

# Sustainable Philanthropy

Advising and Representing *Exempt Organizations* and *Donors*

Donor Care: Charity in its Tax Context  
Competence, Delivery, and Acceptance

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## *Sustainable Philanthropy – Donor Perspectives*

### *Overview and Fundamentals – Charity and its Tax Context – Competence, delivery, and Acceptance*

To encourage philanthropy and charitable giving, the Internal Revenue Code (IRC) permits an *Itemized Deduction*<sup>1</sup> (and a very limited and temporary *Deduction from Gross Income*<sup>2</sup>) for *Donors* who donate money or property to *Qualified Organizations*. These provisions encourage philanthropy by reducing the after-tax cost of giving.

*Donors* who take a *Charitable Deduction* must meet both general statutory requirements, and specific requirements for the class of deduction. e.g., *Art, Conservation Easements*, IP and royalty interests, real property, and automobile donations must meet both the general deduction requirements and a set of additional requirements. Before a *Donor* contributes, it is useful to review what the IRS says about the subject.<sup>3</sup>

According to the IRS, A deductible charitable contribution<sup>4</sup> is:

- a voluntary gift of
- money or property,
- made with Charitable Intent
- without receipt of adequate consideration
- to or for the use of a *Qualified Organization*.

The statute further requires that the contribution “shall be allowable as a deduction only if verified under regulations prescribed by the Secretary.” Those Regulations impose *Donor* substantiation and documentation requirements that may also be specific to the type of property conveyed.

The Code’s definition presupposes that we know what constitutes a “gift” or “charitable contribution.” The IRC states that “a charitable contribution is made when all intervening interests in, and rights to actual possession or enjoyment of, the property have expired, or are held by persons other than the taxpayer, or those standing in a relationship to the taxpayer.”

While helpful, that definition is incomplete. It has therefore been left to the courts to make it more specific. Court decisions have addressed, and for the most part resolved, the threshold issues:

**Are “gifts” and “charitable contributions” similar enough, in this context, to be considered the same?**

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<sup>1</sup> IRC §170, applicable to Federal Income Tax. IRC §642(c) governs trust and estates’ charitable income tax deductions. Estate tax charitable deductions are governed by IRC §§2055 and/or 2522

<sup>2</sup> Coronavirus Aid, Relief, and Economic Security (CARES) Act created a \$300 “above the line” charitable deduction for non-itemizers. The Consolidated Appropriations Act, 2021 (the CAA) extends that option to 2021.

<sup>3</sup> [Publication 526, Charitable Contributions](#) (PDF), [Publication 561, Determining the Value of Donated Property](#) (PDF), and [Publication 1771, Charitable Contributions - Substantiation and Disclosure Requirements](#) (PDF)

<sup>4</sup> IRC §170(c)

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Several decisions assert that the terms are synonymous in their tax context.<sup>5</sup> In *Duberstein*<sup>6</sup> the Supreme Court noted that the word “gift” for taxation purposes does not have the same meaning as “gift” in common law terms. “The course of decision here makes it plain that the statute does not use the term “gift” in the common law sense, but in a more colloquial sense. This Court has indicated that a voluntarily executed transfer of his property by one to another, without any consideration or compensation therefor, though a common law gift, is not necessarily a “gift” within the meaning of the statute. For the Court has shown that the mere absence of a legal or moral obligation to make such a payment does not establish that it is a gift.”

### **What elements and actions are necessary to effectuate a gift or charitable contribution?**

In an early case,<sup>7</sup> the court identified the essential elements of gift or charitable transactions:

- (1) a donor competent to make the gift,
- (2) a donee capable of taking the gift,
- (3) a clear and unmistakable intention on the part of the donor to absolutely and irrevocably divest himself of the title, dominion and control of the subject matter of the gift, in praesenti,
- (4) the irrevocable transfer of the present legal title and of the dominion and control of the entire gift<sup>8</sup> to the donee so that the donor can exercise no further act of dominion or control over it,
- (5) a delivery by the donor to the donee of the subject matter of the gift or of the most effectual means of commanding the dominion of it, and
- (6) acceptance of the gift by the donee.

