



# Conservation Easement Audit Technique Guide

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The taxpayer names and addresses shown in this publication are hypothetical.

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# Table of Contents

I. Overview.....	13
A. Statement of Purpose .....	13
B. Generally.....	13
C. Background / History.....	14
D. Relevant Terms .....	15
D.1. Conservation Easement .....	15
D.2. Charitable Contribution .....	15
D.3. Qualified Conservation Contribution .....	15
D.4. Conservation Purpose .....	16
D.5. Fair Market Value.....	16
E. Law / Authority .....	16
E.1. Exhibit 1-1 Conservation Easement Legal Authority .....	16
E.2. Tax Issues .....	17
E.3. Resources .....	17
II. Statutory Requirements for All Charitable Contributions .....	18
A. Overview .....	18
B. Charitable Contribution Definition .....	18
B.1. Qualified Organization .....	18
B.2. Charitable Intent.....	18
C. Real Estate Contributions .....	18
D. Partial Interest Rule .....	19

E. Conditional Gifts .....	19
F. Earmarking .....	19
G. Year of Donation .....	19
H. Substantiation of Noncash Contributions .....	20
I. Amount of Deduction .....	21
III. Qualified Conservation Contribution.....	22
A. Overview .....	22
B. Qualified Real Property Interest .....	22
C. Qualified Organization.....	22
D. Conservation Purpose.....	23
E. Perpetuity .....	23
E.1. Reserved Rights.....	24
E.2. Recording Easements.....	25
E.3. Amendment Clauses in Easement Deeds .....	25
E.4. Subordination of Mortgages in Lender Agreements.....	26
E.5. Extinguishment .....	26
E.6. Allocation of Proceeds in Deed and Lender Agreements	26
IV. Qualified Organization .....	28
A. Overview .....	28
B. Qualified Organization.....	28
C. Commitment and Resources .....	28
D. Special Rules for Buildings in a Registered Historic District ...	29

E. Cash Contributions.....	29
E.1. Quid Pro Quo Contribution .....	30
V. Conservation Purpose .....	30
A. Overview .....	30
B. Land for Outdoor Recreation or Education .....	31
C. Relatively Natural Habitat or Ecosystem .....	31
D. Open Space .....	33
D.1. Scenic Enjoyment .....	33
D.2. Governmental Conservation Policy.....	34
D.3. Significant Public Benefit .....	34
E. Historically Important Land or Structure .....	36
E.1. Historically Important Land.....	36
E.2. Certified Historic Structure .....	36
E.3. Special Rules for Buildings in Registered Historic Districts .....	37
F. Public Access.....	38
G. Inconsistent Uses .....	38
H. Baseline Study .....	39
VI. Substantiation.....	39
A. Overview .....	40
B. Contemporaneous Written Acknowledgment .....	40
C. Form 8283, Noncash Charitable Contributions.....	42

C.1. Generally .....	42
C.2. Declaration of Appraiser.....	43
C.3. Donee Acknowledgment.....	44
C.4. Failure to Attach Form 8283 .....	44
D. Qualified Appraisal .....	44
D.1. Qualified Appraisal Under Regulations.....	44
D.2. Generally Accepted Appraisal Standards .....	45
D.3. Reasonable Cause .....	45
E. Façade Easement Filing Fee (Registered Historic District Only)	
45	
F. Baseline Study .....	45
G. Additional Donor Recordkeeping Requirements .....	46
H. Exhibit 6-1 - Substantiation Requirements .....	46
VII. Qualified Appraisal Requirements .....	47
A. Overview .....	47
B. Qualified Appraisal .....	47
B.1. Reasonable Cause Exception .....	49
C. Qualified Appraiser .....	50
D. Generally Accepted Appraisal Standards.....	51
D.1. Uniform Standards of Professional Appraisal Practice...51	
E. Appraisal Fees .....	52
VIII. Amount of Deduction .....	52

A.	Overview .....	52
B.	Percentage Limitations .....	53
B.1.	Individuals.....	53
B.2.	Corporations.....	54
B.3.	Special Rules for Qualified Farmers and Ranchers .....	54
B.4.	Carryovers .....	54
C.	Contributions of Appreciated Property.....	54
C.1.	Ordinary Income and Short-Term Capital Gain Property	55
C.2.	Long-Term Capital Gain Property .....	56
D.	Bargain Sale .....	56
D.1.	Taxable Gain .....	57
D.2.	Federal and State Easement Purchase Programs .....	57
E.	Quid Pro Quo or Substantial Benefit and Charitable Intent.....	57
F.	Rehabilitation Tax Credit.....	58
F.1.	Recapture of Rehabilitation Tax Credit .....	58
IX.	Valuation of Conservation Easements .....	59
A.	Overview .....	59
B.	Valuation Process .....	59
C.	Valuation Date .....	60
D.	FMV .....	60
D.1.	Before and After Method .....	61

D.2.	Use of Flat Percentage Cannot Be Applied to Before Value	61
D.3.	Contiguous Parcels.....	61
D.4.	Enhancement Rule .....	62
E.	Market Analysis.....	63
F.	Highest and Best Use .....	64
G.	Methodology.....	65
G.1.	Sales Comparison Approach .....	65
G.2.	Cost Approach.....	66
G.3.	Income Capitalization Approach.....	66
G.4.	Subdivision Development Method.....	67
G.5.	Aggregate Partnership Interest.....	68
H.	Transferable Development Rights.....	69
X.	Partnership Anti-Abuse Rules, Judicial Doctrines, and Codified Economic Substance Doctrine.....	69
A.	Partnership Anti-Abuse Rules .....	69
B.	Judicial Doctrines .....	70
B.1.	Bona Fide Partner and Partnership .....	70
B.2.	Substance Over Form .....	71
B.3.	Step Transaction Doctrine.....	71
C.	Codified Economic Substance Doctrine.....	72
XI.	Preplanning the Examination .....	73
A.	Overview .....	73

<b>B. Review of Return.....</b>	<b>73</b>
<b>B.1. Form 8283 – Appraisal Summary.....</b>	<b>73</b>
<b>B.2. Signature Requirements.....</b>	<b>74</b>
<b>B.3. Return Attachments.....</b>	<b>74</b>
<b>B.4. Other Tax Issues .....</b>	<b>75</b>
<b>B.5. TEFRA Considerations .....</b>	<b>75</b>
<b>B.6. BBA Considerations (Taxable Years Beginning on or After         January 1, 2018) .....</b>	<b>76</b>
<b>C. Internal Sources of Information.....</b>	<b>76</b>
<b>C.1. IRS Intranet .....</b>	<b>76</b>
<b>C.2. Program Analysts.....</b>	<b>77</b>
<b>C.3. Integrated Data Retrieval System – IDRS.....</b>	<b>77</b>
<b>C.4. Façade Filing Fee Verification.....</b>	<b>77</b>
<b>C.5. Tax Exempt Organization Search .....</b>	<b>77</b>
<b>C.6. Office of Professional Responsibility.....</b>	<b>78</b>
<b>D. External Sources of Information.....</b>	<b>78</b>
<b>D.1. Internet Research .....</b>	<b>78</b>
<b>D.2. Taxpayer.....</b>	<b>78</b>
<b>D.3. Donee Organization .....</b>	<b>78</b>
<b>D.4. Appraiser.....</b>	<b>79</b>
<b>D.5. Public Records .....</b>	<b>79</b>
<b>D.6. National Park Service.....</b>	<b>80</b>



E. Interviews .....	81
F. Information Document Requests.....	81
G. Valuation Expert Involvement.....	81
G.1. Referral to LB&I Engineering .....	82
G.2. Referral Outcomes .....	82
G.3. LB&I Engineering Products.....	83
G.4. Outside Experts.....	83
H. Consultation with Counsel.....	83
I. Coordination with TEGE.....	84
XII. Conducting the Examination .....	84
A. Overview .....	84
B. Interviews .....	85
C. Property Inspection .....	86
D. Review of Documents.....	87
D.1. Deed of Conservation Easement .....	87
D.2. Perpetuity.....	88
D.3. Conservation Purpose .....	88
D.4. Reserved Rights.....	89
D.5. Lender Agreements.....	89
D.6. Subordination Agreements .....	89
D.7. Allocation of Proceeds .....	90

D.8.	Baseline Study.....	90
D.9.	Taxpayer’s Appraisal .....	92
D.10.	Donee Organization .....	92
D.11.	Commitment and Resources.....	93
D.12.	Cash Payments.....	93
D.13.	Contemporaneous Written Acknowledgment.....	94
D.14.	National Park Service – Form 10-168 .....	94
D.15.	Partnership Documents.....	96
E.	Third-Party Contacts .....	96
E.1.	Donee Organizations .....	97
E.2.	Mortgage Lenders .....	97
E.3.	Appraiser.....	98
E.4.	Federal and State Conservation Agencies .....	98
E.5.	Local Government Officials.....	98
E.6.	Real Estate Agents.....	99
E.7.	Property Owners .....	99
XIII.	Concluding the Examination.....	99
A.	Overview .....	99
B.	Issue Identification .....	100
B.1.	Substantial Compliance.....	100
C.	Report Writing .....	101

C.1.	Job Aids .....	102
C.2.	Valuation Expert Reports .....	103
C.3.	Penalties.....	103
C.4.	Technical Assistance.....	104
D.	Closing Conference .....	104
E.	Taxpayer Protests .....	104
E.1.	Rebuttals to Taxpayer Protest .....	104
F.	Exhibit 13-1 Conservation Easement Issue Identification Worksheet.....	105
XIV.	Penalties .....	109
A.	Overview .....	109
B.	Introduction to Penalty Approval .....	110
C.	Accuracy-Related Penalties.....	112
C.1.	Section 6662(b)(1) and (c) Negligence or Disregard of Rules or Regulations.....	112
C.2.	Section 6662(b)(2) and (d) Substantial Understatement of Income Tax.....	113
C.3.	Section 6662(b)(3) and (e) Substantial Valuation Misstatement and Section 6662(h) Gross Valuation Misstatement .....	113
C.4.	Section 6662(b)(6) and (i) Codified Economic Substance Doctrine.....	114
D.	Section 6663 Civil Fraud Penalty.....	115
E.	Section 6664 Reasonable Cause Exception.....	115

E.1.	Special Rule for Overvaluation of Charitable Contributions .....	115
E.2.	Reliance on Professionals.....	116
F.	Section 6694 Understatement of Taxpayer’s Liability by Tax Return Preparer.....	117
G.	Sections 6700 and 6701 Penalty for Promoting Abusive Tax Shelters and Aiding and Abetting Understatements of Tax ...	117
H.	Section 6695A Substantial and Gross Valuation Misstatements Attributable to Incorrect Appraisals.....	118
H.1.	Office of Professional Responsibility Sanctions.....	119
I.	Penalties Specifically Related to Reportable Transactions ....	119
I.1.	Section 6662A Accuracy-Related Penalty on Understatements with Respect to Reportable Transactions 120	
I.2.	Section 6707A Penalty for Failure to Include Reportable Transaction Information with Return.....	120
I.3.	Section 6707 Failure to Furnish Information Regarding Reportable Transaction .....	121
I.4.	Section 6708 Failure to Maintain Lists of Advisees with Respect to Reportable Transactions .....	122
XV.	State Tax Credits.....	122
A.	Overview .....	122
B.	State Tax Credit Programs .....	122
C.	Receipt of State Tax Credits .....	123
D.	Sale of State Tax Credits .....	124

## I. Overview

### A. Statement of Purpose

- (1) The purpose of this audit techniques guide (ATG) is to provide guidance for the examination of charitable contributions of conservation easements. Users of this guide will learn about the general requirements for charitable contributions and additional requirements for contributions of conservation easements.
- (2) This ATG includes examination techniques and an overview of the valuation of conservation easements. It also includes a discussion of penalties, which may be applicable to taxpayers and others involved in the conservation easement transaction.
- (3) This guide is not designed to be all-inclusive. It is not a comprehensive training manual for conservation easements.

### B. Generally

- (1) To be deductible, donated conservation easements must be legally binding, permanent restrictions on the use, modification and development of property such as farmland, forest land, scenic areas, historic land or historic structures. The restrictions on the property must be in perpetuity. Current and future owners of the easement and the underlying property must all be bound by the terms of the conservation easement deed.
- (2) The general rule is that no charitable contribution deduction is allowed for a transfer of property of less than the taxpayer's entire interest in the property. IRC § 170(f)(3). Section 170(f)(3)(B)(iii) provides an exception to the partial interest rule for qualified conservation contributions.
- (3) Section 170(h)(1) of the Internal Revenue Code (IRC) states that a qualified conservation contribution is a contribution of a qualified real property interest (i.e., a restriction granted in perpetuity on the use which may be made of the real property) to a qualified organization exclusively for conservation purposes. The IRC and accompanying Treasury Regulations outline the requirements that must be met before a charitable contribution is deductible.
- (4) Qualified organizations that accept conservation easements must have a commitment to protect the conservation purposes of the donation in perpetuity and must have sufficient resources to enforce compliance with the terms of the easement deed.
- (5) Section 170(h)(4)(A) specifies the four conservation purposes:
  - Preservation of land areas for outdoor recreation by, or the education of, the general public.
  - Protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem.

- Preservation of open space (including farmland and forest land), where such preservation is for the scenic enjoyment of the general public or pursuant to a clearly delineated federal, state, or local governmental conservation policy and, for both purposes, will yield a significant public benefit.
  - Preservation of a historically important land area or a certified historic structure.
- (6) The donation of a conservation easement that meets all statutory and regulatory requirements, including specific substantiation requirements, can be claimed as a charitable contribution deduction.
  - (7) The value of a conservation easement must be determined in a qualified appraisal prepared and signed by a qualified appraiser. The value of the contribution is the fair market value (FMV) of the conservation easement at the time of the contribution. To the extent there is a substantial record of sales of conservation easements comparable to the donated easement, the FMV is based on the sales price of such comparables. If there is no substantial record of marketplace sales, the value is generally the difference between the FMV of the underlying property before and after the easement is granted to the donee. Because there is usually no substantial record of comparable sales, a before and after valuation is used in most cases.
  - (8) To conduct a quality examination, in-depth development of facts is necessary. Examiners have primary responsibility for addressing the taxpayer's compliance with all statutory and regulatory requirements.
  - (9) Valuation is also an important component of this tax issue. A multi-divisional approach, working with LB&I Engineering, Counsel, and Tax Exempt and Government Entities (TEGE), may be needed to properly develop tax issues in a conservation easement examination.
  - (10) Taxpayers, return preparers, appraisers, and others involved with an improper or overvalued conservation easement may be subject to various penalties.
  - (11) While the charitable contribution of a conservation easement may be the most significant issue on the tax return, Examiners should be alert to other related tax issues such as a sale of state tax credits, basis adjustments, or a recapture of rehabilitation tax credits.

### **C. Background / History**

- (1) In recognition of our need to preserve our heritage, Congress allowed an income tax deduction for owners of significant property who give up certain rights of ownership to preserve their land or buildings for future generations.
- (2) The IRS has seen abuses of this tax provision that compromise the policy Congress intended to promote. We have seen taxpayers, often encouraged by promoters and armed with questionable appraisals, take inappropriately large

deductions for easements. In some cases, taxpayers claim deductions when they are not entitled to any deduction at all (for example, when taxpayers fail to comply with the law and regulations governing deductions for contributions of conservation easements). Also, taxpayers have sometimes used or developed these properties in a manner inconsistent with section 501(c)(3). In other cases, the charity has allowed property owners to modify the easement or develop the land in a manner inconsistent with the easement's restrictions.

- (3) Another problem arises in connection with historic easements, particularly façade easements. Here again, some taxpayers are taking improperly large deductions. They agree not to modify the façade of their historic house and they give an easement to this effect to a charity. However, if the façade was already subject to restrictions under local zoning ordinances, the taxpayers may, in fact, be giving up nothing, or very little. A taxpayer cannot give up a right that he or she does not have.

## **D. Relevant Terms**

### **D.1. Conservation Easement**

- (1) "Conservation easement" is the generic term for easements granted for preservation of land areas for outdoor recreation, protection of a relatively natural habitat for fish, wildlife, or plants, or a similar ecosystem, preservation of open space for the scenic enjoyment of the public or pursuant to a federal, state, or local governmental conservation policy, and preservation of a historically important land area or historic building.
- (2) Conservation easements permanently restrict how land or buildings are used. The "deed of conservation easement" describes the conservation purpose, the restrictions and the permissible uses of the property. The deed must be recorded in the public record and must contain legally binding restrictions enforceable by the donee organization.
- (3) The donor gives up certain rights specified in the deed of conservation easement, but retains ownership of the underlying property. The extent and nature of the donee organization's control depends on the terms of the conservation easement deed. The organization has an interest in the encumbered property that runs with the land, which means that its restrictions are binding not only on the landowner who grants the easement but also on all future owners of the property.

### **D.2. Charitable Contribution**

- (1) A charitable contribution is a contribution or gift to or for the use of a qualifying organization. See [Chapter 2](#).

### **D.3. Qualified Conservation Contribution**

- (1) Section 170(h)(1) defines a qualified conservation contribution as a contribution of a qualified real property interest to a qualified organization to be used exclusively for conservation purposes.

#### D.4. Conservation Purpose

- (1) Section 170(h)(4)(A) defines “conservation purpose” as one of the following:
- Preservation of land for outdoor recreation by, or the education of, the general public.
  - Protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem.
  - Preservation of open space (including farmland and forest land) either for the scenic enjoyment of the general public or pursuant to a clearly delineated governmental conservation policy (both purposes must yield a significant public benefit).
  - Preservation of a historically important land area or a certified historic structure.
- (2) The easement must be created by deed and be exclusively for conservation purposes. Donations of conservation easements may meet more than one conservation purpose.

#### D.5. Fair Market Value

- (1) The value of the donated easement must meet the definition of FMV as defined by Treas. Reg. § 1.170A-1(c)(2): The FMV is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts.

### E. Law / Authority

#### E.1. Exhibit 1-1 Conservation Easement Legal Authority

- (1) **NOTE:** This exhibit is not an all-inclusive list of potential issues for donations of conservation easements. Users should review IRC § 170, DEFRA § 155, the corresponding Treasury Regulations, Notice 2006-96 and case law.

Code/Regs/Other	Title
IRC § 170	Charitable, etc., contributions and gifts
DEFRA § 155	Deficit Reduction Act of 1984
Notice 2006-96	Guidance Regarding Appraisal Requirements for Noncash Charitable



	Contributions
Treas. Reg. § 1.170A-1	Charitable, etc., contributions and gifts; allowance of deduction
Treas. Reg. § 1.170A-13	Recordkeeping and return requirements for deductions for charitable contributions
Treas. Reg. § 1.170A-14	Qualified conservation contributions
Treas. Reg. § 1.170A-16	Substantiation and reporting requirements for noncash charitable contributions
Treas. Reg. § 1.170A-17	Qualified appraisal and qualified appraiser

## E.2. Tax Issues

- (1) Taxpayers must satisfy numerous statutory provisions in order to claim a noncash charitable contribution deduction for the donation of a conservation easement. Some deficiencies revealed in examinations of conservation easements include:
  - Failure to meet charitable contributions rules, for example the easement was granted in exchange for a change in zoning by the county (a quid pro quo).
  - Noncompliance with substantiation requirements.
  - Inadequate documentation of or lack of conservation purpose.
  - Lack of perpetuity evidenced by terms in the deeds.
  - Reserved property rights inconsistent with conservation purpose.
  - Failure to comply with subordination rules.
  - Failure to provide the donee organization with the specified proportionate share of the proceeds in the event of extinguishment.
  - Use of improper appraisal methodologies.
  - Failure to report income from the sale of state tax credits.
  - Overvalued conservation easements.
- (2) The IRS has identified some promoters and appraisers involved in conservation easement tax schemes.

## E.3. Resources

- (1) Information about conservation easements, including contacts, job aids, and other reference materials are on the IRS Virtual Library, Form 1040 Knowledge Base.

## II. Statutory Requirements for All Charitable Contributions

### A. Overview

- (1) In order to claim a charitable contribution deduction for a conservation easement, taxpayers must meet the statutory requirements applicable to all charitable contributions, as well as the specific requirements for conservation easement donations.
- (2) See [Publication 526, Charitable Contributions](#) (PDF), [Publication 561, Determining the Value of Donated Property](#) (PDF), and [Publication 1771, Charitable Contributions - Substantiation and Disclosure Requirements](#) (PDF).

### B. Charitable Contribution Definition

- (1) A charitable contribution is a contribution or gift to or for the use of a qualifying organization. It is a transfer of money or property made with charitable intent and without receipt of adequate consideration. IRC § 170(c); Treas. Reg. § 1.170A-1(h).
- (2) Section 170 contains the rules that govern income tax deductions for charitable contributions, including donations of conservation easements.

#### B.1. Qualified Organization

- (1) A taxpayer can only deduct contributions made to organizations eligible to accept tax-deductible contributions, which are organizations described in IRC § 170(c).
- (2) An organization accepting tax-deductible contributions of conservation easements must meet additional requirements to be a qualified organization. See [Chapter 4](#) for additional guidance on qualified organizations.

#### B.2. Charitable Intent

- (1) A charitable contribution is a donation or gift to, or for the use of, a qualified organization. It is voluntary and made without receipt, or the expectation of receipt, of anything of economic value.
- (2) A transfer of money or property is not voluntary if it is required or is made with the expectation of a direct or indirect benefit. A benefit received or expected to be received in connection with a payment or transfer by the taxpayer is called a quid pro quo.
- (3) See [Chapter 8](#) for additional discussion of charitable intent and quid pro quo.

### C. Real Estate Contributions

- (1) For a contribution of real estate, including a contribution of a conservation easement, there is no “transfer,” and therefore no deductible charitable contribution, unless there is:

- A deed signed by the donor transferring the property and
  - Acceptance by the qualified organization.
- (2) Conservation easement deeds must be recorded in the public record.

## D. Partial Interest Rule

- (1) Generally, in order to have a deductible contribution, a taxpayer must contribute the entire interest in the property. A partial interest is generally not deductible. This is known as the "partial interest" rule. IRC § 170(f)(3)(A).
- (2) A qualified conservation contribution is deductible even though it is a partial interest. It is an exception to the partial interest rule. IRC §§ 170(f)(3)(B)(iii) and (h).

## E. Conditional Gifts

- (1) If the contribution is a conditional gift, the donor cannot take a deduction.
- **Example:** If Justin transfers land in Maine to a city on the condition that the land is used by the city for an unlikely use (e.g., alligator habitat), there is no deductible charitable contribution before the time that the specified use actually occurs.
- (2) However, if there is only a negligible chance that the gift will be defeated, the deduction is allowed. Treas. Reg. §§ 1.170A-1(e) and 1.170A-7(a)(3).
- **Example:** Susan transfers land to a city on the condition that the land is used by the city for a public park. If, on the date of the gift, the city plans to use the property as a park, and the possibility that it will not be used as a park is so remote as to be negligible, the deduction is allowable at the time of the transfer to the city.

## F. Earmarking

- (1) A taxpayer may not deduct earmarked contributions (e.g., for the benefit of a particular individual or family). Earmarked amounts are treated as transfers to the earmarked beneficiary and not as transfers to the IRC § 170(c) organization.
- **Example:** Steven made payments to his church. He earmarked the payments for John, a needy individual. Steven cannot deduct the amount of the payments since he earmarked the funds for John. The church was merely a conduit for Steven's gift to John.

## G. Year of Donation

- (1) A taxpayer may deduct contributions paid within the taxable year. IRC § 170(a)(1) and Treas. Reg. § 1.170A-1(a) and (b).

- (2) A promise to pay cash or transfer property in the future is not deductible. The taxpayer may deduct payments made by check when the check is mailed or delivered to the IRC § 170(c) organization. Treas. Reg. § 1.170A-1(b).
- (3) For conservation easements, the year of the deduction is the year of recordation. Treas. Reg. § 1.170A-14(g)(1).
  - **Example:** A conservation easement was granted to a qualified organization on December 20, 2007, as evidenced by the dated signatures on the conservation easement deed. However, the easement was not recorded in the public records until March 12, 2008. The year of donation is 2008.

## H. Substantiation of Noncash Contributions

- (1) A charitable contribution is not deductible unless it is properly substantiated in accordance with the IRC and the regulations. The documentation requirements vary depending on the date of contribution, nature of the contribution (noncash in the case of a conservation easement), type of property contributed, and dollar amount claimed. For a conservation easement, the following documents are required:
- (2) Contemporaneous written acknowledgment from the donee organization. IRC § 170(f)(8). The contemporaneous written acknowledgment must meet the acknowledgment requirement and the contemporaneous requirement.
  - The acknowledgment must:
    - Be in writing,
    - Describe the property received by the donee,
    - Contain a statement of whether the donee provided any goods or services in consideration, in whole or in part, for the gift, and
    - Provide a description of and a good faith estimate of the goods or services, other than intangible religious benefits, provided to the taxpayer.
  - The contemporaneous requirement provides:
    - The taxpayer must get the acknowledgment on or before the earlier of:
      - The date the taxpayer files a return for the year in which the contribution was made, or
      - The due date (including extensions) for filing such return.
- (3) Form 8283, Section B, with supplemental statement.
- (4) Deed (should be stamped with the recording date).
- (5) Qualified Appraisal (for contributions of more than \$5,000).

- (6) Baseline study.
- (7) The tax court has considered a number of cases in which taxpayers argued that the deed of easement satisfied the contemporaneous written acknowledgment requirement. In *French v. Commissioner*, T.C. Memo. 2016-53, and *Schrimsher v. Commissioner*, T.C. Memo. 2011-71, the deed did not satisfy the contemporaneous written acknowledgment requirement. In *Big River Development, LP v. Commissioner*, T.C. Memo. 2017-166; *310 Retail, LLC v. Commissioner*, T.C. Memo. 2017-164; *RP Golf, LLC v. Commissioner*, T.C. Memo. 2012-282; and *Averyt v. Commissioner*, T.C. Memo. 2012-198, the deed did satisfy the contemporaneous written acknowledgment requirement.
- (8) Examiners should contact Counsel for assistance if a taxpayer contends that the deed of easement satisfies the contemporaneous written acknowledgment requirement.
- (9) In *Belair Woods, LLC v. Commissioner*, T.C. Memo. 2018-159, a Form 8283 that omitted the cost basis of the subject property, with an attachment indicating that it was not necessary to disclose it, neither strictly nor substantially complied with the regulatory requirement to include such information on the form. See also *RERI Holdings v. Commissioner*, 149 T.C. 1 (2017); Treas. Reg. § 1.170A-13(c)(2)(i)(B) and (4)(ii)(E). Taxpayers are afforded the opportunity to demonstrate reasonable cause for omitting the information. IRC § 170(f)(11)(A)(ii)(II).
- (10) See [Publication 526, Charitable Contributions](#) (PDF), and [Publication 1771, Charitable Contributions - Substantiation and Disclosure Requirements](#) (PDF) and [Chapter 6](#) for additional guidance on substantiation requirements.
- (11) See IRC § 170(f)(8)(A)-(D), Treas. Reg. § 1.170A-13(f) (effective for contributions made on or after December 16, 1996 and on or before July 30, 2018) and Treas. Reg. § 1.170A-16(a) (effective for contributions made after July 30, 2018).
- (12) See also Section 155 of the Deficit Reduction Act of 1984 (DEFRA), Pub. L. 98-369, 98 Stat. 691, Treas. Reg. § 1.170A-13(c)(2)(i)(B) (effective for contribution made after December 31, 1984, and on or before July 30, 2018) and Treas. Reg. § 1.170A-16(c)-(e) (effective for contributions made after July 30, 2018).

## I. Amount of Deduction

- (1) Factors that may affect the amount a taxpayer may claim as a charitable contribution deduction for a conservation easement include:
  - FMV
  - Quid pro quo and charitable intent
  - Bargain sale

- Type of property (ordinary income, short-term capital gain, long-term capital gain)
  - Basis
  - Percentage limitations
  - Type of donee organization
- (2) See [Chapter 8](#) and [Publication 526, Charitable Contributions](#) (PDF) for additional guidance on specific limitations on charitable contributions.

### III. Qualified Conservation Contribution

#### A. Overview

- (1) Section 170(h)(1) defines a qualified conservation contribution as a contribution of a qualified real property interest to a qualified organization to be used exclusively for conservation purposes.

#### B. Qualified Real Property Interest

- (1) A qualified real property interest is any of the following interests in real property:
- The entire interest of the donor, other than a qualified mineral interest.
  - A remainder interest.
  - A restriction on the use of the real property granted in perpetuity (often referred to as a conservation easement).
- (2) See IRC § 170(h)(2).

#### C. Qualified Organization

- (1) The recipient of a deductible conservation easement donation must be a qualified organization and also an eligible donee. IRC §§ 170(h)(1)(B) and 170(h)(3); Treas. Reg. § 1.170A-14(c)(1).
- (2) Qualified organizations include:
- The federal government, a United States (U.S.) possession, the District of Columbia, a state government, or any political subdivision of a state or U.S. possession.
  - An organization described in IRC § 170(b)(1)(A)(vi).
  - A charity described in IRC § 501(c)(3) that meets the public support test of IRC § 509(a)(2).
  - An IRC § 501(c)(3) organization that meets the requirements of IRC § 509(a)(3) and is controlled by one of the organizations described above.
- (3) **Note:** See Treas. Reg. § 1.170A-14(c)(1) for the requirements to qualify as an eligible donee.

- (4) See IRC § 170(h)(3) and [Chapter 4](#) for additional information on qualified organizations.

## D. Conservation Purpose

- (1) Section 170(h)(4)(A) defines “conservation purpose” as one of the following:
- Preservation of land for outdoor recreation by, or the education of, the general public.
  - Protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem.
  - Preservation of open space (including farmland and forest land) either for the scenic enjoyment of the general public or pursuant to a clearly delineated governmental conservation policy (both purposes must yield a significant public benefit).
  - Preservation of a historically important land area or a certified historic structure.
- (2) The easement must be created by deed and be exclusively for conservation purposes. Donations of conservation easements may meet more than one conservation purpose.
- (3) See [Chapter 5](#) for additional information on conservation purpose.

