

SCETs: Do Tax Court Valuations Reflect Government Rhetoric?

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In this article, Stone argues that data from Tax Court decisions involving syndicated conservation easements show that easements and substantially similar transactions with no technical flaws are not based on

willfully false values.

For many years, the IRS has been targeting syndicated conservation easement transactions (SCETs) for their alleged overvaluation of donated property.¹ In a 2020 announcement, then-IRS Commissioner Charles Rettig said, “The IRS will continue to actively identify, audit and litigate these syndicated conservation easement deals as part of its vigorous and relentless effort to combat abusive transactions. These abusive transactions undermine the public’s trust in private land conservation and defraud the government of revenue. Ending these abusive schemes remains a top priority for the IRS.”²

The government’s enforcement actions against SCETs are not limited to the IRS. In a 2018 press release, then-Deputy Assistant Attorney General Richard E. Zuckerman said, “The Department of

Justice is working with our partners in the Internal Revenue Service to shut down fraudulent conservation easement shelters . . . which were based in willfully false valuations.”³

As ominous and frequent as these claims have been, the Tax Court has rarely reached the valuation of an SCET, at least since its decision in the 2009 landmark taxpayer win in *Kiva Dunes*,⁴ without finding a technical flaw (for example, the deed, baseline report, Form 8283, etc.). This article focuses on those few cases in which the Tax Court has valued an SCET and what the IRS has identified as “substantially similar transactions”⁵ in which no technical flaw was found.

Enforcement History

A brief history of the enforcement initiatives taken by the IRS and the Justice Department is useful to understand the government’s overall position. The IRS, Justice Department, and other parts of the government have made a concerted effort to target SCETs and substantially similar transactions since 2016. The most notable examples include:

- **Notice 2017-10, 2017-4 IRB 544.** In December 2016 the IRS issued Notice 2017-10 labeling SCETs and substantially similar transactions as listed transactions.⁶ On November 9, 2022, the Tax Court issued an

³ Department of Justice release announcing suit against conservation easement scheme promoters (Dec. 19, 2018).

⁴ *Kiva Dunes Conservation LLC v. Commissioner*, T.C. Memo. 2009-145.

⁵ Reg. section 301.6011-4(c)(4); LTR 201017076 (substantial similarity to Notice 95-34, 1995-23 IRB 1); FSA 200218014 (substantial similarity to Notice 2001-16, 2001-09 IRB 1); CCA 200712044 (substantial similarity to Notice 2005-13, 2005-1 C.B. 630); and CCA 200929005 (substantial similarity to Notice 2004-8, 2004-1 C.B. 333).

⁶ A listed transaction is a transaction that is the same as or substantially similar to one of the types of transactions that the IRS has determined to be a tax avoidance transaction. Listed transactions can be identified by notice, regulation, or other form of published guidance as a listed transaction.

¹ See ILM 202044010 (explaining that the “promoters obtain an appraisal that purports to be a qualified appraisal . . . but that generally inflates the value of the conservation easement based on unreasonable conclusions about the development potential of the real property”).

² IR-2020-130.

opinion in *Green Valley Investors*⁷ indicating that Notice 2017-10 would be held invalid for all SCETs for not adhering to the Administrative Procedure Act.

- **EcoVest complaint.** On December 18, 2018, the Justice Department filed a complaint alleging that “Defendants [EcoVest] organize, promote, or sell (or assist in the organization promotion and sale of) a highly structured — and abusive — tax scheme involving the syndication of conservation easements.”⁸ On March 13, 2023, the Justice Department and EcoVest filed a stipulation in which EcoVest denied any wrongdoing or liability regarding the allegations in the complaint but agreed to pay a settlement and consented to a permanent injunction prohibiting participation in activities related to SCETs.
- **IRS compliance campaign.** In November 2019 the IRS launched a formal compliance campaign targeting SCETs.⁹
- **Fisher indictment.** On February 24, 2022, the Justice Department issued the following statement: “A federal grand jury sitting in Atlanta, Georgia, returned a superseding indictment on Feb. 24 charging seven individuals with conspiracy to defraud the United States and other crimes arising out of their promotion of fraudulent tax shelters involving syndicated conservation easements dating back nearly two decades.”¹⁰
- **Proposed regulations.** On December 8, 2022, the IRS issued proposed regulations (REG-106134-22) identifying certain SCETs and substantially similar transactions as listed transactions.¹¹

- **SECURE 2.0 Act of 2022.** On December 29, 2022, the SECURE 2.0 Act of 2022 was signed into law.¹² It revises section 605 to set new limitations and rules on SCETs.¹³

Tax Court Valuation of SCETs

This valuation analysis focuses on SCETs and substantially similar transactions in which the Tax Court did not deny the deduction based on a technical flaw before finding the fair market value of the donation. Thus, the data displayed in tables 1 through 3 reflect cases in which the FMV of a deduction resulting from a SCET or substantially similar transaction was found without the Tax Court holding that there was a technical flaw.

