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STATE AND FEDERAL CHARITABLE GIVING RULES FOR NON-CASH CHARITABLE CONTRIBUTIONS

LOW COUNTRY OPEN LAND TRUST

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STATE AND FEDERAL TAX LAW FOR NON-CASH CHARITABLE CONTRIBUTIONS IN EXCESS OF $5,000

BACKGROUND

In the 1990s and early 2000s donors gave thousands of conversation easements to national and local land trusts. These land trusts were experts in state and federal conservation easement law – they had read all of Stephen Small's books – but some were not expert in the general rules of charitable giving.

BACKGROUND

In addition it has never been clear who has the responsibility for ensuring the technical aspects of federal law are complied with:

- The land trust who accepted the easement;
- The lawyer who represented the conservation easement donor; or
- The accountant who prepared the donor's federal income tax return?

EXAMPLE ONE

Donor is a real estate developer who gives conservation easement on a small tract of a large residential development in order to buy off the neighbors, DHEC and CCL and takes huge charitable deduction.

This *quid pro quo* -

- Is none of the land trust's business;
- Is none of the lawyer's business who prepared the easement – she did exactly what the client asked and has nothing to do with the income tax returns;
- The CPA who prepared income tax returns was not aware of the quid pro quo

EXAMPLE TWO

No one cares about the greedy real estate developer, but what about the donor who gives a conservation easement and the land trust fails to give the required substantiation form.

- Lawyer's responsibility to check that the form was given?
- Accountant's responsibility?

To make it worse the charitable giving laws were, and are, straightforward:

- Substantiation;
- Execution of IRC Form 8283; and
- Appraisal

APPRAISAL REQUIREMENT

Deductions of More than $5,000

Generally, if the claimed deduction for an item or group of similar items of donated property is more than $5,000, you must get a qualified appraisal made by a qualified appraiser, and you must attached Section B of Form 8283 to your tax return. The donor retains the copy of the appraisal for donations of less than $500,000.

APPRAISAL REQUIREMENT

Deductions of More than $500,000

If you claim a deduction of more than $500,000 for a donation of property, you must attach a qualified appraisal of the property to your return.

APPRAISAL REQUIREMENT

Qualified Appraisal

A qualified appraisal is an appraisal document that:

- Is made, signed, and dated by a qualified appraiser in accordance with generally accepted appraisal standards.
- Meets the relevant requirements of Regulations section 1.170A-13(c)(3) and Notice 2006-96.
- Relates to an appraisal made not earlier than 60 days before the date of the contribution of the appraised property.
- Does not involve a prohibited appraisal fee, and
- Includes certain information

APPRAISAL REQUIREMENT

Qualified Appraisal

You must receive the qualified appraisal before the due date, including extensions, of the return on which a charitable contribution deduction is first claimed for the donated property.

APPRAISAL REQUIREMENT

Qualified Appraiser

A qualified appraiser is an individual who:

- has earned an appraisal designation from a recognized professional appraiser organization or has otherwise satisfied minimum education and experience requirements set forth in regulations prescribed by the Secretary;
- Regularly performs appraisals for which the individual receives compensation; and
- Satisfies such other requirements as may be prescribed by the Secretary in regulations or other guidance.

For real property appraisals, the appraiser must be licensed or certified for the type of property being appraised in the state in which the real property is located.

IRS FORM 8283

Form 8283

Generally, if the claimed deduction for an item of donated property is more than $5,000, you must attach Form 8283 to your tax return and complete Section B.

If you do not attach Form 8283 to your return and complete Section B, the deduction will not be allowed unless your failure was due to reasonable cause, and not willful neglect, or was due to a good faith omission. If the IRS requests that you submit the form because you did not attach it to your return, you must comply within 90 days of the request or the deduction will be disallowed.

IRS FORM 8283

For items with a claimed deduction of more than more than $5,000, the following information is required:

- Description of donated property;
- If tangible property was donated, a brief summary of the overall physical condition of the property at the time of the gift;
- Appraised fair market value of the property;
- Date property acquired by donor;
- How property was acquired by donor;
- Donor's cost or adjusted basis;
- For bargain sales, the amount received in the sale part of the transaction; and
- If an appraisal was not required, the amount claimed as a deduction.

