

CC-2021-001

October 01, 2020

Settlement of Syndicated Conservation
Easement Transaction in Cases
Docketed Before the U.S. Tax Court

Subject: Additional Information

Cancel Date: Until Further Notice

I. PURPOSE

This notice provides guidance about the settlement option offered by the Office of Chief Counsel (CC) in Notice 2017-10 syndicated conservation easement (SCE) transactions in certain cases pending before the United States Tax Court.

II. DISCUSSION

A. The Settlement Generally

1. Why is the Office of Chief Counsel offering a settlement option to certain participants in Notice 2017-10 syndicated conservation easement transactions?

Use of SCE transactions has led to increased IRS enforcement efforts and litigation. Some partnerships and their partners who participated in SCE transactions have expressed interest, through their tax advisors, in exploring settlement options. In an effort to resolve a substantial number of these cases in an efficient, coordinated, and consistent manner, CC has decided to provide a standard settlement offer to certain partnerships and their partners with SCE transaction cases pending before the Tax Court.

2. Why should a partner participate in the settlement?

The settlement resolution offers partners who engaged in an SCE transaction the opportunity to resolve their docketed case in an efficient manner. Based on the existing state of the law, partners should not expect a better result at trial or in the Independent Office of Appeals (Appeals) than what is provided in this settlement.

Partners who choose not to participate in this initiative run the risk of full disallowance of all deductions claimed with respect to the SCE transactions and imposition of penalties, including:

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- An accuracy-related penalty under section 6662 (calculated in most cases at a 40 percent rate).
- Alternatively, an accuracy-related penalty under section 6662A (calculated at either the 20 percent rate or 30 percent rate in the case of a nondisclosed transaction).
- The 75 percent civil fraud penalty under section 6663, in appropriate cases.

B. Settlement Terms – Eligibility & Election

1. Who is eligible to participate in the settlement?

Only those partnerships with cases pending before the Tax Court that received letters inviting them to elect into the settlement may participate in the settlement. The presence of a partner in the partnership who is under criminal investigation may render the partnership ineligible for the settlement, even if it had received an offer letter. However, the IRS will consider whether a resolution can be reached on the terms of the settlement with the partners who are not under criminal investigation. Under such circumstances, the partnership is encouraged to discuss possible resolution with the CC attorney assigned to the Tax Court case.

2. May individual partners participate in the settlement?

No. In order to participate in the settlement, all of the partners of the partnership described in B.1. must agree to participate.

CC may consider offers from a group of fewer than all partners, but only if (1) the group represents a significant percentage of all of the partnership's interests in the partnership, and (2) *all* partners in the partnership, whether or not participating, waive the right to consistent agreements under § 6224(c)(2) if requested by CC. See B.3. and D.1.b. for additional details. Cooperation in providing information and documents is also expected and will be considered. See D.1.b.

3. If an offer is made by a group of fewer than all of the partners, will CC settle on the same terms available to partnerships with full participation by all of its partners?

No. While CC may consider offers from a group of partners representing a significant percentage of partnership interests, but fewer than all partners, the terms of any settlement will be less favorable than if all partners participate. In such a case, the group of participating partners must agree to the applicable increased penalty rate as described in C.7.b. The group of partners may use the same Attachment 1, Syndicated Conservation Easement Initiative Terms and Election, used for a partnership election to make the offer. See B.8. When making this offer, the group must provide the names of all participating partners in the group, their percentage interests in the partnership, and the amount of deductions claimed. The group has 30 days from the issuance of this CC Notice to make an offer to settle for the group of fewer than all of its partners.

In the event of extraordinary circumstances that prevent the partnership from securing a partner's acceptance, CC may consider treating the partnership as if 100% of the partners participated. Such circumstances should be discussed with the CC attorney who signed the offer letter.

4. Are partnerships with returns currently under examination or under Appeals jurisdiction, in administrative or non-docketed status, eligible to participate in the settlement?

