But It's for Charity! – Don't Open the Door for IRS to Ruin Your Charitable Planning

ORANGE COUNTY ESTATE PLANNING COUNCIL

Presented by:
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Curriculum Vitae

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Mr. Prokey is a Fellow of The American College of Trust and Estate Counsel. He is also a member of the California Lawyers Association. He served on the Trusts and Estates Section Executive Committee and the Taxation Section Executive Committee of the California State Bar; and also served as Chair (2004-2005) of the Taxation Section's Estate and Gift Tax Sub-Committee. John is a member of the Silicon Valley, Santa Clara County, and American Bar Associations.

Mr. Prokey is a frequent lecturer and guest speaker at numerous seminars and conferences throughout California and elsewhere, and is an author on various tax and estate planning topics. Speaking engagements include the Heckerling Institute on Estate Planning, Jerry A. Kasner Estate Planning Symposium, AICPA Advanced Estate Planning Conference, CalCPA Advanced Estate Planning Institute, Annual Estate Planning Symposium, Tax and Update Planning Conference, the San Diego Tax and Estate Planning Forum, the Hawaii Tax Institute, CEB/UCLA Estate Planning Conference, Continuing Education of the Bar Estate Planning and Administration, San Francisco, San Mateo County, and Silicon Valley Bar Associations, East Bay, Orange County, Sacramento, Santa Clara County, Santa Cruz County, and Stanislaus County Estate Planning Councils, CPE Forum of the Central Coast, East Bay Trust & Estates Lawyers Seminar, and Paralegal Association of Santa Clara County.

Mr. Prokey received his Baccalaureate of Science degree from Santa Clara University in 1994 and his Juris Doctor degree from Santa Clara University School of Law in 1999, graduating *cum laude* in both undergraduate and law school studies.

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But It's for Charity! - Don't Open the Door for IRS to Ruin Your Charitable Deductions

I. OVERVIEW

Charitable giving, both during lifetime and at death, is an important aspect of estate planning and higher education. Within the tax law there is general public policy in favor of encouraging gifts to charities. See United States v. Benedict, 338 U.S. 692 (1950). While this general public policy pervades the tax law, taxpayers and their advisors must be diligent. A failure to carefully plan and implement charitable giving can lead to disastrous results. These outline materials provide guidance on select income tax and estate tax charitable deduction topics surrounding gifts of property (not cash) to charity.

The general two-step principle of federal taxation is that state law determines the nature and scope of property rights, and federal law determines the appropriate tax treatment of those rights. United States v. National Bank of Commerce, 472 U.S. 713, 722 (1985); United States v. Rodgers, 461 U.S. 677, 683 (1983); Aquilino v. United States, 363 U.S. 509, 513 (1960); Morgan v. Commissioner, 309 U.S. 78, 80 (1940). Therefore, the first consideration when making transfers of property to charity is, "what are the property rights being gifted?" As discussed in these materials, a failure to properly address can lead to disastrous results (and often proper planning could have avoided those disastrous results).

An integral part of charitable planning is supporting the charitable deduction with appraisal support. For lifetime gifts where the income tax charitable deduction is sought, a qualified appraiser must be hired to prepare a qualified appraisal. In many circumstances, hiring the appraiser early (even before the transfer is made) is the best course of action. Appraisals must meet requirements to support the charitable deduction. Thus, when seeking an income tax charitable deduction the taxpayer and the advisor team must insure the appraisal meets the technical requirements spelled out for a qualified appraisal. It is often harder than one can expect to make sure each and every requirement of a qualified appraisal is specifically satisfied.

Finally, the law surrounding valuation in the tax arena is very technical. There are issues specific to real estate, business entities, works of art, partial interests and reasonably foreseeable events. While many of these issues are more fully developed in transfer tax court cases, those cases equally apply to income tax charitable planning. A solid understanding of the special valuation issues affecting property valuation is important.

II. INCOME TAX CHARITABLE DEDUCITON

A. Source of Income Tax Charitable Deduction.

1. IRC Section 170. For individuals and corporations, the source of the charitable income tax deduction is IRC section 170. In particular, IRC section 170(a)(1) provides as follows, "There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary."

2. IRC Section 642(c). For estates and trusts, the source of the charitable income tax deduction is IRC section 642(c). In particular, IRC section 642(c)(1) provides the general rule and states as follows, "In the case of an estate or trust (other than a trust meeting the specifications of subpart B), there shall be allowed as a deduction in computing its taxable income (in lieu of the deduction allowed by section 170(a), relating to deduction for charitable, etc., contributions and gifts) any amount of the gross income, without limitation, which pursuant to the terms of the governing instrument is, during the taxable year, paid for a purpose specified in section 170(c) (determined without regard to section 170(c)(2)(A))."

B. Individuals and Corporations Versus Estates and Trusts.

IRC section 170 (for individuals and corporations) and IRC section 642(c) (for trusts) work very differently. As stated above, estates and trusts are entitled to an income tax deduction under § 642(c)(1) for "[a]ny amount of the gross income of an estate, or trust which, pursuant to the terms of the governing instrument is paid. . . during the taxable year for a purpose specified in section 170(c)" (determined without regard to section 170(c)(2)(A)). What happens with the trust contributes appreciated real estate purchased from gross income? Does the trust receive a deduction for the amount of gross income spent to acquire the real estate or the real estate's value at time of charitable contribution?

These were the questions presented in Green, Trustee of the David and Barbara Green 1993 Dynasty Trust, v. U.S., No. 16-6371 (10th Cir. 2018). In this case, an irrevocable trust (the "Trust") donated real estate to charity and claimed an income tax deduction equal to the amount of appreciation in the real estate. The Trust's total adjusted basis in the donated real property was approximately $10.7 million with a fair market value of $30.3 million. The trust later filed a claim for refund based on claiming the fair market value of the contributed real estate as the amount of the income tax deduction. IRS denied the claim for refund. IRS' position was that the income tax charitable deduction was limited to the income tax basis of the contributed real property – because that reflects the gross income used to acquire the real estate. Thereafter, the Trust sued the United States for a refund of income tax. The District Court awarded the Trust an income tax refund. The United States appealed. On appeal, the Appellate court confirmed that for estates and trusts, generally an income tax deduction has three requirements: (1) the taxpayer is an estate or trust; (2) during the taxable year at issue, or, alternatively, within the calendar year following the taxable year at issue, the taxpayer makes a qualifying charitable contribution under IRC section 170(c); and (3) the charitable contribution must be authorized by the terms of the instrument that established the estate or trust. The central question, however, is "what is the authorized amount of a deduction under [IRC section] 642(c)(1)?" The Eleventh Circuit held the trust receives a deduction for the gross income used to acquire the real estate. The appreciation in the real estate

is not gross income because the real estate was not sold and no gross income was recognized. IRC section 642(c)(1) does not allow for a deduction of anything other than gross income.

