RECENT DEVELOPMENTS IN FEDERAL INCOME TAXATION

We apologize to our readers. If we had more time, this outline would be much shorter.

By

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I. ACCOUNTING

II. BUSINESS INCOME AND DEDUCTIONS

A. Income

B. Deductible Expenses versus Capitalization

C. Reasonable Compensation

D. Miscellaneous Deductions

1. Standard mileage rates for 2023. Notice 2023-3, 2023-3 I.R.B. 388 (12/29/22). The standard mileage rate for business miles in 2023 goes up to 65.5 cents per mile (from 62.5 cents in the second half of 2022) and the medical/moving rate goes up to 22 cents per mile (unchanged from the second half of 2022). The charitable mileage rate remains fixed by § 170(i) at 14 cents. The portion of the business standard mileage rate treated as depreciation goes up to 28 cents per mile (from 26 cents in 2022). The maximum standard automobile cost may not exceed $60,800 (up from $56,100 in 2022) for passenger automobiles (including trucks and vans) for purposes of computing the allowance under a fixed and variable rate (FAVR) plan.

- The notice reminds taxpayers that (1) the business standard mileage rate cannot be used to claim an itemized deduction for unreimbursed employee travel expenses because, in the 2017 Tax Cuts and Jobs Act, Congress disallowed miscellaneous itemized deductions for 2023, and (2) the standard mileage rate for moving has limited applicability for the use of an automobile as part of a move during 2023 because, in the 2017 Tax Cuts and Jobs Act, Congress disallowed the deduction of moving expenses for 2023 (except for members of the military on active duty who move pursuant to military orders incident to a permanent change of station, who can still use the standard mileage rate for moving).

The following table summarizes the optional standard mileage rates:

Category	**2021**	**2022**		**2023**
		Jan.-Jun.	Jul.-Dec.	
Business miles	56 cents	58.5 cents	62.5 cents	65.5 cents
Medical/moving	16 cents	18 cents	22 cents	22 cents
Charitable mileage	14 cents	14 cents	14cents	14 cents

E. Depreciation & Amortization

F. Credits

1. Administrative guidance on the prevailing wage and apprenticeship requirements that apply to credits and deductions enacted or modified by the Inflation Reduction Act. The Inflation Reduction Act amended §§ 30C, 45, 45L, 45Q, 48, 48C, and 179D to provide increased credit or deduction amounts for taxpayers who satisfy certain requirements. The same legislation added §§ 45U, 45V, 45Y, 45Z, and 48E to the Code to provide new credits, which also contain provisions for increased credit amounts for taxpayers who satisfy certain requirements. Specifically, increased credit amounts are available under sections 30C, 45, 45Q, 45V, 45Y, 45Z, 48, 48C, and 48E, and an increased deduction is available under section 179D, for taxpayers satisfying certain *prevailing wage and apprenticeship* requirements. Increased credit amounts are available under sections 45L and 45U for taxpayers satisfying certain *prevailing wage* requirements. Generally, if a taxpayer satisfies the prevailing wage and apprenticeship requirements or the prevailing wage requirements, whichever one applies (or meets an exception to these requirements), the amount of the credit or deduction is equal to the otherwise determined amount of the credit or deduction multiplied by five.

a. The IRS has provided initial guidance on the prevailing wage and apprenticeship requirements. Notice 2022-61, 2022-52 I.R.B. 560 (11/30/22). This notice provides guidance on the prevailing wage and apprenticeship requirements that generally apply to certain provisions of the Code, as amended by the Inflation Reduction Act. As amended by the Inflation Reduction Act, these provisions generally authorize an increased credit or deduction if a taxpayer meets either prevailing wage requirements (as in the case of the credit authorized by § 45L) or prevailing wage and apprenticeship requirements. A facility generally must meet the prevailing wage and apprenticeship requirements to receive the increased credit or deduction amounts under §§ 30C, 45, 45Q, 45V, 45Y, 48, 48E, and 179D if construction (or installation for purposes of § 179D) of the facility begins on or after the date 60 days after the Secretary publishes guidance with respect to the prevailing wage and apprenticeship requirements of the Code. The notice serves as the published guidance establishing the 60-day period and provides that the date that is 60 days after the Secretary published guidance is January 30, 2023. The notice also provides guidance for determining the beginning of construction of a facility for certain credits allowed under the Code, and the beginning of installation of certain property with respect to the energy efficient commercial buildings deduction under the Code. The notice provides that Treasury and the IRS anticipate issuing proposed regulations and other guidance with respect to the prevailing wage and apprenticeship requirements.