No. Only cases that are docketed in the Tax Court and in which the partnership received a settlement offer are eligible to participate in the settlement. Docketed cases in Appeals jurisdiction in which the partnership received a settlement offer are eligible. If a partnership elects the settlement, or a group of fewer than all of the partners makes an offer to settle, the case will be returned from Appeals to CC jurisdiction. See D.1.a.

5. CC announced the settlement initiative on June 25, 2020. Is the settlement offer limited only to those cases pending before the Tax Court on that date?

CC may extend the settlement terms to certain newly petitioned cases. In deciding whether to extend an offer, CC will consider a number of factors including whether the partnership, its partners, and representatives cooperated with the IRS during the examination. Consistent with the current procedures, partnerships eligible for the settlement will be notified by letter with the applicable terms. CC may at any time modify the standard terms of settlement offers from those initially announced in the IRS Press Release of June 25, 2020. Partnerships with newly petitioned cases should carefully review the specific terms of any settlement offer.

6. If a partner has one or more tax years docketed in the Tax Court and one or more tax years under examination or under consideration by Appeals, in administrative or non-docketed status, can the partner participate in the settlement for all tax years?

No. A partner is only eligible to participate in the settlement for tax years that are currently docketed in the Tax Court and in which the partnership received a settlement offer letter.

7. If a partner participated in multiple SCE transactions that are the subject of docketed Tax Court cases, can the partner resolve some, but not all of the docketed matters?

Presently, yes. The terms and/or availability of the settlement for such partners may change at any time going forward.

8. How does a partnership elect to participate in the settlement?

To participate in the settlement, the partnership, through the Tax Matters Partner, must initial each page of Attachment 1 and sign the last page of Attachment 1. The initialed and signed Attachment 1 should be returned to the CC attorney who signed the offer letter within 60 days of the date of the offer letter. See B.3. for the time in which a group of less than all the partners must provide CC with Attachment 1. The signature will be considered a non-binding consent to participate in this settlement. Formal agreement will be memorialized with a Decision Document and Closing Agreement. See D.1.d. and E.1

9. Can a partnership, through the Tax Matters Partner, request an extension to make the election to participate?

The partnership, through the Tax Matters Partner, may request an extension of no more than 30 days to make an election by contacting the attorney who signed the offer letter. CC will determine on a case by case basis whether to grant an extension.

10. How does a group of partners representing fewer than all of the partnership interests make an offer to settle?

A group of partners representing fewer than all the partnership interests may make an offer to settle by using Attachment 1. The IRS, however, may modify the terms to reflect a 5 percent increase to the penalty. See C.7.b. Each page of Attachment 1 used to make the offer must be initialed by the partner authorized to sign for the group. That partner must also sign the last page of Attachment 1, just as described in B.8. The initialed and signed document should be returned to the CC attorney who signed the original offer letter within 30 days of the date of the issuance of this CC Notice. Formal agreement will be memorialized with a Closing Agreement. See D.1.d. and E.1.b.

C. Settlement Terms- Financial

1. What are the financial terms of the settlement?

The partnership (or the group in the case of a settlement with fewer than all of the partners) will make a lump sum payment representing the aggregate tax, penalties, and interest due from each partner (Settlement Amount). This lump sum payment must be remitted to CC when the partnership (or the group in the case of a settlement with fewer than all of the partners) returns the signed Closing Agreement.

2. Will individual partners participating in the settlement have a deficiency in tax assessed under the settlement?

No. The Settlement Amount to be paid by the partnership (or the group in the case of a settlement with fewer than all of the partners) will be in lieu of any deficiency in tax or penalties that would have been assessable or collectable against individual partners for the disallowance of the deduction under § 170.

3. How is the deficiency portion of the Settlement Amount calculated?

The deficiency portion is the deficiency in tax that would have been imposed for each partner of the partnership for each tax year affected by the § 170 deduction.

