



September 2021

House Proposal Targets Charitable Deductions for Conservation Easements by Passthrough Entities

On Sept. 13, 2021, the U.S. House Ways and Means Committee announced a proposal to limit charitable deductions for conservation easement contributions made by partnerships and other passthrough entities. The proposal, which targets syndicated conservation easement transactions, would disallow a taxpayer's charitable contribution deduction when it exceeds 2.5 times the taxpayer's modified basis in the passthrough entity. The proposal also addresses the application of the accuracy-related penalty and statute of limitations to conservation easement transactions. If enacted, the House proposal would make it considerably more difficult for taxpayers to prevail in cases involving conservation easement transactions.

Background on Syndicated Conservation Easements and IRS Enforcement Efforts

Under Internal Revenue Code (IRC) Section 170, a taxpayer is permitted a charitable deduction for contributing a qualified real property interest to a qualified organization exclusively for conservation purposes. An individual taxpayer's charitable deduction is typically limited to 50% of his or her adjusted gross income. Promoters and advisors have established syndicated conservation easements to circumvent the deduction limitations for individual taxpayers. In the typical syndicated conservation easement transaction, a passthrough entity is established to acquire real property, and investors acquire interests in the passthrough entity in exchange for a fee. The passthrough entity then grants a conservation easement to a tax-exempt organization, such as a land trust. Under the partnership tax provisions, the entity's charitable contribution deduction passes through to the investor partners. In some cases, the syndicated

conservation easement transactions produce charitable deductions that far exceed the amounts invested in the passthrough entity.

The IRS has aggressively pursued abusive conservation easement transactions for over a decade. In [Notice 2017-10](#), the IRS identified syndicated conservation easement transactions as listed transactions that expose taxpayers to heightened reporting requirements and increased penalties. In November 2019, the IRS announced a coordinated campaign to target syndicated conservation easement transactions. In June 2020, the IRS made a [time-limited settlement offer](#) to taxpayers with pending docketed Tax Court cases. The IRS has been successful in litigating the conservation easement cases in Tax Court and continues to identify new cases for audit.

Summary of House Proposal

The House proposal would significantly limit the use of syndicated conservation easements. If enacted, it would provide as follows:

- Disallowance Rule. A taxpayer's charitable contribution deduction would be disallowed where it exceeds 2.5 times the taxpayer's modified basis in interests in the passthrough entity.
- Exception Where Three-Year Holding Period Is Satisfied. The disallowance rule would not apply to conservation contributions where the three-year holding period is satisfied. The holding period is satisfied three years after the latest of the last date on which the passthrough entity acquired any portion of the real property subject to the conservation easement or any partner/member acquired an interest in the passthrough entity.
- Exception for Certain Family Partnerships. The House proposal provides a limited exception to allow for contributions made through family partnerships.
- Application of the Accuracy-Related Penalty. The House proposal confirms that the accuracy-related penalty would apply to any underpayment attributable to the disallowance of a conservation easement transaction under the proposed rule. Such a disallowance would be deemed a gross valuation misstatement, and a penalty equal to 40% of the understatement would apply. There would be no reasonable-cause defense to the 40% accuracy-related penalty. Finally, the IRS would not be required to obtain supervisory approval under IRC Sec. 6751(b) prior to assessing the accuracy-related penalty.
- Applicable Statute of Limitations
 - For returns filed for partnership taxable years beginning before Jan. 1, 2018, tax may be assessed against the partners within two years following the date on which a final partnership administrative adjustment may no longer be petitioned to the U.S. Tax Court.
 - If a conservation easement deduction is disallowed under this proposal, it will be deemed a listed transaction that must be disclosed to the IRS. Therefore, the statute of limitations for assessment will not expire until one year after the earlier of: (i) the date on which the transaction is disclosed to the IRS; or (ii) the date on which a material advisor satisfies the disclosure requirements under IRC Sec. 6112.
- Effective Date- The House proposal would be made retroactive for all transactions occurring after Dec. 23, 2016 (i.e., the date of Notice 2017-10).

Conclusion

It remains to be seen whether the House proposal will be enacted, but it appears to have bipartisan support. In the meantime, the IRS continues to aggressively identify, audit, and litigate cases involving syndicated conservation easements. Taxpayers who have invested in conservation easement transactions should consult their tax advisor to understand how the pending legislation and ongoing IRS enforcement efforts affect them.

Authors

This GT Alert was prepared by:

- [G. Michelle Ferreira](#) | +1 415.655.1305 | ferreiram@gtlaw.com
- [Barbara T. Kaplan](#) | +1 212.801.9250 | kaplanb@gtlaw.com
- [Courtney A. Hopley](#) | +1 415.655.1314 | hopleyc@gtlaw.com

GT's Tax Audits, Litigation & Criminal Tax Defense Group:

- [Jared E. Dwyer](#) | +1 305.579.0564 | dwyerje@gtlaw.com
- [G. Michelle Ferreira](#) | +1 415.655.1305 | ferreiram@gtlaw.com
- [Scott E. Fink](#) | +1 212.801.6955 | finks@gtlaw.com
- [Courtney A. Hopley](#) | +1 415.655.1314 | hopleyc@gtlaw.com
- [Barbara T. Kaplan](#) | +1 212.801.9250 | kaplanb@gtlaw.com
- [Shira Peleg](#) | +1 212.801.6754 | pelegs@gtlaw.com
- [Jennifer A. Vincent](#) | +1 415.655.1249 | vincentj@gtlaw.com

Albany. Amsterdam. Atlanta. Austin. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany.[~] Houston. Las Vegas. London.* Los Angeles. Mexico City.+ Miami. Milan.» Minneapolis. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. Salt Lake City. San Francisco. Seoul.[∞] Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.^ Tokyo.* Warsaw.~ Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ~Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. *Operates as a separate UK registered legal entity. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. »Greenberg Traurig's Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ¶Greenberg Traurig's Tokyo Office is operated by GT Tokyo Horitsu Jimusho and Greenberg Traurig Gaikokuhojijimubengoshi Jimusho, affiliates of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig's Warsaw office is operated by GREENBERG TRAUIG Nowakowska-Zimoch Wysokiński sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in GREENBERG TRAUIG Nowakowska-Zimoch Wysokiński sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2021 Greenberg Traurig, LLP. All rights reserved.*