Dusting Off the Old Charitable Remainder Trust and Advanced Structures

Reynolds T. Cafferata
Rodriguez, Horii, Choi & Cafferata LLP

During the 1990's, rapid appreciation of assets and a higher capital gains tax rate made charitable remainder trusts a popular charitable, financial and tax planning tool. Flat or declining asset values in the 2000's combined with lower tax rates diminished interest in charitable remainder trusts. The stock market is back at its pre-crash levels, real estate markets are strengthening, and tax rates are up. Once again planners are dusting off the old charitable remainder trust for the charitable, financial and tax benefits that it can provide to donors.

While many charitable remainder trust donors will be able to meet their needs with traditional charitable remainder trust structures, some donors need more advanced planning. Donors who want to control distributions from the charitable remainder trust, donors with S corporation stocks, and donors with encumbered assets all require special planning to implement a charitable remainder trust. This article reviews charitable remainder trust requirements, analyzes the tax benefits of the charitable remainder trust and the role appreciation plays, and discusses solutions for complicated situations.

Basic Requirements for a Charitable Remainder Trust

Since it may have been some time since a planner worked with a charitable remainder trust or a newer planner has not implemented a charitable remainder trust, the following is a review of the basic requirements.

A charitable remainder trust makes payments to beneficiary for life or a term of years[1]. At the end of the term of payments to the beneficiary, the assets remaining in the trust are distributed to one or more charitable organizations.[2] In most instances, the beneficiary of the charitable remainder trust is a natural person. If the beneficiary of the trust is a natural person, the term of the payments can be that person's lifetime or a term of years up to 20 years.[3] If the beneficiary is not a natural person such as a corporation or a partnership, the term of the charitable remainder trust must be a term of years not in excess of 20 years.[4]

[1] Multiple beneficiaries such as a husband and wife or parent and child are permitted.
[2] Internal Revenue Code ("IRC") §664(d)(1)(C) and (d)(2)(C).
[3] IRC §664(d)(1)(A) and (d)(2)(A).
[4] *Id.*

The payment to the beneficiary of the charitable remainder trust can be a fixed dollar amount paid annually or a fixed percentage of the value of the trust's assets determined and paid annually.[5] If the payment to the beneficiary is a fixed dollar amount, the trust is referred to as a charitable remainder annuity trust.[6] If the payment to the beneficiary is a fixed percentage of the value of the charitable remainder trust assets, trust is referred to as a charitable remainder unitrust.[7]

The charitable remainder annuity trust pays a fixed dollar amount to the beneficiary each year.[8] The amount must equal or exceed 5% of the value of the assets on the date that trust is created.[9] In addition, using IRS actuarial assumptions, there must be no more than a 5% probability that the charitable remainder annuity trust assets will be exhausted prior to the termination of the trust.[10] Only a single contribution can be made to a charitable remainder annuity trust. After the trust is created, assets cannot be added to it.[11]

The charitable remainder unitrust pays a fixed percentage of the value of the assets to the beneficiary determined annually.[12] That percentage must be at least 5%, but not more than 50%. A charitable remainder unitrust also may provide that if the trust accounting income is less than the unitrust amount, only the trust accounting income is paid to the beneficiary.[13] When the distribution from the unitrust is limited to its net income, the trust can further provide that when the trust income is less than the unitrust amount in prior years, the difference can be made up in later years if the trust accounting income exceeds the unitrust amount.[14] A final option for charitable remainder unitrust is that the trust can start out with a net income limitation, and then upon the sale of an asset of the trust or some other event not solely in control of the trustee, the trust can change to paying out the unitrust amount without regard to the income of the trust.[15] The change is effective on the January 1 following the year of the sale of the asset or other event that could have triggered the change in methods of the trust.[16] Trust accounting income is determined under state law subject to certain regulatory limits.

