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Charitable Contribution Deductions Under IRC § 170

SUMMARY

Subject to certain limitations, taxpayers can take deductions from their adjusted gross incomes (AGIs) for contributions of cash or other property to or for the use of charitable organizations.¹ To take a charitable deduction, taxpayers must contribute to a qualifying organization² and substantiate contributions of \$250 or more.³ Litigation generally occurred in this reporting cycle in the following three areas:

- Substantiation of the charitable contribution;
- Valuation of the charitable contribution; and
- Requirements for a qualified conservation easement.

TAS identified and reviewed 29 cases decided between June 1, 2017, and May 31, 2018, with charitable deductions as a contested issue. The IRS prevailed in 24 cases, taxpayers prevailed in four cases, and the remaining case resulted in a split decision. Taxpayers represented themselves (appearing *pro se*) in 10 of the 29 cases (34 percent), and the IRS prevailed fully in all 10 cases.

TAXPAYER RIGHTS IMPACTED⁴

- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to a Fair and Just Tax System*

PRESENT LAW

Charitable contributions made within the taxable year are generally deductible by taxpayers, but in the case of individual taxpayers, a taxpayer must itemize deductions from income on his or her income tax return in order to deduct the contribution.⁵ Transfers to charitable organizations are deductible only if they are contributions or gifts,⁶ not payments for goods or services.⁷ A contribution or gift will be allowed as a deduction under Internal Revenue Code (IRC) § 170 only if it is made “to” or “for the use of” a qualifying organization.⁸

1 Internal Revenue Code (IRC) § 170.

2 To claim a charitable contribution deduction, a taxpayer must establish that he or she made a gift to a qualified entity organized and operated exclusively for an exempt purpose, no part of the net earnings of which inures to the benefit of any private shareholder or individual. IRC § 170(c)(2).

3 IRC § 170(f)(8)(A).

4 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the IRC. See IRC § 7803(a)(3).

5 IRC §§ 63(d) and (e), 161, and 170(a).

6 The Supreme Court of the United States has defined “gift” as a transfer proceeding from a “detached and disinterested generosity.” *Comm’r v. Duberstein*, 363 U.S. 278, 285 (1960).

7 See also Treas. Reg. § 1.170A-1(g) (no deduction for contribution of services).

8 IRC § 170(c).

For individuals, charitable contribution deductions are generally limited to 60 percent of the taxpayer's contribution base (AGI computed without regard to any net operating loss carryback to the taxable year under IRC § 172).⁹ However, subject to certain limitations, individual taxpayers can carry forward unused charitable contributions in excess of the 60 percent contribution base for up to five years.¹⁰ Corporate charitable deductions are generally limited to ten percent of the taxpayer's taxable income and are also available for carryforward for up to five years, subject to limitation.¹¹ Taxpayers cannot deduct services that they offer to charitable organizations; however, incidental expenditures incurred while serving a charitable organization and not reimbursed, may constitute a deductible contribution.¹²

Substantiation

For cash contributions, taxpayers must maintain receipts from the charitable organization, copies of cancelled checks, or other reliable records showing the name of the organization, the date, and the amount contributed.¹³ Deductions for single charitable contributions of \$250 or more are disallowed in the absence of a contemporaneous written acknowledgement from the charitable organization.¹⁴

The donor is generally required to obtain the contemporaneous written acknowledgment no later than the date he or she files the return for the year in which the contribution is made, and it must include:

- The name of the organization;
- The amount of cash contribution;
- A description (but not the value) of non-cash contribution;
- A statement that no goods or services were provided by the organization in return for the contribution, if that was the case;
- A 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 that was the case.¹⁵

For each contribution of property other than money, taxpayers generally must maintain a receipt showing the name of the recipient, the date and location of the contribution, and a description of the property.¹⁶ When taxpayers contribute property other than money, the amount of the allowable deduction is the fair market value of the property at the time of the contribution.¹⁷ This general rule

9 This new 60 percent limitation was part of tax reform legislation that went into effect on January 1, 2018 and is an increase from the 50 percent prior limit. See Pub. L. No. 115-97, § 11023, 131 Stat. 2054, 2074-2075 (Dec. 22, 2017). In addition, the new legislation repealed the donee reporting provision contained in IRC § 170(f)(8)(D). See Pub. L. No. 115-97, § 13705, 131 Stat. 2054, 2169 (Dec. 22, 2017). We discussed a case involving this provision in our 2017 Annual Report. See National Taxpayer Advocate 2017 Annual Report to Congress 447-449 (discussing *15 West 17th Street LLC v. Comm'r*, 147 T.C. No. 19 (2016)).