b. Proposed regulations provide further guidance on the prevailing wage and apprenticeship requirements. REG-100908-23, Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements, 88 F.R. 60018 8/30/23). The Treasury Department and the IRS have issued proposed regulations under a variety of Code provisions to reflect legislative changes enacted in August 2022 by the Inflation Reduction Act. The Inflation Reduction Act amended §§ 30C, 45, 45L, 45Q, 48, 48C, and 179D to provide increased credit or deduction amounts for taxpayers who satisfy certain requirements. The same legislation added §§ 45U, 45V, 45Y, 45Z, and 48E to the Code to provide new credits, which also contain provisions for increased credit amounts for taxpayers who satisfy certain requirements. Specifically, increased credit amounts are available under sections 30C, 45, 45Q, 45V, 45Y, 45Z, 48, 48C, and 48E, and an increased deduction is available under section 179D, for taxpayers satisfying certain *prevailing wage and apprenticeship* requirements. Increased credit amounts are available under sections 45L and 45U for taxpayers satisfying certain *prevailing wage* requirements. Generally, if a taxpayer satisfies the prevailing wage and apprenticeship requirements or the prevailing wage requirements, whichever one applies (or meets an exception to these requirements), the amount of the credit or deduction is equal to the otherwise determined amount of the credit or deduction multiplied by five.

Prevailing wage and apprenticeship requirements. Generally, a taxpayer satisfies the *prevailing wage* requirements if the taxpayer ensures that laborers and mechanics employed by the taxpayer (or by any contractor or subcontractor) in the construction, alteration, or repair of a facility are paid wages at rates not less than those set forth in applicable wage determinations issued by the Secretary of Labor. Prop. Reg. § 1.45-7(b)(1). For this purpose, the applicable general wage determination is the wage determination in effect for the specified type of construction in the geographic area when the construction, alteration, or repair of the facility begins. Prop. Reg. § 1.45-7(b)(2). A taxpayer satisfies the *apprenticeship requirement* by ensuring that two basic requirements are met. *First*, qualified apprentices must perform not less than the "applicable percentage" of the total labor hours of the construction, alteration, or repair work of any qualified facility (referred to as the labor hours requirement). For this purpose, the applicable percentage is 10 percent, 12.5 percent, or 15 percent, depending on when construction of the facility begins. Prop. Reg. § 1.45-8(b). *Second*, a taxpayer, contractor, or subcontractor who employs four or more individuals to perform construction, alteration, or repair work with respect to the construction of a qualified facility must employ one or more qualified apprentices to perform the work (referred to as the participation requirement). Prop. Reg. § 1.45-8(d). The proposed regulations provide that construction, alteration, or repair does not include *maintenance work* that occurs after the facility is placed in service. For this purpose, maintenance is work that is ordinary and regular in nature and designed to maintain the existing functionality of a facility as opposed to an isolated or infrequent repair of a facility to restore specific functionality or adapt it for a different or improved use. Prop. Reg. § 1.45-7(d)(2).

Correction of failure to satisfy the prevailing wage and apprenticeship requirements. The proposed regulations permit a taxpayer who claims the increased credit or deduction and who fails to satisfy the *prevailing wage* requirement to cure the failure. To do so, a taxpayer must (1) pay any laborer or mechanic who was not paid a prevailing wage the difference between the prevailing wage required and the amount actually paid plus interest at the federal short-term rate plus 6 percentage points, and (2) pay a penalty of $5,000 for each laborer or mechanic who was not paid a prevailing wage. Prop. Reg. § 1.45-7(c)(1)(i)-(ii). The penalty generally is waived with respect to a laborer or mechanic if the taxpayer makes a correction payment by the earlier of 30 days after the taxpayer becomes aware of the error or the date on which the increased credit is claimed and if certain other requirements are met. Prop. Reg. § 1.45-7(c)(6)(i). The correction payment is increased to three times the normal amount and the penalty is increased to $10,000 per laborer or mechanic if the IRS determines that the failure to satisfy the prevailing wage requirement was intentional. Prop. Reg. § 1.45-7(c)(3). The proposed regulations also provide a mechanism for a taxpayer to cure a failure to satisfy the *apprenticeship requirement*. Prop. Reg. § 1.45-8(e).

Generally, a taxpayer can cure such a failure either by submitting requests for apprentices or paying a penalty equal to $50 for each labor hour for which the apprenticeship requirements (either the labor hours requirement or participation requirement) were not satisfied. The $50 per hour penalty is increased to $500 per hour if the IRS determines that the failure to satisfy the apprenticeship requirements was intentional. Prop. Reg. § 1.45-8(e)(2)(ii).

Recordkeeping requirements. The proposed regulations provide guidance on the types of records taxpayers should maintain to demonstrate compliance with the prevailing wage and apprenticeship requirements. At a minimum, to demonstrate compliance with the *prevailing wage* requirement, those records include payroll records for each laborer and mechanic (including each qualified apprentice) employed by the taxpayer, contractor, or subcontractor in the construction, alteration, or repair of the qualified facility. Prop. Reg. § 1.45-12(b). In addition, the proposed regulations provide that records sufficient to demonstrate compliance with the prevailing wage requirement may include eight other categories of records, including identifying information (such as name, social security or tax identification number, address, telephone number, and email address) for each laborer or mechanic (including qualified apprentices) employed. The proposed regulations provide that sufficient records to demonstrate compliance with the apprenticeship requirements may include (1) any written requests for the employment of apprentices from registered apprenticeship programs, including any contacts with the Department of Labor or state apprenticeship agency regarding requests for apprentices, (2) any agreements entered into with registered apprenticeship programs with respect to the construction, alteration or repair of the facility, (3) documents reflecting the standards and requirements of any registered apprenticeship program, including the ratio requirement prescribed by each program, (4) the total number of labor hours worked by apprentices, and (5) records reflecting the daily ratio of apprentices to journeyworkers. Prop. Reg. § 1.45-12(d).