First, all deductions, losses, or other tax benefits arising from or relating to the SCE transaction, including but not limited to the deductions claimed for non-cash charitable contributions, are disallowed in full to the partnership and its partners for all taxable years. Next, each Category Two Partner (see C.5.) may take an ordinary deduction from gross income equal to the net out of pocket costs paid to participate in the SCE transaction. This amount shall include only cash or the cost of property, if any, contributed to the partnership. The amount of out of pocket costs is reduced by any previous distributions from the partnership. Any subsequent recovery of the net out of pocket cost will be included in gross income reportable as ordinary income for the taxable year of receipt. Category One Partners (see C.4.) receive no deduction.

4. Who is a Category One Partner?

A Category One Partner is any direct or indirect partner who:

- a. organized or participated directly or indirectly in the sale or promotion of any SCE transaction,
- b. received fees for organizing, selling, or promoting any SCE transaction,
- c. received fees for providing an appraisal in any SCE transaction,
- d. received fees for providing legal or tax advice or tax return preparation services for any SCE transaction,
- e. received fees for tax return preparation services (including both signing and non-signing preparers) for any SCE transaction,
- f. was a donee of a conservation easement in any SCE transaction,
- g. was a “material advisor” within the meaning of § 6111(b) with respect to any SCE transaction,
- h. was a partner in a partnership, or employee of a person, that engaged in activities described in (a) to (g) of this paragraph at the time he or she participated in the SCE transaction, or
- i. was related to a person described in (a) to (g) of this paragraph within the meaning of § 267(b).

The partnership (or the group in the case of a settlement with fewer than all of the partners) must identify all Category One Partners participating in the settlement.

5. Who is a Category Two Partner?

A Category Two Partner is any partner other than a Category One Partner.

6. How is the penalty portion of the Settlement Amount calculated?

The partnership (or the group in the case of a settlement with fewer than all of the partners) must aggregate all required penalties, as explained in C.7. and 8. For each calculation, the underpayment or understatement for each applicable tax year will be the deficiency portion described in C.3. attributable to each partner.

7. How is the accuracy-related penalty under § 6662 calculated?

a. Accuracy-related penalty under § 6662 for cases involving partnership settlement with all partners.

- i. For Category One Partners: The penalty on the underpayment of tax attributable to a Category One Partner will be calculated using the highest penalty rate asserted in the Final Partnership Administrative Adjustment (FPAA) or raised by CC pursuant to § 6214.
- ii. For Category Two Partners: The penalty will be calculated as follows:
 1. If the Category Two Partner claimed a charitable contribution deduction that equals or is less than an amount that is five times the amount of that partner's investment in the SCE transaction, the penalty percentage is 10 percent.
 2. If the Category Two Partner claimed a charitable contribution deduction that exceeds an amount that is five times the amount of that partner's investment in the SCE transaction but equals or is less than an amount that is eight times the amount of that partner's investment, the penalty percentage is 15 percent.
 3. If the Category Two Partner claimed a charitable contribution deduction that exceeds an amount that is eight times the amount of the partner's investment in the SCE transaction, the penalty percentage is 20 percent.

b. Accuracy-related penalty under § 6662 for cases involving settlement with fewer than all partners.

- i. For Category One Partners: The penalty on the underpayment of tax attributable to a Category One Partner will be calculated using the highest penalty rate asserted in the FPAA or raised by CC pursuant to § 6214.
- ii. For Category Two Partners: The penalty will be calculated as follows:

1. If the Category Two Partner claimed a charitable contribution deduction that equals or is less than an amount that is five times the amount of that partner's investment in the SCE transaction, the penalty percentage is 15 percent.
2. If the Category Two Partner claimed a charitable contribution deduction that exceeds an amount that is five times the amount of that partner's investment in the SCE transaction but equals or is less than an amount that is eight times the amount of that partner's investment, the penalty percentage is 20 percent.
3. If the Category Two Partner claimed a charitable contribution deduction that exceeds an amount that is eight times the amount of the partner's investment in the SCE transaction, the penalty percentage is 25 percent.

8. How is the failure to disclose a reportable transaction penalty under § 6707A calculated?

The Settlement Amount also includes penalties for failing to adequately disclose the transaction.