10 IRC § 170(d)(1).

11 IRC § 170(b)(2) and (d)(2).

12 Treas. Reg. § 1.170A-1(g). Meal expenditures in conjunction with offering services to qualifying organizations are not deductible unless the expenditures are away from the taxpayer's home. *Id.* Likewise, travel expenses associated with contributions are not deductible if there is a significant element of personal pleasure involved with the travel. IRC § 170(j).

13 Treas. Reg. § 1.170A-13(a)(1).

14 IRC § 170(f)(8). See also Treas. Reg. § 1.170A-13(f).

15 IRS Pub. 1771, *Charitable Contributions Substantiation and Disclosure Requirements* (Rev. 3-2016).

16 Treas. Reg. §§ 1.170A-13(b)(1)(i) to (iii).

17 Treas. Reg. § 1.170A-1(c)(1).

is subject to certain exceptions that in some cases limit the deduction to the taxpayer's cost basis in the property.¹⁸ For claimed contributions exceeding \$5,000, the taxpayer must obtain a qualified appraisal prepared by a qualified appraiser.¹⁹

ANALYSIS OF LITIGATED CASES

TAS reviewed 29 decisions entered between June 1, 2017, and May 31, 2018, involving charitable contribution deductions claimed by taxpayers. Table 8 in Appendix 3 contains a detailed list of those cases. Of the 29 cases, the most common issues were: substantiation (or lack thereof) of the claimed contribution (18 cases), valuation of the property contributed (four cases), and contribution of an easement (nine cases).²⁰

Substantiation

Eighteen cases involved the substantiation of deductions for charitable contributions. When determining whether a claimed charitable contribution deduction is adequately substantiated, courts tend to follow a strict interpretation of IRC § 170. As noted earlier, deductions for single charitable contributions of \$250 or more are disallowed in the absence of a contemporaneous written acknowledgement from the charitable organization.²¹

In *RERI Holdings I, LLC v. Commissioner*, the taxpayer, a limited liability company, purchased the remainder interest of a property in Hawthorne, California in March 2002 for \$2,950,000.²² In August 2003, the taxpayer assigned the remainder interest to the University of Michigan, a tax-exempt organization. On its 2003 Form 1065, *U.S. Return of Partnership Income*, the taxpayer claimed a charitable contribution deduction of \$33,019,000. The taxpayer attached a required Form 8283, *Noncash Charitable Contributions*, to its return that provided the date and manner of acquisition of the contributed remainder interest but, critical to this case, left blank the space for the "Donor's cost or other adjusted basis." The IRS initially reduced, then subsequently disallowed, the claimed charitable contribution deduction and asserted valuation misstatement penalties. The taxpayer challenged this disallowance and penalty assertion in Tax Court.

In addressing whether the taxpayer had properly substantiated its contribution of the remainder interest in the property and was entitled to claim a charitable contribution deduction, the court discussed the Deficit Reduction Act of 1984 (DEFRA).²³ The court noted that this legislation directed the Treasury Secretary to prescribe regulations under IRC § 170 that would require donors to meet stricter substantiation requirements to support claimed charitable contribution deductions. The court examined

18 Treas. Reg. § 1.170A-1(c)(1). Note that the deduction is reduced for certain contributions of ordinary income and capital gain property. See IRC § 170(e).

19 IRC § 170(f)(11)(C). "Qualified appraisal" and "qualified appraiser" are defined in IRC §§ 170(f)(11)(E)(i) and (ii), respectively. On July 27, 2018, after the close of our reporting period, the IRS released lengthy final regulations relating to IRC § 170. See T.D. 9836, 83 Fed. Reg. 36417-01 (July 30, 2018). These regulations provide guidance on cash, check, or other monetary gift substantiation requirements; noncash substantiation requirements; and new requirements for qualified appraisals and qualified appraisers. For example, the regulations provide that an email from a donee organization to a donor can qualify as a written communication and be used to substantiate a monetary contribution. However, a blank pledge card provided by a donee organization but filled out by a donor is insufficient substantiation.