Therefore, when planning for income tax charitable deductions, it is critical to know whether the deduction will be sought (or whether it should be sought) by an individual or corporation under IRC section 170, or by a trust or estate under IRC 642(c).

C. IRC Section 170 Income Tax Charitable Deduction of Property over $5,000. Treas. Reg. section 1.170A-13 requires that an income tax charitable deduction of property over $5,000 be supported by a "qualified appraisal" prepared by a "qualified appraiser." These terms are discussed in more detail below. In addition, a Form 8283 must also be completed and submitted with the taxpayer's income tax return. For donations over $500,000, the taxpayer must also attach a qualified appraisal to the income tax return.

D. Substantiation Requirement. A failure to provide a qualified appraisal by a qualified appraiser is not an automatic loss of the income tax charitable deduction for the taxpayer. Cases such as Pankratz v. Commissioner, T.C. Memo 2021-26 [March 3, 2021], confirm that a taxpayer may not lose the income tax charitable deduction for non-cash gifts over $5,000 if the taxpayer can show failure to submit an appraisal "is due to reasonable cause and not to willful neglect." See IRC section 170(f)(11)(A)(ii)(II). The Tax Court found that the taxpayer did not meet the standard. In referring to Form 8283, the Tax Court stated, "We think that four mentions of 'appraisal', 'appraiser', or 'appraised' on one page of one form is pretty good notice that substantial non-cash donations need to be backed up by an appraisal." The Tax Court denied the taxpayer's income tax charitable deductions for failure to provide an appraisal, and found that such failure was not due to reasonable cause and was due to willful neglect.

E. Form 8283. When claiming a non cash income tax charitable deduction in excess of $5,000, a Form 8283 must be submitted with the taxpayer's income tax return. Form 8283 must be filed with the tax return for the year that the taxpayer contributed the property and first claimed a deduction and any carryover year. This form must be signed and dated by the qualified appraiser and the taxpayer not earlier than 60 days before the date of contribution. The taxpayer must receive the appraisal before the due date, including extensions, of the return on which the deduction of property was first claimed. For an amended return on which a deduction is first claimed, taxpayer must obtain the appraisal before the date the amended return is filed.

F. Qualified Appraiser. A "*qualified appraiser*" means an individual (other than an excluded person) who includes on the appraisal summary a declaration that he or she (see IRC section 170(f)(11)(E)(ii) and Treas. Reg. section 1.170A-17(b)):

1. an individual with verifiable education and experience in valuing the type of property for which the appraisal is performed.

2. an individual is treated as having education and experience in valuing the type of property if, as of the date the individual signs the appraisal, the individual has—

a. Successfully completed (for example, received a passing grade on a final examination) professional or college-level coursework, as described in the Regulations, in valuing the type of property, as described in the Regulations, and has two or more years of experience in valuing the type of property, as described in the Regulations; or

b. Earned a recognized appraiser designation, as described in in the Regulations, for the type of property, as described in in the Regulations.

c. Coursework must be obtained from an educational organization, generally recognized professional trade or appraiser organization, or employer educational program. The coursework must be obtained from—

i. A professional or college-level educational organization described in IRC section 170(b)(1)(A)(ii);

ii. A generally recognized professional trade or appraiser organization that regularly offers educational programs in valuing the type of property; or

iii. An employer as part of an employee apprenticeship or educational program substantially similar to the educational programs described in the Regulations.

d. A recognized appraiser designation means a designation awarded by a generally recognized professional appraiser organization on the basis of demonstrated competency.

3. The type of property means the category of property customary in the appraisal field for an appraiser to value.

4. Education and experience in valuing the type of property are verifiable if the appraiser specifies in the appraisal the appraiser's education and experience in valuing the type of property, and the appraiser makes a declaration in the appraisal that, because of the appraiser's education and experience, the appraiser is qualified to make appraisals of the type of property being valued.

5. Excluded Persons: The following individuals are not qualified appraisers for the appraised property:

a. An individual who receives a prohibited fee (as defined in the Regulations) for the appraisal of the appraised property.

b. The donor of the property.

c. A party to the transaction in which the donor acquired the property (for example, the individual who sold, exchanged, or gave the property to the donor, or any individual who acted as an agent for the transferor or for the donor for the sale, exchange, or gift),

unless the property is contributed within 2 months of the date of acquisition and its appraised value does not exceed its acquisition price.

d. The donee of the property.

e. Any individual who is either—(i) Related, within the meaning of IRC section 267(b), to, or an employee of, an individual described in the foregoing provisions; (ii) Married to an individual described in the foregoing; or (iii) An independent contractor who is regularly used as an appraiser by any of the individuals described in the Regulations, and who does not perform a majority of his or her appraisals for others during the taxable year; (iv) An individual who is prohibited from practicing before the Internal Revenue Service by the Secretary at any time during the three-year period ending on the date the appraisal is signed by the individual.

6. In general, the fee arrangement cannot be based on a percentage of the appraised value of the property.

G. Qualified Appraisal. A "qualified appraisal" means an appraisal which (see IRC section 170(f)(11)(E)(i) and Treas. Reg. section 1.170A-17(a)):

1. An appraisal document that is prepared by a qualified appraiser in accordance with generally accepted appraisal standards and otherwise complies with the requirements of a qualified appraisal.

2. Generally accepted appraisal standards means the substance and principles of the Uniform Standards of Professional Appraisal Practice, as developed by the Appraisal Standards Board of the Appraisal Foundation.

3. Contents of qualified appraisal:

a. The following information about the contributed property: (i) A description in sufficient detail under the circumstances, taking into account the value of the property, for a person who is not generally familiar with the type of property to ascertain that the appraised property is the contributed property; (ii) In the case of real property or tangible personal property, the condition of the property; (iii) The valuation effective date; (iv) The fair market value, within the meaning of Treas. Reg. section §1.170A-1(c)(2), of the contributed property on the valuation effective date.

b. The terms of any agreement or understanding by or on behalf of the donor and donee that relates to the use, sale, or other disposition of the contributed property, including, for example, the terms of any agreement or understanding that: (i) Restricts temporarily or permanently a donee's right to use or dispose of the contributed property; (ii) Reserves to, or confers upon, anyone, other than a donee or an organization participating with a donee in cooperative fundraising, any right to the income from the contributed property or to the possession of the property, including the right to vote contributed securities, to acquire the property by purchase or otherwise, or to designate the person having income, possession, or right to acquire; or (iii) Earmarks contributed property for a particular use.

c. The date, or expected date, of the contribution to the done.

d. The following information about the appraiser: (i) Name, address, and taxpayer identification number; (ii) Qualifications to value the type of property being valued, including the appraiser's education and experience; (iii) If the appraiser is acting in his or her capacity as a partner in a partnership, an employee of any person, whether an individual, corporation, or partnership, or an independent contractor engaged by a person other than the donor, the name, address, and taxpayer identification number of the partnership or the person who employs or engages the qualified appraiser.

e. The signature of the appraiser and the date signed by the appraiser (appraisal report date).

f. The following declaration by the appraiser: "I understand that my appraisal will be used in connection with a return or claim for refund. I also understand that, if there is a substantial or gross valuation misstatement of the value of the property claimed on the return or claim for refund that is based on my appraisal, I may be subject to a penalty under section 6695A of the Internal Revenue Code, as well as other applicable penalties. I affirm that I have not been at any time in the three-year period ending on the date of the appraisal barred from presenting evidence or testimony before the Department of the Treasury or the Internal Revenue Service pursuant to 31 U.S.C. 330(c)";

g. A statement that the appraisal was prepared for income tax purposes.

h. The method of valuation used to determine the fair market value, such as the income approach, the market-data approach or the replacement-cost-less-depreciation approach.

i. The specific basis for the valuation, such as specific comparable sales transactions or statistical sampling, including a justification for using sampling and an explanation of the sampling procedure employed.