Overall, as shown in Table 1, 10 cases reported conservation easement deductions totaling \$88,628,417. The Tax Court upheld \$74,669,396 — approximately 84 percent — of the original claimed deductions.

The cases shown in Table 2 reported conservation easement deductions totaling \$35,266,758. The Tax Court upheld \$26,392,991 — approximately 75 percent — of the original claimed deductions.

⁷Although this decision and subsequent order are applicable only to petitioner, the Court intends to apply this decision setting aside Notice 2017-10 to the benefit of all similarly situated taxpayers who come before us.” *Green Valley Investors LLC v. Commissioner*, 159 T.C. No. 5 (2022). See also *Mann Construction Inc. v. United States*, 539 F. Supp. 3d 745, 763 (E.D. Mich. 2021); *GBX Associates LLC v. United States*, No. 1:22-cv-00401 (N.D. Ohio 2022); *Green Rock LLC v. IRS*, No. 2:21-cv-01320 (N.D. Ala. 2023).

⁸*United States v. EcoVest Capital Inc.*, No. 1:18-cv-05774 (N.D. Ga. 2018).

⁹IR-2019-182; Kristen A. Parillo, “IRS Is Building Up Its Easement Toolbox,” *Tax Notes Federal*, Nov. 18, 2019, p. 1215.

¹⁰Justice Department release announcing the *Fisher* indictment (Mar. 1, 2022); *United States v. Fisher*, No. 1:21-cr-00231 (N.D. Ga. 2022).

¹¹REG-106134-22.

¹²The SECURE 2.0 Act is a component of the Consolidated Appropriations Act, 2023 (P.L. 117-328).

¹³Codified at section 170(h)(7).

Table 1. Valuations From *Kiva Dunes* Until Issuance of Notice 2017-10

Case Name	Decision Year	Value Reported on Return	Tax Court Value
<i>Kiva Dunes Conservation LLC v. Commissioner</i> , T.C. Memo. 2009-145	2009	\$30,588,235	\$28,656,004
<i>Trout Ranch LLC v. Commissioner</i> , T.C. Memo. 2010-283	2010	\$2,179,849	\$560,000
<i>Boltar LLC v. Commissioner</i> , 136 T.C. 326 (2011)	2011	\$3,245,000	\$42,400
<i>Butler v. Commissioner</i> , T.C. Memo. 2012-72, Easement 1 ^a	2012	\$4,684,000	\$2,458,300
<i>Butler</i> , Easement 2	2012	\$191,000	\$139,400
<i>Butler</i> , Easement 3	2012	\$2,550,000	\$1,637,600
<i>Butler</i> , Easement 4	2012	\$2,936,000	\$2,312,800
<i>Esgar Corp. v. Commissioner</i> , T.C. Memo. 2012-35	2012	\$2,274,500	\$149,051
<i>Mountanos v. Commissioner</i> , T.C. Memo. 2013-138	2013	\$4,691,500	\$0
<i>Schmidt v. Commissioner</i> , T.C. Memo. 2014-159	2014	\$1,600,000	\$1,152,445
<i>SWF Real Estate LLC</i> , T.C. Memo. 2015-63	2015	\$7,398,333	\$7,350,000
<i>McGrady v. Commissioner</i> , T.C. Memo. 2016-233 ^b	2016	\$2,350,000	\$1,491,896
<i>Palmer Ranch Holdings Ltd. v. Commissioner</i> , T.C. Memo. 2016-190, on remand from 812 F.3d 982 (11th Cir. 2016), affirming in part, and remanding T.C. Memo. 2014-79	2016	\$23,940,000	\$23,940,000

^aIn *Butler*, the Tax Court valued four separate easements for a single taxpayer.

^bIn *McGrady*, the court also valued the donation of a fee simple interest that is discussed below.

Table 2. Valuations Post-Issuance of Notice 2017-10

Case Name	Decision Year	Value Reported on Return	Tax Court Value
<i>Pine Mountain Preserve LLLP v. Commissioner</i> , T.C. Memo. 2018-214 ^a	2018	\$4,100,000	\$4,779,500
<i>Rajagopalan v. Commissioner</i> , T.C. Memo. 2020-159 ^b	2020	\$4,879,000	\$4,879,000
<i>Johnson v. Commissioner</i> , T.C. Memo. 2020-79	2020	\$610,000	\$372,919
<i>Champions Retreat Gold Founders LLC v. Commissioner</i> , T.C. Memo. 2022-106, on remand from 959 F.3d 1033 (11th Cir. 2020), vacating and remanding T.C. Memo. 2018-146	2022	\$10,427,435	\$7,834,091
<i>Murphy v. Commissioner</i> , T.C. Memo. 2023-72, Easement 1 ^c	2023	\$8,424,909	\$2,790,274
<i>Murphy</i> , Easement 2	2023	\$1,080,814	\$100,000
<i>MurFam Enterprises LLC v. Commissioner</i> , T.C. Memo. 2023-73	2023	\$5,744,600	\$5,637,207

^aIn *Pine Mountain*, the Tax Court did not value two of the three easements since it determined that neither qualified as a real property interest.

