



Yale Richards Professional Education Seminar

*Presented by
Jewish Federation of Omaha Foundation*

Edward Jay Beckwith
Partner – BakerHostetler LLP

RECENT DEVELOPMENTS

Income Taxes

Charitable Gifts and Distributions

1. Expanded Charitable Contribution Limitations - No Limits on 2021 Itemized Deductions for "Cash" Charitable Gifts to Certain Public Charities
2. Regulations Clarify Effect of a State or Local Income Tax Credit on SALT Cap Workaround
 - a) Charitable Transfers Deductible as Business Expenses
 - b) Safe Harbor for Payments by Individuals
 - c) *Quid Pro Quo* Rules Updated
3. Denial of Charitable Deduction for Deconstructed House - *Mann v. United States*
4. No Appraisals Not Excused by Reasonable Reliance - *Pankratz v. Comm'r*
5. Insufficient Substantiation – No Charitable Contribution Deductions - *Chiarelli v. Comm'r*
6. Gross Overvaluation Penalty (40%) Applies when Charitable Gift was not a Completed Transfer - *Fakiris v. Comm'r*
7. No Gain Recognized for a Series of Stock Gifts to Charity followed by Redemptions - *Dickinson v. Comm'r*
8. Substantial Compliance Doctrine Saved Developer's Charitable Deduction. *Emanouil v. Comm'r*
9. IRS will not Rule on Private Foundations Owning LLC Interests. Rev. Proc. 2021-40, 2021-38
10. QTIP Trust Payment of Estate Taxes on Surviving Spouse's Estate is Not an Act of Self-Dealing Where Private Foundation is Residuary Beneficiary of QTIP Trust. PLR 202042007

Fiduciary Income Taxation

1. New Section 67(g) and 642(h) Regulations Regarding Beneficiary's Deduction for Estate Excess Deductions.
T.D. 9918, 85 Fed. Reg. 66219 (Oct. 19, 2020)

RECENT DEVELOPMENTS

Estate Taxes

Unified Credit & Portability/Valuation

1. Executor Can Make Late Election of Portability if Estate is Under the Filing Threshold – Multiple PLRs
2. Tax Court Values Intangibles Owned by Michael Jackson's Estate. *Estate of Michael J. Jackson v. Comm'r*
3. Section 2032A Limitation Adjusted for Inflation. Rev. Proc. 2020-45 § 3.42

Transfers with Retained Beneficial Enjoyment or Retained Control over Beneficial Enjoyment

1. Some Favorable Estate Tax Treatment of Intergenerational Split-Dollar Life Insurance Upheld, Along with Some Unfavorable Tax Treatment - *Estate of Morrisette v. Comm'r*
2. Assets of Family Limited Partnership Included in Decedent's Gross Estate Despite Pre-Death Sale to Third Parties - *Estate of Moore v. Comm'r*

Charitable Deduction/Marital Deduction

1. Value of Charitable Dispositions of Minority LLC Interest is Less than Gross Estate Value of Controlling Interest - *Estate of Warne v. Comm'r*
2. Religious Divorce and Israeli Marriage Constitute a Valid Marriage for Estate Tax Purpose. *Estate of Grossman v. Comm'r*

Estate Tax Procedures

1. User Fee (\$67) for an Estate Tax Closing Letters - Prop. Reg. § 300.13
2. Court Orders Sale of Two Inherited Properties to Satisfy Deficiency - *United States v. Widifeldt*
3. Court of Federal Claims Refuses to Dismiss Claim that Late Estate Tax Payment and Filing Penalties Should be Avoided for Taxpayer's Reasonable Reliance on Advice of Counsel - *Leighton v. United States*
4. Executor Cannot Avoid Late Filing and Payment Penalties by Relying on Attorney to Request an Estate Tax Extension - *Andrews v. United States*
5. Executor May be Personally Liable for Estate Taxes Having Preferred Himself or Other Beneficiaries before Paying the IRS; Transferee Liability and Fiduciary Liability Imposed - *United States v. Estate of Kelley*

RECENT DEVELOPMENTS

Gift Taxes/Generation-Skipping transfer Taxes

Gift Taxes/GST Taxes

1. Gift Tax Annual Exclusion Adjusted for Inflation - Rev. Proc. 2020-45 § 3.43
2. Dispositions of certain life estates - Commutation of QTIP Trust is Taxable Gift of the Remainder Interest Under Section 2519 - CCM 202118008
3. GST Exemption Adjusted for Inflation. Rev. Proc. 2020-45 § 3.41

What Now?

Surviving the Potential for Significant Tax Law Changes?

The Legislative Dance

1. Infrastructure, Budget Building and Reconciliation
2. The House Tax Proposals (See Description of the Chairman's Amendment
3. Corporate and International Provisions
4. Tax Increases for High-Income Individuals
5. Contribution Limit for Individual Retirement Plans of High-Income Taxpayers with Large Balances
6. Other Provisions Relating to Individual Retirement Accounts
7. BUT What About the Senate?