4. A qualified appraisal must be signed and dated by the qualified appraiser no earlier than 60 days before the date of the contribution and no later than:

a. The due date, including extensions, of the return on which the deduction for the contribution is first claimed; or

b. In the case of a donor that is a partnership or S corporation, the due date, including extensions, of the return on which the deduction for the contribution is first reported; or

c. In the case of a deduction first claimed on an amended return, the date on which the amended return is filed.

5. Valuation effective date: (i) The valuation effective date is the date to which the value opinion applies; (ii) For an appraisal report dated before the date of the contribution (i.e., time when delivery is effected), the valuation effective date must be no earlier than 60 days before the date of the contribution and no later than the date of the contribution. For an appraisal report dated on or after the date of the contribution, the valuation effective date must be the date of the contribution.

6. An appraisal is not a qualified appraisal for a particular contribution, even if the requirements of the Treas. Reg. are met, if the donor either failed to disclose or misrepresented facts, and a reasonable person would expect that this failure or misrepresentation would cause the appraiser to misstate the value of the contributed property.

7. A donor must obtain a separate qualified appraisal for each item of property for which an appraisal is required under IRC section 170(f)(11)(C) and (D) and paragraph (d) or (e) of Treas. Reg. section §1.170A-16 and that is not included in a group of similar items of property, as defined in Treas. Reg. section §1.170A-13(c)(7)(iii). For rules regarding the number of appraisals required if similar items of property are contributed, see IRC section 170(f)(11)(F) and Treas. Reg. section §1.170A-13(c)(3)(iv)(A).

8. The qualified appraisal must be received by the donor before the due date, including extensions, of the return on which a deduction is first claimed, or reported in the case of a donor that is a partnership or S corporation, under IRC section 170 with respect to the donated property, or, in the case of a deduction first claimed, or reported, on an amended return, the date on which the return is filed.

9. The fee for a qualified appraisal cannot be based to any extent on the appraised value of the property. For example, a fee for an appraisal will be treated as based on the appraised value of the property if any part of the fee depends on the amount of the appraised value that is allowed by the Internal Revenue Service after an examination.

10. The donor must retain the qualified appraisal for so long as it may be relevant in the administration of any internal revenue law.

11. If an appraiser has been prohibited from practicing before the Internal Revenue Service by the Secretary under 31 U.S.C. 330(c) at any time during the three-year period ending on the date the appraisal is signed by the appraiser, any appraisal prepared by the appraiser will be disregarded as to value, but could constitute a qualified appraisal if the requirements of this section are otherwise satisfied, and the donor had no knowledge that the signature, date, or declaration was false when the appraisal and Form 8283 (Section B) were signed by the appraiser.

12. If the contributed property is a partial interest, the appraisal must be of the partial interest.

H. Working with the Appraiser. The taxpayer and the advisor team must work closely with the appraiser. The common goal should be to provide credible, reliable and relevant conclusions of value supported by a detailed appraisal report meeting each and every criteria of a qualified appraisal.

1. When to Hire. When should the appraiser become involved? That will depend on the nature of the matter. If a charitable contribution deduction is at issue for a contribution of property, it depends on the circumstances and how tightly the client wishes to match the deduction to current year income. The appraiser should be involved as soon as possible to make sure client expectations are met. In the transfer tax arena, an appraiser might be retained during the planning phase as a consulting expert. In any event, an appraiser will be needed for a transfer tax return (Form 709 or Form 706) for transfers other than cash and other than assets determined by the market.

2. How to Hire an Appraiser. Hiring an appraiser involves many steps, including, but not limited to:

a. Locate and identify an appraiser. This can be a time-consuming process depending on the type of property to be appraised. For more unique property, making many inquiries may be necessary. Tax Court decisions can be a good resource, particularly when the appraiser's report was accepted by the Tax Court (but note that an appraiser may be accepted in one case, but rejected in another). Researching the appraiser's court record in general can be useful. Asking other professionals is perhaps the most common and successful approach.

b. Make sure the appraiser is qualified to appraise the subject property.

c. Make sure the appraiser produces readable, comprehensive reports. This can be determined by asking the appraiser for a sample report.

d. Discuss the appraisal methodology before retaining the appraiser. Appraisal is an art, not a science. Different appraisers use different methodology, and you should know what to expect before the report is prepared.

e. Do not over-negotiate the fee. This leads to attorney time (that can cost more than the benefits of the negotiation). It can also lead to an unhappy appraiser, and a product that reflects the resulting attitude.

f. Consider costs carefully. Some appraisers will require more attorney review, and thus added costs. Thus, the lowest cost appraiser will not always cost the client the least.

g. Consider the report's use. If you need a qualified appraiser, make sure the appraiser is such.

h. Make sure the appraiser has experience with the legal issues that are raised by the subject property. Asking how the appraiser has dealt with such issues in the past will give some idea of the experience level.

3. What Appraisers Should Do. Investigate all facts and circumstances related to the subject property. If the subject property is a closely held business or an interest therein, the appraiser should visit the site. In the FLP context, the appraiser should talk with management and have questions answered.

a. Make sure he or she understands all of the legal issues surrounding the subject property.

b. Produce a comprehensive and detailed report – and if required, make sure all requirements for a qualified appraisal are met.

c. Make sure the report is written to help the reader, not convince the reader. The appraiser is not an advocate. This is a fine line. See Knight v. Commissioner, 115 TC 506 (2000), where the appraiser was considered an advocate for the taxpayer and his value conclusions were largely disregarded. This can be addressed by discussing multiple methods and including strengths and weaknesses of the methods used.