20 Cases addressing more than one described issue are counted for each issue. For example, cases addressing the valuation of easements are counted once as a valuation issue case and again as a conservation easement issue case. As a result, the breakdown of case issues above will not add up to the total number of cases reviewed by TAS.

21 IRC § 170(f)(8). See also Treas. Reg. § 1.170A-13(f).

22 *RERI Holdings I, LLC v. Comm'r*, 149 T.C. No. 1 (2017), appeal docketed, No. 17-1266 (D.C. Cir. Dec. 18, 2017).

23 Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 155(a)(1) and (2), 98 Stat. 494, 691 (1984).

the legislative history of DEFRA and stated that in enacting the legislation, Congress intended that the new substantiation requirements would alert the IRS to potential overvaluations of contributed property, thereby deterring taxpayers from claiming excessive charitable contribution deductions, which was a concern of Congress.

The court then noted that in response to Congress' directive in DEFRA, Treasury amended Treas. Reg. § 1.170A-13 to add new paragraph (c), which provided new substantiation requirements that apply to donors who contribute property worth more than \$5,000. To meet these requirements, donors must obtain a qualified appraisal of the contributed property, attach a "fully completed" appraisal summary to the return on which the deduction is first claimed, and maintain records containing specified information. The appraisal summary must provide the adjusted cost or other basis of the donated property. Under the regulations, a taxpayer that does not meet these requirements is denied a deduction for the contribution.

The court next discussed the doctrine of substantial compliance, which may allow a taxpayer to claim a charitable contribution deduction even if it fails to strictly comply with all reporting requirements. The court discussed two cases with different results and then applied them to this case. The court previously held in *Bond v. Commissioner* that the reporting requirements of Treas. Reg. § 1.170A-13 are "directory and not mandatory," meaning that a taxpayer who fails to strictly comply with reporting requirements may still be allowed to claim a charitable contribution deduction provided the taxpayer substantially complies.²⁴ In *Bond*, the taxpayers attached to their return an appraisal summary on Form 8283 that included all required information except for the appraiser's qualifications. However, the taxpayers provided this missing information around the time that the IRS began the audit of their return. The court in *Bond* stated that a denial of the deduction would be an unnecessary sanction and therefore allowed the deduction based on the substantial compliance doctrine.

The court then contrasted *Bond* with its holding in *Hewitt v. Commissioner*.²⁵ In *Hewitt*, the taxpayers donated non-publicly traded stock but did not obtain a qualified appraisal or attach an appraisal summary to their return. The IRS disallowed the taxpayers claimed charitable contribution deduction even though it did not dispute that the amount the taxpayers deducted was equal to the stock's value. The court in *Hewitt* upheld the IRS's disallowance of the deduction and rejected the taxpayers' substantial compliance argument, finding that the statutory language required an appraisal and the need for the IRS to be provided with appropriate information to be aware of potential overvaluations, thereby distinguishing this case from *Bond*. The court also mentioned the case of *Smith v. Commissioner*, where it articulated a standard for substantial compliance based on the *Bond* and *Hewitt* cases.²⁶ In *Smith*, the court noted that in determining whether there was substantial compliance, the court would consider whether the donor provided sufficient information for the IRS to evaluate the contribution, in accordance with congressional intent.

Turning to the case at hand, the court noted that the taxpayer's Form 8283, *Noncash Charitable Contributions*, appraisal summary showed that it had purchased the remainder interest in the property but left blank the space for "Donor's cost or other adjusted basis." Therefore, the taxpayer did not meet the requirements of the regulations.²⁷ The court then addressed whether the taxpayer should be allowed to claim the charitable contribution deduction based on the doctrine of substantial compliance.

24 *Bond v. Comm'r*, 100 T.C. 32, 40-41 (1993).

25 *Hewitt v. Comm'r*, 109 T.C. 258 (1997), *aff'd without published opinion*, 166 F.3d 332 (4th Cir. 1998).

26 *Smith v. Comm'r*, T.C. Memo. 2007-368, *aff'd*, 364 F. App'x 317 (9th Cir. 2009).

