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As year-end approaches, many clients may be thinking about charitable giving and supporting their preferred causes. This newsletter addresses various aspects of charitable and public sector giving and offers important information for taxpayers and their advisors.

## CHARITABLE GIVING FACTS

- Charitable giving in the U.S. totaled \$499.33 billion in 2022.
- In actual dollars, total charitable giving declined 3.4% in 2022.
- However, the inflation adjusted value of total charitable giving 2021 was \$516.65 billion, and based on that inflation adjusted figure, total giving declined 10.5% in 2022.
- Using actual dollars, total charitable giving fell only three other times in the last 40 years: in 1987, 2008, and 2009.
- Giving by individuals in 2022 totaled an estimated \$319.04 billion, declining 6.4% from 2021 in actual dollars, or 13.4% adjusted for inflation.
- Giving by bequest totaled an estimated \$45.60 billion in 2022, growing by 2.3% over 2021 – a decline of 5.3% when adjusted for inflation.

Sources: Lilly Family School of Philanthropy, Giving USA

## 501(C)(4) ORGANIZATIONS: A NEW FRONTIER FOR PUBLIC SECTOR GIVING

BY CHARLOTTE P. HOPSON

**Overview:** While long-standing advocacy groups like the AARP, ACLU, and Sierra Club are organized as non-profit organizations under Code section 501(c)(4), the option for wealthy individuals to make donative transfers to existing 501(c)(4) organizations or form 501(c)(4)s is ripe with flexibility. Although donors may not claim a charitable income tax deduction for transfers made to 501(c)(4) organizations, such entities offer donors several unique tax-related benefits. Namely, donors do not recognize gain on transfers of appreciated property to 501(c)(4)s, and under Code section 2501(a)(6), transfers to 501(c)(4) organizations are not subject to gift tax.

However, taxpayers should be aware that the charitable estate tax deduction is not available for testamentary transfers to 501(c)(4)s. A key reason donors may find 501(c)(4)s attractive is that, unlike Code section 501(c)(3) organizations, 501(c)(4)s can benefit classes or communities that traditionally would not be considered charitable. For instance, 501(c)(4)s may promote a political ideology, conduct unlimited lobbying, and encourage the legalization of illegal activities. Additionally, 501(c)(4)s permit some private benefits, if the benefits are not the organization's primary activity, and they are not subject to the excise tax regime that applies to private foundations.

**General Requirements:** 501(c)(4) organizations must be engaged in the promotion of the common good and general welfare of those in a "community." Revenue rulings, rather than statutes or regulations, largely define those qualifications. 501(c)(4)s may have limited assets, or none at all, and they may have very few activities, such as a single annual festival. However, they cannot operate for the sole benefit of the organization's members, rather than for the promotion of the welfare of humankind. Likewise, they cannot operate a business with the general public in a manner similar to for-profit organizations. Acceptable income streams include membership dues (but activities cannot benefit only members), voluntary contributions, and *limited sales* activities.

**Donor Management Prohibitions:** When considering 501(c)(4) organizations, donors should be mindful of the prohibition on donor management. Under Code section 2036(a)(2), if an individual transfers property by gift but retains certain rights to control the property during his or her lifetime, the value of the donated property may be included in the individual's taxable estate at death. Therefore, if a donor has the direct or indirect right to control property donated to a 501(c)(4) organization, the donated property may be includable in the donor's taxable estate. Solutions to this potential problem exist. One, a donor might disassociate completely from the 501(c)(4)'s management, and not act as a member, director, or officer of the organization. Alternatively, the 501(c)(4)'s governing documents might provide that all assets of the organization be transferred to 501(c)(3) organizations upon the donor's death, thereby enabling the donor's estate to receive a charitable deduction if the estate is deemed to include assets of the 501(c)(4).