A donor who creates charitable remainder trust is entitled to an income tax deduction for the present value of the remainder interest in the trust passing to charity.[17] The present

---

5 *Id.*
6 *See* IRC §664(d)(1).
7 *See* IRC §664(d)(2).
8 IRC §664(d)(1)(A).
9 *Id.*
10 Rev. Rul. 77-374.
11 IRC §664(d)(1)(B).
12 IRC §664(d)(2)(A).
13 *Id.*
14 IRC §664(d)(3)(B).
15 Treas. Reg. § 1.664-3(a)(1)(i)(c).
16 *Id.*
17 Treas. Reg. § 1.664-3(d).

value is computed based on the payout, the Applicable Federal Rate published by the IRS monthly, and actuarial tables provided by the IRS.[18] The longer the term of the charitable remainder trust, or the higher the payout, the lower the income tax deduction will be. In order to qualify as a charitable remainder trust, the present value of the remainder interest in the trust on the date it was established must equal at least 10% of the value of the trust.[19] Thus a charitable remainder trust funded with $1 million must have payment terms that yield a reminder valued and deduction of at least $100,000.

The charitable remainder trust is exempt from taxation.[20] This advantage of the charitable remainder trust is often more significant than the charitable income tax deduction that the donor receives for establishing the charitable remainder trust. The tax exempt status of the trust allows the trust to sell an appreciated asset and reinvest the proceeds without any reduction for taxes. If the taxpayer has little or no basis in an asset, the amount that can be invested by the charitable remainder trust selling the asset may be 30% or 40% more than could be invested after a taxable sale of the asset.

Payments from the charitable remainder trust to the beneficiary are taxed under what is referred to as the "four-tier" system.[21] Under this system, the payment to the beneficiary is first taxed as ordinary income until all of the ordinary income received by the trust has been distributed.[22] Second, payments are taxed as capital gain until all capital gains from the trust have been distributed.[23] Third, after all taxable income has been distributed, tax exempt income would be distributed to the beneficiary.[24] Fourth and finally, distributions would carry out the taxpayer's basis in the contributed asset.[25] Within each of the four tiers, classes of income that are taxed at higher rates come out before classes of income taxed as a lower rate. Accordingly, interest income taxed at rate of 39.6% would come out in the ordinary income tier before dividends taxed at a 20% rate. In the capital gains tier, short-term capital gains come out before long term capital gains.

Charitable remainder trusts are subject to a special excise tax on unrelated business taxable income ("UBTI").[26] Charitable remainder trust UBTI is taxed at a rate of 100%.[27] UBTI arises from the direct conduct of a business such as the charitable remainder trust operating a restaurant as a sole proprietorship.[28] UBTI also can flow through partnerships and LLC's directly conducting a business. Dividends, interest, rent from

---

18 IRC § 7520
19 IRC §664(d)(1)(D).
20 IRC § 664(c)(1).
21 *See* IRC §664(b).
22 IRC §664(b)(1).
23 IRC §664(b)(2).
24 IRC §664(b)(3).
25 IRC §664(b)(4).
26 IRC § 664(c)(1).
27 IRC § 664(c)(2).
28 *See* IRC §512.

real property and royalties are not UBTI.[29] Another source of UBTI is income that is derived from a debt finance asset.[30] Accordingly, dividends from a stock for which there is acquisition indebtedness will be UBTI. Because acquisition indebtedness can arise simply from a debt that was incurred in order to allow the continued holding of an asset in the charitable remainder trust, a charitable remainder trust generally should not incur any debt. Below is a discussion of some limited circumstances where it may be possible to have an asset subject to an encumbrance held by a charitable remainder trust.

A charitable remainder trust cannot be a grantor trust.[31] A grantor trust is a trust for which the creator of the trust is treated as the owner of the income of the trust for income tax purposes.[32] A variety of rights retained by the grantor or related parties can cause grantor trust status. Specifically in the context of charitable remainder trust, the Internal Revenue Service has ruled that a charitable remainder trust would be treated as a grantor trust if property is transferred to the charitable remainder trust subject to a debt for which the lender would have personal recourse to the grantor.[33] In that situation, since the charitable remainder trust is not qualified, the donor is not entitled to an income tax deduction, the trust is not exempt from tax, and the donor will owe gift tax on the remainder value of the trust.

