THE 2017 TAX ACT AND SETTLEMENT TRUSTS

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By any measure, the enactment of the Alaska Native provisions of the 2017 Tax Act was an extraordinary achievement by the Alaska congressional delegation. Although the ANCSA Amendments Act of 1987 first permitted Alaska Native Corporations to establish "settlement trusts" to benefit their shareholders, relatively few settlement trusts have been established to date due to various obstacles posed by the Internal Revenue Code. The 2017 Tax Act removed a significant hurdle by permitting Alaska Native Corporations to claim a tax deduction for transfers to a settlement trust, thereby allowing such transfers to occur on a pre-tax basis rather than on the after-tax basis as was the rule prior to the new legislation. The 2017 Tax Act also provides tax certainty with regard to assignments to a settlement trust of certain payments required by ANCSA such as those under section 7(j), which should encourage Alaska Native Corporations to use such assignments to fund settlement trusts in convenient annual installments. To the extent that ambiguities exist as to the Alaska Native provisions of the Act, those provisions should be interpreted in favor of the Alaska Native entities and individuals that seek to utilize those provisions in accordance with canons of statutory construction for Indian Law and ANCSA.

New possibilities have been created for Alaska Native Settlement Trusts and Alaska Native Corporations by the recently passed tax legislation, Pub. L. No. 115-97 (the "2017 Tax Act").[1] Congress first authorized Native Corporations to establish Settlement Trusts in 1988 "to promote the health, education, and welfare of its beneficiaries and preserve the heritage and culture of Natives,"[2] but the Trusts have been relatively underutilized thus far by Native Corporations. Among the important changes made by the 2017 Tax Act was the addition of section

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1. Pub. L. No. 115-97, 131 Stat. 2054 (2017).

2. *See* Alaska Native Claims Settlement Act Amendments of 1987 ("1987 ANCSA Amendments"), Pub. L. No. 100-241, § 10, 101 Stat. 1788, 1805 (1988).

247 to the Internal Revenue Code (I.R.C.), which permits a Native Corporation to make contributions to a Settlement Trust on a tax deductible basis rather than an after-tax basis. This alone should make the use of Settlement Trusts more attractive to Native Corporations.

This Article proceeds in three main parts. The first Part discusses key concepts that are applicable to Settlement Trusts as an element of federal Indian law and policy, to provide readers a context through which the 2017 Tax Act can be understood. The second Part discusses the legislative process that led to the enactment of the 2017 Tax Act, including a summary of the predecessor bills, S. 1698 and H.R. 3524, from which the Settlement Trust provisions of the 2017 Tax Act were derived. The third Part highlights potential areas of importance to practitioners as they seek to apply the 2017 Tax Act to the circumstances of their Native Corporation clients that have established or plan to establish Settlement Trusts.

I. THE CIRCUMSTANCES LEADING TO THE 2017 TAX LEGISLATION

A. ABOUT ANCSA

Congress enacted the Alaska Native Claims Settlement Act of 1971 (ANCSA)[3] to resolve various claims by Alaska Natives, including claims related to aboriginal land titles based on use and occupancy, as well as aboriginal hunting or fishing rights.[4] ANCSA obligated the federal government to convey approximately 44 million acres of land and pay almost one billion dollars to Alaska Natives in exchange for the relinquishment of Alaska Native claims.[5] A central piece of the settlement was the requirement that Alaska Natives incorporate under Alaska state law to receive the land conveyances and the cash payments. Within a few years of ANCSA's 1971 enactment, it became apparent that the corporate form did not always suit the needs of Alaska Natives,[6] and in the years since, Congress has amended ANCSA several times in attempts to serve the needs of Alaska Natives more effectively.[7]

3. Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601–1629 (2012)).

4. *See generally* Robert T. Anderson, *Sovereignty and Subsistence: Native Self-Government and Rights to Hunt, Fish, and Gather After ANCSA*, 33 ALASKA L. REV. 187 (2016).

5. *See* Christian G. Vazquez, Note, *A Business Entity By Any Other Name: Corporation, Community and Kinship*, 33 ALASKA L. REV. 353, 354–62 (2016).

6. *See generally* Martha Hirschfield, Note, *The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form*, 101 YALE L.J. 1331 (1992).

7. *See, e.g.*, H.R. REP. NO. 94-729, at 17 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 2376, 2383–87 (explaining why 1976 ANCSA amendments eliminated

ANCSA and the various statutes that implement it are plainly remedial Indian legislation. As Congress described in section 2(9) of the 1987 ANCSA Amendments, ANCSA and the laws that succeeded it "are Indian legislation enacted by Congress pursuant to its plenary authority under the Constitution of the United States to regulate Indian affairs."[8] Therefore, in construing ANCSA, courts have available to them several canons of construction specific to Indian law. In particular, courts may employ the canon that ambiguity in statutes passed for the benefit of Indians should be liberally construed in favor of Indians.[9] For example, in an oft-quoted passage in *Bryan v. Itasca County*,[10] the Supreme Court described the "eminently sound and vital canon"[11] that "statutes passed for the benefit of dependent Indian tribes are to be liberally construed, doubtful expressions being resolved in favor of the Indians."[12]

The United States Tax Court's decision in *Old Harbor Native Corporation v. Commissioner*[13] demonstrates the principle that ambiguous provisions within ANCSA and its implementing statutes are construed liberally to the favor of Alaska Natives. Old Harbor Native Corporation had claimed a tax deduction under ANCSA section 21(h)(2)[14] for lobbying expenses incurred relative to an exchange of some of its ANCSA lands for federal lands.[15] In relevant part, ANCSA section 21(h)(2) permits a deduction for "[a]ll expenses . . . incurred by a Native Corporation . . . in connection with the selection or conveyance of lands pursuant to [ANCSA]."[16] The IRS argued that ANCSA section 21(h)(2) could not apply because Old Harbor had already selected and been conveyed the

applicability of federal securities laws to Native Corporations); House Explanatory Statement, 133 CONG. REC. H11,933 (daily ed. Dec. 21, 1987), *as reprinted in* 1987 U.S.C.C.A.N. 3299, 3307–10; S. REP. NO. 100-201, at 20 (1987), *as reprinted in* 1987 U.S.C.C.A.N. 3269, 3270–72 (explaining that Settlement Trust provisions were added to ANCSA because the corporate form did not always address the needs of Alaska Natives).

8. 1987 ANCSA Amendments, Pub. L. No. 100-241, § 2(9), 101 Stat. 1788, 1789 (1988).

9. *See, e.g.*, Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1918) (citing Choate v. Trapp, 224 U.S. 665, 675 (1912)); *see also* Antoine v. Washington, 420 U.S. 194, 199 (1975) ("The canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice.").

10. 426 U.S. 373 (1976).

11. *Id.* at 392 (quoting N. Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 655 n.7 (1976)).

12. *Id.* (quoting *Alaska Pac. Fisheries*, 248 U.S. at 89).

13. 104 T.C. 191 (1995).

14. ANCSA § 21(h)(2), 43 U.S.C. § 1620(h)(2).

15. *Old Harbor Native Corp.*, 104 T.C. at 192, 198.

16. 43 U.S.C. § 1620(h)(2).

lands that Old Harbor was exchanging.[17] Accordingly, the IRS contended, the lobbying expenses incurred relative to the exchange did not fall within the express language of ANCSA section 21(h)(2).[18] In permitting the deduction, the Tax Court referenced the presumption that remedial Indian legislation, including ANCSA, is to be read broadly and in the light most favorable to the Indians.[19]

B. TAX ISSUES INVOLVING SETTLEMENT TRUSTS PRIOR TO 2017

In 1988, Congress enacted the 1987 ANCSA Amendments, which added section 39 to ANCSA.[20] Under ANCSA section 39, a Native Corporation is permitted to form one or more Settlement Trusts "to promote the health, education, and welfare of its beneficiaries and preserve the heritage and culture of Natives."[21] The Settlement Trust accomplishes these purposes by using the assets (including cash) placed in the Trust by a Native Corporation and the earnings derived from that investment to provide benefits to its beneficiaries. Most typically, the benefits are provided in the form of cash distributions directly to, or cash expenditures for, the benefit of the beneficiaries. Examples of benefits provided by Settlement Trusts include educational benefits; funeral, burial, and potlatch benefits; elders benefits; and pro rata cash distributions.

Unfortunately, the 1987 ANCSA Amendments did not address the numerous tax issues inherent in the creation, funding, and operation of Settlement Trusts, five of which are particularly noteworthy. First, significant trust level taxes limited the ability of a Settlement Trust to reinvest its income for the future. Another issue was that the reporting process for Settlement Trust income and distributions created significant administrative problems. Third, when assets were placed in the Settlement Trust, a Trust's beneficiaries would likely have "phantom

17. *See Old Harbor Native Corp.*, 104 T.C. at 204.

18. *See id*.

19. *Id.* at 204 ("We do not read 43 U.S.C. section 1620(h)(2) as narrowly as respondent. To the contrary, we read ANCSA broadly and in the light most favorable to Alaskan [N]atives, the intended beneficiaries of ANCSA.").

20. 1987 ANCSA Amendments, Pub. L. No. 100-241, § 10, 101 Stat. 1788, 1804–06 (1988) (codified as amended at ANCSA § 39, 43 U.S.C. § 1629e (2012)).

21. ANCSA § 39(b)(1), 43 U.S.C. § 1629e(b)(1). *See also* S. REP. NO. 100-201, at 34 (1987), *as reprinted in* 1987 U.S.C.C.A.N. 3269, 3285–86 ("The general purpose of the State-Chartered Settlement Trust is to preserve Native heritage and culture and to promote the health, education and economic welfare of its beneficiaries, the shareholders of the transferor Native Corporation and their lawful successors.").

income" in the form of a constructive dividend. Fourth, if the Native Corporation had certain forbidden controls over the Settlement Trust, the Settlement Trust would be disregarded under the "grantor trust rules" as a tax entity and its income could become taxable to the Native Corporation. Lastly, the contribution of appreciated assets to a Settlement Trust triggered gain to the contributing Native Corporation under section 311(b).