## E. Perpetuity

- (1) A deductible conservation easement must be made in perpetuity, permanently restricting the use of the property. Section 170(h)(2)(C) requires that the interest in real property be subject to a use restriction granted in perpetuity, and IRC § 170(h)(5)(A) requires that the conservation purpose be protected in perpetuity. See also Treas. Reg. §§ 1.170A-14(b)(2) and 1.170A-14(g)(1).
- (2) This means that the deed of conservation easement must indicate that the restriction remains on the property forever and is binding on current and future owners of the property.
- (3) If a deed of conservation easement does not meet the perpetuity requirements, the contribution of a conservation easement is not deductible.
- (4) If the conservation easement deed imposes restrictions for a specific period such as ten years, it is not in perpetuity and is not deductible. An easement is not enforceable in perpetuity if it ends after a period of years or if it can revert to the donor or to another private party. However, if a remote future event, like an earthquake, can extinguish the easement, the donation could nevertheless be treated as enforceable in perpetuity. Treas. Reg. § 1.170A-14(g)(3).
- (5) In *Carpenter v. Commissioner*, T.C. Memo. 2012-1, a conservation easement was not enforceable in perpetuity because it allowed for the extinguishment of the easement by mutual consent of the parties if circumstances arose in the

future that would render the purpose of the conservation easement impossible to accomplish.

- (6) In *Belk v. Commissioner*, 140 T.C. 1 (2013), *motion for reconsideration denied*, T.C. Memo. 2013-154, *aff'd* 774 F.3d 1243 (4th Cir. 2014), the deed of easement allowed the taxpayers and donee to change the property subject to the easement by substituting other property owned by the taxpayers for the property originally subject to the easement. The tax court ruled that the provision caused the easement to fail the requirements of IRC § 170(h)(2)(C), as the donated property interest was not subject to a use restriction granted in perpetuity.
- (7) In *Pine Mountain Preserve, LLLP v. Commissioner*, 151 T.C. 247 (2018), and *Pine Mountain Preserve, LLLP v. Commissioner*, 116 T.C. Memo. 214, *rev'd in part, aff'd in part, vacated and remanded*, 2020 WL 6193897 (11th Cir. Oct. 22, 2020), the 2005 deed of easement set out boundaries for ten building areas, but allowed the boundaries to be modified by mutual agreement of the donor and NALT, the donee. The 2006 deed of easement allowed the designation of six building areas within the conservation area, but with no other restriction on location except that the locations must be approved in advance by NALT. The Tax Court, following *Belk*, ruled that these provisions caused the easement to fail the grant in perpetuity requirements of IRC § 170(h)(2)(C). In so doing, the court explicitly rejected the holding in *BC Ranch II, L.P. v. Commissioner*, 867 F.3d 547 (5th Cir. 2017), where the Fifth Circuit ruled that the so-called floating homesites did not defeat perpetuity. The Eleventh Circuit, in *Pine Mountain*, ruled that the moveable building areas do not violate the “granted in perpetuity” requirement under § 170(h)(2)(C), but remanded the issue of whether they violate the “protected in perpetuity” requirement under § 170(h)(5)(A). The Eleventh Circuit agreed with the Tax Court that the amendment clause did not violate the protected in perpetuity requirement of IRC § 170(h)(5)(A). Lastly, the Eleventh Circuit held that when determining the fair market value of the easement, the Tax Court should value the easement using the standards set forth in the governing regulations.
- (8) Agents should note that under *Golsen v. Commissioner*, 54 T.C. 742, 756-57, *aff'd*, 445 F.2d 985 (10th Cir. 1971), the Tax Court is bound by an appellate court’s opinions in cases appealable to that appellate court’s circuit. We recommend that all floating homesite/moveable building area clause cases and amendment clause cases be referred to the assigned LB&I and SB/SE Counsel.

## **E.1. Reserved Rights**

- (1) In *Hoffman Props. II, LP v Commissioner*, 956 F.3d 832 (6th Cir. 2020), a façade easement case, the Sixth Circuit Court of Appeals affirmed the Tax Court’s holding that the automatic approval clause in the deed rendered the easement nondeductible because the clause was inconsistent with the easement being enforceable in perpetuity under IRC § 170(h)(5)(A). The clause



reserved to the donor rights to modify the building façade if the donor obtained the prior approval of the easement holder, but if the holder failed to respond to a request for approval within 45 days, the request was automatically considered approved. The court of appeals explained that a failure of the donee to act within 45 days would foreclose its ability to prevent the proposed modification. For a CCA containing an acceptable “constructive denial” clause, see CCA 202002011 (released Jan. 10, 2020).

## E.2. Recording Easements

- (1) The deed of conservation easement must be recorded in the appropriate recordation office. See generally Treas. Reg. § 1.170A-14(g)(1).
- (2) In a federal tax controversy, state law controls the determination of a taxpayer’s interest in property while the tax consequences are determined under federal law. *United States v. Nat’l Bank of Commerce*, 472 U.S. 713, 722 (1985); *Woods v. Commissioner*, 137 T.C. 159, 162 (2011). An easement is not enforceable in perpetuity before it is recorded.
- (3) In addition to the deed, all exhibits or attachments to the deed, such as a description of the easement restrictions, maps, and lender agreements, may need to be recorded. In *Herman v. Commissioner*, T.C. Memo. 2009-205, the taxpayer recorded a “Declaration of Restrictive Covenant” for a donation of unused development rights above a building in New York City. The covenant referred to an attached architectural drawing, which described the easement restrictions, but the drawing was not recorded. The court ruled that because the attached drawing was not recorded, it could not bind subsequent purchasers, did not protect the conservation purpose of preserving the building “in perpetuity,” and failed to meet the requirements of IRC § 170(h)(5)(A). But see *Butler v. Commissioner*, T.C. Memo. 2012-72, holding that documents incorporated into the deed by reference do not have to be recorded with the deed under Georgia law.

## E.3. Amendment Clauses in Easement Deeds

- (1) The restriction on the use of the real property must be enforceable in perpetuity, meaning that it lasts forever and binds all future owners. An easement deed may fail the perpetuity requirements of IRC § 170(h)(2)(C) and (h)(5)(A) if it allows any amendment or modification that could adversely affect the perpetual duration of the deed restriction.
- (2) In *Pine Mountain Preserve, LLLP v. Commissioner*, 151 T.C. 247 (2018), *rev’d in part, aff’d in part, vacated and remanded*, 2020 WL 6193897 (11th Cir. Oct. 22, 2020), the deed of easement allowed the donor and the donee to amend the deed by agreement so long as the amendment was not inconsistent with the conservation purposes. The Tax Court ruled that such an amendment clause does not violate the enforceable in perpetuity requirements of IRC §

170(h)(5)(A). See discussion of amendment clauses and the *Pine Mountain* case above under the heading “Perpetuity.”

- (3) The issue of Amendment Clauses is different than the issue of Reserved Rights. See [Chapter 12](#) for information on Reserved Rights in an easement deed.

#### **E.4. Subordination of Mortgages in Lender Agreements**

- (1) If the property has a mortgage or lien in effect at the time the easement is recorded, the easement contribution is not deductible unless the mortgagee or lien holder subordinates its rights in the property to the rights of the donee organization to enforce the conservation purposes of the easement in perpetuity. Treas. Reg. § 1.170A-14(g)(2).
- (2) The subordination agreement must be recorded in a timely manner.
- (3) In *Minnick v. Commissioner*, T.C. Memo. 2012-345, *aff'd*, 796 F.3d 1156 (9th Cir. 2015), the tax court held that petitioners were not entitled to a charitable contribution deduction because they failed to meet the subordination requirements (i.e., the mortgagor and petitioners had not entered into a subordination agreement at the time the easement was donated, rather, it was entered into after the donation). See also *Mitchell v. Commissioner*, 138 T.C. 324 (2012), *supplemented by* T.C. Memo. 2013-204, *aff'd*, 775 F.3d 1243 (10th Cir. 2015); *RP Golf, LLC v. Commissioner*, T.C. Memo. 2016-80, *aff'd* 860 F.3d1096 (8th Cir. 2018); *Palmolive Building Investors v. Commissioner*, 149 T.C. 380 (2017).

#### **E.5. Extinguishment**

- (1) Treas. Reg. § 1.170A-14(g)(6)(i) generally provides that if a subsequent unexpected change in the conditions surrounding the property that is the subject of a donation can make impossible or impractical the continued use of the property for conservation purposes, the conservation purpose can nonetheless be treated as protected in perpetuity if the restrictions are extinguished by judicial proceeding and all of the donee’s proceeds (determined under Treas. Reg. § 1.170A-14(g)(6)(ii)) from a subsequent sale or exchange of the property are used by the donee organization in a manner consistent with the conservation purposes of the original contribution.

#### **E.6. Allocation of Proceeds in Deed and Lender Agreements**

- (1) In order to claim a charitable contribution deduction for the donation of a conservation easement, the donor, at the time of the gift, must agree that the donation of the perpetual conservation restriction gives rise to a property right, immediately vested in the donee organization, with a FMV that is at least equal to the proportionate value that the perpetual conservation restriction at the time of the gift bears to the value of the property as a whole. The proportionate value

of the donee's property rights must remain constant. The donee organization must be entitled to a portion of the proceeds at least equal to that proportionate value of the perpetual conservation restriction. The requirements of Treas. Reg. § 1.170A-14(g)(6)(i) and (ii) are strictly construed. If a grantee is not absolutely entitled to the proportionate share of extinguishment proceeds, then the conservation purpose of the contribution is not protected in perpetuity. The only exception is if 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. Treas. Reg. §1.170A-14(g)(6)(ii) (last clause).

- (2) Treas. Reg. § 1.170A-14(g)(6)(ii) requires the donee's proportionate interest upon extinguishment of a conservation easement to be a percentage determined by (1) the FMV of the conservation easement on the date of the gift (numerator), over (2) the FMV of the property as a whole on the date of the gift (denominator).
- (3) In *Carroll v. Commissioner*, 146 T.C. 196 (2016), petitioners' deed of conservation easement instead used a ratio of the charitable contribution deduction allowable over the value of the property as a whole on the date of the gift. Thus, the deed failed to satisfy Treas. Reg. § 1.170A-14(g)(6)(ii) because it did not guarantee the donee a proportionate share of the extinguishment proceeds based on the FMV of the conservation easement at the time of the gift.
- (4) In *PBBM-Rose Hill, Ltd. v. Commissioner*, 900 F.3d 193 (5th Cir. 2018), the deed of easement provided that in case of extinguishment, the donee would receive the proportionate value required by the regulation less the expenses of the sale and the amount attributable to improvements constructed after the easement. The court disallowed the deduction because any reduction to the proportionate value required by the regulation failed to satisfy its requirements.
- (5) In *Coal Property Holdings, LLC v. Commissioner*, 153 T.C. 126 (2019), the deed of easement provided that in case of extinguishment, the donee would receive the proportionate value required by the regulation "after the satisfaction of prior claims" and less any increase in value attributable to improvements. The court, following *PBBM-Rose Hill*, disallowed the deduction because any reduction to the proportionate value required by the regulation failed to satisfy its requirements.
- (6) See also *Plateau Holdings, LLC v. Commissioner*, T.C. Memo. 2020-93; *Belair Woods, LLC v. Commissioner*, T.C. Memo. 2020-112; *Village at Effingham, LLC v. Commissioner*, T.C. Memo. 2020-102; *Riverside Place, LLC v. Commissioner*, T.C. Memo. 2020-103; *Maple Landing, LLC v. Commissioner*, T.C. Memo. 2020-104; *Englewood Place, LLC v. Commissioner*, T.C. Memo. 2020-105; *Hewitt v. Commissioner*, T.C. Memo. 2020-89; *Woodland Property Holdings, LLC v. Commissioner*, T.C. Memo. 2020-55; *Oakbrook Land Holdings, LLC v. Commissioner*, T.C. Memo. 2020-54; *Cottonwood Place, LLC v. Commissioner*, T.C. Memo. 2020-115; *Red Oak Estates, LLC v.*

Commissioner, T.C. Memo. 2020-116; Smith Lake, LLC v. Commissioner, T.C. Memo. 2020-107; Lumpkin One Five Six, LLC v. Commissioner, T.C. Memo. 2020-94.

- (7) Examiners should contact Counsel for assistance in review of deeds and lender agreements to determine if the documents satisfy the allocation of proceeds requirements of Treas. Reg. § 1.170A-14(g)(6)(ii).

## **IV. Qualified Organization**

### **A. Overview**

- (1) A taxpayer must transfer the conservation easement to an eligible donee to qualify for a contribution deduction. An eligible donee:
  - Is a qualified organization,
  - Must have the commitment to protect the conservation purpose(s) of the donation, and
  - Must have the resources to enforce the conservation restrictions.
- (2) See IRC § 170(h)(3); Treas. Reg. § 1.170A-14(c)(1).

### **B. Qualified Organization**

- (1) A qualified organization is one of the following:
  - A governmental unit, including the U.S. government, a U.S. possession, the District of Columbia, a state government, or any political subdivision of a state or U.S. possession so long as the contribution is made for exclusively public purposes.
  - A public charity described in IRC § 501(c)(3) that meets the public support test of IRC § 509(a)(2) or a public charity described in 170(b)(1)(A)(vi).
  - A public charity described in IRC § 501(c)(3) that meets the requirements of IRC § 509(a)(3) and is controlled by one of the organizations described above. Treas. Reg. § 1.170A-14(c)(1).

### **C. Commitment and Resources**

- (1) The qualified organization must have the commitment to protect the conservation purpose(s) of the donation Treas. Reg. § 1.170A-14(c)(1). An entity organized or operated for one of the conservation purposes in IRC § 170(h)(4)(A) is considered to have the commitment required to protect the conservation purposes of the donation. Treas. Reg. § 1.170A-14(c)(1).
- (2) Qualified organizations that accept easement contributions and are committed to conservation will generally have an established monitoring program, such as annual property inspections to ensure compliance with the conservation easement terms and to protect the easement in perpetuity. The terms of the

easement contribution must permit the qualified organization access to the property for inspection. Treas. Reg. § 1.170A-14(g)(5)(ii).

- (3) The qualified organization must also have the resources to enforce the restrictions of the conservation easement. Resources do not necessarily mean cash. Treas. Reg. § 1.170A-14(c)(1). Resources may be in the form of the volunteer services of lawyers who provide legal services or conservationists who inspect the property and prepare monitoring reports.
- (4) See [Chapter 12](#) for suggestions on how to evaluate the organization's commitment and resources.

#### **D. Special Rules for Buildings in a Registered Historic District**

- (1) For a contribution made after July 25, 2006, of a qualified real property interest with respect to a building in a registered historic district, an additional requirement must be met to satisfy the commitment and resources test. Section 170(h)(4)(B)(ii) requires the taxpayer and the donee organization to execute a written agreement certifying, under penalty of perjury, that the donee is a qualified organization with a purpose of environmental protection, land conservation, open space preservation, or historic preservation, and that the donee has the resources to manage and enforce the restriction and a commitment to do so. The taxpayer is also required to attach to its return a copy of the qualified appraisal for the qualified property interest, photos of the entire exterior of the building and a description of all restrictions on the development of the building. IRC § 170(h)(4)(B)(iii)(I-III).
- (2) **Note:** This special rule does not apply to properties listed on the National Register.
- (3) See [Chapter 5](#) for a complete discussion of the special rules for buildings in registered historic districts.

#### **E. Cash Contributions**

- (1) A common practice for qualified organizations is to request a cash contribution (sometimes referred to as a "stewardship fee") from donors of conservation easements. To be deductible as a charitable contribution, the cash payment must be a voluntary transfer made with charitable intent to a qualified organization. IRC § 170 (a) and (c). All cash contributions, regardless of amount, must be substantiated with a bank record or a receipt from the donee. The record or receipt must show the name of the donee, the date of the contribution, and the amount of the contribution. IRC §170(f)(17); Treas. Reg. §1.170A-15.
- (2) Charitable intent exists if the transfer is made without the receipt of, or the expectation of receiving, a quid pro quo for the transfer. Generally, if the benefits the transferor receives or expects to receive are substantial, rather than incidental to the transfer, the transfer does not satisfy the charitable intent

requirement under IRC § 170. *Hernandez v. Commissioner*, 490 U.S. 680, 691 (1989); *United States v. American Bar Endowment*, 477 U.S. 105, 117-118 (1986); *Wendell Falls Development, LLC v. Commissioner*, T.C. Memo. 2018-45, at \*10-13; *Singer Co. v. United States*, 196 Ct. Cl. 90, 106 449 F.2d 413, 422-423 (1971).

- (3) If a direct or indirect economic benefit (other than a tax deduction) is received or is expected to be received as a result of making a contribution, the deduction may be limited or disallowed. See *generally* § 1.170A-1(h)(3), which was published on June 13, 2019. A state or local tax credit is a direct or indirect economic benefit that reduced the amount of a taxpayer's charitable contribution deduction.

## E.1. Quid Pro Quo Contribution

- (1) A quid pro quo contribution is a transfer of money or property made to a qualified organization partly in exchange for goods or services in return from the charity or a third party. A quid pro quo may also be in the form of an indirect benefit from a third party.
  - **Example:** A land developer agrees to grant a conservation easement to the county or other qualified organization in exchange for the approval of a proposed subdivision. See *Triumph Mixed Use Investments III, LLC v. Commissioner*, T.C. Memo. 2018-65. \*31-42.
- (2) If a taxpayer receives a quid pro quo, the transfer to the charity may be deductible as a charitable contribution, but only to the extent the amount transferred exceeds the FMV of the quid pro quo, and only if the excess amount was transferred with charitable intent. *United States v. American Bar Endowment*, 477 U.S. 105, 117 (1986).
- (3) The burden is on the taxpayer to show that all or part of a payment is a charitable contribution or gift. Treas. Reg. § 1.170A-1(h)(1) and (2); *United States v. American Bar Endowment*, 477 U.S. 105, 116-118 (1986); and Rev. Rul. 67-246, 1967-2 C.B. 104.

## V. Conservation Purpose

### A. Overview

- (1) A contribution of a conservation easement to a qualified organization must be made for one of the following conservation purposes:
  - Preservation of land areas for outdoor recreation by, or the education of, the general public.
  - Protection of a relatively natural habitat for fish, wildlife, or plants, or a similar ecosystem.
  - Preservation of open space for the scenic enjoyment of the general public, or pursuant to a federal, state, or local governmental conservation policy, both yielding a significant public benefit.

- Preservation of historically important land area or certified historic building.
- (2) IRC § 170(h)(4)(A).
  - (3) The conservation easement must be transferred by deed (or other legal instrument as appropriate under the law of the relevant State) and recorded where the property is located, be exclusively for conservation purposes, protected in perpetuity, and meet at least one of the above conservation purposes.
  - (4) Any required access to the land by the general public depends on the conservation purpose of the conservation easement. If the claimed conservation purpose is for the preservation of open space under IRC § 170(h)(4)(A)(iii), the contribution must yield a significant public benefit which is usually by visual access from a public highway. Treas. Reg. § 1.170A-14(d)(4)(ii)(B).
  - (5) The deed of conservation easement must prohibit inconsistent use of the property that could permit destruction of a significant conservation interest, even if the easement accomplishes an enumerated conservation purpose. Treas. Reg. § 1.170A-14(e)(2).
  - (6) A baseline study is used to identify the conservation attributes and to establish the condition of the property at the time of the conservation easement donation. Treas. Reg. § 1.170A-14(g)(5).

## B. Land for Outdoor Recreation or Education

- (1) This category includes the donation of a qualified real property interest to preserve land for outdoor recreation by, or for the education of, the general public. IRC § 170(h)(4)(A)(i).
- (2) Substantial and regular physical access by the general public to the preserved land is required. Treas. Reg. § 1.170A-14(d)(2)(ii).
  - **Examples:** A donation to preserve a lake for use by the general public for boating or fishing, or to preserve land for a hiking trail.
- (3) See Treas. Reg. § 1.170A-14(d)(2) for additional guidance.
- (4) See also *PPBM-Rose Hill, Limited v. Commissioner*, 900 F.3d 193 (5th Cir. 2018). In denying the charitable contribution deduction because the taxpayer failed to comply with the extinguishment clause requirements in Treas. Reg. § 1.170A-14(g)(6)(ii), the Fifth Circuit Court of Appeals reversed the tax court on the issue of whether the conservation easement met the outdoor recreation conservation purpose. The court determined that the easement met the outdoor recreation conservation purpose because the terms of the deed stated that the property was being protected for outdoor recreation “for use by the general public.”

## C. Relatively Natural Habitat or Ecosystem

- (1) This conservation purpose is satisfied if the conservation easement protects a **significant** relatively natural habitat of fish, wildlife or plants, or similar ecosystem. IRC § 170(h)(4)(A)(ii). An ordinary tract of land where a common fish, wildlife or plant community, or similar ecosystem normally lives does not satisfy this conservation purpose. Treas. Reg. § 1.170A-14(d)(3)(ii).
- (2) Significant habitats and ecosystems include, but are not limited to:
  - Habitats for rare, endangered, or threatened species.
  - Natural areas that are relatively intact and are considered high quality examples of land or aquatic communities.
  - Natural areas that are in or contribute to the ecological viability of a park, preserve, wildlife refuge, wilderness area, or other similar conservation area.
- (3) For this conservation purpose, limitations on public access are allowable. For example, a restriction on all public access to the habitat of a threatened native animal species would not defeat the claimed deduction. Treas. Reg. § 1.170A-14(d)(3)(iii). The taxpayer's documentation, called a baseline report, as required by Treas. Reg. § 1.170A-14(g)(5)(i), should clearly describe and identify the relative natural habitat or ecosystem being protected on the property.
- (4) The determination of what specifically meets this conservation purpose test is based on the facts and circumstances of the specific case. In *Glass v. Commissioner*, 124 T.C. 258 (2005), *aff'd*, 471 F.3d 698 (6th Cir. 2006), the taxpayer donated two easements that restricted the development of a fraction of a 10-acre parcel of residential property. The tax court held that the conservation purpose of natural habitat was satisfied because the conservation easements were placed on property that had possible places to create or promote a relatively natural habitat of plants or wildlife.
- (5) In *Atkinson v. Commissioner*, T.C. Memo. 2015-236, taxpayer claimed deductions for conservation easements encumbering non-contiguous tracts of land on and adjacent to golf courses located in a gated and guarded residential community. The tax court distinguished the *Glass* case and held that the easements did not protect a relatively natural habitat. In so holding, the tax court reasoned, among other things, that the golf courses' use of pesticides could destroy the ecosystem of the encumbered property. The tax court's reliance on the Service's expert reports and testimony in *Atkinson* demonstrates the importance of expert evidence in "protecting natural habitat" cases.
- (6) In *Champions Retreat Golf Founders, LLC. v. Commissioner*, T.C. Memo. 2018-146, taxpayer claimed a deduction for an easement on approximately 350 acres that encumbered most of a golf course scattered among houses in a gated residential community. Taxpayer argued the easement satisfied conservation purposes by preserving habitat for "species of conservation concern," and providing open space for scenic enjoyment of the general public and pursuant to a clearly delineated governmental policy. The court sustained the



disallowance, finding that that the easement failed to satisfy either the habitat purpose or the open space purpose. The court held there was an insufficient presence of rare, endangered, or threatened species, and the encumbered land was in a non-natural state. Finally, the court held that open space conservation purpose was not met because there was insufficient physical and visual access for the public to enjoy the encumbered land in the gated community. Moreover, the court held that the easement did not satisfy a clearly delineated governmental policy since the state statute cited by the taxpayer did not support a determination that the encumbered property was a part of an “identified conservation project.” As in the *Atkinson* case, the tax court relied on expert reports and testimony to determine that the taxpayer failed to satisfy the conservation purposes of IRC § 170(h). On appeal, the Eleventh Circuit Court of Appeals disagreed with the tax court and vacated and remanded the tax court opinion. *Champion’s Retreat Golf Founders, LLC v. Commissioner*, 959 F.3d 1033 (11th Cir. 2020). A Motion to Amend the Opinion, filed in the 11th Circuit Court of Appeals on behalf of the Commissioner, is currently pending.

## D. Open Space

- (1) The donation of a qualified real property interest to protect open space (including farmland and forest land) must be (1) for the scenic enjoyment of the general public, or (2) pursuant to a clearly delineated federal, state, or local governmental conservation policy. This type of conservation easement must preserve open space **and** must yield a significant public benefit. IRC § 170(h)(4)(A)(iii).

### D.1. Scenic Enjoyment

- (1) Preservation of open space may be for the scenic enjoyment of the general public if development of the property would impair the scenic character of the local rural or urban landscape or interfere with a scenic panorama that can be enjoyed by the public. Treas. Reg. § 1.170A-14(d)(4)(ii)(A).
- (2) Whether the easement provides scenic enjoyment to the general public is evaluated based on all the facts and circumstances. The burden of proof is on the taxpayer to show the scenic characteristics of the property.
- (3) Treas. Reg. § 1.170A-14(d)(4)(ii)(A) lists factors to consider:
  - The compatibility of the land use with other land in the vicinity.
  - The degree of contrast and variety provided by the visual scene.
  - The openness of the land (which would be a more significant factor in an urban or densely populated setting or in a heavily wooded area).
  - Relief from urban closeness.
  - The harmonious variety of shapes and textures.

- The degree to which the land use maintains the scale and character of the urban landscape to preserve open space, visual enjoyment and sunlight for the surrounding area.
  - The consistency of the proposed scenic view with a methodical state scenic identification program, such as a state landscape inventory.
  - The consistency of the proposed scenic view with a regional or local landscape inventory made pursuant to a sufficiently rigorous review process, especially if the donation is endorsed by an appropriate state or local governmental agency.
- (4) A conservation easement preserving open space for the scenic enjoyment of the general public does not require physical access by the public. Visual access to or across the property by the general public is sufficient. Although the entire property need not be visible to the public in order to qualify for a deduction, the public benefit from the donation may be insufficient to qualify if only a small portion of the property is visible to the public. Treas. Reg. § 1.170A-14(d)(4)(ii)(B).
- (5) In *Turner v. Commissioner*, 126 T.C. 299 (2006), the conservation purpose of open space was not met because the easement deed did not protect the views of the property. The taxpayer was not entitled to a deduction because the conservation easement did not satisfy one of the required conservation purposes in IRC § 170(h)(4)(A).
- (6) See Treas. Reg. § 1.170A-14(d)(4)(ii) for additional guidance.

## **D.2. Governmental Conservation Policy**

- (1) Conservation purpose includes the preservation of open space where such preservation is pursuant to a clearly delineated federal, state, or local government conservation policy. IRC § 170(h)(4)(A)(iii)(II).
- (2) A broad declaration by a single official or legislative body that the land should be conserved is not sufficient. The donation must further a specific, identified conservation project. The fact that the donation was accepted by a government agency is not sufficient to satisfy this requirement. The more rigorous the review process by the governmental agency, the more the acceptance of the easement tends to establish the requisite clearly delineated governmental policy. Treas. Reg. § 1.170A-14(d)(4)(iii)(B).
- (3) The government need not fund the conservation program, but it must involve a significant commitment by the government with respect to the conservation project.
- (4) Public access is not required if the conservation purpose would be undermined or frustrated by the public access. Treas. Reg. § 1.170A-14(d)(4)(iii)(C).

## **D.3. Significant Public Benefit**

- (1) A conservation purpose based on the preservation of open space, whether for scenic enjoyment or pursuant to a governmental conservation policy, must yield a significant public benefit. IRC § 170(h)(4)(A)(iii).
- (2) A determination of whether a conservation easement provides a significant public benefit must be based on all facts and circumstances. Treas. Reg. § 1.170A-14(d)(4)(iv) lists a number of factors that may be considered:
  - Uniqueness of the property to the area.
  - Intensity of land development in the area.
  - Consistency of the proposed open space use with public programs for conservation in the region.
  - Consistency of proposed open space use with existing private conservation programs in the area, evidenced by other protected land held by a qualified organization in close proximity to the property.
  - Likelihood the property would be developed in the absence of the easement.
  - Opportunity of the public to appreciate the property's scenic values.
  - Importance of the property to preserve a landscape or resource that attracts tourism or commerce.
  - Likelihood of the donee acquiring substitute property or property rights.
  - Cost of enforcing the terms of the conservation restrictions.
  - Population density in the area.
  - Consistency of open space use with a legislatively mandated program identifying particular parcels of land for future protection.
- (3) The preservation of an ordinary tract of land would not, in and of itself, yield a significant public benefit. Treas. Reg. § 1.170A-14(d)(4)(iv)(B). A charitable contribution will not be allowed if an easement does not impose new or expanded restrictions on the property. A conservation easement that merely limits the number of lots that the acreage is divided into does not necessarily satisfy the open space requirement of IRC § 170(h). *Turner v. Commissioner*, 126 T.C. 299 (2006).
- (4) The legislative history underlying IRC §170(h) shows that Congress did not intend for every easement to qualify for a deduction. A deduction is not allowed unless there is an assurance that the public benefit furthered by the contribution would be substantial enough to justify the allowance of a deduction. S. Rep. 96-1007, at 9-10 (1980), reprinted in 1980 U.S.C.C.A.N. 6736, 6744-45.
  - **Example:** Significant public benefit includes the preservation of a unique natural land formation for the enjoyment of the general public or the preservation of woodland along a well-traveled public highway to preserve

the appearance of the area so as to maintain the scenic view from the highway.

## **E. Historically Important Land or Structure**

- (1) This category includes the donation of a qualified real property interest to preserve a historically important land area or a certified historic structure. IRC § 170(h)(4)(A)(iv).

### **E.1. Historically Important Land**

- (1) Historically important land includes:
  - An independently significant land area that meets the National Register Criteria for Evaluation.
  - Land within a registered historic district and buildings on the land area that is reasonably considered as contributing to the significance of the district.
  - Land where the physical or environmental features contribute to the historic or cultural importance and continuing integrity of certified historic structures.
- (2) See Treas. Reg. § 1.170A-14(d)(5)(ii) for additional guidance.
- (3) Under the Pension Protection Act (IRC § 170(h)(4)(C)), a “certified historic structure” includes a land area listed in the National Register of Historic Places. The National Register is part of a national program administered by the National Park Service (NPS) to identify, evaluate and protect historic and archeological resources worthy of preservation. A list of properties in the National Register can be found on the NPS Web page.

### **E.2. Certified Historic Structure**

- (1) A certified historic structure is:
  - Any building, structure, or land area listed on the National Register, or
  - Any building located in a registered historic district and certified by the Secretary of the Interior as being of historic significance to the district.
- (2) A certified historic structure may be a commercial property or a personal residence.
- (3) The NPS Technical Preservation Services administers the certification program for the Department of the Interior. This certification application is submitted through the taxpayer’s State Historic Preservation Office, which makes a recommendation to the NPS regarding the application. The certification must be done at the time the easement is donated or by the due date (including extensions) of the return for the year of the donation. Treas. Reg. § 1.170A-14(d)(5)(iii).

