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NEWS ANALYSIS

The Donald: Entertainer, Developer, And Reluctant Conservationist

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The New York Times recently argued that Donald Trump must be paying zero income taxes because he is a real estate developer (*The New York Times,* Aug. 12, 2016, p. B1).

That seemed a little pat, while raising few questions about why the law might permit any real estate developer to zero out. The prevailing theory about The Donald's refusal to disclose his returns is that his reported income and/or effective rate must be embarrassingly low. The Clintons, in contrast, paid relatively high rates of tax on $238 million of income. (Related coverage: p. 1087.)

More questions should be asked in view of Trump's refusal to disclose any tax returns, the most recent years of which are still under audit. Being audited isn't an excuse not to disclose; if you run for president, you understand the customs. Former South Carolina Gov. Mark Sanford argued that the tradition of transparency, once broken, cannot be restored (*The New York Times,* Aug. 15, 2016, p. A19).

Of course, things can be kosher from a technical tax standpoint and still look ugly above the fold. There may be no bombshell. The reason for nondisclosure could turn out to be mundane. Readers will recall that we relentlessly analyzed Mitt Romney's tax positions, but his reason for nondisclosure was the mere failure to check the foreign account box on Schedule B.

The Donald's real estate may be self-sheltering, and his noncash charitable deductions may wash out his licensing royalties and show business income. The questions that should be asked go to the justification for what might well be a low effective rate:

1. Does Trump materially participate in his real estate deals or shelter them some other way?

The Apprentice had an 11-year run. The Donald, who earned about $2 million per year from it, was very professional about doing the show, which takes time. In addition to rent from commercial buildings, his income comes from licensing his name to projects, mainly real estate, but also steaks, dress shirts, neckties, wine, mattresses, and whatever else comes along. Tourists buy Trump teddy bears in the lobby of Trump Tower.

As his lawyers pointed out, Trump's sprawling enterprise is not a single entity. The Donald holds interests as the sole or principal owner in approximately 500 separate entities, which perform services and invest in other entities (he appears to have a single-member LLC for each project). Trump has a significant interest in 93 projects, including ownership interests in 14 golf clubs, eight hotels, and five large commercial buildings, including Trump Tower.

In deals in which he has majority ownership, Trump owns the corporation that is the managing member of the LLC that owns the property. He also manages other hotels for investors, such as the Trump Soho. Trump has developed many residential properties, mainly in New York, which are condominiums, meaning that the residents own the apartments, in contrast to his father's rental properties.

His lawyers noted that these entities are mostly partnerships whose items pass through to Trump's individual federal income tax returns. The entities that own real estate and projects that license Trump's name are partnerships. They file Forms 1065 and give The Donald a Form K-1. He enters those partnerships through a wholly owned entity that takes a profits interest (he may also own an equity interest).

Items passed through to him by those partnerships would show up on Schedule E of his individual returns. Trump uses a holding partnership rather than trying to use his Schedule E to consolidate partnership items. His vehicle for equity ownership in his domestic real estate investments and some other deals is Florida-based DJT Holdings LLC. So, for example, the LLC that owns the Old Post Office hotel project in Washington is owned 76 percent by DJT, 22 percent by family, and 1 percent by the managing member corporation owned by Trump. But the IRS would still want to audit the underlying entities, which would not show up on his individual return.

For partnerships that are not under DJT, Schedule E could serve as a mixing bowl. "So by the time it gets to his return, all of the entities' income and expenses lose their individual identity . . . sort of a 'consolidated partnership' tax return (which nets

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Where's the rule that says protected species get priority for tee times?

the profits and losses between the various real estate operations)," said Steven Bankler of Steven Bankler CPA Ltd.

The United States is on a scheduler system called the passive activity loss limitation rules (section 469). But as a real estate developer, Trump may be able to argue that he is active in his projects on the whole under the statute enacted as part of the Reagan-era tax reform.

If Trump were sufficiently active in real estate, he would not be on a schedule, and he could take all real estate depreciation and interest deductions against his non-real-estate income. If he did not materially participate in his real estate projects, then the associated tax deductions would be unavailable for use against his licensing and television income for the years under audit (section 469(c)(1)(B), (c)(7)).