Effective date and period for comments. The proposed regulations would apply to facilities, property, projects, or equipment placed in service in taxable years ending after the date on which final regulations are published as final in the Federal Register and the construction or installation of which begins after the date on which final regulations are published. Nevertheless, taxpayers can rely on the proposed regulations with respect to construction or installation of a facility, property, project, or equipment beginning on or after January 29, 2023, and on or before the date final regulations are published, provided that, beginning after the date that is 60 days after August 29, 2023, taxpayers follow the proposed regulations in their entirety and in a consistent manner. Treasury and the IRS have invited comments on the proposed regulations. Any comments must be submitted by October 30, 2023. A public hearing on the proposed regulations is scheduled for November 21, 2023.

G. Depreciation & Amortization

1. Section 280F 2023 depreciation tables for business autos, light trucks, and vans. Rev. Proc. 2023-14, 2023-6 I.R.B. 466 (1/18/23). Section 280F(a) limits the depreciation deduction for passenger automobiles. For this purpose, the term "passenger automobiles" includes trucks and vans with a gross vehicle weight of 6,000 pounds or less. The IRS has published depreciation tables with the 2023 depreciation limits for business use of passenger automobiles acquired after September 27, 2017, and placed in service during 2023:

2023 Passenger Automobiles with § 168(k) first year recovery:

1st Tax Year	$20,200
2nd Tax Year	$19,500
3rd Tax Year	$11,700
Each Succeeding Year	$ 6,960

2023 Passenger Automobiles (no § 168(k) first year recovery):

1st Tax Year	$12,200
2nd Tax Year	$19,500
3rd Tax Year	$11,700
Each Succeeding Year	$ 6,960

For leased vehicles used for business purposes, § 280F(c)(2) requires a reduction in the amount allowable as a deduction to the lessee of the vehicle. Under Reg. § 1.280F-7(a), this reduction in the lessee's deduction is expressed as an income inclusion amount. The revenue procedure provides a table with the income inclusion amounts for lessees of vehicles with a lease term beginning in 2023. For 2023, this income inclusion applies when the fair market value of the vehicle exceeds $60,000.

H. Credits

I. Natural Resources Deductions & Credits

J. Loss Transactions, Bad Debts, and NOLs

K. At-Risk and Passive Activity Losses

III. INVESTMENT GAIN AND INCOME

IV. COMPENSATION ISSUES

A. Fringe Benefits

1. Limits for contributions to health savings accounts for 2024. Rev. Proc. 2023-23, 2023-22 I.R.B. 883 (5/16/23). The IRS has issued the inflation-adjusted figures for contributions to health savings accounts. For calendar year 2024, the annual limitation on deductions under § 223(b)(2)(A) for an individual with self-only coverage under a high deductible health plan is increased to $4,150 (from $3,850 in 2023). For calendar year 2024, the annual limitation on deductions under § 223(b)(2)(B) for an individual with family coverage under a high deductible health plan is increased to $8,300 (from $7,750 in 2023). For this purpose, for calendar year 2024, a "high deductible health plan" is defined under § 223(c)(2)(A) as a health plan with an annual deductible that is not less than $1,600 (increased from $1,500 in 2023) for self-only coverage or $3,200 (increased from $3,000 in 2023) for family coverage, and for which the annual out-of-pocket expenses (deductibles, co-payments, and other amounts, but not premiums) do not exceed $8,050 for self-only coverage (increased from $7,500 in 2023) or $16,100 for family coverage (increased from $15,000 in 2023).

The following table summarizes the limits for contributions to health savings accounts:

Health Savings Account Limitations				
Category	**Self-Only Coverage**		**Family Coverage**	
	2023	**2024**	**2023**	**2024**
Limit on Deductions for Contributions to HSAs	$3,850	$4,150	$7,750	$8,300
High-Deductible Health Plan				
Minimum Deductible	$1,500	$1,600	$3,000	$3,200