**Recent Developments:** Recently, prominent philanthropists have made greater use of public sector giving. In September 2022, the founder of Patagonia, Yvon Chouinard, and his family transferred approximately 98% of Patagonia's shares (all of the non-voting stock) to a new 501(c)(4) social organization focused on fighting climate change. In 2020, Barre Seid, who made his fortune in manufacturing electrical products, transferred stock worth approximately \$1.6 billion to a 501(c)(4) organization, Marble Freedom Trust, which supports conservative causes. In October 2023, billionaire Charles Koch announced that over a four-year period he transferred \$5.3 billion of non-voting stock to a pair of non-profits organized as 501(c)(4) organizations, one of which is the newly created entity "Believe in People."

**Year-End Gifting:** Because transfers to 501(c)(4) organizations do not qualify for a charitable or other income tax deduction and are not subject to gift tax, the usual year-end tax considerations applicable to contributions to 501(c)(3) organizations are not relevant for 501(c)(4) giving.

## INCOME TAX DEDUCTION RULES FOR CHARITABLE GIFTS

BY TAE MIN KIM\* AND LESLIE W.  
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Charitable giving to Code section 501(c)(3) organizations takes many forms, and different types of donations result in different limitations on income tax deductions. Broadly, a taxpayer can deduct contributions of money or property to 501(c)(3) organizations. However, when a contribution exceeds 20% of adjusted gross income (AGI), the deduction may be limited, depending on the category of 501(c)(3) organization to which the donation is made and the type of property donated.



**Category of Organization:** Every 501(c)(3) organization is either a public charity or a private foundation. Public charities generally include churches, schools, hospitals, other organizations that receive a certain percentage of support from the general public, and some supporting organizations. Private foundations generally are created and controlled by a small number of donors. More favorable deduction limitations are available for contributions to public charities, private operating foundations, and certain non-operating foundations that either (i) promptly distribute all contributions and income (“distributing foundations”) or (ii) maintain a common fund. For ease of reference, those more favorably treated 501(c)(3)s are referred to below as Public Charities and Private Operating Foundations. Contributions to private non-operating foundations (other than those qualifying as distributing foundations or foundations that maintain a common fund) are treated less favorably. These private non-operating foundations are referred to below as Private Non-operating Foundations.

**Category of Donated Property:** Charitable contributions may be divided into cash and non-cash contributions, with the category of non-cash contributions being further divided into additional subcategories. The current deduction limitations applicable to the various property categories, based on the type of 501(c)(3) organization to which the property is donated, can be summarized as follows:

- Cash donations:
  - o If to a Public Charity or Private Operating Foundation, capped at 60% of AGI.
  - o If to a Private Non-operating Foundation, capped at 30% of AGI.
- Ordinary income property (inventory, etc.) and capital assets held less than one year:
  - o If to a Public Charity or Private Operating Foundation, deducted at cost basis and capped at 50% of AGI.
  - o If to a Private Non-operating Foundation, deducted at cost basis and capped at 30% of AGI.
- Long-term capital gain marketable securities:
  - o If to a Public Charity or Private Operating Foundation and deducted at cost basis, capped at 50% of AGI.
  - o If to a Public Charity or Private Operating Foundation and deducted at fair market value (FMV), capped at 30% of AGI.
  - o If to a Private Non-operating Foundation, deducted at FMV and capped at 20% of AGI.
- Other long-term capital gain property
  - o If to a Public Charity or Private Operating Foundation and deducted at cost basis, capped at 50% of AGI.
  - o If to Public Charity or Private Operating Foundation and deducted at FMV, capped at 30% of AGI.
  - o If to a Private Non-operating Foundation, deducted at cost basis and capped at 20% of AGI.
- Tangible personal property unrelated to charity's purpose or prematurely sold by charity:
  - o If to a Public Charity or Private Operating Foundation, deducted at cost basis and capped at 50% of AGI.
  - o If to a Private Non-operating Foundation, deducted at cost basis and capped at 20% of AGI.