^bIn *Rajagopalan*, the Tax Court did not come to an independent value for the easement. But it sustained the taxpayer's full deduction, saying, "We find, from all these different perspectives, that the FMV of the conservation easement is *at least* the amount claimed by SS Mountain (and that flowed through to Kumar and Sapp) — \$4,879,000" (emphasis in original).

^cIn *Murphy*, there were two easements at issue, and the Tax Court examined each separately.

Tax Court Fee Simple Valuations

Fee simple donations are not inherently susceptible to many of the technical flaws that have been the cornerstones of IRS arguments. From the time of the *Kiva Dunes* decision, the Tax Court has determined a valuation in only one substantially similar transaction of a fee simple donation, as shown in Table 3.

Table 3. Valuation of Fee Simple Donation in *McGrady*

Case Name	Decision Year	Value Reported on Return	Tax Court Value
<i>McGrady</i> , T.C. Memo. 2016-233	2016	\$2,350,000	\$2,191,896

In *McGrady*, the Tax Court upheld 93 percent of the claimed valuation, 30 percent more than its valuation of the conservation easement donation.

So Many SCETs, Why So Few Valuations?

With an estimated 750 or more docketed cases in the Tax Court, the number of valuations since the IRS issued Notice 2017-10 may appear low. However, the explanation for that may be much simpler than you would think. Persuading the Tax Court to disallow a deduction on technical grounds is a much easier road to victory for the IRS because (1) these flaws are often found throughout SCETs, and (2) valuation disputes are fact-intensive and expend large amounts of resources, which requires much more money and time to be spent by the IRS.

To illustrate this point, the IRS has relied heavily on reg. section 170A-14(g)(6)(ii) (proceeds extinguishment regulation) to defeat taxpayers in easement valuation battles since the Tax Court first addressed the regulation in *Carroll*.¹⁴ In fact, since the Tax Court issued its decision in *Coal Property*,¹⁵ the IRS has repeatedly used the proceeds extinguishment regulation to successfully defeat taxpayers in SCET litigation. From the Tax Court's decision in *Coal Property* until the invalidation of the proceeds

extinguishment regulation by the Eleventh Circuit in *Hewitt*,¹⁶ the IRS persuaded the Tax Court to find that more than 15 SCETs violated the proceeds extinguishment regulation.

The Future of SCETs

SCETs will likely see a short-term decrease in conservation easement deductions because of the passing of SECURE 2.0. However, SECURE 2.0 did not address fee simple donations. Further, the proposed regulations only mention fee simple donations once, and that comes in the preamble.¹⁷ The Tax Court has unequivocally stated in a precedential opinion that it has “never understood the preamble to proposed regulations to be precedential.”¹⁸ With many of the technical arguments not being at issue in fee simple donations the IRS will inevitably be forced into valuation disputes.

Conclusion

Despite the rhetoric from the IRS and Justice Department regarding SCETs, the data from the Tax Court show that SCETs and substantially similar transactions with no technical flaws have not been based on “willfully false values.” In these cases, the Tax Court upheld \$100,689,468 of \$123,285,175 — or almost 81 percent — in reported deductions stemming from donated conservation easements. It was even more favorable to the only fee simple donation, upholding 93 percent of the claimed deduction.

As donations likely start to focus on fee simple interests, the IRS will be forced to make an earnest effort in determining the FMV of charitable donations and stop relying on technical readings of the regulations. ■

¹⁶ *Hewitt v. Commissioner*, 21 F.4th 1336 (11th Cir. 2021).

¹⁷ “Proposed section 1.6011-9(a) provides that a transaction that is the same as, or substantially similar to, a syndicated conservation easement transaction described in proposed section 1.6011-9(b) is a listed transaction for purposes of section 1.6011-4(b)(2) and sections 6111 and 6112. ‘Substantially similar to’ is defined in section 1.6011-4(c)(4) to include any transaction that is expected to obtain the same or similar types of tax consequences and that is either factually similar or based on the same or a similar tax strategy. In the context of a syndicated conservation easement transaction, that would include, for example, transactions in which the contributed property is described in section 170(h)(2)(A) or (B) or a fee interest in real property” (emphasis added). REG-106134-22.

¹⁸ *Dobin v. Commissioner*, 73 T.C. 1121 (1980).

¹⁴ *Carroll v. Commissioner*, 51 T.C. 213 (2016).

¹⁵ *Coal Property Holdings LLC v. Commissioner*, 153 T.C. 126 (2019).