It’s Déjà vu All Over Again…and Again…and Again…

2016 In Review:
A Charitable Planning Update

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October, 2016

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Charitable Planning Update

Today's Agenda

Current Trends in Philanthropy

Types of Charitable Giving/Planning Options

- Tax Rules
- Direct Giving/Update
- Split Interest Giving/Update
- Indirect Giving/Update
- Other Updates and Trends

Planning Mistakes

Planning Examples

Q & A

Charitable Planning Update

“These Americans are the most peculiar people in the world…In a local community, in their country a citizen may conceive of some need, which is not being met. What does he do? He goes across the street and discusses it with his neighbor. Then what happens? A committee comes into existence and then the committee begins functioning on behalf of that need…All of this is done by private citizens of their own initiative.”

Alexis de Tocqueville, *Democracy In America* (1835)

Charitable Planning Update

Current Trends in Philanthropy

Giving USA* 2015 charitable giving data

- 2015 charitable gifts of $373.25 Billion, highest ever
- 4.1% increase over 2014
- Sixth increase in a row, after 2 down years – which were only the 2nd and 3rd declines in ***current*** dollars since 1956 when tracking of charitable giving began (1987, 2008 and 2009 being the only decline years)
- Charitable giving is both a growth and a non-cyclical business, though giving increases more rapidly with stock market rise, less so in recession years
- Charitable giving continues to be led by individuals, not corporations

*Giving USA, the Annual Report on Philanthropy, is published by Giving USA Foundation, a public service initiative of the Giving Institute, researched and written by The Center on Philanthropy at Indiana University

Charitable Planning Update

Current Trends in Philanthropy (cont.)

Individual Giving*

- $264.58 Billion in 2015
- 71% of the total
- 3.8% increase from 2014; 3.7% after inflation
- Represents 2.2% of household disposable income, same as 50-plus year average of 2.2%
- Volunteerism (62.8 MM adults, or 25.3% of the population) volunteered, though this percentage is trending down
  - Bureau of Labor Statistics

*Giving USA

Charitable Planning Update

Current Trends in Philanthropy (cont.)

Charitable Bequests*

- $31.76 Billion in 2015
- 9% of the total
- 2.1% increase (2.0% after inflation) from 2014
- Recent years had seen a decline in this category because of declining death rates; extremely volatile because of the effect of large estates
- 80% of total giving comes from individuals, living or deceased

*Giving USA

Charitable Planning Update

Current Trends in Philanthropy (cont.)

Foundation Giving*

–$58.46 Billion in 2015

–16% of the total

–6.5% increase from 2014 (6.4% after inflation)

–Most foundations follow an endowment philosophy and are disciplined in spending approximately 5% of value – giving is closely tied to stock market values

– Over half comes from Family Foundations, meaning that individually directed giving totals 88% of all giving (71% direct, 9% bequest, 8% from Family Foundations)

*Giving USA

Charitable Planning Update

Current Trends in Philanthropy (cont.)

Corporate Giving*

- $18.45 Billion in 2015
- 5% of the total
- 3.9% increase from 2014
- Still very low as percentage of pre-tax profits

*Giving USA

Charitable Planning Update

Current Trends in Philanthropy (cont.)

The Recipients*

	Dollars	Percent
Religion	119.30 B	32.0%
Education	57.48 B	15.0%
Human Services	45.21 B	12.0%
Foundations	42.26 B	11.0%
Health	29.81 B	8.0%
Public-society Benefit	26.95 B	7.0%
International	15.75 B	4.0%
Arts, culture, humanities	17.07 B	5.0%
Environment and animals	10.68 B	3.0%
Individuals	6.56 B	2.0%

*Giving USA

Charitable Planning Update

Current Trends in Philanthropy (cont.)

U.S. Trust Study of High Net Worth Philanthropy

- In conjunction with Indiana University's Center on Philanthropy, the largest, most comprehensive survey of charitable giving behaviors and motivations of High Net Worth Donors
- Original Study released in Fall, 2006, with bi-annual studies since then
- Supplement, entitled "Portraits of Donors" released December, 2007
- Related Study re: Women's Philanthropy, released November, 2011
- Advisors' Study, released Fall, 2013
- To see the Study, go to www.bankofamerica.com/philanthropy
    - Under "Services and Insights," there is a link to the Study

Charitable Planning Update

Planning Options

Tax Rules

Income Tax Rules

- 2 Types of Charities
- 4 Types of Property
- Deductibility dependent on combination of the type of property given and the type of charity

Charitable Planning Update

Planning Options (cont.)

Tax Rules (cont.)

Type of Property	Type of Charity	
	50%	30%
Cash	50%	30%
Ordinary Income Property	50%*	20%*
Long Term Capital Gain	30%	20%**
Tangible – Unrelated	50%*	20%*

* Limited to lesser of fair market value (FMV) or cost basis

** Limited to cost basis unless publicly traded stock

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Charitable Planning Update

Planning Options (cont.)

