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Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:

CC:PSI:2-PLR-104418-03

Date:

May 27, 2003

LEGEND

A =

B =

Corporation =

Plan =

D1 =

y =

Dear :

This letter responds to a letter from your authorized representative dated June 13, 2002, and subsequent correspondence, requesting rulings under §§ 170, 664, 1223 and 2522 of the Internal Revenue Code concerning the effect of a contribution to a charitable remainder unitrust (CRUT). With respect to this transaction, the Employee Plans Office of the Internal Revenue Service previously issued rulings within their jurisdiction to you.

The information submitted states that A was employed by Corporation and was a participant in the Corporation's profit sharing plan (Plan) for more than five years. A retired from her employment on D1. The Plan permits its participants to elect to have lump-sum distributions paid out in-kind with Corporation stock. Corporation distributed all of A's assets in Plan to her within one year of retirement. Currently, A holds y shares of corporation stock that include net unrealized appreciation as defined under § 402(e)(4) (the "non-rollover shares").

A proposes to contribute the non-rollover shares to a CRUT. A represents that the CRUT complies with the requirements of § 664 and the regulations thereunder. Under the terms of the CRUT, a unitrust amount will be paid to A and B during their lifetimes. The remainder beneficiaries will be public charities as defined under §§ 170(c) and 170(b)(1)(A).

A ruling was requested that A will not recognize any immediate taxable income, gain, or loss from the act of contributing the non-rollover shares received from the Plan to the CRUT.

Generally, a donor will not recognize gain on the contribution of appreciated property to charity. However, if the donee is merely carrying out a prearranged plan for the realization of the income from the donated property, the donor may be taxed on the appreciation. See Blake v. Commissioner, 697 F.2d 473 (2d Cir. 1982), aff'g T.C.M. 1891-579 (donee obligated to sell appreciated stock received from the donor and use the proceeds to buy donor's yacht at an inflated price).

In this case, there is no indication that there is a pre-arranged plan involving the CRUT's disposition of the shares contributed by A. Accordingly, assuming that the CRUT qualifies as a charitable remainder unitrust under § 664, we conclude that A will not recognize gain or loss as a result of her contribution of stock to the CRUT.

A ruling was requested that A will receive an income tax deduction for the contribution of the non-rollover shares to the CRUT equal to the fair market value of the stock at the time of transfer less the present value of A's retained unitrust interest.

Section 170(a) allows, subject to certain limitations, a deduction for contributions and gifts to or for the use of organizations described in § 170(c), payment of which is made within the taxable year. Section 170(f)(2)(A) provides, in relevant part, that no deduction is allowed under § 170 for the value of a remainder interest transferred in trust unless the trust is a charitable remainder trust described in § 664.

Section 1.170A-1(c)(1) provides that, if a charitable contribution is made in property other than money, the amount of the contribution is the fair market value of property at the time of the contribution, reduced as provided in § 170(e)(1) and § 1.170A-4(a).

Section 1.170A-6(b)(2) provides that the fair market value of a remainder interest in a charitable remainder unitrust shall be computed under § 170(e)(1)(A).

Section 170(e)(1) reduces the amount of a charitable contribution of appreciated property in three situations: (a) where there is ordinary income or short-term capital gain; (b) where there is long-term capital gain and the donee is a private foundation; and (c) where tangible personal property is put to an unrelated use by the donee.

The ruling issued by the Employee Plans Office states that the non-rollover shares constitute long-term capital gain property to A to the extent of the original net unrealized appreciation, regardless of the time period between the date these shares were distributed from the Plan and the subsequent sale (or transfer) date. Additionally, the ruling issued by the Employee Plans Office also states that any post-distribution

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gain in excess of the net unrealized appreciation amount will be taxed at the applicable capital gain rate based on the holding period of the stock from the distribution date to the sale or contribution date. Thus, if there is any post-distribution gain on the non-rollover shares and A transfers them to the CRUT within one year of the distribution date, then such gain is short-term capital gain and subject to the terms of § 170(e)(1).

Section 170(e)(1)(A) provides that all contributions of ordinary income property must be reduced by the amount of ordinary income that would have resulted if the donor had sold the contributed property at its fair market value at the time of the contribution. (For purposes of § 170(e)(1)(A), "ordinary income" includes both ordinary income and short-term capital gain property.) Thus, if there is any short-term capital gain on the non-rollover shares at the time they are transferred to the CRUT, then the amount of A's charitable contribution (as calculated under § 1.664-4) must be reduced by the amount of the short-term capital gain pursuant to § 170(e)(1)(A).

To the extent that there is no post-distribution gain in the non-rollover shares, or any such gain constitutes long-term capital gain because more than one year elapses between the distribution date and the date the shares are transferred to the trust, A's contribution of the non-rollover shares to the CRUT is not subject to the reductions of § 170(e).

