

Practitioners' Corner

“Exterior Easement” Contributions Of Personal Residences Remain Viable Under New Law, With Strings Attached

Although the *Pension Protection Act of 2006 (PPA)* “reformed” the charitable contributions of certain easements in registered historic districts, the new law does not foreclose them by a long shot. Clearly, new restrictions are imposed but primarily address the abuses that had arisen over the last several years in donating façade easements. The Tax Code, however, still encourages partial conservation easements on historic structures, including personal residences, and there are benefits to be gained by taxpayers residing in those homes.

New law overview

The new charitable donation provisions in the *PPA* restrict:

- Façade-only easements to buildings listed in the National Register;
- Easements on other structures and land area only to those listed in the National Register; and
- Total-exterior easements to only those buildings located in registered historic districts and certified by the Department of Interior as being of historic significance to the district.

The new law also tightens the appraisal and reporting requirements when an exterior easement deduction of any kind is taken. However, the rules on valuation that are key to a successful donation remain basically the same. The tax considerations weighed by a homeowner in giving such an easement also remain constant, albeit with more certainty that any overvaluation will be questioned by the IRS on audit.

What is a structure?

A “structure” in connection with the charitable deduction of a partial interest may mean both a building and a non-building structure for one purpose under the Tax

Code but only a non-building structure under another provision. While hair splitting of this term was not of consequence under the old law, the difference is significant under the *PPA*. It also has been a source of confusion among practitioners.

structure, or land area which is listed in the National Register.”

Finally, Code Sec. 47(c)(3)(B), whose definition of registered historic district is incorporated by reference into revised Code Sec. 170(h)(4)(C)’s definition of certified

“...the rules on valuation that are key to a successful donation remain basically the same.”

Reg §1.170A-14(d)(5)(iii), issued several years ago to interpret existing law, states, “the term certified historic structure, for purposes of this section, means any building, structure or land area ...” Unfortunately, and as the cause for current confusion, the reg goes on to equate a residence with a structure by stating, “A structure for purposes of this section means any structure, whether or not it is depreciable. Accordingly, easements on private residences may qualify under this section.” To compound the problem, the Joint Committee on Taxation report on the *PPA* (JCX-38-06), in explaining prior law, cited the same reg, stating “For this purpose, a structure means any structure, whether or not it is depreciable, and, accordingly, easements on private residences may qualify.”

To muddy the waters further, Code Sec. 47(c)(3)(A) defines the term certified historic structure narrowly to include only “any building (and its structural components).” New Code Sec. 170(h)(4)(C), on the other hand, gives a different definition to the term certified historic structure. It defines the term more broadly. In addition to “any building” referred to in Code Sec. 170(h)(4)(C)(ii), it includes “any building,

historic structure, specifically restricts the meaning of historic district to an area “preserving and rehabilitating buildings of historic significance.” Partial interests in structures and land areas solely by their location in a registered historic district no longer qualify for a deduction.

Bottom line: A personal residence under the new law can continue to be the subject of a deductible partial conservation easement, either:

- (1) For a façade-only easement (and all other qualifying easements) if the residence is listed in the National Register, or
- (2) For the entire exterior if located in a registered historic district and the residence is certified by the Department of Interior as being of historic significance to the district.

For the new law to make sense, a structure under Reg §1.170A-14(d)(5)(iii)’s definition must be interpreted to refer to the larger term certified historic structure that in turn encompasses a building, structure or land. For purposes of determining the eligibility of a deduction for an exterior easement solely by reason of being located in an historic district, that reg should not be used to view a personal residence as a structure that is distinct and separate from a building.