27 See Treas. Reg. § 1.170A-13(c)(4)(ii)(E).

The court noted that the taxpayer's omission of its basis in the remainder interest on the Form 8283 prevented the appraisal summary from accomplishing its intended purpose. The court reiterated that Congress had directed Treasury to adopt stricter substantiation requirements for charitable contributions to alert the IRS to potential overvaluations of contributed property, thereby deterring taxpayers from claiming excessive deductions. The court stated that the taxpayer had purchased the remainder interest in March 2002 for around \$3 million and claimed a charitable contribution deduction of approximately \$33 million for its assignment of the remainder interest in August 2003, a mere 17 months later. Had the taxpayer properly reported its cost basis on the Form 8283, the significant disparity between the purchase price of the property and its claimed fair market value would have alerted the IRS to a potential overvaluation of the property. Therefore, because the taxpayer failed to provide sufficient information on its Form 8283 for the IRS to evaluate its contribution, the court found that the taxpayer had not substantially complied with the substantiation requirements and was not entitled to any deduction.²⁸

Value of the Property Contributed

In *Gardner v. Commissioner*, the taxpayer, an avid big-game hunter, owned a vast collection of 'trophies' from his hunting expeditions.²⁹ The taxpayer sought to downsize his collection and, on the advice of a fellow hunter, decided to donate various unwanted specimens to the Dallas Ecological Foundation, a tax-exempt organization. Following the recommendation of the fellow hunter, the taxpayer contacted an appraisal expert, who agreed to appraise 177 specimens that the taxpayer wished to donate.

The appraisal expert prepared a report and used a replacement cost method to determine the fair market value of the items. Specifically, the appraiser estimated the cost to replace each item by calculating the expected out-of-pocket expenses for traveling to a hunting site, spending time on a safari, killing the animal, removing, preserving, and shipping the body, and taxidermy costs. The appraiser, who was aware that the taxpayer intended on claiming a charitable contribution deduction for the donation of the items, appraised the taxpayer's 177 specimens at \$1,425,900. Relying on this valuation, the taxpayer reported a charitable contribution of \$1,425,900 on his 2006 tax return. Due to charitable contribution deduction limits, the taxpayer only claimed a charitable contribution deduction of \$129,459 in 2006, but carried forward the excess contribution into the following tax years, deducting \$429,313 in 2007 and another \$783,509 in 2008.³⁰ The IRS examined the taxpayer's 2006-2008 returns and determined that the value of the 177 specimens was only \$163,045. The IRS therefore asserted deficiencies of \$137,647 and \$274,228 for 2007 and 2008, respectively.

The court first noted that under the regulations, the amount of the charitable contribution allowed as a deduction is generally equal to the fair market value of the property at the time the contribution is made.³¹ The court also mentioned that the IRS and taxpayer agreed that the taxpayer had fulfilled all necessary procedural requirements, including obtaining a qualified appraisal. The court pointed out that the only dispute in this case was the fair market value of the 177 donated items and that the burden of proving it was on the taxpayer.

The court then discussed the valuation methodologies of the parties and noted their fundamental disagreement in this regard. The IRS took the position that fair market value is determined by

28 *RERI Holdings I, LLC v. Comm'r*, 149 T.C. No. 1 (2017) appeal docketed, No. 17-1266 (D.C. Cir. Dec. 18, 2017).

29 *Gardner v. Comm'r*, T.C. Memo. 2017-165.

30 See IRC § 170(b)(1)(C).

31 See Treas. Reg. § 1.170A-1(c)(1).

considering market prices for comparable items while the taxpayer insisted that, because of their unique nature, the specimens had no real comparables in the open market and valuation was appropriate using a replacement cost methodology.

The court noted that an important factor in the dispute between the IRS and the taxpayer was whether the specimens were more appropriately classified as “collectibles,” whose value depends on who shot the animal, where it was shot, and previous ownership, or “commodities,” which can be valued on the open market. The court stated that it had “no difficulty” concluding that the specimens were commodities and the IRS’s valuation based on the market price was appropriate. The court noted that the taxpayer did not call his appraiser as a witness or seek to enter his report into evidence. The court stated that the donated specimens were no longer available for inspection and that the expert witnesses on both sides had therefore relied on the appraisal report, which overrated many specimens, provided limited information about them, and did not explain why the appraiser had adopted a replacement cost approach.