Limit on Out-of-Pocket Expenses	$7,500	$8,050	$15,000	$16,100

B. Qualified Deferred Compensation Plans

C. Nonqualified Deferred Compensation, Section 83, and Stock Options

D. Individual Retirement Accounts

V. PERSONAL INCOME AND DEDUCTIONS

A. Rates

B. Miscellaneous Income

1. **If you can understand half of the terminology in this ruling, you are ahead of the game. A cash method taxpayer who receives additional units of cryptocurrency as a reward for participating in a validation process by staking the taxpayer's holdings through a cryptocurrency exchange has gross income equal to the fair market value of the units received in the year in which the taxpayer gains dominion and control over the validation rewards.** Rev. Rul. 2023-14, 2023-33 I.R.B. 484 (7/31/23). This ruling addresses the tax consequences for a cash-method taxpayer who receives units of cryptocurrency as a reward for performing so-called validation services in connection with cryptocurrency transactions. Many cryptocurrencies such as Bitcoin use blockchain technology. Generally, blockchain, which is one form of distributed ledger technology, is a storage technology that is used for saving data on decentralized networks. Blockchain stores information in batches called blocks, which are linked together in a sequential way. The creation of new blocks on a blockchain requires the participation of multiple validators who validate the legitimacy of transactions. The validators receive as a reward one or more newly-created units of the cryptocurrency native to the blockchain. In one form of this validation process, those validating stake their holdings in cryptocurrency. If the validation is successful, the validator receives a reward. If the validation is unsuccessful, the validator may forfeit some or all of the staked units. The ruling addresses a set of facts in which a cash method taxpayer stakes 200 units of a cryptocurrency, validates a new block of transactions, and receives 2 units of cryptocurrency asa reward. The ruling concludes as follows:

> If a cash-method taxpayer stakes cryptocurrency native to a proof-of-stake blockchain and receives additional units of cryptocurrency as rewards when validation occurs, the fair market value of the validation rewards received is included in the taxpayer's gross income in the taxable year in which the taxpayer gains dominion and control over the validation rewards. The fair market value is determined as of the date and time the taxpayer gains dominion and control over the validation rewards. The same is true if a taxpayer stakes cryptocurrency native to a proof-of-stake blockchain

The ruling cautions that it does not address issues that might arise under any rules not cited in the ruling, including § 83.