Congress sought to address most of these issues in the Economic Growth and Tax Relief Reconciliation Act (EGTRRA) of 2001,[22] which added section 646 as a temporary provision to the I.R.C.,[23] and also added section 6039H to govern information reporting concerning a Settlement Trust that elected section 646 treatment.[24] Section 646 allows Settlement Trusts to elect to be governed by the provisions of section 646 rather than the other provisions of Subchapter J, including the grantor trust rules of I.R.C. section 671 et seq. Making a section 646 election solves the first problem, that of significant taxes on reinvestment of Settlement Trust income, both by lowering the overall tax rates applicable to Settlement Trusts and also by imposing the tax on the Settlement Trust without regard to whether the Settlement Trust distributes its income to the beneficiaries. Thus, the trustees of the Settlement Trust can make the decision on whether and how much to distribute to beneficiaries in a tax-neutral environment. This is in sharp contrast to the other provisions of Subchapter J, which impose significant income tax on a trust to the extent that trust does not distribute its income.[25] The section 646 election also means that the streamlined reporting rules of section 6039H applies, which permits a simplified tax return by the Settlement Trust. And so long as the Settlement Trust's distributions are not taxable under section 646(e), nothing needs to be reported by the beneficiaries on their own individual tax returns. A section 646 election further eliminates the possibility that beneficiaries will have "phantom income" on contributions to the Settlement Trust, because section 646(d)(1) expressly forbids such taxation. Also, after a section 646 election, per subsection (b), the grantor trust rules no longer apply to an electing Settlement Trust, which means that the relationship between the Native Corporation (as the grantor) and the Settlement Trust do not have to be as carefully scrutinized for hidden impermissible controls by the Native Corporation over the Settlement Trust. Thus, the addition of section 646 and the use of

22. Pub. L. No. 107-16, 115 Stat. 38 (amending scattered sections of I.R.C.).

23. *Id.* § 671(a), 115 Stat. at 144 (codified at I.R.C. § 646 (2012)). Section 646 was eventually made permanent by the American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 101, 126 Stat. 2313 (2013).

24. *Id.* § 671(b), 115 Stat. at 147 (codified at I.R.C. § 6039H).

25. *Compare* I.R.C. § 646 *with id.* §§ 641–92.

an election addressed all of the problems described in the preceding paragraph except for the last: the applicability of section 311(b) to cause gain recognition to the Native Corporation if it contributed appreciated assets to the Settlement Trust.[26] That is, even with a section 646 election, a contribution of appreciated property to a Settlement Trust would still trigger gain to the Native Corporation.

II. THE LEGISLATIVE PROCESS FOR THE 2017 TAX ACT

The legislative process of the 2017 Tax Act provides important insights into how the resulting I.R.C. provisions should be interpreted and applied. Moreover, once the process is understood, it becomes clear that the enactment of the Alaska Native provisions of the 2017 Tax Act was an impressive achievement by the Alaska congressional delegation.

A. S. 1698 AND H.R. 3524

Even after section 646 was made permanent in 2012,[27] the I.R.C. still posed problems to the establishment of Settlement Trusts. Contributions of appreciated property still triggered gain and had to be made on an after-tax basis, which dramatically reduced the funds that a Native Corporation could place in trust.

By way of example, assume that Native Corporation "NC" has an effective combined Alaska state and federal income tax rate of 40%. If NC wants to contribute land with a fair market value of $1000 and an adjusted basis of $600 to Settlement Trust "ST," a tax of $160 would be owed by NC. This tax is computed as gain of $400 (fair market value of $1000 less adjusted basis of $600) multiplied by the effective combined tax rate of 40%. Obviously, NC would have to use its other assets to supply the cash necessary to pay the tax, unless it has net operating losses or tax credits it can use to avoid a cash payment.

Another problem concerned advance assignments to a Settlement Trust of the payments that a Native Corporation was entitled to receive annually under ANCSA. The most prominent example of such a payment

26. The tax rate problem was directly solved by section 646(b), which cross-referenced to the "lowest rate" in section 1(c) and to the rate on net capital gain applicable to a taxpayer that was subject to such lowest rate. The administrative reporting problems were solved by new section 6039H. The "phantom income" problem was directly solved by section 646(d)(1). The flush language of section 646(b) addressed the potential application of the grantor trust rules by stating that the taxes imposed were "in lieu of the income tax otherwise imposed." *See* I.R.C. §§ 646, 6039H.

27. American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (2013) (codified at I.R.C. § 646).

is the right of a Village Corporation to receive annual payments under ANCSA section 7(j). Although the regularity of such payments offers a ready-made installment funding device for a Settlement Trust, the tax treatment was uncertain and thus was not used.

To address these problems the Alaska congressional delegation introduced identical bills in 2017 in the House of Representatives, H.R. 3524,[28] and in the Senate, S. 1698.[29] As discussed below, virtually the entirety of these identical bills were eventually enacted into law as a part of the 2017 Tax Act.

Both H.R. 3524 and S. 1698 contained four substantive sections.[30] Section 2 of both H.R. 3524 and S. 1698 proposed to add a new section 139G to the I.R.C.[31] The proposed section 139G would be effective for taxable years beginning after December 31, 2016. It would permit Native Corporations to exclude advance assignments of certain payments required by ANCSA (including those under ANCSA section 7(j))[32] to a Settlement Trust, with the Settlement Trust (and not the assigning Native Corporation) being the proper taxpayer to report such assigned income.[33]

Section 3 of both H.R. 3524 and S. 1698 proposed to add a new section 250 to the I.R.C.,[34] effective for any taxable year as to which the statute of limitations on refunds or credit had not expired.[35] Section 250, as proposed in H.R. 3524 and S. 1698, had several subsections. Subsection (a) would permit Native Corporations to elect on an annual basis to deduct contributions to a Settlement Trust whether or not that Settlement Trust had made the section 646 election.[36] Subsection (b) provided that the deduction would be the amount of cash contributed or, if property is

28. The Settlement Trust Improvement Act of 2017, H.R. 3524, 115th Cong. (2017). H.R. 3524 was introduced by Congressman Young on July 27, 2017.

29. The Settlement Trust Improvement Act of 2017, S. 1698, 115th Cong. (2017). S. 1698 was introduced by Senator Murkowski on August 1, 2017, with Senator Sullivan as a co-sponsor.

30. *See* H.R. 3524 § 1; *see also* S. 1698 § 1.

31. H.R. 3524 § 2; S. 1698 § 2.

32. ANCSA § 7(j), 43 U.S.C. § 1606(j). However, the payments that could be excluded after advance assignment under new section 139G were not limited to ANCSA section 7(j) payments and could be any payment made or treated as made to the Native Corporation "pursuant to, or as required by, any provision" of ANCSA. *See* H.R. 3524 § 2; S. 1698 § 2.

33. *See* H.R. 3524 § 2; S. 1698 § 2.

34. H.R. 3524 § 3; S. 1698 § 3. The enacted 2017 Tax Act changed the numbering of the new section permitting deductibility of contributions to section 247 due to other changes made by the legislation.

35. H.R. 3524 § 3(d)(1); S. 1698 § 3(d)(1). Section 3(d)(2) of both S. 1698 and H.R. 3524 allowed taxpayers one full year after the date of enactment in which to claim a refund. The effective date provision for what ultimately became section 247 is somewhat complex and is discussed in detail *infra* at Part III.

36. *See* H.R. 3524 § 3(a); S. 1698 § 3(a).

contributed in kind, the deduction would be the lesser of the Native Corporation's adjusted basis in the asset or the asset's fair market value.[37] Subsection (c) provided that for any one taxable year, the Native Corporation's deduction would be limited to the amount of its taxable income for that year, with the Native Corporation being able to carry unused deductions forward for up to fifteen years.[38] Subsection (d) cross-referenced to section 646(h) of the code for certain definitions.[39] Subsection (e) provided the manner of making and revoking the section 250 election.[40] Subsection (f) provided various technical and conforming rules, including: the Native Corporation would not recognize gain or loss when a contribution was made if the annual section 250 deductibility election was in effect; the consequence of the deduction was that the Settlement Trust would have income in the amount of the deduction; and that the Settlement Trust would have a basis in the contributed property equal to the lesser of the Native Corporation's basis as to any property contributed in kind or the asset's fair market value.[41] Subsection (g) would permit a Settlement Trust to elect to defer income associated with the contribution of appreciated property until the contributed property is resold and would impose a recapture rule if the Settlement Trust did not hold the property that is subject to the deferral election for the entire taxable year beginning after the taxable year of the Settlement Trust in which the contribution was made.[42]

Section 4 of both H.R. 3524 and S. 1698 proposed an amendment to the existing information reporting rules relative to Settlement Trusts, so that Native Corporations making a deductible contribution were obligated to provide the following information to the Settlement Trust on

37. *See* H.R. 3524 § 3(b); S. 1698 § 3(b).
38. *See* H.R. 3524 § 3(c); S. 1698 § 3(c).
39. *See* H.R. 3524 § 3(d); S. 1698 § 3(d).
40. *See* H.R. 3524 § 3(e); S. 1698 § 3(e).
41. *See* H.R. 3524 § 3(f); S. 1698 § 3(f).
42. *See* H.R. 3524 § 3(g); S. 1698 § 3(g). Section 3(c) of both S. 1698 and H.R. 3524 allowed a Settlement Trust one year after the date of enactment to amend its Trust Agreement in conjunction with the respective Native Corporation, if necessary to permit the Settlement Trust to make the section 250(g) deferral election. This provision was subsequently deleted from the version that initially passed the Senate, presumably to avoid potential problems under the Senate's so-called "Byrd Rules" that pertain to the scope of reconciliation measures. This is because this provision was arguably not a revenue-related measure.

or before January 31 of the calendar year following the calendar year in which the contribution was made:

- the amount of the contribution(s) for which the Native Corporation was taking a deduction;
- whether the contribution was in cash;
- for each of those contributions that was not in cash, the date the property was originally acquired by the Native Corporation and the adjusted basis and fair market value of that property on the date the property was contributed to the Settlement Trust;
- the date on which each contribution was made to the Settlement Trust; and
- for each such contribution, such additional information as required by the IRS.[43]

Section 5 of both H.R. 3524 and S. 1698 contained an express statement that any eventual legislation was remedial Indian legislation enacted under the plenary authority of Congress to regulate Indian affairs, with the consequence that any ambiguities in the application of new section 139G[44] or new section 250 were to be construed in favor of the respective Native Corporation.[45]

Neither H.R. 3524 nor S. 1698 contained any provision relative to the tax rates applicable to Settlement Trusts.