- (4) The term “registered historic district” includes a district described in IRC § 47(c)(3)(B) and includes:
- Any district listed in the National Register, and
  - Any district:
    - designated under a statute of the appropriate state or local government, if such statute is certified by the Secretary of the Interior as containing criteria which will substantially achieve the purpose of preserving and rehabilitating buildings of historic significance to the district, and
    - that is certified by the Secretary of the Interior as meeting substantially all of the requirements for the listing of districts in the National Register.
- (5) A building in a local historic district will not meet the definition of a certified historic structure unless both the structure and the district have been certified in accordance with IRC § 47.

### E.3. Special Rules for Buildings in Registered Historic Districts

- (1) Section 170(h)(4)(B) imposes additional requirements for contributions of conservation easements on the exterior of a building in a registered historic district. **Note:** These requirements do not apply to properties listed in the National Register.
- (2) To qualify, all of the following additional requirements must be met:
- The entire exterior of the building, including the front, sides, rear, and height, must be restricted, and no changes can be made to the exterior that are inconsistent with the historical character of the exterior.
  - The donor must enter into a written agreement with the donee certifying, under penalty of perjury, that the donee is a qualified organization with a purpose of environmental protection, land conservation, open space preservation, or historic preservation, and that the donee has the resources to manage and enforce the restrictions and the commitment to do so.
  - Donors must attach to the return a qualified appraisal as defined in IRC § 170(f)(11)(E), photographs of the entire exterior of the building, and a description of all restrictions on the development of the building.
  - Donors must pay a \$500 filing fee to the U.S. Treasury if a deduction of more than \$10,000 is claimed. IRC § 170(f)(13).
- (3) Some visual access by the public to the building, structure or land area is required. The terms of the easement must be such that the general public is given the opportunity on a regular basis to view the characteristics and features

of the property. Factors to be considered in determining the type of access for historic properties include:

- Historical significance of the property;
- The nature and features that are the subject of the easement;
- The remoteness or accessibility of the site of the donated property;
- The possibility of physical hazards to the public visiting the property;
- The extent to which public access would be an unreasonable intrusion on any privacy interests of individuals living on the property;
- The degree to which public access would impair the preservation interests which are the subject of the donation; and
- The availability and opportunities for the public to view the property by means other than visits to the site.

(4) See Treas. Reg. § 1.170A-14(d)(5)(iv) for additional guidance.

## **F. Public Access**

- (1) Public access (either physical or visual) to the property is generally required for the conservation easement to be deductible except with respect to protection of a relatively natural habitat or ecosystem or pursuant to specified governmental policies. The type of access depends on the claimed conservation purpose.
- (2) If physical access is required, access must be substantial and on a regular basis.
- (3) If only visual access is required, the entire property need not be visible to the public for a donation to qualify. However, the public benefit from the donation is insufficient to qualify for a deduction if only a small portion of the property is visible to the public.
- (4) See Treas. Reg. § 1.170A-14(d) for specific access requirements.

## **G. Inconsistent Uses**

- (1) A donation must be exclusively for conservation purposes, and generally the deed of conservation easement must prohibit inconsistent uses. An inconsistent use allows for the destruction or potential destruction of significant conservation interests in conflict with a conservation purpose.
- (2) However, some inconsistent uses are permitted if necessary to protect the conservation interests that are the subject of the easement.
- (3) All conservation easements reserve some rights for the owner of the encumbered property. Depending on the nature and extent of these reserved rights, the claimed conservation purpose may be impaired to such a degree that the contribution may not be allowable. A determination of whether the reserved

rights defeat the conservation purpose must be determined based on all facts and circumstances.

- **Example:** The conservation purpose of the easement as described in the conservation easement deed was to protect the relatively natural habitat for scrub jay, a threatened bird. The deed of easement allows the taxpayer to use pesticides that would destroy the natural food source for the scrub jay. The taxpayer is not entitled to a deduction because the allowed activity is an inconsistent use.

(4) See Treas. Reg. § 1.170A-14(e)(2) and (e)(3) for additional guidance.

## H. Baseline Study

- (1) When a donor reserves a Taxright, the exercise of which may impair conservation interests associated with the encumbered property, the donor must provide the donee organization with documentation sufficient to establish the condition of the property at the time of the donation. The donor must provide baseline documentation to the donee **prior to the time the donation is made.** Treas. Reg. § 1.170A-14(g)(5)(i). This documentation should provide specific information about the conservation values of the property.
- (2) The baseline documentation is generally prepared by a person with specific training in the assessment of conservation values such as a biologist, botanist, or historian. The baseline study may be prepared by a person affiliated with the donee organization.
- (3) This documentation may include:
  - Survey maps from the U.S. Geological Survey, showing the property line and other contiguous or nearby protected areas.
  - A map of the area drawn to scale showing all existing man-made improvements or incursions (such as roads, buildings, fences, or gravel pits) and vegetation, and identification of flora and fauna (including, for example, rare species locations, animal breeding and roosting areas, and migration routes), land use history (including present uses and recent past disturbances), and distinct natural features (such as large trees and aquatic areas).
  - An aerial photograph of the property.
  - On-site photographs taken at appropriate locations on the property.
- (4) The documentation must be accompanied by a statement signed by the donor and a representative of the donee organization affirming that the documentation is an accurate representation of the protected property at the time of the transfer.
- (5) See Treas. Reg. § 1.170A-14(g)(5)(i) for additional guidance.

## VI. Substantiation

## A. Overview

- (1) A charitable contribution is not deductible unless properly substantiated in accordance with the Internal Revenue Code and applicable regulations, including:
  - IRC § 170(a)(1)
  - IRC § 170(f)(8)
  - IRC § 170(f)(11)
  - IRC § 170(f)(13)
  - Treas. Reg. § 1.170A-13
  - Treas. Reg. § 1.170A-14
  - Treas. Reg. § 1.170A-16
  - Treas. Reg. § 1.170A-17
- (2) These IRC sections and corresponding regulations describe the specific substantiation and recordkeeping requirements for donors of noncash contributions. Note that substantiation requirements for noncash contributions made on or before July 30, 2018, are generally governed by Treas. Reg. § 1.170A-13, while substantiation requirements for noncash contributions made after July 30, 2018, are generally governed by Treas. Reg. § 1.170A-16. Treas. Reg. § 1.170A-16(g). Where appropriate, both regulations are cited below. Treas. Reg. §1.170A-17 is applicable to contributions made on or after January 1, 2019.
- (3) The kind of documents required to substantiate a charitable contribution vary depending on the amount, date of contribution, and type of property contributed
- (4) The burden is on the taxpayer to demonstrate that the property transferred to the qualified organization is a deductible contribution. See Treas. Reg. § 1.170A-1(h)(1) and (2); *United States v. American Bar Endowment*, 477 U.S. 105, 116-118 (1986); and Revenue Ruling 67-246, 1967-2 C.B. 104.
- (5) See [Publication 1771, Charitable Contributions-Substantiation and Disclosure Requirements](#) (PDF), [Publication 526, Noncash Contributions](#) (PDF), and [Publication 561, Determining the Value of Donated Property](#) (PDF), for additional information.
- (6) See Exhibit 6-1 for a summary of substantiation requirements.

## B. Contemporaneous Written Acknowledgment

- (1) A contemporaneous written acknowledgment (CWA) by the qualified donee organization is required for all contribution deductions of \$250 or more, whether in cash or property.



- (2) “Contemporaneous” means that the taxpayer must obtain the acknowledgment by the earlier of the date on which the taxpayer files his or her tax return claiming the charitable contribution deduction, or the due date (including extensions) for the return. IRC § 170(f)(8); Treas. Reg. § 1.170A-13(f)(3); and [Publication 1771, Charitable Contributions-Substantiation and Disclosure Requirements](#) (PDF).
- (3) This acknowledgment by the qualified donee organization must contain:
- Amount of any cash contribution,
  - Description (but not the value) of the property contributed,
  - Statement that no goods or services were provided by the organization in return for the contribution (if this was the case),
  - Description and good faith estimate of the value of goods or services, if any, that an organization provided in return for the contribution, and
  - A statement that goods or services (if any) that an organization provided in return for the contribution consisted entirely of intangible religious benefits (if this was the case).
- (4) See Treas. Reg. § 1.170A-13(f)(2).
- (5) Section 170(f)(8) requirements must be complied with for a deduction to be allowed. See *Addis v. Commissioner*, 374 F.3d 881, 887 (9th Cir. 2004), *aff'g*, 118 T.C. 528 (2002) (“the deterrence value of section 170(f)(8)’s total denial of a deduction comports with the effective administration of a self-assessment and self-reporting system”), cited in *Viralam v. Commissioner*, 136 T.C. 151; *Schrimsher v. Commissioner*, T.C. Memo. 2011-71.
- (6) The following CWA does not meet the statutory requirement of IRC § 170(f)(8) because it does not make an affirmative statement that no goods or services were provided (or describe if goods or services were actually provided) in exchange for the contribution.
- **Example:** “Thank you for your contribution by deed of a conservation easement on XYZ property and \$10,000 cash contribution for maintenance of the easement that ABC Land Trust received on May 5, 2018.”
- (7) A CWA is not required to take any particular form, and an easement deed may qualify as a CWA under certain circumstances. Unless the deed expressly states the total value of the goods or services received by the donor in exchange for the contribution, the deed taken as a whole must provide that no goods or services were received in exchange. *Schrimsher v. Commissioner*, T.C. Memo. 2011-71. The tax court has held that a deed qualified as a CWA when no valuable consideration was mentioned in the deed and the deed contained a merger clause. *Averyt v. Commissioner*, T.C. Memo. 2012-198; *RP Golf, LLC v. Commissioner*, T.C. Memo. 2012-282. A merger clause provides

that the particular deed sets forth the entire agreement of the parties regarding the contribution of the conservation easement and supersedes all prior discussions, negotiations, or agreements relating to the easement. *French v. Commissioner*, T.C. Memo. 2016- 53, held that in the case of a deed without an indication that there were no goods or services provided, unless there is a merger clause, the deed cannot be taken as a whole to qualify as a CWA. In such a case, the absence of a merger clause means that a donor could have received consideration in exchange for the contribution even if the deed does not mention that there was any valuable consideration transferred.

- (8) Some deeds recite the amount of consideration as "\$1.00 and other good and valuable consideration." Numerous state courts have held that phrase is inherently and intrinsically ambiguous. The phrase may mean that no real consideration was given, that the consideration was nominal, or that the consideration was substantial but was not disclosed. Nevertheless, in the absence of any other evidence concerning the amount of consideration, the tax court has held that a deed can satisfy the CWA requirements even if it describes the consideration as "\$1.00 and other good and valuable consideration" as long as the deed contains a merger clause. *310 Retail, LLC v. Commissioner*, T.C. Memo. 2017-164, and *Big River Dev., L.P. v. Commissioner*, T.C. Memo. 2017-166.
- (9) If you have any questions about whether the deed language satisfies the requirements for a CWA under IRC § 170(f)(8), consult with Counsel.
- (10) In IRC § 170(f)(8)(D), Congress provided an exception to the CWA requirement. Section 170(f)(8)(D) states that a CWA is not required if the donee organization files a return on such form and in accordance with such regulations as the Treasury Department may prescribe (donee reporting). In the Tax Cuts and Jobs Act, Congress deleted subparagraph (D) and redesignated what had been subparagraph (E) as subparagraph (D), effective for contributions made in tax years beginning after December 31, 2016. Even before that effective date, the IRC § 170(f)(8)(D) exception was not effective. *15 West 17th St. v. Commissioner*, 147 T.C. No. 19 (2016).
- (11) **Note:** Taxpayers and return preparers frequently confuse the CWA requirement with the filing of [Form 8283, Noncash Charitable Contributions](#) (PDF). This form is not a substitute for the CWA; both are required. Failure to meet either requirement may result in disallowance of the charitable contribution deduction.

## C. Form 8283, Noncash Charitable Contributions

### C.1. Generally

- (1) Section B of [Form 8283, Noncash Charitable Contributions](#) (PDF), referred to in the Deficit Reduction Act of 1984 and in Treas. Reg. § 1.170A-13(c)(4) as an "appraisal summary," must be fully completed and attached to the return for noncash donations greater than \$5,000.

- (2) **Note:** If the donation originates from a flow-through entity (such as S corporation or partnership), the partner or shareholder who receives an allocation of the charitable contribution must attach a copy of the flow-through entity's appraisal summary (Form 8283) to the tax return on which the deduction for the contribution is first claimed. Treas. Reg. § 1.170A-13(c)(4)(iv)(G); Treas. Reg. § 1.170A-16(f)(4)(ii).
- (3) Form 8283, Section B is often improperly completed. Common errors include:
  - Inadequate description of the property
  - Missing information
  - Missing signatures
  - Inconsistent dates
- (4) The description of the property must have sufficient detail for a person unfamiliar with the type of property to ascertain that the property being appraised is the property that was contributed. Treas. Reg. § 1.170A-13(c)(4)(ii)(B). A similar rule applies under Treas. Reg. § 1.170A-16(d)(3)(iv)(B).
- (5) Form 8283, Section B, Part I, requests information regarding:
  - Acquisition date of the property
  - How the property was acquired by the donor
  - Donor's cost or adjusted basis
  - Bargain sale amount received
  - Appraised FMV of the easement
- (6) For conservation easements, the instructions to Form 8283 also require a statement that identifies the conservation purpose, shows FMV before and after, states whether the donation was made in order to get an approval or was required by contract, and whether the taxpayer or related person has any interest in nearby property. This statement, described in the Instructions to the Form 8283, must be attached to the Form 8283.
- (7) See [Instructions for Form 8283, Noncash Charitable Contributions](#) (PDF), and Treas. Reg. § 1.170A-13(c)(4); Treas. Reg. § 1.170A-16(d)(3) for detailed discussion of the appraisal summary (Form 8283) requirements.
- (8) In *Belair Woods, LLC v. Commissioner*, T.C. Memo. 2018-159, the tax court held that the taxpayer's Form 8283 appraisal summary did not comply with Treas. Reg. § 1.170A-13(c)(4) when the taxpayer failed to include its cost basis in the property on Form 8283 and the taxpayer's explanation in the statement attached to Form 8283 did not show that it was unable to provide such information. The deduction was therefore disallowed.

## C.2. Declaration of Appraiser

- (1) Form 8283, Section B, Part III, Declaration of Appraiser, must be completed by the qualified appraiser for donations in excess of \$5,000. Treas. Reg. § 1.170A-13(c)(4)(ii)(K) and (L); Treas. Reg. § 1.170A-16(d)(3)(iii) and (d)(4).

### **C.3. Donee Acknowledgment**

- (1) Form 8283, Section B, Part IV, Donee Acknowledgment, must be signed by an official authorized to sign the tax or information returns of the donee organization or a person specifically authorized by such official to sign Form 8283. Treas. Reg. § 1.170A-13(c)(4)(iii); Treas. Reg. § 1.170A-16(d)(5)(i).

### **C.4. Failure to Attach Form 8283**

- (1) For contributions made on or before July 30, 2018, the failure to file Form 8283 results in disallowance of the charitable contribution deduction for the conservation easement unless:
  - Such failure was due to a “good-faith omission,”
  - The donor otherwise complied with Treas. Reg. § 1.170A-13(c)(3) and (c)(4) (including completion of a timely qualified appraisal), and
  - The IRS requests that the donor submit a fully completed form within 90 days of the request, and the donor complies. Treas. Reg. § 1.170A-13(c)(4)(iv)(H).
- (2) In rare and unusual circumstances in which it is impossible for the taxpayer to obtain the signature of the donee, the taxpayer’s deduction will not be disallowed for that reason provided that the taxpayer attaches a statement to the Form 8283 explaining, in detail, why it was not possible to obtain the donee’s signature. Treas. Reg. § 1.170A-13(c)(4)(iv)(C)(2).

## **D. Qualified Appraisal**

- (1) Qualified appraisals are required for all contribution deductions for conservation easements valued at more than \$5,000. IRC § 170(f)(11)(C).
- (2) To be a qualified appraisal under IRC § 170(f)(11)(E), an appraisal of property (1) must be treated as a qualified appraisal under regulations or other guidance prescribed by the Secretary and (2) must be conducted by a qualified appraiser in accordance with generally accepted appraisal standards and any regulations or other guidance prescribed by the Secretary. See also Notice 2006-96, 2006-2 C.B. 902, for rules applicable to contributions made before January 1, 2019, the effective date of Treas. Reg. § 1.170A-17.

### **D.1. Qualified Appraisal Under Regulations**

- (1) Treas. Reg. § 1.170A-13(c)(3) and Treas. Reg. § 1.170A-17(a)(3) define a qualified appraisal as a document that, among other things: (1) relates to an appraisal that is made not earlier than 60 days before the date of contribution of the appraised property and no later than the due date (including extensions) of

the return on which a deduction is first claimed under IRC § 170; (2) is prepared, signed, and dated by a qualified appraiser; (3) includes, among other requirements, (a) a description of the property appraised; (b) the FMV of such property and the specific basis for the valuation, (c) a statement that such appraisal was prepared for income tax purposes; (d) the qualifications of the qualified appraiser; and (e) the signature and taxpayer identification number of such appraiser; and (4) does not involve an appraisal fee that violates certain prescribed rules.

## D.2. Generally Accepted Appraisal Standards

- (1) Section 170(f)(11)(E) specifies that the qualified appraisal must be conducted by a qualified appraiser in accordance with generally accepted appraisal standards.
- (2) If a charitable contribution deduction of more than \$500,000 is claimed for a noncash contribution, the taxpayer must attach a copy of a qualified appraisal of the property to the return for the year of donation. IRC § 170(f)(11)(D).
- (3) **Special rule:** For contributions of façade easements in registered historic districts, a qualified appraisal must be attached to the return regardless of the dollar amount claimed for the conservation easement. IRC § 170(h)(4)(B)(iii)(I).  
**Note:** This special rule does not apply to properties listed on the National Register.

## D.3. Reasonable Cause

- (1) If the taxpayer fails to obtain a qualified appraisal or fails to otherwise meet the requirements of IRC §170(f)(11)(B),(C), or (D), the deduction is not disallowed if the failure was due to reasonable cause and not to willful neglect. IRC § 170(f)(11)(A)(ii)(II). A determination of whether or not the taxpayer acted reasonably and not with willful neglect, requires an analysis of the relevant facts and circumstances. If you have any questions or concerns, consult Counsel.
- (2) See [Chapter 7](#) for additional information on qualified appraisals.

## E. Façade Easement Filing Fee (Registered Historic District Only)

- (1) For deductions of more than \$10,000, for a donation of an easement on a building in a registered historic district, a donor must pay a \$500 filing fee with its return in the taxable year of the contribution. IRC § 170(f)(13). The fee is to be used to enforce the provisions of IRC § 170(h).
- (2) Payment is transmitted to the IRS using [Form 8283-V, Payment Voucher for Filing Fee under Section 170\(f\)\(13\)](#) (PDF).

## F. Baseline Study

- (1) A donor that retains rights in property subject to a donated conservation easement (nearly all donors) must make available to the qualified organization documentation that establishes the condition of the property at the time of the gift (baseline study). Treas. Reg. § 1.170A-14(g)(5)(i). The baseline study must be signed by the donor and donee. The baseline study generally includes maps, surveys, and photographs of the property and must be given to the qualified organization prior to the time the donation is made.
- (2) See [Chapter 5](#) for additional information on baseline documentation.

## G. Additional Donor Recordkeeping Requirements

- (1) In addition to the substantiation requirements described above, Treas. Reg. § 1.170A-14(i) requires the donor of a qualified conservation easement who claims a deduction to maintain written records of the FMV of the property before and after the donation and the conservation easement purpose furthered by the donation.

## H. Exhibit 6-1 - Substantiation Requirements

Required Item	Criteria	Due Date	Attach to Return?
Contemporaneous Written Acknowledgment	≥ \$250 or more	Earlier of return filing date or due date (with extensions)	No
Form 8283 (Appraisal Summary)	> \$500, ≤ \$5,000 - Part A > \$5,000 Part B	Return filing date	Yes Also attach conservation easement statement per Form 8283 Instructions
Qualified Appraisal	>\$5,000	Must be made no earlier than 60 days prior to date of contribution, but no later than original/amended return filing date	Yes, but only if > \$500,000 or an easement on a building in a registered historic district
Façade Filing Fee of \$500	All easements on buildings in registered historic districts >\$10,000	Return filing date	No Mail in with Form 8283-V

Baseline Study	Required to be made available to donee and signed by donor and donee to establish condition of property	Before time of donation	No
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## VII. Qualified Appraisal Requirements

### A. Overview

- (1) Generally, noncash charitable contributions for which a deduction of more than \$5,000 is claimed must be substantiated with a qualified appraisal prepared by a qualified appraiser in accordance with generally accepted appraisal standards. IRC §§ 170(f)(11)(C) and (f)(11)(E)(i)(II).
- (2) The Pension Protection Act of 2006 (PPA) amended IRC § 170(f)(11)(E) to provide definitions of qualified appraisal and qualified appraiser. See Notice 2006-96, 2006-2 C.B. 902, for transitional rules. See Treas. Reg. § 1.170A-17 for contributions on or after January 1, 2019.
- (3) Treas. Reg. § 1.170A-13(c)(3), which predates IRC § 170(f)(11)(E), sets forth substantiation requirements that must be met for the appraisal to be considered a qualified appraisal. Portions of Treas. Reg. § 1.170A-13(c)(3) are superseded by IRC § 170(f)(11)(E).
- (4) This chapter discusses the requirements for a qualified appraisal, a qualified appraiser and generally accepted appraisal standards.
- (5) See [Publication 561, Determining the Value of Donated Property](#) (PDF), Treas. Reg. § 1.170A-13 and Treas. Reg. § 1.170A-17 for additional guidance on qualified appraisal requirements.

### B. Qualified Appraisal

- (1) Section 170(f)(11) states that no deduction is allowed for any contribution of property for which a deduction of more than \$500 is claimed unless the requirements of IRC § 170(f)(11)(B), (C), and (D) are met.
- (2) Section 170(f)(11)(C) requires a qualified appraisal for property donations of more than \$5,000.
- (3) Section 170(f)(11)(D) additionally requires the attachment of the qualified appraisal to the return if the deduction claimed exceeds \$500,000.
- (4) For contributions of façade easements in registered historic districts, a qualified appraisal must be attached regardless of the dollar amount claimed as a deduction. IRC §170(h)(4)(B)(iii)(I).
- (5) **Note:** This special rule does not apply to properties listed on the National Register.

- (6) Section 170(f)(11)(E) was amended in 2006 to include new definitions of the terms “qualified appraisal” and “qualified appraiser.” Treas. Reg. § 1.170A-17 provides guidance relating to these definitions. For contributions prior to January 1, 2019, taxpayers may rely on the transitional guidance and safe harbors in Notice 2006-96.
- (7) An appraisal is treated as a qualified appraisal within the meaning of IRC § 170(f)(11)(E) if the appraisal complies with all of the requirements of Treas. Reg. § 1.170A-17. For contributions prior to January 1, 2019, an appraisal that complies with all the requirements of Treas. Reg. § 1.170A-13(c) (except to the extent the regulations are inconsistent with IRC § 170(f)(11)) is also treated as a qualified appraisal. See Notice 2006-96.
- (8) A qualified appraisal must:
- Be prepared, signed and dated by a qualified appraiser in accordance with generally accepted appraisal standards.
  - Meet the relevant requirements of Treas. Reg. § 1.170A-17(a).
  - Be dated no earlier than 60 days before the date of contribution nor later than:
    - The due date (including extensions) of the tax return on which the charitable contribution deduction is first claimed.
    - In the case of a partnership or S corporation, the due date (including extensions) of the return on which the deduction is first reported; or
    - In the case of a deduction first claimed on an amended return, the date on which the amended return is filed.
  - Not involve a prohibited appraisal fee, which, in general, means that the appraisal fee may not be based on the appraised value of the property.
- (9) Treas. Reg. § 1.170A-17(a)(3) outlines specific items that must be included in a qualified report:
- A detailed description of the property.
  - The property’s physical condition (for a contribution of real property or tangible personal property).
  - The date or expected date of the contribution.
  - The valuation effective date, defined in Treas. Reg. § 1.170A-17(a)(5).
  - The terms of any agreement relating to the property’s use, sale or other disposition.
  - The appraiser’s name, address, and taxpayer identification number, and that of the appraiser’s employer or partnership.



- The qualifications of the appraiser, including the appraiser’s background experience, education and membership in professional appraisal associations.
  - A statement that the appraisal was prepared for income tax purposes.
  - The signature of the appraiser and the date signed by the appraiser.
  - The declaration by the appraiser set forth in Treas. Reg. § 1.170A-17(a)(3)(vi).
  - The appraised FMV of the property on the valuation effective date.
  - The method of valuation used to determine the FMV.
  - The specific basis for the valuation (such as specific comparable sales transactions or statistical sampling, including a justification for using sampling and an explanation of the sampling procedure used).
- (10) An appraisal is not a qualified appraisal for a particular contribution if the donor either failed to disclose or misrepresented facts, and a reasonable person would expect that this failure or misrepresentation would cause the appraiser to misstate the value of the donated property. Treas. Reg. § 1.170A-17(a)(6).
- (11) Note that for contributions made before January 1, 2019, Treas. Reg. § 1.170A-13(c)(5)(ii) states that an individual is not a qualified appraiser with respect to a particular donation if the donor had knowledge of facts that would cause a reasonable person to expect the appraiser falsely to overstate the value of the donated property.
- (12) See also [Notice 2006-96](#), which provides guidance and safe harbors that taxpayers can rely on for contributions prior to January 1, 2019.

### **B.1. Reasonable Cause Exception**

- (1) The charitable contribution deduction will not be denied for the donor’s failure to comply with the requirements of IRC § 170(f)(11) if the failure was due to reasonable cause and not willful neglect. IRC § 170(f)(11)(A)(ii)(II). Reasonable cause requires that the taxpayer exercise ordinary business care and prudence as to the challenged item, and thus the inquiry is inherently a fact-intensive one.
- (2) A taxpayer’s reliance on the advice of a professional constitutes reasonable cause and not willful neglect if the taxpayer can prove by a preponderance of the evidence that: (1) the taxpayer reasonably believed the professional was a competent tax adviser with sufficient expertise to justify reliance; (2) the taxpayer provided necessary and accurate information to the advising professional; (3) the taxpayer actually relied in good faith on the professional’s advice. These determinations are very fact-specific. Compare *Crimi v. Commissioner*, T.C. Memo. 2013-51 (donor met the reasonable cause requirements) with *Alli v. Commissioner*, T.C. Memo. 2014-15 (donor did not meet the reasonable cause requirements).

## C. Qualified Appraiser

- (1) The term “qualified appraiser” as defined in IRC § 170(f)(11)(E)(ii) means an individual who:
  - Has earned an appraisal designation from a recognized professional appraiser organization or met minimum education and experience requirements as set forth in the regulations,
  - Regularly performs appraisals for which the individual receives compensation, and
  - Meets such other requirements as prescribed by the Secretary in regulations or other guidance.
- (2) An individual is not a qualified appraiser unless the individual:
  - Demonstrates verifiable education and experience in valuing the type of property subject to the appraisal, and
  - Has not been prohibited from practicing before the IRS any time in the 3-year period ending on the date of the appraisal. IRC § 170(f)(11)(E)(iii).
- (3) Treas. Reg. § 1.170A-17 provides guidance on the qualified appraiser requirements.
  - If the appraiser is relying on an appraisal designation to meet the education and experience requirements in Treas. Reg. § 1.170A-17(b)(2), the designation from a recognized appraiser organization must be based on the appraiser’s demonstrated competency.
  - The appraiser is treated as having demonstrated education and experience in valuing the type of property that is “verifiable” within the meaning of IRC § 170(f)(11)(E)(iii) and Treas. Reg. § 1.170A-17(b)(4) if the appraiser specifies, in the appraisal, the appraiser’s education and experience in valuing the type of property and the appraiser makes a declaration in the appraisal that, because of the appraiser’s experience and education the appraiser is qualified to make appraisals of the type of property being valued.
- (4) Under Treas. Reg. §1.170A-17(b)(5)(v)(C), an independent contractor who is regularly used as an appraiser by any of the individuals described in Treas. Reg. § 1.170A-17(b)(5) (ii), (iii), or (iv) and who does not perform a majority of his or her appraisals for others during the taxable year is not a qualified appraiser. Should this issue arise, Examiners should contact Counsel.
- (5) Also, an individual who is prohibited from practicing before the Internal Revenue Service under 31 U.S.C. 330(c) (now 31 U.S.C. 330(d)) at any time during the three-year period ending on the date the appraisal is signed by the individual is not a qualified appraiser. Treas. Reg. §1.170A-17(b)((5)(vi).

- (6) A qualified appraisal must include the appraiser's qualifications to value the type of property being valued. Treas. Reg. § 1.170A-17(a)(3)(iii)(B). The appraiser's resume, which is typically included in the appraisal, may be included to satisfy this requirement and provides a good starting point to assess whether the appraiser is a qualified appraiser. The resume provides information on his or her education and experience and professional designations. It will also typically indicate in which jurisdictions the appraiser holds a license or certification.
- (7) License information regarding jurisdictions, history, and disciplinary actions can be found on The Appraisal Foundation Web page at <http://www.appraisalfoundation.org>. Some states also provide appraisal licensing information online. Examiners or IRS appraisers can contact the various state boards by telephone to determine if there are any past or pending disciplinary actions against the appraiser. The Office of Professional Responsibility (OPR) publishes a list of practitioners, including appraisers, who have been subject to disciplinary actions by the IRS.

## **D. Generally Accepted Appraisal Standards**

- (1) Section 170(f)(11)(E)(i)(II) and Treas. Reg. § 1.170A-17 state that a qualified appraisal is an appraisal conducted by a qualified appraiser in accordance with generally accepted appraisal standards and any regulations or other guidance prescribed by the Secretary.
- (2) Treas. Reg. § 1.170A-17(a)(2) provides that "generally accepted appraisal standards" means the substance and principles of the Uniform Standards of Professional Appraisal Practice (USPAP), as developed by the Appraisal Standards Board of The Appraisal Foundation.