Charitable remainder trusts are not eligible shareholders for S-Corporations.[34] If S-Corporation stock is transferred to a charitable remainder trust, the S election for the corporation is terminated. An S election allows the income of the corporation to be taxed only at the shareholder level rather than taxed at the corporate level, and then taxed again as dividend income to the shareholder. A strategy for having an S-Corporation create a charitable remainder trust is discussed below.

The above discussion is a general description of the rules applicable to charitable remainder trusts to provide context for a discussion of the potential benefits of charitable remainder trusts in the current tax and financial environment. Many of the rules have been simplified and stated in generalities. For guidance in the structuring of a charitable remainder trust transaction, a planner should consult a comprehensive guide such as Conrad Tietell's Deferred Charitable Giving or Tax Economics of Charitable Giving.

Drivers of Charitable Remainder Trust Planning

Although a charitable remainder trust can be used in a variety of contexts, most frequently a charitable remainder trust is set up by a donor to provide income to the

---

[29] IRC §512(b).
[30] *See* IRC §514.
[31] *See* Treas. Reg. §1.664-1(a).
[32] *See* IRC §677.
[33] Priv. Ltr. Rul. 9015049.
[34] *See* IRC §1361(b)(1).

donor, or the donor and a spouse for life with the remainder passing to charity. Generally, the donor is not in the financial position to give away the asset during lifetime because the donor needs the income that is generated by the asset. One option for the donor would be to retain the asset for life and make a bequest to charity. The charitable remainder trust is potentially more tax advantageous because it provides an immediate income tax deduction for the remainder value that will pass to charity at the donor's death. This deduction, however, will represent only a fraction of the value of the assets, possibly as little as 10%. The donor needs to weigh the benefit of the deduction against the loss of access to the principal of the asset.

The asset, however, may not be in the form that the donor desires. The asset may be undeveloped land that does not generate current income, or may be a concentrated stock position that is creating an excessive risk in the donor's portfolio. In these circumstances, it would be advantageous for the donor to dispose of the asset in order to achieve his or her financial objectives. Here the case for the charitable remainder trust for the donor becomes compelling. Using the charitable remainder trust allows the donor to preserve 30%-40% more of the value of the asset to reinvest to generate income than would be the case if the donor sold the asset outside of the charitable remainder trust. This means that the donor can enjoy significantly higher income from the proceeds of the sale of the asset. Over time, the tax exempt status of the charitable remainder trust may be more beneficial to the donor than the original income tax deduction.

The extent of the advantage of the tax exempt status of the charitable remainder trust is a function of tax rates and the amount of taxable gain that would result from the sale of asset that the donor contributes to the charitable remainder trust. Prior to 2013, taxpayers selling long-term capital gain property paid a federal tax rate of 15% and, in California, a state tax of 9%. Since state taxes are deductible from federal taxable income, the effective tax rate was around 20%. For 2013, federal tax rate on capital gains increased to 20% plus an additional 3.8% Medicare tax for high income taxpayers. Under the Proposition 30, the California tax rate increased to 13.5%. Taking into account the deductibility of the state income taxes, the combined effective rate is still 30% or more. If the taxpayer was selling short-term capital gain property or ordinary income property the combined rates would be 40% or 50%. These new higher tax rates mean the charitable remainder trust preserves a significantly larger portion of an assets value than was the case before the 2013 tax law changes.

The late 2000's, saw a significant decline in asset values across most asset classes. The stock market, however, has recently reached its previous high values. Real estate values, particularly residential real estate are recovering as well. Appreciation of asset values is important for charitable remainder trust planning because the taxes that are avoided by the charitable remainder trust apply only to the appreciation of the value of the asset over the donor's acquisition cost.