The court then discussed the testimony of experts on both sides. It noted that the IRS’s expert was a certified taxidermy appraiser, who had conducted appraisals for museums, state and local governments, and the IRS. The expert’s testimony, which the court found “credible and convincing,” characterized the specimens as consisting primarily of “remnants and scraps” of a trophy collection. The expert valued the contributed specimens by consulting market data from brick and mortar auction houses, online auction sites, and websites specializing in hunting specimens. The expert assigned each specimen a price on the assumption that each specimen was in “excellent” condition, then reduced the appraised value by each observed defect from photographs in the appraisal report. Ultimately, the IRS’s expert valued the 177 contributed specimens at \$41,140 in excellent condition and, after viewing the appraisal photographs of the items that showed defects in many items, he reduced his appraisal to \$34,240.

Next, the court discussed the testimony of the taxpayer’s three experts. It noted that two of these experts did not put a dollar figure on the 177 specimens but rather sought to defend the replacement cost methodology. The court found their testimony, which essentially claimed that the market approach asserted by the IRS could not capture the true fair market value of the specimens because they were museum-quality pieces uniquely valuable for research, to be without any factual support and therefore “wholly unreliable.” The court pointed out various issues with their qualifications, lack of professional experience appraising taxidermy, improper assumptions, and overreliance on the original flawed appraisal report. The taxpayer’s third expert claimed that the 177 specimens had a replacement cost value of \$2,544,300, which was \$1,128,400 more than the replacement cost that the taxpayer had claimed as a charitable contribution on his tax return. This expert arrived at this figure by assuming that each of the 177 specimens would be obtained on a separate trip, crated and shipped back individually, and incur taxidermy and mounting expenses. The court noted that this expert conceded that multiple animals could be hunted in one trip and the taxpayer had in fact done so.

The court, which had adjudicated valuation disputes over charitable contributions of hunting specimens in the past, stated that it generally relied on a comparable sales method of valuation where an active market existed, and that the replacement cost method of valuation was proper only in the case of unique property with a limited market and no evidence of comparable sales. The court was persuaded by the testimony of the IRS’s expert that the specimens were mostly “remnants, leftovers, and scraps” and that the taxpayer was essentially discarding unwanted items. The court found the testimony of the taxpayer’s experts that all the specimens were of excellent quality to be unpersuasive, and noted that their assertions lacked a factual basis and were contradicted by the photographs contained in the initial

appraisal report. Therefore, the court found that the specimens were commodities, not collectibles, and that the market price for similar items, rather than replacement cost, should determine fair market value. The court stated that the IRS's expert had credibly determined that the fair market value of the specimens, depending on their condition, was between \$34,240 and \$41,140. The court held that the taxpayer had not carried his burden of proving that the fair market value of the specimens exceeded the \$163,045 value allowed by the IRS and therefore sustained the IRS's determination to disallow the taxpayer's charitable contribution deduction in excess of this amount.³²

Qualified Conservation Contribution

For a gift to constitute a qualified contribution under IRC § 170, the donor must possess a transferrable interest in the property and intend to irrevocably relinquish all rights, title, and interest to the property without any expectation of some benefit in return.³³ Taxpayers generally are not permitted to deduct gifts of property consisting of less than the taxpayer's entire interest in that property.³⁴ Nevertheless, taxpayers may deduct the value of a contribution of a partial interest in property that constitutes a "qualified conservation contribution,"³⁵ also known as a conservation easement. A contribution will constitute a qualified conservation contribution only if it is of a "qualified real property interest" made to a "qualified organization" and "exclusively for conservation purposes."³⁶ All three conditions must be satisfied for the donation to be deemed a "qualified conservation contribution." For the current reporting period, we identified nine charitable contribution deduction cases involving conservation easements, an increase from the five cases we identified in the 2017 reporting period.³⁷

In *BC Ranch II, L.P. v. Commissioner*, the taxpayers, two limited partnerships, BCR I and BCR II, appealed to the United States Court of Appeals for the Fifth Circuit a Tax Court decision upholding the IRS's disallowance of their charitable contribution deductions for conservation easements grants.³⁸ In 2003 BCR I had purchased a 3,744-acre piece of land (the "ranch") and, in 2005, conveyed approximately 1,866 acres to BCR II. In 2003, the developers of the ranch approached the North American Land Trust ("NALT"), an IRC § 501(c)(3) organization, to determine if the ranch could qualify for a tax-deductible conservation easement. NALT advised the taxpayers that the land would qualify as a conservation easement, with one benefit of the easement being the protection of the nesting areas and habitat of the gold-cheeked warbler, which was listed as an endangered species.