IRS FORM 8283

Both the donor (taxpayer), appraiser, and donee (land trust) must sign the Form 8283

THE SUBSTANTIATION REQUIREMENT

SUBSTANTIATION

The Substantiation Rules provide a method for the IRS to discover—and value—*Quid Pro Quo*.

CONTEMPORANEOUS WRITTEN ACKNOWLEDGMENT

A charitable contributions deduction is not allowed for any contribution of $250 or more unless the donor substantiates the contribution with a contemporaneous written acknowledgment by the donee organization.

CONTEMPORANEOUS WRITTEN ACKNOWLEDGMENT

A required written disclosure statement must:

- inform a donor that the amount of the contribution that is deductible for federal income tax purposes is limited to the excess of money (and the fair market value of property other than money) contributed by the donor over the value of goods or services provided by the organization
- provide a donor with a good-faith estimate of the fair market value of the goods or services

CONTEMPORANEOUS WRITTEN ACKNOWLEDGMENT

"An organization must furnish a disclosure statement in connection with either the solicitation or the receipt of the quid pro quo contribution. The statement must be in writing and must be made in a manner that is likely to come to the attention of the donor. For example, a disclosure in small print within a larger document might not meet this requirement."

CONTEMPORANEOUS WRITTEN ACKNOWLEDGMENT

The acknowledgement must include the following information:

- The amount of cash contributed and a description (but not necessarily the value) of any property other than cash contributed;
- whether the donee organization provided any goods or services in consideration, in whole or in part, for any cash or other property contributed;

CONTEMPORANEOUS WRITTEN ACKNOWLEDGMENT

- if the donee organization provides any goods or services other than intangible religious benefits, a description and good-faith estimate of the value of the goods or services; and
- if the donee organization provides any intangible religious benefits, a statement to that effect.

ELEMENTS OF A CONTEMPORANEOUS WRITTEN ACKNOWLEDGMENT

Regs. § 170A-13(f) does not require any particular format for a contemporaneous written acknowledgment. According to the legislative history, the acknowledgment may be made by letter, postcard, or computer-generated forms. An acknowledgment can be provided in paper form or electronically, including an e-mail addressed to the donor.

ELEMENTS OF A CONTEMPORANEOUS WRITTEN ACKNOWLEDGMENT

EXAMPLES

IRS Pub. 1771, *Charitable Contributions: Substantiation and Disclosure Requirements*, provides the following examples of contemporaneous written acknowledgments that satisfy the requirements of § 170(f)(8):

- Thank you for your cash contribution of $300 that (organization's name) received on December 12, 2007. No goods or services were provided in exchange for your contribution.

ELEMENTS OF A CONTEMPORANEOUS WRITTEN ACKNOWLEDGMENT

- Thank you for your cash contribution of $350 that (organization's name) received on May 6, 2007. In exchange for your contribution, we gave you a cookbook with an estimated fair market value of $60.

ELEMENTS OF A CONTEMPORANEOUS WRITTEN ACKNOWLEDGMENT

Exception

"A written disclosure statement is not required:

- where the goods or services given to a donor meet the 'token exception,' the 'membership benefits exception,' or the 'intangible religious benefits exception'
- where there is no donative element involved in a particular transaction, such as in a typical museum gift shop sale"

ELEMENTS OF A CONTEMPORANEOUS WRITTEN ACKNOWLEDGMENT

Penalty

A penalty is imposed on charities that do not meet the written disclosure requirement. The penalty is $10 per contribution, not to exceed $5,000 per fundraising event or mailing. An organization may avoid the penalty if it can show that failure to meet the requirements was due to reasonable cause.

SUBSTANTIATION

The donee may lose the charitable deduction if the written acknowledgement is not given.

There have been a very large number of cases in the past five years on this issue. For example, many land Trusts were experts on the tax issues involving conservation easements—but not on the law of charitable giving—and they failed to provide the proper written acknowledgment.

SUBSTANTIATION REQUIREMENT CASE EXAMPLES

SCHRIMSHER V. C.I.R.
T.C. MEMO. 2011-71 (2011)

- On December 30, 2004, Schrimsher executed an agreement granting a architectural façade conservation easement on their property known as the “Times Building” in Huntsville, AL, to the Alabama Historical Commission.
- Schrimsher deducted $193,180 in charitable contributions in 2004, and claimed carryover deductions of $206,699 and $120,724 in the following years.
- IRS disallowed these deductions, claiming Schrimsher failed to meet the substantiation requirements of section 170.

