WRMarketplace

An AALU Washington Report

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The *WRMarketplace* is created exclusively for AALU members by experts at Greenberg Traurig and the AALU staff, led ***by Jonathan M. Forster, Steven B. Lapidus, Martin Kalb, Richard A. Sirus, and Rebecca Manicone.*** **WRMarketplace #17-33** was written by Greenberg Traurig **Associate Ashley B. Sawyer.**

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TOPIC: Feeling Charitable? The IRS May Not Be When It Comes to Your Deductions - 5 Things to Know.

MARKET TREND: The IRS continues to be very strict when it comes to charitable tax deductions. Accordingly, failure to comply strictly with the substantiation requirements for a charitable gift may result in denial of the full deduction.

SYNOPSIS: To support and incentivize charitable giving, the Internal Revenue Code ("Code") provides an income tax deduction for contributions to qualified charities. The substantiation requirements for claiming the income tax deduction for charitable donations, however, are numerous and complex, especially for non-cash gifts. Further, the IRS closely scrutinizes a taxpayer's compliance with each requirement and provides almost no margin for error. Full compliance is expected, or the IRS may deny the entire deduction and impose penalties. The Tax Court also has supported a strict enforcement standard. The following reviews some key substantiation requirements to help avoid missteps in charitable planning.

TAKE-AWAYS: Charitable giving is a common part of many legacy plans and may involve life insurance. Recent Tax Court decisions should remind taxpayers to work closely with their advisors to review and ensure full compliance with charitable deduction substantiation requirements so they can receive the intended tax treatment for their charitable contributions. Otherwise, they may risk not only losing the deduction, but upsetting larger legacy planning goals.

PRIOR REPORTS: 2015-44; 2017-31.

While the act of charitable giving can be simple, claiming a charitable income tax deduction for the gift can be quite the opposite, especially when it comes to charitable donations of assets. The IRS and the Tax Court have rigorously enforced a strict compliance standard for the substantiation rules relating to charitable income tax deductions, with draconian results for compliance failures – complete denial of the deductions ***and*** assessment of accuracy-related penalties. This WRMarketplace notes some key substantiation requirements for a donor's charitable income tax deduction and provides a quick substantiation checklist to reference.[1]

#1: Contribute to a Qualifying Charitable Organization.

A charitable income tax deduction is allowed only for gifts made to or for the benefit of "qualifying" charitable organizations, which includes U.S. organizations operated exclusively for religious, charitable, scientific, literary, or educational purposes, to prevent cruelty to children or animals, or to foster national or international amateur sports competition and meeting certain other requirements ("**QCO**").[2]

Although this point seems straightforward, donors should not simply assume that a charity is a QCO based on its name or apparent purpose or operation. The IRS and courts have denied charitable deductions on the basis that the donor made the contribution to a non-QCO.[3] So that taxpayers may vet organizations before making a contribution, the IRS maintains a searchable database – Exempt Organizations Select Check[4] – which contains data that taxpayers may rely on in determining the deductibility of their contributions. Donors also may want written confirmation from the charity with regard to their status as a QCO.

#2: Don't Expect A Personal Benefit – Have Donative Intent.

For a gift to qualify as a deductible charitable contribution, it must be complete, voluntary, and made with "donative intent," rather than made on an involuntary or conditional basis, to satisfy a personal obligation (other than taxpayer's personal pledge to a QCO), to obtain personal gain or benefit, or otherwise to receive consideration for the gift. If a taxpayer makes a gift to a QCO with an expectation of receiving consideration of equivalent value in return, no charitable income tax deduction will be allowed for the asset transferred.[5]

#3: If You Receive Something, You May Need to Disclose It.

If a taxpayer has the requisite donative intent for a charitable contribution but receives some consideration for the gift (a "**quid pro quo contribution**"), the charitable income tax deduction is limited to the excess of the value of the gift over the consideration received.[6] The QCO must provide a written disclosure statement to a donor who makes a quid pro quo contribution exceeding $75. The statement must include the amount of the contribution that is deductible and a good-faith estimate of the fair market value of the goods or services provided by the QCO to the donor.[7]

> ***Example***. Jack gives $100 to the QCO in exchange for theatre tickets with a fair market value of $50. Jack's charitable income tax deduction may not exceed $50. Further, the QCO must furnish a disclosure statement to Jack, because the total value of his payment to the QCO exceeds $75, even though Jack's deductible amount is less than $75.

The burden of proof is then on the taxpayer to show that all or part of any payment to a QCO is a gift for which a charitable income tax deduction should be allowed, and failure to do so will likely result in disqualification from claiming any deduction with regard to the gift.[8]

#4: Obtain a Compliant Contemporaneous Written Acknowledgment for the Gift.