Maximizing Income with the Charitable Remainder Trust

If the donor has $1 million worth of appreciated stock in a company that has a basis of zero and it is long-term capital asset, the combined federal and California taxes on the sale of the asset total would be approximately $300,000. Accordingly, the donor would be left with only $700,000 to reinvest and generate income. Assuming the donor was looking for an income of $50,000, the assets would need to generate a rate of return of 7.14%. Alternatively, if the assets generate a rate of return of 5%, the donor would have an income of only $35,000. If the stock was instead placed in a charitable remainder trust, the rate of return of 5% would generate an income of $50,000 a year. At 7.14%, the donor would be receiving $71,400 (all assuming the payout rate matches the income).

Planning Situations

Donors with significant real estate wealth have the option of selling one piece of real property and acquiring another piece of real property without the payment of capital gains tax through use of a section 1031 exchange. Section 1031 allows a person to avoid payment of taxes on the gain from that sale of real estate if that person purchases real estate of a like kind of equal or greater value to the property that was sold. If such a person wishes to acquire an asset other than real estate of a like kind, however, taxes must be paid on the gain. If the donor is holding property that was acquired at the end of the series of the like kind exchanges, the donor's basis may be little or nothing, particularly if the donor had deducted depreciation with respect to the property. Assuming that the property does not have debt on it, or the donor can pay off the debt prior to contributing the property to the charitable remainder trust, the charitable remainder trust may be an ideal way for the donor to sell the real property without having to acquire another piece of real property.

As stated in the example above, founders of companies often have little or no basis in their stock. Individuals who have acquired stock for investment, however, may also have highly appreciated stock positions. Currently, early investors in Google and Apple would have significant appreciation in their positions. Should these donors wish to diversify out of the appreciated position, the charitable remainder trust is way to do that and maximize the ability to reinvest the proceeds of the sale.

Controlling the Charitable Remainder Trust Payout

Traditional charitable remainder trusts offer only limited options regarding the timing of the charitable remainder trust payout to their beneficiary. A donor who wants to defer payments to a future date may be able to use a flip trust to achieve that goal, but it is a one-time change that then sets the payout at the unitrust amount after the date of the flip. Some donors may desire to have more flexibility on timing and amount of payments for the life of the CRT.

Deferral of Income

The income exception and makeup provision of a net income with makeup charitable remainder unitrust ("NIMCRUT") can be used to control the timing of distributions from the NIMCRUT to the beneficiary. Because of the income exception, the NIMCRUT is never required to pay to the beneficiary more than its income. The timing of distributions is controlled by controlling when the NIMCRUT has income that it will be required to distribute. Trust income is defined under state law principal and income acts.[35] Because many trust instruments require distribution of trust income to the beneficiary, trust income is a cash concept. That is, the trust will not have trust accounting income if it does not have a cash receipt. Not all cash receipts are income, however. When the trust receives cash, the trustee must determine whether it is allocable to income or principal. State law and the trust instrument will determine which receipts are allocated to income and which receipts are allocated to principal.[36] In general, under most state law acts, dividends, rents, royalties and interests are allocable to income.[37] Receipts from the sale of capital assets are typically allocable to principal.[38] Many state laws, however, allow the trust instrument to make other provisions.[39] The Treasury Regulations provide that the gain in the value of an asset that occurs before the asset is contributed to a NIMCRUT cannot be allocated to income.[40]

There are several popular techniques to control the timing of trust receipts, and thus control when a NIMCRUT will have trust accounting income. Each technique, however, has disadvantages.

Certain Deferral Structures and Their Problems

Zero coupon bonds do not pay interest during the term of the bond, but only at maturity. Thus, a NIMCRUT that holds a zero coupon bond receives no trust accounting income during the term of the bond and would not be required to make distributions to the beneficiary. Using zero coupon bonds to defer income, however, limits the NIMCRUT to a single class of assets that do not provide the best investment performance over a long period of time. In addition, once the bond has been purchased, the maturity date and time for NIMCRUT receipt of income is established. Thus, zero coupon bonds do not provide a flexible method of deferral.