4. What Lawyers/CPAs Should Look for in Report. I have heard, all too often, from lawyers and CPAs that they have not read the valuation report they attached to a tax return. In light of all of the various penalties applicable to taxpayers, appraisers and return preparers, this is not wise. So…what should lawyers and CPAs be looking for? Here is a short (non-exclusive) list:

a. All relevant facts. Post-transfer date events, facts and circumstances are relevant. The appraiser is entitled to, and must demand from the client and other advisors, all the facts, data, good news and bad news. Once known, such information cannot be ignored.

b. All legal issues are addressed in the report.

c. A review of the market conditions affecting the property. This may include national, state and more localized review and discussion.

d. A discussion of the appraisal methodology used and not used. The report should indicate what approaches to value were not used. For example, if the appraiser is not using the income approach, then the report should say it was considered and why it is not being used. Similarly, when determining discounts for lack of control and lack of marketability, a discussion of the approaches not used can be helpful.

e. If the appraiser relies upon studies or other data, the study or data should be in the report as an appendix.

f. If the report is for Tax Court, it is the expert's direct testimony. Thus, the written valuation report must contain all data and reasoning supporting the appraiser's value conclusions if he or she expects the Tax Court to give the report substantive weight. This is due to the Federal Rules of Evidence, Tax Court Rules, and the Standing Pretrial Order of the Tax Court.

g. Make sure the report includes all that is necessary for its purpose. If it needs to be a qualified appraisal, make sure it includes all that is required under the Regs. If it is for adequate disclosure purposes, make sure the requirements are met. This means printing the Regs. and checking-off each requirement.

h. Only the appraiser should draft the report. If the appraiser asks for a portion to be drafted, say no! The appraiser needs to understand what is needed and draft the report accordingly.

i. Make sure the report clearly states why the methodologies used apply to the subject property.

j. Make sure the report is understandable and clearly written.

k. Make sure the report is the opinion of the appraiser and not some other person.

5. What Clients Should Look For. Clients pay a lot for appraisals. Also, it is their taxes that are at issue. Thus, the client must review appraisal reports. But what should they look for? Here's a short (and non-exclusive) list:

a. That the description of the property is correct.

b. That all descriptions of the operations and facts associated with the property are accurate.

c. That the value conclusion is not obviously inconsistent with common sense or contrary to what the client knows. A taxpayer defense to penalties is good faith reliance on an appraisal. Good faith is a distinct element – if the taxpayer has reason to believe the appraisal is wrong, then the taxpayer may not have a penalties defense (also note that mounting a defense to a penalty based on advice of counsel can waive the attorney-client privilege).

d. That he or she can understand the report. Many clients will say they cannot understand. This is an indication, although not always, of a poorly written report. It can also be an indication of a client's lack of effort.

III. ASSIGNMENT OF INCOME

A. Summary. Anticipatory assignment of income is a tax concept that basically means once a right to receive income has "ripened" for tax purposes, the taxpayer who held the property when the right ripened will be taxed on any gain realized. This is true even if a transfer occurred

before the income is received. The idea here is that you cannot assign income you have earned to another. This doctrine often arises when a taxpayer desires to, or does, transfer ripened assets to a charity.

With anticipatory assignment of income, the question is whether the right to receive income from has "ripened" prior to contribution to charity. This can be a sale of the asset itself (such as stock or real estate), or sale of an asset held by a passthrough entity. There is no bright-line rule to answer this question. The courts tend to look at what is likely to occur and whether the income realization event is practically certain to occur. There are a few cases (such as Estate of Applestein v. Commissioner, 80 T.C. 331 (1983) and Ferguson v. Commissioner, 174 F.3d 997 (9th Cir. 1999) where the IRS was successful in asserting the anticipatory assignment of income in the merger context. In those cases, the board of the acquirer, the board of the to be acquired, and at least a majority of shareholders of both corporations, all had approved the merger transaction. The courts found that once the shareholder consent reached 50%, the right to income was deemed to have ripened.

However, in older cases, such as Stern v. Commissioner (1950) and Palmer v. Commissioner (1974), the Tax Court held that the anticipatory assignment of income doctrine did not apply because the transferee was not "legally bound" to surrender or liquidate the shares; therefore, the liquidation event was not practically certain to occur. Both *Stern* and *Palmer* dealt with closely held businesses and did not involve public shareholder votes or approval.

In a more recent case, Rauenhorst v. Commissioner (2002), the Tax Court relied on the concept of whether the transferee was "legally bound" to sell stock at the time the transfer occurred. The court looked at the facts of the case to make this determination. Prior to the transfer, there was a letter of intent to purchase and acceptance and resolution to negotiate the sale by the board, but the binding shareholder and company purchase agreement was not entered into until after the transfers of stock. For these reasons, the court held that the donees were not "legally bound" to sell at the time the donation occurred. Furthermore, the holding in *Rauenhorst* was upheld even though the directors who signed the acceptance of the offer owned more than 90% of the shares. The Tax Court declined to agree with IRS that this was effectively a shareholder vote because the signers were acting as directors and not shareholders. This decision seems in direct contrast with *Ferguson;* however, we must deal with both cases.

In short, there is no clear law regarding when a right to income is "ripened" or when the transferee is "legally bound." However, in the context of publicly traded companies, it appears that the status of the shareholder vote or approval of at least 50% of shareholders is an important consideration. Once that vote or approval has occurred, there is a good chance that the right to income has "ripened." If the vote or approval is still pending (and there are other contingencies), then the right very well may not have ripened yet.

B. The Second Leg of Anticipatory Assignment of Income. Keefer v. U.S. (2022) 130 AFTR 2d 2022-5002 (N.D. Texas) [July 6, 2022] discusses the anticipatory assignment income doctrine. Not just the leg discussed above, but also a second leg. The second leg provides that the taxpayer must transfer his or her entire interest in the property. Keefer is "The Trifecta Tax Calamity," showing how devastating the anticipatory assignment income doctrine can be for taxpayers. In Keefer, Taxpayer assigned his 4% limited partnership interest to a donor advised fund (DAF). The assignment specifically limited what was assigned to the proceeds from the sale of real estate owned by the partnership. As of the date of transfer, there was a letter of intent to sell the real estate owned by the partnership. After the transfer to the DAF, a contract for sale of the real estate was executed, and the real estate sold. The good news is that this timing did not trigger the anticipatory assignment of income doctrine. What did trigger the doctrine is that Taxpayer did not transfer his entire interest in the property to the DAF. As such, the income related to the partnership's sale of real property remained taxable to the taxpayer (even though Taxpayer would receive none of the proceeds). What's more, Taxpayer failed to meet the added charitable deduction requirement for gifts to DAFs. When gifts are made to DAFs, the contemporaneous acknowledgement of the gift must state that the charity has exclusive legal control over the assets contributed. Thus, The Trifecta was that the Taxpayer: (1) recognized the taxable income; (2) received no income tax charitable deduction; and (3) received none of the sales proceeds related to the real estate. The Trifecta Tax Calamity!

