

PUBLICATION

Year-End Tax Planning: Potential Benefits of Land Contributions for Recreation or Education

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Charitable conservation contributions can be an excellent means of not only making meaningful donations for the public good, but also establishing the basis for potential tax benefits to the donor. The purpose of this Alert is to address just certain aspects of properly structured charitable conservation contributions.

Generally

For land that has been held over one year, and is not dealer property, a gift prior to January 1, 2012 for a proper conservation purpose will produce a federal tax deduction based on the appraised value of the land.¹ A conservation deduction may be taken in 2011 equal to 50 percent of an individual's contribution base, and may be carried forward for 15 years. This enhanced treatment applies only to gifts of qualified real property interests, and generally will not be available to a donation of a taxpayer's entire interest in real property.² For other types of charitable contributions, including most straight-up fee interests, the individual limit would be 30 percent, and the carry-forward would be limited to five years.³

The Internal Revenue Code recognizes four conservation purposes:

- Preservation of land for the general public's outdoor recreation or education;
- Protection of a significant relatively natural habitat;
- Preservation of open space, pursuant to a clearly delineated governmental policy or for the scenic enjoyment of the general public; and
- Preservation of an historically important land area or a certified historical structure.

In this Alert, the first of these purposes -- namely, contributions which may increase outdoor recreation or education of the general public -- will be discussed.

Outdoor Recreation or Education

It is interesting that the Federal Income Tax Regulations have only 15 lines describing the "recreation or education" conservation purpose. Over 28 times that amount of space is devoted to the requirements of the other three purposes. The main factor that distinguishes this conservation purpose from the others is that physical access must be made available to the general public for substantial and regular use. Such a requirement is consistent with the donor's desire in many instances. In other cases, however, access to a potential site must cross private lands or roadways. In such events, this may not always be an appropriate use for a particular site.

The Income Tax Regulations and a Private Letter Ruling list boating, fishing, a nature or hiking trail, picnic areas, a pavilion and rental campsites as examples of permitted uses which are consistent with this conservation purpose. These are just some examples of various conservation purposes permitted under appropriate facts and circumstances. Each intended use or purpose must be scrutinized not only in relationship to the Regulations and any Rulings issued by the IRS, but also in relationship to all the surrounding facts and circumstances.

The recreation or education conservation purpose has the potential for attracting fewer IRS disputes that have been otherwise posed for claimed conservation-oriented contributions. Whether based on the habitat, open space or historic features or the other purposes, many deductions claimed based on such other purposes have been subjected to great scrutiny in terms of their conservation purpose. However, facilities made available to the general public have generally (in our experience) not attracted the same degree of apparent IRS animosity.

Land trusts, section 501(c)(3) organizations and states, counties, cities and townships are each eligible donees for conservation gifts. Since there is generally no need for a "base-line" study for "recreation or education" conservation purpose contributions (which is not the case for the habitat purpose) or similar background investigation of the land, it may be possible for a gift to be made and accepted this calendar year.

Compliance

As in all gifts of property having a value in excess of \$500,000, it is necessary to attach to the federal tax return an appraisal report prepared by a "qualified appraiser" and an IRS Form 8283 signed by the donee. Even though many of the issues raised on audit or in litigation will not apply to recreation or education purpose conveyances, an unrealistic valuation can be expected to trigger an examination and adjustment.⁴

In 2006, Congress enacted additional penalties for overstating appraisals on which federal tax is based. Currently, temporary guidelines indicate that an appraisal will be sufficient under the Code if made consistent with the "substance and principles" of the Uniform Standards of Professional Appraiser Practice (USPAP).⁵ Obviously, the choice of appraiser is critical to any proposed donation, regardless of conservation purpose.

Conclusion

As stated at the beginning of this Alert, charitable conservation contributions can provide not only substantial benefit for the public good, but also establish a basis for tax benefits to the donor. Significant opportunities do exist, if properly structured, to achieve both goals through contributions which have a conservation purpose focusing upon the general public's outdoor recreation or education.

Should you have any questions or otherwise wish to discuss your particular planning needs or objectives, please contact one of the attorneys within the Firm's Tax Department.

1. The enhanced treatment of conservation gifts originally had a sunset of 12/31/2005 and was extended on several occasions, now through 12/31/2011. There appears to be some bipartisan Congressional support to further extend this law. Yet the Super Committee's absence of a consensus for 2011 tax legislation calls the future of conservation planning into some doubt.

2. Qualified real property interests are defined as (a) the entire interest of the taxpayer other than a qualified mineral interest (b) a remainder interest or (c) a restriction (granted in perpetuity) on the use which may be made of the real property. See Internal Revenue Code Section 170(h)(2). See also IRS Notice 2007-50, Q&A 3, at pages 6-7.

3. Certain benefits may also be made available under state law, such as Georgia, Mississippi, Delaware, Kentucky, Maryland, North Carolina, South Carolina, Virginia and West Virginia, among others.

4. See *Boltar v. Commissioner* 136 T.C. No. 14 (April 5, 2011), wherein the Tax Court Judge found the appraisal offered by the taxpayer "is not admissible . . . because it is not the product of reliable methods." The

judge also noted that there is a "cottage industry of experts who function primarily in the market for tax benefits".

5. See Internal Revenue Code Section 170(f)(11)(E)(i)(II) and IRS Notice 2006-96, Section 3.02(2).