If the NIMCRUT assets are invested in growth stocks that pay little or no dividends, the NIMCRUT will have little or no trust income. Even if a stock is disposed of, so long as capital gains are not allocated to trust income by the trust instrument, the receipt from

---

35 Treas. Reg. §1.664-3(1)(i)(b)(3); I.R.C. §643(b).
36 I.R.C. §643(b).
37 *See*, *e.g.*, Cal. Prob. Code §16303(a)(2).
38 *See*, *e.g.*, Cal. Prob. Code §16303(b)(1).
39 *See*, *e.g.*, Cal. Prob. Code §16302(a)(1).
40 Treas. Reg. §1.664-3(a)(7)(i)(b)(4).

that sale would not be allocated to trust income. Accordingly, a growth stock portfolio can be used to defer distributions from a NIMCRUT. However, using growth stocks to defer income significantly limits the trustee's ability to balance the portfolio. Furthermore, the growth stock strategy creates a dilemma for determining how to treat trust capital gains. Under most state laws, a trust instrument could allocate capital gains to either income or to principal. As noted above, the Treasury Regulations allow only post contribution gain to be allocated to income. Allocating post-contribution capital gain to income will make more of the trust return available for distribution to the beneficiary. This allocation, however, conflicts with the goal of deferral. If NIMCRUT capital gains are allocated to income, the trustee would create income required to be distributed to the beneficiary each time the trustee disposed of an appreciated position to make changes to the NIMCRUT's portfolio.

Variable annuities and partnerships have been used as containers to hold NIMCRUT investments and NIMCRUT cash so that regardless of the investments, the NIMCRUT will not have income until the variable annuity or partnership makes a distribution to the trust. The variable annuity or partnership can receive interest and dividends, and the proceeds of the sale of assets, holding and reinvesting those funds until the beneficiary desires a distribution from the NIMCRUT. When the beneficiary wants a distribution from the NIMCRUT, a distribution is made from the variable annuity or partnership to the NIMCRUT. That distribution is characterized as income and distributed to the beneficiary.

If the NIMCRUT purchases a variable annuity, it will be able to defer income without restricting its investments. The variable annuity can generally be invested in a variety of funds and assets. However, these investments will be limited to publicly traded securities, and may be limited to the products of the issuer of the annuity. The most significant disadvantage of a variable annuity is that under the annuity taxation rules, all income flowing from the annuity is taxable as ordinary income.[41] Thus, although under the four tier rule,[42] a beneficiary of the NIMCRUT might be able to take advantage of capital gains rates for such gains realized by the NIMCRUT, if the variable annuity is used, all distributions will be taxed as ordinary income. Each year, all the gains of the annuity are taxable to the NIMCRUT, regardless of distributions from the annuity.[43] This flow through taxation is not a problem because the NIMCRUT is tax exempt.[44]

To avoid the ordinary income tax rate and investment limitations of a variable annuity, some NIMCRUTs hold their assets in partnerships. Partnerships are not generally subject to tax because the income of the partnership flows through to and is reported by

---

[41] I.R.C. §72.

[42] *See*, *Id*. §664(b). Under this rule, current ordinary income and the ordinary income from prior years is distributed from the NIMCRUT prior to distribution of net capital gains.

[43] *Id*. §72(u).

[44] *Id*. §664(c).

the partners of the partnership.[45] Since the taxable income of the partnership flows through to the NIMCRUT, the taxable income of the partnership flows through to the NIMCRUT's tax-exempt environment. Cash is contained in the partnership until distributed, providing the deferral income and payments from the NIMCRUT. The difficulty of using a partnership to defer income in a NIMCRUT is the requirement that the partnership have two partners.[46] Accordingly, some taxpayer other than the NIMCRUT must participate in the partnership for this plan to work. Having the donor as a partner may raise self-dealing and fiduciary duty issues. In general, a tax-exempt partner and a non-tax-exempt partner will have different requirements complicating the operations of the partnership. For example, the taxable partner will desire a distribution from the partnership to at least pay income taxes on the partner's share of partnership income. The NIMCRUT will not need or desire such distributions. Partnerships must file an information tax return and issue a K-1 to each partner, further complicating the administration of the NIMCRUT.