IV. ESTATE TAX

A. Only receive estate tax deduction for what passes to charity. In Estate of Moore v. Commissioner, (2020) T.C. Memo 2020-40 [April 7, 2020], the Tax Court addressed the question of an estate tax charitable deduction in the IRC section 2036 context. In this case, the decedent and his children created a limited partnership. Decedent transferred a 4/5ths interest in his farm (his home), another ranch, and $1.8 million from his investment account. The farm sold to a third party and decedent retained the right to live on and operate the farm until his death. During life, the decedent transferred FLP interests to irrevocable trusts for his descendants. The Tax Court held that the farm was includible in the decedent's estate for estate tax purposes. Who owned the farm for state law purposes? Mostly the FLP. Who owned the FLP? Trusts for decedent's descendants.

Decedent's revocable trust contained a provision stating the remainder of the revocable trust assets pass to charity at his death. The estate argued that because of this provision, any increased value caused by the value of the ranch being included in decedent's estate for estate tax purposes is offset by an estate tax charitable deduction, and thus no additional estate tax is owed. The Tax Court rejected this argument, finding that only assets held in decedent's revocable trust could pass to charity and qualify for the estate tax charitable deduction. The ranch was not held in decedent's revocable trust; rather, it was held in the FLP, and interests in the FLP were held in the irrevocable trusts for Decedent's descendants. Thus, the increased value in decedent's estate from application of IRC section 2036 cannot result in an increased estate tax charitable deduction.

B. The Estate Tax Value and Estate Tax Deduction Value Mismatch. In Estate of Warne v. Commissioner, T.C. Memo. 2021-17 we received an important reminder to contrast lifetime charitable gifting versus charitable gifting at death. In the Warne case, Miriam Warne held majority interests through a family trust in five LLCs holding leased real estate. Warne made gifts

of minority interests in four LLCs in 2012. Therefore, at death, the remaining owners of the companies consisted of family members. Most of the properties held by the companies were subject to long-term ground leases. Warne served as the manager of all the companies, but the operating agreement provisions varied. One of the operating agreements established strict protocols for transferring interests, including if a member wished to sell an interest to anyone who was not an immediate family member.

At the time of Mrs. Warne's death, the Family Trust held a 100% interest in Royal Gardens, LLC. The Family Trust provided that, upon Mrs. Warne's death, a 75%-member interest in Royal Gardens, LLC would be transferred to a family foundation and the remaining 25% would be transferred to a church.

On the estate tax return, the estate reported the value of its 100% interest in Royal Gardens, LLC, at its net asset value with no discounts. The estate tax return also listed the charitable donations for the 75% interest donation to the foundation and the 25% interest donation to the church with no discounts. The estate tax return was pulled for examination. IRS decreased the value of the charitable contributions by applying discounts for lack of control and marketability to the 75% and 25% interest in Royal Gardens, LLC. Thus, IRS' position resulted in inclusion of 100% of the assets of Royal Gardens, LLC in the gross estate, but estate tax charitable deductions for less than that amount. As a result, even though the entire value of Royal Gardens, LLC passed to charity, the charitable deduction is less than the value included in the gross estate and the estate owes estate tax on that difference.

Before the Tax Court, the Estate argued that no discounts should apply for purposes of the estate tax charitable deduction when valuing the interests in Royal Gardens, LLC that passed to the two charities. The entire interest passed to charity, and thus the estate tax charitable deduction should cover the entire value. IRS argued that discounts should apply because each charity received a portion of the LLC.

The Tax Court held that discounts should apply to the 75% and 25% interests in Royal Gardens, LLC passing to charities for purposes of the estate tax charitable deduction, even though the entire LLC passed to charity. The Tax Court specifically noted that Ahmanson Foundation v. United States, 674 F.2d 761, 768 (9th Cir. 1981), stated that there is nothing to suggest the valuation of the gross estate should take into account the fact that assets will come to rest in several hands rather than one. That is to say, the decedent's entire interest in an entity is valued in his or her estate, regardless of how many beneficiaries will receive that entire interest. Here, that means the entire 100% of Royal Gardens, LLC is valued in the gross estate, regardless of the fact that the 100% interest will pass among two charities. However, when the property is split as part of an estate tax charitable contribution, a different principle applies. "In short, when valuing charitable contributions, we do not value what an estate contributed; *we value what the charitable organizations received*." (Emphasis added).

The parties previously stipulated that if a discount applied, then a 27.385% discount would apply to the 25% interest and a 4% discount would apply to the 75% interest. Therefore, 100% of the value of the LLC was included in the Estate but the Estate only received a charitable deduction equal to approximately 90% of the LLC ((25 x (1- 0.27385) = 18.15375) + (75 x (1- 0.04) = 72)).

V. SPECIAL VALUATION ISSUES

A. Cryptocurrency. CCA 202302012. While this Chief Counsel Advice should not be used or cited as precedent, it tells us the following: (1) If a taxpayer donates cryptocurrency for an income tax charitable contribution deduction of more than $5,000, a qualified appraisal is required; and (2) the taxpayer will not meet the reasonable cause exception provided in IRC section 170(f)(11)(A)(ii)(II) if the taxpayer determines the value of the donated cryptocurrency based on the value reported by a cryptocurrency exchange on which the cryptocurrency is traded rather than by obtaining a qualified appraisal.

B. Post-Valuation Date Events. In the income tax case of Bergquist v. Commissioner, (131 T.C.8) taxpayers were medical doctors and shareholders in University Anesthesiologists, P.C. (UA), a medical professional service corporation. The medical doctors provided medical services to patients of the Oregon Health & Science University Hospital (OHSU), and the CPA served as the chief executive officer for UA.

To reduce perceived risks and management concerns associated with operating various separate medical practice specialty groups, the Oregon Health & Science University Hospital (OHSU) decided to form a single consolidated medical practice group, OHSU Medical Group (OHSUMG), as a section 501(c)(3) tax-exempt professional service corporation under which all medical doctors were to be employed. In conjunction with this consolidation, OHSU's attorney outlined a three-step plan that would allow the taxpayers to claim charitable contribution deductions, as follow: (1) issue a new class of nonvoting UA stock through distribution of UA stock dividend; (2) donate the newly created UA nonvoting stock to OHSUMG to claim charitable contribution deductions; and (3) donate UA voting stock to OHSUMG to potentially claim additional charitable contribution deductions.

According to step 1 of the plan, UA declared a stock dividend and issued 4 shares of nonvoting stock to each of the 28 UA stockholders for each share of UA voting stock held such that each stockholder now held 400 shares of nonvoting stock and 100 shares of voting stock. On September 14, 2001, under step 2 of the plan, 24 of the 28 stockholders donated to OHSUMG all 400 shares of their UA nonvoting stock and 40 shares of their UA voting stock. The valuation advisors hired by UA appraised the donated UA voting and nonvoting stock as of August 31, 2001 at $401.79 per share for a total of $200,895 for the CPA and $176,787 for the doctors. On January 1, 2002, the medical practice group, including UA, were consolidated into OHSUMG, and all doctors became OHSUMG employees. After determining that the value of UA shares would be insufficient to justify claiming of a charitable contribution deduction, taxpayers decided to forego step 3 of the plan.