Tax Rules (cont.)

Income Tax Rules (cont.)

- Must itemize to deduct
- 5 Year Carry forward
- Itemized Deduction Phase-out Rules
- Strict Appraisal and Substantiation Requirements
- Other specialized rules
  - Partial Interest Rule for all gifts
  - Related Use Rule for tangible personal property
  - Fractional Interest Rule for art

Charitable Planning Update

Planning Options (cont.)

Tax Rules (cont.)

Partial Interest Rule

- Gifts of Partial Interests do not qualify for an income tax charitable deduction
  - 4 exceptions to the rule:
    - Undivided portion
    - Irrevocable remainder interest
    - Qualified conservation or façade easement
    - Qualified split interest trusts and pooled income funds

Charitable Planning Update

Planning Options (cont.)

Tax Rules (cont.)

Partial Interest Rule (cont.)

- Consequences:
  - Lack of income tax deduction
  - Possible taxable gift

Charitable Planning Update

Planning Options (cont.)

Tax Rules (cont.)

Partial Interest Rule (cont.)

- Example: donor who contributes artwork but retains copyright (no deduction)
- Example: donor contributes ¼ interest in artwork, and copyright (deductible)
- Example: Oil & Gas Interests are often fractional interests, so must be careful

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Charitable Planning Update

Planning Options (cont.)

Tax Rules (cont.)

Related Use Rule

- Donations of tangible personal property will be limited to a cost basis deduction unless, at the time of donation, the recipient charity certifies that it intends to use the donated property to further its mission
- Otherwise, donor is limited to a cost basis deduction
- If sold within 3 years of donation, Form 8282 required to be filed to reflect actual sales price

Charitable Planning Update

Planning Options (cont.)

Tax Rules (cont.)

Income Tax Rules (cont.)

Fractional Interest Rule

- If a donation of a fractional interest in art is made, then the donor:
  - Must complete the donation of the entire work within the earlier of death or 10 years
  - Must use the same appraised value of the initial fractional gift for all subsequent fractional gifts
  - Must relinquish possession for actual ownership periods

Charitable Planning Update

Planning Options (cont.)

Tax Rules (cont.)

Estate and Gift Tax Rules

- 100% Fair Market Value Deduction

Charitable Planning Update

Planning Options (cont.)

- Structures
- Direct Gifts
  - Assets
  - Interests in assets
- Indirect Gifts
  - Community Foundation
  - Donor Advised Fund
  - Private Foundation
  - Supporting Organization

Charitable Planning Update

Planning Options (cont.)

Structures (cont.)

Split-Interest Gifts

- Charitable Gift Annuities
- Charitable Remainder Trusts
- Charitable Lead Trusts
- Remainder Interests
- Pooled Income Funds

Charitable Planning Update

What's New – Part I

Qualified Charitable Distribution (QCD) made permanent

- More proposals – Legacy IRA Act
  - Life-income rollovers at age 65, including Charitable Remainder Trusts and Charitable Gift Annuities, capped at $400,000
- Grow Philanthropy Act, which would make donor advised funds (DAFs) eligible to receive QCDs
- Charities Helping Americans Regularly Throughout the Year Act, includes the DAF provision

Charitable Planning Update

What's New – Part I

Presidential Candidates Proposals regarding charitable deduction

- Previously, President Obama has including limits on the charitable deduction in all of his budget requests to Congress
- Clinton Proposals
  - Higher income tax rates for some, increases value of deductions
  - Cap itemized deduction **but not** charitable deduction
- Trump Proposals
  - Lower income tax rates, reducing value of deductions
  - Cap itemized deductions, including charitable deduction, to $200,000/$100,000

Charitable Planning Update

What's New – Part I

- Extenders Legislation, made permanent
  - QCD above
  - Preferential Treatment for Conservation Easements
  - 4 Others
- Donor Data
  - IRS withdrew its substantiation proposal, which would have allowed (not required) alternative reporting of donors social security numbers instead of normal substantiation
  - *Americans for Prosperity Foundation v. Harris*, 117 AFTR 2d 2016-34 (DC CA, April 21, 2016), ruled against California AG request for APF's Form 990 Schedule B, listing donor names and addresses
- Chan Zuckerberg Initiative – much ado about nothing?

Charitable Planning Update

What's New – Part I (cont.)

- Lots of case law, rulings, etc. this year:
  - Qualified Charitable Donee/General substantiation rules
    - Summary of the Rules
    - For cash:
      - < $250 – 3rd party record is sufficient
      - > $250 – contemporaneous written acknowledgement ("CWA"), no goods or services received, keep for 3 years
    - For property
      - > $500 < $5,000 – CWA, plus Form 8283 (updated in December, 2014)
      - > $5,000 - CWA, Form 8283, and qualified appraisal (unless publicly traded stock, or closely-held stock under $10,000)
      - Qualified appraisal requires a qualified appraiser
    - Applies to private foundations as well as public charities, but not charitable remainder trusts

Charitable Planning Update

What's New – Part I (cont.)