C. Hobby Losses and § 280A Home Office and Vacation Homes

D. Deductions and Credits for Personal Expenses

E. Divorce Tax Issues

F. Education

G. Alternative Minimum Tax

VI. CORPORATIONS

VII. PARTNERSHIPS

A. Formation and Taxable Years

B. Allocations of Distributive Share, Partnership Debt, and Outside Basis

C. Distributions and Transactions Between the Partnership and Partners

D. Sales of Partnership Interests, Liquidations and Mergers

E. Inside Basis Adjustments

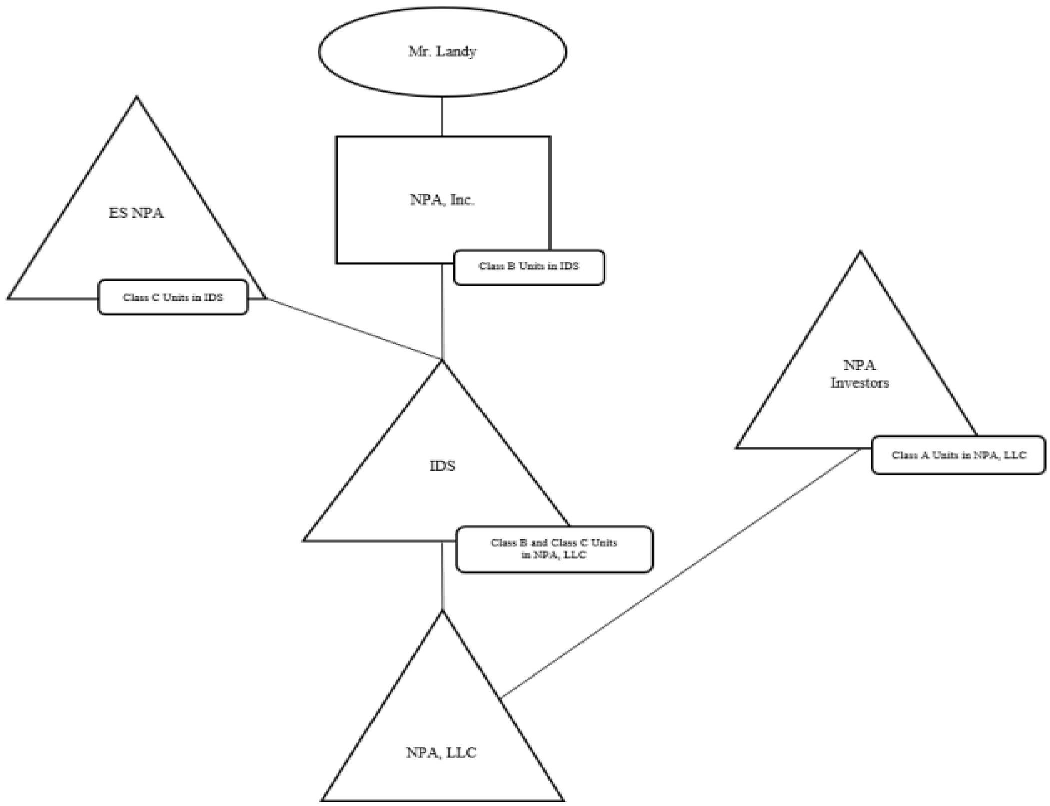
F. Partnership Audit Rules

G. Miscellaneous

1. This memorandum opinion from the Tax Court affirms the applicability of Rev. Proc. 93-27 (partnership profits interest issued for services) in a tiered partnership structure, but the real dispute was whether there was a proper "book up" of the partners' capital accounts. ES NPA Holding, LLC v. Commissioner, T.C. Memo. 2023-55 (5/3/23). The authors discuss relatively few memorandum opinions of the Tax Court; however, this case is one which the authors believe is noteworthy—perhaps more so for what the opinion does not address than what it does. The ostensible dispute in the case concerned whether a partnership interest issued for services met the safe harbor of Rev. Proc. 93-27, 1993-2 C.B. 343, as clarified by Rev. Proc. 2001-43, 2001-2 C.B. 191. As readers may recall, Rev. Proc. 93-27 and Rev. Proc. 2001-43 generally provide that the receipt of a partnership interest for services is nontaxable to the recipient so long as the interest in question does not share in liquidation proceeds assuming a hypothetical liquidation of the partnership immediately following the grant of the partnership interest (i.e., that the partnership interest is a true "profits interest," not a "capital interest"). If the requirements of Rev. Proc. 93-27 are met, then the IRS will not contest that the issuance of a partnership profits interest in exchange for services is nontaxable.[1] In this case, the Tax Court (Judge Weiler) held over the IRS's objection that Rev. Proc. 93-27 applied in the context of an intricate tiered-partnership structure used in an acquisitive transaction. For details, see below.

Facts. The facts of the case are complex, and to fully appreciate the issues and arguments at stake, the intricacies of the tiered partnership structure must be understood. The ownership diagram provided by Judge Weiler is very helpful in this regard and easily worth a thousand words:

[1] Technically speaking, the safe harbor of Rev. Proc. 93-27 applies to partnership profits interests issued for services only if certain limiting conditions are met: (1) the profits interest must not relate to a substantially certain and predictable stream of income from partnership assets, such as income from high-quality debt securities or a high-quality net lease; (2) the recipient partner must not dispose of the profits interest within two years of receipt; and (3) the profits interest is not in a "publicly traded partnership" within the meaning of § 7704(b). These limiting conditions were not applicable to the facts of the case.



The tiered partnership structure depicted above related to the acquisition of a seventy-percent interest in a consumer loan portfolio held by Joshus Landy through a wholly-owned corporation, NPA, Inc. Oversimplifying to avoid writer's cramp, the capital for the acquisition was provided by a group of outside investors (NPA Investors, LLC). Mr. Landy's corporation, NPA, Inc., contributed its entire consumer loan portfolio to a second-tier partnership, IDS, LLC, which in turn contributed the portfolio to a first-tier partnership, NPA, LLC. Then, the investors, through NPA Investors, LLC, purchased a seventy-percent interest in the consumer loan portfolio by paying cash of roughly $21 million to the second-tier partnership, IDS, LLC, in exchange for a seventy-percent partnership interest in NPA, LLC. NPA, Inc., Mr. Landy's corporation, retained the remaining thirty-percent interest in the consumer loan portfolio by holding the residual thirty-percent interest (valued at approximately $9 million) in the second-tier partnership, IDS, LLC. In connection with the acquisition, certain advisors to the transaction, as members of a third-tier partnership, ES NPA Holding, LLC, were issued a partnership interest in the second-tier partnership, IDS, LLC, in exchange for past and future services provided to the first-tier acquisition partnership, NPA, LLC. The central issue in the case was whether the partnership interest issued to the advisors via ES NPA Holding, LLC was in fact a "profits interest" qualifying as nontaxable under the safe harbor rules of Rev. Proc. 93-27.

IRS Arguments. The IRS made two arguments as to why Rev. Proc. 93-27 did not apply. The IRS's primary argument was that Rev. Proc. 93-27 was inapplicable because the partnership interest issued to the third-tier partnership, ES NPA Holding, LLC, was granted by the second-tier partnership, IDS, LLC, *not* the first-tier partnership, NPA, LLC, for which the past and future services were performed. With respect to this argument, Judge Weiler held that Rev. Proc. 93-27 nonetheless applied because the IRS's reading of the ruling was too narrow. Specifically, Judge Weiler pointed to other language in Rev. Proc. 93-27 supporting a broader reading. Section 4.01 of Rev. Proc. 93-27 states that "if a person receives a profits interest for the provision of services to or for the benefit of a partnership in a partner capacity or in anticipation of being a partner, the