B. H.R. 1: VERSION INITIALLY PASSED BY THE HOUSE

Although the final conference bill that ultimately became the 2017 Tax Act was labeled "H.R. 1," the legislation went through several iterations in the House and Senate as well as in conference that were all known as "H.R. 1." To fully understand the below discussion of the legislative process, readers must be mindful of which version of H.R. 1 is being referenced.

43. *See* H.R. 3524 § 4; S. 1698 § 4.

44. The actual reference within section 5 of both H.R. 3524 and S. 1698 was incorrectly cited to "section 139F."

45. *See* H.R. 3524 § 5; S. 1698 § 5. As with section 3(c) of both H.R. 3524 and S. 1698, section 5 was subsequently deleted from the version that initially passed the Senate, again presumably to avoid potential problems under the Senate's Rules that pertain to the scope of reconciliation measures. Properly understood, section 5 was merely a restatement of the existing law set out in Part I.A. of this Article that ANCSA and its implementing legislation are Indian statutes so that ambiguities are resolved in favor of the Alaska Natives. Nonetheless, section 5 was arguably not a revenue provision and thus not properly a part of reconciliation legislation.

The version of H.R. 1 that initially passed the House on November 16, 2017,[46] did not include any of the provisions set forth in H.R. 3524 or its Senate counterpart, S. 1698. Thus, this original version of H.R. 1 did not make any of the changes discussed above, such as permitting exclusion of assignments of ANCSA-required payments, allowing contributions to Settlement Trusts to be deductible, or eliminating the rule that contributions of appreciated property in kind caused gain to the Native Corporation under section 311(b).

However, the initial House version of H.R. 1 did contain a proposed *increase* in the tax rates applicable to Settlement Trusts.[47] Understanding this requires first looking at the tax rates applicable to Settlement Trusts prior to the initial House version of H.R. 1, and then looking at the change proposed by the initial House version of H.R. 1, as described in the next subsection of this Article.

Settlement Trust Tax Rates Prior to the 2017 Tax Act

Prior to H.R. 1, the first legislative draft of the 2017 Tax Act, the I.R.C. imposed two different tax rates on Settlement Trusts that made the section 646 election: a flat 10% tax rate on the Settlement Trust's ordinary income (such as rents, interest and short term capital gain) and a 0% tax rate on the net capital gain of the Settlement Trust (including its qualified dividends).[48] This rate structure was imposed on electing Settlement Trusts by section 646(b) and two subsections of section 1 of the I.R.C.[49]

Before Congress passed the 2017 Tax Act, Section 646(b) of the I.R.C. read as follows:

> (b) Taxation of income of trust. Except as provided in subsection (f)(1)(B)(ii)[50]—
>
> > (1) In general
> > There is hereby imposed on the taxable income of an electing Settlement Trust, other than its net capital gain, a tax at the lowest rate specified in section 1(c).

46. H.R. 1, 115th Cong. (2017) (as passed by House, Nov. 16, 2017).
47. *See* H.R. 1 § 11001(a) (amending I.R.C. § 1(j)(2)(E) (2012)).
48. *See* I.R.C. §§ 646(b), 1(c), (i).
49. *See id.* §§ 646(b), 1(c), (h)(11), (i).
50. This subsection imposes a recapture rule when either the beneficial interests in the Settlement Trust or the stock of the Native Corporation have become alienable in certain circumstances, in addition to the limited circumstances permitted by ANCSA section 7(h)(1)(B). Absent such a change, section 646(f)(1)(B)(ii) does not affect taxation of a Settlement Trust.

> (2) Capital gain
> In the case of an electing Settlement Trust with a net capital gain for the taxable year, a tax is hereby imposed on such gain at the rate of tax which would apply to such gain if the taxpayer were subject to a tax on its other taxable income at only the lowest rate specified in §1(c).
>
> > Any such tax shall be in lieu of the income tax otherwise imposed by this chapter on such income or gain.[51]

With regard to taxation of ordinary income, section 646(b)(2) references section 1(c), which on its face appears to establish a rate of 15% as to a Settlement Trust's ordinary income.[52] However, section 1(i) modifies section 1(c) to provide that the rate of tax under section 1(c) is 10%.[53] Thus, the tax on the ordinary income of a Settlement Trust is 10%.

With regard to the "net capital gain"[54] of a Settlement Trust, section 646(b)(2) provides that the tax rate is "the rate of tax which would apply to such [net capital] gain" if the taxpayer were subject to tax on its other income "at the lowest rate specified in § 1(c)."[55] The lowest rate of tax specified in section 1(c), as modified by section 1(i), is 10%.[56] The question thus becomes what tax rate is imposed on the net capital gain of a taxpayer whose other income is taxable at a 10% rate. That question is answered by section 1(h)(1)(B), which provides that the capital gain tax rate applicable to a taxpayer subject to tax at a rate of 25% or less (as were Settlement Trusts by virtue of section 1(c), as modified by section 1(i)) is zero.[57]

Thus, although not directly spelled out in a single I.R.C. provision, the tax rates applicable to a Settlement Trust prior to passage of the 2017 Tax Act were (i) 10% on the trust's ordinary income (e.g., interest and rental income),[58] and (ii) 0% on its net capital gain (including qualified dividends).[59]

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51. *Id.* I.R.C. § 646(b).
52. *See id.* §§ 646(b)(2), 1(c).
53. *Id.* § 1(i).
54. *Id.* § 1(h)(11) (defining "net capital gain" to include "qualified dividend income"). The most common form of qualified dividend income is from United States domestic corporations. *See id.* § 1(h)(11)(B)(i)(I).
55. *Id.* § 646(b)(2).
56. *See id.* § 1(c), (i).
57. *Id.* § 1(h)(1)(B).
58. *See id.* §§ 646(b)(2), 1(c), (i).
59. *See id.* §§ 646(b)(2), 1(h)(1)(B).

The Rate Change For Settlement Trusts Contained in the House Version of H.R. 1

Section 1005(b)(6) of the version of H.R. 1 that passed the House on November 16, 2017, would have increased the tax rates applicable to Settlement Trust by enactment of an amended section 646(b) of the I.R.C. as follows:

> Except as provided in subsection (f)(1)(B)(ii), there is hereby imposed on the taxable income of an electing Settlement Trust a tax at the rate specified in section 1(a)(1). Such tax shall be in lieu of the income tax otherwise imposed by this chapter on such income.[60]

Unlike in the existing section 646(b), this proposed amendment did not include an exception for net capital gain. So, that meant that all income of an electing Settlement Trust would be taxed at the rate set forth in proposed section 1(a)(1) of H.R. 1: "12% of so much of the taxable income as does not exceed the 25% bracket threshold amount."[61] Therefore, under the version of H.R. 1 that passed the House in November, the tax rate on ordinary income of a Settlement Trust would increase from 10% to 12%, while the tax rate on the Settlement Trust's net capital gain (including qualified dividend income) would increase from 0% to 12%.

The drafters of the initial House version may have looked only at section 1(c) for both of the tax rates applicable to Settlement Trust income, and mistakenly concluded that a flat 15% tax rate applied under existing law to all Settlement Trust income. From that perspective, a 12% tax rate would be viewed (albeit incorrectly) as a tax reduction. Or, the drafters may have made this mistake with respect to the tax rates on a Settlement Trust's ordinary income, and then concluded that the 0% rate on net capital gain provided by section 1(h)(1)(B) should be changed so that a single rate of 12% applied to all Settlement Trust income. Either way, the drafters overlooked or ignored section 1(i), which reduces the section 1(c) rate to 10%, as well as the provisions of section 1(h) pertaining to net capital gain. Regardless, eliminating the exception for net capital gain in proposed section 1005(b)(6) and changing the rate as proposed in section 1(a)(1) would have increased the tax rates applicable to all of the income of a Settlement Trust.

60. H.R. 1, 115th Cong. § 1005(b)(6) (as passed by House, Nov. 16, 2017) (proposing to amend I.R.C. § 646(b)).

61. *Id.* § 1001 (amending I.R.C. § 1(a)(1)).

C. THE SENATE VERSION OF H.R. 1, S. 1698, AND NO RATE CHANGES

The Senate passed its initial version of H.R. 1 on December 2, 2017.[62] Section 13821 of the Senate version was modeled closely on S. 1698 and contained most of the provisions relating to Settlement Trusts described above at Part II.A., such as the exclusion for advance assignments of ANCSA-required payments under proposed I.R.C. section 139G and annual elective deductibility of contributions to Settlement Trusts under proposed I.R.C. section 250. However, what would have been new I.R.C. section 250 under S. 1698 became new I.R.C. section 247 under section 13821 of the Senate version of H.R. 1.