- Lots of case law, rulings, etc. this year:
  - Qualified Charitable Donee/General substantiation rules
    - Isaacs v. Comm'r, TC Memo 2015-121 (June 30, 2015), taxpayer failed to provide an appraisal for contribution of his $600,000 fossil collection
    - Brown v. Comm'r, T.C.Memo 2016-39 (march 3, 2016), pastor and founder of church, denied deduction for $19,224 in cash contributions
    - Payne v. Comm'r, T.C. Memo 2016-30 (June 30, 2016), $169,000 in non-cash charitable deductions disallowed, penalties imposed
    - Kaplan v. Comm'r, T.C. Memo 2016-149, artist denied deduction for contributions of postcards she created
    - Garcia v. Comm'r, T.C. Memo 2016-21, cash contributions were substantiated and allowed, but travel for charity, and non-cash contributions were disallowed for lack of substantiation
    - Cave Buttes, LLC v. Comm'r, 147 TC No 10 ((/10/2016) – bargain sale deduction allowed

Charitable Planning Update

What's New – Part I (cont.)

- Conservation easement substantiation rules
  - Over 50 conservation/facade easement cases decided since 2006, and approximately 200 cases in process!
    - Palmer Ranch Holdings, Ltd. V. Comm'r, CA 11, 117 AFTR 2d 2016-614, Tax Court was affirmed in part, reversed in part – at issue was valuation methodology
    - French v. Comm'r, T.C. Memo 2016-53 (3/3/2016), $400,000 deduction denied for faulty receipt
    - Carroll, III v. Comm'r, 146 T.C. No. 13 (4/17/2016), conservation easement deduction denied because easement not perpetual
    - RP Golf, LLC v. Comm'r, T.C. Memo 2016-80 (4/28/2016), $13 MM deduction denied for title defects and late subordination
    - Other cases denying deduction for similar reasons
    - Administration Budget proposals have included a provision to bar conservation easements on golf course properties

Charitable Planning Update

What's New – Part I (cont.)

- Conservation easement substantiation rules (cont.)
  - What's the Lesson?
  - Strict Adherence to Substantiation and Appraisal Requirements
  - General Substantiation Rules: Publication 1771
  - Conservation Easement Rules: PLR 20083601
  - IRS Easement Audit Techniques Guide: www.irs.gov/businesses/small/article
  - Probate and Property article: Exacted Conservation Easements, January/February, 2012
  - ABA RPTE Spring 2012 Symposium program; Heckerling 2013 program; ABA Membership Call in January, 2014
  - RIA Checkpoint: 2/8/2012 article on Conservation Easements
  - 95 Practical Tax Strategies 112 (September, 2015)
  - ABA Ad Hoc group pushing for new regulations

Charitable Planning Update

Planning Options (cont.)

Charitable Remainder Trusts (CRTs)

- Irrevocable trust
- Inter vivos or testamentary
- Non-charitable beneficiary receives the "income" interest, either an annuity or unitrust amount
- "Income" interest is payable for a life, joint lives, or term of years not to exceed 20
- Charitable beneficiary receives the remainder interest

Charitable Planning Update

Planning Options (cont.)

Charitable Remainder Trusts (cont.)

- “Income” interest must be either:
  - Annuity – fixed sum or fixed percentage of the initial contribution (CRAT)
  - Unitrust – fixed percentage of the net fair market value of the trust, revalued annually (CRUT)
- “Income” interest must be:
  - At least 5% of the initial value of the trust
  - No more than 50% of the initial value of the trust
- Remainder interest:
  - Present value must be at least 10% of the initial value
  - For CRATs, must meet 5% “probability exhaustion test”

Charitable Planning Update

Planning Options (cont.)

Charitable Remainder Trusts (cont.)

- Types of CRTs
  - Charitable Remainder Annuity Trust (CRAT) – pays a fixed amount or fixed percentage of initial trust principal
  - Charitable Remainder Unitrust (CRUT) or Standard Charitable Remainder Unitrust (STANCRUT) – pays a fixed percentage of the net fair market value of the trust principal, revalued annually
  - Net Income Charitable Remainder Unitrust (NICRUT) – pays the lesser of
    - Unitrust amount
    - Net income actually earned by the trust

Charitable Planning Update

Planning Options (cont.)

Charitable Remainder Trusts (cont.)