The Details - The House

1. Income Taxes
 - a) Restore Pre-2018 Top Marginal Rate to 39.6%
 - b) Surcharge on High Income Individuals, Estates and Trusts
 - c) Increase in Top Capital Gains Rate to 25%
 - d) Limitation on Qualified Business Income
2. Transfer Taxes
 - a) Early Termination of Temporary Increase in Unified Credit
 - b) Valuation Rules for Certain Transfers of Nonbusiness Assets
 - c) Increase in limitation on Estate Tax Valuation Reduction for Certain Real Property Used in Farming or Other Trades or Businesses
3. New Rules for Grantor Trusts
 - a) New Estate Tax Inclusion
 - b) New Income Tax Consequences

The Senate Has a Voice and Its Own Ideas

1. Increase Transfer Tax Rates
2. Capital Gains Proposals
3. Carry-Over Basis
4. Tax at Transfer, Gift and Death
5. More?

Charitable Provisions Impacting Charitable Giving - Accelerating Charitable Efforts Act – S. 1981

- The Accelerating Charitable Efforts Act (“ACE Act”) was introduced on June 9, 2021, by Senators King (I-ME) and Grassley (R-IA) and has been referred to the Senate Finance Committee.
- The Premise: There is a timing mismatch between when taxpayers are entitled to a deduction for contributions to Private Foundations (“PFs”) and Donor Advised Funds (“DAFs”) and when the contributions are deployed to address charitable needs. Some also have a concern that taxpayers can set aside charitable resources in perpetuity. Many dispute the premise or the need for additional rules.
- The proposal evolved from the efforts of the Initiative to Accelerate Giving, which is funded by John Arnold and supported by academics Ray Madoff and Roger Colinvaux, among others. The ACE Act would seek to address the premise by enacting additional rules and limitations with respect to PFs and DAFs.

ACE - Private Foundation Provisions

- Sections 4, 5, 7, and 8.
- A contribution to a DAF would not count toward the 5% minimum payout requirement unless the funds were distributed by the DAF by the end of year following the contribution.
- PFs would have expanded annual reporting requirements with respect to distributions to DAFs.
- Salaries and travel expenses for family members would not be counted as part of the 5% minimum payout requirement.
- PFs would avoid the excise tax on net investment income, either by maintaining a payout rate of 7% or more, or by limiting the term of the PF to no more than 25-years.

Potential Objections:

- All PFs would be treated the same regardless of size. Often family members provide valuable service to smaller PFs.
- PFs make distributions to DAFs for many reasons, but rarely to “park” funds.
- Can’t any concern about PF distributions be addressed through additional reporting requirements?

ACE - Donor Advised Funds Provisions

- Sections 2 and 3.
- A Donor would be entitled to a current deduction if the DAF has a term of 15 years or less (to be referred to as a Qualified DAF or QDAF). Contributions would be treated on a first in first out basis.
- In contrast, if a donor opted for a DAF term of up to 50 years, the benefit of claiming a deduction with respect to a non-cash gift would be tied to the amount and the time assets were distributed from the DAF (to be referred to as a Non-Qualified DAF or NQDAF) to a qualifying charity (not another DAF). This would require a contemporaneous written acknowledgement from the DAF sponsor at such time.
- If all assets are not paid out within 15 years (for a QDAF) or 50 years (for a NQDAF), the sponsoring organization would be subject to a penalty tax equal to 50% of the undistributed amount.

Potential Objections:

- Charitable giving is completely voluntary: adding additional complexity and limitations could depress rather than accelerate giving.
- Is this too much complexity for smaller DAFs?
- This would preclude using a DAF as a PF substitute for family multi-generational giving.
- What is the inherent “evil” in endowment like funds if they regularly distribute funds to support charitable causes?
- Wouldn’t aggregate payout requirements at the sponsoring organization level accomplish the same goal?
- Delaying the timing of when a donor can take a deduction adds administrative burdens on the DAF sponsor and the donor.
- Could the concept of timing the deduction to the DAF distribution lead to similar rules for other charitable giving?
- The added complexity and limitations could discourage the use of DAFs which are the fastest growing form of philanthropic vehicle over several years.

ACE – Proposals with respect to Community Foundations

- Sections 2 and 3.
- A Qualified Community Foundation would be defined as a single-issue or mission-based Foundation formed for the purpose of serving the needs of a geographic community no larger than 4 States and that has at least 25% of its assets in non-DAF funds.
- No requirement to track DAF accounts that are \$1 million or less (adjusted for inflation).
- Other accounts can meet payout with a 5% payout rule.
- All donors would be entitled to a deduction when a contribution is made to a DAF under \$1 Million and for a contribution to a larger DAF if the contributed asset is distributed within 15 years.

Potential Objections:

- This appears to be targeted to the DAF programs sponsored by for-profit financial service firms.
- The definition of a Qualified Community Foundation does not fit the largest and most active and impactful mission-based DAF sponsors like national religious based and University sponsored DAF programs.
- The added complexity could discourage the use of DAFs.