- a. **Partnership Failure:** If the partnership did not disclose the transaction as required by Treas. Reg. § 1.6011-4, the Settlement Amount will include an amount equal to a penalty computed under § 6707A(b), for each such non-disclosure.
- b. **Partner Failure:** If any partner (Category One Partner or Category Two Partner) did not disclose the transaction as required by Treas. Reg. § 1.6011-4, the Settlement Amount will include an amount equal to a penalty computed under § 6707A(b), for each such non-disclosure.

The § 6707A penalties may be avoided if the partnership and all partners provide evidence, either through documents or affidavits, that the partnership and all its partners timely made the disclosures required by Treas. Reg. § 1.6011-4. No rescission is available under § 6707A(d), as SCE transactions, and those that are substantially similar, are listed transactions.

9. Are individual partners permitted to assert partner-level defenses to penalties?

No. Any partner- or partnership-level defense(s) to penalties must be waived. See C.11. regarding § 6751(b)(1) compliance.

10. Will the IRS assess penalties in addition to the amounts included in the Settlement Amount?

Generally no, but, the IRS may still pursue promoter penalties, material advisor penalties, appraiser penalties, tax return preparer penalties, criminal penalties and other enforcement actions.

11. If the penalty was conceded (or would be conceded) based on non-compliance with § 6751(b)(1), will the partnership be liable for a penalty under the settlement initiative?

No. If CC concedes (or would concede) the accuracy-related penalty because of non-compliance with § 6751(b)(1), the accuracy-related penalty described in C.7. will not apply.

12. Who pays the penalties?

All of the penalties for the partnership and each partner will be included in each partner's amount due and paid in the aggregate as part of the Settlement Amount. The Settlement Amount will be paid by the partnership (or the group in the case of a settlement with fewer than all of the partners).

13. How is the interest portion of the Settlement Amount calculated?

Interest will accrue as required by law. The partnership (or the group in the case of a settlement with fewer than all of the partners) shall aggregate all interest required by law in determining the amount of interest to be paid under the settlement.

14. Are partnerships (or the group in the case of a settlement with fewer than all of the partners) entitled to interest suspension under § 6404(g)?

No. Interest suspension under § 6404(g) will not be allowed.

15. Who is responsible for calculating the Settlement Amount?

The partnership (or participating partners in the case of a settlement with fewer than all partners) is responsible for providing CC with computations of the aggregate Settlement Amount as well as supporting documentation, which includes the separate computations of tax, penalties, and interest for each partner. Computations and the identity of Category One Partners provided by the partnership (or participating partners in the case of a settlement with fewer than all partners) are subject to review and verification.

16. When must the partnership provide computations of the Settlement Amount?

The partnership (or participating partners in the case of a settlement with fewer than all partners) is required to provide computations of the tax, applicable penalties, and interest within 90 days of the date that it indicates its intent to accept the offer.

Partners may submit documentation to support the calculation of their share of the Settlement Amount directly to the IRS, provided that the partnership provides to the IRS an aggregated Settlement Amount. Under the terms of the settlement, the partnership and its partners agree to fully cooperate with CC during the settlement, which includes, but is not limited to, providing additional information if requested by CC, including partner-level computations. See D.1.

17. Will extension of the 90-day period to provide computations and supporting documents be available?

Generally, the partnership (or participating partners in the case of a settlement with fewer than all partners) must provide computations within 90 days from the date that it elects to participate in the settlement initiative. In rare cases, extensions of time may be granted based on the particular facts of the case. Partnerships that were previously granted an extension to make an election should not expect any further extensions of time to carry out the settlement.

D. Settlement Terms – Other

1. Are there other terms partnerships (or the group in the case of a settlement with fewer than all of the partners) may be asked to agree to?