### **Same-Year Gifts to Public Charities and Private Foundations:**

When a donor makes contributions to both Public Charities and/or Private Operating Foundations and to Private Non-operating Foundations in a tax year, the overall deduction limitation must be determined by application of complicated ordering rules. Deductions that exceed the current year's limits may be carried over to a subsequent tax year. These carryovers retain the character of the deduction and must be used before contributions newly made in the carryover year.

Generally, cash contributions to Public Charities and Private Operating Foundations are applied first to the limits. Then, non-cash contributions to Public Charities and Private Operating Foundations are applied. When the FMV of non-cash contributions to Public Charities and Private Operating Foundations exceeds 50% of AGI, no deductions to Private Non-operating Foundations are allowed in the same year. If the 50% limit has not been met, then deductions for contributions to Private Non-operating Foundations apply in the same order (cash, then non-cash).

**Application of Limits:** The following example illustrates the interaction between various deduction limits as applied to different gifts:

Brady has an AGI of \$50,000 in Year 1 and Year 2. If Brady contributes \$35,000 in cash to a Public Charity, he can deduct \$30,000 (60% of AGI) in Year 1 and carry over \$5,000 of cash deductions to a subsequent tax year.

In Year 2, Brady contributes a painting with a \$28,000 FMV to a Public Charity and gives \$5,000 in cash to a Private Non-operating Foundation. Unfortunately, Brady cannot deduct any contributions to the Private Non-operating Foundation because the contributions made to the Public Charity exceed 50% of his AGI. Unlike in Year 1, his maximum deduction is limited to 50% of AGI (\$25,000) because he contributed property rather than cash. He may deduct \$20,000 worth of the painting's value because the \$5,000 cash carryover deduction from Year 1 applies first. The remaining deductions, \$8,000 from the painting's value and the \$5,000 cash donation to the private foundation, will carry over to a subsequent tax year.

The interactions between these limitations are complex. As always, taxpayers should consult with their attorneys, accountants, or financial advisors to understand how the charitable income tax deduction rules apply to their particular situation.

\*Tae Min Kim, a student at Georgetown University Law Center, was a summer associate at Ivins, Phillips & Barker in 2023.

## CHARITABLE CONTRIBUTIONS: COMMON QUESTIONS ANSWERED



BY CHARLOTTE P. HOPSON

Taxpayers have options for structuring charitable gifts. In addition to the deduction limits explained in the previous article, knowing about other aspects of charitable giving may aid philanthropists in decision-making. Some commonly asked questions are discussed below.



## **What is a Donor Advised Fund?**

A donor advised fund (“DAF”) is not in fact itself an organization. Rather, certain public charities operate DAF programs and allow contributions to DAF accounts, for which the donor can receive a charitable income tax deduction. Donors may retain privileges over DAF accounts to make grant recommendations and recommendations regarding investments. When a donor contributes to a DAF, the charitable recipient technically is the public charity that legally owns and controls the account. However, because of the donor’s privileges, the benefits for contributions to DAF accounts fall between the benefits available for contributions to public charities and private foundations.

## **Can Gifts Be Made from Retirement Accounts?**

A taxpayer aged 70½ or older may be able to make a qualified charitable distribution (“QCD”) from an individual retirement account (IRA), other than a SEP or SIMPLE IRA. A QCD enables the taxpayer to satisfy all or part of the taxpayer’s required minimum distributions (RMDs), by paying such amount directly to a qualified charity, other than a DAF, private foundation, or supporting organization. By taking advantage of this technique, the taxpayer can avoid recognition of income for the amount of the QCD. While no charitable income tax deduction is allowed, the nonrecognition of income provides a better tax result than would recognition of the RMD income followed by a charitable deduction for distribution of the RMD amount to charity. This is because nonrecognition will provide a benefit even if the taxpayer does not itemize deductions and will lower the taxpayer’s AGI (which is the figure on which many tax benefits, deductions, credits, and other additional charges are based). The maximum QCD per taxpayer is \$100,000 per year. Unlike other charitable contributions, there is no carryover provision for QCDs. Thus, if a taxpayer’s QCDs exceed \$100,000 in a tax year, the excess amount must be included in that year’s gross income. Starting in 2024, the \$100,000 limit will be adjusted for inflation. Also new for 2023 is a one-time-only QCD of up to \$50,000 to fund a charitable remainder unitrust, a charitable remainder annuity trust, or a charitable gift annuity, though such QCDs are subject to strict constraints.