- Types of CRTs (cont.)
  - Net Income With Make-up Charitable Remainder Unitrust (NIMCRUT) – pays the same as a NICRUT, but with accrual of shortfall when net income is less than the unitrust amount, paid when net income exceeds the unitrust amount
  - FLIP Charitable Remainder Unitrust (FLIP-CRUT) – allows for a NICRUT or a NIMCRUT to become a STANCRUT upon a "triggering event"
    - "Triggering event" must be something beyond the control of the donor, the unitrust beneficiary, the trustee, or any other person
    - Can only "flip" once, and only one way (no "backflips")

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Charitable Planning Update

Planning Options (cont.)

Charitable Remainder Trusts (cont.)

- Income Taxes
  - CRTs do not pay income taxes…unless they have Unrelated Business Taxable Income (UBTI)
  - Non-charitable "income" beneficiaries do pay income tax according to "WIFO" (worst in, first out)
    - Ordinary Income, including qualified dividends, current and accrued
    - Capital Gain, current and accrued
    - Other Income, such as tax exempt, current and accrued
    - Return of principal
  - Key word – deferral…not avoidance!

Charitable Planning Update

Planning Options (cont.)

Charitable Remainder Trusts (cont.)

- Donor qualifies for an income tax charitable deduction equal to the present value of the remainder interest (subject to adjusted gross income (AGI) and phase-out limitations)
- Diversify a concentrated asset position with deferred capital gains tax consequences
- Almost always achieve a higher current after tax yield than what was earned on the contributed asset
- Estate tax savings
- Benefit charity or charities of choice

Charitable Planning Update

Planning Options (cont.)

Charitable Remainder Trusts (cont.)

- CRTs are primarily an income tax planning tool with estate tax benefits
- CRTs are subject to private foundation rules, so must avoid self-dealing
- If “income” interest is payable to other than the donor or donor’s spouse, gift and/or estate tax consequences
- CRATs work “better” in high interest rate environment

Charitable Planning Update

What's New – Part II – Charitable Remainder Trusts

- Combination of low interest rates, low capital gains tax rates and low volume of transactions has led to:
  - Lesser use of CRTs for pre-sale income tax planning
  - Greater number of existing CRT terminations
- Lower 7520 rate leads to a lower valuation of the remainder interest
  - At inception, leads to lower charitable income tax deduction
  - If terminating, leads to a lower value to charity, higher value to non-charitable beneficiary
- Low capital gains rates
  - At inception, less incentive to defer, especially to an expected higher capital gains rate environment
  - If terminating, "income interest" is a capital asset, with deemed basis of zero, so lower capital gains tax is incurred

Charitable Planning Update

What's New – Part II (cont.)

– Significant number of Private Letter Rulings over the past several years have made it clear that CRT terminations can be done without adverse income, gift or estate tax consequences, so long as the actuarial present value of the income and remainder interests are properly calculated and paid to the proper parties
  - No self-dealing
  - No private foundation termination tax

– If considering termination, should also consider selling the income interest
  - Regulations re: valuation of annuity and unitrust interests issued in T.D. 7929, 80 FR 48249, 8/12/2015
  - Estate of Schaefer, 145 T.C. No. 4 (July 28,2015), regarding valuation of remainder interests in NIMCRUTs

– CRT "Rollovers" – "Income" interest to new CRT may provide flexibility

Charitable Planning Update

What's New – Part II (cont.)

- CRTs are still valid planning techniques in appropriate circumstances
- Likely to see increased use of CRTs to manage income because of
  - Higher income tax rates
  - 3.8% health care surtax
- Rev Proc 2016-42, 2016-34 IRB – provides relief from "probability of exhaustion" test

Charitable Planning Update

Planning Options (cont.)

Charitable Lead Trusts

- Irrevocable trust
- Inter vivos or testamentary
- Charitable beneficiary receives the “income” interest, either an annuity or unitrust amount
- “Income” interest is payable for life, lives, or term of years (notice, no limitation on term of years), or even for a life plus term of years
- Non-charitable beneficiary receives the remainder interest

Charitable Planning Update

Planning Options (cont.)

Charitable Lead Trusts (cont.)

- "Income" interest must be either:
  - Guaranteed Annuity Interest, which is a sum certain at least annually (CLAT)
  - Unitrust Interest, which is a fixed percentage of trust assets, revalued annually (CLUT)
- CLT must also be either
  - Grantor Trust – donor entitled to income tax charitable deduction when funded, but must also report income of trust in future years
  - Non-grantor Trust – no up-front income tax deduction, but the trust itself is responsible for any income tax consequences

Charitable Planning Update

Planning Options (cont.)

Charitable Lead Trusts (cont.)

- Types of CLTs
  - Charitable Lead Annuity Trust (CLAT)
  - Charitable Lead Unitrust (CLUT)

- Benefits of CLTs/Planning Thoughts
  - Non-grantor CLT is a leveraged gifting technique, similar in structure and purpose to a Grantor Retained Annuity Trust (GRAT)
  - Non-grantor CLT has incidental income tax benefit of not being subject to AGI limits or itemized deduction phase-outs

Charitable Planning Update

Planning Options (cont.)