In general, to claim a charitable income tax deduction for any contribution to a QCO of $250 or more[9] the taxpayer must obtain a contemporaneous written acknowledgment ("**CWA**") from the QCO.[10] Typically, a CWA must include (i) the name of the charity; (ii) the date of the contribution; (iii) the amount of any cash contribution; (iv) a statement of whether or not goods or services were provided by the QCO in exchange for the contribution; (v) a description and estimated value of any such goods or services provided by the QCO to the taxpayer; and (vi) if applicable, in the case of contributions to organizations that operate exclusively for religious purposes, a statement of any intangible religious benefits provided by the charity to the taxpayer must be obtained by the earlier of the date that taxpayer files his or her income tax return for the year of the contribution, or the due date for the return (including extensions).[11]

The Tax Court has consistently held that ***the doctrine of substantial compliance does not apply to the CWAs***. Consequently, the ***failure of a CWA to comply with all statutory requirements will result in a loss of the entire charitable income tax deduction***. For example, in *15 West 17th Street LLC v. Commissioner*,[12] the Tax Court denied a taxpayer's $64.49 million charitable income tax deduction when the form of CWA that accompanied the taxpayer's income tax return did not include a statement that no goods or services were provided as consideration for the gift. Similarly, in *Izen v. Commissioner*,[13] the Tax Court denied a taxpayer's entire deduction with respect to a gift of a Hawker Jet aircraft because the taxpayer's CWA did not strictly comply with the requirements for the donation of a vehicle.

#5: Procure a Qualified Appraisal & Complete an Appraisal Summary

A taxpayer will not receive a charitable income tax deduction for any non-cash gift (other than publicly-traded securities) valued over $5,000 unless (i) the gift is supported by a "qualified appraisal"[14] prepared by a "qualified appraiser"[15] and (ii) the taxpayer attaches an "appraisal summary" (see IRS Form 8283) to the income tax return claiming the deduction.[16] For gifts valued over $500,000, the actual qualified appraisal must be attached to the income tax return.[17]

A qualified appraisal must be prepared (i) no earlier than 60 days before the contribution date and no later than the due date (with extensions) of the return first claiming the charitable income tax deduction, (ii) by a qualified appraiser (who also signs and dates

the appraisal), (iii) under a fee arrangement where ***no*** part of the fee is based on a percentage of the appraised value, and (iv) with detailed information provided in over 11 identified areas, including with regard to the donated assets, the qualified appraiser, and the appraisal procedures and valuation methods used, among others.[18] The appraisal summary also has numerous technical requirements that may require additional information regarding the donor and the assets contributed, for example, the provision of information regarding the adjusted cost or other income tax basis of the assets.[19]

As with CWAs, failure to comply with any of these rules may result in a denial of the charitable deduction. In *RERI Holdings, LLC I v. Commissioner*,[20] for instance, the Tax Court denied a $33 million charitable contribution deduction because the appraisal summary attached to the taxpayer's income tax return failed to include statements of the asset's cost or other basis.[21]

TAKE AWAYS

Charitable giving is a common part of many legacy plans and may involve life insurance, such as when deduction savings in a given tax year offset the costs of a life insurance purchase or policy death benefits are used to replace family assets transferred to charity using a charitable remainder trust. Recent Tax Court decisions should remind taxpayers to work closely with their advisors to review and ensure full compliance with charitable deduction substantiation requirements so they can receive the intended tax treatment for their charitable contributions. Otherwise, they may risk not only losing the deduction, but upsetting larger legacy planning goals.

QUICK REFERENCE CHECKLIST:
SUBSTANTIATING CHARITABLE INCOME TAX DEDUCTIONS

✓	Confirm gift is made to or for the benefit of a qualifying charitable organization (**QCO**).
✓	Confirm taxpayer intends to make a charitable contribution (has donative intent).
✓	Obtain written disclosure from QCO of any goods or services tendered to the taxpayer in exchange for a charitable contribution exceeding $75.
✓	Obtain a complete contemporaneous written acknowledgment (**CWA**) from the QCO for the contribution and attach it to the income tax return claiming the deduction.
✓	Obtain a qualified appraisal from a qualified appraiser for a non-cash gift (other than publicly traded securities) valued in excess of $5,000.
✓	For gifts over $5,000, attach a fully-completed "appraisal summary" (see IRS Form 8283) to the donor's income tax return for the value of assets supported by a qualified appraisal. Retain the qualified appraisal at least until the expiration of the time for assessing a deficiency for the year in which the charitable deduction was claimed.
✓	For gifts over $500,000, attach the full qualified appraisal to the income tax return claiming the charitable income tax deduction for the value of property supported by a qualified appraisal.

DISCLAIMER

This information is intended solely for information and education and is not intended for use as legal or tax advice. Reference herein to any specific tax or other planning strategy, process, product or service does not constitute promotion, endorsement or recommendation by AALU. Persons should consult with their own legal or tax advisors for specific legal or tax advice.

NOTES

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[1] This report is intended to provide only an overview of certain important substantiation requirements for claiming a charitable income tax deduction of certain non-cash donations to qualified charities under Code §170. An in-depth analysis of all tax requirements pertaining to deductibility of gifts of specific types of assets, including substantiation, valuation, and deduction limitations, is beyond the scope of this report.

[2] *See* Code §170(c) for a complete list of the types of qualifying charitable organizations.