[IRS] will not treat the receipt of such an interest as a taxable event for the partner or the partnership." Judge Weiler held that the above-quoted language supported the broader reading of Rev. Proc. 93-27 advocated by ES NPA Holding, LLC, the recipient of the partnership interest. The IRS's alternative argument, and perhaps the IRS's real concern, is that the partnership interest issued by the second-tier partnership, IDS, LLC, to the third-tier partnership, ES NPA Holding, LLC, was in fact a "capital interest" because the consumer loan portfolio acquired by the first-tier partnership, NPA, LLC, was undervalued. The IRS, supported by a valuation expert, contended that the consumer loan portfolio should have been valued at approximately $48.5 million, meaning that ES NPA Holding, LLC would receive as much as $12 million upon a hypothetical liquidation of the tiered partnership structure, not $0 as reflected in ES NPA Holding, LLC's capital account in the second-tier partnership, IDS, LLC. In other words, the IRS was arguing that the "book up" performed in connection with the formation of the tiered partnership structure was insufficient, so the service provider, ES NPA Holding, LLC, received a "capital interest" not a "profits interest" within the meaning of Rev. Proc. 93-27. Judge Weiler, though, disagreed, holding that the valuation agreed to by the parties to the transaction—roughly $21 million purchased by the investors via NPA Investors, LLC plus approximately $9 million in value retained by Mr. Landy via NPA, Inc.'s thirty-percent interest in the second-tier partnership, IDS, LLC—was the best evidence of the valuation of the consumer loan portfolio. Hence, Judge Weiler concluded that Rev. Proc. 93-37 applied, and the service provider, ES NPA Holding, LLC, received a nontaxable partnership profits interest in connection with the transaction.

Comment: Perhaps the real import of ES NPA Holding, LLC v. Commissioner is not that Rev. Proc. 93-37 applies in a tiered partnership structure. The authors believe that most practitioners have assumed as much. Instead, perhaps the most important lesson of the case is that partnerships issuing interests in exchange for the performance of services should take care to accurately substantiate capital account "book ups," thereby safeguarding against an argument by the IRS that the interest so issued was a taxable "capital interest" instead of a nontaxable "profits interest."

VIII. TAX SHELTERS

IX. EXEMPT ORGANIZATIONS AND CHARITABLE GIVING

A. Exempt Organizations

B. Charitable Giving

1. After 2022, syndicated conservation easements are on life support if not DOA. A well-hidden provision of the SECURE 2.0 Act, Division T, Title VI, § 605 of the Consolidated Appropriations Act, 2023, amended Code § 170(h) to add a new subsection (7) severely restricting charitable deductions for "qualified conservation contributions" by partnerships, S corporations, and other pass-through entities. "Qualified conservation contributions" are defined by § 170(h)(1) to include (but are not limited to) conservation easements granted to charitable organizations in connection with syndicated conservation easements. As described in Notice 2017-10, 2017-4 I.R.B. 544, a typical syndicated conservation easement involves a promoter offering prospective investors the possibility of a charitable contribution deduction in exchange for investing in a partnership. The partnership subsequently grants a conservation easement to a qualified charity, allowing the investing partners to claim a charitable contribution deduction under § 170.

New "2.5 times" proportionate outside basis rule will limit the charitable deduction for conservation contributions by pass-through entities. New § 170(h)(7)(A) generally provides that a partner's charitable contribution deduction for a qualified conservation contribution by a partnership (whether via a direct contribution or as an allocable share from a lower-tier partnership) cannot exceed "2.5 times the sum of [such] partner's relevant basis" in the partnership. The term "relevant basis" is defined by new § 170(h)(7)(B)(i) to mean that portion of a partner's "modified basis" which is allocable (under rules similar to those used under § 755) to the real property comprising the qualified conservation contribution. "Modified basis" (defined in

§ 170(h)(7)(B)(ii)) essentially refers to a partner's outside basis exclusive of the partner's share of partnership liabilities under § 752. Thus, reading between the lines and subject to further guidance, relevant basis appears to equate to an investor's cash investment (a/k/a initial tax and book capital account) in a syndicated conservation easement partnership. Many syndicated conservation easement partnerships claim that investors may secure a charitable deduction that is five times their cash investment. New § 170(h)(7)(A) thus limits the charitable deduction to "2.5 times" an investor's cash contribution, making a syndicated conservation easement much less attractive. New § 170(h)(7) also contains three exceptions: (i) partnerships making conservation easement contributions after a three-year holding period applicable at the partnership- and partner-level, including through tiered partnerships; (ii) "family partnerships" (as defined) making conservation easement contributions; and (iii) partnerships making conservation easement contributions relating to historic structures. *See* IRC §§ 170(f)(19), 170(h)(7)(C)-(E). Moreover, new § 170(h)(7)(F) authorizes Treasury to issue regulations applying similar rules to S corporations and other pass-through entities. Related provisions of the legislation make dovetailing amendments to (i) § 170(f) (charitable contribution substantiation and reporting requirements); (ii) §§ 6662 and 6664 (underpayment penalties attributable to valuation misstatements); (iii) § 6011 (reportable transactions); and (vi) §§ 6235 and 6501 (statute of limitations). New § 170(h)(7) applies to qualified conservation contributions made by partnerships and other pass-through entities after December 29, 2022.