"Material participation" is required, meaning regular, continuous, and substantial involvement in operations (section 469(h)(1)). Any type of work done in connection with a project, in any capacity, is considered "participation" for purposes of the tax law (reg. section 1.469-5(f)). The question becomes whether the individual has done enough work so that it is "material."

In a *Vanity Fair* article, your correspondent speculated that Trump might not materially participate. According to the article, he does not know whether he materially participates, but he said that he spends a lot time on real estate, even while campaigning (*Vanity Fair*, June 23, 2016).

Real estate professionals don't get a free pass. They have to show how much they worked during the year in question, but need not track each property (reg. section 1.469-9). Although the IRS goes after a lot of minnows, the big fish do get audited on material participation, and the examiners are well versed in the subject.

There are different rules for rental properties and other activities. For rental properties, losses are per se passive (section 469(c)(2)). Rental real estate includes the obvious, like rental apartments. It does not include hotels (because of the services) unless the hotel building is subject to a lease (reg. section 1.469-1T(e)(3)). Rental real estate activity cannot be combined with other real estate activities to establish material participation. The Donald has significant rental real estate, including Trump Tower and 40 Wall Street, so he is subject to these rules.

But rental losses can be used if the taxpayer is a real estate professional logging 750 hours per year and devoting half of all personal services rendered during the year to real property trades or businesses in which he materially participates (section 469(c)(7)). Participation in other non-rental real estate activities is counted toward establishing that half.

But that doesn't get the professional home free. It is the condition predicate to permit him to demonstrate that he materially participates in rental real estate activity. So if a hotelier met the 750 hours and half of personal services test for hotel business participation, he would still have to demonstrate separately that he materially participated in his unrelated rental real estate activity.

A West Coast real estate professional recently argued in federal court that she should be able to deduct real estate tax losses without materially participating in rental real estate projects, which are not described as passive relative to professionals (section 469(c)(2), (7)). The taxpayer was hardly a mogul — she was a real estate agent who happened to own a couple of rental properties. The court stuck with the statute and implementing regulation (reg. section 1.469-9(e)(1) and (e)(3)(i)). The general rule applies (*Gragg v. United States*, No. 14-16053 (9th Cir. Aug. 4, 2016)).

For other real estate businesses, there are seven alternative tests, roughly: 500 hours of participation; no other owner participating; no other owner is participating; 100 hours in all activities; material participation for five out of 10 prior years; material

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participation in a service business; and facts and circumstances (reg. section 1.469-5T(a)). The nearly three-decade-old grandfathered temporary rules are not high hurdles; they are simply designed to weed out mere investors with no involvement in the business.

In plain English, a real estate professional could have more than one active business, provided he meets the 500-hour standard for each business (or the rental real estate standard). ''So The Donald or any real estate person could have several other businesses which are active and still have an active real estate business,'' said Dick Lipton of Baker & McKenzie, who has handled section 469 audits of real estate moguls. ''Or even better, if they are profitable, the other businesses are passive because the hours are not sufficient, and any income goes into the passive bucket.''

When the partnership is an LLC, the member must have management rights to materially participate (prop. reg. section 1.469-5(e)(3)). This 2012 proposed rule is controversial, but not a problem for a managing member (*Newell v. Commissioner*, T.C. Memo. 2010-23). Trump owns the managing member corporation in a lot of his real estate equity deals.

Managers don't get a free pass for the mere status of being managers (reg. section 1.469-5T(b)(2)(ii)). Trump signs checks, but does he do enough to be considered active? He takes a hands-on interest in the sprawling family business, but his adult children run many projects. Ivanka Trump's time spent in the business cannot be attributed to her father. But if Melania Trump were to develop a sudden interest in real estate, her time could be attributed to her husband. Trump regretted involving his first wife in his business.

According to the legislative history of section 469, management is sufficient to establish material participation if the manager controls and supervises the local property managers. That is, time spent in a managerial capacity counts as material participation for the CEO, according to Lipton. So if Trump owns rental properties that he manages as CEO, the presence of other salaried managers at those properties would be meaningless. Agents have raised similar issues on audit, and accepted that active managerial time counts toward material participation, Lipton noted.