Several of these criteria parallel code provisions.<sup>9</sup> We discuss them in that framework. The remaining criteria amplify the statutory definition and invoke additional concepts:

### ***Competence***

**Donor competence is sometimes contested and depends, in most cases, on state rules governing competency to contract.**<sup>10</sup> Fortunately, those rules are reasonably consistent across jurisdictions and often parallel the provisions for contractual competence. For example, California statute provides that:

a person has the capacity or competence to enter into a contract if the person has the ability to understand and appreciate, to the extent relevant, all of the following: (a) The rights, duties, and responsibilities created by, or affected by the decision. (b) The probable consequences for

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<sup>5</sup> *Seed v. Commissioner*, 57 T.C. 265, 275 (1971); *DeJong v. Commissioner*, 36 T.C. 896, 899 (1961), aff’d 309 F. 2d 373 (9th Cir. 1962) – citing *Channing v. United States*, [4 F.Supp. 33, 34](#) (D. Mass.), affirmed per curiam 67 F.2d 986 (C.A. 1), certiorari denied 291 U.S. 686

<sup>6</sup> [Commissioner v. Duberstein](#), 363 U.S. 278, 285 (1960)

<sup>7</sup> *Weil v. Commissioner*, 31 B.T.A. 899, 906 (1934)

<sup>8</sup> Subsequent law carves out minimal exceptions to this “partial interest rule” for *Conservation Easements* (IRC §170h) and *Grantor Retained Interests* (Many in IRC Subchapters B and J).

<sup>9</sup> Notably, Item #s 2, 3, and 4

<sup>10</sup> Competence litigation occurs most often in a civil context: dispossessed heirs contesting the legacy choices made by the donor. As such, they are not – strictly speaking – tax issues, but may affect tax outcomes for the grantor and the dispossessed heirs.

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the decisionmaker and, where appropriate, the persons affected by the decision. (c) The significant risks, benefits, and reasonable alternatives involved in the decision.<sup>11</sup>

In most states, several potential donor groups are identified as “not competent to contract” or permitted to void previously agreed contracts:<sup>12</sup>

- Minors retain the right to void most agreements until they reach the age of majority, which differs among the states.
- Persons who lack mental capacity, and/or their appointed guardian or conservator, may void agreements made while that condition is extant.<sup>13</sup>
- Persons under the influence of alcohol or drugs may void agreements made while they are “completely out of it” – if the other (sober) party knows, and takes advantage of, that condition.<sup>14</sup>

### *Delivery*

**Delivery is defined by state conventions.**

Most states statutes, and IRS treatment of donation transactions, focus on whether *actual dominion and control* passes from the donor to the donee.<sup>15</sup> Common rules include:

- Actual (manual) delivery is necessary if the subject of the gift is capable of manual delivery.
- If the gift is not capable of manual delivery, it must be delivered as completely as possible and must clearly manifest the donor’s intention to divest themselves of title and possession.
- Delivery of a deed may substitute for delivery of the gift where actual delivery is inconvenient or impracticable.<sup>16</sup>
- A duly executed deed of gift satisfies the delivery requirement, even if physical possession is deferred.<sup>17</sup>

If delivery is made by deed, that deed and its accompanying exhibits must be recorded in the appropriate recordation office in the jurisdiction where the property is located.<sup>18</sup> Generally, state law determines the donor or donee’s interest in property – Federal Law determines tax consequences.<sup>19</sup> Hence, the timing and completion of delivery may vary based on jurisdiction:

<sup>11</sup> CA Probate Code, Title 17, §§ 810-813, Legal Mental Capacity

<sup>12</sup> *Exempt Organizations* may wish to include similar restrictions in their *Gift Acceptance Policies*. See our materials on <<*Gift Acceptance Policies*>>