Based on the valuation provided for by the valuation advisors, Taxpayers claimed a charitable contribution deduction of $401.79 per share for a total of $1736,788 by the doctors and $200,895 by the CPA. However, the IRS Commissioner, on the basis of an expert appraisal, determined that the UA voting stock had a value of $37 per share and the UA nonvoting stock had a value of $35 per share.

The difference between the appraised value for the UA stock between the Taxpayers' experts and the Commissioner's expert stems from the issue of whether to value UA as a going concern. The Taxpayer's experts valued UA as a going concern as of the gift date, because they viewed the scheduled consolidation of UA into OHSUMG on January 1, 2002, as uncertain. However, the Tax Court concluded that UA should not be valued as a going concern, because the donation of UA stock was driven by the imminent consolidation of UA and the Taxpayers would not have donated their stock had there been a possibility that the consolidation would not occur. Although the consolidation date had not been set in stone, the Court emphasized that a reasonably informed and willing buyer or seller certainly would have known about and would have taken into consideration the fact that, as of the gift date, there was an extremely high likelihood that UA would no longer be an operating entity by some early time in 2002.

Thus, the Tax Court adopted the Commissioner's expert's valuation method and determination based on the asset-based approach, which treats as a non-ongoing business operation. For estimating the total UA equity, the Commissioner's expert examined UA's balance sheet to determine the book value of assets and liabilities before making adjustments. To account for the noncontrolling, nonmarketable nature of the UA stock, the expert derived a 35% discount for lack of control from a study of mergers of publicly traded companies in the health care industry and a 45% lack of marketability discount obtained from a study of restricted stock health care companies and from a study of IPOs. Finally, to obtain the value of the UA voting stock, the expert divided the discounted UA equity by the number of shares to arrive $37 per share. As for the nonvoting UA stock, the expert determined a value of $35 per share after applying an additional 5% discount to account for the lack of voting rights.

C. Actual Sales After Valuation Date. If there is no public market or the asset is not sold at retail, then the best evidence of value will be actual arm-length sales at or near the valuation date. Andrews v. Commissioner, 79 T.C. 938 (1982). Thus, a critical question when valuing assets where there is no public market is, "Whether there are any actual sales at or near the valuation date."

1. Estate of Scanlan v. Commissioner, (T.C. July 24, 1996). This gift and estate tax case involved valuation of shares of stock in Eatelcorp, Inc., a privately-owned corporation ("Eatel"). Decedent and his wife gifted 10,667 shares of Eatelcorp on April 12, 1991, and Decedent owned a 50% community property interest in 50,000 shares at his death (July 16, 1991). The shares at issue constituted a minority interest in Eatelcorp, which had 964,666 shares of outstanding stock as of the valuation dates. Decedent's family owned approximately 37% of the outstanding Eatelcorp stock. Based on appraisals, the 1991 gift tax return reported a $34.84 per share value for the April 1991 gifts, and the estate tax return reported a $35.20 per share value for the stock as of Decedent's July 16, 1991 death.

In September 1992 (17 months after the gifts and 14 months after Decedent's date of death), Eatelcorp solicited offers for the purchase of all stock in the company. Various offers came in for the purchase of the stock, and the highest offer was made for $72,500,000 (or $75.1555 per share) from an unrelated third party (Brighton). In **January 1994 (approximately two and half years after the valuation dates)**, subject to their right of first refusal, the Decedent's family

bought out the rest of the Eatelcorp stockholders for a per share price of $75.1555. Based on the 1994 redemption price, the IRS determined that the per share price on the 1991 valuation dates was $72.15 per share (less a 4% minority interest discount). There were no sales or redemptions of Eatel stock between 1989 and 1994.

In challenging the increase in value, the Decedent's estate attempted to exclude evidence of the 1993 offers and the 1994 sales, claiming that they were not relevant to value because: (i) they occurred too long after the valuation dates; (ii) there was a dramatic increase in profitability between the valuation dates and the sales dates; and (iii) there was no plan or agreements to sell the stock as of the valuation date.

The Tax Court found the 1993 offers and the 1994 sales to be relevant because the "best indicator of the value of unlisted stock often is arm's-length sales of that stock at or around the time of valuation." The court found the redemption price probative even though it was "more than 1 year [removed] from the Valuation Dates" (actually more than 2 years). In its analysis, the court found the passage of time and the company's financial data between the valuation dates and the redemption date must be used to discount the redemption date value to the present value as of the valuation dates.

The Court rejected both the IRS and the Estate's value determinations and applied its own valuation analysis. The Court started with the $75.1555 redemption value as of August 1993, adjusted this figure to account for passage of time via an income analysis, and applied a 30% minority interest discount. The Court concluded that a value of $50.50885 per share was the fair market value of the Eatelcorp stock on both valuation dates. Coincidentally, this was close to splitting the difference between the Estate's value and the IRS' value, even though the court claimed it completely rejected those values.

2. Estate of Freeman v. Commissioner, (T.C. Aug. 13, 1996). Decedent was a founder of Xilinx and a member of its board of directors. From inception through June 1990, the company sold preferred stock at prices from $1 to $4. In August 1989, the corporation was authorized to sell common stock to outside sales representatives for $1.25 per share. In July 1989, stock options were granted to certain employees at $1.25 per share. In August 1989, the board of directors discussed an IPO, but had not yet filed a registration statement. Decedent died on October 22, 1989. In December 1989, the corporation was authorized to sell common stock to outside sales representatives for $2.25 per share. Also, in December 1989, stock options were granted to certain employees at $2.25 per share. In June 1990, the company had an IPO at $10 per share. Here were the positions and the Court's conclusion on a per share basis: **Estate: $1.02; IRS: $4.20; Court: $4.20.** The Court rejected the Estate's appraisal because the Estate's appraiser did not inquire whether the company had any IPO plans as of the date of death and did not consider the possibility of an IPO.

3. Estate of Busch v. Commissioner, T.C. Memo 2000-3. This estate tax case involved valuation of a 50% interest in 90.74 acres of real property held by Decedent as of his February 26, 1993, date of death. The Alameda County property was zoned for agricultural use as of the Decedent's date of death. However, under the Pleasanton General Use Plan in effect at the Decedent's date of death, the property was designated for medium and high density residential

zoning that had yet to be approved. About a year after the Decedent's death, various developers made offers to purchase the property based upon the assumption that the property would be able to be developed. In June 1994 (16 months after a valuation date), a contract was entered into for the sale of the land for $150,000 per acre with a 9% increase annually through the date of the first closure of a lot, or June 30, 2000, and depending on the number of lots approved for development.