Monitoring the finances or operations in a non-managerial capacity is not considered material participation, but rather investor behavior (reg. section 1.469-5T(f)(2)(ii)). The key here is non-managerial. A manager's financial monitoring does count as material participation. The same legislative history that says managers get credit for what they do also says that activities of employees cannot be attributed to managers. The pertinent Senate Finance Committee report stated:

> The fact that a taxpayer utilizes employees or contract services to perform daily functions in running the business does not prevent such taxpayer from qualifying as materially participating. However, the activities of such agents are not attributed to the taxpayer, and the taxpayer must still personally perform sufficient services to establish material participation. (S. Rep. No. 99-313, at 735 (1986), 1986-3 C.B. (Vol. 3) 1, 735.)

In another recent case, a trust qualified for material participation in rental properties in a managerial capacity (*Frank Aragona Trust v. Commissioner*, 142 T.C. No. 9 (Mar. 27, 2014)). This case is pertinent because the trust was at the center of a real estate operation and acting through its trustees (trusts are subject to section 469(a)(2)).

The Frank Aragona Trust was a complex residuary trust that owned rental real estate and developed real estate. The trustees were five siblings and one unrelated individual, who all received fees that created tax losses. Three of the siblings were full-time employees of a disregarded LLC wholly owned by the trust that managed the trust's rental properties. The trust conducted its activities through entities in which it held interests along with two of the trustees.

> ***The Donald may not even need to use real estate deductions. Residential real estate development can be internally sheltered.***

The IRS argued that a trust couldn't perform personal services (reg. section 1.469-9(b)(4)). The court held that Congress indicated no intent to exclude trusts, which could act through their individual trustees, by virtue of their state law duty of loyalty, even in their capacity as employees. But the court held that non-trustee employee activity could not be attributed to the trust. The IRS has a guidance project on its business plan.

Does a busy mogul keep a log of his daily activities? Probably not, unless he's trying to argue he is not a New York state resident (Trump is one of the few Manhattan 1-percenters who doesn't do that). The Donald says that his days aren't structured. Daily logs are the gold standard of proof of activity (e.g., *Richard S. Leyh et ux. v. Commissioner*, T.C. Summ. Op. 2015-27). After-the-fact logs are acceptable. When logs are not available, advisers

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dig out all the travel, phone, and credit card records, as well as affidavits, which can be used to establish material participation.

Then again, The Donald may not even need to use real estate deductions. Residential real estate development can be internally sheltered. As we keep saying, accounting methods are where the rubber meets the road, or in this case, where the nail hits the drywall.

The ploy in real estate development is to have an investment vehicle in which to park a parcel of real estate before it is developed, being careful that it does not become a dealer, which would lead to ordinary income on the sale of the land to the development company at a profit. In order to benefit from capital gain treatment on that sale, the investment company will hold the land at least two years (and perhaps install a golf course during that period). If the seller takes back a note instead of cash, gain can be deferred almost indefinitely, even beyond death (section 453(e)(2)).

The development company builds and develops the real estate. If it is residential real estate, gain can be deferred until 95 percent of the project is completed because developers are allowed to use the completed contract method of accounting at the partnership level for residential buildings (section 460). Moreover, profits on domestic residential developments qualify as domestic production income (section 199).

In a recent case, the IRS unsuccessfully contested a family-run developer's right to use the completed contract method (*Shea Homes v. Commissioner*, 142 T.C. No. 3 (2014)). The developer built planned communities, including infrastructure on raw land and formation of homeowners' associations. When infrastructure and common improvements were in place but before houses were built, the developer took deposits — some for the entire purchase price — from prospective homeowners. The purchase contracts were effectively closed in the year entered but could be rescinded for noncompliance with state law.

The developer was delaying recognition of income until these contracts came out of escrow (reg. section 1.460-1(c)(3)(ii)). The IRS argued that the completed contract method did not clearly reflect the developer's income (section 446(b)). Accrual of income and expense is not required for home construction contracts (section 460(e)(1)(A), (6)(A)). The taxpayer unsuccessfully argued for a burden shift because the IRS did not identify what would be the correct method (*Golden State Litho v. Commissioner*, T.C. Memo. 1998-184).

