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Giving Around the Globe

Orange Coast Estate Planning Council - May 24, 2022

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Deductions Allowed

- U.S. Citizens
 - Deduction from U.S. income tax under IRC 170
 - Deduction from estate tax under IRC 2055
 - Deduction from gift tax under IRC 2522
- Non-U.S. Citizens
 - Permanent residents who are also U.S. domiciliaries are allowed the same deductions
 - Nonresidents are allowed deduction against U.S. source income

Deduction Limitations

- Individual limits based on AGI
- Gifts to public charities (“50% limit orgs”)
 - 100% of AGI for cash gifts (60% for DAFs)
 - 50% cap on non-cash gifts
 - 30% cap on gifts of capital gain property
- Gifts to private non-operating foundations
 - 30% cap on gifts
 - 20% cap on gifts of capital gain property
- Separate deduction reduction rules

Deduction Limitations cont'd

- Corporate limits
 - Limited to 10% of taxable income under IRC 170(b)(2)(A)
- Trusts and estates
 - Generally unlimited fiduciary income tax deduction under IRC 642(c)
 - Must be permitted by governing instrument
 - Must be paid out or permanently set aside for charitable purposes during tax year for which deduction is claimed

Private Foundations

- Default for all 501(c)(3)s under IRC 509(a)
- Most corporate and family foundations
- Non-operating vs. operating vs. conduit
- Excise taxes

Organizations exempt under IRC Section 501(c)(3) are further classified as either public charities or private foundations. We determined you're a public charity under the IRC Section listed at the top of this letter.

Our records also indicate that you are not a private foundation within the meaning of section 509(a) of the Code because you are described in section(s) 509(a)(1) and 170(b)(1)(A)(vi).

Public Charities (50% Orgs)

- Serve the public or a broad enough class
- Defined under IRC 509(a)(1) & 170(b)(1)(A)
 - Houses of worship
 - Education organizations
 - Hospitals or medical research organizations
 - Government units
 - Etc.

Public Charities cont'd

- Publicly supported
 - *Donative* – receives more than 1/3 support via contributions (IRC 509(a)(1))
 - *Revenue-based* – receives more than 1/3 of revenue via service-oriented fees (IRC 509(a)(2))
 - *Cannot* receive more than 1/3 of revenue via gross investment income.
- Supporting organizations under IRC 509(a)(3) are discussed later

The Rub – the U.S. Charity Limitation

- Individual deductions only for gifts to U.S. charities under IRC 170(c)(2)(A)
 - Earmarking for use outside U.S. is not allowed
- Corporation deduction only if contributions used within the U.S. under IRC 170(c)(2)
- Trusts and estates allowed unlimited deduction for contributions to foreign charities if used for charitable purposes

Relief Through Income Tax Treaties

Country	Reciprocal Deductibility	Reciprocal Recognition of Exempt Status
Canada*	✓	✓
Germany		✓
Israel*	✓	
Mexico*	✓	✓
Netherlands*		✓

* 50% of org's beneficiaries must be eligible to benefit under the treaty - e.g., by being residents of one of the countries

U.S. Charities with Foreign Activities

- U.S. public charity required
- Activity that is charitable if carried out in the U.S. is also charitable activity if carried out in a foreign country
- No deduction if gift is earmarked for a foreign donee; U.S. charity cannot serve as a conduit for foreign activity
- Think of the American Red Cross

“Friends Of” Organizations

- U.S. public charities meant to aid programs operated by non-U.S. charities
- May be created to receive tax-deductible contributions; see Rev. Rul. 66-79
- Usually satisfy the public support test under IRC 509(a)(1) but could use the revenue test under IRC 509(a)(2)
- Think of Doctors Without Borders

Supporting Orgs Not Really a Choice

- Type I SO ("operated, supervised on controlled by") structure - a disallowed conduit arrangement
- Type II SO ("supervised or controlled in connection with") structure - control by foreign org is not allowed
- Type III SO ("operated in connection with") structure - prohibited under IRC 509(f)(1)(B)

Expenditure Responsibility

- U.S. private foundation engaged in foreign grantmaking
- Exercise expenditure responsibility over grants to foreign orgs or else the grant is a taxable expenditure (triggering excise taxes and the need to correct)
- Foreign grantee that has not filed for U.S. recognition of exempt status must segregate the funds

Expenditure Responsibility cont'd

- Grants to (1) foreign governments, (2) agencies thereof, and (3) international orgs recognized under 22 U.S.C. 288 do not require expenditure responsibility or equivalency determination (discussed below).
 - Grant paperwork must document that grant is made for charitable purposes, not for general purposes of the government

ER Req'ts under IRC 4945(h)

- Pre-grant inquiry
- Written grant agreement obligating grantee to return unused funds
- Grantee must send annual reports on use of funds
- Grantee makes books and records available
- Grantee agrees not to use funds for non-exempt activity, esp. political or legislative
- Grantmaker updates IRS annually

Equivalency Determination Instead?

- Foundation makes a good faith determination that foreign org would qualify as exempt if it had applied for US recognition as public charity
- Allowed under Treas. Reg. 53.4945-5(a)(5)
- Now only one option: opinion of counsel

ED by Opinion of Counsel

- Counsel should review
 - Foreign org's governing documents
 - Description of the grantee's charitable purposes
 - Relevant statutory law
 - A demonstration that grantee does not engage in non-charitable activity and does not allow individual private benefit
 - A demonstration that grantee does not engage in political or legislative activity
 - Supporting financial data

Special Private Foundation Concerns

- Inexperienced grantmaking PFs may decide to make grants to more experienced grantmaking PFs
- Such grants do not count toward minimum distribution requirements unless:
 - Grantee must distribute by end of year 2
 - Grant must be to public charity or else ER requirements apply
 - Grant will not count toward grantee's required minimum distribution

Foreign Corrupt Practices Act (FCPA)

- Domestic charities are prohibited from making contributions to terrorist groups or individuals associated with them
- The U.S. Office of Foreign Assets Control (OFAC) maintains an online searchable database of prohibited grantees
- Ideally U.S. org's governing documents will specify process it will use in screening and records will reflect all efforts to screen

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