### **D.1. Uniform Standards of Professional Appraisal Practice**

- (1) In 1989, The Appraisal Foundation, a nonprofit organization, adopted licensing and appraisal standards for the appraisal industry. USPAP sets forth the minimum acceptable appraisal standards for federally regulated transactions. USPAP is recognized throughout the U.S. as the generally accepted standards of professional appraisal practice.
- (2) Although USPAP was intended for appraisals prepared for federally regulated transactions, all states have adopted USPAP for real estate appraisals completed by licensed or certified appraisers.
- (3) In addition, various appraisal organizations such as the Appraisal Institute (AI), National Association of Independent Fee Appraisers (NIAFA), American Society of Appraisers (ASA), and American Society of Farm Managers and Rural Appraisers (ASFMRA) have additional standards and ethics that their membership (both designated and undesignated) is required to follow. For the most part these organizations require adherence to USPAP.

- (4) For contributions prior to January 1, 2019, IRC § 170(f)(11)(E)(i)(II) does not specifically mandate compliance with USPAP but does require the appraisal to be prepared in accordance with generally accepted appraisal standards. Notice 2006-96, section 3.02(2). Qualified real estate appraisers holding themselves out to the public as appraisers generally would be required to comply with USPAP by virtue of their appraisal licenses and professional designations. For contributions on or after January 1, 2019, Treas. Reg. § 1.170A-17(a)(1) and (2) require that appraisals be prepared in accordance with the substance and principles of USPAP.
- (5) In assessing whether an appraisal is a qualified appraisal, Examiners and IRS Appraisers must consider whether the appraisal is prepared in accordance with the substance and principles of USPAP. If not, it is not a qualified appraisal under Treas. Reg. §1.170A-17(a), which is applicable to contributions made on and after January 1, 2019. For rules applicable to contributions made before January 1, 2019, see IRC § 170(f)(11)(E) and Notice 2006-96.
- (6) The USPAP rules of ethics provide that “[a]n appraiser must perform assignments with impartiality, objectivity, and independence, and without accommodation of personal interests. Further, it provides that, among other things, an appraiser “must not perform an assignment with bias; must not advocate the cause or interest of any party or issue; must not accept an assignment that includes the reporting of predetermined opinions and conclusions;... must not communicate assignment results with the intent to mislead or to defraud;...[and] must not use or communicate a report or assignment results known by the appraiser to be misleading or fraudulent...” There may be grounds to challenge whether the appraisal is a qualified appraisal if any of the above (or other improper conduct) is present. Examiners should consult Counsel regarding these issues.

## E. Appraisal Fees

- (1) Appraisal fees that a taxpayer pays to determine the FMV of donated property are not deductible as charitable contributions. However, for taxable years prior to 2018, taxpayers can claim appraisal fees, subject to the two percent of adjusted gross income (AGI) limit, as a miscellaneous itemized deduction on [Schedule A, Itemized Deductions](#) (PDF), of [Form 1040, U.S. Individual Income Tax Return](#) (PDF). Beginning in taxable year 2018, appraisal fees paid to determine the FMV of donated property are not deductible as miscellaneous itemized deductions on Schedule A.

## VIII. Amount of Deduction

### A. Overview

- (1) There are several considerations that may influence the amount a taxpayer may claim as a charitable contribution deduction for a conservation easement. These considerations may be categorized as follows:

- FMV (See [Chapter 9](#))
- Percentage limitations
- Carryovers
- Contributions of appreciated property (ordinary income, short-term capital gain, long-term capital gain)
- Bargain sale
- Quid pro quo or substantial benefit and charitable intent

## B. Percentage Limitations

### B.1. Individuals

- (1) For charitable contributions by individuals, the amount of the deduction a taxpayer may claim is subject to a limitation based on a percentage of that taxpayer's "contribution base." IRC § 170(b)(1)(H). This limitation is referred to as a percentage limitation. Percentage limitations may vary, depending on:
  - The type of property donated,
  - The type of qualified donee organization that received the donation, and
  - The use of the property by the qualified donee organization.
- (2) Contribution base for individuals is defined in IRC § 170(b)(1)(H) as the individual's adjusted gross income (computed without regard to any net operating loss carryback to the taxable year under IRC § 172).
- (3) See [Publication 526, Charitable Contributions](#) (PDF) for additional guidance on percentage limitations.
- (4) In general, when an individual contributes to an organization described in IRC § 170(b)(1)(A) (IRC § 170(b)(1)(A) organization), that individual's deduction may not exceed 50% of the individual's "contribution base." IRC § 170(b)(1)(A).
- (5) When the individual contributes long-term capital gain property to an IRC § 170(b)(1)(A) organization, however, the applicable percentage limitation may be limited to 30% of the individual's contribution base. IRC § 170(b)(1)(C).
- (6) A deduction arising from an individual's contribution to a qualified, but otherwise non-IRC§ 170(b)(1)(A) organization may not exceed 30% of the individual's contribution base. IRC § 170(b)(1)(B). When that contribution is of long-term capital gain property, a percentage limitation of 20% may apply instead. IRC § 170(b)(1)(D).
- (7) A conservation easement is considered long-term capital gain property if the underlying property is a capital asset held for more than a year. Generally, when an individual contributes a qualified conservation contribution, the individual's deduction for that contribution may not exceed 50% of his or her "contribution base." IRC § 170(b)(1)(E)(i).

- (8) If the individual is a qualified farmer or rancher, however, a 100% limitation may apply. IRC § 170(b)(1)(E)(iv).
- (9) The maximum percentage limitation for contributions of cash by individuals is 50% for contributions made in tax years beginning before January 1, 2018, and is increased to 60% for contributions of cash made in tax years beginning after December 31, 2017, and 100% for contributions of cash in 2020.

## **B.2. Corporations**

- (1) For C-corporation donors, in general, the maximum amount allowable as a charitable contribution deduction for any taxable year is 10% of that corporation's taxable income for that year (25% for 2020), computed with certain adjustments described in IRC § 170(b)(2)(D).

## **B.3. Special Rules for Qualified Farmers and Ranchers**

- (1) In general, if an individual is a “qualified farmer or rancher” and makes a qualified conservation contribution of “property used in agriculture or livestock production,” the qualified farmer or rancher may claim a charitable contribution deduction up to 100% of the contribution base. IRC § 170(b)(1)(E)(iv). See and IRC § 170 (b)(2)(B) for corporate farms and ranchers.
- (2) A “qualified farmer or rancher” is generally an individual or corporate taxpayer whose gross income from the trade or business of farming is greater than 50% of that taxpayer’s gross income for the taxable year. IRC § 170(b)(1)(E)(v). Gross income from the trade or business of farming does not include income from the sale of property. *Rutkoske v. Commissioner*, 149 T.C. 133 (2017).
- (3) A qualified conservation contribution is of “property used in agriculture or livestock production” only when the contribution subjects the underlying property to a restriction that requires the property to remain available for agriculture or livestock production. IRC § 170(b)(1)(E)(iv)(II). If the contribution fails to do so, the ordinary limitations for qualified conservation contributions will apply.

## **B.4. Carryovers**

- (1) In general, taxpayers (both individuals and corporations) can carry over unused charitable contributions for up to five years. For conservation easement contributions, however, the carryover period is 15 years. IRC § 170(b)(2)(E) and (2)(B)(ii).

## **C. Contributions of Appreciated Property**

- (1) Generally, a taxpayer’s deduction for a charitable contribution of property equals the FMV of the property, but in some cases it may be limited to the lesser of FMV or basis.

- (2) If a taxpayer contributes appreciated property (i.e., property with a FMV that exceeds the taxpayer's basis), the amount of the taxpayer's charitable contribution deduction may be reduced. As relevant here, the extent to which a taxpayer's deduction may be reduced will depend on the nature of the contributed property. IRC § 170(e)(1). To determine whether to reduce the amount of allowable deduction, find out whether the property is:
  - Ordinary income property
  - Short-term capital gain property
  - Long-term capital gain property
- (3) See [Publication 544, Sales and Other Dispositions of Assets](#) (PDF) for additional guidance.

### C.1. Ordinary Income and Short-Term Capital Gain Property

- (1) Generally, if the property is ordinary income property or short-term capital gain property, the taxpayer's deduction is limited to basis. IRC § 170(e)(1)(A).
- (2) This rule applies to contributions of appreciated property only to the extent that, if the taxpayer had hypothetically sold the property for FMV rather than donate the property, the resulting gain would have been ordinary income or short-term capital gain to the taxpayer.
- (3) This means that, generally, if the property is ordinary income property in the hands of the donor-taxpayer, the taxpayer's deduction is limited to basis.
- (4) An example of ordinary income property is inventory. In a real property context, inventory will include real property (land and anything built on it) held by a real estate dealer, when that real property is primarily held for sale to the dealer's customers in the ordinary course of his/her trade or business.
- (5) Gain on the disposition of depreciable real property is treated as ordinary income to the extent of additional depreciation allowed or allowable on the property. Additional depreciation is the amount of the actual depreciation over the depreciation figured using the straight line method. See [Publication 544, Sales and Other Disposition of Assets](#) (PDF) and [Form 4797](#) (PDF) and the related instructions.
- (6) Contributions of short-term capital gain property (such as real estate held for investment for a year or less) is treated the same as ordinary income property in that the taxpayer's deduction is generally limited to basis.
  - **Example:** Jefferson contributes a conservation easement on a parcel that he held for 11 months. The conservation easement is short-term capital gain property, and Jefferson's deduction is limited to the lesser of his basis in the easement or its FMV.
- (7) The amount of basis allocable to the conservation easement bears the same ratio to the total basis of the property as the FMV of the conservation easement

bears to the FMV of the entire parcel before the granting of the conservation easement. IRC § 170(e)(2); Treas. Reg. § 1.170A-4(c).

- **Example:** Mary paid \$80,000 for a parcel held for investment, which has a FMV of \$100,000. She decides to donate a conservation easement with a FMV of \$5,000. If Mary's parcel is held for less than one year, her deduction for the easement is \$4,000 ( $\$5,000/\$100,000 \times \$80,000 = \$4,000$ ). If Mary held the property for more than a year, her deduction is the easement's FMV (\$5,000).

## C.2. Long-Term Capital Gain Property

- (1) If the taxpayer contributes appreciated long-term capital gain property, the taxpayer's deduction generally is not limited to basis and may equal FMV. IRC § 170(e)(1).
- (2) Property is long-term capital gain property when, if the taxpayer had hypothetically sold the property or FMV rather than donated the property, its sale on the date of the contribution would have resulted in long-term capital gain to the taxpayer.
- (3) Long-term capital gain property is a capital asset held for more than a year. IRC § 1222(3).
- (4) Examples of long-term capital gain property are (1) real estate held for more than a year for investment, or (2) a personal residence held for more than a year.

## D. Bargain Sale

- (1) A bargain sale is a taxpayer's sale or transfer of property to a qualified organization for less than the property's FMV. Treas. Reg. § 1.170A-4(c)(2)(ii).
- (2) A bargain sale is treated partly as a charitable contribution and partly as a sale or exchange of the property. As such, to qualify for bargain sale treatment, the taxpayer must establish that charitable intent motivated the taxpayer to sell the property to the qualified organization for less than FMV.
- (3) As relevant here, the amount of the charitable contribution deduction arising from the bargain sale equals the excess of the FMV of the property less the consideration paid by the qualified organization to acquire the property.
  - **Example:** Betty sells a conservation easement (on property held for investment for more than one year) to a conservation organization for \$10,000. The FMV of the easement is \$12,500. Her charitable contribution deduction from the bargain sale is \$2,500 ( $\$12,500 - \$10,000$ ) provided that all requirements to claim a conservation easement deduction have been met and she knew, at the time of the sale, that the easement was worth \$12,500. If a taxpayer contributes property subject to a debt (such



as a mortgage), and the debt is assumed by the qualified organization, the taxpayer must reduce the FMV of the property by the amount of the debt.

## D.1. Taxable Gain

- (1) The part of the bargain sale that is a sale or exchange may result in a taxable gain. The amount of taxable gain is determined by allocating basis (under IRC § 1011(b)) between the portion of the property deemed sold and the portion of property deemed contributed.
- (2) For more information on determining the amount of any taxable gain, see "Bargain Sales to Charity" in [Publication 544, Sales and Other Dispositions of Assets](#) (PDF), and IRC § 1011(b). There are examples in Pub. 544 and Pub. 526.
- (3) See Treas. Reg. §§ 1.170A-4(c)(2) and 1.170A-14(h)(3)(iii) for additional guidance on allocating basis.

## D.2. Federal and State Easement Purchase Programs

- (1) Many states and some federal agencies have conservation easement purchase programs. The purchase price may be at FMV or at a discounted price, depending on the specific program. If the conservation easement was purchased by the state or federal agency at FMV, then there would be no charitable contribution for the conservation easement.
- (2) The donation must meet all of the statutory and regulatory requirements for a qualified conservation easement contribution in order for the taxpayer to claim a noncash charitable contribution for the donation portion of a bargain sale.

## E. Quid Pro Quo or Substantial Benefit and Charitable Intent

- (1) Charitable intent generally exists if the transfer was made without the receipt of, or the expectation of receiving, a quid pro quo or substantial benefit for the transfer. As a general rule, if the benefits received or expected to be received are greater than those that inure to the general public, the transfer does not satisfy the charitable intent requirement under IRC § 170. *Hernandez v. Commissioner*, 490 U.S. 691 (1989); *United States v. American Bar Endowment*, 477 U.S. 105, 118 (1986); *Singer Co. v. U.S.*, 196 Ct. Cl. 90, 449 F.2d 413, 422-423 (1971).
- (2) If the donor receives, or can reasonably expect to receive, a substantial financial or economic benefit, but it is clearly shown that the benefit is less than the amount of the donor's transfer, then a deduction is allowable for the excess of the amount the donor transferred over the amount of the financial or economic benefit received or reasonably expected to be received by the donor. In considering whether the taxpayer had any expectation of receiving a quid pro quo, we may look to external features of the transaction. *Triumph Mixed Use Investments III, LLC v. Commissioner*, T.C. Memo. 2018-065. The benefits that

the taxpayer expects to receive may flow from property that is not the subject of the easement. *Wendell Falls v. Commissioner*, T.C. Memo. 2018-45.

- (3) If a taxpayer transfers a conservation easement with the expectation of receiving a state or local tax credit in return, that credit is a quid pro quo. See Treas. Reg. § 1.170A-1(h)(3), which applies to property transferred by taxpayers after August 27, 2018.
  - **Example 1:** Steven is a real estate developer. He contributes a conservation easement with the expectation that it will result in his receiving preferential zoning treatment from the city zoning board. Steven is not allowed a charitable contribution deduction.
  - **Example 2:** Jeanie lives along a scenic highway. In order for her to secure a variance on her property, the zoning board requires an easement on 10 percent of her property. Jeanie decides to place an easement on 25 percent of her property. Jeanie may deduct as a charitable contribution the value of the easement she placed on 15 percent of her property.

## F. Rehabilitation Tax Credit

- (1) Section 47 is an investment tax credit intended to encourage rehabilitation of historic buildings for urban and rural revitalization. The rehabilitation tax credit is a 20% credit available to taxpayers who make qualified rehabilitation expenditures with respect to certified historic structures.
- (2) NPS and the IRS in partnership with State Historic Preservation Offices jointly administer the Historic Preservation Tax Incentives Program. See the [Rehabilitation Tax Credit Market Segment Specialization Program Guide](#) (PDF) for additional information.

### F.1. Recapture of Rehabilitation Tax Credit

- (1) Section 50(a)(1) provides for recapture of the investment tax credit upon disposition.
- (2) When a façade easement is contributed during the same year that a qualified rehabilitated building is placed in service, the taxpayer will not be entitled to claim the portion of the rehabilitation tax credit attributable to the façade easement. *Rome I, Ltd. v. Commissioner*, 96 T.C. 697 (1991); Rev. Rul. 89-90, 1989-2 C.B. 3.
- (3) Under IRC § 50, if a taxpayer claims a rehabilitation tax credit with respect to property and subsequently makes a qualified conservation contribution (i.e., contributes a façade easement) with respect to the property, the charitable contribution is a partial disposition of the property. This event will trigger recapture of all or part of the credit if the contribution is made within the recapture period (5 years from the placed in service date). See Rev. Rul. 89-90.
- (4) Pursuant to IRC § 170(f)(14), the amount of a taxpayer's charitable contribution deduction for a qualified conservation contribution may be reduced if the

taxpayer was allowed IRC § 47 credits for prior years with respect to the building underlying the present conservation contribution. In such cases, the amount of the taxpayer's deduction will be reduced by an amount bearing the same ratio to the FMV of the contribution as the sum of the total IRC § 47 credits allowed to the taxpayer for the 5 preceding years over the FMV of the building on the date of contribution.

- (5) See the [Rehabilitation Tax Credit Market Segment Specialization Program Guide](#) (PDF) for additional information.

## **IX. Valuation of Conservation Easements**

### **A. Overview**

- (1) To determine the FMV of a conservation easement, appraisers must have a clear understanding of IRC § 170 and the accompanying Treasury regulations. The appraiser also must meet the definition in IRC § 170(f)(11)(E) of a "qualified appraiser."
- (2) The value of a conservation easement is the FMV at the time of contribution and depends on the particular facts and circumstances of the property. Treas. Reg. § 1.170A-14(h)(3)(i).
- (3) Section 170(f)(11)(E) and Treas. Reg. § 1.170A-13(c)(3) impose substantiation requirements that must be met for the appraisal to be considered a qualified appraisal.
- (4) Treas. Reg. § 1.170A-14(h)(3)(i) requires that, if there is a substantial record of sales of comparable easements, those sales are used to value conservation easements. Since easements are not typically sold, there usually are insufficient sales to use a comparable easement sales approach. In most cases, the "before and after" method of valuing a conservation easement is used.
- (5) The purpose of this chapter is to provide a general overview on the valuation of conservation easements and generally accepted appraisal standards. A comprehensive discussion of valuation is beyond the scope of this ATG.
- (6) See Treas. Reg. §§ 1.170A-13 and 1.170A-14, and, for contributions on or after January 1, 2019, Treas. Reg. 1.170A-17. See also Notice 2006-96, [Publication 526, Charitable Contributions](#) (PDF), [Publication 561, Determining the Value of Donated Property](#) (PDF), [Form 8283, Noncash Charitable Contributions](#) (PDF), and the [Instructions for Form 8283](#) (PDF) for more information about valuation, qualified appraisers, qualified appraisals, and other requirements.

### **B. Valuation Process**

- (1) Valuation, as defined by the *Dictionary of Real Estate Appraisal, Sixth Edition*, The Appraisal Institute, Chicago, Ill., 2015, is the process of estimating the FMV of an identified interest in a specific parcel or parcels of real estate as of a

specified date. It is a term used interchangeably with appraisal. The valuation process includes:

- Defining the problem/scope of work,
  - Data collection and property description,
  - Data analysis,
  - Application of the approaches to value,
  - Reconciliation of value indications and final opinion of value, and
  - Reporting the defined value.
- (2) Critical to the completion of any valuation assignment, especially the valuation of a conservation easement, is clearly defining the problem and determining the scope of work. A detailed scope of work should be presented in the appraisal to allow a reader to understand exactly what steps and procedures were utilized by valuation experts in their analyses and FMV determinations.
- (3) Appraisers must have a thorough understanding of which rights were “given up” or relinquished and which rights were retained by the donor in order to properly value the conservation easement. They must refer to the deed to determine what rights were relinquished.

### **C. Valuation Date**

- (1) The value of a conservation easement contribution is the FMV of the easement at the time of the contribution. Treas. Reg. § 1.170A-14(h)(3)(i). For federal income tax purposes, the date of contribution is the date the deed of easement is recorded pursuant to state law. The qualified appraisal must state, among other things, the date or expected date of the contribution. Treas. Reg. § 1.170A-13(c)(3)(ii)(C); Treas. Reg. § 1.170A-17(a)(3)(iii).

### **D. FMV**

- (1) The value of the donated easement must meet the definition of FMV as defined by Treas. Reg. § 1.170A-1(c)(2):
- The FMV is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts.
- (2) A common error found in appraisals submitted for federal income tax purposes is that the FMV definition utilized in the appraisals is not correct. Also, the FMV of the property must decrease as a result of the granting of the conservation easement in order for a taxpayer to claim a charitable contribution deduction. In some instances, the grant of a conservation easement may have no material effect on the value of the property or may in fact serve to enhance the value of property. Treas. Reg. § 1.170A-14(h)(3)(ii).

## D.1. Before and After Method

- (1) In theory, the best evidence of FMV of a conservation easement is the sale price of easements comparable to the donated easement. An appraiser should research the market to determine if there is a substantial record of sales of comparable easements; however, in most instances, there is no substantial record of comparable sales.
- (2) If there is no substantial record of comparable easement sales, the "before and after" approach to valuing a conservation easement is used.
  - $\text{FMV of the property before the easement} - \text{FMV of the property after the easement} = \text{FMV of the easement}$
- (3) In essence, an appraiser must determine the highest and best use (HBU) and the corresponding FMV of the subject property twice: first, without regard to the conservation easement ("before" value), and then again after considering the specific restrictions imposed on the property by the deed ("after" value).
- (4) In determining the "before" value of the property, an appraiser must consider the current use of the property but also objectively assess the likelihood that the property would be developed absent the conservation easement restriction. Existing zoning, conservation, historic preservation, or other laws and restrictions may limit the property's potential HBU. Treas. Reg. § 1.170A-14(h)(3)(ii).
- (5) In determining the "after" value of the property, an appraiser must consider both the specific restrictions imposed by the conservation easement being valued and the specific restrictions imposed by easements on any "comparable" properties.

## D.2. Use of Flat Percentage Cannot Be Applied to Before Value

- (1) There is no standard value or percentage impact on the "before" value of the property due to the granting of a conservation easement. Each conservation easement must be valued before and after the granting of the easement, based on the particular facts and circumstances of that property, and the value must be substantiated with a qualified appraisal.

## D.3. Contiguous Parcels

- (1) The amount of the charitable contribution deduction due to the granting of a conservation easement covering a portion of a contiguous property owned by the donor and the "donor's family" (as defined in IRC § 267(c)(4)) is the difference between the FMV of the entire contiguous parcel of the property before and after the granting of the easement. Treas. Reg. § 1.170A-14(h)(3)(i).
- (2) Section 267(c)(4) defines the term "family" as including only an individual's "brothers and sisters (whether by the whole or half-blood), spouse, ancestors

and lineal descendants.” Parents, children, grandparents, grandchildren, half-brothers and half-sisters are included in the definition of family, but cousins, nieces, nephews, in-laws, and step relations are not included.

- **Example:** John Smith owns a 1,000-acre farm. Mr. Smith decides to put a conservation easement on the southern 500 acres. The entire 1,000 acres would need to be valued before and after the easement is imposed because the donor owns the entire 1,000 acres, and the unencumbered parcel is contiguous to the encumbered parcel.
- (3) In order to properly determine what properties should be valued, an appraiser must identify and determine the ownership of any contiguous parcels at the outset of the appraisal assignment. Next, the appraiser must assess whether the owners of any contiguous parcels are the donor or donor’s family as defined in IRC § 267(c)(4).
  - (4) Application of the contiguous parcel rules can be complex. IRS appraisers should contact a program analyst or Counsel for guidance. For information about contiguous parcels, see CCA 201334039 (8/23/2013).

#### D.4. Enhancement Rule

- (1) A taxpayer must also consider any enhancement to the value of other property owned by the donor or a “related person” resulting from the taxpayer’s contribution of a conservation easement. The amount of the conservation contribution deduction is reduced by the amount of the increase in the value of the other property, whether or not that other property is contiguous. Treas. Reg. § 1.170A-14(h)(3)(i).
- (2) A related person, for purposes of applying the enhancement rule, is defined in IRC §§ 267(b) or 707(b). Application of the related party rules can be complex. IRS appraisers should contact a program analyst or Counsel for guidance.
- (3) There are two important distinctions between the contiguous parcel and the enhancement rules. First, the contiguous parcel rule applies only to contiguous property, but the enhancement rule can apply to both contiguous and noncontiguous property. Second, the contiguous parcel rule only applies to contiguous property owned by the donor or the donor’s family (as defined in IRC § 267(c)(4)), but the enhancement rule applies to contiguous or noncontiguous property owned by a related party under §§ 267(b) or 707(b). The definition of “related person” includes the donor’s family members and also “related” non-family members.
  - **Example:** John Smith owns a 1,000-acre farm. Mr. Smith decides to put a conservation easement on the southern 500 acres. The entire 1,000-acre parcel would need to be valued based on the application of the contiguous parcel rule. John Smith also owns a noncontiguous 50-acre parcel located within a quarter mile of the subject property. Because of the conservation easement, the 50-acre parcel will have superior views of the river that lies

beyond the 500-acre parcel. As a result, the 50-acre parcel would need to be valued and the conservation easement contribution would be reduced by the amount of the increase in value (if any) to the 50-acre parcel.

- (4) Application of the enhancement rules can be complex. IRS appraisers should contact a program analyst or Counsel for guidance. See CCA 201334039 (8/23/2013).

## E. Market Analysis

- (1) Market analysis is defined as a process for examining the demand for and supply of a property type and the geographic market area for that property type. This is a critical step in the highest and best use analysis. The six-step market analysis process described below provides data required for the four test criteria (physically possible, legally permissible, financially feasible and maximally productive). See *The Appraisal of Real Estate, 14th Edition*, The Appraisal Institute, Chicago, Ill., 2013, page 299.
- (2) An appraiser can use current and historical market conditions to infer future supply and demand. In addition, to forecast subject-specific supply, demand, absorption and capture rate (capture rate is the percentage of total market demand a specific property or group of properties is expected to capture) over a property's projected holding period, the appraiser should augment the analysis of current and historical market conditions with fundamental analysis. Given the fact that, in the majority of conservation easement cases, development of the property has not taken place, then there should be more emphasis on a fundamental analysis. A fundamental analysis would require an analysis of historic and projected: population, income, zoning, demand, absorption, supply, ideal improvement, existing space, proposed space, occupied space, market demographics, market income and expense information, capitalization rates, etc. to forecast future market conditions and is a much more detailed analysis than an inferred analysis.
- (3) Most market analysis can be performed using a six-step process:
  - Property Productivity Analysis: Physical, Legal and Location Attributes
  - Market Delineation: Competitive Market Area
  - Demand Analysis: Demand Segmentation, Historical Growth & Demand Drivers
  - Supply Analysis: Existing, Under Construction and Proposed Competition
  - Interaction of Supply and Demand: Competitive and Residual Demand
  - Forecast Subject Capture: Reconciliation of Inferred and Fundamental Forecasts
- (4) **Layman's terms:** The appraiser analyzes how competitive the subject property is or will be in its market area. The current and future demand for similar

properties is estimated and compared to the estimated current and future supply within the market area.

- (5) Appraisers using a residential subdivision method may not always adequately quantify the market demand and supply for the proposed lots and/or houses. *The Appraisal of Real Estate, 14th Edition*, The Appraisal Institute, Chicago, Ill, 2013, pages 299 – 330 (Chapter 15) provides a detailed discussion on completing a market analysis for a variety of property types and serves as a good reference tool.
- (6) When appraisers fail to follow the six-step process, and do not support demand, supply and a capture rate for the subject property, it can lead to erroneous conclusions in the highest and best use analysis.

## F. Highest and Best Use

- (1) The determination of the property's HBU is vital to the valuation of any real estate, including conservation easements.
- (2) All professional appraisal organizations recognize that the HBU of the property is a key element to a proper valuation. To qualify as the HBU, a use must satisfy four criteria:
  - **Physically Possible** - The land must be able to accommodate the size and shape of the ideal improvement: What uses of the subject site are physically possible?
  - **Legally Permissible** - A property use that is either currently allowed or most probably allowable under applicable laws and regulations. What uses of the subject site are permitted by zoning, deed restrictions, and government restrictions?
  - **Financial Feasibility** - The ability of a property to generate sufficient income to support the use for which it was designed. Among those uses that are physically possible and legally permissible, which uses will produce a net return to the owner?
  - **Maximally Productive** - The selected use must yield the highest value among the possible uses. Among the feasible uses, which use will produce the highest net return or the highest present worth?
- (3) An appraiser's HBU analysis and conclusion should be documented in the appraisal report with a comprehensive discussion supported by relevant market data or other information sources to adequately support the conclusions.
- (4) At times, an appraiser may rely in part on the analysis by another professional such as a land planner or geologist. However, an appraiser is required by generally accepted appraisal standards to exercise due diligence with respect to the assumptions put forth by the other professional. An appraiser must have a reasonable basis to believe that the other professional's work product is credible and should disclose such reliance.



## G. Methodology

- (1) Treas. Reg. § 1.170A-14(h)(3)(i) and (ii) allows for two different types of valuation: direct comparison or indirect analysis.
- (2) Direct comparison is to analyze sales of comparable properties to arrive at a conclusion as to value. A direct comparison is based on direct sales of easements, meaning the price paid by purchases of easements having the same or similar restrictions.
- (3) Conservation easements are sold infrequently and even if the appraiser is able to identify sales of easements, they might not be appropriate comparables, and the number of sales might not be substantial. Accordingly, most conservation easements are valued by indirect analysis (before and after approach).
- (4) There are three recognized valuation methodologies within the appraisal industry:
  - Sales Comparison Approach (SCA)
  - Cost Approach (CA)
  - Income Capitalization Approach (ICA)
- (5) All three approaches should be considered in every appraisal assignment. This does not mean that all three approaches need to be applied.
  - **Example:** If the appraiser is valuing the impact of granting a conservation façade easement on a single-family home in an area in which single-family homes are typically not rental income properties, then it is not necessary to complete the income capitalization approach. Generally, a statement that due to the lack of market information the income capitalization approach was not completed would be sufficient.
- (6) The following brief descriptions of the three approaches (i.e., Sales, Cost and Income Capitalization Approaches) were taken from *The Dictionary of Real Estate Appraisal, Sixth Edition*, which was published by The Appraisal Institute, Chicago, Ill., 2015.

### G.1. Sales Comparison Approach

- (1) In the Sales Comparison Approach, a value indication is derived by comparing the property being appraised to similar properties that have been sold recently, applying appropriate units of comparison, and making adjustments to the sale prices of the comparables based on the elements of comparison. The sales comparison approach is the most common and preferred method of land valuation when an adequate supply of comparable sales is available.
- (2) Elements of comparison are defined by *The Appraisal of Real Estate, 14th Edition*, The Appraisal Institute, Chicago, Ill. 2013, page 404 as “the characteristics or attributes of properties and transactions that help explain the variances in the prices paid for real property.” The elements of comparison are

divided into two categories: transactional adjustments and property adjustments.