Relying on the contracts, the court concluded that the developer was not selling just a house, but an entire development with amenities and common facilities (reg. section 1.460-3(b)(2)(iii)). Therefore the taxpayer should be allowed to defer income from the contracts until 95 percent of the total contract costs were incurred, or the development (or a promised phase) was completed (reg. section 1.460-1(c)(3)(i)). Moreover, common improvements were not secondary items subject to separate accounting (reg. section 1.460-1(c)(3)(ii)). So the IRS could not change the taxpayer's method.

It all comes back to golf. To the extent that Trump's even fancier golf course residential developments took a while to complete, the development entity could defer income until customers could move in and begin golfing. So in the life of a development, the elapsed time between purchase of raw land and customers teeing off could be several years, even though the developer had cash in hand from would-be homeowners who made a commitment on the basis of a glossy brochure.

2. Has Trump overvalued charitable contributions made in kind or made ineligible contributions?

Many of Trump's publicized charitable gifts take the form of conservation easements, or goods and services provided by his businesses. A lot of contributions are made in his name, but few seem to come from him individually or in cash (*The Washington Post,* Apr. 10, 2016). These are the kind of contributions about which audit valuation and conservation purpose disputes frequently arise.

Trump told newspapers that he has given $102 million to charity over the last five years. That would be 2010 to 2015, which overlap with the years under examination, 2009 forward. The years 2002 to 2008 were closed without audit adjustment, but the more recent returns show items from continuing transactions that could be affected by those earlier years. One of his recent conservation easements may be an audit issue given the IRS antipathy to deductions for easements on golf courses.

The law permits donors of easements to continue to use them while permitting others to appreciate nature. For a contribution to constitute a qualified conservation contribution, the contribution must be of a "qualified real property interest," made to a "qualified organization," and "exclusively for conservation purposes" (section 170(h)). The conservation purpose requirement asks for a "significant relatively natural habitat" (reg. section 1.170A-14(d)(3)(i)). Pesticides are frowned upon (reg. section 1.170A-14(e)(2)).

The value of an easement is the value by which land is diminished when preserved naturally rather than being put to its highest commercial use. Property subject to an easement is valued before and after the easement is put in place to determine the amount of the charitable gift. Enhancements to the

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property are subtracted from the gift (reg. section 1.170A-14(h)(3)(i) and *Browning v. Commissioner*, 109 T.C. 303 (1997)).

The latter point is important because golf courses usually raise the value of the surrounding land, making it more valuable for residential development. Jack Nicklaus proved that the expenditure to build a golf course increases the value of the surrounding land by more than the cost of the course. So for a residential development, a course would be built while the land was in the hands of the investment company, before it was sold to the development company, guaranteeing capital gain treatment for golf-enhanced value. After the golf course is built, which takes some years, the more valuable unusable surrounding land is good for conservation easements.

The Donald appears to be a reluctant conservationist. He seems to have settled for easements after acquiring properties with the intent to develop, and then running into other rich people with contrary ideas about scenery and wildlife. The Mar-a-Lago easements, granted in 1995 and 2002, went to the National Trust for Historic Preservation. Trump essentially promised not to do what he set out to do with the old Marjorie Merriweather Post palace — build other houses around it. (What did we say about zoning fights being rich people's favorite sport?) (Prior analysis: *Tax Notes*, Aug. 31, 1998, p. 997.)

In 2004 and 2005, he gave an easement at Trump National Golf Club in Bedminster, New Jersey, the former John DeLorean estate, for protection of birds. As long as nothing happens to the local bobolinks, he is allowed to maintain two golf courses and a clubhouse on that land. The tax years of the New Jersey gifts were closed with no adjustment (*The Wall Street Journal*, Mar. 10, 2016).

Trump has claimed large charitable donations for conservation easements in the years still under audit. For the years 2010 through 2015, his claimed deductions for conservation easements was $64 million.