I.R.C. section 247, as set forth in the Senate version of H.R. 1, was virtually identical to section 250 as proposed in S. 1698 (and for that matter, H.R. 3524). Thus, section 247(a) as proposed by the Senate version allowed an elective deduction for a Native Corporation's contributions to a Settlement Trust (just as did section 250(a) of S. 1698), with the amount of the deduction per section 247(b) being equal to the amount of cash contributed, or, if property is contributed in kind, the deduction was to be lesser of the Native Corporation's adjusted basis in the asset or the asset's fair market value (just as had been set forth in section 250(b) of S.1698). As section 250(c) of S. 1698 had, section 247(c) of the Senate version provided that for any one taxable year, the Native Corporation's deduction would be limited to the amount of its taxable income for that year, with the Native Corporation being able to carry unused deductions forward for up to fifteen years. Section 247(d), the same as section 250(d), cross-referenced to I.R.C. section 646(h) for certain definitions, and section 247(e) provided the manner of making and revoking the section 247 election (as had 250(e)). Subsection (f) of both section 247 of the Senate version and section 250 of S. 1698 provided various technical and conforming rules, including that the Native Corporation would not recognize gain or loss when a contribution was made if the annual section deductibility election was in effect, that the consequence of the deduction was that the Settlement Trust would have income in the amount of the deduction, and that the Settlement Trust would have a basis in the contributed property equal to the lesser of the Native Corporation's basis as to any property contributed in kind or the asset's fair market value. Section 247(g) and section 250(g) both permitted a Settlement Trust to elect to defer income associated with the contribution of appreciated property until the contributed property is resold, and would impose a recapture rule if the Settlement Trust did not hold the property that is

62. H.R. 1, 115th Cong. (as passed by Senate, Dec. 2, 2017).

subject to the deferral election for the entire taxable year beginning after the taxable year of the Settlement Trust in which the contribution was made. Thus, section 247, as set forth in section 13821 of the Senate version of H.R. 1, was identical for all intents and purposes to section 250 as proposed by S. 1698.[63]

The Senate Budget Committee Explanation of the Senate version of H.R. 1 described the rationale for section 13821 as follows:

> The Committee believes that restrictions on the activities and assets of Settlement Trusts may discourage contributions by Native Corporations. The Committee further believes that Settlement Trusts are effective tools for reducing dependence on state and federal welfare programs in Alaska Native communities. More generally, the Committee believes that it is desirable to promote the funding of Settlement Trusts as a means to improve the health, education, and welfare of the Settlement Trusts' beneficiaries.[64]

No rate change for Settlement Trusts was proposed by S. 1698, and similarly, no rate change was set forth in section 13821 of the Senate version of H.R. 1. Because the House version of H.R. 1 did not contain any of the previously described Settlement Trust provisions, while the Senate version did, and because the House version of H.R. 1 increased the tax rates applicable to Settlement Trusts, while the Senate version did not, these differences had to be reconciled in a conference committee.

D. THE YOUNG-BRADY COLLOQUY

Concerned that House version of H.R. 1 did not include the Alaska delegation's proposed changes to taxation of Settlement Trusts contained in H.R. 3524, and that the bill would actually raise the taxes applicable to Settlement Trusts, Congressman Don Young, Alaska's at-large congressman, negotiated with Ways and Means Committee Chairman Kevin Brady, from Texas, for a commitment that tax rates would not be raised on Settlement Trusts and that provisions similar to those in H.R. 3524 would eventually be included in the final legislation. A colloquy

63. *Id.* § 13821. The principal differences between S. 1698 and the version of H.R. 1 that the Senate passed on December 2, 2017, were, one, the elimination of the provision permitting Settlement Trusts to amend their trust agreements to permit the deferral election of section 250(g), which became section 247(g) in the Senate bill, and two, the elimination of the provision (section 5 of section 250) expressly stating that these provisions were remedial Indian legislation. *See* discussion *infra* Part II.B.

64. STAFF OF S. COMM. ON THE BUDGET, 115TH CONG., RECONCILIATION RECOMMENDATIONS PURSUANT TO H. CON. RES. 71 (Comm. Print 2017).

between Chairman Brady and Congressman Young on the House floor during the vote upon the House version of H.R. 1 on November 16, 2017 captures the issue:

> MR. YOUNG (of Alaska). Mr. Speaker, Congress established Alaska Native Settlement Trusts in 1988 to provide permanent health, education and welfare benefits to Alaska Natives, who are among the most economically disadvantaged populations in the United States.
>
> Unfortunately, Mr. Speaker, the Tax Code has, in many cases, impeded the creation and funding of Alaska Native Settlement Trusts. As a result, Alaska Native Settlement Trusts have not been able to function in the manner Congress originally intended to provide benefits to Alaska Natives. To remedy some of these tax issues, I have sponsored H.R. 3524, which permits an Alaska Native corporation to deduct contributions to their Settlement Trust.
>
> The provisions of H.R. 3524 were not included in the H.R. 1 and the tax bill also adversely increases Alaska Native Settlement Trust tax rates from 10 percent to 12 percent. This would make it more difficult for Alaska Native Settlement Trusts to provide long-term benefits to Alaska Natives.
>
> Mr. Speaker, I request that the provisions of H.R. 3524 be included in the final conference report that results from the conference committee.
>
> MR. BRADY. I am pleased to work with the Gentleman of Alaska (Mr. YOUNG) on this important legislation for the Alaska Native community. Under the tax bill, Alaska Native Settlement Trusts would unintentionally be subject to a higher tax rate.
> I thank him for bringing this to my attention. I assure him that I will focus on this in the conference as we finalize individual rate structures between the House and the Senate. I also look forward to working with him to advance the important provisions of his bill in this important area.

> Mr. YOUNG (of Alaska). Mr. Speaker, I thank the chairman for those remarks. He has been great to work with. I thank him for his commitment to working on the inclusion of H.R. 3524 and the maintenance of existing rates in law with regard to Alaska Native Settlement Trusts, and, more generally, for his support of the Alaska Native community.[65]

E. THE CONFERENCE VERSION OF H.R. 1: THE SENATE VERSION WITHOUT RATE CHANGES

In due course, both Congressman Young and Senator Lisa Murkowski, Alaska's senior senator, were appointed to the conference committee as negotiators on behalf of their respective chambers.[66] When the conference committee finished its work on the conference report, the commitment that Congressman Young had negotiated with Chairman Brady was included.

Section 13821 of the Senate bill became section 13821 of the conference report,[67] thereby including within the conference report the section 139G exclusion for advance assignments of ANCSA-required payments, section 247 annual elective deductibility of contributions to Settlement Trusts, and the revised reporting requirements of section 6039H.[68] These had not been in the version of H.R. 1 that the House had passed on November 16, 2017.[69]

As to the tax rates that would be applicable to Settlement Trusts, the conference report ultimately left existing law intact as to both the rate on net capital gain (including qualified dividends) and ordinary income. The

65. 163 CONG. REC. H9405, 1230 (daily ed. Nov. 16, 2017).

66. *Murkowski Added to House-Senate Tax Bill Reconciliation Committee*, FAIRBANKS DAILY NEWS-MINER (Dec. 7, 2017), www.newsminer.com/news/murkowski-added-to-house-senate-tax-bill-reconciliation-committee/article_2148f118-db36-11e7-bd45-8b57ba8b38b7.html.

67. H.R. REP. NO. 115-466, at 339–51 (2017); 163 CONG. REC. H9943 (daily ed. Dec. 15, 2017). The House Explanation of the conference agreement erroneously indicates that "[t]he provision permits the amendment of the terms of any Settlement Trust agreement to allow [the 247(g)] election within one year of the enactment of the provision, with certain restrictions." House Explanatory Statement, 163 CONG. REC. H10088 (daily ed. Dec. 21, 1987). Although this provision had been in S. 1698 (and H.R. 3524), that provision was not in the version that the Senate passed on December 2, 2017, see S. 163 Cong. Rec. S. 7712, 7789-90 and therefore, not in the conference version. IRS Newswire IR-2018-6 also incorrectly refers to this non-existent statutory provision. IRS, TAX ISSUES FOR ALASKA NATIVE AMERICAN CORPORATIONS AND ALASKA NATIVE SETTLEMENT TRUSTS (2018), https://www.irs.gov/newsroom/tax-issues-for-alaska-native-american-corporations-and-alaska-native-settlement-trusts.

68. H.R. REP. NO. 115-466, at 128–29, 163–67 (2017).

69. 163 CONG. REC. H9414 (daily ed. Nov. 16, 2017).

version of H.R. 1 that had passed the House on November 16, 2017, had provided both for a modification of section 646(b) (by making a Settlement Trust's net capital gains and ordinary income taxable at a unitary rate) *and* a change of the section 1(c) rate, to which the revised section 646(b) would cross-reference.[70] On the question of modification of section 646(b) to impose the same tax rate on different kinds of income, the House adopted the Senate version, which had no provision concerning modification of section 646(b).[71] Thus, the bifurcation within existing section 646(b) between a Settlement Trust's net capital gain and ordinary income was retained, with the rates as to each type of income determined (as before) through a cross-reference to section 1(c).

