

## **unpause**

recent legislation, regulations, and  
litigation affecting charitable gift planning

---

prepared for the  
Planned Giving Roundtable of Southern Arizona  
07 April 2021

Russell A. Willis III, J.D., LL.M.  
<https://plannedgiftdesign.com>

## **and yet more agenda**

### **3. recent decisions and pending litigation, cont'd**

- *United States v. Zak, et al*, pending  
re "abusive" syndicated easement scheme
- *United States v. Meyer*,  
re LLC into DAF scheme
- *Freedom Path v. IRS*, pending  
re "eleven factors" per Rev. Rul. 2004-6
- cert. granted in *Americans for Prosperity*  
re state requirement to disclose  
substantial contributors

## **agenda**

### **1. recent and pending legislation**

- "unlimited" itemized deduction
- death of the "stretch" IRA, workarounds
- above the line deduction for nonitemizers
- expansion of QCDs to life income gifts?

### **2. formal and informal guidance from IRS**

- "no rule" positions on INGs, 4947(a)(2)
- SALT cap regs finalized, workarounds
- UBTI "silo" regs finalized
- PLRs re avoiding self-dealing, excess holdings

## **recent legislation**

### **a. the 60 pct. limitation**

- enacted as part of the 2017 tax bill,  
sunsets after 2025
- forces carryforward of deductions subject  
to lower limitations
- JCS-1-18 "bluebook" says this was inadvertent
- but no technical correction three years out

## **more agenda**

### **3. recent decisions and pending litigation**

- *Loube*, T.C.Memo. 2020-3  
re substantial compliance on 8283
- *Oakbrook*, 154 T.C. No 10 (05/12/20)  
re conservation easement "improvements" clause
- *Dickinson*, T.C.Memo. 2020-128  
re prearranged sale of contributed stock
- *Fairbairn v. Fidelity Charitable*, pending  
re disposition of contributed stock

## **recent legislation, cont'd**

### **b. the "unlimited" deduction**

- per sec. 2205 of Cares Act, extended through  
2021 per sec. 213 of pandemic relief attached  
to appropriations measure
- cash only to (b)(1)(A) charities,  
expressly excluding nonoperating private  
foundations, supporting orgs, DAFs
- "disregarded" in applying lower limitations
- carryforward subject to 50 pct. limitation
- election to "qualify"

recent legislation, cont'd

b. the "unlimited" deduction, cont'd

- partial election  
the last dollar is deducted at 10 pct.

scenario:

contribution 1000x  
AGI 600x  
limits: 60 pct. 360x, 50 pct. 300x, 30 pct. 180x  
assume up to 180x subject to 30 pct. limit

how much to elect to override 60 pct. limit?

proposed legislation

a. above the line deduction for nonitemizers

[cf. sec. 212 of pandemic relief bill,  
moved from sec. 62 to sec. 170, w/ penalty]

- HR 1704, Pappas (D-NH), Walorski\* (R-IN)  
(03/09/21)
- S 618, Lankford\* (R-OK), six cosponsors
- would allow nonitemizers to claim up to  
one-third of standard deduction
- through 2022 only [several previous iterations  
would have been permanent]

recent legislation, cont'd

c. the Secure Act

- death of the "stretch" IRA
  - testamentary CRT as possible workaround
    - minimum 10 pct. remainder
    - no encroachments
    - term of years
  - testamentary gift annuity [?]
    - cf. PLR 200230018
      - no realization event, but
      - no "investment" to recover

proposed legislation, cont'd

a. above the line, cont'd

- previous sessions
  - HR 651, Smith (R-NJ) (01/17/19)
    - would have moved charitable deduction  
above the line altogether, subject to  
170 percentage limitations
  - HR 1260, Davis (D-IL) (02/14/19)
    - also subject to "Pease" limitation

[these would require "circular" calculations]

recent legislation, cont'd

c. the Secure Act, cont'd

- required beginning date now age 72
- no age limit on deductible contributions to IRA
  - but dollar for dollar reduction in  
availability of QCDs

[note: per sec. 408(d)(8)(D), QCDs treated as  
made first from taxable amounts, versus default rule  
pro rata]

proposed legislation, cont'd

b. expanded charitable IRA "rollover"

- S 243, Cramer (R-ND), Stabenow\* (D-MI),  
Daines\* (R-MT), Rosen (D-NV), Cornyn\* (R-TX)  
(02/02/21)
- previous sessions back to 2009
- 100k limit outright age 70.5
- up to 400k combined life income age 65
- payout entirely ordinary income
- participant and/or spouse, not assignable

proposed legislation, cont'd

- c. syndicated conservation easements
- S 5019, Daines\* (R-MT), Stabenow\* (D-MI), Grassley\* (R-IA), Wyden\* (D-OR), other (12/15/21), nothing yet this session
  - disallow deduction passthrough from partnership in excess of 2.5x basis if w/in three years
  - cf. Notice 2017-10 overvaluation, partnership abuse, substance
  - Finance Committee report 08/25/20 ref. EcoVest (see pending litigation)

formal guidance, cont'd

- c. SALT cap workarounds regs, TD 9864 published 06/13/19, effective 08/12/19
- "applicability date" 08/27/18, date of publication of proposed regs
  - state credits treated as quid pro quo subject to 15 pct. threshold
  - disallowed portion may be treated as tax payment
  - cf. Notice 2020-75, treating SALT as operating expense of passthrough entity

formal guidance

- a. "no rule" position on INGs
- per Rev. Proc. 2020-3, category 3 on 671 issues only
  - per Rev. Proc. 2021-3, category 5 on 671, 678, 2041/2514, 2511 pending further study
  - New York tax code sec. 612(b)(41), treating INGs as "grantor" trusts
  - related effort pending in California
- cf. PLR 201908008, discussed below

formal guidance, cont'd

- d. "dark money" regs, TD 9898, published 05/28/20
- (c)(4)s need not report identities of "substantial contributors" on 990 sch. B
  - obsoleting Rev. Proc. 2018-38 to similar effect
  - note *Bullock v. IRS*, No. 18-cv-00103 (D.Mont. 07/30/19), declaring Rev. Proc. invalid
  - cf. *Americans for Prosperity*, below

formal guidance, cont'd

- b. also "no rule" position
- application of 4947(a)(2) if no deduction claimed
- PLR 201713002, 003, remainder trust
  - PLR 200714025, discretionary trust
  - per Rev. Proc. 2020-3, categories 3 and 4
  - per Rev. Proc. 2021-3, category 4 only
  - note nonqualified lead trust strategy
  - Rev. Rul. 77-275, reserved power to allocate renders gift incomplete

formal guidance, cont'd

- e. UBTI "silo" regs finalized effective 12/02/20
- applicable to tax years beginning on or after
  - permits aggregating income/expenses of any trade or business grouped under same two-digit NAICS number
    - Notice 201-67 would have used six-digit
  - rescinds AOD on *Rensselaer Polytechnic*, 732 F.2d 1058 (2d Cir. 1984), *aff'g* 79 T.C. 967 (1982), re fixed expenses

informal guidance

a. PLR 201908008

cf. "no rule" position on INGs, above

- reserved power to direct distributions from principal to charity

[typical model reserves power exercisable in nonfiduciary capacity to appoint among permitted distributees, subject to ascertainable standard]

- exercise completes gift, deductible per sec. 2522(a)
- deductible by trust per sec. 642(c)

informal guidance, cont'd

c. ILM 202053010 re "insurance" against disallowance of syndicated easement deduction

- "policy" issued by promoter itself
- not "ordinary and necessary," per sec. 162(a)
- per sec. 212,
  - not expense of producing income
  - not incurred "in connection w/ determination of tax," b/c cost of defense excluded

cf. discussion of *Oakbrook*, etc. below

informal guidance, cont'd

a. PLR 201908008, continued

- no mention of tracing requirement, per sec. 642(c)

cf. *Green*, No. 16-6371 (10th Cir. 01/12/18)

- misreading of sec. 674(b)(4)
  - power to allocate amounts irrevocably designated to charity

informal guidance, cont'd

d. AM 2020-006, "abusive" CRAT structure marketed strategy to "trap" gains in trust

- fund trust w/ appreciated property
- sell w/in exempt entity
- invest not quite 90 pct. of proceeds in single premium annuity contracts

[magic]

- portion of payout excludible per sec. 72
- ignoring sec. 664(b) four tier system

informal guidance, cont'd

b. PLR 201907004

- sale of closely held business interest to IDGT
- promissory notes assigned to LLC
- nonvoting interests contributed to CLAT
- not indirect self-dealing b/c CRAT holds only nonvoting interest and cannot compel dissolution

cf. PLRs 201723005, 006, transfer at death to private foundation

also PLR 202037009, executor placing notes into LLC

informal guidance, cont'd

d. AM 2020-006, cont'd

other disqualifying features

- payout "greater of" stated annuity or actual payout on contract, but not more than 49 pct. of contribution
- cash out remainder charity at just over 10 pct.