In 2014 Trump took a $25 million charitable donation for the gift to the Palos Verdes Peninsula Land Conservancy of an easement for 12 acres adjacent to Trump National Golf Club LA in Rancho Palos Verdes, California. The easement land is being used as a driving range, which is permitted by the terms of the easement. The conservation aspect is that there will be no building on it, although it had been zoned for construction of houses (*The Associated Press*, Aug. 3, 2015).

Trump gave an easement for three-quarters of the land on his Westchester estate, Seven Springs, to the North American Land Trust (NALT) in 2015. He can still put that land to a variety of noncommercial uses — windmills, solar panels, picnic shelters, and hunting stands. He really wanted to develop the 200-acre estate as a golf course or housing, but his wealthy neighbors predictably threw fits, so conservation seems to have been a last resort.

The permissive practices for conservation easements have been controversial for quite a while. Golf has been the subject of court and policy battles over conservation easements (*The Wall Street Journal*, Jan. 4, 2016). Even the current president has proposed to eliminate the conservation easement deduction for golf courses in his fiscal 2017 budget, as he has in every budget.

Then-Senate Finance Committee Chair Chuck Grassley, R-Iowa, studied easements a few years ago and did not like what he found on the links. Like the Obama administration budgets, his charitable reform proposal would have eliminated the deduction for any partial interests in property used as a golf course. Other senators agreed when they introduced S. 526, the Rural Heritage Conservation Extension Act of 2013.

Recently, a group of development partners had their charitable deduction denied in a case involving easements over two golf courses in a North Carolina gated community. The Tax Court denied an $8 million deduction for two easements over entire operating golf courses as not satisfying the conservation purpose requirement (*John A. Atkinson et ux. v. Commissioner*, T.C. Memo. 2015-236).

The donee of the easements was NALT. Both easements covered noncontiguous tracts of operating golf courses bordered by vacation houses. The easements covered fairways, greens, teeing grounds, ranges, roughs, ponds, and wetland areas with a paved golf cart path throughout. Wetlands were a mere 4 acres (5 percent) of one easement and 34 acres of the other (37 percent). Each easement's terms permitted fertilizing, digging, dredging, treecutting, pesticide use, and other operations necessary to run a golf course with buildings and cart paths.

Nonetheless, the taxpayers were able to shift the burden to the government (section 7491(a)). The government argued that the retained rights in the easement negated the conservation goals. The court found no plan to preserve longleaf pine trees in their natural state. Manmade ponds with manicured edges did not host plants and wildlife. Even the rough was not rough enough to sustain suitably rare frogs and squirrels. The taxpayer was reduced to arguing for a few Venus flytraps, which are not endangered.

Each easement had a big parcel of real wetlands abutting it, subject to separate easements that were not in dispute. The wetlands easements were being used to justify the golf course easements (reg.

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section 1.170A-14(d)(3)(i)). The court rejected the argument that the not-quite-natural golf courses contributed to the preservation of the wetlands or acted as buffer zones because there were houses in between (reg. section 1.170A-14(f), Example 2).

The *Atkinson* court refused to decide whether an operating golf course is inherently inconsistent with conservation purposes (reg. section 1.170A-14(e)(2)). Because NALT advised the taxpayers, they had reasonable cause to get out of accuracy-related penalties (section 6664(c)(1)). They also avoided gross valuation overstatement penalties because they relied on appraisers (section 6664(c)(2)).

Atkinson was a big victory for the IRS. In its other golf course case, the IRS conceded the conservation purpose of a golf course, and then lost an argument about valuation (*Kiva Dunes Conservation LLC v. Commissioner*, T.C. Memo. 2009-145). The same judge, Thomas Wells, decided both cases.

In *Kiva Dunes*, the project was a gated community with a golf course that took up more than half its acreage. NALT was granted an easement covering the entire golf course. The taxpayers deducted a $31 million charitable contribution plus a $35,000 cash donation to NALT. The IRS asked for a gross valuation overstatement penalty. The court favored the testimony of the taxpayer's local appraiser, whose estimate was three times the IRS estimate. The court compared a hypothetical scenic residential subdivision with the golf course.

> ***A driving range would not seem to be a habitable place for birds and wildlife.***

Having passed on The Donald's solicitude for bobolinks, would the IRS be more aggressive about the Palos Verdes driving range in the wake of *Atkinson*? A driving range would not seem to be a habitable place for birds and wildlife.