Charitable Lead Trusts (cont.)

- Benefits of CLTs/Planning Thoughts (cont.)
  - All CLTs allow funding charitable gifts without permanently giving away an asset
  - Grantor CLT provides current income tax charitable deduction for present value of the income stream going to charity in future years, which may be useful against income spike
  - CLTs are not tax exempt, so either grantor (of grantor CLT) or the trust itself are subject to income tax
- CLTs are subject to private foundation rules

Charitable Planning Update

Planning Options (cont.)

Charitable Lead Trusts (cont.)

- Benefits of CLTs/Planning Thoughts (cont.)
  - Avoid contributing encumbered property, because of possible gain recognition
  - Monitor funding with closely-held stock or Family Limited Partnership (FLP) interests because of excess business holding rules

Charitable Planning Update

- **What's New – Part III – CLTs**
  - Converse to CRTs, but similar to Grantor Retained Annuity Trusts (GRATs), low interest rates should lead to greater use of CLTs
  - LISI (Leimberg Information Services), Messages 158 and 159, August 3 and 10, 2010, respectively, written by Richard Fox, will tell you everything you need to know about CLTs
  - "Shark Fin" CLTs
    - Featured article from PG Calc, March, 2010, "The 'Shark Fin' Lead Trust"
    - Validity of "Shark-fin" CLATs uncertain – R.L. Fox and M.A. Teitelbaum, 37 Estate Planning, No. 10, 3 (October, 2010)
    - LISI Messages 162 and 163 – arguments for and against Shark Fin CLTs

Charitable Planning Update

- **What's New – Part III – CLTs (cont.)**
  - PLR 2012-16-045 (4/20/2012) – testamentary zero-out CLAT was permitted to change from a straight annuity to an 20% increasing annuity
    - "mini – sharkfin"
    - This PLR does not address the question of how much is too much, that is, how much can the annuity increase

- Use of CLT to fund a private foundation

- Administration Budget Proposals – grantor CLT assets would be includable in the estate of the grantor

Charitable Planning Update

- **What's New – Part III – CLTs (cont.)**
  - CLTs are subject to private foundation rules
    - CLT cannot distribute to a private foundation where grantor serves as trustee, unless CLT funds are segregated and grantor has no say in further distribution of those funds from the foundation
      - PLR 201421023 – H and W each set up testamentary CLATs to 2 separate charities, both supported by their private foundation, and received naming rights. Structured so as to avoid self-dealing
  - PLR 201433021 – 3 testamentary CLATs, with 3 separate private foundations as lead beneficiaries, structured to avoid excess business holdings excise tax. In effect, a charitable bailout of the family business. Whether it works depends of whether sufficient other assets are in the CLTs to avoid distributions of family stock as part of annuities.
  - These PLRs demonstrate use of CLTs in sophisticated planning

Charitable Planning Update

Planning Options (cont.)

Conduit Entities

- Private Foundations
- Donor Advised Funds (including Community Foundations)
- Supporting Organizations

Charitable Planning Update

Planning Options (cont.)

Conduit Entities (cont.)

Private Foundations

- A charitable entity formed by an individual or family to carry out charitable activities
  - Private non-operating foundation – makes grants to other charities
  - Private operating foundation – conducts its own charitable activities
- Since the creator maintains significant control over investments, operations and future grants, private foundations have:
  - Least favorable tax status
  - Exposure to excise (penalty) taxes for errant behavior
  - Possible loss of exemption for errant behavior

Charitable Planning Update

What's New – Part IV

Private Foundations

- No new laws since Pension Protection Act of 2006 (PPA) which doubled most of the penalty taxes
- Number of cases, PLRs, etc., regarding the 6 excise taxes to which Private Foundations are subject:
  - Tax on Net Investment Income (different definition than for 3.8% surtax) – proposals to combine the 1 and 2 percent rates into a single, revenue neutral rate, which is estimated at 1.34 – 1.52%
  - Qualifying Distributions – non-operating foundations must pay out "income," defined to be 5% of non-charitable use assets, each year, within 12 months of end of year, or face 30% tax on shortfall
    - Set-asides – PLR 201606033 allowed set-aside for construction costs
    - Program-related investments

Charitable Planning Update

What's New – Part IV

Private Foundations

- Qualifying Distributions (cont.)

- PRI Final Regulations, T.D. 9762, April 21, 2016
  - Loan or capital investment made in lieu of an outright grant
  - Properly structured PRIs count as qualifying distributions, and do not constitute "jeopardy investments"
  - PRI Regs were out of date; Proposed Regs issued in May, 2012
  - Family Foundation Advisor, July/August 2016

- Equivalency Determinations of Foreign Charities

Charitable Planning Update

What's New – Part IV – (cont.)

