Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
Re: CC:PSI:04 – PLR-163848-03
Date: JULY 12, 2004

Legend

Donor 1 =
Donor 2 =
X =
Agreement =

Account =

Dear :

This responds to a letter dated November 4, 2003, submitted by your authorized representatives on your behalf, concerning the income and gift tax consequences of a proposed donation to X.

The facts and representations submitted are summarized as follows: Donor 1, an individual, and Donor 2, a limited liability company, propose to make donations of cash and traded securities to X. It is represented that X is a tax-exempt college described in sections 170(b)(1)(A)(ii), 501(c)(3), and 2522(a) of the Internal Revenue Code.

At the time of the donation, Donor 1 and Donor 2 will each enter into a separate agreement (Agreement) with X. The Agreements are identical except for the identity of the respective Donor and description of the contributed assets. Under the terms of Agreement, any donation made to X is to be placed in an investment or brokerage account, Account, established in the name of X exclusively for its own benefit. Each donation will be unconditional and irrevocable. Donor 1 and Donor 2 will surrender all rights to retain or reclaim ownership, possession or a beneficial interest in any donation,

and Donor 1 and Donor 2 may not divert the assets held in the Account to any person. Under each Agreement, Donor 1 or Donor 2, respectively, or the respective Donor's investment manager, is permitted to manage the investments in Account pursuant to a limited power of attorney. The respective Donor is prohibited from engaging in any act of self-dealing, as defined in the applicable provisions of the Code or regulations thereunder, with respect to assets in Account.

Agreement imposes the following investment restrictions and limitations on a Donor's management of Account as follows: the Donor will hold or invest only in United States (U.S.) equities, U.S. open-end mutual funds, U.S. closed-end mutual funds, U.S. fixed income securities (including, but not limited to treasures and mortgage-backed, asset-backed and high-yield securities), offshore/onshore hedge funds, REITS, and private placements; no investment may be made in companies in which the Donor owns, directly or indirectly, more than 5 percent of the outstanding shares of stock; assets in Account may not be pledged or encumbered by the Donor or advisor, or used to satisfy any debt or liability of the Donor; the Donor has no right to vote any stock or other securities held in Account; the Donor may not commingle assets in Account with any assets outside Account; the Donor's power to manage investments terminate 10 years from the date of the donation (unless sooner terminated as discussed below); and the Donor may not invest in short sales, forward settling transactions, derivatives, or any borrowings.

Agreement also provides that X has the right at any time or for any purpose and in its sole discretion to withdraw any or all of the assets held in Account or to terminate the limited power of attorney and Agreement.

Finally, Agreement will terminate automatically in severe loss cases, as determined by X in its sole discretion. Agreement may also be terminated at any time by either party upon written notice to the other party.

You request the following rulings:

(1) The proposed contributions to be made by Donor 1 and Donor 2 to X, under the circumstances described above, meet the requirements for a deduction as charitable contributions for income tax purposes.

(2) The proposed contributions to be made by Donor 1 and Donor 2 to X, under the circumstances described above, meet the requirements for deduction as charitable contributions for gift tax purposes.

Issue 1

Section 170(a) allows as a deduction any charitable contribution, payment of which is made within the taxable year. Section 170(c) defines a charitable contribution to include a contribution or gift to or for the use of an organization described in section 170(c)(2). Taxpayers represent that X is a tax-exempt college described in section 170(b)(1)(A)(ii). We assume for purposes of this ruling that X is an organization described in section 170(c).

In order to be deductible under section 170 of the Code, a contribution must qualify as a gift in the common law sense of being a voluntary transfer of property by the owner to another without consideration. Pettit v. Commissioner, 61 T.C. 634, 639 (1974). See also Hansen v. Commissioner, 820 F.2d 1464, 1468 (9th Cir. 1987) (the term "charitable contribution" is synonymous with the term "gift"); Elrod v. Commissioner, 87 T.C. 1046, 1075 (1986). If the donor receives, or can reasonably expect to receive, a financial or economic benefit commensurate with the money or property transferred, no deduction under section 170 is allowable. Rev. Rul. 76-185, 1976-1 C.B. 60.

Section 170(f)(3) denies taxpayers a charitable contribution deduction for certain contributions of partial interests in property. Section 170(f)(3)(A) provides, in part, that in the case of a contribution (not made by a transfer in trust) of an interest in property which consists of less than the taxpayer's entire interest in such property, a deduction shall be allowed only to the extent that the value of the interest contributed would be allowable as a deduction under section 170 if such interest had been transferred in trust. For purposes of section 170(f)(3)(A), a contribution by a taxpayer of the right to use property shall be treated as a contribution of less than the taxpayer's entire interest in such property.