ACE - Proposal with Respect to the Public Support Test

- Section 6.
- A charitable organization would not treat distributions it receives from a sponsoring organization of DAFs as public support received from another public charity unless the distribution from the sponsoring organization is not sourced to a DAF.
- All anonymous distributions from DAFs held by a sponsoring organization would be treated as though they were from a single source. However, distributions from DAFs that are identified to a particular DAF donor would be treated as support received from that donor.

What Everyone Wants to Know

1. What will Actually Pass
2. When Will it Be Effective?
3. How Would These Changes Impact Our Planning?
4. What Should I be Doing Now?

NEWS AND VIEWS YOU CAN USE

Private Wealth Planning

Year-End Planning

- Bonus Unified Credit – Use it or Lose it
 - Year-end Gifts
 - Prefund Insurance Trusts
 - Late Allocation of Generation-Skipping Tax Credit for Old and Cold Potentially Dynastic Trusts
- Accelerate Income – Defer Restrictions
- Rebalance Investment Portfolios
- Review and Grantor Trusts
 - Consider releasing Grantor Trust status for “old and cold” Pre-Enactment Trusts
 - Wait and see if Tax Payments are additions?
 - Rely on downstream Severance?

NEWS AND VIEWS THAT YOU CAN USE

Charitable Giving

Year-End Planning

1. **Don't Overlook the Power of Cash Gifts** – For 2021 Taxpayers can still deduct up to 100% of their adjusted gross income (AGI) using charitable gifts of cash. These gifts must go to a Public Charity. Gifts to Donor Advised Funds (DAF) and Private Foundations do not qualify.
2. **Fund a CGA** – With the ability to deduct up to 100% of consider funding a charitable gift annuity (CGA) with cash. Of course, funding with appreciated stock remains advantageous because the donor avoids an immediate capital gains tax.
3. **Bunch Gifts** – When the standard deduction was double after 2017 it reduced the number of taxpayers who benefit from itemizing their deductions thereby reducing the number of people who benefit from the charitable contribution deduction. However, donors can still get a tax benefit from their charitable gifted if they bunching a number of years of giving into one year. Taxpayers can fund a DAF or use the 100% AGI rule to pay-off existing pledges
4. **Combine a Roth conversion with a Donation** – The conversion creates a large increase in taxable income but all future distribution are tax-free. Coupling the conversion with a large charitable gift, again utilizing the 100% AGI rule can help offset a significant tax due.

Year-End Planning (cont.)

5. **Gift Appreciated Assets Rather Than Cash**

- Donating appreciated assets creates two tax benefits
- The tax deduction is the same size as a gift of cash if the asset has been owned for a year or more
- And the taxpayer avoids paying capital gains tax on the appreciation

6. **Or Make a Charitable Swap: Gift Appreciated Investments Without Changing the Portfolio**

- Donate shares of stock (owned one year or more) and immediately purchase new shares in the same company
- The portfolio doesn't change, but the capital gain is removed
- Because this is gain property not loss property, the "wash sale" rule doesn't apply.

Year-End Planning (cont.)

7. Donors age 70½ + reduce income taxes by donating from their IRA

- Taxpayers age 70½ or older can make gifts directly from an IRA to a charity up to \$100,000 through a qualified charitable distribution (QCD)
- Since QCDs are donations of pre-tax dollars, the earned income is never taxed because it goes directly to the nonprofit.

8. IRA gifts @ age 59 1/2 – 70½

- IRA withdrawals during this age bracket create no penalties - But they are taxable
- If a taxpayer is already itemizing deductions this can help offset the tax impact from an IRA withdrawal

9. Move 401k/403b balances into an IRA rollover to prepare for future IRA gifts

- A qualified charitable distribution from an IRA or IRA rollover reduces the taxpayers RMD
- To do this from a 401(k) or 403(b), a taxpayer must first convert the account into an IRA rollover. But conversion requires first taking any RMD from the 401(k) or 403(b). You must pay taxes on that distribution.

Year-End Planning (cont.)

10. **Make Charity the Beneficiary of an IRA instead of a Beneficiary in a Will**

- One tax smart strategy is to leave part of an IRA, 401(k), or 403(b) account to charity instead
- Heirs pay income taxes on money they inherit from an IRA. Heirs (except spouses) now must take out all funds (and pay taxes) within 10 years of inheriting.
- But any part left to charity avoids these taxes

11. **Pass Assets to Heirs or Reduce Income Taxes through a Charitable Lead Trust**

- People with high net worth often seek to pass their assets to their heirs with little or no estate and gift tax exposure
- Individuals who receive large lump sum payments such as bonuses, contingency fees and commissions, stock options and contracts also seek ways to decrease or eliminate the tax consequences involved
- Transferring assets into a CLT allows the donor to make annual gifts to charity for the term of the trust and pass the remaining assets to heirs while offsetting or eliminating gift, estate and/or income taxes

Questions and Comments?

Contact the Presenter

Edward Jay Beckwith
Partner
BakerHostetler LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
ebeckwith@bakerlaw.com

BakerHostetler

Atlanta
Chicago
Cincinnati
Cleveland
Columbus
Costa Mesa
Dallas
Denver
Houston
Los Angeles
New York
Orlando
Philadelphia
San Francisco
Seattle
Washington, DC
Wilmington

bakerlaw.com