Trump may not be very liquid, as evidenced by reported borrowing and asset sales to finance his low-cost campaign (Politico, May 31, 2016). Trump gave $1 million of his own cash to a veterans' group in 2016 after publicly pledging to do so. *The Washington Post* found that he personally gave $4 million since 2001, including the veterans donation, but criticized him for lack of follow-through on pledges to charities (*The Washington Post,* June 28, 2016).

He has a foundation, the Donald J. Trump Foundation, to which he did not give any money from 2009 through 2014, having given it roughly $3 million before. It received an additional $7 million from his friends, and gave away $7 million through 2014, including a $100,000 gift to the National September 11 Memorial Museum. Some recipients were cancer charities that held functions at Trump properties. The foundation gave $50,000 to the American Conservative Union Foundation, which hosts the Conservative Political Action Conference, where Trump spoke.

More than $6 million of Trump's recent donations took the form of in-kind gifts of services from Trump businesses. *The Washington Post* estimated that Trump claimed deductions for at least 2,900 free rounds of golf, 175 free hotel stays, 165 free meals, and 11 gift certificates to spas. Sometimes those items were donated to charities as prizes to be auctioned.

3. Might the audit concern expenses related to Trump's television show *The Apprentice*?

The Donald owns the rights to *The Apprentice* and *Celebrity Apprentice* in partnership with producer Mark Burnett. He did the show for 11 years, until NBC canceled it and his beauty pageants because of his offensive comments made while campaigning. He was fully committed to the show, so he must have incurred some individual expenses doing things like flying out to meet contestants. Oh, and the creation of videotapes qualifies as domestic production income!

Entertainers routinely fight with the IRS about expenses that they see as business expenses and the IRS sees as personal lifestyle expenses. As your correspondent told *Vanity Fair*: ''Entertainers fight about this stuff with the IRS all the time.'' Carol Burnett, who starred in her own variety show on CBS, argued successfully that she would not wear her sequined Bob Mackie gowns to the grocery store and that they were work uniforms.

Even outside his role on *The Apprentice*, The Donald's lavish lifestyle is part of the product he sells. His creditors recognized that fact in the 1990s when they allowed him to keep up appearances. Like Ralph Lauren, he sells a dream of copying his own lifestyle. So he can validly argue that some expenditures are just for show. Let's face it, if anyone can make the cost of his lifestyle deductible, it'd be The Donald, whose whole life is on display.

> ***Let's face it, if anyone can make the cost of his lifestyle deductible, it'd be The Donald, whose whole life is on display.***

Even though Trump buys his aircraft used, the cost of the Trump air force must be considerable, given the hefty operating costs for aircraft. He has the famous Boeing 757, bought used, which would cost about $50,000 per day to operate. He also owns a smaller Cessna Citation X jet and three Sikorsky helicopters. He uses the aircraft for campaigning,

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which gave him a significant advantage in the primaries, because he could make several appearances in one day and still return to New York at night. But that means his campaign must reimburse the cost of aircraft use.

4. Might the IRS be contesting contributions of image rights to partnerships?

The Donald does a lot of licensing of his image, but sometimes not in the usual way of granting a license and taking back royalties. He receives a lot of royalty income from foreign licensing deals in developing countries that are fond of final withholding taxes and don't have advantageous treaties with the United States. Well, gee, can't he shift income like multinationals do? Income shifting by multinationals depends critically on the subpart F "look-thru" rule and the EU interest and royalties directive, 2003/49/EC, which prohibits withholding. Guys like Trump have to worry about creation of foreign personal holding companies.

In some domestic deals, he contributes his image rights to a limited partnership that owns the project that will use his image. He's contributing his highly marketable persona to partnerships, being treated as a partner, and enjoying the benefits of passthrough treatment of partnership items and capital gains on disposition of his interests. (Prior analysis: *Tax Notes*, Aug. 31, 2015, p. 907.)