Section 170(f)(3)(B) and section 1.170A-7(b)(1)(i) of the Income Tax Regulations provide, as an exception to section 170(f)(3)(A), that a deduction is allowed under section 170 for the value of a charitable contribution not in trust of an undivided portion of a taxpayer's entire interest in property. An undivided portion of a donor's entire interest in property must consist of a fraction or percentage of each and every substantial interest or right owned by the donor in such property and must extend over the entire term of the donor's interest in such property and in other property into which such property is converted. Section 1.170A-7(b)(1)(i). A charitable contribution in perpetuity of an interest in property not in trust where the donor transfers some specific rights and retains other substantial rights will not be considered a contribution of an undivided portion of the donor's entire interest in property to which section 170(f)(3)(A) does not apply. Id. A donor is therefore not entitled to a charitable contribution deduction if the donor has retained substantial rights in the contributed property. See Stark v. Commissioner, 86 T.C. 243, 251-252 (1986). If, however, the rights in the contributed property retained by the donor are so insubstantial that the donor has, in substance, transferred his entire interest in the property, the partial interest limitations of section 170(f)(3) do not apply, section 1.170A-7(b)(1)(i) is

satisfied, and a deduction is allowed under section 170. Id. See also Rev. Rul. 76-331, 1976-2 C.B. 52; Rev. Rul. 75-66, 1975-1 C.B. 85.

In Rev. Rul. 81-282, 1981-2 C.B. 78, the taxpayer contributed shares of voting stock to a charitable organization, but retained the right to vote the contributed stock. The ruling concludes the right to vote the stock is a substantial right inherent in the ownership of common stock. Accordingly, the ruling holds that the taxpayer is not entitled to a deduction under section 170 since the taxpayer did not transfer all substantial rights in the stock to the donee, but only a partial interest under section 170(f)(3), and the contributed interest was not an undivided portion.

In Rev. Rul. 75-66, 1975-1 C.B. 85, the taxpayer donated his entire interest in 800 acres of real property to the United States but retained the right during his life to train his personal hunting dog on trails extending over the entire property, and to maintain paths and lanes relating to this reserved use. The ruling holds that the contribution satisfied section 1.170-7(b)(1)(i) since the rights retained by the taxpayer were not substantial enough to affect the deductibility of the property contributed, and the taxpayer was thus entitled to a charitable contribution deduction under section 170.

In the present case, the retention of investment management control by Donor 1 and Donor 2, respectively, subject to the restrictions and limitations contained in the Agreements, is not substantial enough to affect the deductibility of the property contributed, and does not constitute the retention of a prohibited partial interest under section 170(f)(3).

Accordingly, Donor 1 and Donor 2 may deduct their respective contributions of the cash and publicly traded securities to X in the manner and to the extent provided by section 170. This conclusion is based on the assumption that X is an organization described in section 170(c).

Issue 2

Section 2501 imposes a tax for each calendar year on the transfer of property by gift by any individual. Section 2511(a) provides that subject to limitations contained in chapter 12, the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.

Section 25.2511-2(b) of the Gift Tax Regulations provides, in part, that as to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or for the benefit of another, the gift is complete. But if upon a transfer of property (whether in trust or otherwise) the donor reserves any power over its disposition, the gift may be wholly incomplete, depending upon all the facts in the

particular case. Accordingly, in every case of a transfer of property subject to a reserved power, the terms of the power must be examined and its scope determined.

Section 25.2511-1(h)(1) provides that a transfer of property by a corporation to B is a gift to B from the stockholder of the corporation.

Section 2522(a) provides, in part, that in computing taxable gifts for the calendar year, there is allowed a deduction for the amount of all gifts to or for the use of a corporation or trust organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes.

Section 25.2522(c)-3(b)(1) provides that if, as of the date of the gift, a transfer for charitable purposes is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that the charitable transfer will not become effective is so remote as to be negligible. If an interest has passed to, or is vested in, charity on the date of the gift and the interest would be defeated by the performance of some act or the happening of some event, the possibility of occurrence of which appeared on such date to be so remote as to be negligible, the deduction is allowable.

Under section 2522(c)(2) and section 25.2522(c)-3(c)(1)(i), if a donor transfers an interest in property (other than an interest described in section 170(f)(3)(B)) to a charitable organization and if the donor also retains an interest in the subject property, no deduction is allowable with respect to the transferred interest unless the transaction is structured to conform to specified statutory and regulatory requirements.

In this case, Donor 1 and Donor 2 propose to make gifts to X. Pursuant to the terms of the respective Agreements, after making a contribution to X, the assets contributed will be held in respective Accounts in the name of X. Donor 1 and Donor 2, or their investment managers, may manage the investments in the respective Donor's account for a period of 10 years. However, under Agreement each Donor is subject to certain restrictions and limitations discussed above, and X may terminate the arrangement at any time and X has the right at any time or for any purpose and in its sole discretion to withdraw any or all of the assets held in Account. Under the facts presented, we conclude that the power retained by Donor 1 and Donor 2, respectively, to manage the investment of the assets contributed by each Donor, does not constitute the retention of an interest in the property for purposes of section 2522(c)(2) and section 25.2522(c)-3(c)(1). Further, under the facts presented, the retained power to manage investments of an Account does not cause the charitable gifts to be subject to a condition or power under section 25.2522(c)-3(b). Accordingly, under the facts of this case, we conclude that a gift tax deduction will be allowable under section 2522 to Donor 1 and to the appropriate individual with respect to the gift by Donor 2.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

In accordance with the power of attorney on file with this office, we are sending a copy of this letter to your authorized representative.

Sincerely,

George L. Masnik
Chief, Branch 4
Office of Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures
Copy for section 6110 purposes
Copy of this letter

cc:

cc:

cc: