

Giving Securities for Advisors

Amount of Donor's Charitable Contribution

Securities held long-term: In general, if an individual donates securities held long-term to a "public" charity, such as a church, educational institution, health care organization, or other cause, the amount he or she can claim as a charitable gift for federal income tax purposes is the securities' fair market value on the date of the gift. See Internal Revenue Code section 170(b)(1)(A).

"Long-term" means at least 12 months and one day. See IRC section 1222(3). The holding period to qualify as long-term property for deduction of appreciated property gifts at full market value remains 12 months and a day.

Securities held short-term: The amount that can be claimed as a charitable gift in the case of donated securities held short-term, on the other hand, is the donor's cost basis in the securities if the cost basis is less than the securities' fair market value. See IRC section 170(e)(1)(A).

Securities that have declined in value: Shares that have gone down in value since being purchased generally should not be donated, because a gift of such an investment does not cause the potential capital loss to be realized for federal income tax purposes. Instead, the donor should sell the shares to realize the loss and then give the cash from the sale.

Fair market value: For purposes of determining the amount of the donor's charitable gift, the fair market value of publicly traded securities is generally the average of its high and low trading prices on the date of the gift. See Regulation section 25.2512-2(b)(1).

Private foundations: Special rules may apply to gifts of appreciated property to private foundations. See IRC section 170(e).

Donors should be well advised regarding current rules before completing such gifts.

The Donor's Income Tax Charitable Deduction

The federal income tax charitable deduction is subject to various percentage limitations.

The overall ceiling on the deduction is 50% of adjusted gross income (AGI). Gifts of cash and short-term capital gain property to "public" charities are deductible up to this 50% limit. See IRC section 170(b)(1)(A).

Gifts to "public" charities of appreciated stock held long-term (together with certain other types of other long-term appreciated property contributions) are generally deductible up to 30% of AGI. See IRC section 170(b)(1)(C).

"Excess" contributions may be carried forward for up to five subsequent tax years. See IRC section 170(d)(1).

The interplay of the 50% and 30% limits and the carry-over rules sets out a hierarchy that governs the order in which various types of gifts (to public charities) are to be deducted as follows:

1. Current gifts subject to the 50% limit
2. Current gifts subject to the 30% limit
3. Carried-over gifts subject to the 50% limit
4. Carried-over gifts subject to the 30% limit. See IRC section 170(b)(1)(B).
5. A special election

A contributor of appreciated stock or other appreciated assets subject to the 30% limitation may find the 30% limit too tight a restriction and wish that the higher 50% limitation be applied to his or her gift.

For example, the donated asset may be only slightly appreciated. Or the donation may be quite large relative to the donor's income, with the result that a large portion of the gift will have to be carried over into years when the donor will not be able to make such good use of deductions.

Donors in these circumstances may wish to avail themselves of a special election under IRC section 170(b)(1)(C)(iii). The election permits the donor to deduct all "30%" gifts at cost basis but to take the reduced gifts as a charitable deduction subject to the 50% limitation.

The election can be useful in some situations but needs to be considered carefully. The election applies to all gifts otherwise subject to the 30% limit (including carried-over contributions).

Substantiating Gift Value

Ordinarily, no “qualified appraisal” (as that term is defined in Reg. section 1.170A-13(c)) is needed to sustain a claim of an income tax charitable deduction with respect to a gift of publicly traded securities.

If, however, shares of stock are subject to a sale restriction—such as a restriction under Securities and Exchange Commission (SEC) Rule 144—then even though the stock itself is publicly traded, the shares are not considered to be publicly traded. They therefore fall within the requirement for a “qualified appraisal” if the donor claims a value of more than \$5,000 for the shares. See Reg. section 1.170A-13(c)(7)(xi)(C).

Substantiation rules: It is important for donors to keep any written acknowledgments they receive from charities for charitable gifts. Since 1994, donors have been required to have special receipts from charities to which they have made gifts valued at \$250 or more. Receipts must specify the value of any benefits received in exchange for gifts or state that no benefits were received.

Gifts of Stock Subject to SEC Rule 144

A full discussion of the effect of Rule 144 on donations of stock is beyond the scope of this publication, but it is important to note that although Rule 144 limits how much stock can be sold, it does not limit how much stock can be donated. See *Bullion Lode Mining Co.*, 1972-3 CCH Dec. para. 78,869 (SEC 1972).

Rule 144, however, may limit sales of donated stock by the donee organization.

“S” Corporation Stock

A provision in the “Small Business Job Protection Act of 1996” allows charities to be shareholders of “S” corporation stock beginning in 1998. Note, however, that any income or gain realized by the donee organization with respect to “S” stock is unrelated business income.