Some welcome news for non-syndicated conservation easement donors? In an uncodified provision (*see* § 605(d)), the legislation directs Treasury to publish "safe harbor deed language for extinguishment clauses and boundary line adjustments" relating to qualified conservation contributions (whether via partnerships or otherwise). Treasury is directed to publish such safe harbor deed language within 120 days of the date of enactment of new § 170(h)(7) (i.e., by April 28, 2023), and donors have 90 days after publication of the safe harbor language to execute and file corrective deeds. This special, uncodified relief provision seems to be targeted toward donors like those who lost battles with the IRS over highly technical language in their conservation easement deeds. *See Oakbrook Land Holdings LLC v. Commissioner*, 154 T.C. 180 (5/12/20) (deed's extinguishment clause violated the proportionate benefit rule), *aff'd*, 28 F.4th 700 (6th Cir. 3/14/22), and *Pine Mountain Preserve, LLLP v. Commissioner*, T.C. Memo. 2018-214 (12/27/18) (deed improperly allowed substituted property), *rev'd in part, aff'd in part, and vacated and remanded*, 978 F.3d 1200 (5th Cir. 10/22/20). Importantly, however, the foregoing uncodified relief provision does not apply to syndicated conservation easements as described in Notice 2017-10 or to conservation easement cases (and related penalty disputes) docketed in the federal courts before the date a corrective deed is filed.

a. Safe harbor conservation easement deed language published by the IRS with a short (now passed) deadline to file amended deeds. Notice 2023-30, 2023-17 I.R.B. 766 (4/10/23). As directed by Congress, the IRS has published safe harbor deed language for extinguishment and boundary line adjustment clauses relating to conservation easements. In *Section 1.04* of the notice, the IRS sets forth its position, established in litigation, that upon destruction or condemnation of conservation easement property and the collection of any proceeds therefrom, Reg. § 1.170A-14(g)(6)(ii) (the "extinguishment regulation") requires that the charitable donee share in the proceeds according to a "proportionate benefit fraction" set forth in the conservation easement deed. The IRS's view of the allowed language in the conservation easement deed has been fairly narrow, requiring that the proportionate benefit fraction be fixed and unalterable *as of the date of the donation* according to the following ratio: the value of the conservation easement as compared to the total value of the property subject to the conservation easement. Therefore, according to the IRS and as upheld by several court decisions, if the conservation easement deed either (i) allows the donor to reclaim from the charitable donee any portion of the donated conservation easement property in exchange for substitute property of equivalent value or (ii) grants the donor credit for the fair market value of subsequent improvements to the donated conservation easement property, the proportionate benefit fraction language in the deed is flawed and the charitable deduction must be disallowed. *See, e.g., Pine Mountain Preserve, LLLP v. Commissioner*, 151 T.C. 247 (2018), including its companion case, *Pine Mountain Preserve, LLLP v. Commissioner*, T.C. Memo. 2018-214 (deed allowed substituted property), *aff'd in part, vac'd in part, rev'd in part*, 978 F.3d 1200 (11th Cir. 2020); *PBBM Rose Hill, Ltd. v. Commissioner*, 900 F.3d 193 (2018) (deed reduced charitable donee's benefit for subsequent improvements made by taxpayer donor); *Coal Property Holdings, LLC v. Commissioner*, 153 T.C. 126 (2019). *Section 4* of the Notice then sets forth what the IRS considers acceptable language regarding the proportionate benefit fraction as is relates to extinguishment and boundary line adjustment clauses in conservation easement deeds. *Section 3* of the Notice sets forth the process and timeline for amending an original "flawed" (in the eyes of the IRS) conservation easement deed to adopt the IRS-approved proportionate benefit fraction language. Corrective, amended deeds must be properly executed by the donor and the donee, must be recorded by July 24, 2023, and must relate back to the effective date of the original deed.