Section 11001 of the conference report did revise section 1 of the I.R.C. somewhat by adding a new section 1(j), which indirectly affected section 1(c).[72] But ultimately, this revision did not change the tax rates applicable to Settlement Trusts. This remodeling of section 1 by section 11001 of the conference report was done as follows: New section 1(j)(1)(A) first renders section 1(i) inapplicable prior to January 1, 2026.[73] Then, new section 1(j)(1)(B) and new section 1(j)(2) together add five new rate tables, in lieu of the previous rate tables in section 1(a) through (e),[74] with the rate table in new section 1(j)(2)(C) overriding the rate table in existing section 1(c).[75] As a practical matter, this change did not adversely affect Settlement Trusts because the lowest rate in new section 1(j)(2)(C) is 10%, which was the same tax rate as under existing law; that is, section 1(c) as amended by former section 1(i).[76]

The rates specified in section 1(c) are important for various other I.R.C. purposes beyond section 646(b). To eliminate any residual concern

70. H.R. 1, 115th Cong. § 1001 (amending I.R.C. § 1(c) (2012)), § 1005(b) (amending I.R.C. § 646(b)) (as passed by House, Nov. 16, 2017).

71. *See* H.R. 1, 115th Cong. § 1005(b) (amending I.R.C. § 646(b)) (as passed by Senate, Dec. 2, 2017).

72. H.R. REP. NO. 115-466, § 11001 (2017) (Conf. Rep.).

73. As indicated above, section 1(i) was previously important because it reduced the 15% rate expressly stated in section 1(c) to 10%. It now has no role, at least prior to January 1, 2026.

74. The new rate tables are themselves labeled as § 1(j)(2)(a)–(e).

75. H.R. REP. NO. 115-466, § 11001(a) (2017) (Conf. Rep.) (amending I.R.C. § 1(j)(2)(C)).

76. I.R.C. § 1(c).

as to whether new section 1(j)(2)(C) should apply when another I.R.C. section (such as section 646(b)) references a rate of tax under section 1(c), the conference report included a new section 1(j)(2)(F), which provided:

> (F) REFERENCES TO RATE TABLES.—Any reference in this title to a rate of tax under [section 1(c)] shall be treated as a reference to the corresponding rate bracket under [section 1(j)(2)(C)], except that the reference in section 3402(q)(1) to the third lowest rate of tax applicable under section [1(j)(2)(C)], shall be treated as a reference to the fourth lowest rate of tax under [section 1(j)(2)(C)].[77]

As to the net capital gain of a Settlement Trust, section 11001 of the conference report did not modify the capital gain provisions of section 1(h).[78] Thus, because a 0% capital gain rate applies under existing section 1(h)(1)(B) to taxpayers (including Settlement Trusts) that have a tax rate lower than 25%, a 0% tax rate continues to apply to a Settlement Trust's net capital gain.[79] That the conference report would tax Settlement Trusts at a rate lower than 25% by virtue of new section 1(j)(2)(C) rather than (as was previously the case) through section 1(c), as amended by section 1(i), is irrelevant to the operation of section 1(h)(1)(B).

The conference report was passed by the House on December 19, 2017.[80] When the conference report proceeded to the Senate, an objection was raised under Senate Rules to the short title of the bill, the "Tax Cuts and Jobs Act."[81] To resolve the objection, the short title was deleted,[82] and the conference report (as amended) was thereafter passed by the Senate on December 19, 2017.[83] Because of the amendment, the House had to repass the revised conference report, which it did on December 20, 2017.[84]

The conference report was subsequently enrolled and was sent to President Donald J. Trump on December 21, 2017. The President signed Pub. L. No. 115-97 into law on December 22, 2017.[85]

77. H.R. REP. NO. 115-466, § 11001(a) (2017) (Conf. Rep.) (amending I.R.C. § 1(j)(2)(F)).
78. *See* H.R. REP. NO. 115-466, § 11001 (2017) (Conf. Rep.).
79. I.R.C. § 1(h)(1)(B).
80. H.R. 1, 115th Cong. (as passed by House, Dec. 19, 2017).
81. H.R. REP. NO. 115-466 (2017) (Conf. Rep.) (as passed by House, Dec. 19, 2017); *see also* Thomas Kaplan & Alan Rappeport, *Republican Tax Bill Passes Senate in 51-48 Vote*, N.Y. TIMES (Dec. 19, 2017), https://www.nytimes.com/2017/12/19/us/politics/tax-bill-vote-congress.html (noting the objection to the short title).
82. 163 CONG. REC. S8151 (daily ed. Dec. 19, 2017).
83. H.R. 1, 115th Cong. (as passed by Senate, Dec. 19, 2017).
84. 163 CONG. REC. H10312 (daily ed. Dec. 20, 2017).
85. Pub. L. No. 115-97, 131 Stat. 2054 (2017).

III. OBSERVATIONS CONCERNING THE SETTLEMENT TRUST CHANGES MADE BY THE 2017 TAX ACT

A. ENACTMENT DATE VERSUS EFFECTIVE DATE

While December 22, 2017, is the *enactment* date of the 2017 Tax Act, it is not the *effective* date of the provisions within the 2017 Tax Act that affect Settlement Trusts.

The effective date for both section 6039H(e), which imposes new reporting requirements on Native Corporations as to deductible Settlement Trust contributions, and section 139G, which pertains to exclusions for advance assignments of ANCSA-required payments, are taxable years beginning after December 31, 2016.[86] Both section 6039H(e) and section 139G therefore apply to the 2017 calendar taxable year.

The effective date provision for section 247 is somewhat more complex. Section 13821(b)(3) of the 2017 Tax Act provides that the amendments made by section 247 "shall apply to taxable years for which the period of limitation on refund or credit under section 6511 of the [I.R.C.] has not expired."[87] Thus, as of the December 22, 2017, enactment date, new section 247 applies to any taxable year of a Native Corporation as to which the refund statute of limitation under section 6511 has not expired as of the December 22, 2017, date of enactment.[88] Section 6511 imposes a rule that when a return is required, a refund claim must be filed within the later of (i) three years of the filing of the relevant return or (ii) two years after the date the tax was paid.[89]

The effective date for new section 247 is December 22, 2014, meaning that a Native Corporation that filed a corporate income tax return on or after December 22, 2014, can claim a deduction under new section 247 for the taxable year represented by that return.[90] Therefore, for a Native Corporation with a calendar taxable year, the taxable year ended December 31, 2014, will normally be the first taxable year to which new section 247 will apply.[91] Because December 31, 2014 (the end of the 2014 calendar taxable year) has passed, to claim a deduction under new section

86. *Id.* §§ 13821(a)(3), (c)(3).
87. *Id.* § 13821(b)(3).
88. *Id.*
89. I.R.C. § 6511 (2012) ("Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later.").
90. *See id.*
91. March 15, 2015, was a Sunday, so the due date becomes Monday, March 16, 2015. This due date also could have been extended.

247, a Native Corporation must have made a contribution to a Settlement Trust before December 31, 2014, and then timely amend its 2014 corporate income tax return to make the annual election for the 2014 calendar taxable year and claim the deduction.

B. PURSUING A REFUND UNDER SECTION 247 FOR A YEAR PRIOR TO THE ENACTMENT DATE

The purpose of filing an amended tax return for a taxable year prior to the enactment date of December 22, 2017, is to claim a new tax deduction for a pre-existing contribution to a Settlement Trust, thereby enabling a tax refund. Section 6511(b)(2) imposes limits on what may be paid as a refund or provided as a credit as follows:

> **(2) Limit on amount of credit or refund–**
>
> > **(A) Limit where claim filed within 3-year period**
> > If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. . . .
> >
> > **(B) Limit where claim not filed within 3-year period**
> > If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.[92]

As long as a Native Corporation made a contribution to a Settlement Trust in 2014 and files an amended return relative to its 2014 calendar year income tax return within three years of the return's filing, it may claim a refund based on the new section 247 of the amounts that it paid (or is deemed to have paid) with such return.[93]

92. I.R.C. § 6511(b)(2).

93. *See* Pub. L. No. 115-97, § 13821, 131 Stat. 2054 (2017) (amending I.R.C. § 247). Although not directly set out in either new section 247 or elsewhere in section 13821 of the 2017 Tax Act, the consequence per section 247(f)(3) of a deductible contribution by the Native Corporation is taxable income to the Settlement Trust (unless a section 247(g) deferral election is properly made). Thus, it seems that the Settlement Trust should amend its own income tax return for the year of the contribution to include the additional income arising from the Native Corporation's deduction. A failure of the Settlement Trust to do this could conceivably cause the loss of the Native Corporation's deduction.

A further refinement is necessary here. Congress presumably anticipated that, as of the date of enactment, only a relatively short period might remain under section 6511 in which to claim a refund for particular Native Corporations due to their fiscal taxable years. In such circumstances, section 13821(b)(2) provides that a refund claim may be filed within one year of the effective date of the 2017 Tax Act, meaning on or before December 22, 2018.[94] Specifically, section 13821(b)(2) amends section 247 to prove a one-year waiver of the statute of limitations if the period of limitation on a credit or refund resulting from amendments made by the section 13821(b)(1) expires before the end of one year subsequent to the date of enactment.[95]

As of March 2018, the IRS had not issued any formal guidance as to how the effective date rules of section 13821(b)(2) apply. However, on January 30, 2018, the IRS issued the 2018 Newswire, which asserted, without stating any authority, that the one year period of section 13821(b)(2) begins on December 22, 2017, the 2017 Tax Act's enactment date, and ends on December 21, 2018: that is, on the last day of a 365 day period beginning on the date of enactment.[96] This assertion is inconsistent with Chief Counsel Advice (CCA) 201636041,[97] which interprets an identical effective date provision, section 2(d) of Tribal General Welfare Exclusion Act of 2014 (TGWEA).[98] The TGWEA was enacted on September 26, 2014, and added section 139E to the I.R.C. to provide an exclusion for Indian General Welfare Benefits payable by an Indian Tribal Government. CCA 201636041 concludes that the "one year period" set forth in section 2(d) of TGWEA begins on September 26, 2014, and ends on September 26, 2015; that is, on the first anniversary of the TGWEA's date of enactment.