Private Foundations (cont.)

- Number of cases, PLRs, etc., regarding the 6 excise taxes to which Private Foundations are subject (cont.):
  - Self-Dealing – no direct or indirect financial transactions between the foundation and its "disqualified persons"
    - Fox and Blattmachr article, Leimberg's Charitable Planning Newsletter, #226
    - Megan Sanders, Self-dealing article, Family Foundation Advisor, July/August 2015 and Family foundation Advisor, September/October 2015
    - PLR 201624001 and PLR 201624013 – proposed redemption of non-voting common stock was not self-dealing

- Self-dealing is the most common violation, and must be self-reported. Most common violation – borrowing money from own foundation, followed by excessive compensation

Charitable Planning Update

What's New – Part IV – (cont.)

Private Foundations (cont.)

- Number of cases, PLRs, etc., regarding the 6 excise taxes to which Private Foundations are subject (cont.):
  - Taxable Expenditures – prohibition on political activities (with exceptions) or payments to individuals (with exceptions)
    - A number of PLRs on scholarship programs – PLRs 201608017, 201608018, 201608019, 201608020, 201612015, 201610022, 201618012, 201618018, 201620017, 201620018, 201621018, 201622034, 201623014, 201623015, 201623016, 201623017, 201623018, 201625020, 201629010, 201629011, 201629012, 201632025, 201630018, 201634027, 201634028, 201638009, 201635010, 201638025, 201638026, 201638027, 201638024, 201639017, 201604020, 201604021

Charitable Planning Update

What's New – Part IV – (cont.)

Private Foundations (cont.)

- Number of cases, PLRs, etc., regarding the 6 excise taxes to which Private Foundations are subject (cont.):
  - Taxable Expenditures (cont.)
    - Keys here are a broad enough class of potential recipients, non-discrimination standards and, in the case of employer/employee relationship, that it is not disguised compensation
    - Family Foundation Advisor, September/October, 2016 edition, has summary of scholarship programs
  - Election Year
    - Parks v. Comm'r, 145 TC No. 12 (11/17/15) – tax imposed for political activities

Charitable Planning Update

What's New – Part IV – (cont.)

Private Foundations (cont.)

- Number of cases, PLRs, etc., regarding the 6 excise taxes to which Private Foundations are subject (cont.):
  - Excess Business Holdings – basically, cannot own more than 20% of voting shares of a business
    - PLR 201603032 – 100% ownership in LLC allowed because it was a charitable activity
    - PLR 201441021 – first tier tax applied; good summary of Section 4943 tax
  - Jeopardy Investments – though not defined, focus is on investment process, not specific investments
    - Notice 2015-62, 2015-39 IRB issuing guidance regarding application of jeopardy investment excise tax to non-PRI investments
    - Leimberg's Charitable Planning Newsletter, #236 addresses this notice

Charitable Planning Update

What's New – Part IV – (cont.)

Private Foundations (cont.)

- Termination
  - Can be subject to 100% tax
    - PLR 201606030 – transfer of assets between exempt foundations did not constitute a taxable termination
- Unrelated Business Taxable Income ("UBTI" or "UBIT")
  - PLR 201636042 and 201636043 – charity issues units in its endowment fund to CRTs ("CRT rollup"), make continuing payments to CRT "income interest," and receive management fees, did not cause UBTI
  - PLR 201633032 – charity sold merchandise through online store, printed catalog and at various retail outlets, found to be UBTI. Facts were heavily redacted, but appears as though the manner of sale was a bigger issue than the items for sale

Charitable Planning Update

What's New – Part IV (cont.)

Donor Advised Funds

- An account maintained by a public charity where the donor has retained the right to advise (but not direct) where future distributions will be made
- May be maintained by a community foundation, a financial services company, or even an operating charity such as a university
- Less expensive (on the low end), easier to administer, version of a private foundation, without the same level of continuing donor control

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What's New – Part IV (cont.)

Donor Advised Funds

- PPA "threatened" the adoption of new private foundation like rules for DAFs, and directed Treasury to undertake a study of DAFs and report back with findings and recommendations
- PPA did impose excess business holdings, and excess benefits, penalties on DAFs
- The PPA mandated report was finally issued in December, 2011, and basically said that widespread abuse did not exist
- Treasury is working on Regulations to provide more guidance, especially definitional guidance as to what exactly constitutes a donor advised fund [as opposed to giving circles, local scholarship funds, etc.]

Charitable Planning Update

What's New – Part IV (cont.)