In this type of licensing deal, Trump contributes image rights (royalty-free nonexclusive licenses) as property in exchange for partnership equity interests. He also takes a separate profits interest in the partnership in exchange for services, just like an investment fund manager. When he contributes licenses to use the Trump name to partnerships, he claims that because the rights constitute property, he can take a positive capital account equal to the value of his image rights in a nonrecognition exchange (section 721).

He contributes a Trump brand and image license agreement to the partnerships in which he participates in lieu of a capital contribution. The license is held by the partnership in which his own LLC (of which he is manager and sole equity owner) is an equity partner. Numerous examples are listed on his Federal Election Commission disclosure. His LLC is listed as the licensor, and the licensee partnership is also listed. Values of the licenses, management companies, and book deals are described as "not readily ascertainable."

Presumably Trump would have a zero basis in his self-created intangible, giving him a tax basis of zero in his partnership interest, regardless of its option value (section 722). Royalties and fees are ordinary income. For ultimate capital gain treatment, his interest would have to be redeemed, or be an equity interest in a partnership owning capital assets, so that gain passed through. So he would achieve nonrecognition upon contribution and potential conversion.

Courts permit pretty much anything of value to be considered property. Planners rely on section 351 precedent and regulations to discern what constitutes property, even though section 721 requires that a partner be acting in a partner capacity when a contribution is made. If a partner retains ownership of the contributed property but allows the partnership to use it, the contribution is not sheltered by section 721 (reg. section 1.721-1(a)). The question is whether self-developed intangibles are eligible.

When Trump licenses his self-developed intangibles, the license is nonexclusive because he has a lot of licenses. In the IRS view, a transfer of nonexclusive rights is just a license, so that it would be an assignment of income rather than a transfer of property under section 721. Moreover, the IRS does not respect nonrecognition transfers of property that have been created especially for the transferee, which Trump's licenses necessarily would be (Rev. Rul. 64-56, 1964-1 C.B. 133).

Trump may also enter a marketing and promotional services agreement with a licensee partnership. This agreement is his promise to perform services in support of the license of his name. Sometimes a deal has management agreement to be performed by a management company controlled by him. He appears to treat his image rights as assets separate from his fee-producing services. The IRS view is that any services simultaneously transferred should be ancillary.

The Donald gets profits interests when he promises to perform services for licensee partnerships. If a President Trump were to push a tax reform plan that would change the taxation of profits interests for investment fund managers, would he change the taxation of real estate professionals? He proposed a lower rate for income from passthrough entities. Some of the legislative schemes proposed to change the tax treatment of profits partners would not have exempted real estate professionals (see Carried Interest Fairness Act of 2015; H.R. 2889; and S. 1686). The tax reform draft released by then-House Ways and Means Committee Chair Dave Camp would have exempted real estate professionals.

5. Would tax returns disclose his real wealth?

The last question is a red herring. Tax returns are not wealth disclosure documents. FEC filings are clumsy wealth disclosure documents intended to flag conflicts of interest. Those who object to the vagueness of FEC forms should take it up with the Senate, whose millionaire members do not want to disclose their actual wealth.

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Suppose, as many analysts believe, that The Donald's wealth is not the $10 billion he puts on it. Estimates have ranged from $200 million to $4 billion — the number *Forbes* and *Fortune* put on it. His FEC filing, which reports ranges of values, shows tangible assets of at least $1.5 billion. The difference between his estimate and everyone else's is the value of his image rights, which are difficult to value. The less liquid and less tangible assets are, the harder they are to value.

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Reasonable minds can disagree about the value of hotels, golf courses, and image licenses. All of those assets turn out to be idiosyncratic and difficult to value. ''My net worth fluctuates, and it goes up and down with markets and with attitudes and with feelings, even my own feelings,'' Trump said in a 2007 deposition that became part of the public record in a lawsuit (*The Washington Post*, Aug. 10, 2016).

Mitt Romney's wealth was illiquid, consisting mostly of profits interests in private equity deals, and could only be estimated (Prior coverage: *Tax Notes*, Oct. 1, 2012, p. 21). Other presidential candidates have held their wealth in more conventional, liquid investments. President Obama's wealth is easy to gauge because it consists of Treasury securities and a house. Ross Perot's wealth could be valued because he held the bulk of it in Treasury securities after selling his Medicare payments processing business. ■

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