- (3) Transactional adjustments are:
  - Real property rights conveyed
  - Financing terms
  - Conditions of sale
  - Expenditures made immediately after purchase
  - Market conditions
- (4) These adjustments are “generally applied in the order listed” and are successive.
- (5) Property adjustments are:
  - Location
  - Physical characteristics
  - Economic characteristics
  - Legal characteristics
  - Non-realty components of value.
- (6) Property adjustments are usually applied after the transactional adjustments, but in no particular order and are not successive.
- (7) **Layman’s terms:** The appraiser compares the subject property to recently sold properties. Adjustments are made to the sales to account for differences between the properties to estimate the FMV of the subject property. If there is a sufficient number of sales, this is the preferred valuation methodology for land.

## G.2. Cost Approach

- (1) In the cost approach, a value indication is derived for the fee simple interest in a property by estimating the current cost to construct a reproduction of (or replacement for) the existing structure, including entrepreneurial incentive or profit; deducting the depreciation from the total cost; and adding the estimated land value. Improvement cost estimates can be done with national cost manuals (e.g., Marshall Valuation Service Manual), builder cost estimates or market extraction. National cost manuals only provide a cost for new improvements. In utilizing these manuals, the valuation must include indirect costs and an analysis for all forms of depreciation.

## G.3. Income Capitalization Approach

- (1) In the Income Capitalization Approach, an appraiser derives a value indication for an income-producing property (i.e., rental property) by converting its

anticipated benefits (cash flows and reversion) into property value. This conversion can be accomplished in two ways. One year's net income expectancy or an annual average of several years' income expectancies can be capitalized at a market-derived capitalization rate. Alternatively, the annual cash flows for the holding period and the reversion can be discounted at a specified yield rate.

- (2) The FMV of the subject property is estimated based on the anticipated net income from the property. The appraiser estimates the potential gross income and subtracts vacancy and collection loss as well as operating expenses to estimate the net income. If one year's net income is estimated, then that income is capitalized via a market-derived capitalization rate to provide an indication of the FMV of the subject property. If multiple years' net income is estimated, then the cash flows and reversion are discounted at a specified yield rate to provide a FMV indication.

#### G.4. Subdivision Development Method

- (1) In the valuation of land conservation easements, many appraisals include a land residual analysis using a Subdivision Development Method. Although appraisers have referred to this approach as a different valuation methodology, the Subdivision Development Method is an adaptation (or subset) of the income capitalization method. The reason appraisers refer to it as "another" method is because the analysis utilizes a combination of both the sales comparison and cost approaches described above.
- (2) This method estimates land value assuming that subdivision and development of the property is the HBU of the parcel of land being appraised. When all direct and indirect costs, and entrepreneurial incentive (expected rate of return on investment) are deducted from the anticipated gross sales price of the finished lots, the resultant net sales proceeds are then discounted to present value at a market-derived rate over the development and absorption period to indicate the value of the raw land (*The Dictionary of Real Estate Appraisal, Sixth Edition*, The Appraisal Institute Chicago, Ill., 2015, page 223).
- (3) **Layman's terms:** The FMV of the subject property is estimated by first estimating what the "finished" lots would sell for in the marketplace. Costs, including anticipated profit, are then deducted to estimate the net income projected to be generated by the property. The projected net income (i.e., cash flow) is discounted (for the time necessary to get approvals, finish the lots and sell the lots) at a specified discount rate (a/k/a yield rate) to provide a FMV indication.
  - **Example:** Parcel C is a 100-acre parcel that is zoned residential, and the appraiser has concluded that the HBU of the property is for a 50 lot residential subdivision. An appraiser may use the sales comparison approach to determine the market value of the "finished" lots. The appraisal would provide information on similar projects in order to estimate

the absorption period to sell the lots. Next, the appraiser deducts the costs to improve the property (development costs) necessary for the subject property to attain the finished lot status. Finally, the cash flow over the absorption period is discounted back to the valuation date (this accounts for the time get the approvals, take the lots to the finished lot stage, and to sell all of the lots) to provide an estimate of the present value of the subject property as raw land.

- (4) The Subdivision Development Method requires a significant amount of data such as development costs, profit margins, sales projections and the pricing of developed lots. It is typically completed using a Discounted Cash Flow (DCF) analysis.
- (5) Although the tax court has not specifically addressed the merits of utilizing the Subdivision Development Method, there are several decisions in the federal courts that provide some insight. The Supreme Court stated in *Olson v. United States*, 292 U.S. 246, 257 (1934) that “Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration.”
- (6) Since there are many variables involved in the Subdivision Development Method, there is a greater chance of errors, which could result in an incorrect valuation. Some common errors include:
  - Failure to account for time to obtain necessary project approval.
  - Failure to account for time to put infrastructure in place.
  - Failure to include the cost of the infrastructure.
  - Failure to account for time necessary to sell the units (absorption) or lack of support for the absorption estimate.
  - Failure to include developer’s profit.
  - Failure to account for existing competing properties as well as properties that are still in the planning stage.
  - Inadequate assessment of the risk associated with the development.

## **G.5. Aggregate Partnership Interest**

- (1) The examiner should look at the aggregate investment by partners in the partnership as a factor in determining the FMV of the contributed property when, as is true in most syndicated conservation easement cases, that partnership’s only significant asset is the land. In other words, the amounts invested by partners in acquiring their partnership interests, less any portion of that investment used to pay fees and costs, may be a reasonable indicator of the before value of the property held by the partnership, especially when the partners acquire their partnership interests shortly before the donation of the

easement. Contemporaneous sales and transactions have been approved by the courts to support a determination of value. *Plateau Holdings, LLC v. Commissioner*, T.C. Memo. 2020-93; *TOT Property Holdings, LLC v. Commissioner*, TC Docket No. 5600-17 (unpublished bench op., Nov. 22, 2019).

## H. Transferable Development Rights

- (1) A transferable development right (TDR) is a development right held by the landowner that can be transferred by the landowner for use in another location. A number of states, counties and cities have established TDR programs. These programs are used to manage land development through the exchange of zoning privileges allowing property owners to separate development rights from the underlying property and sell them to purchasers who want to increase the density of development in higher density areas.
- (2) For example, in New York City, an owner of a building with TDRs may be able to transfer (sell) unused development rights for use in other building sites subject to the program restrictions.
- (3) A transfer of development rights by the landowner is not a transfer of the landowner's entire interest in the property and may not qualify for a charitable contribution per IRC § 170(f)(3). Examiners and IRS appraisers should consult with Counsel if the conservation easement case involves TDRs.

## X. Partnership Anti-Abuse Rules, Judicial Doctrines, and Codified Economic Substance Doctrine

### A. Partnership Anti-Abuse Rules

- (1) If a partnership is formed or availed of in connection with a transaction a principal purpose of which is to reduce substantially the partners' aggregate federal tax liability in a manner that is inconsistent with the intent of subchapter K, the Commissioner can recast the transaction for federal tax purposes, as appropriate to achieve tax results that are consistent with the intent of subchapter K, in light of the applicable statutory and regulatory provisions and the pertinent facts and circumstances. See § 1.701-2(b). Whether a partnership was formed or availed of with a principal purpose to reduce substantially the present value of the partner's aggregate federal tax liability in a manner inconsistent with the intent of subchapter K is determined based on all the facts and circumstances. See §1.701-2(c) for a list of some factors.
- (2) Implicit in the intent of subchapter K are the following requirements: (1) the partnership must be bona fide and each partnership transaction or series of related transactions (individually or collectively, the transaction) must be entered into for a substantial business purpose; (2) the form of each partnership transaction must be respected under substance over form principles; and (3) the tax consequences to each partner and the partnership must accurately reflect the partners' economic agreement and clearly reflect the partner's

income, except to the extent that the results of a particular provision which would otherwise not meet this requirement are clearly contemplated by that provision. See § 1.701-2(a).

- (3) Section 1.701-2(b) provides that, even though the transaction may fall within the literal words of a particular statutory or regulatory provision, the Commissioner can determine, based on the particular facts and circumstances, that to achieve results that are consistent with the intent of subchapter K:
- The purported partnership should be disregarded in whole or in part, and the partnership's assets and activities should be considered, in whole or in part, to be owned and conducted, respectively, by one or more of its purported partners;
  - One or more of the purported partners of the partnership should not be treated as a partner;
  - The methods of accounting used by the partnership or a partner should be adjusted to reflect clearly the partnership's or the partner's income;
  - The partnership's items of income, gain, loss, deduction, or credit should be reallocated; or
  - The claimed tax treatment should otherwise be adjusted or modified.
- (4) **Audit Tip:** Examiners should consult with Counsel if Treas. Reg. §1.701-2 appears applicable to the facts of the case. CCDM 31.1.1-1 requires review by Associate Chief Counsel, Pass-throughs and Special Industries (P&SI). Field Counsel should consult with P&SI early if this argument is potentially applicable.

## B. Judicial Doctrines

### B.1. Bona Fide Partner and Partnership

- (1) Whether an entity or contractual arrangement is a partnership for federal income tax purposes requires a facts-and-circumstances analysis. The Supreme Court in *Commissioner v. Culbertson*, 337 U.S. 733, 742 (1949), stated that there is a partnership for federal tax purposes when:
- (2) Considering all the facts – the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent – the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise.
- (3) The critical inquiry is the parties' intent to join together in conducting business activity and sharing profits. See, e.g., *Commissioner v. Tower*, 327 U.S. 280, 287 (1946). See also *Estate of Kahn v. Commissioner*, 499 F.2d 1186, 1189 (2d Cir. 1974) (identifying factors a court might consider); *Luna v. Commissioner*, 42 T.C. 1067, 1077-78 (1964) (same).

- (4) In *Historic Boardwalk Hall, LLC v. Commissioner*, 694 F.3d 425 (3d Cir. 2012), the Third Circuit applied *Culbertson* to determine if a partner was a bona fide partner. The facts in the case revealed the purported partner had neither a meaningful downside risk nor a meaningful upside potential; therefore, the court found that investor was not a bona fide partner.

## B.2. Substance Over Form

- (1) Transactions that literally comply with the language of the IRC but produce results other than what the IRC and regulations intend are not given effect. In *Gregory v. Helvering*, 293 U.S. 465, 470 (1935), the Supreme Court found that even though the transaction complied with the Code, “the transaction upon its face lies outside the plain intent of the statute.” Therefore, the Court found that to give the transaction effect would be to “exalt artifice above reality and to deprive the statutory provision in question of all serious purpose.” *Id.* In *Knetsch v. United States*, 364 U.S. 361 (1960), the Supreme Court again found a transaction abusive, even though the transaction met every literal requirement of the Code. The Court stated that “there was nothing of substance to be realized by Knetsch from this transaction beyond a tax deduction.” *Id.* at 366. See also *Allen v. Commissioner*, 92 T.C. 1, 8, 11 (1989) (explaining that “the transaction in its entirety must be examined in a realistic economic sense to determine the tax consequences” and that transactions where tax savings are more than twice the cash investment are subject to scrutiny).

## B.3. Step Transaction Doctrine

- (1) Under the step transaction doctrine, a series of formally separate steps may be collapsed and treated as a single transaction if the steps are in substance interrelated and focused toward a particular result. Courts have applied three alternative tests in deciding whether the step transaction doctrine should be invoked in a particular situation: the binding commitment test, the end result test, and the interdependence test.
- (2) The binding commitment test is the most limited and rigorous of the three tests. It looks to whether, at the time the first step was entered into, there was a binding commitment to undertake the later transactions. *Commissioner v. Gordon*, 391 U.S. 83, 96 (1968).
- (3) The end result test analyzes whether the formally separate steps merely constitute prearranged parts of a single transaction intended from the outset to reach a specific end result. This test relies on the parties’ intent at the time the transaction is structured. The intent the courts focus on is not whether the taxpayers intended to avoid taxes, but whether the parties intended from the outset “to reach a particular result by structuring a series of transactions in a certain way.” *True v. United States*, 190 F.3d 1165, 1175 (10th Cir. 1999).
- (4) Finally, the interdependence test looks to whether the steps are so interdependent that the legal relations created by one step would have been

fruitless without a completion of the later series of steps. See *Penrod v. Commissioner*, 88 T.C. 1415, 1430 (1987). Steps are generally accorded independent significance if, standing alone, they were undertaken for valid and independent economic or business reasons. *Security Indus. Ins. Co. v. United States*, 702 F.2d 1234, 1246 -1247 (5th Cir. 1983). See also *Greene v. United States*, 13 F.3d 577, 584 (2d Cir. 1994).

- (5) The existence of economic substance or a valid non-tax business purpose in a given transaction does not preclude the application of the step transaction doctrine. Events such as the actual payment of money, legal transfer of property, adjustment of company books, and execution of a contract all produce economic effects and accompany almost any business dealing. Thus, the courts do not rely on the occurrence of these events alone to determine whether the step transaction doctrine applies. “Likewise, a taxpayer may proffer some non-tax business purpose for engaging in a series of transactional steps to accomplish a result he could have achieved by more direct means, but that business purpose by itself does not preclude application of the step transaction doctrine.” *True v. United States*, 190 F.3d at 1177. See also *Associated Wholesale Grocers v. United States*, 927 F.2d 1517, 1527 (10th Cir. 1991); *Long Term Capital Holdings, et al. v. United States*, 330 F. Supp. 2d 122, 193 (D. Conn. 2004), *aff’d without published opinion* 150 Fed. Appx. 40 (2d Cir. 2005).

### C. Codified Economic Substance Doctrine

- (1) Section 7701(o)(1) provides that, in the case of any transaction to which the economic substance doctrine is relevant, such transaction shall be treated as having economic substance only if (A) the transaction changes in a meaningful way (apart from federal income tax effects) the taxpayer’s economic position, and (B) the taxpayer has a substantial purpose (apart from federal income tax effects) for entering into such transaction.
- (2) In cases where a taxpayer relies on profit potential, the potential for profit of a transaction shall be taken into account in determining whether the requirements of IRC § 7701(o)(1)(A) and (B) are met with respect to the transaction only if the present value of the reasonably expected pre-tax profit from the transaction is substantial in relation to the present value of the expected net tax benefits that would be allowed if the transaction were respected. Fees and other transaction expenses shall be taken into account as expenses in determining pre-tax profit. IRC § 7701(o)(2)(A) and (B).
- (3) For additional information about the codified economic substance doctrine, see Notice 2010-62; Notice 2014-58. Examiners considering application of the codified economic substance doctrine are encouraged to coordinate with Counsel.
- (4) **Audit Tip:** Examiners should also be alert to other appropriate arguments and consult with Counsel as necessary.



## XI. Preplanning the Examination

### A. Overview

- (1) IRM 4.10.2, *Pre-contact Responsibilities*, requires Examiners to perform a pre-contact analysis, including a review of the income tax return, any attachments to the return, and internal and external sources of information.

### B. Review of Return

- (1) Only itemizers may claim a charitable contribution deduction. A conservation easement deduction is reported on [Schedule A, Itemized Deductions](#) (PDF), Line 12, "Other than by cash or check." Any carryover of charitable contributions originating from earlier tax years appears on the "Carryover from Prior Year," Line 13.
- (2) **Audit Tip:** Examiners should determine, at the beginning of the examination, the tax year of the contribution. If the amount claimed on the return is a carryover from an earlier tax year, the original return, including all attachments, must be secured. This is important 1) to verify compliance with substantiation requirements, and 2) to ensure that all open tax years are included in the examination.

#### B.1. Form 8283 – Appraisal Summary

- (1) [Form 8283, Noncash Charitable Contributions](#) (PDF), referred to in DEFRA §155 and Treas. Reg. § 1.170A-13(c)(4) as the "appraisal summary," is the starting point to gather information about the conservation easement deduction.
- (2) Form 8283 must be completed and attached to the return for all noncash charitable contribution deductions greater than \$500. IRC § 170(f)(11)(B). For noncash charitable contribution deductions in excess of \$5,000, the taxpayer must complete Section B of the Form 8283. Treas. Reg. § 1.170A-13(c)(2); Treas. Reg. § 1.170A-16(d)(1)(iii). For contributions after July 30, 2018, these rules also apply to carryover years. Treas. Reg. § 1.170A-16(f)(3).
- (3) If the donation originates from a flow-through entity (such as S corporation or partnership), the partner or shareholder must include a copy of the entity's Form 8283 with the return on which the deduction is first claimed. Treas. Reg. § 1.170A-13(c)(4)(iv)(G); Treas. Reg. § 1.170A-16(f)(4).
- (4) Close inspection of Form 8283 may indicate an improper deduction or overvalued conservation easement. Look for:
  - Incomplete or missing information, such as an inadequate description of the property or missing acquisition date or basis in the property.
  - Missing appraiser or donee signatures.
  - Inconsistent dates when compared to the appraisal or other documents.
  - A short time period between the acquisition of the property and the donation date.

- High valuation of the easement as compared to the basis of the underlying property, in light of holding period and the market conditions for the relevant market.
  - High valuation of the easement in light of the total value of the land.
  - Use of an appraiser who does not generally perform appraisals where the easement is located.
- (5) **Audit Tip:** Completion of the appraisal summary (Form 8283) does not satisfy the CWA requirement in IRC § 170(f)(8) and Treas. Reg. § 1.170A-13(f). A CWA is required for any contribution of \$250 or more. Failure to comply with the CWA requirement will result in disallowance of the charitable contribution deduction. See [Chapter 2](#) for a discussion of what information must be included in the CWA and when it must be obtained by the taxpayer.

## B.2. Signature Requirements

- (1) Form 8283, Section B, Part II, Taxpayer (Donor) Statement, is not relevant unless the appraised value for an item is \$500 or less. It is typically left blank for conservation easement donations.
- (2) Form 8283, Section B, Part III, Declaration of Appraiser, must be signed and dated by the qualified appraiser for donations in excess of \$5,000. Treas. Reg. § 1.170A-13(c)(4)(i)(C); Treas. Reg. § 170A-16(d)(1)(iii).
- (3) Form 8283, Section B, Part IV, Donee Acknowledgment, must be signed by an official authorized to sign the tax returns of the donee organization or a person specifically designated to sign Form 8283. Treas. Reg. § 1.170A-13(c)(4)(i)(B); Treas. Reg. § 170A-16(d)(5). Examiners should look for incomplete or improperly completed donee acknowledgments and determine if there are any discrepancies with other available information.

## B.3. Return Attachments

- (1) A qualified appraisal, prepared and signed by a qualified appraiser, is required to be attached to the return if the deduction claimed (1) exceeds \$500,000, or (2) regardless of the dollar amount claimed, if the deduction relates to a contribution of a façade easement on a building or structure in a registered historic district. IRC §§ 170(f)(11)(D) and 170(h)(4)(B)(iii)(I).
- (2) **Note:** The special rule for façade easements does not apply to properties listed on the National Register.
- (3) See [Chapter 7](#) for guidance on qualified appraisals.
- (4) If a qualified appraisal was required to be attached, but was not attached to the original return claiming the conservation easement, the charitable contribution deduction will be disallowed for failing to meet the IRC § 170(f)(11) requirements. Section 170(f)(11)(A)(ii)(II), however, provides for a limited exception to this rule. The charitable contribution deduction may still be allowed

if it is shown that the failure to meet such requirements is due to reasonable cause and not willful neglect.

- (5) If the Examiner does not have the original return or has been assigned a carryover tax year, the original return must be ordered from the Service Center using SC 45 to verify compliance with the requirement to attach a qualified appraisal.
- (6) If a return is filed electronically, any attachments, including the appraisal, must be filed with the return. The attachments can be scanned and attached electronically to the e-file return as a PDF file. If documents are not submitted electronically, they must be mailed with the [Form 8453, U.S. Individual Income Tax Transmittal](#) (PDF) for an IRS e-file Return. The Examiner will need to request the original Form 8453 with attachments to determine if the taxpayer has met the substantiation requirements.
- (7) IDRS command code TRDBV will show whether the Form 8453 was filed and the related Document Locator Number (DLN). The Form 8453 and any attachments can be secured using command code ESTAB with the identified DLN. If the TRDBV does not show the filing of a Form 8453, the IDRS print should be included in the examiner's work papers to demonstrate that there is no record of filing the required return attachments.
- (8) In some cases, taxpayers attach baseline studies, correspondence or other documents related to the easement donation. This information should be reviewed for unusual items or inconsistencies and ultimately compared to actual source documents.

#### **B.4. Other Tax Issues**

- (1) The Examiner is responsible for determining the scope of the audit and should be alert to other potential tax issues on the tax return, which may or may not be related to the conservation easement deduction.
- (2) Some examples of potential issues related to the conservation easement donation are cash donations to the easement donee, income generated from the sale of state tax credits and recapture of rehabilitation tax credits.
- (3) IRM 4.10.4.3, *Minimum Requirements for Examination of Income*, requires Examiners to consider gross income during the examination of all income tax returns regardless of the type of return filed by the taxpayer. All deviations from minimum probes need to be documented and approved by the group manager.

#### **B.5. TEFRA Considerations**

- (1) An individual's income tax return may be selected for examination based on a large noncash contribution or carryover. Examiners must determine as quickly as possible whether the donation originated from a partnership or limited liability company (LLC) treated as a partnership for federal income tax purposes. This

information may not be readily available by inspection of the return particularly for carryovers.

- (2) The determination of the tax treatment of partnership items is made at the partnership level. If the easement donation was made by a partnership or LLC treated as a partnership, which is subject to TEFRA, the charitable contribution is a partnership item. An adjustment to the charitable contribution deduction cannot be proposed without conducting an examination of the originating donor entity (i.e., Form 1065 entity). If the entity is a TEFRA entity, the unified audit procedures for partnership proceedings must be followed. These procedures may present additional administrative complexities due to statute concerns, involvement of multiple tiers of ownership, and the location of the key case entity and partnership investors.
- (3) It is possible that the minimum assessment period for partnership items per IRC § 6229 may have expired. While the government can best protect its interest by extending the IRC § 6229 period of assessment before it expires and conducting a partnership proceeding that includes all the partners, the government is not precluded from conducting a partnership proceeding if the IRC § 6501 assessment period for any of the partners is still open.
- (4) Examiners should consult with their local Technical Services Passthrough Coordinator for guidance on TEFRA examinations. A list of current coordinators can be found on the IRS Virtual Library.
- (5) TEFRA was repealed for tax years beginning on or after January 1, 2018.

## **B.6. BBA Considerations (Taxable Years Beginning on or After January 1, 2018)**

- (1) The Bipartisan Budget Act replaced the auditing procedures for partnerships under TEFRA with the centralized partnership audit regime, referred to as BBA. Partnerships that file returns for tax years starting January 2018 must follow rules under the BBA. Refer to the BBA resources on the IRS Virtual Library and consult with the Technical Services Passthrough Coordinator.

## **C. Internal Sources of Information**

- (1) Information available from internal sources may be useful in preplanning for the examination, including the Conservation Easement issue Web page on the IRS Virtual Library, IDRS and contacts with program analysts and the Office of Professional Responsibility.

### **C.1. IRS Intranet**

- (1) Training materials, job aids, recent court decisions and other reference materials on conservation easements can be found on IRS Virtual Library, Form 1040 Knowledge Base. Examiners should refer to the Virtual Library page for updated information.

## C.2. Program Analysts

- (1) Examiners are encouraged to contact program analysts (PAs) assigned to this issue to discuss case development as early as possible in the examination. Contact information can be found on the Virtual Library page. PAs can explain the statutory requirements, help the examiner analyze the documents, and write reports.

## C.3. Integrated Data Retrieval System – IDRS

- (1) Examiners should review all available IDRS information to identify any additional donations and carryovers. A review of the taxpayer's filing history over several years can provide insight.
- (2) Reviewing the taxpayer's Information Returns Processing (IRP) documents and securing a yK1 link analysis may reveal related flow-through entities associated with the easement contribution.

## C.4. Façade Filing Fee Verification

- (1) Donors must pay a \$500 filing fee to the U.S. Treasury for donations of easements on buildings in registered historic districts if they claim a deduction of more than \$10,000. IRC § 170(f)(13)(A)-(B). The fee is to be used to enforce the provisions of IRC § 170(h). IRC § 170(f)(13)(C).
- (2) No deduction is allowed for façade easement deductions over \$10,000 unless the taxpayer includes the fee with the return. IRC § 170(f)(13)(A). Payment is transmitted to the IRS using [Form 8283-V, Payment Voucher for Filing Fee under Section 170\(f\)\(13\)](#) (PDF).
- (3) IDRS reports IMFOLT (individual returns) and BMFOLT (corporate/partnership returns) will show a TC (Transaction Code) 971 with AC (Action Code) 670 to identify the payment of the filing fee. Examiners can also contact a program analyst for confirmation of fee payment.

## C.5. Tax Exempt Organization Search

- (1) Tax Exempt Organization Search (previously Publication 78) should be consulted to verify whether the organization has tax-exempt status. The online searchable version can be found IRS.gov. Click on “Charities and Nonprofits,” then “Search for Charities” to search for qualified organizations by name and city.
- (2) Examiners should be aware that a listing on the Tax Exempt Organization Search is not always necessary in order to qualify to receive tax deductible contributions.
- (3) Some entities eligible to receive tax-deductible charitable contributions may not be listed in Tax Exempt Organization Search, such as churches and certain

affiliated organizations, group exemption subordinate organizations, and governmental units (including Indian tribal governments).

- (4) Only qualified organizations that meet the requirements of IRC § 170(h)(3) and Treas. Reg. § 1.170A-14(c)(1) are eligible to receive a deductible conservation easement contribution. The donee organization must have the commitment to protect the conservation purpose and have the resources to enforce the conservation restrictions.
- (5) See [Chapter 4](#) for detailed discussion on qualified organization requirements.

## **C.6. Office of Professional Responsibility**

- (1) Examiners can search the Office of Professional Responsibility intranet Web page for any previous disciplinary actions against the appraiser or the return preparer. The presence of prior sanctions suggests a need for extra scrutiny by the examiner.

## **D. External Sources of Information**

- (1) Examination of a charitable contribution deduction for a conservation easement is fact intensive, requiring examiners to gather and analyze information to determine whether the charitable contribution deduction is allowable. Review of documents from external sources such as the Internet, public records, and the National Park Service in advance of taxpayer contact can help streamline the examination process.

### **D.1. Internet Research**

- (1) The Internet (using Google or other similar search engine) can be an excellent source of background information relevant to the taxpayer, donee organization, and appraiser.

### **D.2. Taxpayer**

- (1) Examiners should search the Internet for information on the taxpayer's business, personal history, reputation in the community, and involvement with conservation issues and organizations.
- (2) A particular easement donation may have received local newspaper coverage at the time of the donation. News articles may provide evidence regarding charitable intent, quid pro quo, transactions between related parties, the donor's basis, or whether the property constitutes inventory in the hands of the taxpayer.

### **D.3. Donee Organization**

- (1) The Tax Exempt Organization Search on IRS.gov and Guidestar.org provide tax returns of charitable organizations and other important information relating to the organizations. Examiners will need to register online to access the

Guidestar information. Returns provided on Guidestar, however, generally do not include schedules of contributors. The Economic Research Institute also can be used to research charitable organizations.

- (2) An Internet search of the donee organization may provide relevant information on the organization. Most organizations have their own websites, which provide a wealth of information, especially regarding their charitable purpose and goals. This research may reveal relationships between the donor and donee organization. Transactions between related parties by either position or business activity must be scrutinized closely.
- (3) **Audit Tip:** A "self-serving" donee organization organized solely for the purpose of accepting one easement may lack charitable purpose or be engaged in self-dealing. If there is a question or concern as to the operations of the organization, examiners should submit a referral to Tax Exempt and Governmental Entities (TEGE) through the Specialist Referral System (SRS).

#### D.4. Appraiser

- (1) Examiners can obtain information about the appraiser and appraisal firm, such as their professional credentials, expertise with respect to conservation easements, and past business dealings with the donor or donee organization. This information is helpful in determining if the appraiser is a "qualified appraiser" and may provide some insight into any business history with the taxpayer or donee organization.
- (2) License information regarding jurisdictions, history and disciplinary actions can be found on The Appraisal Subcommittee of the Federal Financial Institutions Examination Council webpage. You can search for information on a specific appraiser by selecting the "find an appraiser" button or utilize this link: [Find an Appraiser](#). Some states also provide appraisal licensing information online. Examiners or IRS appraisers can contact the various state boards by telephone to determine if there are any past or pending disciplinary actions against the appraiser. The contact information for each state's appraiser regulatory program can be found on the Appraisal Subcommittee Web page at this link: [State Appraisal Regulatory Information Web page](#).
- (3) **Audit Tip:** An appraisal summary or a qualified appraisal must include the name, address, and identifying number of the qualified appraiser that signs the appraisal summary or qualified appraisal. Treas. Reg. §§ 1.170A-13(c)(4)(ii)(I); 1.170A-13(c)(3)(ii)(E); 1.170A-16(d)(3)(iii) and 1.170A-17(a)(3)(iv)(A). For a qualified appraisal, the appraiser's professional qualifications must be included. Information found on the Internet should be used to verify the accuracy of the information provided with the return.

#### D.5. Public Records

- (1) Examiners must secure, directly from the appropriate recordation office, the conservation easement deed, any subordination agreements, and other

pertinent documents that are recorded with the deed. If online research is not available, the Examiner or the IRS appraiser may need to travel to the recordation office to obtain this information. Use of research services such as Accurint alone is not sufficient.

- (2) **Audit Tip:** Until the easement is recorded, the easement is not enforceable in perpetuity. Treas. Reg. § 1.170A-14(g)(1). In some cases, taxpayers claim the donation in the wrong tax year. See [Chapter 2](#) for a detailed discussion on statutory requirements.
- (3) Examiners should determine if there were any preexisting restrictions on the property imposed by local or state ordinances, zoning, or the rules of the historic districts. There will be no loss in value as a result of the granting of the easement if the easement does not impose new restrictions on the property. IRS appraisers have significant experience with this type of research and will generally address this as part of their fieldwork.
- (4) In addition to obtaining copies of the recorded instruments, examiners should research the property's ownership, sales, and mortgage history. Be alert to recent sales or mortgages on the property that may provide insight into the easement value. Insurance records may also be informative.
- (5) The IRS appraiser will need to identify the property owner of the encumbered property. Identify any contiguous properties, and any other properties owned by the taxpayer or a related party, in order to properly apply the contiguous/enhancement rules in valuing the property and determining the proper amount of the deduction. Examiners should verify ownership on the date of the contribution through interviews and review of public records (in the county where the property is located).
- (6) Many conservation easements originate from flow-through entities (i.e., S corporations and partnerships). The allocation of contributions to the shareholders or partners is reported on Schedule K-1, *Partners Share of Income, Deductions, Credits, etc.* Examiners should verify the percentage of ownership and determine if the contribution amount was properly allocated.

