dec. 48,822 (emphasis added).
[105] *Bond*, 100 T.C. 32, Dec. 48,822.
[106] *See also Brannan Sand and Gravel Co., LLC*, 119 TCM 1525, Dec. 61,688(M), TC Memo. 2020-76 (disallowing deductions where the Form 8283 indicated "none" as its basis and "various" as the acquisition dates) and *Loube*, 119 TCM 1011, Dec. 61,606(M), TC Memo. 2020-3 (holding that attaching a qualified appraisal to the tax return, alone, is insufficient to cure significant omissions from Form 8283 requirements and did not constitute substantial compliance).
[107] *RERI Holdings I, LLC*, 149 TC No 1, Dec. 60,954; *aff'd sub nom Blau*, CA-DC, 924 F3d 1261.
[108] *RERI Holdings I, LLC*, 149 TC No 1, 16, Dec. 60,954 (2017).
[109] *Belair Woods LLC*, 116 TCM 325, Dec. 61,275(M), TC Memo. 2018-159.
[110] *Belair Woods, LLC*, 116 TCM 325, Dec. 61,275(M), TC Memo. 2018-159.
[111] *Belair Woods, LLC*, 116 TCM 325, Dec. 61,275(M), TC Memo. 2018-159.
[112] *Belair Woods, LLC*, 116 TCM 325, Dec. 61,275(M), TC Memo. 2018-159 (emphasis added).
[113] *Oakhill Woods, LLC*, 119 TCM 1144, Dec. 61,629(M), TC Memo. 2020-24.
[114] *Oakhill Woods, LLC*, 119 TCM 1144, Dec. 61,629(M), TC Memo. 2020-24. The partnership also argued that there was "reasonable cause" for not complying with the regulatory requirements because it relied on advice from the accountant who prepared Form 8283, along with guidance from the organizer, who allegedly relied on advice from an outside law firm. The Tax Court indicated that this issued could not be resolved via Summary Judgment, and a trial would be necessary to determine the following whether the organizer was a "tax professional," whether the organizer was independent or had a conflict of interest, whether the partnership could reasonably rely on legal advice provided to it indirectly, whether the accountant was a competent tax professional who provide advice independent of that provided by the organizer, and whether the partnership actually relied in good faith on any advice that it received.
[115] *Oakhill Woods, LLC*, 119 TCM 1144, Dec. 61,629(M), TC Memo. 2020-24.
[116] *Oakhill Woods, LLC*, 119 TCM 1144, Dec. 61,629(M), TC Memo. 2020-24 (internal citations omitted).
[117] *Hewitt*, 119 TCM 1593, Dec. 61,701(M), TC Memo. 2020-89.
[118] *See, e.g., Coal Property Holdings, LLC*, 153 TC 126 (2019) (explaining that "[i]n box 5(e) it stated that it had acquired the Property by "purchase," whereas it had actually acquired the Property by contribution [and] box 5(d), which directs the taxpayer to supply the date on which the property was acquired, was left blank.").