Prior to donating the conservation easement, the taxpayers assembled extensive documentation from NALT's visits to the ranch site, including photographs, property maps, details of site visit by an NALT biologist, and maps of the gold-cheeked warbler habitat. The taxpayers also hired an environmental consultant to advise as to how the property should be developed to ensure compliance with the Endangered Species Act. The consultant completed a report that included detailed aerial photographs and topographic maps that had habitat surveys of the gold-cheeked warbler's probable nesting areas.

After the taxpayers and NALT assembled two binders of "baseline documents" detailing the conservation easements, the taxpayers, BCR I and BCR II, donated conservation easements to NALT in

32 *Gardner v. Comm'r*, T.C. Memo. 2017-165.

33 IRC § 170(f)(3).

34 *Id.*

35 IRC §§ 170(b)(1)(E) and (f)(3)(B)(iii).

36 IRC § 170(h)(1)(A)-(C).

37 See National Taxpayer Advocate 2017 Annual Report to Congress 447.

38 *BC Ranch II, L.P. v. Comm'r*, 867 F.3d 547 (5th Cir. 2017), *vacating and remanding* T.C. Memo. 2015-130.

2005 and 2007, respectively. Both easements were substantially similar and provided for the protection and preservation of the environment and its natural inhabitants, including the gold-cheeked warbler and other birds and animals. The easements granted perpetual rights to NALT over the conservation areas while reserving certain narrow rights to the taxpayers that could not impact the conservation purpose of the easements. The easements could only be amended with the NALT's consent and only to modify the boundaries of "homesite parcels," which were areas of land where limited partners could build homes on select five-acre sites. These modifications were allowed so long as they did not increase the homesite parcels above five acres. NALT regularly monitored the conservation area and found it to be in good condition and in compliance with the terms of the easements.

The taxpayers each claimed charitable contribution deductions of approximately \$8,000,000 for conservation easements they had donated to NALT in 2005 and 2007. The IRS disallowed these deductions and asserted that the taxpayers were liable for gross valuation misstatement penalties. The taxpayers petitioned the Tax Court, which held that the IRS had properly disallowed the charitable contribution deductions, as the conservation easements were not given in perpetuity. The taxpayer appealed to the United States Court of Appeals for the Fifth Circuit.

After reviewing the basic law governing conservation easements and noting that a conservation easement restriction must be made in perpetuity to qualify for a charitable contribution deduction, the court discussed the perpetuity requirement. The court discussed the basic terms of the easement, including the homesite modification provision. As mentioned above, this provision allowed the taxpayers, with NALT's consent, to amend the property covered by the easements but only for the limited purpose of modifying the boundaries of the five-acre homesite parcels and without increasing these parcels above five acres. The court stated that these modifications were only permitted if in NALT's reasonable judgment they did not interfere with any of the conservation purposes.

The Tax Court had agreed with the IRS that the homesite boundary modification provision violated the perpetuity requirement contained in IRC § 170(h)(2)(C). Relying on *Belk v. Commissioner*, the Tax Court held that an easement is not qualified real property granted in perpetuity if the boundaries of the property subject to the easement may be modified.³⁹ The Court of Appeals for the Fifth Circuit found that the Tax Court's reliance on the *Belk* case was misplaced and distinguished it. It noted that the easements in this case were significantly different than the one in *Belk*. For example, the easements in this case allowed only the homesite parcels boundaries to be changed and only within the tracts subject to the easement and without increasing the size of the homesite parcels. Unlike in *Belk*, where entire tracts of land could be swapped in and out of the easement, the exterior boundaries and total acreage of the easements in this case could not be changed. Any homesite parcel boundary adjustments would require NALT's consent and remain within the easements. The court noted that such adjustments might be necessary to account for new nesting sites for the warblers and would not provide any financial benefit to the easement donors.

After distinguishing the easements from the one in *Belk*, the court stated that they were more akin to ones in two conservation façade easements cases. In those cases, two courts of appeals held that conservation easements are perpetual even though trusts could consent to the partial lifting of restrictions to allow repairs and changes to the façades of buildings.⁴⁰ The Fifth Circuit noted that the courts in those cases had applied "common sense reasoning" to allow for the modification of an

39 *Belk v. Comm'r*, 774 F.3d 221 (4th Cir. 2014), *aff'g* 140 T.C. 1 (2013). We discussed the *Belk* case in our 2015 Annual Report. See National Taxpayer Advocate 2015 Annual Report to Congress 517-518.

