THE NEW YORK COMMUNITY TRUST

Professional Notes

FALL 2017

TAX & ESTATE PLANNING

Timing of Charitable Contributions

Many people wait until the end of the calendar year to begin thinking about charitable gifts. But the timing of year-end gifts is critically important if a donor wants a charitable income tax deduction in the current year. The date of the contribution not only determines when the deduction may be claimed, but is key in determining the value of the gift and the amount of the deduction.

General Rules

Under Code Section 170(a)(1)[1] and the Treasury Regulations thereunder, a deduction is permitted for the payment of a charitable contribution made within the taxable year. Generally, a contribution is made when the donor transfers control of the gift to The New York Community Trust or another charity. As a general rule, an unconditional gift is effective when it is physically delivered to the charity or its agent. A pledge is not deductible until the gift is actually made, even if the pledge is legally enforceable.

The nature of the contributed asset and the method of delivery will determine the effective date of the contribution.

Gifts Paid by Cash, Check, and Credit Card

A contribution of cash is effective when the donor delivers it to the charity. This is true even if the donor is an accrual basis taxpayer. As a practical matter, charities rarely accept cash, as such; these contributions commonly are made by check or credit card.

A charitable gift by check is effective when the check is delivered or mailed, as long as the check clears in due course. The check is not treated as an

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[1]All "Code Section" references are to sections of the Internal Revenue Code of 1986, as amended, and all "Treas. Reg. Section" references are regulations promulgated thereunder.

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incomplete gift, even though a donor theoretically could stop payment at any time until the check is presented for payment.

Treas. Reg. Section 1.170A-1(b) refers to "mailing" a check (or stock certificate), and that reference is commonly understood to refer to the U. S. Postal Service. In a different context, Code Section 7502—which provides that a tax return is properly filed when mailed—was amended in 1996 to authorize use of other widely available delivery services (such as Federal Express). The permitted use of these delivery services has not been extended to charitable contributions. We advise donors to use the U.S. Postal Service whenever the date of mailing a charitable contribution is important.

A contribution of property is completed when the donor unconditionally relinquishes control of the asset to the charity or its agent.

A caution against the use of private postage meters: the Tax Court has ruled more than once that petitions were not timely filed, despite the date on the envelope, where the document was not received in the timeframe that mail postmarked by the U.S. Postal Service ordinarily would have been received.

Cash gifts also are commonly paid by credit card. The Internal Revenue Service has ruled that the gift occurs when the donor becomes indebted to the credit card issuer—when the charge is made, not when the donor pays the credit card bill. Similarly, a contribution to charity by text message should be complete when the text message is sent.

Gifts of Securities

A contribution of property is completed when the donor unconditionally relinquishes control of the asset to the charity or its agent. In the case of a contribution of stock or bonds, this occurs when the donor gives up control of the securities and can no longer revoke the authorization to transfer them.

The deduction for publicly traded securities generally will be the average high and low trade on the day of the gift. In a volatile stock market, the value of contributed securities may vary significantly over a few days, or even in the course of a day. The donor's charitable income tax deduction will reflect the value on the date the transfer is deemed to occur, not on the day he or she gave instructions to a broker.

When the stock certificate itself is delivered to the charity, the contribution of stock is effective on the date of mailing (if by U.S. mail) or upon delivery (if by some means other than U.S. mail) of a properly endorsed stock certificate. Of course, it is never a good idea to mail an endorsed stock certificate because it is a negotiable instrument. Rather, the stock certificate and a fully executed stock power should be mailed in separate envelopes, by certified mail. The date of gift is the date both are mailed (or the date of the last mailing, if mailed at different times).

If the donor delivers or mails the stock certificate to his or her own agent or to the issuing corporation or its transfer agent for transfer to the charity, the contribution of the stock is not effective until the stock is transferred on the corporation's books. The mere delivery to the donor's agent or to the issuing corporation with the order for the transfer does not effectuate the transfer, and the actual issuance of new certificates or the transfer on the corporation's books can take weeks. If a gift is time sensitive, delivery of the stock certificate and stock power directly to the charity or its agent generally makes more sense.

The transfer of stock held in a brokerage account in so-called "street name" is effective when the stock is transferred on the issuing corporation's books, or when the stock is delivered to the charity or its agent. If the donor and the charity use the same broker, the contribution is effective when the broker transfers the share from the donor's account to the charity's account. When there is little time to complete a gift, a donor's broker may suggest establishing an account for the charity so the broker can act as its agent. More typically, a broker will wire transfer securities through the Depository Trust Corporation (DTC). We understand that the IRS regards the DTC as the donor's agent, and that the gift is not complete until the shares are credited to the charity's account.