SCHRIMSHER V. C.I.R.
T.C. MEMO. 2011-71 (2011)

- Schrimsher argued that the agreement document that granted the easements constituted a contemporaneous written acknowledgement within the meaning of section 170(f)(8).
- The IRS did not dispute that the agreement was "contemporaneous" and an "acknowledgement," but that "it does not state whether the commission provided any goods or services in consideration."
- The court pointed out that even if consideration was never actually provided, the written acknowledgement must still say so in order to satisfy the section 170(f)(8)(B)(ii) requirement.

SCHRIMSHER V. C.I.R.
T.C. MEMO. 2011-71 (2011)

- The only statement in the agreement that dealt with consideration stated: “for and in consideration of [$10], plus other good and valuable consideration.”
- The court observed: “if the statement be construed literally to mean that the commission provided the stated consideration, then the agreement fails the requirement of section 170(f)(8)(b(iii) since it does not include a description and good faith estimate of the ‘other good and valuable consideration.’”
- Consequently, the court upheld the disallowance due to the failure to obtain a contemporaneous written acknowledgment of the façade easement.

AVERYT V. C.I.R.
T.C. MEMO. 2012-198 (2012)

- On December 29, 2004, Cook's Mountain Timber, LLC, (CMT) conveyed a conservation easement to Wetlands America Trust, Inc. (WAT) on 1092 acres in Richland County, SC.
- The conservation deed included a detailed description of the conservation easement's restrictions and rights, as well as a description of the property.
- CMT reported charitable contributions of $5,496,000, the appraised value of the conservation easement, and petitioner members claimed pro rata shares of the deduction on their individual returns.

AVERYT V. C.I.R.
T.C. MEMO. 2012-198 (2012)

- CMT argued that the contemporaneous written acknowledgement requirements of section 170(f)(8) were fulfilled by the conservation deed.
- In response, the IRS tried to analogize the instant case to *Schrimsher*, discussed *supra*.
- The court disagreed with the IRS, because while the conservation deed described the property's conservation value, it did not include consideration of any value besides the preservation of the land.
- Accordingly, the court held that the petitioners had satisfied the requirements of section 170(f)(8).

IRBY V. C.I.R.
139 T.C. NO. 14 (2012)

- In fulfillment of an option agreement, the petitioners conveyed conservation easements on two parcels of the Irby Ranch to Colorado Open Lands (COL) for $268,224 in 2003 and $537,468 in 2004.
- Based on an August, 2003, appraisal of the Ranch amended in December, 2003, and May, 2004, only to validate the original values, the petitioners claimed charitable contribution deductions of $89,408 in 2003 and $165,576 in 2004.
- The IRS disallowed petitioners deductions in part because of the lack of a qualified appraisal and a contemporaneous written acknowledgement.

IRBY V. C.I.R.
139 T.C. NO. 14 (2012)

- The court held that the petitioner provided several documents that taken in totality fulfilled the reporting requirements, including: the option agreements to purchase the easements, Forms 8283 attached to the petitioner's income tax returns, letters from COL, and the deeds for the easements.
- The IRS asserted these still failed, because nothing stated that the donee did not provide services.
- However, the court observes that such statement is only required if "*no good or services*" were provided, and since this was a bargain sale, goods (cash) were provided, which the documents disclosed.

QUID PRO QUO

FEDERAL CHARITABLE CONTRIBUTION RULES

The burden is on a taxpayer claiming a charitable contributions deduction to show that all or part of a payment constitutes a contribution or gift.

A charitable contribution must be made voluntarily and not under compulsion.

FEDERAL *QUID PRO QUO* RULE

A transfer to a permissible donee is deductible as a charitable contribution under IRC § 170 if:

- the taxpayer transfers to charity money or property that exceeds the value of any return benefit to the taxpayer; and

FEDERAL *QUID PRO QUO* RULE

- the taxpayer intends to make a gift of the excess.

The two-part test is known by various names, including the *quid pro quo* rule.

FEDERAL *QUID PRO QUO* RULE

"A donor may only take a contribution deduction to the extent that his/her contribution exceeds the fair market value of the goods or services the donor receives in return for the contribution; therefore, donors need to know the value of the goods or services. An organization must provide a written disclosure statement to a donor who makes a payment exceeding $75 partly as a contribution and partly for goods and services provided by the organization. A contribution made by a donor in exchange for goods or services is known as a *quid pro quo* contribution."