Supporting Organizations

- PPA made significant changes to qualification requirements for Supporting Organizations, especially "Non-functionally integrated Type III Supporting Organizations"
- Series of releases, from Advanced Notice of Proposed Rule-Making, to several sets of Proposed Regulations
- Final set of Regulations issued in December, 2015 [T.D. 9746], required non-functionally integrated Type III supporting organizations to pay out greater of 85% of their income, or 3.5% of FMV (as originally proposed in 2012)
- Proposed Regs issued in February, 2016, regarding definition of functionally integrated Type III supporting organization

Charitable Planning Update

What's New – Part IV (cont.)

Other Updates

- Exempt Status
  - Small charities that did not file a Form 990 (because they didn't have to in the past but do now) automatically lost exempt status on October 15, 2010
    - Automatic, not because the IRS is mean
    - Estimated 300,000 non-profits revoked – real number – 446,000
    - 23,000 reapplied in 2012 – meaning most didn't exist anymore
  - IRS issued Form 1023-EZ (Streamlined Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code)
    - See also Rev Proc 2014-40, and instructions to the new form

Charitable Planning Update

What's New – Part IV (cont.)

Other Updates

- Exempt Status
  - Exemption Request Denial of the Year, Runners-up and Previous Contestants
    - PLR 201427018 (7/3/2014) – in-home synagogue, with 15 members (none of whom donated any money) denied exemption
    - PLR 201438030 (9/19/2014) – beauty pageant denied exemption where private inurement to sponsoring organization
    - PLR 201416010 (4/18/2014) – organization that does fundraising education for churches denied exemption since it was affiliated with a for-profit financial services firm
    - PLR 201404013 (1/24/2014) – community grocery store denied exemption as private inurement to participating farmers

Charitable Planning Update

What's New – Part IV (cont.)

- Exempt Status (cont.)
  - Exemption Request Denial of the Year, Runners-up and Previous Contestants
    - First Church of Cannabis – exemption was actually granted, as reported by its "grand pooba" and "minister of love" on May 25, 2015
    - GameHearts v. Comm'r, TC memo 2015-218, sober gambling organization denied exemption
    - At least 50 exemption requests denied
  - Exemption May Also Be Revoked:
    - Foundation of Harmony and Happiness, California based
    - Kids Against Drugs, West Virginia

Charitable Planning Update

What's New – Part IV (cont.)

Other Updates

- Donor Intent
  - Continued and growing focus on donee charity adherence to donor intent
  - "Drafting for Donor Intent," by Prof. Susan Gary and Kurt Sommer, March 7, 2014
  - Continuing line of cases where donors, or their descendants, allege violation of donor intent by the donee charitable institution.

- Foundation Transitions
  - P. Snow, 43 Estate Planning, No. 2, 30 (February, 2016)

Charitable Planning Update

What's New – Part IV (cont.)

Other Updates

- Formula Planning, aka "Charitable Lid"
  - With Petter and Christiansen cases in 2009, and Petter appeal and Hendrix (TC Memo 2011-133) in 2011, and Wandry in 2012, it is likely that the use of formula valuation planning will increase, with gift over clauses going to DAFs, but also to other planning entities
  - See LISI, Archived messages 1556, 1557, 1560 and 1562
  - Also, Wandry case is first to use a formula clause without a charitable lid
  - Probate and Property article on formula clauses, November/December 2015 issue

Charitable Planning Update

What's New – Part IV (cont.)

Other Updates

- In 2017, private equity and hedge fund managers are required to report income that has been held in offshore accounts
  - Leimberg's Charitable Planning Newsletter #253
- Charitable Giving Using Private Equity Interests
  - Checkpoint article, 9/28/2016
- "Stepping-up" CLATs
  - Leimberg's Charitable Planning Newsletter #244

Charitable Planning Update

What's New – Part IV (cont.)

Expect to see:

- IRS Priority Guidance
  - Temporary Regs – DAFs - ???? -
  - Temporary and Final Substantiation Regs under Section 170
  - Hope is to get Conservation Easement Reg project on Priority Guidance by 2016
- Affinity Marketing Programs
  - Chief Counsel Advice 201543013, Checkpoint Federal Taxes Weekly alert 11/05/2015

Charitable Planning Update

What's New – Part IV (cont.)

Expect to see:

- Protection of Charitable Assets Act - dead
- Talk (but no action?) about restricting charitable income tax deduction
- Good reading – "Present Law and Background Relating to the Federal Income Tax Treatment of Charitable Contributions," Joint Committee on Taxation, October 14, 2011

Charitable Planning Update

Planning Mistakes

- Basic premise that charitable giving is good, for society, for recipient charities, and for donors
- Federal income tax law has always included some incentive for charitable giving
- Over the years, that incentive has been restricted
  - Taxpayer abuse
  - Tax policy
  - Other
- Today's incentive – primarily the charitable income tax deduction – is restricted based on
  - Type of property donated
  - Type of recipient charity
  - Intended use of donation

Charitable Planning Update

Planning Mistakes (cont.)