[3] *See e.g., Gunkle v. Commissioner*, 753 F.3d 502 (CA5, May 19, 2014), aff'g T.C. Memo 2012-305; *Riether v. U.S.*, 919 F. Supp. 2d 1140 (June 21, 2012).

[4] *See* https://www.irs.gov/charities-non-profits/exempt-organizations-select-check

[5] Treas. Reg. §1.170A-1(h)(1). *See also McGrady v. Commissioner*, T.C. Memo 2016-233. The IRS stated that the taxpayers lacked the requisite donative intent to qualify the gift as a charitable contribution because they negotiated and received a benefit from the conservation easements as they would protect their privacy and indirectly prevent suburban development from affecting their residential views. While the Tax Court acknowledged that there was a certain benefit to taxpayers resulting from protection of the natural state of the land from suburban sprawl, such benefit was incidental to the conveyance of real property by conservation easement and did not constitute a quid pro quo exchange.

[6] Treas. Reg. §1.170A-1(h)(2). *See also* Code §6115, defining a "quid pro quo contribution" as "a payment made partly as a contribution and partly in consideration for goods or services provided to the payor by the donee organization."

[7] IRS Pub. 1771. Note that certain exceptions apply to the written disclosure requirement, including where the goods or services given to a donor meet the rules for a "token exception," a "membership benefits exception" or the "intangible religious benefits exception" as described under Treasury Regulations or where there is no donative element involved in a particular transaction, such as in a typical museum gift shop sale.

[8] *See Seventeen Seventy Sherman St., LLC v. Comm'r,* T.C. Memo. 2014-124. In claiming a charitable income tax deduction on its tax return, taxpayer filed Form 8283 disclosing a non-cash contribution of interior and exterior easements with a fair market value of $7,150,000 but failed to report the consideration received for the contribution. The Tax Court held that the disclosure requirements for any consideration received in exchange for a charitable contribution must be strictly complied with and that failure to do so will result in disqualification from any deduction whatsoever.

[9] Code §170(f)(8)

[10] For specific substantiation requirements and special rules for contributions of certain property, see Code §170(f)(12) *et. seq.* and underlying Treasury Regulations.

[11] Code §170(f)(8); Treas. Reg. § 1.170A-13.

[12] 147 T.C No. 19 (2016). Taxpayer relied on Code §170(f)(8)(D), which provides that a charitable contribution may be substantiated if the QCO files a return "on such form and in accordance with such regulations as the Secretary may prescribe" which contains the information required in a CWA. The Tax Court disagreed and stated that because the Treasury has not yet issued the regulations described and the statute is not "self-executing;" until such time as the Treasury acts, a CWA is required for a taxpayer to claim a charitable income tax deduction for any contribution to a QCO of $250 or more.

[13] 148 T.C. No. 5 (2017). Taxpayer filed an amended income tax return on which he claimed a charitable income tax deduction for an Aircraft donation and attached an appraisal, an acknowledgment letter from

the QCO, a signed Form 8283, and a copy of the Aircraft Donation Agreement. The Tax Court determined that the CWA requirement was not satisfied by the attachments to taxpayer's income tax return because (i) the acknowledgment letter was not addressed to the taxpayer, did not include his TIN, and did not identify whether any goods or services were provided as consideration; (ii) while deeds of gift signed by donor and donee have been held to satisfy the requirements of a CWA, the Aircraft Donation Agreement was not signed by the donor and did not contain taxpayer's TIN; (iii) the Form 8283 was dated April 13, 2016 and thus was not contemporaneous with the 2010 gift and (iv) a copy of Form 1098-C, which may qualify as a CWA, was not attached to the return.

[14] *See* Code §170(f)(11)(E)(i), Treas. Regs. §1.170A-13(c)(3), and IRS Pub. 561 for full requirements.

[15] *See* Code §§170(f)(11)(E)(ii) and Treas. Reg. §1.170A-13(c)(5) for specific requirements of a qualified appraiser.

[16] *See* Code §170(f)(11)(C), Treas. Reg. §1.170A-13(c)(4), Notice 2006-96, and IRS Pub. 561.

[17] Code §170(f)(11)(D).

[18] *See* Treas. Reg. §1.170A-13(c)(3)(ii).

[19] *See e.g.*, Treas. Reg. §1.170A-13(c)(4)(ii).

[20] 149 T.C. 1 (July 3, 2017).

[21] Note, however, there are cases where the Tax Court has found that substantial compliance with the appraisal requirements will suffice. In *Friedberg v. Commissioner* (T.C. Memo 2013-224), the IRS argued that an appraisal failed to identify the method of valuation used because the method was "sloppy, inaccurate, or haphazardly applied." The Tax Court disagreed, stating that such analysis was irrelevant because whether the appraisal is a qualified appraisal is based on the identification of the valuation method, not the accuracy of the appraiser's application of the methodology. *See also Scheidelman v. Commissioner* (T.C. Memo 2013-18). The Tax Court held that taxpayer substantially complied with the reporting requirements by submitting two Forms 8283 with the income tax return, which together contained the required information for an appraisal summary.