note: this would be "reportable transaction" per Notice 2000-15, para. 6, reg. sec. 1.643(a)-8(b)

recent decisions

- a. *Loube*, T.C.Memo. 2020-3 (01/08/20)
- contribution of residential improvements to deconstruction/salvage charity
  - appraisal for replacement cost, adjusted for depreciation
    - rather than salvaged items as such
  - 8283 omits adjusted basis, date acquired
  - no substantial compliance
    - cite to *RERI Holdings*, 149 T.C. No. 1 (2017) and *Belair Woods*, T.C.Memo. 2018-159

recent decisions, cont'd

- c. *Dickinson*, T.C.Memo. 2020-128 (09/03/20)
- re prearrangement
- restricted stock in closely held corp, subject to call by board
  - transfer to Fidelity DAF
  - board waives restriction, citing anticipated tender by Fidelity
  - IRS argues second prong of Rev. Rul. 78-197
  - court rejects
- cf. *Palmer*, 62 T.C. 684 (1974), *aff'd on other grounds*, 523 F.2d 1308 (8th Cir. 1975)

recent decisions, cont'd

- b. *Oakbrook*, 154 T.C. No. 10 (05/12/20)  
cross appeals to 6th Cir., nos. 20-2117 and 2141
- re conservation easement "improvements" clause
- opinion per Lauber, eleven judges concurring
  - Gustafson withholds concurrence from part D.3
  - Toro concurs in result only w/ separate opinion
  - Holmes dissents, cf. T.C.Memo. 2020-54
  - reg. sec. 1.170A-14(g)(6)(ii) requires "proportionate" value on extinguishment
  - IRS reads this to preclude reduction for "improvements"

recent decisions, cont'd

- d. *Warne*, T.C.Memo. 2021-17 (02/18/21)
- fractional interests in LLC
    - 25 pct. to church,
    - 75 pct. to private foundation
  - estate tax inclusion at full value, but discounts apply to charitable deduction
  - conditional stipulation 27.385 pct. for minority interest, 4.0 pct. for controlling
  - citing *Ahmanson*, 674 F.2d 761 (9th Cir. 1981)

recent decisions, cont'd

- b. *Oakbrook*, cont'd
- Toro concurrence, joined by Urda
    - statute alone sufficient to deny deduction, as share of easement holder is frozen
    - reg. could be read to allow compensation to holder of servient estate for improvements
    - Treasury did not adequately address comments of New York Landmarks Conservancy in finalizing reg. [\*]
  - Gustafson agrees w/ first two points
  - Jones agrees w/ first point
    - [\*] Holmes dissent to similar effect

recent decisions, cont'd

- e. *Fairbairn v. Fidelity Charitable*, 18-cv-04881 (N.D.Cal. 02/26/21)
- large block of publicly traded stock to DAF
  - price spike immediately preceding contribution
  - Fidelity sold entire block w/in hours, as price fell sharply [causation?]
  - alleged promises re how Fidelity would sell,
  - negligence resulting in losses to
    - value of tax deduction,
    - amounts subject to advisory privilege

recent decisions, cont'd

e. *Fairbairn*, cont'd

- motion to dismiss for lack of standing to assert claim on behalf of DAF itself
- denied, court finds "special relationship"
- summary judgment motion arguing estoppel by inconsistency w/ tax reporting position
- denied, court notes return is still open
- re "unclean hands," court says no evidence Fidelity was harmed by undisclosed info

pending litigation

- a. *United States v. Zak, et al*, (EcoVest) no. 18-cv-05774 (N.D.Ga.) re "abusive" syndicated easement scheme
- b. *Peskin v. Peachtree*, 21-cv-00002 (N.D.Ga.) class action against promoters of syndicated easement scheme
- c. *Agee*, nos. 20-cr-128 and 129 (W.D.N.C.)
  - conspiracy to defraud IRS through syndicated easement scheme

recent decisions, cont'd

e. *Fairbairn*, cont'd

- bench trial over seven days in October
- submitted December 04
- opinion issued February 26
  - some alleged promises not broken, others not proven
  - standard of care re negligence claim
    - advisor acting for client account vs. DAF acting on its own account

pending litigation

- d. *Freedom Path v. IRS*, no. 20-cv-01349 (D.D.C.) re "eleven factors" per Rev. Rul. 2004-6
- e. cert. granted in *Americans for Prosperity*, No. 19-251 also *Thomas More Law Center*, No. 19-255
  - re state requirement to disclose identities of substantial contributors to state attorney general
  - set for argument 04/26
- cf. *Citizens United v. Schneiderman*, 882 F.3d 374 (2d Cir. 02/15/18), no petition

recent decisions, cont'd

f. *Meyer*, no. 18-cv-60704 (S.D.Fla. 04/26/19)

- re LLC into DAF scheme
- consent judgment
- dft. permanently enjoined from tax work
- ref. Notice 2004-30
  - nonvoting stock in S corp. 90 pct.
  - contributed to exempt org, but
  - no actual distributions
  - warrants to dilute equity

Russell A. Willis III, J.D., LL.M.

<https://www.plannedgiftdesign.com>

314.566.3386

[rawillis3@plannedgiftdesign.com](mailto:rawillis3@plannedgiftdesign.com)

<https://www.linkedin.com/in/russ-willis-plannedgiftdesign/>  
<https://twitter.com/rawillis3>