## D.6. National Park Service

- (1) For donations of easements on certified historic structures, examiners must verify that the property is a certified historic structure and that the status was obtained either at the time the transfer was made or at the due date (including extensions) for filing the donor's return for the taxable year in which the contribution was made. IRC § 170(h)(4)(C) and Treas. Reg. § 1.170A-14(d)(5)(iii). The taxpayer will generally provide this information in response to the initial information document request (IDR).
- (2) If a building is individually listed on The National Register of Historic Places, no certification is required from the NPS Historic Preservation Division. If a building is located in a registered historic district, it must be certified by the Secretary of



the Interior to the Secretary of Treasury as being of historic significance to the district. Treas. Reg. § 1.170A-14(d)(5)(iii)(B).

- (3) Review the returns for the relevant period to see if the Rehabilitation Tax Credit was claimed. If the credit was claimed, consult the program analysts, Counsel, and the IRS Virtual Library.
- (4) **Audit Tip:** To obtain certification from NPS, the taxpayer would have submitted [Form 10-168](#) (PDF) to the Historic Preservation Division for certification that the building contributes to the district. Examiners should obtain a copy of the certification and any related documents from the taxpayer or NPS.

## E. Interviews

- (1) As in all income tax examinations, the interview is an important component of a quality examination. The interview is a crucial step in securing the necessary background information to evaluate the claimed deduction. See IRM 4.10.3.3, *Interviews: Authority and Purpose*.
- (2) The best time for interviewing the taxpayer is usually after conducting the research discussed above, reviewing the easement documents and assignment of an IRS appraiser to the case (if applicable). If possible, the Examiner and IRS appraiser should jointly interview the taxpayer.
- (3) Examiners will usually need to interview the taxpayer. The representative cannot substitute for the taxpayer. Do not provide written questions to the representative to ask the taxpayer. In some instances, it may be necessary to summons the taxpayer.
- (4) **Audit Tip:** Develop a timeline of events surrounding the donation and a diagram depicting the transaction.

## F. Information Document Requests

- (1) A sample Information Document Request (IDR) can be found on the IRS Virtual Library. The IDR should be modified to meet the specific needs of the examination, requesting only relevant information. Documents from the taxpayer are necessary not only to verify the easement donation, but also to collect initial documentation of the FMV of the easement. See [Chapter 2](#) for a detailed discussion of what documents are required to substantiate a conservation easement contribution.
- (2) Securing documents is only the beginning of the examination of a conservation easement deduction. A final determination cannot be made without careful review of the documents and background information, coordination with LB&I Engineering on the valuation (as appropriate), and in many cases, third party contacts.

## G. Valuation Expert Involvement

- (1) Valuation of the conservation easement is an important part of a conservation easement deduction examination. A referral to LB&I Engineering for an IRS appraiser or an outside expert will generally be required. Examiners and the IRS appraiser need to work together to avoid duplication of effort, share information, and rely on each person's specific job skills to fully develop the case.
- (2) **Note:** The Examiner has primary responsibility for the non-valuation aspects of the issue and must not suspend or delay work on the income tax case pending receipt of LB&I Engineering's valuation report.

## G.1. Referral to LB&I Engineering

- (1) A referral is made through the Specialist Referral System (SRS). Referrals to LB&I Engineering should be considered in all conservation easement cases. The referral must be made early in the examination process to allow sufficient time for LB&I Engineering input. The Examiner should inform the taxpayers and their Representative of an IRS appraiser's participation and expected examination timeframes.
- (2) Examiners should promptly provide the IRS appraiser with:
  - A copy of the return or pertinent part of the return
  - Form 8283, including attachments
  - A copy of the appraisal (if attached or once received)
  - Other pertinent information attached to the return
  - A recorded copy of easement deed including any attachments and correspondence
  - Baseline study of the property (if attached or once received)
  - Contemporaneous Written Acknowledgment (IRC § 170(f)(8))

## G.2. Referral Outcomes

- (1) LB&I Engineering may accept or decline the referral, depending on the deduction amount, available staffing resources, and other factors. In lieu of an "appraisal review," the IRS appraiser may provide informal feedback to the Examiner as to the reasonableness and adequacy of the taxpayer's appraisal.
- (2) If the formal referral is accepted, a meeting should be scheduled with the assigned IRS appraiser to discuss duties and timeframes for completion. This meeting should be documented in memo form. The IRS appraiser and Examiner should coordinate their actions throughout the examination.
- (3) Generally, the scope of the IRS appraiser's work is limited to valuation and qualified appraisal issues, and the Examiner will handle the legal issues under IRC § 170. However, there is some overlap of responsibilities. For example, the inspection of the property and interview of the taxpayer are important for both

the IRS appraiser and the Examiner and should (to the extent possible) be conducted jointly.

- (4) If funds are available, LB&I Engineering may hire an outside fee appraiser.
- (5) Examiners can seek assistance from program analysts to discuss alternatives and assistance in resolution of any issues with LB&I Engineering.

### **G.3. LB&I Engineering Products**

- (1) The IRS appraiser will generally prepare an “appraisal review with an opinion of value,” which is a detailed review of the taxpayer’s appraisal and includes an estimate of the FMV of the conservation easement. In other cases, the IRS appraiser will prepare an appraisal.
- (2) In some cases, the IRS appraiser may provide an “appraisal review,” which is simply a critique of completeness and reliability of the taxpayer’s appraisal without determining the FMV of the conservation easement. Another option is an informal consultation, where the IRS appraiser gives informal feedback on the taxpayer’s appraisal.

### **G.4. Outside Experts**

- (1) The IRS hires outside valuation experts (“outside fee appraisers”) if funds are available. Requests for use of an outside fee appraiser are made using the SRS referral process.
- (2) An outside fee appraiser must be approved through the IRS procurement process. LB&I Engineering is responsible for working with the Contracting Officer’s Representative (COR) to identify experts, solicit bids, arrange for background investigations, and execute the contract.
- (3) The outside fee appraiser reports only address valuation of the conservation easement. Examiners will need to address the legal issues under IRC § 170.

## **H. Consultation with Counsel**

- (1) Because examination of a conservation easement deduction involves review of a number of legal documents, Examiners will need to consult with Counsel.
- (2) Counsel should be engaged early in the examination to assist with review of the legal documents for areas of IRC § 170 noncompliance, such as conservation purpose, inconsistent use of the property, perpetuity, subordination and allocation of proceeds. It is imperative that examiners consult with Counsel in the case of raising any of the following: bona fide partner or partnership, partnership anti-abuse rules under Treas. Reg. §1.701-2, judicial doctrines (e.g., substance over form or step transaction doctrine) or the codified economic substance doctrine under IRC §7701(o). See [Chapter 10](#) for additional information. Examiners will need to be alert to court decisions that

could affect their examination. Recently decided cases relevant to the conservation easement issue can be found on the IRS Virtual Library.

- (3) **Audit Tip:** Certain arguments, including those made under Treas. Reg. § 1.701-2 and the codified economic substance doctrine, require Associate Office review. CCDM 31.1.1-1.

## I. Coordination with TEGE

- (1) The Examiner should determine whether the donee organization is or has been under examination by TEGE. If so, the Examiner should contact the Exempt Organization (EO) Examiner assigned to the case to obtain pertinent information and to coordinate examination activities, as appropriate.
- (2) The EO Examiner can assist in securing records from the donee organization and provide detailed information on the organization. Coordination with TEGE avoids duplication of effort and unnecessary contacts with the donee organization.
- (3) During the examination, the Examiner may need to consider a referral to TEGE for examination of the donee organization. Some factors that may warrant a referral include:
  - False or misleading statements by the donee organization regarding the tax requirements or valuation of contributions of conservation easements.
  - Evidence of undue influence on the taxpayer's appraiser by the donee organization.
  - Presence of related party transactions between the donor and the donee organization.
  - Lack of any charitable activity by the donee organization, or activities contrary to its stated charitable purpose.
  - Use of a related "for-profit" business to process easement donations.
  - Information indicating that the donor's conservation contribution lacked a "conservation purpose" for purposes of IRC § 170(h) could also have a bearing on the donee organization's exempt status, particularly if it has accepted other conservation contributions that lack a conservation purpose.
- (4) Examiners can make referrals to TEGE using the SRS referral process or submit a request for consultation.

## XII. Conducting the Examination

### A. Overview

- (1) Conservation easement examinations are very challenging cases requiring substantial factual development and review of legal documents. A team

approach (examiner working with LB&I Engineering, Counsel, and program analysts) is the most effective way to conduct these examinations.

- (2) Examiners will need to look beyond information provided on the tax return and analyze the substance of the transaction rather than the mere form of the transaction. Examiners must employ investigative skills to identify any omissions or discrepancies of material facts.
- (3) During an examination, the examiner will obtain documentation, conduct interviews of the taxpayer and third parties, and perhaps visit the property encumbered by the easement. The examiner must evaluate all of this information to determine if the taxpayer meets the:
  - General statutory requirements for all charitable contributions per IRC § 170.
  - Specific statutory requirements for qualified conservation contributions per IRC § 170(h) and Treas. Reg. § 1.170A-14, including compliance with one or more of the conservation purposes listed in IRC § 170(h)(4)(A).
  - Contemporaneous written acknowledgment requirement under IRC § 170(f)(8).
  - Substantiation requirements and, specifically, the qualified appraisal and appraiser requirements in IRC § 170(f)(11), Notice 2006-96, and Treas. Reg. § 1.170A-13. The substantiation requirements of Treas. Reg. § 1.170A-16 are applicable to contributions made after July 30, 2018.
  - Statutory (DEFRA) and regulatory requirements for Form 8283. Treas. Reg. § 1.170A-13(c)(4).
  - Baseline requirements. Treas. Reg. § 1.170A-14(g)(5).

## **B. Interviews**

- (1) As with all examinations, interviewing the taxpayer who donated the conservation easement is an important step in the development of facts. The interview provides important information regarding the history of the property and the taxpayer's:
  - Intent in making the easement donation.
  - Understanding of the transaction.
  - Efforts to comply with the statutory and regulatory requirements.
  - Due diligence in obtaining a correct appraisal.
- (2) If possible, the examiner and IRS appraiser should conduct a joint interview. Review of the conservation easement deed, baseline study and the taxpayer's appraisal, prior to the interview, will help the Examiner and IRS appraiser carry out a focused interview. In some cases, more than one interview may be required to gather all relevant facts.

- (3) **Audit Tip:** Some representatives may request that questions be submitted in writing prior to the interview or in lieu of an interview. Written questions and answers are not an appropriate substitute for an in-person interview of the taxpayer. If the taxpayer or representative will not consent to an interview, then the examiner should either issue a summons for interview or develop the case based on third party contacts.
- (4) Depending on the case, interviews of third parties such as representatives of the donee organization, the appraiser, the baseline study author, or other conservation experts may be needed. See discussion below on third party contacts.

### C. Property Inspection

- (1) The examiner's inspection of the property provides valuable information to assist in determining whether the conservation easement meets one of the four IRC § 170(h)(4) conservation purposes.
- (2) If possible, the examiner should inspect the entire property. Site visitation should be coordinated with the IRS appraiser, whenever possible. If the examiner does not inspect the property, the examiner should contact the IRS appraiser to discuss the appraiser's observations and review pictures obtained during site inspection. Examiners can also research property on Google Maps, Zillow, or Real Quest.
- (3) If it is not practical to inspect the entire property, the examiner should view areas that are relevant to the taxpayer's claimed conservation purpose and document the observations.
- (4) Both the interior and exterior of historic properties should be inspected. The IRS appraiser generally will need to inspect the interior for purposes of valuing the property.
- (5) **Audit Tip:** Depending on the location of the property and time of year, casual attire and boots may be necessary. The Examiner may want to consider bringing a copy of a map of the property from the baseline report or the appraisal as a reference guide during the visit.
- (6) During the inspection, the examiner should note:
  - The location of the significant or protected habitat or species
  - Physical and visual access by the public to the easement property
  - The nature of the surrounding properties and intensity of development in the area
  - The location of buildings and other structures
  - Any post-easement building or land improvements impacting the stated conservation purposes

- Any inconsistent use of the property
- (7) The IRS appraiser will be interested in factors affecting the highest and best use of the property before and after the granting of the conservation easement, such as zoning or other restrictions on the property, topography or floodplains.
  - (8) Ask the taxpayer or representative to point out the outdoor recreation areas, animals, plants, scenic views, or historic land and structures that contribute to the conservation purpose. If the examiner observes an absence of conservation attributes, lack of access, de minimis public benefit, or use inconsistent with a conservation purpose, the examiner should discuss with the taxpayer or representative to clarify and solicit additional documentation as warranted.
    - **Example:** A Wisconsin taxpayer donates a conservation easement with a claimed conservation purpose of protecting the habitat for pheasants, a federally protected species. Pheasants thrive in a habitat of hay fields, cropland, and grassland. The examiner observes none of this habitat on the property during the site inspection.
  - (9) **Audit Tip:** “A picture speaks a thousand words.” Consider taking photographs and video of the property, the surrounding areas, and the protected habitat or species, from various public access points with an IRS approved device. The IRS appraiser will generally take pictures of the property.

## D. Review of Documents

- (1) The examiner and IRS appraiser will be required to review documents, such as the deed of conservation easement, subordination agreements, baseline study, appraisals, contemporaneous written acknowledgment, and information provided by the qualified organization and, in appropriate cases, documents submitted to the National Park Service. The documents lay the foundation for determining deductibility.

### D.1. Deed of Conservation Easement

- (1) Conservation easement deeds vary considerably in complexity and length. It is imperative that the examiner and appraiser read the deed carefully and have a clear understanding of each of the deed’s provisions in order to properly assess the taxpayer’s compliance with the statute and regulations. Program analysts and Counsel should be consulted for help.
- (2) Be sure to review a complete and executed copy of the recorded deed including attachments. Taxpayers and representatives sometimes provide drafts or unexecuted copies. If there are multiple versions, ask for them. Inquire as to the changes made and reasons for the revisions.
- (3) **Audit Tip:** A copy of an easement deed should be included as part of the appraisal report. Compare it to the recorded deed to see if they are the same. If not, discuss with the IRS appraiser as the value of the conservation easement could be impacted.

- (4) In reading the conservation easement deed, the examiner should determine:
- What property is being encumbered?
  - What is the stated conservation purpose?
  - Does the deed protect the property in perpetuity?
  - What type of public access is allowed to the property?
  - What rights are reserved by the taxpayer?
  - What are the provisions for mortgagee subordination and allocation of proceeds upon extinguishment?

## D.2. Perpetuity

- (1) Most conservation easement deeds will state that the easement is granted and enforceable in perpetuity, but be alert to any provisions contradicting that statement.
- (2) See [Chapter 3](#) for guidance on the perpetuity requirements.

## D.3. Conservation Purpose

- (1) The conservation easement deed should include a specific description of the conservation purpose of the particular easement, including, for example, the species, scenic views, or building being protected. The deed alone is not evidence of conservation purpose and must be substantiated by other available information.
- (2) **Audit Tip:** In some cases, the conservation purpose as described in the deed merely repeats the conservation purpose definition in IRC § 170(h)(4)(A). The taxpayer must clearly describe and provide documentation to show how the easement meets the conservation purpose.
- (3) Except for protection of a relatively natural habitat or ecosystem, conservation easements generally must offer either physical access or visual access by the public from a public space such as a highway. Physical access is only required if the conservation purpose is for recreation by or education of the general public under IRC § 170(h)(4)(A)(i). When evaluating access, the examiner needs to determine:
- What access is allowed, by whom, and with what frequency?
  - What portion of the conservation easement can be seen from the highway or other public space (if an open space easement for scenic enjoyment)?
  - What impact do reserved rights have on public access?
- (4) For donations of conservation easements on buildings in registered historic districts, the entire exterior (including the front, sides, rear, and height of the building) must be preserved. IRC § 170(h)(4)(B). If the conservation easement



deed does not clearly protect the entire exterior, the charitable contribution is not deductible.

- (5) **Audit Tip:** The term “height” was specifically used in the statute to encompass the donation of space above the historic building. A deed that describes the restriction as the “roof,” would not satisfy the statute absent any additional narrative limiting the “height” of the building. A roof can be raised, and additional floors can be added if the easement merely uses the term “roof.”
- (6) See [Chapter 5](#) for guidance on conservation purpose requirements.

#### D.4. Reserved Rights

- (1) Taxpayers sometimes reserve rights that can destroy a conservation purpose.
  - **Example:** The easement calls for the protection of the Virginia running buffalo clover, an endangered plant. However, the deed allows use of all-terrain vehicles over the protected land in the area of the clover, which would destroy the clover. This is an inconsistent use, which would result in disallowance of the deduction. Treas. Reg. § 1.170A-14(e).
- (2) Taxpayers are permitted to reserve some development rights on a portion of the property, such as construction of additional homes or structures, installation of utilities, and building of fences or roads, provided that conservation purposes are protected. Depending on the facts and circumstances, retention of these reserved rights may result in disallowance and need to be reflected in the appraisal report and valuation conclusions.
  - **Example:** A taxpayer claims a charitable contribution deduction for an open space easement but reserves the right to build three residences on the property. The deed does not state the specific location or limit the size of the residences. This may raise multiple issues:
    - It may allow for construction of homes that block the public’s scenic view, thus permitting destruction of a conservation interest (Treas. Reg. § 1.170A-14(f) Ex. 3).
    - It may not restrict the use of the property in perpetuity.
- (3) See [Chapter 3](#) and [Chapter 5](#) for guidance on perpetuity and conservation purpose requirements.

#### D.5. Lender Agreements

- (1) If the property was encumbered by a mortgage or other lien at the time of the easement recordation, the taxpayer must obtain a subordination agreement from the lender prior to the donation of the conservation easement. *Palmolive Building Investors, LLC v. Commissioner*, 149 T.C. 380, 394 (2017).
- (2) See [Chapter 3](#) for additional guidance on lender agreements.

#### D.6. Subordination Agreements

- (1) A subordination agreement is an agreement by the lender to subordinate its rights to the rights of the easement holder to enforce the conservation purposes of the donation in perpetuity. Subordination agreements must be recorded in the public record.
- (2) The best way to determine if there are existing mortgages, including home equity loans or lines of credit, is by researching public records and interviewing the taxpayer. The subordination agreement is generally part of the lender agreement attached to the conservation easement deed.
- (3) **Audit Tip:** Examiners must confirm that timely subordination agreements for all liens were recorded in the public record no later than the time the easement is recorded. If the taxpayer did not obtain a subordination agreement before the time of the contribution, the charitable contribution should be disallowed for lack of perpetuity.
- (4) Substantial compliance does not apply to failure to properly subordinate. *Mitchell v. Commissioner*, 775 F.3d 1243 (10th Cir. 2015).

## D.7. Allocation of Proceeds

- (1) For a charitable contribution deduction to be allowed, at the time of the gift, the donation of the perpetual conservation restriction must give rise to a property right immediately vested in the donee organization, which a FMV that is at least equal to the proportion that the value of the perpetual conservation restriction at the time of the gift bears to the value of the property as a whole at that time, and that proportion remains constant. If a subsequent unexpected change in the conditions surrounding the property that is the subject of a perpetual conservation restriction make the continuation of the easement impossible or impractical (e.g., condemnation, casualty, hazard, or accident) the easement may only be extinguished by judicial proceeding. In the event of such an extinguishment, at a minimum, the donee must receive its proportion (as determined when the easement was originally valued) of the extinguishment proceeds.
- (2) **Audit Tip:** Counsel should always be consulted to determine whether the deed meets the allocation of proceeds requirement; improper language in the deed could result in disallowance. See *Carroll v. Commissioner*, 146 T.C. No. 13 (2016), *Coal Property Holdings, LLC v. Commissioner*, 153 T.C. 126 (2019).

## D.8. Baseline Study

- (1) Under Treas. Reg. § 1.170A-14(g)(5)(i), a baseline study is required if the taxpayer has reserved any right that may impair the conservation purpose. Taxpayers almost always reserve these kinds of rights.
- (2) The baseline study is a record of a property's condition at the time of the donation and is required to substantiate the conservation purpose. It serves two significant purposes: 1) to satisfy the Treasury Regulations and 2) to assist the

donee organization and others in monitoring and enforcing the easement in perpetuity.

- (3) The baseline study does not have to be attached to the return or the deed of conservation easement, but the donor must provide the study to the donee prior to the time the donation is made. If the terms of the donation contain restrictions with regard to a particular natural resource to be protected, the condition of the resource at or near the time of the gift must be established. A statement saying that the natural resource inventory is an accurate representation of the protected property at the time of the transfer must be signed by the donor and donee. Examiners should obtain a copy of the baseline study (natural resource inventory and signed statement) from the taxpayer or donee organization.
- (4) The quality of a baseline study can vary a great deal. Some are detailed, expert reports, describing the property's condition, conservation value, impact of reserved rights, and environmental hazards. Some are the taxpayer's self-assessment of the property or the work of a volunteer with little or no professional credentials.
- (5) A properly documented baseline study is invaluable in helping the examiner determine if the donation satisfies one of the conservation purposes. A comprehensive baseline study would generally include:
  - A description of the encumbrance
  - A description and map of the conservation characteristics and areas (i.e., listing of identified plants or wildlife)
  - A map or series of maps, drawn to scale, depicting roads, fences, existing structures, trails, water bodies, wetlands, land use history and any other property features
  - Identification of any reserved building sites
  - Surveys or plat maps
  - Description of any management plans, such as a timber plan
  - On-site photographs possibly including aerial photographs
  - The study author's name and professional credentials
- (6) The first step in reviewing the baseline study is determining whether the taxpayer was required to secure one. Nearly all easement deeds reserve significant rights, so nearly all must have a baseline study.
- (7) If the taxpayer is required to have a baseline study, the next step is to ascertain whether the baseline study is sufficient to satisfy the baseline requirements as outlined in Treas. Reg. § 1.170A-14(g)(5), including the signed statement by the donor and representative of the donee organization. This statement is an affirmation that the baseline study is an accurate representation of the protected property at the time of transfer. The statement may be incorporated in the

baseline study or be a separate document, and it may be included in the deed of easement.

- (8) The examiner will also need to assess the credibility of the baseline study. A baseline study prepared by an independent qualified expert such as a conservationist, biologist, forester or botanist would generally be given greater evidentiary weight than one prepared by a less qualified person or the taxpayer's self-assessment. Also, a baseline study with a lot of documentary support is more credible than one with little support.
- (9) Examiners will need to confirm that the baseline study is based on accurate information. In some cases, the IRS will hire outside experts to evaluate the baseline study. Generally, examiners will need to conduct their own research contacting federal, state or local conservation agencies or historic preservation groups as appropriate. Internet research will reveal many useful Internet websites such as [natureserve.org](http://natureserve.org) that can help the examiner in evaluating the baseline study.
- (10) **Audit Tip:** Sometimes taxpayers only have a narrative about the general area or state without any specific reference to the donated property. These generic narratives do not meet the requirements of Treas. Reg. § 1.170A-14(g)(5).
- (11) See [Chapter 5](#) for guidance on the baseline study requirements.

## D.9. Taxpayer's Appraisal

- (1) The IRS appraiser has primary responsibility for review of the taxpayer's appraisal to determine if the claimed conservation easement value is correct.
- (2) The examiner should read the appraisal to obtain background information on the property and have a general understanding of the appraisal content and methodology. In consultation with the IRS appraiser, the examiner should determine if the appraisal was timely and if it meets the requirements of IRC § 170(f)(11), Notice 2006-96, and Treas. Reg. § 1.170A-13(c).
- (3) See [Chapter 7](#) for guidance on qualified appraisal requirements.

## D.10. Donee Organization

- (1) During the preplanning of the examination, the examiner will generally be able to determine whether the donee is an organization eligible to receive tax-deductible contributions. The examiner must also consider whether the donor made any cash payments to the donee, and review the contemporaneous written acknowledgment.
- (2) The examiner may need assistance from TEGE to determine whether the donee has the commitment to protect the conservation purposes of the donation and has resources to enforce the restrictions of the conservation easement. Indication of failure by the donee organization in these areas may suggest the need for a referral to TEGE.

- (3) See [Chapter 4](#) for guidance on qualified organizations.

## D.11. Commitment and Resources

- (1) The taxpayer must transfer the conservation easement to an eligible donee to qualify for a contribution deduction. In order to be an eligible donee, the organization must be a qualified organization, must have a commitment to protect the conservation purpose of the donation and must have the resources to enforce the restrictions in the conservation easements.
- (2) Some of the information used to evaluate commitment and resources include:
  - The donee organization's website
  - The donee organization's tax returns (Forms 990), obtained from either the Tax Exempt Organization Search on IRS.gov, Guidestar.org, or the Economic Research Institute
  - Interviews of the taxpayer and representatives of the donee organization
  - Observations during the property inspection
  - Property monitoring reports
  - Written agreements between the organization and the taxpayer certifying that the donee is qualified and has commitment and resources (required for contributions of easements in registered historic districts)
- (3) If the organization did not meet the commitment and resources tests at the time of contribution, no deduction is allowed. A conservation group organized or operated primarily or substantially for one of the conservation purposes specified in IRC § 170(h)(4)(A) is considered to have the requisite commitment. Treas. Reg. § 1.170A-14(c)(1).
- (4) **Audit Tip:** Ask for the organization's monitoring reports to verify whether the taxpayer is in compliance with, and the donee organization is enforcing, the terms of the easement. In some cases, donee organizations have allowed changes that were in violation of the terms of the easement.
- (5) Examiners should consult Counsel for assistance if the easement was terminated or not being enforced. In addition, a referral to TEGE should be considered.

## D.12. Cash Payments

- (1) A voluntary transfer of money to a qualified organization is generally deductible as a charitable contribution.
- (2) If a taxpayer received goods or services from the organization in exchange for making the cash contribution, the deduction is limited to the excess of the cash over the FMV of the goods and services. Goods and services include cash, property, services, benefits, or privileges.

- (3) Any cash payment made in conjunction with the conservation easement must be addressed as part of the examination. Examination steps should include an interview of the taxpayer and a review of documents provided by the taxpayer and the donee organization. A properly substantiated stewardship fee may be deductible if it meets the requirements of IRC § 170.
- (4) Each case must be decided on the facts and circumstances.
- (5) **Audit Tip:** The Examiner may need to issue a summons to the donee organization for relevant documents (including the application, correspondence, donation agreements, processing documents, and other documents relevant to the cash and easement donations).

### D.13. Contemporaneous Written Acknowledgment

- (1) Section 170(f)(8) states that all cash and noncash contributions of \$250 or more must be substantiated with a CWA and lists the requirements for a CWA. It must be obtained by the taxpayer by the earlier of the date the taxpayer filed the return or the due date (including extensions) for the return. The [Form 8283, Noncash Charitable Contributions](#) (PDF), is not a substitute for a CWA.
- (2) A CWA is required for both the cash payment and the conservation easement. Examiners must verify that it was a timely acknowledgment and fully complies with the statutory requirements. Failure to secure a timely or proper CWA results in disallowance of the contribution.
- (3) **Note:** A CWA must include either a statement that no goods or services were provided (if this was the case) or the value of any goods or services provided.
- (4) **Audit Tip:** Some taxpayers may argue all that is required is substantial compliance with the CWA requirement. However, because the CWA is specifically required by statute, substantial compliance does not apply.
- (5) **Audit Tip:** In some cases, the deed itself may satisfy the CWA requirement. In *Big River Development, LP v. Commissioner*, T.C. Memo. 2017-166; *310 Retail, LLC v. Commissioner*, T.C. Memo. 2017-164; *RP Golf, LLC v. Commissioner*, T.C. Memo. 2012-282; and *Averyt v. Commissioner*, T.C. Memo. 2012-198, the deed did satisfy the contemporaneous written acknowledgment requirement.
- (6) If the taxpayer makes this argument, this issue should be discussed with Counsel.
- (7) See [Chapter 6](#) for guidance on CWA requirements.

### D.14. National Park Service – Form 10-168

- (1) Congress provided two incentives for historic preservation: (1) the charitable contribution deduction for historic preservation of a historically important land area or a certified historic structure under IRC § 170(h) and (2) the rehabilitation credit under IRC § 47.

- (2) The [Form 10-168](#) (PDF) must be submitted to the NPS for certification that a building in a registered historic district contributes to the district for purposes of either tax incentive. Examiners should obtain a copy of the certification and any related documents from the taxpayer or the NPS.
- (3) Even if the property is certified by the Secretary of Interior, it does not mean the charitable contribution deduction is allowable. The IRS is responsible for all legal determinations concerning the tax consequences. 36 CFR § 67.1.
- (4) Part I of the Form 10-168, used for certification of the building for historic status, details the condition of the building at the time of the application. Part II is a notice of proposed work and generally includes information such as:
  - Date of application
  - Description of the condition of the building and any proposed work
  - The expected start and completion dates
  - Estimated costs
  - Architectural drawings
- (5) Part II is required for any rehabilitation project whether the property is individually listed on the National Register of Historic Places or in a registered historic district.
- (6) In some cases, taxpayers have improperly claimed a charitable contribution deduction for the contribution of development rights that they retained.
- (7) Section 47 permits the rehabilitation tax credit to be claimed only by owners and, in some instances, lessees if certain statutory requirements are met. If the taxpayer does not own all of the interests in real property to which the rehabilitation relates (and is not a lessee), the taxpayer is not entitled to the entire rehabilitation tax credit. Generally, no tax credit is permitted for property that the taxpayer does not own. See *Villa v. Commissioner*, T.C.M. 1980-305; *Davenport v. Commissioner*, T.C.M. 1977-34; *Schaevitz v. Commissioner*, T.C.M.1971-197 and *Bailey v. Commissioner*, 88 T.C. 1293 (1987).
- (8) **Audit Tip:** Contact Counsel in rehabilitation project cases. Resources and contacts for the Rehabilitation Credit are available on the IRS Virtual Library.
- (9) Being listed on the National Register of Historic Places or located in a registered district imposes no restrictions on the property. Only local law can impose restrictions. A local historic district may not have the same boundaries as the National Register District by the same name. Thus, a building may be certified for purposes of a charitable contribution deduction by the NPS but the only restrictions prior to the easement might be local zoning.
- (10) **Audit Tip:** Be sure to determine whether there are restrictions under local preservation law. A building added to the National Register of Historic Places may or may not be subject to local restrictions.