<sup>13</sup> This, often accompanied by a duress or undue influence allegation, is the most frequently argued cause of action for revoking a donation or gift. States apply different criteria and standards for determining competency in these disputes: Most states apply a “cognitive test;” can (does, did) the donor understand the meaning and effect of the words comprising the transaction? Other states apply a “motivational test;” can (does, did) the donor have the ability to judge whether or not to enter into the agreement? or an “affective test;” is the donor unable to act in a reasonable manner and does the donee have reason to know of the condition? Courts reach disparate conclusions using different criteria. The *Exempt Organization*’s defenses or remedies against these arguments also vary from state to state. Consult local counsel for details in any instance.

<sup>14</sup> *Thackrah v. Haas*, 119 U.S. 499 (1886) is the paradigm case in contract law. We could not find a parallel case involving charitable donors.

<sup>15</sup> *Greer v. Commissioner*, 70 T.C. 294 (1978), acq. 1979-2 C.B. 2 (1979), aff’d 632 F.2d 1044 (6th Cir. 1980)

<sup>16</sup> *Bennett v. Commissioner*, T.C. Memo 1991-604

<sup>17</sup> *Winokur v. Commissioner*, 90 T.C. 733 (1988), acq. 1989-1 C.B. 1.

<sup>18</sup> Treas. Reg. § 1.170A-14(g)(1)

<sup>19</sup> *United States v. Nat’l Bank of Commerce*, 472 U.S. 713, 722 (1985); *Woods v. Commissioner*, 137 T.C. 159, 162 (2011); and *Bennett v. Commissioner*, T.C. Memo 1991-604

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Example 1: New York Law requires that all deeds and any supporting documents be recorded. Thus, a deed that purported to transfer development rights did not perfect delivery because an architectural drawing it referred to was not recorded.<sup>20</sup>

Example 2: Georgia law holds that documents incorporated into a deed by reference do not have to be recorded. This mandated a contrary conclusion in *Butler v. Commissioner*.<sup>21</sup>

In view of the contradictory findings in these and other cases, it behooves *Donors* to retain local counsel (local to the property and/or donee's situs) when they donate real property, easements, or other property that requires recordation.<sup>22</sup>

If a deed of gift satisfies the state's delivery requirements, the gift is effective on delivery and acceptance of the executed deed of gift. The donee acknowledges that date when completing Form 8283. The Donor reports the contribution as of that date.

### **Acceptance**

**Acceptance of a gift is generally assumed unless the donee rejects the gift.**

Courts and the IRS ordinarily assume that a proffered gift has been accepted if the gift is beneficial to the *Exempt Organization* unless some event, such as *Donee* rejection, occurs to indicate that the gift is (was) not accepted. From the *Donor's* perspective, this implies that a gift has been accepted unless the *Donee* declines or returns the gift.

*Donees* may decline or return a gift for any number of reasons, and are not obligated, except by common courtesy, to disclose those reasons.<sup>23</sup> Gifts are considered declined unless the donee unconditionally agrees to take the gift subject to donor-imposed restrictions – i.e., Donees must accept or negotiate donor-restrictions before accepting the Donor's proffer. As under contract law principles, if the Donee declines the gift, they cannot "retroactively accept" it or "change their mind" unless the Donor once again proffers it. Similarly, Donors may revoke the gift offer any time before acceptance, but a proffer and acceptance must render the gift irrevocable.<sup>24</sup>

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<sup>20</sup> [Herman v. Commissioner, T.C. Memo. 2009-205](#)

<sup>21</sup> [Butler v. Commissioner, T.C. Memo. 2012-72](#)

<sup>22</sup> One might also recommend that advisors do the same – and encourage donors to do so.

<sup>23</sup> See our materials on <<[Gift Acceptance Policies](#)>> for examples.

<sup>24</sup> As with almost all tax rules, there are exceptions.