Leaving aside the question of when the one-year period of section 13821(b)(2) of the 2017 Tax Act ends, CCA 201636041 provides an insight (by analogy) as to how the one year period may eventually be interpreted. Although the initial IRS guidance as to TGWEA section 2(d) was not very

94. Pub. L. No. 115-97, § 13821(b)(2), 131 Stat. 2054, 2180 (2017).

95. *Id.*

96. IRS, TAX ISSUES FOR ALASKA NATIVE AMERICAN CORPORATIONS AND ALASKA NATIVE SETTLEMENT TRUSTS (2018), https://www.irs.gov/newsroom/tax-issues-for-alaska-native-american-corporations-and-alaska-native-settlement-trusts.

97. I.R.S. Chief Counsel Advice No. 201636041 (July 11, 2016). A CCA is a form of "written determination" within the meaning of section 6110 of the I.R.C.. Pursuant to section 6110(k)(3), a written determination by the IRS as to an income tax matter may not be used or cited as precedent. Generally only the taxpayer to whom the written determination was issued may rely on the written determination, although written determinations often provide an insight into IRS administrative practice. Another common form of a written determination subject to these rules is a Private Letter Ruling.

98. Pub. L. No. 113-168, § 2(a), 128 Stat. 1883 (2014).

pro-taxpayer and only allowed refunds under section 139E in very limited circumstances,[99] CCA 201636041 is considerably more favorable to taxpayers. CCA 201636041 provides the following three examples as to whether refund claims are allowable under the effective date rules for section 139E:

> Example 1:
> Tax year 2011, no extension requested
> Return filed March 14, 2012 reporting a tax liability of $4000
> Claim filed September 14, 2015 reporting a corrected tax liability of $2500
> Refund requested $1500
>
> Payments: withholding of $3000; with the return (March 14, 2012) $1000
>
> Analysis:
> Applying I.R.C. § 6513(a), the original return and all payments are deemed filed and paid on April 15, 2012. Under section 6511(a), the claim was filed more than three years from the date of the return and more than two years from the date of payment.
>
> However, utilizing the [one-year] exception, the taxpayer could have filed a timely claim on September 26, 2014. Therefore, any claim filed on or before September 26, 2015 may be considered timely to the same extent as if it had been filed on September 26, 2014. If it had been filed on [the date of enactment] September 26, 2014, the claim would have been filed within three years of the return. Therefore, the claim is deemed timely filed under the 3-year period and the exception. The applicable look-back period is section 6511(b)(2)(A). Three years before the claim date was September 14, 2012, and no extensions were requested to extend that time period. No payments would be available under the rule without an exception. Utilizing the exception, the look-back is then determined as if the claim were filed on [the date of enactment] September 26, 2014. Three years before that date would be September 26, 2011. As all payments were deemed made on April 15, 2012, all payments are deemed available under section 6511(b) and the exception.

99. *See* I.R.S. Chief Counsel Advice No. 201515024 (Apr. 10, 2015), No. 201515025 (Apr. 10, 2015) and No. 201515026 (Apr. 10, 2015).

> Example 2:
> Tax year 2011; extension granted to October 15, 2012
> Return filed October 15, 2012
> Claim filed September 1, 2015
> Analysis: The claim was filed within the three-year period in section 6511(a) without need to consider the exception. The look-back period is found in section 6511(b)(2)(A) and includes the extension period; therefore, there is no need to consider the exception to the allowable amount.
>
> Example 3:
> Tax year 2011; extension granted to October 15, 2012
> Return filed June 1, 2012
> Claim filed September 1, 2015
>
> Analysis: Section 6513 does not deem a return filed on the extended due date. Therefore, the claim is not filed within three years of the return or two years of payment. However, a claim filed on [the date of enactment] September 26, 2014 would have been within the 3-year period of section 6511(a). Therefore, utilizing the exception, the claim is deemed to be filed within the 3-year period. The applicable look-back period is section 6511(b)(2)(A). The look-back period is three years plus any extensions; therefore, the look-back period reaches all payments without a need to utilize the exception.[100]

Even assuming the IRS eventually interprets section 13821(b)(2) of the 2017 Tax Act in a manner similar to its interpretation of section 2(d) of the TGWEA, and not in the manner set forth in the 2018 Newswire, the cautious course of conduct for a Native Corporation seeking to file an amended tax return to obtain a refund or credit for a taxable year that has ended prior to the enactment date for the 2017 Tax Act is simply to file an amended return for itself, to claim the section 247 deduction as soon as possible.[101]

100. I.R.S. Chief Counsel Advice No. 201636041 (Sept. 2, 2016).
101. The Settlement Trust should also file its own return reporting the increased income, again as soon as possible.

C. SECTION 247(G) ELECTIONS: REVOCATIONS VERSUS RECAPTURE

When a Settlement Trust receives a contribution for which the Native Corporation will claim a deduction under section 247(a), the Settlement Trust is generally required to report income pursuant to section 247(f)(3) in the same amount as the deduction claimed by the Native Corporation.[102] In the case of the contribution of non-cash property, the amount of the deduction is the lesser of the Native Corporation's adjusted basis of the fair market value of the property.[103] Because the contribution is in kind and not cash, the Settlement Trust may not have the cash to pay the tax that arises from immediate inclusion under section 247(f)(3). Section 247(g) addresses this situation by allowing a Settlement Trust to elect to defer the section 247(f)(3) income from a given contribution until such time as the asset is sold, presumably providing cash for the Settlement Trust to pay the tax bill.[104]

One of the requirements for a section 247(g) deferral election is that the Settlement Trust must hold the asset for the entire taxable year *after* the taxable year in which the contribution was made.[105] The failure to meet this holding requirement voids the section 247(g) deferral election retroactively, causing the Settlement Trust to pay tax in the taxable year of the contribution on the amount of income that it would have reported but for the failed section 247(g) deferral election.[106] In addition to the interest that would apply on the delayed payment of the tax, section 247(g)(3)(c)(i)(III) imposes a penalty equal to 10% of the tax that was originally deferred.[107] The IRS has four years from the filing of the return making the section 247(g) deferral election in which to assess such additional tax, rather than the normal three-year period of section 6501(a).[108]

Section 247(g)(3)(B), however, permits a Settlement Trust that has made a section 247(g) deferral election to revoke that election pursuant to a timely filed amendment or supplement to the income tax return that made the original section 247(g) deferral election.[109] The consequence of such a revocation would be that the Settlement Trust would be required to report the income originally deferred and pay additional tax (together

102. I.R.C §§ 247(a), (f)(3).
103. *Id.* § 247(b)(2).
104. *Id.* § 247(g).
105. *Id.* § 247(g)(3)(C)(i).
106. *Id.* § 247(g)(3)(C)(i)(II).
107. *Id.* § 247(g)(3)(C)(i)(III).
108. *Id.* § 6501(a).
109. *Id.* § 247(g)(3)(B).

with interest).[110] Importantly though, there is no penalty for revoking the section 247(g) deferral election. This leads to the conclusion that when a Settlement Trust sells an asset subject to a section 247(g) deferral election during the first taxable year following the taxable year of contribution, the Settlement Trust would be well advised to revoke the section 247(g) deferral election and pay the additional tax and interest rather than taking chances on whether or not the IRS will audit its tax returns during the extended four-year statute of limitations.

D. IMPACT OF DEDUCTIBILITY ON TAXATION OF BENEFICIARY DISTRIBUTIONS

For Settlement Trusts that have made the section 646 election, the taxation of beneficiaries on the distributions they receive from a Settlement Trust is primarily controlled by section 646(e), which identifies four tiers of taxation as to Settlement Trust distributions.[111] Tier 1 distributions are Settlement Trust distributions in an aggregate amount less than or equal to the Settlement Trust's current year taxable income (less federal income taxes paid but plus tax-exempt income) and are tax-free to the recipients.[112] Tier 2 distributions are those Settlement Trust distributions that exceed the Tier 1 amounts for a given taxable year, but do not exceed the accumulated taxable income of the Settlement Trust that was not distributed in prior taxable years, again, less federal income taxes paid but plus tax-exempt income.[113] These are likewise tax-free to the beneficiaries. Tier 3 distributions are those Settlement Trust distributions that exceed the Tier 1 and Tier 2 amounts for a given taxable year, but do not exceed the Native Corporation's current or accumulated earnings profits within the meaning of section 312.[114] Tier 3 amounts are deemed to be taxable dividends paid by the Native Corporation.[115] Tier 4 distributions are those Settlement Trust distributions that exceed the amounts described in Tiers 1, 2, and 3, and are nontaxable to the

110. *Id.* § 247(g).
111. *Id.* § 646(e).
112. *Id.* § 646(e)(1).
113. *Id.* § 646(e)(2).
114. *Id.* § 646(e)(3).
115. It is unclear the extent to which other Code provisions might provide an alternate basis upon which otherwise taxable Settlement Trust distributions might become non-taxable. Depending on what benefits a Settlement Trust is providing, these other potentially applicable Code provisions could include section 117 (pertaining to scholarships), section 139D (pertaining to Indian health benefits), section 139E (pertaining to Indian General Welfare Benefits), and/or the general welfare exclusion for Indians set forth in Rev. Proc. 2014-35, 2014-26 I.R.B. 1110.

beneficiaries.[116] Thus, to limit or avoid beneficiary taxation, it is important that a Settlement Trust have sufficient current year or undistributed taxable income (less federal income taxes paid but plus tax-exempt income).