2. Capital gain income but no charitable deduction: The taxpayer waited too long to pull the trigger on a charitable donation of stock and ends up shooting himself in the foot. Estate of Hoensheid v. Commissioner, T.C. Memo. 2023-34 (3/15/23). This fact-intensive and fact-sensitive case reminds us that the anticipatory assignment of income doctrine is alive and well, especially in connection with last minute donations of stock to charity before closing. The idea in these transactions, of course, is to donate a portion of a taxpayer's highly-appreciated, low-basis stock to charity in advance of a planned sale of the stock, claim the charitable contribution deduction for the fair market value of the donated stock, and then have the charity sell the donated stock (simultaneously with the sale of the donor's retained stock) at the subsequent closing of the stock purchase transaction. The taxpayer thereby obtains a charitable contribution deduction for the fair market value of the donated stock while avoiding tax on the inherent capital gain in the contributed stock. *See, e.g., Rauenhorst v. Commissioner*, 119 T.C. 57 (2002). *See also* Rev. Rul. 78-197, 1978-1 C.B. 83. The conventional wisdom in this area is that a taxpayer may wait to donate the stock to charity until after a letter of intent has been signed but should donate before the definitive stock acquisition agreement is executed. In this case, however, the Tax Court (Judge Nega) determined that the taxpayer nevertheless waited too late, even though he donated the stock sometime before the execution of the stock purchase agreement and the simultaneous closing. It did not help the taxpayer's case that he had sent an email to his tax advisor stating "I do not want to transfer the stock until we are 99% sure we are closing." The taxpayer apparently was concerned that if he gave away a portion of his stock too soon, his brothers, who owned the remaining stock in the corporation, might outvote him in connection with the anticipated sale. Furthermore, the documents and facts were unclear and there was a substantial dispute between the taxpayer and the IRS as to the precise date of the transfer of the donated stock to the charity. Even worse, it appeared that some of the documents may have been backdated by the taxpayer. After a lengthy analysis of the facts, Judge Nega ultimately determined that the transfer of the donated shares took place two days before closing. It also did not help the taxpayer's case that he and his brothers stripped the corporation of virtually all of its cash via a declared dividend (colloquially known as a "boot-strap" sale) one day before the closing, yet the charity, which according to the taxpayer received a stock certificate for the donated shares previously, received no portion of the dividend. In eventually holding for the IRS regarding the anticipatory assignment of income issue, Judge Nega concluded:

> To avoid an anticipatory assignment of income on the contribution of appreciated shares of stock followed by a sale by the donee, a donor must bear at least some risk at the time of the contribution that the sale will not close. On the record before us, viewed in the light of the realities and substance of the transaction, we are convinced that [the taxpayer's] delay in transferring the [donated] shares until two days before closing eliminated any such risk and made the sale a virtual certainty.

Judge Nega also determined that the taxpayer, as argued by the IRS, had not satisfied the qualified appraisal requirements of § 170(f)(11)(A)(i). Judge Nega therefore denied the taxpayer's claimed charitable contribution deduction for the donated shares, even though the charity received a portion of the proceeds of the stock sale attributable to the shares it held as of closing. *Ouch!* We commend the case to readers who are advising taxpayers in connection with these transactions, but we decline to try to capture here and discuss the myriad factual nuances of a forty-nine page Tax Court Memorandum decision. For a more detailed analysis of the facts and Judge Nega's reasoning, see Zaritsky, *Bad Timing of Charitable Gift and Sale Creates Major Income Tax Problems*, 35 Tax'n Exempts 27 (July/Aug. 2023).

X. TAX PROCEDURE

A. Interest, Penalties, and Prosecutions

1. Trustee learns that frivolity can be costly when it comes to filing and signing his trust's tax returns. Stanojevich v. Commissioner, 160 T.C. No. 7 (4/10/23). In a case of first impression, the Tax Court, in an opinion by Chief Judge Kerrigan, has determined that the $5,000 per taxable year frivolous return penalty of § 6702(a) can be imposed personally (apparently not limited to the trust's assets) against a trustee filing and signing an IRS Form 1041 (U.S. Income Tax Return for Estates and Trusts) as an "authorized representative." The case arose out of a collection due process hearing after the IRS sent the taxpayer a notice of federal tax lien relating to the assertion of the § 6702(a) frivolous return penalty across multiple years. The taxpayer was the trustee of, in Judge Kerrigan's words, a "grantor-type trust." (The opinion does not elaborate on the precise federal income tax status of the trust—i.e., disregarded grantor trust within the meaning of Reg. § 1.671-4 or another type trust—except to state in a footnote that the IRS disputed the validity of the trust, but the Tax Court assumed it was valid for purposes of the opinion.) The trust in question reported gross income across multiple years but simultaneously reported tax withheld for those years equal to or exceeding the amount of reported gross income. The returns reported that the trust had no tax liability and that it had made overpayments equal to the tax withheld. The IRS previously announced in Section III(22) of Notice 2010-33, 2010-17 I.R.B. 609, 611, its position that such facially incorrect returns are considered frivolous within the meaning of § 6702. The trustee argued that the § 6702(a) frivolous return penalty should not apply to him personally, even if he filed and signed the multi-year returns as an "authorized representative of the trust, because the frivolous returns were returns of the trust, not the trustee as an individual. Judge Kerrigan disagreed, relying on the plain terms of § 6702(a) which states that a "person shall pay a penalty of $5,000 if (1) such person files [a frivolous return, as defined]." Judge Kerrigan reasoned further that nothing in the statute conditions the imposition of the penalty on a person's filing of his or her personal return and that Congress, because it did not provide otherwise, must have considered it appropriate to impose the § 6702(a) penalty personally on a trustee who files a return on behalf of a trust.

B. Discovery: Summonses and FOIA

C. Litigation Costs

D. Statutory Notice of Deficiency

E. Statute of Limitations

F. Liens and Collections

G. Innocent Spouse