## D.15. Partnership Documents

- (1) Examiners should carefully review partnership agreements and other documents when present in any easement case. A partnership arrangement was used to transfer state rehabilitation tax credits in *Virginia Historic Tax Credit Fund 2001LP v. Commissioner*, 693 F.3d 129 (4th Cir. 2011). The Fourth Circuit Court of Appeals held that the transfer of the state tax credit was a disguised sale. The partnership structure and partnership agreement are of particular importance in a syndicated conservation easement case because the partnership relies on the contributing partner's holding period to generate the deduction. Some cases involve multiple layers of partnerships. In addition to the partnership agreement, the partnership may use other materials including a Private Placement Memorandum, operating agreement, and articles of organization. All partnership materials should be reviewed thoroughly. Examiners should determine the relationship between the various entities and consider whether the transaction is respected for tax purposes as well as whether the partners are bona fide, meaning that they each share meaningfully in the economic returns of the activity.

## E. Third-Party Contacts

- (1) Development of a conservation easement case frequently requires contact with third-parties for additional facts or confirmation of information obtained during the course of the examination. Examples of possible third-party contacts include:
  - Donee organization
  - Mortgage lenders
  - Appraisers
  - Local government officials
  - Real estate agents
  - State and federal conservation agencies
  - Prior and subsequent owners of the encumbered property
- (2) Examiners must adhere to procedures for making third-party contacts as outlined in IRM, Section 4.11.57, *Third Party Contacts*; IRM 25.27.1, *Third-Party Contact Program*. Advance notification of potential third-party contacts during an examination is required. The examiner must provide Letter 3164 to the taxpayer and must wait 45 days from the issuance of the letter before contacting the third party. There are multiple letters in the 3164 series. Typically, Letters 3164-E, F and G are used in a conservation easement audit.
- (3) IRC 7602(c) Notice of Contact of Third Parties, does not apply to any contact with any office of any local, state, federal or foreign entity unless the contact is



concerning the taxpayer's business with the government office contacted, such as the taxpayer's contracts with, or employment by the office. See IRM Section 4.11.57.4.2.5 for additional guidance.

- (4) Form 12180, Third-Party Contact Authorization Form, or Letter 1995, Third Party Contact Letter to Request Information, is used to solicit records. Some cases may require use of an administrative summons (Form 2039).
- (5) **Audit Tip:** While the examiner is required to notify the taxpayer of the intent to make a third-party contact and wait 45 days, there is no requirement to obtain the taxpayer's permission prior to making a third party contact.

## E.1. Donee Organizations

- (1) Third-party contacts may be warranted with key representatives of the donee organization. Individuals involved in drafting the easement deed or who were points of contact may have important information on the transactions. Consider separate interviews of all third parties. Typically, these interviews can be done by telephone.
- (2) **Audit Tip:** Examiners should request the organization's entire file including all correspondence for this donation and any other donation by the taxpayer.
- (3) Donee organizations may want a summons before consenting to release of records.

## E.2. Mortgage Lenders

- (1) Mortgage lender files are a valuable source of information about the subordination, allocation of proceeds, and valuation of the conservation easement.
- (2) If the bank agreed to the subordination, the lender's file may include correspondence or other information from the taxpayer or the donee organization describing the impact of the conservation easement on the value or use of the property. Examiners should obtain explanations for any inconsistent statements made to third parties.
  - **Example:** Correspondence from the donee organization to the lender soliciting a subordination agreement includes statements that the conservation easement has no impact on the value of the property.
- (3) If the taxpayer secured a mortgage or refinancing around the time of the easement donation, an appraisal may have been obtained by the lender. The appraisal coupled, with information on the loan application, may be helpful in evaluating the reasonableness of the claimed value of the easement.
  - **Example:** The taxpayer granted a conservation easement on December 27, 2019, claiming a loss in value on the property of \$23 million. The taxpayer's appraised before value of the property was determined to be \$25 million with an after value of \$2 million. The taxpayer obtained a

mortgage loan on January 27, 2020. The bank's appraisal reports a value of \$20 million after considering the impact of the conservation easement on the property. This suggests that the taxpayer overvalued the easement.

- (4) The taxpayer's loan application and related appraisals can also be useful in determining whether the taxpayer made a good faith investigation of the value of the easement. This is relevant to imposition of penalties.
  - **Example:** Using the example above, suppose the taxpayer showed the value of the property on his loan application as \$24 million. If the taxpayer believed his property lost \$23 million in value due to the donation of the easement, why was the "alleged" \$2 million after value not reported on the loan application?
- (5) A summons will generally be required to obtain the loan file information.

### E.3. Appraiser

- (1) An interview of the taxpayer's appraiser should generally be conducted by the IRS appraiser. The examiner should also participate.
- (2) It may also be necessary to obtain the taxpayer's appraiser's work file. Most licensed appraisers are required to maintain a work file in accordance with state licensing requirements. The appraiser's work file may include communications between the taxpayer and donee organization or may reveal the existence of multiple versions of the appraisal.
- (3) The examiner or the IRS appraiser should determine if there were multiple versions of the appraisal and if so, secure copies and the reasons for them.

### E.4. Federal and State Conservation Agencies

- (1) To find out about the physical characteristics of the subject property and the easement's conservation purposes, examiners may want to contact various federal and state conservation agencies, including but not limited to:
  - NPS
  - U.S. Fish and Wildlife Service
  - U.S. Environmental Protection Agency
  - U.S. Department of Agriculture
  - U.S. Army Corps of Engineers
  - State Departments of Natural Resources
- (2) These agencies may have information on the specific property or on the area in general.

### E.5. Local Government Officials

- (1) Local preservation boards and officials responsible for zoning and building permits are good sources of information. If possible, secure copies of pertinent records and speak directly to the officials. Evidence of quid pro quo may be found by talking to local officials and reviewing records including minutes of meetings.
- (2) **Audit Tip:** If the conservation easement is part of subdivision development, request assistance from the IRS appraiser in reviewing documents such as plats, maps, etc.

## E.6. Real Estate Agents

- (1) Local real estate agents can be valuable third-party contacts, having knowledge of property values, sales, and local market conditions, including sales of properties encumbered by easements.
- (2) **Audit Tip:** If the property was purchased or sold shortly before or after the date of the contribution, the real estate agent may be able to provide useful information as to the value of the property or impact of the conservation easement.

## E.7. Property Owners

- (1) Prior or subsequent owners of the subject property can provide information useful in determining the value of the property such as physical condition, preexisting restrictions or encumbrances and other specific attributes.
- (2) **Audit Tip:** If the property was sold subsequent to the granting of the easement, consider contacting the buyer to determine the impact (if any) on the purchase price paid. Buyers are sometimes unaware of the easement or may indicate the easement had no impact on the purchase price.

## XIII. Concluding the Examination

### A. Overview

- (1) The examiner must determine whether the taxpayer meets all of the requirements to claim a charitable contribution deduction for the conservation easement. While the process of issue identification begins in the preplanning stages of the examination, a conclusion as to the deductibility of the conservation easement can only be made after considering all of the information obtained during the examination.
- (2) In addition to identifying legal issues, examiners, generally with the assistance of a valuation expert, will determine if the conservation easement has been properly valued.
- (3) Preparation of a quality examination report is a critical component of the examination process. The examiner will need to include a comprehensive explanation of the facts, law, and conclusions, incorporating the IRS appraiser's work product and attaching relevant exhibits. If the examination results in a

proposed adjustment, the examiner must consider whether penalties are applicable and who is liable for the penalties.

- (4) During the closing conference, the examiner should explain the bases for any proposed adjustments to the charitable contribution deduction and proposed penalties. In unagreed cases, the examiner will need to verify that the taxpayer's protest complies with the requirements as outlined in [Publication 5, Your Appeal Rights and How to Prepare a Protest If You Don't Agree](#) (PDF) and to prepare a rebuttal to the protest as warranted.

## B. Issue Identification

- (1) The examiner and IRS appraiser must have a comprehensive understanding of all of the legal requirements and the value of the conservation easement in order to make a decision on deductibility of the contribution.
- (2) The Internal Revenue Code, Treasury Regulations, publications, and this ATG are tools to help in the identification of potential issues. Program analysts and Counsel can also be consulted for assistance.
- (3) An Issue Identification Worksheet has been developed as a job aid to help examiners with issue analysis. The worksheet is not all-inclusive but is a summary of key issues. See Exhibit 13-1.
- (4) Besides examining all aspects of the conservation easement deduction issue, examiners must also examine whether other costs associated with the conservation easement contribution were properly reported.
- (5) **Audit Tip:** Taxpayers will sometimes improperly claim the appraisal fees and other costs as cash contributions. Appraisal fees are deductible only as miscellaneous deductions subject to a 2% adjusted gross income limitation under IRC § 67, and, even then, are not deductible for any taxable year beginning after December 31, 2017, and before January 1, 2026.

### B.1. Substantial Compliance

- (1) The burden is on taxpayers to establish they have complied with all statutory requirements to substantiate the charitable contribution claimed under IRC § 170. *INDOPCO, Inc. v. Commissioner*, 503 U.S. 79, 84 (1992). Moreover, a charitable contribution is allowed as a deduction only if verified under the Treasury Regulations. IRC § 170(a)(1).
- (2) In cases where the disallowance is based in whole or in part on noncompliance with the substantiation rules, taxpayers and their representatives may argue that they have substantially complied, based on a judicial doctrine called "substantial compliance." *Bond v. Commissioner*, 100 T.C. 32, 40–41 (1993).
- (3) Under prior law, some courts have allowed a deduction for a taxpayer who has substantially, but not strictly, complied with "directory" regulations governing tax elections and deductions. See *Bond v. Commissioner*, 100 T.C. 32, 40-41 (1993). The tax court has ruled that a taxpayer substantially complies with the

regulations when the taxpayer had “provided most of the information required, and the single defect in furnishing everything required was not significant.” *Hewitt v. Commissioner*, 109 T.C. 258, 265 (1997).

- (4) It is important to note that *Bond, Hewitt, and Simmons v. Commissioner*, T.C. Memo. 2009-208, were based on law in effect prior to the enactment of the Pension Protection Act (2006), which imposes new mandatory statutory requirements for qualified appraisals.
- (5) In *Costello v. Commissioner*, T.C. Memo. 2015-87, the tax court declined to apply the substantial compliance doctrine where the taxpayer’s appraisal valued a fee simple interest “before and after a hypothetical sale of development rights” instead of a conservation easement. The tax court stated that an appraisal of the wrong asset cannot substantially comply with the regulations because the appraisal in that case prevents the Commissioner from properly understanding and calculating the claimed deduction.
- (6) The tax court has stated that the substantial compliance doctrine should not be liberally applied. *Alli v. Commissioner*, T.C. Memo 2014-15. Compliance is not substantial if an appraisal fails to meet the essential requirements of the governing statute. *Cave Buttes, LLC v. Commissioner*, 147 T.C. 338, 350 (2016). The substantial compliance doctrine should only be used to forgive “minor discrepancies in the taxpayer’s reporting.” *Kaufman v. Shulman*, 687 F.3d 21, 22 (1st Cir. 2012).
- (7) A failure to comply with the contemporaneous written acknowledgment requirement of IRC § 170(f)(8) cannot be excused by the substantial compliance doctrine. *Izen v. Commissioner*, 148 T.C. 71, 77 (2017); *Boone Operations Co. LLC v. Commissioner*, T.C. Memo. 2013-101. However, the tax court determined that a deed of easement may constitute a contemporaneous written acknowledgment in *310 Retail, LLC, v. Commissioner*, T.C. Memo. 2017-164 and in *Big River Development v. Commissioner*, T.C. Memo 2017-166 as long as the deed satisfies the requirements of § 170(f)(8).
- (8) A refusal to report the cost basis and date of acquisition on the donated property on Form 8283 does not substantially comply with the regulatory requirement. *Belair Woods, LLC v. Commissioner*, T.C. Memo. 2018-159. Where a taxpayer’s Form 8283 has “simply too many omissions to overlook or to categorize as inadvertent” it cannot be said to have substantially complied. *Brannan Sand & Gravel Co., LLC v. Commissioner*, T.C. Memo. 2020-76.

## C. Report Writing

- (1) The examiner’s report is the principal means of informing to the taxpayer, IRS Independent Office of Appeals (Appeals), and Counsel of the reasons for proposed adjustments to the conservation easement deduction. Typically, conservation easement issue reports take a significant amount of time to prepare. Unagreed reports should be prepared in accordance with IRM section

4.10.8.12, *Unagreed Case Procedures (SB/SE Field and Office Examiners Only)*.

- (2) See [Chapter 14](#) and IGM SBSE-20-0520-0029, Timing of Supervisory Approval with Respect to IRC 6751(b)(1), for more information about timing of supervisory approval for penalties.
- (3) The explanation of items, whether presented in a lead sheet format or on Form 886-A, *Explanation of Items*, will be fact intensive, describing all details of the transaction, the tax law, and the bases for any proposed adjustment. There may be a number of exhibits including the appraisal, an appraisal review, the conservation easement deed (with recording date), lender agreement, the contemporaneous written acknowledgment, baseline, and other pertinent documents.
- (4) If the lead sheet work papers are used for the unagreed report, extraneous information (e.g., work paper cross-referencing, audit steps, etc.) that would be of no use to the taxpayer or representative should be removed prior to the issuance of the report.
- (5) In many cases in which an adjustment is proposed, there will be more than one legal theory for the proposed adjustment (in addition to valuation). The legal issues are generally the primary position, and valuation serves as an alternative position.
- (6) **Audit Tip:** It is very important that the report clearly articulate and address all issues and include relevant exhibits. Appeals will generally not consider bases for the adjustment if not addressed in the unagreed report.

### C.1. Job Aids

- (1) Report writing job aids are available on the IRS Virtual Library page. These aids, while intended to help streamline the report writing process, must be customized to address the facts and circumstances of each case.
- (2) The job aids provide a sample presentation format including facts, applicable tax law, analysis, and conclusions. The examiner will need to check the most current edition of the IRC, Treasury Regulations, case law, and published guidance to be sure that there have not been any changes since the date of the job aid.
- (3) The Facts section of the job aid serves as an example of the extent and type of information that should be included in the report.
- (4) The Law section contains a summary of conservation easement tax law. It was prepared in consultation with Counsel and generally is used verbatim in all reports, but examiners should update for any new case law decisions and statutory changes.
- (5) The Analysis and Conclusion section will also be case specific, but this material may be used to assist with drafting of the examiner's conclusions. A discussion

of substantial compliance included in this section should be incorporated into all unagreed reports.

## C.2. Valuation Expert Reports

- (1) The IRS appraiser's or outside fee appraiser's report or review must be attached as an addendum to the examiner's unagreed report.
- (2) **Audit Tip:** Notate on the Examiner Case Activity Record (Form 9984) and in the Report Transmittal (Form 4665) that a complete copy of the IRS appraiser report was provided to the taxpayer so there will be no question that the taxpayer received a copy. It is also a good idea to mention this in the report narrative.

## C.3. Penalties

- (1) The application of penalties is based on the facts and circumstances of each case. There is no statutory authority to waive applicable penalties unless the taxpayer can establish that the reasonable cause exception, to the extent applicable to accuracy-related and other penalties, applies. The reasonable cause exception is not available for gross valuation misstatements. IRC § 6664(c)(3).
- (2) A separate lead sheet or Form 886-A will be needed if there are any proposed penalties.
- (3) Throughout the examination, the examiner should be developing relevant facts to determine which penalties may apply and whether there is reasonable cause for any of the otherwise applicable penalties. Examiners are required to consider penalties, document their determination, and obtain written approval by their immediate supervisor of any determination to seek a penalty in all taxpayer examinations. See IRC § 6751(b)(1).
- (4) See [Chapter 14](#) and IGM SBSE-20-0520-0029, Timing of Supervisory Approval with Respect to IRC 6751(b)(1), for more information about timing of supervisory approval for penalties.
- (5) **Audit Tip:** Do not wait until the end of the audit to think about penalties. Consideration of penalties and gathering of information should be done throughout the examination, beginning with the preplan. Interviews of the taxpayer and third parties may be required to obtain all necessary facts.
- (6) The penalty report for a conservation easement case will generally include a tiering of proposed penalties with multiple alternative positions, starting with valuation misstatements, then substantial understatement, and finally negligence.
- (7) A discussion of reasonable cause must be incorporated into the penalty write-up.

- (8) **Audit Tip:** Examiners should be alert to any indication of fraud and should consult the Fraud Enforcement Advisor if badges of fraud are identified during the examination.
- (9) See [Chapter 14](#) for detailed discussion of penalties and reasonable cause.

## C.4. Technical Assistance

- (1) Program analysts and Counsel attorneys assigned to this issue are available to provide assistance and feedback with respect to unagreed reports. Contacts can be found on the IRS Virtual Library page.

## D. Closing Conference

- (1) A closing conference is normally held with the taxpayer or representative. The purpose of the conference is to explain the bases for any proposed adjustments to the charitable contribution deduction and proposed penalties, confirm the accuracy of the facts, gather new information, and obtain a preliminary response from (or on behalf of) the taxpayer.
- (2) The examiner may want to provide a draft report to the taxpayer or representative in advance of the meeting or at the conference. Since valuation is a significant issue in most conservation easement cases, it is recommended that the IRS appraiser participate in the conference.

## E. Taxpayer Protests

- (1) Taxpayers will generally need to file a formal written protest in order to exercise appeal rights. If the total amount of tax for any tax period is less than \$25,000, a small case request can be submitted instead of a formal written protest.
- (2) [Publication 5, Your Appeal Rights and How to Prepare a Protest If You Don't Agree](#) (PDF), outlines the specific information that must be included in a formal protest. The taxpayer or representative must provide a list of changes they do not agree with, the facts supporting their position, and the authority they are relying upon.
- (3) A protest is not adequate if it does not comply with the requirements as described in Publication 5. A taxpayer's general statements without a clear explanation and without citing any legal basis for disagreement is generally not sufficient.
- (4) Letter 1025, Letter of Protest, is mailed to the taxpayer if the protest is determined to be inadequate. Unless the group manager agrees to an extension, if the taxpayer fails to provide a complete protest within 10 days, the case should be closed for Statutory Notice of Deficiency, Final Partnership Administrative Adjustment, or Notice of Final Partnership Adjustment.

### E.1. Rebuttals to Taxpayer Protest



- (1) If there is new or contradictory information in the protest, the examiner may need to request additional information from the taxpayer or prepare a rebuttal to supplement the unagreed report.
- (2) The examiner should provide a copy of the protest to the IRS appraiser so the appraiser can provide a written rebuttal for issues within the scope of his or her responsibilities (such as qualified appraisal, qualified appraiser, or valuation). The IRS appraiser's rebuttal may be incorporated into a single rebuttal or as an addendum to the examiner's rebuttal.
- (3) A copy of the rebuttal, including the IRS appraiser's rebuttal, should be provided to the taxpayer.

## F. Exhibit 13-1 Conservation Easement Issue Identification Worksheet

- (1) NOTE: This worksheet is not an all-inclusive list of potential issues for donations of conservation easements. Users should review IRC § 170, DEFRA §155, the corresponding Treasury Regulations, Notice 2006-96 and case law.

General Contribution Deduction Issues	Code/Regs/Other
Lack of charitable intent (including receipt of quid pro quo)	IRC § 170(a) Treas. Reg. § 1.170A-1(h)
Conditional gift	Treas. Reg. § 1.170A-1(e) Treas. Reg. § 1.170A-7(a)(3)
Contemporaneous written acknowledgment	IRC § 170(f)(8) Treas. Reg. § 1.170A-13(f) Treas. Reg. § 1.170A-16(b)
Substantiation and reporting requirements	IRC § 170(f)(11) Treas. Reg. § 1.170A-13(c) Treas. Reg. § 1.170A-16(d)-(f)
Qualified Appraisal Issues	Code/Regs/Other
(Note: The Deficit Reduction Act of 1984 (DEFRA) and §170(f)(11) outline the statutory appraisal requirements.)	IRC § 170(f)(11) DEFRA §§ 155(a)(1)(A) and (a)(4) Treas. Reg. § 1.170A-13(c)(3) Treas. Reg. §1.170A-16(e)(1)(iv) Notice 2006-96, Section 3

Appraisal not attached to return (FMV >\$500K)	IRC § 170(f)(11)(D)
Appraisal not prepared in accordance with generally accepted appraisal standards	IRC § 170(f)(11)(E)(i)(II); Treas. Reg. § 1.170A-17(a) Notice 2006-96, Section 3.02(2)
Appraisal not timely	Treas. Reg. § 1.170A-13(c)(3)(i)(A) Treas. Reg. § 1.170A-17(a)(4)
Not a qualified appraiser	IRC § 170(f)(11)(E)(ii) Treas. Reg. 1.170A-13(c)(3)(i)(B) Treas. Reg. 1.170A-13(c)(5) Treas. Reg. 1.170A-17(b)(1) Notice 2006-96, Section 3.03
Doesn't meet IRC, DEFRA, or Treas. Reg. requirements	DEFRA § 155; § 170(f)(11)(E)(i)(I) Treas. Reg. § 1.170A-13(c)(3) Notice 2006-96
Appraisal fee based on percentage of value	Treas. Reg. § 1.170A-13(c)(3)(i)(D) Treas. Reg. § 1.170A-13(c)(6) Treas. Reg. § 1.170A-17(a)(9)
Form 8283 (appraisal summary) missing or incomplete	DEFRA § 155(a)(1)(B) DEFRA § 155(a)(3) Treas. Reg. § 1.170A-13(c)(4) Treas. Reg. § 1.170A-16(d)(iii) Treas. Reg. § 1.170A-16(f)
<b>Qualified Real Property Interest Issues</b>	<b>Code/Regs/Other</b>
Qualified real property interest	IRC § 170(h)(2) Treas. Reg. § 1.170A-14(a) and (b)
Lack of perpetuity	IRC § 170(h)(2)(C) IRC § 170(h)(5)
Lack of perpetuity - Failure to properly subordinate	Treas. Reg. § 1.170A-14(g)(2)
Lack of perpetuity - Extinguishment-allocation of proceeds	Treas. Reg. § 1.170A-14(g)(6)(ii)
Not a qualified organization or eligible donee	IRC § 170(h)(3) Treas. Reg. § 1.170A-14(c)(1)
<b>Conservation Purpose Issues</b>	<b>Code/Regs/Other</b>
Conservation purpose	IRC § 170(h)(4) Treas. Reg. § 1.170A-14(d)
Outdoor recreation or education of public	IRC § 170(h)(4)(A)(i) Treas. Reg. § 1.170A-14(d)(2)
Outdoor recreation or education of public - Lack of access	Treas. Reg. § 1.170A-14(d)(2)(ii)

Protection of environmental system (natural habitat)	IRC § 170(h)(4)(A)(ii) Treas. Reg. § 1.170A-14(d)(3)
Protection of environmental system - Significant habitat or ecosystem	Treas. Reg. § 1.170A-14(d)(3)(ii)
Preservation of open space	IRC § 170(h)(4)(A)(iii) Treas. Reg. § 1.170A-14(d)(4)
Preservation of open space - Scenic enjoyment	IRC § 170(h)(4)(A)(iii)(I) Treas. Reg. § 1.170A-14(d)(4)(ii)

Preservation of open space - Governmental conservation policy	IRC § 170(h)(4)(A)(iii)(II) Treas. Reg. § 1.170A-14(d)(4)(iii)
Preservation of open space - Governmental conservation policy - Physical or visual access required if conservation purpose is frustrated without access	Treas. Reg. § 1.170A-14(d)(4)(iii)(C)
Preservation of historic land or certified historic structure	IRC § 170(h)(4)(A)(iv) Treas. Reg. § 1.170A-14(d)(5)
Preservation of historic land or certified historic structure - Historic land	Treas. Reg. § 1.170A-14(d)(5)(ii)
Preservation of historic land or certified historic structure - Certified historic structure	Treas. Reg. § 1.170A-14(d)(5)(iii)
Preservation of historic land or certified historic structure - Certified historic structure (1) Individually listed or (2) in historic district and NPS certifies	IRC § 170(h)(4)(C) (donations made after 8/17/06) Treas. Reg. § 1.170A-14(d)(5)(iii)
Preservation of historic land or certified historic structure - Lack of visual access	Treas. Reg. § 1.170A-14(d)(5)(iv)(A)
Failure to comply w/ PPA for buildings not individually listed. (façade only)	IRC § 170(h)(4)(B)
Failure to comply w/ PPA for buildings not individually listed - No restriction for entire exterior.	IRC § 170(h)(4)(B)(i)
Failure to comply w/ PPA for buildings not individually listed - Lack of donor/donee written agreement: re donee's qualifications.	IRC § 170(h)(4)(B)(ii)

Failure to comply w/ PPA for buildings not individually listed - Failure to attach appraisal, with photos and description of restrictions.	IRC § 170(h)(4)(B)(iii)
Failure to comply w/ PPA for buildings not individually listed - Failure to pay \$500 filing fee (façade only)	IRC § 170(f)(13)
Not exclusively for conservation purpose	IRC §170(h)(5) Treas. Reg. § 1.170A-14(e)
Not exclusively for conservation purpose	Treas. Reg. § 1.170A-14(e)(2) and (3)
<b>Conservation Purpose Issues</b>	<b>Code/Regs/Other</b>
Inconsistent Use	Treas. Reg. 1.170A-14(e)(2) and (3)
Insufficient or lack of documentation for conservation purpose (baseline study)	Treas. Reg. § 1.170A-14(g)(5)(i) Treas. Reg. §; 1.170A-13(c)(4)(ii)(M)
<b>Valuation Issues</b>	<b>Code/Regs/Other</b>
Overvaluation	IRC § 170(a) Treas. Reg. § 1.170A-14(h)(3)
Deduction not based on FMV	IRC § 170(a) Treas. Reg. § 1.170A-1(c) Treas. Reg. § 1.170A-14(h)(3)
Deduction limited to basis	IRC § 170(e)(1)(A) Contiguous
Parcel/noncontiguous parcel	Treas. Reg. § 1.170A-14(h)(3)(i)
Aggregate partnership investment in an almost contemporaneous transaction indicates the before value of the conservation easement	<i>Plateau Holdings, LLC v. Commissioner</i> , T.C. Memo. 2020-93. <i>TOT Property Holdings, LLC v. Commissioner</i> , TC Docket No. 5600-17 (unpublished bench op., Nov. 22, 2019).
<b>Miscellaneous Issues</b>	<b>Code/Regs/Other</b>
Percentage limitations not computed properly	IRC § 170(b)
Rehabilitation credit-reduction of deduction (façade only)	IRC § 170(f)(14)
Rehabilitation credit-recapture (façade only)	IRC § 50(a) Rev. Rul. 89-90

Partnership anti-abuse rule	Treas. Reg. § 1.701-2
Codified Economic Substance Doctrine	IRC § 7701(o)
<b>Judicial Doctrines</b>	<b>Code/Regs/Other</b>
Step Transaction	See <a href="#">Chapter 10</a>
Substance over Form Doctrine	See <a href="#">Chapter 10</a>
Lack of bona fide partner and partnership	See <a href="#">Chapter 10</a>
<b>Penalties and Penalty Issues</b>	<b>Code/Regs/Other</b>
<b>Taxpayer Penalties</b>	
Accuracy-Related	IRC § 6662(b)(1), (b)(2), (b)(3), (b)(6), (h), (i)
Accuracy-related – reportable transaction understatement	IRC § 6662A(a), (c)
Failure to disclose participation in reportable transaction	IRC § 6707A Treas. Reg. § 301.6707A-1
Fraud Penalty	IRC § 6663
Reasonable Cause	IRC § 6664(c)
<b>Other Penalties</b>	
Appraiser penalty	IRC § 6695A
Tax Return Preparers	IRC § 6694
Promoting Abusive Tax Shelters	IRC § 6700
Aiding and Abetting Understatement of Tax	IRC § 6701
Failure to disclosure- material advisor	IRC § 6707
Failure to maintain list of advisees with respect to reportable transaction	IRC § 6708

## XIV. Penalties

### A. Overview

- (1) Penalties exist to encourage voluntary compliance by supporting the standards of behavior required by the IRC. Examiners are required to consider penalties and document their determination (and obtain written approval by their immediate supervisor of an initial determination to seek a penalty in all taxpayer examinations. See IRC § 6751(b)(1) and Interim Guidance Memorandum SBSE-20-0520-0029 directing examiners when to secure penalty, approval.

- (2) All facts and circumstances must be developed during the examination to determine what penalties (if any) are appropriate. Penalties may be imposed on the taxpayer, return preparer, appraisers and other tax advisors.
- (3) See the IRM 20.1, *Penalty Handbook*, for additional guidance on penalties.