Since the property had not been zoned for development yet, the Estate's expert used a comparable sales method to value the property and concluded that the property's value was $100,000 per acre but should be discounted 60-80% for a lack of development approval. The IRS' expert used the $150,000 per acre price in the sales contract plus $50,000 for each unit expected to be approved in excess of 250 units. The Court rejected the Estate's analysis and rejected the portion of the IRS' analysis involving the $50,000 per unit upward adjustment. The Court used the post-death contract price of $150,000 per acre and applied a 9% discount rate. This value prevailed, even though development was not approved by the city and the sale fell through. Therefore, the Court's reliance on post-valuation date sales resulted in an unfair result for the taxpayer because the sale never occurred; however, it still served as the valuation basis.

4. Estate of Noble v. Commissioner, (T.C. Jan. 6, 2005). This estate tax case involved valuation of 116 shares (or an 11.6% interest) in Glenwood State Bank ("Glenwood"), a closely-held corporation, owned by the Decedent at her September 2, 1996 death. The Estate reported a value of $903,988 for these shares (or $7,793 per share). On October 24, 1997 (almost 14 months after the valuation date), the Estate sold the shares to Bancorporation, which owned all of the other shares, for $1,100,000 (or $9,483 per share). The IRS issued a notice of deficiency claiming that the value of the stock on September 2, 1996 was $1,100,000 based on the post-valuation date sales price.

At trial, the Estate attempted to argue that the $1,100,000 was an inflated price because Bancorporation was a strategic buyer who would pay more to own 100% of the bank after acquiring the Estate's 116 shares. Therefore, the price paid by a strategic buyer is not the price that a hypothetical willing buyer would purchase the property for. The Tax Court found that there was a lack of evidence to prove that Bancorporation was a strategic buyer. Therefore, the Tax Court used the $1,100,000 sales price as a basis for valuing the stock, but discounted it by 3% to account for the passage of time. Therefore, the Court, relying on the post-valuation date sales, determined the fair market value of the stock to be $1,067,000.

5. Levy v. United States, 402 Fed. Appx. 979 (5th Cir. 2010). This estate tax case involved valuation of agricultural land in Plano, Texas. At the time of Decedent's death, the property was zoned for agricultural use only, despite Decedent's prior attempts to obtain approval to develop the land into residential property.

The lower Court decision was the result of a jury trial, so there is no written opinion from the lower Court and there are very few facts set forth in the Third Circuit's opinion. However, the Third Circuit found that post-valuation date offers for the purchase of the property were admissible. Likewise, the final sales price for the property two years after the valuation date was admissible. The sales price was a valid basis for the value determination since the real estate market in Plano was "relatively flat" from the valuation date to the sales date. The Court also found that

it was foreseeable that the property would be zoned for development at the date of death even though prior attempts to zone for development had been rejected. Therefore, the Third Circuit applied the $25,000,000 sales price based on post-date of death events.

6. Estate of Giovacchini v. Commissioner, (T.C. Jan. 24, 2013). This gift and estate tax case involved valuation of a 2,356-acre parcel of land outside of Lake Tahoe, CA, subject to a conservation easement. In 2000, Decedent sold a 50% interest in the land to an LLC controlled by Decedent's family members for $2,500,000 (no appraisal was conducted). In October 2001, Decedent's trust and the LLC entered into a contract to sell a portion of the land (1,790 acres) to American Land Conservancy ("ALC") for 95% of its fair market value. Decedent died on October 8, 2001, prior to the ALC sale, so she still owned an undivided 50% interest in the land. The ALC purchase agreement was finalized on January 14, 2003, for $29,500,000 in exchange for the 1,790 acres. After the sale, Decedent's estate kept its share of the $29,500,000 purchase price and an undivided 50% interest in the remaining 566 acres.

The 2000 sale of the 50% interest in the land to the LLC was not reported on a gift tax return because the Estate was informed that this was a sale for fair market value. The Estate reported a value of $3,235,117 (approximately $2,800,00 for land and $453,000 for timber) as the value of the 50% interest in the land at Decedent's death. The IRS issued a notice of deficiency for the 2000 gift tax return and the estate tax return for, respectively, $3,784,333, and $9,818,040 plus penalties.

The Tax Court noted that the IRS' expert relied almost exclusively on the January 2003 sale of the land to determine the 2000 and 2001 values, while the Estate's expert disregarded the January 2003 sale completely. The Court sided with the IRS and refused to disregard the partial sale of the land in January 2003, stating that such sale is "undoubtedly some evidence of High Meadows' values for estate and gift tax purposes." The Court found that even though there were some changes to the property between the valuation dates and the sale date, they were not sufficient to eliminate the sale's relevance to valuation. The Court also found that the January 2003 sale was the "only truly comparable sale worthy of consideration." The Court then adjusted the 2003 sale price for inflation, the time value of money, and increases in the market. Thus, it discounted the $29,500,000 sales price by 9% for estate tax purposes and 17% for gift tax purposes. The Court, in essence, ended up splitting the difference between the Estate's and the IRS' values, but the Court also refused to apply penalties under the Neonatology Associates, P.A. test. The Court noted that penalties should not apply because the Estate used good faith in relying on competent advisors to determine the fair market value of the land for gift and estate tax purposes.

7. JP Morgan Chase Bank, N.A. v. Comm'r (In re Estate of Newberger), (T.C. Dec. 22, 2015). Decedent died on July 28, 2009. Her estate timely filed a Form 706 United States Estate Tax Return, reporting three paintings: (i) a Picasso; (ii) a Motherwell; and (iii) a Dubuffet. The Estate reported date of death values of $5,000,000, $450,000, and $500,000, respectively, based on appraisals from Christie's and Sotheby's. On August 14, 2013, the IRS issued a notice of deficiency, and determined that the Picasso, the Motherwell, and the Dubuffet had date of death values of $13,000,000, $1,500,000, and $750,000, respectively.

The Picasso: On February 2, 2010, the Picasso sold at Christie's London auction for $12,927,874. The Estate argued that the sale price of the Picasso should not be taken into account as evidence of its fair market value because "it was a fluke" and could not have reasonably been anticipated on the date of death. Based on a December 2009 appraisal from Christie's, which accounted for a decline in the market for fine artwork from 2008 to 2010, the Estate reported on its Form 706 that the Picasso had a $5,000,000 date of death value. The Court held that no evidence was more probative of fair market value than the direct sale price, and therefore the Estate's failure to consider the sale of the Picasso rendered its valuation unreliable. The Court agreed with the IRS' expert, and after adjusting the sale price downward to reflect July 28, 2009, market conditions, valued the Picasso at $10,000,000.

The Motherwell: On November 11, 2010, a similar work by Motherwell sold for $1,426,500. The Estate and the IRS agreed that the November 2010 sale was the best comparable sale relating to the Estate's Motherwell. The Estate argued that the sale price should be adjusted downward to $800,000 to reflect July 28, 2009, market conditions. The IRS offered no explanation for its higher $1,500,000 valuation. The Court held that the IRS should have made the same downward market adjustment to the Motherwell as it made to the Picasso. The Court agreed with the Estate's expert and valued the Motherwell at $800,000.