The amount of A's charitable deduction, however, is subject to the provisions of § 170(b), which provides percentage limitations on charitable contributions made by individuals. Section 170(b)(1)(C) provides that, in the case of a contribution of capital gains property to an organization described in § 170(b)(1)(A), to which § 170(e)(1)(B) does not apply, the total amount of contributions of such property which may be taken into account for determining the income tax deduction shall not exceed 30 percent of the taxpayer's contribution base for the taxable year. A taxpayer's contribution base is his or her adjusted gross income computed without regard to any net operating loss carry backs to the taxable year. § 170(b)(1)(F). Thus, the amount of A's charitable deduction (as calculated pursuant to § 1.664-4) will be limited to 30% of her adjusted gross income for the taxable year, computed without regard to any net operating loss carry backs to that year.

Additionally, a ruling was requested that A will qualify for a gift tax deduction upon A's contribution of the non-rollover shares to the CRUT equal to the fair market value of the stock at the time of transfer less the present value of A's retained unitrust interest.

Rev. Proc. 2003-3, 2003-1 I.R.B. 113, provides a list of those areas under the jurisdiction of the Associate Chief Counsel (Passthroughs and Special Industries) relating to issues on which the Internal Revenue Service will not issue letter rulings. Section 4.01(47) of Rev. Proc. 2003-3 provides that a ruling will not be issued on whether a transfer to a charitable remainder trust described in § 664 that provides for

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annuity or unitrust payments for one or two measuring lives qualifies for a charitable deduction under § 2522(c)(2)(A). Accordingly, we are unable to rule on whether A will qualify for a gift tax deduction.

A ruling was requested that the non-rollover shares transferred to the CRUT will retain A's cost basis and holding period for purposes of any subsequent sale by the CRUT.

Section 1015(a) provides that if the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift, except that if such basis (adjusted for the period before the date of the gift as provided in § 1016) is greater than the fair market value of the property at the time of the gift, then for the purpose of determining loss, the basis shall be such fair market value.

Section 1.1015-1(a) provides that, in general, in the case of property acquired by gift after December 31, 1920 (whether by a transfer in trust or otherwise), the basis of the property for the purpose of determining gain is the same as it would be in the hands of the preceding owner by whom it was not acquired by gift. The same rule applies in determining loss unless the basis (adjusted for the period prior to the date of the gift in accordance with §§ 1016 and 1017) is greater than the fair market value of the property at the time of the gift. In such case, the basis for determining loss is the fair market value at the time of the gift.

Section 1223(2) provides that, in determining the period for which the taxpayer has held property however acquired, there shall be included the period for which the property was held by any other person if, under Chapter 1 of the Code, the property has, for the purposes of determining gain or loss from a sale or exchange, the same basis in whole or in part in the taxpayer's hands as it would have in the hands of the other person.

The CRUT's basis in the non-rollover shares contributed by A to the CRUT will be determined under § 1015. As § 1015 provides that the CRUT has the same basis in the non-rollover shares as A has, then under § 1223(2) A's holding period may be added to the CRUT's holding period. Thus, if the non-rollover shares are assets with long-term gain in A's hands, then they also constitute long-term capital gain assets to the CRUT.

A ruling was requested that the gain from any subsequent sale by the CRUT of the non-rollover shares will be exempt from immediate direct taxation to the CRUT (assuming the CRUT does not have unrelated business taxable income (UBTI) in the year of sale) and to A.

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Section 664(c) provides that a CRUT shall, for any taxable year, not be subject to any tax imposed by subtitle A, unless such trust, for such year, has unrelated business taxable income (UBTI) (within the meaning of § 512, determined as if part III of subchapter F applied to such trust).

Based on the facts and representations submitted, we conclude that the gain from any subsequent sale by the CRUT of the non-rollover shares will not be subject to tax, unless the CRUT, for the year of such sale, has UBTI. The amount of any gain to the extent of the net unrealized appreciation, from the sale of the non-rollover shares will be characterized as capital gain from the sale of capital assets held in excess of 12 months for the purposes of the distribution characterization rules described in § 664(b) and § 1.664-1(d). Gain in excess of the net unrealized appreciation will be characterized according to the holding period of the stock from the distribution date to the sale date.

Except as specifically set forth above, no opinion is expressed as to the federal tax consequences of the above described facts under any other provision of the Code. Specifically, no opinion is expressed concerning whether Trust is or was a charitable remainder unitrust within the meaning of § 664(d)(2).

This ruling is directed only to the taxpayer on whose behalf it was requested. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Pursuant to a power of attorney on file with this office, a copy of this letter is being sent to A's authorized representative.

Sincerely yours,

J. THOMAS HINES
Chief, Branch 2
Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures: 2

Copy of this letter

Copy for § 6110 purposes