## B. Introduction to Penalty Approval

- (1) Nearly every penalty worked in a field audit requires proper, writing supervisory approval prior to asserting that penalty. IRC § 6751(b)(1). The only penalties determined in the field that do not require supervisory approval under IRC § 6751(b)(1) are the additions to tax under IRC §§ 6651, 6654, and 6655.
- (2) Each penalty determined in an examination must be properly approved, unless specifically excepted under IRC § 6751(b)(2). *Palmolive Building Investors, LLC v. Commissioner*, 152 T.C. 75, 82-87 (2019). Therefore, if an examiner determines the gross valuation misstatement penalty applies, but alternatively asserts the negligence penalty, substantial understatement of income tax penalty, and substantial valuation misstatement penalty, the examiner must secure written supervisory approval for each of these four penalties. Multiple penalties may be approved on the same form. *Belair Woods, LLC v. Commissioner*, 154 T.C. No. 1(2020). Even assessable penalties, such as IRC § 6707A penalties for failures to include reportable transaction information with a return, must be approved. *Laidlaw's Harley Davidson Sales, Inc. v. Commissioner*, 154 T.C. No. 4, slip op. at 19 (Jan. 16, 2020).
- (3) Supervisory approval under section 6751(b)(1) should take the proper form and evidence approval by the proper person at the proper time.
  - **Penalty approval must be in writing.** IRC § 6751(b)(1). All examinations in which a penalty is asserted should include a completed and signed Civil Penalty Approval Form under the 300 tab. Legally, a penalty may be approved in writing through other means. For example, a penalty may be approved by signing the cover letter to a summary report, if the subject penalty is included in that summary report. *PBBM-Rose Hill, LTD. v. Commissioner*, 900 F.3d 193, 213 (5th Cir. 2018).
  - **Penalty approval must also be secured from the proper individual.** To be acceptable approval, the immediate supervisor of the individual who initially determined the penalty must provide the written approval. IRC § 6751(b)(1); *Palmolive Building Investors, LLC v. Commissioner*, 152 T.C. 75, 82-87 (2019).
    - **Note:** Different employees can determine different penalties within the same examination. However, if separate employees determine different penalties in the same examination, then each individual must have their immediate supervisor approve the penalties they determined. *Palmolive Building Investors, LLC v. Commissioner*, 152 T.C. 75, 84-85 (2019). For example, if Revenue Agent A determines

that the negligence penalty applies to the taxpayer's 2015 Form 1120, and Revenue Agent B determines that the substantial understatement of income tax penalty applies to the Taxpayer's 2015 Form 1120, then Revenue Agent A's immediate supervisor must approve the negligence penalty and Revenue Agent B's immediate supervisor must approve the substantial understatement of income tax penalty. An acting supervisor may approve a penalty. *Blackburn v. Commissioner*, 150 T.C. 218, 220, 224 (2018).

- **Note:** A penalty may be determined by an examiner, an Appeals Officer, or Counsel. *Roth v. Commissioner*, T.C. Memo. 2017-248, at \*8-\*12. Therefore, if you are working with Counsel on a case and they recommend a penalty, make sure that the Counsel employee secures their immediate supervisor's written approval. If an examiner's manager mentions that the examiner should assert a specific penalty not previously determined by that examiner, that manager needs to secure the written approval of their immediate supervisor. IRC § 6751(b)(1).
  - **Penalty approvals must be timely.** See Interim Guidance Memorandum SBSE-20-0520-0029 directing examiners when to secure penalty approval for all penalties other than those set forth in IRC §§ 6651, 6654, and 6655 and those automatically calculated through electronic means. That memorandum provides: For all penalties subject to section 6751(b)(1), written supervisory approval required under section 6751(b)(1) must be obtained prior to issuing any written communication of penalties to a taxpayer that offers the taxpayer an opportunity to sign an agreement or consent to assessment or proposal of the penalty.
- (4) As a best practice, Examiners should keep detailed notes about supervisory approval. The notes should include the following information:
- who made the initial determination to assert each penalty;
  - when those determinations were made;
  - when those penalties were first approved in writing;
  - who approved those penalties;
  - what the approver's relationship is to the person who initially determined the penalty (it should always be the determiner's immediate supervisor); and
  - when those penalties were first communicated to the taxpayer.
- (5) Noting this information will help Counsel defend penalties and may limit the times examiners have to testify about the matter.
- (6) Retain all penalty approvals in your file. If you later determine a penalty does not apply or the amount of the penalty changes, do not destroy the previous

approval. You should note the change in determination or amount while making sure to retain the previous approval.

- (7) Examiners should consult Counsel with any IRC § 6751(b) questions.

## **C. Accuracy-Related Penalties**

- (1) Section 6662 imposes accuracy-related penalties on underpayments. Generally, the accuracy-related penalty imposed on any portion of an underpayment is 20% (40% in the case of a gross valuation misstatement under IRC 6662(h) and nondisclosed noneconomic substance transaction under IRC §6662(i)), even if that portion of the underpayment is attributable to more than one type of misconduct. In every case, Examiners should consider all the facts and circumstances to determine if a penalty, an any alternative bases for the penalty, apply.
- (2) The most common accuracy-related penalties in conservation easement cases will be for IRC § 6662(h) gross valuation misstatements, IRC § 6662(b)(1) negligence or disregard of rules or regulations, IRC § 6662(b)(2) substantial understatements of income tax, and IRC § 6662(b)(3) substantial valuation misstatements. Often, an examiner will find it appropriate to assert the IRC § 6662(h) gross valuation misstatement as a primary theory and to assert the three penalties listed in IRC §§ 6662(b)(1)-(3) in the alternative. In syndicated conservation easement cases, Examiners may also assert IRC § 6662A.

### **C.1. Section 6662(b)(1) and (c) Negligence or Disregard of Rules or Regulations**

- (1) A 20% accuracy-related penalty should be asserted pursuant to IRC § 6662(b)(1) and (c) if the underpayment of tax is attributable to negligence or to a careless, reckless, or intentional disregard of rules or regulations.
- (2) Negligence includes any failure to make a reasonable attempt to comply with the provisions of the Internal Revenue Code or to exercise ordinary and reasonable care in the preparation of a tax return. IRC § 6662(c); Treas. Reg. § 1.6662-3(b).
- (3) In *Turner v. Commissioner*, 126 T.C. 299 (2006), the tax court held that the taxpayer was liable for a 20% negligence penalty under IRC § 6662(c). In that case, the appraiser's report was not considered sufficient for the IRC § 6664(c) reasonable cause exception to apply because the report was based on erroneous assumptions.
- (4) The term “disregard” includes any careless, reckless, or intentional disregard of rules or regulations. A disregard is careless if the taxpayer does not exercise reasonable diligence to determine the correctness of a return position that is contrary to a rule or regulation. A disregard is reckless where the taxpayer makes little or no effort to determine whether a rule or regulation exists, under circumstances which demonstrate a substantial deviation from the standard of



conduct that a reasonable person would observe. Disregard is intentional where the taxpayer has knowledge of the rule or regulation that the taxpayer disregards. Treas. Reg. § 1.6662-3(b)(2).

- (5) The terms “rules or regulations” under this section includes the provisions of the IRC, temporary or final Treasury regulations, and revenue rulings or notices (other than notices of proposed rulemaking) issued by the Internal Revenue Service and published in the Internal Revenue Bulletin. Treas. Reg. § 1.6662-3(b)(2). Therefore, if the facts indicate that a taxpayer took a return position contrary to any published notice or revenue ruling, the taxpayer may be subject to the accuracy-related penalty for an underpayment attributable to disregard of rules or regulations.
- (6) See IRM 20.1.5.7, Negligence or Disregard of Rules or Regulations for additional guidance.

## **C.2. Section 6662(b)(2) and (d) Substantial Understatement of Income Tax**

- (1) A 20% accuracy-related penalty should be asserted pursuant to IRC § 6662(b)(2) and (d) if the underpayment of tax is attributable to a substantial understatement of income tax.
- (2) A substantial understatement of income tax exists for a taxable year of an individual if the amount of understatement exceeds the greater of 10% of the tax required to be shown on the return or \$5,000. IRC § 6662(d)(1)(A).
- (3) An understatement of income tax of a corporation (other than an S Corporation or a personal holding company) is substantial if it exceeds the lesser of 10% of the tax required to be shown on the return (or, if greater, \$10,000), or \$10,000,000. IRC § 6662(d)(1)(B).
- (4) The amount of the understatement generally is reduced by the portion of the understatement attributable to any item if:
  - The treatment is, or was, supported by substantial authority, or
  - Facts relevant to the tax treatment were adequately disclosed on the return or on a statement attached to the return and there is a reasonable basis for the tax treatment.
- (5) IRC § 6662(d)(2)(B).
- (6) There is no reduction, however, for any item attributable to a tax shelter, which means either: (1) a partnership or other entity, (2) any investment plan or arrangement, or (3) any other plan or arrangement, if a significant purpose of such partnership, entity, plan, or arrangement is the avoidance or evasion of federal income tax. IRC § 6662(d)(2)(C).
- (7) See IRM 20.1.5.9, *Substantial Understatement*, for additional guidance.

## **C.3. Section 6662(b)(3) and (e) Substantial Valuation Misstatement**

## and Section 6662(h) Gross Valuation Misstatement

- (1) A 20% accuracy-related penalty can be asserted pursuant to IRC § 6662(b)(3) and (e) if the underpayment of tax is attributable to a substantial valuation misstatement. IRC § 6662(e)(1).
- (2) A 40% accuracy-related penalty can be asserted pursuant to IRC § 6662(h) if the underpayment of income tax is attributable to a gross valuation misstatement.
- (3) A substantial valuation misstatement exists when the claimed value of any property is 150% or more of the amount determined to be the correct value. A gross valuation misstatement occurs when the claimed value of any property is 200% or more of the amount determined to be the correct value.
- (4) **Note:** The Pension Protection Act of 2006 (PPA), Pub. L. No. 109–280, sec. 1219(a)(2)(B), 120 Stat. at 1083, amended the rules for the 40% gross valuation misstatement penalty. Before the PPA, the penalty applied when taxpayers misstated the value of their property by 400% or more, and taxpayers could avoid the penalty under certain circumstances if they made the misstatement in good faith and with reasonable cause. The IRC § 6664(c) reasonable cause exception applied to both substantial and gross valuation misstatements. The PPA lowered the threshold for gross valuation misstatements to 200% and eliminated the reasonable cause exception for gross valuation misstatements of charitable contribution property. See secs. 6662(h), 6664(c).
- (5) No penalty is imposed unless the portion of the underpayment attributable to the valuation misstatement exceeds \$5,000 (\$10,000 in the case of a corporation other than an S corporation or a personal holding company). IRC § 6662(e)(2).
- (6) See IRM 20.1.5.10, *Substantial Valuation Misstatement* and IRM 20.1.5.10.3, *IRC 6662(h) Gross Valuation Misstatement*, for additional guidance.

### C.4. Section 6662(b)(6) and (i) Codified Economic Substance Doctrine

- (1) Section 6662(b)(6) provides for a 20% penalty in the case of an underpayment attributable to any disallowance of claimed tax benefits by reason of a transaction lacking economic substance (within the meaning of IRC § 7701(o)) or failing to meet the requirements of any similar rule of law. See [Chapter 10](#) for more information relating to IRC § 7701(o).
- (2) Section 6662(i)(1) provides that the penalty shall be imposed at the rate of 40% in the case of a nondisclosed noneconomic substance transaction as defined in IRC § 6662(i)(2). The term “nondisclosed noneconomic substance transaction” means any portion of a transaction described in IRC § 6662(b)(6) with respect

to which the relevant facts affecting the tax treatment are not adequately disclosed in the return nor in a statement attached to the return.

#### **D. Section 6663 Civil Fraud Penalty**

- (1) Section 6663 imposes a penalty of 75% on any portion of the underpayment of tax is due to fraud.
- (2) In a TEFRA partnership matter, the IRS must prove, by clear and convincing evidence, the partnership-level elements of the fraud penalty based on the conduct and intent of the managing partner(s). If the IRS proves fraud, the fraud penalty is applicable to all the partners in the partnership on any underpayments of tax resulting from the adjustments to partnership items that are attributable to fraud. Those partners may then raise any partner-level defenses in refund actions under section 6230(c).
- (3) Examiners should be alert to any indications of fraud. The Office of Fraud Enforcement and Counsel can assist Examiners as necessary. If badges of fraud are noted, Examiners are required to discuss this with their group manager and involve the local fraud technical advisors as early as possible.
- (4) See IRM 20.1.5.16, *Civil Fraud Penalty*, for additional guidance.

#### **E. Section 6664 Reasonable Cause Exception**

- (1) In general, no penalty will be asserted under IRC §§ 6662 or 6663 if the taxpayer establishes there was reasonable cause for the underpayment and the taxpayer acted in good faith. IRC § 6664(c)(1). See IRM 20.1.5.7.1 & 20.1.5.10.7.1, *Reasonable Cause*, for additional guidance.
- (2) Reasonable cause must be determined on a case-by-case basis, taking into account all the pertinent facts and circumstances. To determine whether reasonable cause exists, examiners must ascertain the taxpayer's experience, knowledge, education, the extent of the taxpayer's review or inquiry in assessing the correctness of the conservation easement donation, and whether the taxpayer relied on any appraisers, return preparers, or other professionals.

##### **E.1. Special Rule for Overvaluation of Charitable Contributions**

- (1) For substantial valuation misstatements of charitable contribution property, reasonable cause may apply only if:
  - The claimed value of the property was based on a qualified appraisal made by a qualified appraiser, and
  - In addition to obtaining the appraisal, the taxpayer made a good faith investigation of the value of the contributed property.
- (2) IRC § 6664(c)(3).
- (3) Improper valuation of conservation easements and a lack of a qualified appraisal are common bases for full or partial disallowance of the charitable

contribution deduction. Accordingly, if the easement is substantially overvalued (150% or more), the reasonable cause exception cannot apply unless the appraisal was a qualified appraisal by a qualified appraiser and the taxpayer made a good faith investigation of the value of the easement in addition to securing the appraisal.

- (4) For returns filed after July 25, 2006, the reasonable cause exception is not available for gross valuation misstatements. IRC § 6664(c)(3).

## E.2. Reliance on Professionals

- (1) Reliance on a return preparer or other professional such as an attorney or appraiser does not automatically constitute reasonable cause and good faith under Treas. Reg. § 1.6664-4(b). *Curtis Investment Company, LLC v. Commissioner*, T.C. Memo. 2017-150, at \*7-\*9, \*40-\*46 (holding no reasonable cause even through the taxpayers claimed they relied on three tax professionals who reviewed the underlying transaction because the tax professionals relied solely on the opinion letter obtained by the promoter and did not provide their own opinion letters).
- (2) Reliance constitutes reasonable cause and good faith if, under all the circumstances, such reliance was reasonable and the taxpayer acted in good faith. However, reasonable cause relief is not appropriate if the professional relief upon was the promoter of the transaction. *CNT Investors, LLC v. Commissioner*, 144 T.C. 161, 226 (2015).
- (3) Reasonable cause and good faith may exist if the taxpayers can demonstrate that:
  - They did not know, nor should have known, that the advisor suffered from a conflict of interest or a lack of expertise,
  - Complete, accurate and all necessary information was provided to the advisor by the taxpayers, and
  - The taxpayers actually relied in good faith on the advisor's judgment.
- (4) *CNT Investors, LLC v. Commissioner*, 144 T.C. 161, 223 (2015).
- (5) If the taxpayer claims reliance on professionals, the examiner must identify specifically who advised the taxpayer and when and what services or advice were provided and determine whether the taxpayer fully disclosed the necessary information for the advisor to make a proper determination.
- (6) This will generally require an interview of the taxpayer and of the professional to confirm the taxpayer's information and evaluate whether non-assertion of the penalty is appropriate due to reasonable cause. Copies of any professional opinion letters, correspondence, analysis, billing records or other documentation should be solicited from the taxpayer or professional to substantiate reliance on professionals.

- (7) Examiners should review IRM 20.1.5.7.4, *Reliance on Advice*, for additional guidance.

## F. Section 6694 Understatement of Taxpayer's Liability by Tax Return Preparer

- (1) Examiners are responsible for determining whether IRC § 6694 penalties should be asserted on the return preparer. Preparer penalties should be asserted only after consideration of all facts and circumstances and not based solely on the determination of deficiencies in related tax return examinations.
- (2) Examiners may consider asserting penalties under IRC § 6694 on appraisers for inflated or incorrect appraisals in lieu of IRC § 6695A if the appraiser meets the definition of a nonsigning return preparer. Treas. Reg. § 301.7701-15(b)(2).
- (3) **CAUTION:** The statute of limitations on assessing the IRC § 6694(a) penalty is three years from the date the return or claim for refund (from which the penalty stems) was filed. IRC § 6696(d). Securing an extension on the return being examined does not extend the IRC § 6694(a) penalty statute. Form 872-D, Consent to Extend the Time on Assessment of Tax Return Preparer Penalty is used to extend the IRC § 6694(a) case statute.
- (4) There is no statute of limitations on assessment of the IRC § 6694(b) penalty. IRC § 6696(d). However, in the interest of efficiency and preserving evidence, these examinations should not be delayed.
- (5) IRM 20.1.6, *Preparer, Promoter, Material Advisor Penalties*, provides additional guidance on the return preparer penalties. Examiners also may contact their local Return Preparer Coordinator for help with preparer penalty cases.

## G. Sections 6700 and 6701 Penalty for Promoting Abusive Tax Shelters and Aiding and Abetting Understatements of Tax

- (1) Various individuals (or entities) may be subject to penalty under IRC §§ 6700 or 6701 for their role in the transaction. For example, appraisers may be subject to IRC § 6700 for direct or indirect participation in the sale of a tax plan or arrangement that results in a material gross overvaluation misstatement. Section 6701 penalties may also be applicable for the preparation of the appraisal if the appraiser knows or had reason to believe that the appraisal was to be used in connection with a material tax matter and knows that use of the document would result in an understatement of tax.
- (2) The examiner should consider a referral to the SB/SE Lead Development Center (LDC) for return preparers, appraisers, promoters, authors of legal opinions, donee organizations, or anyone else who was directly or indirectly involved with a scheme or promotion advocating improper or overvalued conservation easement donations.

- (3) While examiners may secure information on the role and level of involvement of each person in conjunction with the determination of the appropriateness of taxpayer penalties, examiners cannot commence an IRC § 6700, Promoting Abusive Tax Shelters, Etc., or IRC § 6701, Aiding and Abetting Understatement of Tax Liability, penalty investigation without specific authorization from the SB/SE LDC. A referral form can be found on the LDC Web page.
- (4) Contact a SB/SE LDC program analyst for assistance on the application of IRC § 6700 or 6701 penalties, determination of whether a referral is warranted, or coordination of participant examinations.
- (5) There is no statute of limitations on asserting the IRC §§ 6700 and 6701 penalties. However, in the interest of efficiency and preserving evidence, these examinations should not be delayed
- (6) See IRM 20.1.6, *Overview of the Return Preparer, Promoter, and Material Advisor Penalties*, and IRM 4.32 for additional guidance.

## H. Section 6695A Substantial and Gross Valuation Misstatements Attributable to Incorrect Appraisals

- (1) Section 6695A was added by the Pension Protection Act of 2006. It provides a civil penalty on any person who prepares an appraisal of the value of property that the appraiser knows (or reasonably should have known) is to be used in connection with a return or a claim for refund, and such appraisal results in a substantial or gross valuation misstatement (as defined in IRC § 6662(e) and (h) respectively).
- (2) The amount of the IRC § 6695A penalty is the lesser of:
  - The greater of 10% of the amount of the underpayment attributable to the misstatement or \$1,000, or
  - 125% of the gross income received from the preparation of the appraisal
- (3) Under IRC § 6695A(c), the penalty does not apply if the appraiser establishes that it was "more likely than not" that the value established in the appraisal was correct.
- (4) There are no preassessment appeal rights extended to the appraiser at the time of the penalty case closure by the examiner. The appraiser may request an appeals conference upon notice of the Service's intent to assess the penalty.
- (5) **CAUTION:** The statute of limitations for the appraiser penalty case is three years from the later of the due date of the related return or the date the return was filed. Securing an extension on the return being examined does not extend the appraiser penalty statute. Form 872-AP, Consent to Extend the Time on Assessment of IRC Section 6695A Penalty, is used to extend the appraiser penalty case statute.

- (6) Interim guidance on how to open and pursue an IRC § 6695A case was issued on January 22, 2020 at LB&I-20-0120-001. Please review that document when you believe an IRC § 6695A penalty case should be opened.
- (7) See IRM 20.1.12, *Penalties Applicable to Incorrect Appraisals*, and the Servicewide Penalty Web page for additional guidance on the assessment of this penalty.

## **H.1. Office of Professional Responsibility Sanctions**

- (1) Prior to the changes instituted by the Pension Protection Act of 2006 (PPA), an IRC § 6701 penalty for aiding and abetting was required to be assessed before the Office of Professional Responsibility (OPR) could seek disciplinary action against an appraiser.
- (2) The PPA eliminated the penalty assessment requirement. Disciplinary action may include, but is not limited to, suspending or barring an appraiser from:
  - Preparing or presenting appraisals on the value of property or other assets to the Treasury Department or the IRS.
  - Appearing before the Treasury Department or the IRS for the purpose of offering opinion evidence on the value of property or assets.

## **I. Penalties Specifically Related to Reportable Transactions**

- (1) Certain penalties are applicable only to reportable transactions as defined in Treas. Reg. § 1.6011-4(b). In Notice 2017-10, the IRS identified certain syndicated conservation easement transactions as listed transactions. A syndicated conservation easement transaction is a listed transaction if:
  - An investor receives promotional materials that offer prospective investors in a pass-through entity the possibility of a charitable contribution deduction that equals or exceeds an amount that is two and one-half times the amount of the investor's investment.
    - The promotional materials may be oral or written.
    - For purposes of this notice, promotional materials include, but are not limited to, documents described in § 301.6112-1(b)(3)(iii)(B) of the Regulations.
  - The investor purchases an interest, directly or indirectly (through one or more tiers of pass-through entities), in the pass-through entity that holds real property.
  - The pass-through entity that holds the real property contributes a conservation easement encumbering the property to a tax-exempt entity and allocates, directly or through one or more tiers of pass-through entities, a charitable contribution deduction to the investor.

- Following that contribution, the investor reports on his or her federal income tax return a charitable contribution deduction with respect to the conservation easement.
- (2) Transactions that are the same or similar to the transaction described above are considered listed transactions.
  - (3) If a syndicated conservation easement transaction was entered into by a taxpayer on or after January 1, 2010, the taxpayer must have reported their participation. Similarly, material advisors have similar obligations to disclose their participation in listed transactions. IRC § 6111. A material advisor is any person:
    - who provides any material aid, assistance, or advice with respect to organizing, managing, promoting, selling, implementing, insuring, or carrying out any reportable or listed transaction, and
    - who directly or indirectly derives gross income in excess of \$250,000 (\$50,000 for a reportable or listed transaction if substantially all of the tax benefits of the transactions are provided to natural persons).
  - (4) IRC § 6111(b)(1)(B).

### **I.1. Section 6662A Accuracy-Related Penalty on Understatements with Respect to Reportable Transactions**

- (1) Section 6662A sets forth a special accuracy-related penalty for understatements resulting from reportable transactions. A reportable transaction understatement is not calculated in the same manner as the accuracy-related penalty under IRC § 6662. An example of how to calculate this amount can be found at IRM 20.1.5.17.2.
- (2) The IRC § 6662A accuracy-related penalty is 20% of the reportable transaction understatement if the transaction is properly disclosed and 30% if the transaction is not properly disclosed. IRC § 6662A(c).
- (3) In determining whether reasonable cause should excuse the IRC § 6662A penalty, an examiner should look to the special definition of reasonable cause specifically set out for that penalty which is described in IRC § 6664(d). To receive reasonable cause relief, the taxpayer must have shown not only reasonable cause (as discussed for the accuracy-related penalties), but also that the taxpayer:
  - Adequately disclosed the relevant facts about the transaction;
  - Had substantial authority for claiming the tax treatment of the transaction, and
  - Believed the treatment was more likely than not correct. IRC § 6664(d)(3).

### **I.2. Section 6707A Penalty for Failure to Include Reportable Transaction Information with Return**



- (1) Section 6707A(a) provides that any person who fails to file a timely, complete Form 8886, *Reportable Transaction Disclosure Statement*, is subject to a penalty. The IRC § 6707A penalty is imposed in addition to any other penalty. There is no reasonable cause exception to the § 6707A penalty. Generally, the Commissioner may rescind the penalty if doing so would promote compliance with the IRC and effective tax administration. Treas. Reg. § 301.6707A-1(e)(1)(i). This rule does not apply to listed transactions and so is unavailable in the case of a transaction described in Notice 2017-10, Section 2, and substantially similar transactions.
- (2) For listed SCE transactions described in Notice 2017-10, “participants” include (but are not limited to) investors, the pass-through entity (any tier, if multiple tiers are involved), or any other person whose tax return reflects the tax consequences of such SCE transaction. The Notice specifically provides that a donee described in § 170(c) shall not be treated as a participant in the SCE transaction under § 1.6011-4.
- (3) Under § 6707A(b)(1), the amount of the penalty is 75% of the decrease in tax shown on the return as a result of the listed transaction, or the decrease that would have resulted from the transaction if it were respected for federal tax purposes. The penalty amount is subject to the maximum and minimum amounts. The maximum penalty under § 6707A(b)(2)(A) for listed transactions is \$200,000 (\$100,000 in the case of a natural person), and the minimum penalty under § 6707A(b)(3) is \$10,000 (\$5,000 in the case of a natural person).
- (4) A penalty imposed under § 6707A is in addition to any other penalty imposed under the Internal Revenue Code. § 6707A(f); Treas. Reg. § 301.6707A-1(a); IRM 4.32.4.1.1(3).

### **I.3. Section 6707 Failure to Furnish Information Regarding Reportable Transaction**

- (1) Section 6707(a) provides that any material advisor who fails to file a timely, complete Form 8918, *Material Advisor Disclosure Statement*, is subject to a penalty. There is no reasonable cause exception to the § 6707 penalty. Generally, the Commissioner may rescind the penalty if doing so would promote compliance with the IRC and effective tax administration. IRC § 6707(c). This rule does not apply to listed transactions and so is unavailable in the case of a transaction described in Notice 2017-10, Section 2, and substantially similar transactions.
- (2) The penalty amount equals \$50,000 for any failure. In the case of listed transactions, including transactions described in Notice 2017-10, Section 2, and substantially similar transactions, the penalty is the greater of \$200,000 or 50 % of the gross income derived by such person with respect to aid, assistance, or advice which is provided with respect to the listed transaction before the date the return is filed under section 6111. In the case of an intentional failure the

penalty is the greater of \$200,000 or 75% of the gross income derived by such person with respect to aid, assistance, or advice which is provided with respect to the listed transaction before the date the return is filed under section 6111.

#### **I.4. Section 6708 Failure to Maintain Lists of Advisees with Respect to Reportable Transactions**

- (1) Section 6708 provides a penalty applicable to a material advisor who does not make a list required to be maintained under IRC 6112 available to the Service within 20 business days of a request. For more information about making such a request, see IRM 4.32.2.8.2.2.2, *Issuance of IRC 6112 Letter*. The penalty can be imposed in addition to any other penalty. The penalty is subject to a reasonable cause exception.
- (2) The amount of the penalty is \$10,000 per day.

### **XV. State Tax Credits**

#### **A. Overview**

- (1) An increasing number of states offer incentives in the form of income tax credits for the donation of conservation easements. Some state conservation easement tax credit programs allow for the transfer and sale of the tax credits. A taxpayer may qualify for a state tax credit, but still not qualify for a federal tax deduction.

#### **B. State Tax Credit Programs**

- (1) The following states and territories have or had some form of tax credit programs for conservation easements:
  - Arkansas (a “wetland and riparian zone conservation tax credit”)
  - California
  - Colorado
  - Connecticut
  - Delaware
  - Florida (exemption from real property tax)
  - Georgia
  - Iowa
  - Maryland
  - Massachusetts
  - Mississippi
  - New Mexico

- New York
  - North Carolina (repealed for tax years after 2013)
  - South Carolina
  - Virginia
  - Wisconsin (limited to farmland preservation agreements, and the farmland must be in a farmland preservation area identified in a certified farmland preservation plan)
  - Puerto Rico
- (2) The requirements for most state tax credit programs are similar to the requirements under IRC § 170(h) for deducting the contribution of a conservation easement. There is no uniform model, but most state programs determine the amount of the credit based on a percentage of the FMV of the donated easement. Generally, the programs provide for carryforward of unused tax credits over a number of years. Some states, including Colorado, South Carolina, Virginia, New Mexico, and Georgia have transferable tax credits. Puerto Rico also has transferable tax credits available only to the original donor of the easement.
- (3) Transferability allows taxpayers to sell tax credits to third parties. Credit brokers or facilitators assist taxpayers in negotiating the sales price and are generally reimbursed for their services from the proceeds of the sale. The tax credit purchasers then use the credits to pay their own state tax liabilities.
- (4) In 2007, The Conservation Resource Center, a nonprofit conservation organization, published a report analyzing the impact of state conservation tax credits. According to the report, taxpayers generally receive as much as 70 to 82 percent of the face value of their state tax credits, depending on market rates at the time of the sale.

### C. Receipt of State Tax Credits

- (1) Generally, a state tax credit, to the extent that it can be applied against the original recipient's current or future state tax liability, is treated for federal income tax purposes as a reduction or potential reduction in that taxpayer's state tax liability, not as a payment of cash or property to the taxpayer that is includible in gross income under IRC § 61. See generally *Maines v. Commissioner*, 144 T.C. 123, 143 (2015). S
- (2) For an easement donated on or before August 27, 2018, the receipt of a state conservation easement tax credit does not reduce the amount of the taxpayer's federal charitable contribution deduction under IRC § 170. See *Tempel v. Commissioner*, 134 T.C. 341, 351 n.17 (2011), aff'd sub nom, *Esgar Corp. v. Commissioner*, 744 F.3d 648 (10th Cir. 2014). For those donations, the federal tax effect to the original recipient of a state credit is normally a reduction in the amount of state tax imposed and paid for purposes of IRC § 164. The mere fact

the state tax credit is transferable does not cause it to lose its character as a reduction or potential reduction in liability in the hands of the taxpayer who originally qualified for the credit. If the state tax credit is sold or exchanged, please contact Counsel for advice on the federal tax treatment of the credit.

- (3) Donations of conservation easements made after August 27, 2018, that result in a state tax credit reduce the amount of the taxpayer's federal charitable contribution deduction under IRC § 170. Treas. Reg. § 1.170A-1(h)(3). Most state credits received for donations of conservation easements made after August 27, 2018, are considered quid pro quo benefits by the regulations. Treas. Reg. § 1.170A-1(h)(3). As a result, the deductions for these contributions must be reduced by the amount of the state tax credit. Treas. Reg. § 1.170A-1(h)(3)(i). However, if the total amount of the state and local tax credits is 15% or less of the taxpayer's payment, or 15% or less of the FMV of the property transferred by the taxpayer, then the state tax credit is not considered a quid pro quo benefit and will not reduce the allowable deduction. Treas. Reg. § 1.170A-1(h)(3)(vi).
- (4) While state tax *credits* reduce the amount of the allowable federal tax *deduction*, state tax deductions do not reduce the allowed federal tax deduction (unless the state tax deduction exceeds the amount of the taxpayer's payment or the FMV of the property contributed). Treas. Reg. § 1.170A-1(h)(3)(ii).

#### **D. Sale of State Tax Credits**

- (1) Please contact Counsel if it is determined that during a year at issue a taxpayer sold any state tax credits related to a conservation easement.