The Dubuffet: On November 14, 2007, a similar work by Dubuffet sold for $825,000. The Estate and the IRS agreed that the November 2007 sale was the best comparable. The Estate relied on an appraisal by Sotheby's to assert a $500,000 date of death value. The IRS offered no explanation for its higher $900,000 valuation. The Court found that the IRS' contention that the Dubuffet's value was higher during the market downturn than before the market downturn was nonsensical. The Court agreed with the Estate that the Sotheby's appraisal of $500,000, which included a downward market adjustment, properly reflected the Dubuffet's date of death value.

D. Qualified Appreciated Stock – Non-Operating Foundations.

1. Exception to Deduction Limited to Basis. When donating appreciated assets to or for the use of a non-operating private foundation, the general rule is that the charitable contribution amount must be reduced by long-term capital gain that would have been realized had the property been sold at its fair market value (IRC §§ 170(e)(5)(B)(ii), 170(b)(1)(C)(iv)) (i.e., income tax deduction limited to basis). However, there is an exception to this rule as applied to qualified appreciated stock ("QAS") (IRC § 170(e)(5)(A)). A charitable contribution of QAS receives a full fair market value deduction when the following five requirements are met:

a. Corporate Stock – The contribution must be of corporate stock (IRC § 170(e)(5)(B));

b. Market Quotations – Market quotations for the stock must be readily available on an established securities market as of the date of the contribution (IRC § 170(e)(5)(B)(i));

c. Capital Gain Property – The contributed stock must have been

held by the donor for at least one year (i.e., sale of the stock for fair market value at the time of the contribution must result in long-term capital gain) (IRC §§ 170(e)(5)(B)(ii), 170(b)(1)(C)(iv));

d. 10% Limitation –In the aggregate, contributions of the corporation's stock by the donor and his or her family members must not constitute more than 10% of the value of the corporation (IRC § 170(e)(5)(C)); and

e. Freely transferrable – The contributed stock must not be subject to any resale restrictions, including SEC Rule 144 restrictions, private contractual restrictions, or any other restriction limiting the stock's value or future sale (i.e., the stock must be freely transferrable by the donor at the time of the transfer and by the donee following the transfer).

2. What Has Been Considered QAS. In previous PLRs, the IRS has considered the following as QAS and qualifying for a fair market value deduction:

a. Shares of open-end investment companies (i.e., mutual funds) for which net asset value quotations were published daily in a national newspaper of general circulation (PLR 199925029);

b. Shares of corporate common stock contributed to a private foundation when the Taxpayer and the foundation entered into an agreement limiting Taxpayer's ability to sell or dispose of his *other* shares of previously acquired stock in order to meet the Rule 144 volume limitation (PLR 9734034);

c. Shares of common stock traded on the Over-the-Counter Bulletin Board ("OTCBB"), an over-the-counter market for which market quotations reliably reflected the fair market value of stock traded on the OTCBB (PLR 200702031);

d. Shares of stock in domestic or foreign corporations for which market quotations would be readily available on an established securities market within or outside the U.S. (PLR 9825031); and

e. American Depository Shares which represented an interest in the underlying ordinary shares of a non-U.S. company to charitable remainder trusts and private foundations of which private foundations are or may be remainder beneficiaries (PLR 200322005).

3. Factors to Consider.

a. Whether any legal, regulatory or contractual restrictions limit transferability before or after contribution (e.g., charter, corporations code, or investment agreements); and

b. Even if the non-operating foundation no longer owns the stock, whether previous contributions of capital gain property stock aggregate to the 10% limitation (PLR 200112022 and PLR 200112025); and

c. The value of prior donative contributions are determined at the time of contribution (PLR 200112025).

4. What Does Not Qualify As QAS. QAS excludes the following types of stock:

a. Non-stock interests (e.g., bonds, notes, warrants, and options) and non-corporate interests (e.g., partnership interests);

b. Non-publicly traded stock (e.g., convertible stock) and restricted stock (i.e., the shares must actually be freely transferable by the donor at the time of the transfer and by the donee following the transfer). Watch out for stock that is not registered under the securities laws, even though other stock in the company is registered and is freely tradable;

c. Stock that has not been held for more than one year (IRC § 1222(3)) (i.e., non-capital gain property); and

d. A contribution of stock that when aggregated with all earlier contributions of stock in the same corporation made by the donor and/or members of the donor's family will exceed 10% in value of all the outstanding stock of the corporation.

5. What Has Failed to Qualify As QAS. The following have failed to qualify as QAS such that the income tax deduction for the donation to a non-operating foundation was limited to basis:

a. Corporate shares traded on the OTCBB for which stock prices were only listed in a non-nationally circulated newspaper (PLR 9504027);

b. Company Class B shares (not listed on any established securities market) convertible into Class A common stock (listed on an established securities market) since market quotations for the Class B shares were not available on an established securities market at the time of the contribution (PLR 199915053); and

c. Stock that, although listed on the New York Stock Exchange, was subject to the SEC Rule 144 resale restriction (i.e., taxpayer was prohibited from selling to or exchanging with a third party until a certain date) such that the contributed value was less than the value listed on the exchange and was thus deemed stock for which market quotations were not readily available on an established securities market (PLR 9247018).

6. QAS Contribution to Charitable Remainder Trust ("CRT") and Rule 144. A charitable contribution of QAS to a CRT (that allows distribution to a non-operating foundation) offers the possibility of a fair market value income tax deduction for QAS. All of the requirements discussed herein for a QAS contribution to a non-operating foundation must be met, including resale of QAS by a CRT in the open market within the volume limitation and holding period restrictions of Rule 144 of the Securities Act of 1933. To ensure that QAS donated to a CRT qualifies for QAS treatment and a fair market value income tax deduction, the following facts must

be considered before the donor makes the contribution (although many are a repeat of prior sections in these materials, all other applicable sections of these materials and a separate review of the law should be completed before the contribution):

a. The contributed stock (as opposed to just stock in the company in general) is tradeable on an established securities exchange;

b. The contributed stock has been held by the donor for at least one year;

c. In the aggregate, stock contributed by the donor and/or members of the donor's family does not constitute more than 10% of the value of the corporation;

d. The contributed stock is not subject to any legal restriction governing the stock's value or sale;

e. At the time of the contribution, a hypothetical sale of the stock would meet the requirements of SEC Rule 144(e); and

f. Whether a written agreement stating that the donor will not take any action that would restrict the ability of the CRT to sell the contributed stock under Rule 144(e) is necessary.

VI. FOUR KEY TAKAWAYS:

1. Identify the property rights to be donated and who will donate them

2. Find and hire a qualified appraiser to prepare a qualified appraisal

3. Working closely with the appraiser and the client

4. Consider specific asset legal and appraisal issues