The consequence of a deductible contribution by the Native Corporation is that pursuant to section 247(f)(3) the Settlement Trust must report income[117] in the amount of the deductible contribution in the year of actual receipt.[118] This income necessarily increases the Tier 1 amounts (less taxes paid by the Settlement Trust) for the taxable year of the Settlement Trust in which the contribution is received, and to the extent the income is not distributed, the Tier 2 amounts for subsequent taxable years of the Settlement Trust until that income is ultimately distributed. There seems to be no reason that the income the Settlement Trust must report for section 247(f)(3) purposes is not also income of the Settlement Trust for section 646(e)(1) and (2) purposes.

An argument can be made that if a Native Corporation is unable to deduct the full amount of a contribution in the taxable year of the Native Corporation when that contribution is made, then the deferred deduction should likewise defer the reporting of income by the Settlement Trust. This could occur if the Native Corporation has insufficient taxable income so that some or all of the section 247 deduction must be carried over pursuant to section 247(c). But the focus of section 247(f)(3) is on the Settlement Trust and when it "actually" receives the contribution, and ultimately not on whether the Native Corporation is entitled to claim the deduction.[119]

There is no requirement in section 247 that the timing of the Native Corporation's deduction must be matched to the timing of the Settlement Trust's income inclusion in the way that section 83(h) mandates identical timing for the employer's deduction and the employee's income inclusion

116. I.R.C. § 646(e)(4).

117. This is different than the tax result that would occur absent the section 247 election. Under the long-standing ruling posture of the IRS, a true contribution to a Settlement Trust is a capital transaction and is not deductible by the Native Corporation and is not gross income to the Settlement Trust. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 9433021 (May 19, 1994); I.R.S. Priv. Ltr. Rul. 9713011 (Dec. 19, 1996); I.R.S. Priv. Ltr. Rul. 200127012 (Apr. 3, 2011). The enactment of section 646 of the I.R.C. in 2001 did not alter this result. By contrast, after a section 247 election is made, the "contribution" is akin to any other cash receipt of the Settlement Trust that constitutes gross income to the Settlement Trust, presumably not only for tax purposes but also for purposes of the internal financial accounting of the Settlement Trust. To some degree this is dependent upon the language of the trust instrument.

118. I.R.C. § 247(f)(3).

119. *Id.*

when property is transferred for services.[120] Indeed, the whole point behind a section 247(g) election is a deliberate mismatch of the corporate deduction and the Settlement Trust's income inclusion. Further, a mismatch of the deduction and the income inclusion will also occur any time a Native Corporation with a fiscal year (i.e., a year ending on a day other than December 31) makes a contribution to a Settlement Trust with a calendar taxable year. Moreover, amounts not immediately deductible due to section 247(c) are not disallowed. Such amounts are merely deferred and carried over for deduction in any of the 15 subsequent taxable years.

Perhaps it may have been more artful for section 247(f)(3) to have not referenced "deduction allowed under this section"[121] and instead simply referenced "the amount described in §247(b)." However, requiring such precision of expression when the allegedly ambiguous statute implements ANCSA directly ignores the teaching of *Old Harbor*, that ANCSA is Indian legislation to be interpreted favorably to Alaska Native interests.[122] Therefore, depending on the relative effective tax rates and other tax attributes of the Native Corporation versus those of the Settlement Trust,[123] it may make sense for the Native Corporation to use the Settlement Trust as a vehicle to pay distributions.

E. CONTRIBUTIONS OF ENCUMBERED PROPERTY

The normal rule when a taxpayer disposes of encumbered property is that the amount of the debt constitutes an amount realized by the taxpayer, and will produce some form of cancellation of indebtedness income to the taxpayer to the extent the deemed amount realized exceeds the taxpayer's adjusted basis in the property.[124] It is not clear how this normal rule applies in the context of a deductible contribution by a Native Corporation to a Settlement Trust. Section 247(f)(2) establishes an unambiguous rule that the Native Corporation will not have gain or loss when assets are contributed to a Settlement Trust, and there is no exception within section 247(f)(2) for gain that would be produced from

120. *See id.* § 83(h) ("[s]uch deduction shall be allowed for the taxable year of such person in which or with which ends the taxable year in which such amount is included in the gross income of the person who performed such services.").

121. I.R.C. § 247(f)(3).

122. *See* discussion *supra* Part I.A.

123. Among the factors that should be considered are whether the Native Corporation has any net operating losses and/or applicable credits, as well as whether the Native Corporation has current year or accumulated earnings and profits.

124. *See, e.g.*, Crane v. Comm'r, 331 U.S. 1, 15 (1947).

debt cancellation.[125] Moreover, collectively, subsections 247(f)(4) and (f)(5) work together to allow the Settlement Trust to step into the shoes of the Native Corporation relative to the important tax attributes of the contributed property.[126] Under section 247(f)(4), the Settlement Trust's holding period as to a contributed asset includes the Native Corporation's holding period.[127] Also, per section 247(f)(5), the adjusted basis that the Native Corporation has is the adjusted basis to the Settlement Trust, except if the fair market value of the contributed asset is less than the adjusted basis, in which case the Settlement Trust has a basis equal to the lower fair market value.[128] Nothing in section 247(f)(5) provides a mechanism by which the basis in the hands of the Settlement Trust is increased to take account of any gain that results to the Native Corporation from cancellation of indebtedness income,[129] thus implying that Congress did not intend for the Native Corporation to recognize such income or gain.

Given the interaction of these provisions, it is arguably more appropriate to view the transfer of an encumbered asset from the Native Corporation to the Settlement Trust as something other than a "disposition" that must trigger cancellation of indebtedness concepts. The congressional intent relative to the establishment of Settlement Trusts was to allow Native Corporations to restructure themselves into a more flexible legal form to better provide long-term benefits to Alaska Natives. Stated differently, in many ways Congress intended that Settlement Trusts function as a more flexible alter ego to Native Corporations. Thus, just as a transfer from the Native Corporation to the Settlement Trust is no longer a taxable event causing gain to the Native Corporation after the

125. I.R.C. § 247(f)(2). Prior to passage of section 247(f)(2), the IRS had consistently taken the position for almost a quarter century that a transfer of an appreciated asset from the Native Corporation to a Settlement Trust was subject to section 311(b), so that gain recognition was required. *See*, *e.g.*, I.R.S. Priv. Ltr. Rul. 9329026 (Apr. 28, 1993) (explaining that a Native Corporation has section 311(b) gain when appreciated assets are contributed to a Settlement Trust); *see also*, I.R.S. Priv. Ltr. Rul. 201739004 (June 28, 2017). As noted, relative to CCAs, a Private Letter Ruling is not precedential for taxpayers other than the one to whom the Private Letter Ruling was issued and is useful primarily as an indication of administrative practice by the IRS. *See supra* note 97.

126. I.R.C. § 247(f)(4)–(5).

127. *Id.* § 247(f)(4).

128. *Id.* § 247(f)(5). This in essence is a rule to prevent the transfer of an imbedded loss from the Native Corporation to the Settlement Trust.

129. *Id.* § 1015 generally concerns the basis a trust acquires in property placed in the trust. In non-gift situations in which the grantor recognizes a gain or loss, section 1015(b) provides that "the basis shall be the same as it would be in the hands of the grantor increased in the amount of gain or decreased in the amount of loss recognized to the grantor on such transfer." *Id.*

2017 Tax Act for section 311(b) purposes, the same transfer should not cause a taxable event to a Native Corporation under the cancellation of indebtedness rules.

However, until the IRS provides guidance concerning the cancellation of indebtedness issue, Native Corporations would be well advised to avoid transfers of encumbered property to Settlement Trusts, particularly where the amount of the debt exceeds the adjusted basis that the Native Corporation has in the encumbered asset.

F. PRIORITY OF SECTION 247 DEDUCTION.

A further question is, what is the priority for computational purposes of the section 247 deduction relative to the charitable deduction of section 170 and the net operating loss deduction of section 172?

Relative priority of the section 247 deduction and the section 170 charitable deduction.

Analysis of the relative priority of the section 247 and section 170 deductions is straightforward. Section 170(b)(2) provides that a corporation may claim a charitable deduction in an amount "not to exceed 10 percent of the taxpayer's taxable income."[130] Section 170(b)(2)(D) then provides that taxable income, as it relates to section 170(b), is computed without regard to that section, part VIII, section 199A(g), and then any net operating loss carryback to the taxable year under section 172 or section 1212(a)(1).[131] Section 247 is located within "part VIII," and thus is not to be included when computing the amount of "taxable income" against which the 10% limitation is applied. That is, the amount of the allowable section 170 charitable deduction is computed first, with the section 247 deduction (as well as the section 172 net operating loss deduction) computed thereafter.

Relative priority of the section 247 deduction and the section 172 Net Operating Loss Deduction.

For computational purposes, the relative priority of the section 247 deduction and the section 172 net operating loss deduction is less certain. Section 172(a), as amended by the 2017 Tax Act, allows deductions for the taxable year in an amount equal to the lesser of (i) the aggregate of the net operating loss carryovers to such year, plus the net operating loss

130. *Id.* § 170(b)(2).
131. *Id.* § 170(b)(2)(D).

carrybacks to such year, or (ii) 80% of taxable income computed, regardless of the deduction allowable under section 172.[132] Section 247(c)(1) has similar language that limits the section 247(a) deduction to the taxable income of the Native Corporation, computed without regard to the section 247(a) deduction. Thus, for purposes of both section 247 and section 172, the same definition of "taxable income" contained in section 63 applies, and neither the language of section 247[133] nor the language of section 172 establishes a clear priority for which deduction should be taken first for computational purposes. However, when one remembers that section 247 implements ANCSA, and that ANCSA is Indian legislation, it becomes clear from a policy standpoint that the ambiguity within section 247(c)(1) should be construed so that the section 247 deduction is calculated first, and therefore reduces "taxable income" for purposes of computing the section 172 net operating loss deduction. Stated differently, "taxable income" for section 172 purposes should be the taxable income computed after the section 247 deduction is taken.