Gifts of U.S. Savings Bonds

Series E, H, EE, and HH bonds accrue interest income over the period they are held. Generally, the donor is allowed to deduct the full value in the year the proceeds are given; however, he or she must also report the increase in value over the basis as income for that year. Therefore, it may be more advantageous to fund the gift with other stocks or bonds that have been held long-term.

Funding Alternative Charitable Gifts with Securities

It can be advantageous to use appreciated securities to fund qualified charitable remainder trusts and certain other gift planning arrangements that feature income for life or another period of time. The deduction in such cases is generally based on the full value of the securities transferred, and gain on the sale of the assets has historically been avoided at the time of the sale. See IRC section 664, regulations promulgated thereunder, and other relevant code sections and regulations for additional information.

Through the use of such plans, it can be possible to report all or a portion of the income received at capital gains tax rates as low as 5%, depending on the amount of the recipient’s income, the type of property transferred, holding periods, and other factors.

Gifts of Closely Held Stock

In some situations, a person may wish to make a gift of stock in a closely held corporation. A donor who owns highly appreciated stock in a company that has significant cash reserves may be in the best position to make a sizable gift. Sometimes referred to as a “charitable stock bailout,” such a gift is often followed by a redemption of the stock by the corporation.

If the donor owns all stock in the company, the donor’s ownership percentage is not lessened by the gift, but cash to make the gift has effectively been provided by the corporation.

In a case where a donor wishes to pass control to another group of people, this gift will serve to lessen the

donor's percentage of ownership and increase the relative percentage of ownership by others, without incurring a gift tax or estate tax. The IRS has also ruled, however, that neither the donor nor the corporation may be in a position to compel redemption of the stock (for example, under an agreement entered into before the gift is made). See Revenue Ruling 78-197.

The donor will receive a deduction for the full value of the stock. The deduction for the gift is limited to 30% of the donor's adjusted gross income. See IRC section 170(b)(1)(C).

A "qualified appraisal" is required if the claimed value exceeds \$10,000. See Reg. section 1.170A-13(c)(2)(ii).

When is the Gift Complete for Tax Purposes?

The date a gift is complete for tax purposes possibly determines not only the amount of the donor's charitable contribution but also the year in which the gift is deemed made.

If the donor personally delivers a stock certificate with all necessary endorsements to the charitable recipient, the gift is complete for federal income tax purposes on the day of delivery. See Reg. section 1.170A-1(b).

Ordinarily, if the stock certificate is mailed to the charitable donee, the best practice is to send the unendorsed certificate in one envelope and to send a stock power, signed in black, in a separate envelope. The gift is complete in this case on the date of post-mark of the later envelope.

On the other hand, if the donor instructs his or her own agent to have the stock transferred on the books of the issuing corporation to the ownership of the donee organization, the gift is not complete until the transfer takes place—which may be some time. See Reg. section 1.170A-1(b). Therefore, this is generally not a good way to make a donation of stock.

If the stock or mutual fund is held for the owner's account by a financial services provider (or "street name"), special care needs to be taken in making the gift. The Tax Court has held that the gift is not complete in this instance until the stock is transferred to the charitable donee's account. See *Estate of Currey*, 41 TCM 800 (1981).

The mere giving of instructions by the donor to a financial services provider to transfer the stock to the account of the charitable recipient is not sufficient to complete the gift. In this event, a decline in the value of the security prior to the actual transfer of the security will reduce the amount of the donor's charitable deduction by the amount of any such decline.

Note that it is unclear when the gift is complete in the case of stock wired DTC to charity. The gift may be complete when the stock is wired out of the donor's account. Or the gift may not be complete until the stock reaches the donee organization's account. There is no case, ruling, or regulation on point.

Potential Capital Gains Tax Problems

In general, if an individual gives appreciated stock outright to a charitable organization or institution, he or she does not realize the appreciation as a capital gain.

In certain situations, however, the donor may have to report a gain. One of these situations arises when the donor calls his or her broker and instructs the broker to transfer stock held in "street name" to a charitable organization. The broker, prior to transferring the stock to the charity's account, sells the stock and remits the proceeds to the charity.

In this situation, because the sale occurs while the donor is still considered the owner of the stock for tax purposes, the capital gain realized on the sale is attributed to the donor.

Care needs to be taken in dealing with stock held in "street name," therefore, to ensure that if the stock is sold, it is sold out of the donee organization's account upon the instructions of the donee organization.

Other Information Available

See www.irs.gov for a variety of publications and forms, including: charitable contributions (Pub. 526); non-cash contributions (Form 8283 and instructions); and determining the value of donated property (Pub. 561).

For further reading, see also from the Planned Giving Design Center:

Technical Reports:

- Intangible Personal Property

Case Studies:

- The Simplest Planned Gift: Funding Outright Gifts with Appreciated Securities

Articles:

- Surprising News About Stocks and Other Non-Cash Gifts
- Issues to Consider When Making and Accepting Gifts of Restricted Stock

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