



ATR Opposes Retroactive Changes to the Conservation Easement Deduction

August 16, 2019

Dear Members of the Senate Finance Committee:

As the Committee continues its inquiry into potential abuses of the conservation easement deduction under IRC Section 170(h), I write to oppose any retroactive changes to the provision. ATR opposes retroactive tax increases that undermine confidence in the tax system and harm taxpayers that have relied on current law.

One legislative proposal referred to the Finance Committee, S. 170, has called for retroactive changes to the conservation easement deduction effective for tax years ending after December 23, 2016. Such an effective date would disallow deductions for donations made as far back as January 2016 – more than 3-1/2 years ago. ATR believes there is no basis for a retroactive change, especially since the conservation easement deduction has been reaffirmed and strengthened by Congress in recent years. Any changes to the deduction rules should be made prospectively only – for donations after the date of enactment.

Retroactivity is Bad Tax Policy

The tax code relies on consistency, certainty, and fairness. Taxpayers routinely make decisions based on a reasonable interpretation of the law with the expectation that the future changes to the law will not be applied looking backwards.

Legislation that retroactively changes the tax code would violate this principle by affecting activity (in this case irrevocable conservation easement donations made and resulting deductions claimed) that has already occurred. This would also undermine confidence in the tax system and discourage taxpayers from taking advantage of explicit tax incentives (e.g., for charitable contributions, business investments, and energy efficiency) if they fear Congress might retroactively eliminate these incentives in the future.

Generally, even when Congress has determined a statutory provision is being used inconsistent with its original intent, Congress has disallowed or modified the provision on a prospective basis. For instance, when paper manufacturers claimed a credit for mixing diesel with alternative biomass fuels, or “black liquor,” Congress disagreed with this outcome and repealed the credit prospectively.

The Conservation Easement Deduction Has Routinely Been Reaffirmed By Congress

The conservation easement deduction was first created in 1976 and allowed taxpayers to claim a deduction for the donation of conservation easements to qualified land trusts. In 2006, the deduction was temporarily enhanced with [strong bipartisan, bicameral support](#) to allow taxpayers to deduct up to 50 percent of their adjusted gross income and carry forward any unused deductions for up to 15 years. Congress made this enhancement permanent in 2015.

This legislative history demonstrates clear, bipartisan support for the conservation easement deduction as an incentive for taxpayers to conserve their property for future generations.

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AMERICANS for TAX REFORM

IRS Notice 2017-10 Does Not Justify Retroactive Legislation

Some have incorrectly suggested that IRS Notice 2017-10 released on December 23, 2016, would justify a retroactive legislative change as set forth in S. 170.

There is no justification for this claim. The IRS Notice required taxpayers and others to give the IRS additional information regarding certain conservation easement donations.

In no way did it change the law regarding the ability of taxpayers to take the conservation easement deductions.

Conclusion

Moving forward, lawmakers should conduct their review of potential abuses of IRS Section 170(h) in a way that gives stakeholders ample opportunity to weigh in on possible legislative solutions.

Any such legislative solutions should respect prior Congressional intent and avoid retroactive tax changes for those have relied on current law.

Onward,

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