In *Morrison v. Commissioner*, 53 T.C.M. 251 (1987), the Tax Court ruled that when the donor and recipient charity maintained brokerage accounts with the same firm, a transfer of stock held in street name was effective at the time of the entry of the transaction on the brokerage house's books. The court noted that the date of the gift was not the earlier date when the donor directed the broker to transfer the stock (when the stock price was $5 per share higher), because the donor could have revoked her authorization at any time prior to the entry of the transaction.

Mutual funds generally are transferred through a change of ownership on the issuer's books. They cannot be transferred through the DTC system, and the shareholder does not hold a certificate of ownership. It is our experience that gifts of mutual funds may take days or even weeks to complete, depending on the mutual fund company involved and its process for transfers.[2]

Because delays in transferring stock often occur, especially with the involvement of third parties, such as banks, brokers or transfer agents, a donor who is contemplating a gift of stock in the current year would be well advised not to wait until the final days of December to make the gift.

Other Assets

Contributions of real estate are deductible in the year in which the real estate is transferred under applicable state law. In New York, this occurs when the deed is delivered. In some states, there may be a requirement that the deed be recorded.

Contributions Subject to Conditions

If a contribution is contingent on an act by the charity or an event, the contribution is not effective until that act or event occurs, unless the possibility that the charitable transfer will not become effective is "so remote as to be negligible." For example, if a charity informs donors that their contributions will be refunded if all required funds are not raised for a specific project, and the possibility that the funds will not be raised is not so remote as to be negligible, the contribution is not effective until sufficient contributions have been received for the project to go forward. See, Rev. Rul. 79-249, 1979-2 C.B. 104.

Similarly, if a contribution is made, but the charity's interest in the contribution could be defeated by a subsequent event, the contribution is not effective unless the possibility of the occurrence is so remote as to be negligible. The regulations cite an example in which a donor transfers land to a city for as long as the city uses the land as a park. Provided the city intends to use the property for a park at the time of the transfer, and the likelihood of the city using the land for other purposes is so remote as to be negligible, Treas. Reg. Section 1.170A-1(e) concludes that the contribution is effective when the land is transferred.

Accrual Basis Corporations

A corporation that reports its taxable income on an accrual basis may elect to treat a contribution as paid during the taxable year if its board of directors authorizes a contribution during the taxable year, and the corporation actually pays the contribution on or before the fifteenth day of the third month after the close of the taxable year.

Conclusion

As the end of the calendar year nears, donors commonly have questions about the timing of contributions to ensure a current charitable deduction. In a volatile market, the timing of gifts of securities can materially affect the amount of the contribution. These timing rules affect the deduction for contributions to a new or existing fund in The New York Community Trust. However, grants from a donor-advised fund to other charitable organizations do not have tax consequences to the original donor, and are less time sensitive.

The Trust is pleased to work with donors and their professional advisors to make sure gifts can be completed before year end.

For further information, see:

Code Section 170: Charitable contributions
Code Section 7502(f): Filing; treatment of private delivery service
Treas. Reg. Section 1.170A-1(b): Time of making contribution
Treas. Reg. Section 1.170A-1(e): Transfers subject to a condition
Treas. Reg. Section 25.2512-2: Value of securities for gift tax purposes
Revenue Ruling 54-135, 1954-1 C.B. 205
Revenue Ruling 78-38, 1978-1 C.B. 67
Revenue Ruling 79-249, 1979-2 C.B. 104
IRS News Release, IR 2006-192 (12/14/2006)
Estate of Labovitz, 50 TCM 1325 (1985)
Morrison v. Commissioner, 53 T.C.M. 251 (1987)
Ferguson v. Commissioner, 108 T.C. 244 (1997), aff'd, 174 F.3d 997 (1999)

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2 For a more detailed discussion of transfers of mutual fund shares, please see our Summer 2012 Professional Notes column, Donating Mutual Fund Shares to Charity.

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For nearly 100 years, we've worked with nonprofits, donors, and attorneys in New York. Our grants bolster the arts, protect the environment, feed the hungry, educate children, and more. Because The New York Community Trust is a public charity, donors are ensured the maximum deduction allowed by law.

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