FEDERAL *QUID PRO QUO* RULE

"Example of a *quid pro quo* contribution: A donor gives a charitable organization $100 in exchange for a concert ticket with a fair market value of $40. In this example, the donor's tax deduction may not exceed $60. Because the donor's payment (*quid pro quo* contribution) exceeds $75, the charitable organization must furnish a disclosure statement to the donor, even though the deductible amount does not exceed $75."

NATURE OF A *QUID PRO QUO*

A *quid pro quo* is easiest to identify when a taxpayer receives money, property, services, or privileges in return for a transfer to an eligible donee.

Examples include:

- a cash payment;
- religious instruction;
- secondary school education.

FEDERAL *QUID PRO QUO* RULES

"Petitioner granted an [conservation] easement to Howard County in exchange for the county's granting them permission to sell their development rights. . . . Petitioners would not have conveyed the easement unless they received permission to sell their development rights; and they could not sell their development rights unless they executed the deed of easement. Petitioner's transaction thus bears the classic features of a *quid pro quo* exchange. . . ."

Costello v. Commissioner, TC Memo 2015-87

FEDERAL *QUID PRO QUO* RULES
FUTURE BENEFITS

Expectation of Future Benefits

An expectation of receiving a benefit in the future can constitute a *quid pro quo* under § 170.

E.g., Rev. Rule. 58-264, 1958-1 C.B. 144 payments by clergymen required to be made to pension fund for the benefit of them, their widows, and dependent children were nondeductible personal expenses and not deductible charitable contributions; the right to benefits from the fund constituted adequate compensation for the payments.

STATE *QUID PRO QUO* RULES

Section 12-6-1130 provides:

(12) The deduction for charitable contributions allowed by Section 170 of the Internal Revenue Code is determined in the same manner as provided in Section 170 of the code except that no deduction is allowed unless, in addition to the requirements of Section 170 of the Internal Revenue Code, the contribution also meets the requirements of Section 12-6-5590.

STATE *QUID PRO QUO* RULES

Section 12-6-5590 provides:

(A) No credit under Section 12-6-3515 or deduction under Section 170 of the Internal Revenue Code and Section 12-6-1130(12) shall be allowed for a contribution unless the donor has the donative intent required by Section 170 of the Internal Revenue Code and the regulations and cases interpreting Section 170 of the Internal Revenue Code.

STATE *QUID PRO QUO* RULES

Section 12-6-5590 continued:

(B) In addition to the donative intent required by Section 170 of the Internal Revenue Code, no credit under Section 12-6-3515 or deduction under Section 170 of the Internal Revenue Code and Section 12-6-1130(12) shall be allowed for any noncash charitable contribution in the claimed amount of $100,000.00 or more unless the donor has the requisite donative intent required by this section.

STATE *QUID PRO QUO* RULES

Section 12-6-5590 continued:

(C) The requisite donative intent includes the requirement that the donor be motivated by detached and disinterested generosity benefiting a charitable purpose rather than expected economic benefit.

STATE *QUID PRO QUO* RULES

Section 12-6-5590 continued:

(D) A noncash charitable contribution by a donor given to comply with any state or federal environmental or other regulatory requirement; for the purpose of obtaining road, water, or sewer services; or in conjunction with obtaining a grant, subdivision, building, zoning, environmental, mitigation, or similar permit or approval from any government, shall be deemed not to have the requisite donative intent absent extraordinary circumstances.

STATE *QUID PRO QUO* RULES

Section 12-6-5590 continued:

(E) The department shall examine the substance, rather than merely the form, of the contribution and related and surrounding transactions, and may use the step transaction, economic reality, quid pro quo, personal benefit, and other judicially developed doctrines in determining whether the requisite donative intent is present.

TAX SAVINGS FROM CHARITABLE CONTRIBUTIONS DEDUCTION ARE NOT *QUID PRO QUO*

When a donor makes a charitable contribution, the donor is entitled to an income tax deduction under § 170 in the year of the contribution. The deduction reduces the donor's taxable income, which in turn reduces the donor's income tax liability.

