Bloomberg Tax

Daily Tax Report®

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Charitable Contributions

INSIGHT: Demystifying the New Tax Incentive for Gifts of Cash

BY ALEXANDER L. REID AND CAROLINE WALDNER

One bright spot in an otherwise bleak outlook for donors and charities in the aftermath of Pub. L. No. 115-97 (commonly known as the ''Tax Cuts and Jobs Act'') is the new higher percentage limit for gifts of cash. Donors may now offset up to 60 percent of their contribution base. What's complicated, however, is how the new 60 percent limit interacts with the other percentage limits for gifts of property, including appreciated stock, and gifts to private foundations. This article endeavors to clarify matters, with the caveat that Treasury and Internal Revenue Service regulators may read the statute differently. In addition, donors are advised to seek tax counsel as their personal facts and circumstances may affect their ability to realize the full tax benefit of the charitable contribution deduction, including the new 60 percent limit.

Background Before the new legislation was enacted, individuals who contributed cash to tax-exempt organizations listed in tax code Section 170(b)(1)(A) were allowed to itemize and deduct the contributions against their income to the extent such deductions did not exceed 50 percent of their contribution base (adjusted gross income computed without regard to any net operating loss carryback to the taxable year). Sections 170(b)(1)(A) and 170(b)(1)(H).

The Tax Cuts and Jobs Act introduced new Section 170(b)(1)(G), a temporary provision (applicable to taxable years beginning after Dec. 31, 2017 through taxable years beginning before Jan. 1, 2026) which increases the deductibility threshold for charitable cash contribution from 50 percent to 60 percent of the contribution base, with a five-year carryforward of any excess cash contributions. Section 170(b)(1)(G)(i) and (ii).

This provision is intended to encourage donors whose high level of charitable contributions, in combination with low amounts of taxable income, limit their ability to claim charitable contribution deductions. As a matter of demographics, retirees typically have less taxable income when they stop receiving a salary and they may also have tax-exempt investment income from municipal bonds, yet they may have more assets available to donate to charity if they have already met their retirement and estate planning needs. Other philanthropists who may butt up against the percentage limits are those who have recently experienced a liquidity event and may have large amounts of cash on hand that they wish to donate rather than reinvest. The new 60 percent limit can be helpful for these and others seeking to make large contributions in a particular tax year.

A Trap for the Unwary? There is broad agreement among tax practitioners, legislation counsel, and regulators at the IRS and Treasury that the statutory language regarding the percentage limits under Section 170(b) is complex, confusing, and has room for improvement. Some have argued that the new provision, Section 170(b)(1)(G), creates a trap for the unwary whereby the gift of ''even one dollar of non-cash assets'' makes the new 60 percent AGI limit unavailable. See AICPA Sends Congress Recommended Technical Cor-

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rections to New Tax Law (Feb. 22, 2018), available at https://www.aicpa.org/press/pressreleases/2018/aicpa-sends-congress-corrections-to-new-tax-law.html.

Overhauling the percentage limitations with revised statutory text to clarify their interaction may well be a good idea; however, in the interim we are confronted by the task of statutory interpretation.

In our view, new Section 170(b)(1)(G)(iii), which coordinates the 60 percent limitation for cash with the other limitations under Section 170, should be interpreted as reducing the 50 percent and 30 percent limits for the tax year in question by the aggregate cash contributions allowed under the 60 percent limit for the year.

The cash contributions under the 60 percent limitation of Section 170(b)(1)(G) reduce the contributions taken under the other subsections of 170(b) (up to 50 percent of the contribution base). As a result, donors must make cash contributions in amounts that exceed their contribution bases in order to achieve a deduction that exceeds 50 percent of the contribution base. In other words, the cash contributions first reduce the other limits before tapping into the last 10 percent of the 60 percent limit under Section 170(b)(1)(G).

Here are two examples to illustrate the rule:

- *Example 1*. Individual A has Adjusted Gross Income of $200,000 and no charitable contribution carryforwards from a prior year. A has several charitable contribution limits to contend with: the 60% limit=$120,000 and the 30% limit=$60,000. Assume that A contributes $50,000 of cash to a public charity and $15,000 of publicly traded securities to a private foundation. A can deduct the full $50,000 of cash; however, the cash contribution applies *first* to reduce A's 30% limit. So the $60,000 30% limit is reduced by the $50,000 of cash, leaving only $10,000 of headroom for the 30% contribution. As a result, only $10,000 of the $15,000 contribution of publicly traded securities to the private foundation is deductible.

- *Example 2*. Individual B has the same contribution base and limits as Individual A; however, B contributes $110,000 of cash to a public charity and $50,000 of publicly traded securities to a private foundation. B can deduct the entire $110,000 cash contribution (because it is below the 60% limit of $120,000), but will not be able to deduct any of the $50,000 in securities contributed to the private foundation because the 30% limit has been fully exhausted.

Conclusion The gift of the publicly traded securities does not reduce or eliminate the higher 60 percent limit on cash; however, a mix of cash and securities does make it more difficult to take full advantage of the 60 percent limitation.

Alexander Reid, a partner in Morgan Lewis's Washington, D.C., office, advises tax-exempt organizations in planning, structuring, and transactional matters. Waldner is an associate in the firm's Washington office.

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