40 See *Comm'r v. Simmons*, 646 F.3d 6 (D.C. Cir. 2011); *Kaufman v. Shulman*, 687 F.3d 21 (1st Cir. 2012).

easement to promote the underlying conservation interests and that this rationale applied in this case too. The court also noted that the perpetuity of the easement was ensured by the fact that NALT had “virtually unrestricted discretion” to withhold consent to any modifications.

The court finished its discussion of the perpetuity requirement by making two final points. First, it noted that the conservation easement provision under IRC § 170(h) was enacted at the urging of conservation activists, by an overwhelming majority of Congress, and with the goal of conserving thousands of acres of property. Therefore, the usual strict construction of statutory loopholes did not apply to conservation easements. When applying an ordinary standard of statutory construction, the court stated it was satisfied that its perpetuity analysis was correct. Also, the court attached to its opinion a copy of the conservation easement plan and stated that it provided visual confirmation that the homesite adjustment provision would not violate the perpetuity requirement.

The court then turned to the baseline documentation requirement issue. Under the regulations, if a donor of a conservation easement retains rights to property that may impair the conservation interests, the donor must make available to the donee, prior to the time the donation is made, documentation sufficient to establish the condition of the property at the time of the contribution.⁴¹ The regulations provide various examples of proper baseline documents including different types of maps, land use history, and aerial and on-site photographs. The court emphasized that the regulations use the term “may include” rather than “shall include” to indicate that this list is flexible and not rigid.

The Tax Court had held that the taxpayers had failed to meet the baseline documentation requirement of the regulations and characterized the documentation provided by the taxpayers as “unreliable, incomplete, and insufficient” to accurately depict the condition of the property subject to the easements. In reaching this conclusion, the Tax Court determined that some of the documentation was untimely and inaccurate. The Court of Appeals for the Fifth Circuit criticized the Tax Court for its rigid approach and for failing to consider several items in the record that would have sufficiently established the condition of the property prior to the donation, including photographs, reports, and site plans. The Court of Appeals also stated that the timing of these items was appropriate and showed “a great deal of collaboration” between the donor and donee prior to the donation. In sum, the Fifth Circuit found that the taxpayers had provided “more than sufficient” documentation to NALT establishing the condition of the property prior to the donation of the conservation easement and therefore met the baseline documentation requirement.

Therefore, the Court of Appeals for the Fifth Circuit vacated the Tax Court’s holding with respect to the perpetuity and baseline documentation requirements. The court remanded the case to the Tax Court to consider other grounds asserted by the IRS to disqualify the easements that had not been previously addressed by the Tax Court.⁴²

⁴¹ See Treas. Reg. § 1.170A-14(g)(5)(i).

⁴² *BC Ranch II, L.P. v. Comm’r*, 867 F.3d 547, 556 (5th Cir. 2017), *vacating and remanding* T.C. Memo. 2015-130.

CONCLUSION

IRC § 170 and the accompanying Treasury Regulations provide detailed requirements with which taxpayers must strictly comply. The statutory and regulatory requirements to qualify for a deduction become more stringent as deductions increase in size and taxpayers should be mindful of the newly-released final regulations under IRC § 170.⁴³ Like last year, most of the charitable contribution cases we reviewed this year addressed issues regarding substantiation of contributions, while several cases discussed the value of the contributed property and the complex rules governing the donation of a conservation easement.

Under the new tax reform legislation, taxpayers may now deduct up to 60 percent of their contribution base through qualifying charitable contributions.⁴⁴ However, due to the increase in the standard deduction, fewer taxpayers are likely to itemize their deductions, leading to a potentially significant reduction in charitable giving and less litigated cases in this area.

43 See T.D. 9836, 83 Fed. Reg. 36417-01 (July 30, 2018). Some parts of these final regulations do not go into effect until after July 30, 2018 and may lead to more litigation in future years when they become effective.

44 This bill was introduced as the Tax Cuts and Jobs Act but was passed under a different title. See Pub. L. No 115-97, § 11023, 131 Stat. 2054, 2074-2075 (2017).