TAX SAVINGS FROM CHARITABLE CONTRIBUTIONS DEDUCTION ARE NOT *QUID PRO QUO*

The reduction in federal and state income taxes in return for a charitable contribution is a financial benefit received by a donor in return for a contribution to charity. The financial benefit is equal to the amount of the tax savings. Notwithstanding the financial benefit, the reduction in a donor's income taxes attributable to a charitable contributions deduction are not considered a *quid pro quo* received by the donor in exchange for the contribution.

TAX SAVINGS FROM CHARITABLE CONTRIBUTIONS DEDUCTIONS ARE NOT A *QUID PRO QUO*

In CCA 200238041, which discussed the treatment of a state tax credit as a *quid pro quo*, the IRS stated that the tax benefit of a federal or state charitable contributions deduction is not viewed as a return benefit that eliminates or reduces a deduction under § 170 or that vitiates charitable intent.

QUID PRO QUO
CASE EXAMPLES

SEVENTEEN SEVENTY SHERMAN STREET, LLC V. C.I.R. T.C. MEMO. 2014-124 (2014)

- Seventeen Seventy (LLC) owned El Jebel Shrine in Denver, Colorado, which the LLC wanted to develop into residential condominiums.
- As a registered landmark, any changes to the shrine's exterior had to be approved by the city of Denver, but nothing prevented developing condominium units within the shrine.
- However, zoning restrictions did designate its primary use as a cultural center, theater and event rental, and limited the residential development of the parking lot.

SEVENTEEN SEVENTY SHERMAN STREET, LLC V. C.I.R. T.C. MEMO. 2014-124 (2014)

- The LLC developed plans that preserved both the shrine's interior and exterior, and hoped to use the preservations as leverage to convince the city to alter zoning restrictions and allow the LLC to change the shrine's primary use, as well as develop a multi-story parking lot.
- Negotiations with the Community Planning and Development Agency (CPDA) led to an agreement wherein the LLC agreed to transfer interior and exterior conservation easements on the shrine to the designated charity, Historic Denver, Inc., so long as the city approved the restriction changes.

SEVENTEEN SEVENTY SHERMAN STREET, LLC V. C.I.R. T.C. MEMO. 2014-124 (2014)

- The court held that the easement grants were a quid pro quo exchange wherein the LLC received consideration of the CDPA's recommendation to the city's Planning Board to approve zoning changes.
- Further, the court concluded that because CPDA's recommendations increased the likelihood of the Board's approval, which the LLC knew, the recommendation had substantial value to the LLC.
- Ultimately, the charitable contribution deduction was disallowed because of the LLC's failure to value all of the consideration received in the exchange, including the approval recommendation.

COSTELLO V. C.I.R.
T.C. MEMO. 2015-87 (2015)

- As part of a "density exchange" under Howard County's Agricultural Land Preservation Program (ALPP), the petitioners entered into a contract to sell several of their Rose Hill Farm development rights to a developer in October, 2005.
- A land preservation easement was placed on the farm and conveyed to the county as a condition of the petitioners being permitted to sell these rights.
- Under the ALPP, the transfer could not occur until the county approved the density sending and receiving plats, an easement was placed on the land, and all documents were recorded.

COSTELLO V. C.I.R.
T.C. MEMO. 2015-87 (2015)

- The court upheld the disallowance of the petitioners' charitable contribution deduction because they had failed to supply a "qualified appraisal" and a valid appraisal summary.
- However, the court observed that regardless whether or not the petitioners had complied with those requirements, the disallowance would still have been upheld because the easement was conveyed to Howard County as part of a classic quid pro quo exchange wherein the petitioners could not receive a specific benefit unless they made the required "contribution."

COSTELLO V. C.I.R.
T.C. MEMO. 2015-87 (2015)

- The petitioners would not have conveyed the easement to the county unless they were allowed to sell their development rights to the third party developer (petitioners had previously rejected the county's offer to buy the rights themselves).
- Legally, the petitioners could not sell their rights to the developer without executing a deed of easement.
- Accordingly, the transaction was structured as a quid pro quo exchange, and consequently, the petitioners lack donative intent.

NON-CASH CHARITABLE GIVING CHECKLIST

Non-cash charitable contribution of property over $5,000 and less than $500,000

- Substantiation
- Appraisal
- File with the IRS:
  - 1040 Sch. A.; and
  - 8283 Part B

Property over $500,000

- Substantiation
- Appraisal
- File with the IRS
  - 1040 Sc. A.
  - 8283 Part B; and
  - Appraisal must be attached

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