- Most common mistake from the donor perspective is the type of asset
  - Donor/advisor is aware that there is appreciation, but somehow misses the fact that the appreciation is partially/wholly attributable to compensation type income
    - That means it is "ordinary income property," and deduction is limited to lesser of cost basis or fair market value
    - Examples: compensatory stock options, restricted stock units, etc.
  - Other OIP: commercial annuities, inventory
  - Use of tangible personal property must be related to the charity's mission: art and other collectibles, Gold ETFs
  - Encumbered assets – same as selling for amount of debt: Real estate, MLPs and partnerships with debt

Charitable Planning Update

Planning Mistakes (cont.)

– Another common mistake from the donor perspective is timing

- Assignment of income problem – when is a donation “too late”

– Mistakes from the donee charity

- UBTI – look for debt, S corp stock, operating business
- Private foundation self-dealing or excess business holdings issues
- Public charity excess benefit rules
- SEC rules (actually apply to both the donor and donee)

– These considerations are not exhaustive, but reinforce the notion that someone on the advisory team needs to be well versed in charitable planning rules

Charitable Planning Update

Planning Options (cont.)

Planning Examples

- Cash Gift to Public Charity
- Donor
  - 100% deductible, to 50% of AGI, subject to itemized deduction phase-out
  - No valuation issues
- Charity

- Cash Gift to Private Charity
- Donor
  - 100% deductible, to 30% of AGI, subject to itemized deduction phase-out
  - No valuation issues
- Charity

Charitable Planning Update

Planning Options (cont.)

Planning Examples (cont.)

- Cash Gift to Split-Interest Entity
- Charitable Remainder Trust
- Donor
  - Present value of remainder interest is 100% deductible, to 50% or 30% of AGI, depending on type of remainder charity, subject to itemized deduction phase-out
  - No valuation issues
- Charity

Charitable Planning Update

Planning Options (cont.)

Planning Examples (cont.)

Cash Gift to Split-Interest Entity (cont.)

- Charitable Lead Trust
- Donor
  - If grantor trust, present value of income interest is 100% deductible, to 50% or 30% of AGI, depending on type of lead charity, subject to itemized deduction phase-out
  - If non-grantor trust, no income tax deduction
  - No valuation issues
- Charity

U.S. TRUST
Bank of America Private Wealth Management

Charitable Planning Update

Planning Options (cont.)

Planning Examples (cont.)

- Non-Cash Gift to Public Charity
- Donor
  - If long-term capital gain, then FMV is 100% deductible, to 30% of AGI;
  - If not long-term, or tangible – unrelated, then lower of cost or FMV, 100% deductible, to 50% AGI
  - Subject to itemized deduction phase-out
  - If Partial Interest, no deduction
  - Valuation issues
- Charity

Charitable Planning Update

Planning Options (cont.)

Planning Examples (cont.)

Non-Cash Gift to Non-Public Charity

- Donor
  - If long-term capital gain, then FMV (if publicly traded security) or Cost (if not) is 100% deductible, to 20% of AGI;
  - If not long-term, or tangible – unrelated, then lower of cost or FMV, 100% deductible, to 20% AGI
  - Subject to itemized deduction phase-out
  - If Partial Interest, no deduction
  - Valuation issues
- Charity

Charitable Planning Update

Planning Options (cont.)

Planning Examples (cont.)

Non-Cash Gift to Split-Interest Entity

- Charitable Remainder Trust
  - Donor
    - If long-term capital gain, then present value of FMV of the remainder is 100% deductible, to 30% of AGI, if remainder charity is public;
    - If long-term capital gain, then present value of FMV (if publicly traded security) or Cost (if not) of the remainder is 100% deductible, to 20% of AGI, if remainder charity is private
    - If not long-term, or tangible – unrelated, then present value of lower of Cost or FMV of remainder is 100% deductible, to 50% AGI if public, 20% if private
    - Subject to itemized deduction phase-out
    - If Partial Interest, no deduction
    - Valuation issues
  - Charity

Charitable Planning Update

Planning Options (cont.)

Planning Examples (cont.)

Non-Cash Gift to Split-Interest Entity (cont.)

- Charitable Lead Trust – Grantor Trust
  - Donor
    - If long-term capital gain, then present value of FMV of the income stream is 100% deductible, to 30% of AGI, if lead charity is public;
    - If long-term capital gain, then present value of FMV (if publicly traded security) or Cost (if not) of the income stream is 100% deductible, to 20% of AGI, if lead charity is private
    - If not long-term, or tangible – unrelated, then present value of lower of Cost or FMV of income stream is 100% deductible, to 50% AGI if public, 20% if private
    - Subject to itemized deduction phase-out
    - If Non-Grantor Trust, no deduction
    - If Partial Interest, no deduction
    - Valuation issues
  - Charity