To do otherwise (that is, to prioritize the section 172 net operating loss deduction so that "taxable income" for section 247 purposes is the taxable income *after* the section 172 deduction) could mean in particular circumstances that no section 247 deduction is ever allowable. This would effectively eliminate the incentive for Native Corporations with net operating loss carryovers to make contributions to Settlement Trusts, even though Congress clearly intended to provide an incentive for Native Corporations to make contributions to a Settlement Trust.[134]

Moreover, under the 2017 Tax Act, net operating losses generated after December 31, 2017, may be carried over indefinitely,[135] while section 247(c)(1) limits carryover of unused contributions to Settlement Trusts to a mere 15 years.[136] Because Congress placed a time limit on the carryover of deferred Settlement Trust contributions, but in the same Act did not place any time limit on net operating loss carryovers arising in taxable years ending after December 31, 2017,[137] it is reasonable to infer that Con-

132. *Id.* § 172(a). Section 172(a) is effective for taxable years beginning after December 31, 2017. Pub. L. No. 115-97, § 13302(e)(2), 131 Stat. 2054, 2122.

133. From a drafting standpoint, the ambiguity could be solved in favor of a section 247 priority by amending the parenthetical within section 247(c)(1) to read as follows, with the new language being italicized: "(as determined without regard to such deduction *and the deduction under § 172*)."

134. STAFF OF S. COMM. ON THE BUDGET, 115TH CONG., RECONCILIATION RECOMMENDATIONS PURSUANT TO H. CON. RES. 71 (Comm. Print 2017).

135. Pub. L. No. 115-97, § 13302(b)(2), 131 Stat. 2054, 2122.

136. *Id.* § 13821(c).

137. *Id.* § 13302(e)(1).

gress anticipated that the deduction with a limited life (section 247) should be utilized before the deduction with an unlimited life (section 172).[138]

G. SECTION 247 AND THE ACCUMULATED EARNINGS TAX

Section 531 imposes an annual tax in an amount equal to 20% of the "accumulated taxable income" of a corporation described in section 532.[139] "[A]ccumulated taxable income" is defined in section 535(a) as the taxable income of the corporation, with certain adjustments.[140] Among the adjustments per section 535(b)(3) are the special deductions set forth in "part VIII" (which includes section 247).[141] The statute therefore appears to subject a Native Corporation claiming a deduction under section 247 to a 20% tax on the amount of the deductible section 247 contribution.[142] However, this is not the correct conclusion for two reasons. First, the section 531 accumulated earnings tax only applies to a corporation described in section 532; that is, a corporation that is "formed or availed of for the purpose of avoiding the income tax with respect to its shareholders or the shareholders of any other corporation, by permitting earnings and profits to accumulate instead of being divided or distributed."[143] This is most assuredly not the case when a Native Corporation makes a contribution for which a section 247 deduction is claimed, because section 247(f)(1) expressly provides that the Native Corporation's earnings and profits are to be reduced by virtue of the section 247 deduction as follows:

> (1) Earnings and Profits.—Notwithstanding section 646(d)(2), in the case of a Native Corporation which claims a deduction under this section for any taxable year, the earnings and profits of such Native Corporation for such taxable year shall be reduced by the amount of such deduction.[144]

138. This is not dissimilar to the result under section 170, in the sense that carryovers of excess charitable contributions have, in general, a five-year duration under section 170(d)(2) and the amount of the allowable charitable deduction is computed without regard to the section 172 net operating loss deduction, thus making it more likely the section 170 charitable deduction will eventually be fully allowed.

139. I.R.C. § 531 (2012).

140. *Id.* § 535(a).

141. *Id.* § 535(b)(3).

142. This ignores, for purposes of simplicity, the $250,000 accumulated earnings credit of section 535(c)(2).

143. I.R.C. §§ 531–32.

144. *Id.* § 247(f)(1).

The mandatory reduction in earnings and profits dictated by section 247(f)(1) precludes any conclusion that the Native Corporation has allowed its "earnings and profits to accumulate instead of being divided or distributed."[145] Moreover, even without the protection of section 247(f)(1), the earnings and profits in question are no longer present in the Native Corporation and have instead been used to provide an economic benefit that is a deemed distribution to the shareholders when the contribution to the Settlement Trust is made.[146] This would normally be a taxable event to the shareholders unless section 646(d)(1) applies, which it will if the Settlement Trust has made the section 646 election. Regardless of whether the shareholders pay tax with regard to this deemed distribution, the fact that a deemed distribution results from the contribution to the Settlement Trust means that the Native Corporation cannot have violated the "formed or availed of" test of section 532(a) that is a prerequisite for application of the accumulated earnings tax.

As a final point, to the extent that the accumulated earnings tax would apply despite the foregoing analysis, Congress cannot be presumed to have intended the imposition of a 20% "toll charge" (in the form of the accumulated earnings tax) to claim the section 247 deduction: Congressional intent was clearly the opposite in enacting section 247, which is to provide an incentive for Native Corporations to make transfers to Settlement Trusts on a tax-advantaged basis. Furthermore, as discussed above, any ambiguity as to whether the accumulated earnings tax should apply in the context of a section 247 deduction should be resolved under *Old Harbor*,[147] in favor of the Native Corporation.[148]

CONCLUSION

The 2017 Tax Act provides important planning opportunities for Native Corporations and Settlement Trusts, thereby further implementing the remedial purposes of ANCSA and its implementing

145. *Id.*

146. This is another long-standing ruling position of the IRS relative to Native Corporations and Settlement Trusts. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 9326019 (Mar. 31, 1993); I.R.S. Priv. Ltr. Rul. 9329026 (Apr. 28, 1993); I.R.S. Priv. Ltr. Rul. 9433021 (May 19, 1994). *See generally* Sproull v. Comm'r, 16 T.C. 244 (1951), *aff'd*, 194 F.2d 541 (6th Cir. 1952); Rev. Rul. 67-203, 1967-1 C.B. 105.

147. 104 T.C. 191 (1995). *See* discussion *supra* Part I.A.

148. To the extent that other provisions of the Code or general tax concepts might possibly be viewed as limiting or preventing use of the section 247 deduction, or operate to impose a "toll charge" upon the deduction, *Old Harbor* is powerful authority that such provisions or concepts should not operate to deny Native Corporations the full benefit of section 247. *See* 104 T.C. 191, 204 (1995) ("[W]e read ANCSA broadly and in the light most favorable to Alaskan [N]atives, the intended beneficiaries of ANCSA.").

statutes. These opportunities include a new ability of a Native Corporation to claim a tax deduction for amounts and assets placed in a Settlement Trust, thereby allowing Settlement Trusts to be funded on a pre-tax rather than an after tax basis, as has been the case since 1988. Moreover, after the 2017 Tax Act, Native Corporations can exclude ANCSA-required payments that they have assigned in advance to their Settlement Trusts, thereby allowing Native Corporation to establish a reliable long-term funding mechanism so that funds pass directly into the Settlement Trust without an intervening stop in the Native Corporation. The Settlement Trust provisions within the 2017 Tax Act are thus an important step forward in achieving the congressional intent that Settlement Trusts would provide long-term benefits to Alaska Natives.

The inclusion of the Settlement Trust provisions in the 2017 Tax Act was a significant legislative achievement for the Alaska congressional delegation of Senator Lisa Murkowski, Senator Dan Sullivan, and Congressman Don Young. This achievement is even more remarkable considering that at least three other tax bills of major importance to the Native American community were then pending and sponsored by leading Republican senators but were not included in the 2017 Tax Act. Among these pending bills were S. 2012, The Tribal Economic Assistance Act,[149] and S. 1935, the Tribal Tax and Investment Reform Act.[150] Subsequent to the enactment of the 2017 Tax Act, the Bipartisan Budget Act of 2018 partially dealt with the subject matter of these other bills by granting a one-year extension for certain expiring I.R.C. provisions through December 31, 2017, but it did not make these provisions permanent.[151] These provisions, as well as the other provisions of S. 2012, S. 975, and S. 1935, may yet become permanent parts of the I.R.C. But for now, they are not. The point is simply that the Alaska congressional delegation was able to achieve inclusion of the Settlement Trust provisions in the 2017 Tax Act and make those provisions a permanent part of the I.R.C., while other then-pending Indian legislation introduced by other Republicans (including those in leadership) was not so included and has not subsequently been made permanent.

The importance of the 2017 Tax Act is that it allows Native Corporations more flexibility in deciding whether shareholder

149. S. 2012, 115th Cong. (2017). The Tribal Economic Assistance Act was introduced by Republican Senator Hoeven of North Dakota, Chairman of the Senate Indian Affairs Committee.

150. S. 1935, 115th Cong. (2017). The Tribal Tax and Investment Reform Act was introduced by Republican Senator Moran of Kansas.

151. *See* Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 40301 (Indian Employment Credit), § 40306 (accelerated depreciation) and § 40408 (Indian Coal Production Credit), 132 Stat. 64, 146, 147, and 150 (2018).

distributions and benefits are better provided through a Settlement Trust rather than through the corporate vehicle initially required by ANCSA in the 1970s, and which, in many cases, is not well suited to the needs of the Native community. To the extent that ambiguities exist as to the Alaska Native portions of the 2017 Tax Act, under *Old Harbor*, and similar authorities, those provisions should be interpreted broadly in favor of the Alaska Native entities and individuals that seek to utilize those provisions.