Yes. To facilitate the settlement, the partnership and all of its partners (or the group in the case of a settlement with fewer than all of the partners) must agree to the following:

- a. Any partnership under the jurisdiction of Appeals that elects to participate in the settlement must consent to Appeals returning the case to CC for implementation of the settlement. Likewise, should a group of fewer than all of the partners in the partnership offer to settle as discussed in B.3., the partnership and *all* of the partners must consent to the return of the case to CC.
- b. The partnership and its partners must agree to fully cooperate with CC during the settlement, which includes, but is not limited to, providing additional information if requested by CC. Prior to the execution of any settlement, each participating partner, if requested by the CC attorney, is expected to provide the following information and communications: correspondence, emails, communications and other documentation exchanged between the participating partner and the partnership, the agents, representatives, and partners of the partnership, the organizer, promoter, or proponent of the SCE transaction, appraisers, mining engineers, and others involved with appraising

- the property, tax return preparers, and tax advisors, that relate to the SCE transaction.
- c. Partners may also be required to execute Form 8821, Tax Information Authorization, if necessary.
 - d. To finalize the settlement, the partnership and all its partners will be required to execute a Form 906, Closing Agreement on Final Determination Covering Specific Matters (Closing Agreement), consistent with terms and conditions outlined in Attachment 1, and the partnership must consent to entry of decision under Tax Court Rule 248(a). In the case of a settlement with fewer than all the partners, to finalize the settlement, the participating partners will be required to execute a Closing Agreement reflecting the increased accuracy-related penalty term as described in C.7.b., but otherwise consistent with terms and conditions outlined in Attachment 1.

2. How does the settlement impact other potential enforcement tools?

Neither this settlement initiative, nor any settlement executed therefrom, will have any effect, limitation, or prohibition against the IRS asserting promoter, material advisor, appraiser, or return preparer penalties, discipline under Circular 230, or any other penalty, addition to tax, or additional amount. Execution of a Closing Agreement under this initiative does not preclude the IRS from investigating any associated criminal conduct or recommending prosecution for violation of any criminal statute.

E. Settlement Terms – Finalizing the Settlement

Settlement Documents

1. What settlement documents will be used?

a. Documents in cases involving settlement with all partners.

CC will provide the partnership and all its partners with a Closing Agreement and Decision Document to execute. Generally, no provision of either document is subject to negotiation.

b. Documents in cases involving settlement with fewer than all partners.

CC will provide the partnership and all its partners with a Closing Agreement, which the participating partners will execute. CC will also provide a waiver of right to consistent agreement under § 6224(c)(2) settlement if requested by CC. Generally, no provision of the Closing Agreement or the waiver is subject to negotiation.

2. Are partners required to execute a Closing Agreement?

a. Closing Agreements in cases involving settlement with all partners.

Yes. The partnership and all its partners are required to execute a Closing Agreement, consistent with the terms and conditions of the settlement.

b. Closing Agreements in cases involving settlement with fewer than all partners.

Yes. The participating partners are required to execute a Closing Agreement, consistent with the terms and conditions of the settlement.

3. Who must sign the Closing Agreement?

a. Closing Agreements in cases involving settlement with all partners.

The partnership, through its Tax Matters Partner, and all its partners, must sign the Closing Agreement as signatories to the agreement.

b. Closing Agreements in cases involving settlement with fewer than all partners.

All participating partners must sign the Closing Agreement as signatories to the agreement.

4. As part of the settlement initiative, are amended returns required?

No. The partnership shall not issue any Schedules K-1, Partner's Share of Income, Deductions, Credits, etc., as part of the settlement initiative. Neither the partnership nor its partners will file Administrative Adjustment Requests or amended tax returns for the tax year of settlement.

Full Payment

1. The partnership (or the group in the case of a settlement with fewer than all of the partners) must fully pay upon execution of the settlement documents. If the partnership (or a partner in the case of a settlement with fewer than all of the partners) does not have the ability to fully pay, can it still participate in the settlement initiative?

No. Full payment of the Settlement Amount prior to or at the time of delivery of the settlement documents is a requirement of the settlement initiative. The payment must be made by check payable to "United States Treasury." Electronic payments are not available.