## **When Must Donations Be Completed?**

Charitable contributions must be completed by December 31st, subject to two limitations. First, a check mailed to a charity on or before December 31st and received by the recipient charity on or after January 1st is considered a donation made during the year the check is mailed. Second, a check mailed to a charity before the donor’s death that clears in due course after the death is considered to be a gift completed prior to the donor’s death.

## How are Donations Substantiated?

Charitable deductions require proper substantiation. The requirements vary based on the type of property donated.

**Cash Gifts:** For a single cash contribution of \$250 or more, the donor must obtain a contemporaneous written acknowledgment from the recipient organization, including the charity's name, the contribution date, the donated amount, and a statement that the organization did not provide any goods or services in exchange for the contribution (or, where goods or services have been provided, a description and good faith estimate of the value of such goods and services). To be contemporaneous, the donor must receive the acknowledgment by the earlier of (i) the date on which the donor files his or her individual federal income tax return for the year of the contribution; or (ii) the due date (including extensions) of the return. Although a donor need not attach this acknowledgement to the income tax return, he or she must retain the acknowledgement in his or her records.

**Non-cash Gifts and Qualified Appraisals:** Deductions for non-cash charitable contributions may have additional substantiation requirements. A donor must file Form 8283 with his or her individual tax return if the value of donated property is more than \$500 or if the donor has a group of similar items for which a total deduction of over \$500 is claimed. A donor must substantiate the value of donated property with a qualified appraisal if the value of the donated property exceeds \$5,000. When value exceeds \$500,000, the appraisal must be attached to the income tax return. Failure to comply with regulations for a qualified appraisal may result in denial of the deduction. The Form 8283 does not satisfy or replace the contemporaneous written acknowledgment requirement.

**Vehicle Donations:** When a taxpayer donates a vehicle to a charity, the taxpayer must obtain a special contemporaneous written acknowledgment from the charity. In addition to the requirements for general contemporaneous written acknowledgments discussed above, this special acknowledgment for vehicles must provide additional information, including the taxpayer's name, taxpayer identification number, and vehicle identification number. If the charity sells the vehicle, the acknowledgment must also include the following: (i) a statement certifying that the vehicle was sold in an arm's length transaction between unrelated parties; (ii) the date the vehicle was sold; (iii) the gross proceeds received from the sale; and (iv) a statement that the deduction may not exceed the gross proceeds from the sale. Form 1098-C meets these requirements. Importantly, this acknowledgment is considered contemporaneous only if it is received from the donee organization no later than 30 days after (i) the date of the sale, if the donee

organization sold the vehicle in an arm's length transaction, or (ii) after the date of the contribution, if the donee organization will keep the vehicle or donate or sell it for charitable purposes.

Even sophisticated philanthropists often are unclear about the myriad rules affecting charitable giving. Taxpayers should consult their advisors before making donations to understand the opportunities available, the requirements governing charitable gifts, and ways to maximize the charitable deduction.

### OUR ESTATE PLANNING ATTORNEYS



Natanya  
Allan



Brenda  
Jackson-Cooper



Leslie  
Bradenham



Eric  
Fox



Ben  
Grosz



Hank  
Gutman



Carter  
Hood



Charlotte  
Hopson



Linda  
Kotis



Alex  
Maged



Yitz  
Weiss



Andrea  
Ricka

### OUR ESTATE PLANNING PRACTICE

- Estate Administration
- Gift & Estate Tax Planning
- Income Tax Planning
- Wills & Trusts
- Privately Held Businesses
- Exempt Organizations & Charitable Giving