The Single Member LLC as the Deferral Vehicle

Most states now permit the formation of a single member LLC, including Delaware.[47] An LLC is a highly flexible business entity that allows management of the entity by the owner while shielding the owner from liability for the LLC's debts under most circumstances. The check-the-box Treasury Regulations allow the taxation of a single member LLC to flow through to its owner, similar to a partnership. Also like the partnership, distributions from the LLC can be controlled to determine the timing of trust accounting income. Accordingly, the single member LLC has all of the advantages of a partnership for deferral with the elimination of the disadvantage of needing an additional participant in the entity as required with a partnership.

Under the check-the-box regulations, for income tax purposes, the single member LLC is a disregarded entity.[48] The owner of a single member LLC is treated as a sole proprietor with respect to the activity of the LLC. Thus, the single member LLC is a tax nothing, and does not even obtain its own taxpayer identification number.[49] The treatment of the LLC income as trust income means that the activity of the LLC takes place in the tax exempt NIMCRUT. The tax reporting for a single member LLC is simpler than partnership tax reporting because there is no entity level tax return and no K-1's. All activity of the LLC is simply reported on the tax return of the NIMCRUT.

Although the single member LLC does not exist for income tax purposes, it would exist for purposes of trust accounting income. Accordingly, until a distribution is made from the LLC, the NIMCRUT would not have any trust accounting income and would not

45 *Id*. §702(a).
46 Treas. Reg. §301.7701-2(c)(1).
47 Del. Code tit. 6, §18-101(6).
48 Treas. Reg. §301.7701-2(c)(2).
49 Treas. Reg. §301.6109-1(h)(2).

have an obligation to make a distribution to the beneficiary. Thus, the single member LLC allows for deferral distributions from the NIMCRUT.

There may be an issue of whether since the single member LLC is a disregarded entity for income tax purposes, it would be disregarded for purposes of the trust accounting income rules. Trust accounting income, however, is a function of state law.[50] Under these rules, there is often a variance between the taxable income of the trust and its trust accounting income. Accordingly, it seems unlikely that the tax treatment of a single member LLC as a tax nothing will impact its treatment under the trust accounting rules for determination of trust income.

One challenge of using a NIMCRUT to defer distributions is that the NIMCRUT must have trust accounting income to provide for a distribution. As stated above, dividends, interest, rents and royalties are all generally income. Gain from the sale of capital assets is generally allocated to principal. In states that have adopted the Revised Uniform Principal and Income Act ("RUPIA"), asset allocation of distributions from an LLC are governed by the general rules for distribution from entities. Under these rules, distributions that redeem the trust interest in the entity or that are in whole or partial liquidation of the entity are allocated to principal. Generally, the trust relies on the characterization by the entity of a distribution to determine if it is a liquidating distribution or a redemption.

For distributions not characterized as liquidating distributions or redemptions, RUPIA allocates any distribution up to 20% of the value of the entity to income.[51] Distributions in excess of 20% of the entity are allocated to principal. The charitable remainder trust regulations do not address situations involving sales of assets inside of entities or distributions from entities contributed to the charitable remainder trust that are not as a result of the sale of the entity. Thus, the general 20% distribution rule may apply. A more conservative approach to reflect the spirit of the charitable remainder trust regulations would be for the trustee to allocate LLC distributions to income only to the extent that the LLC maintains the value of its assets at the level that existed when the donor funded the charitable remainder trust.

California has modified its statute regarding the allocation of distribution from entities to income requiring a distribution related to the sale of an asset held by the entity to be allocated to principal.[52] The California rule greatly limits the distributions that would be allocated to income. A CRT should use another state's law or provided that the RUPIA,[53] and not California's rule should apply to a charitable remainder trust using an entity to defer income.

[50] I.R.C. §643(b).
[51] RUPIA §401(d)(2).
[52] Cal. Prob. Code §16350(d).
[53] RUPIA §401.

For donors seeking a flexible method of deferring distributions from a NIMCRUT, the single member LLC is a simple, effective structure.

Other Situations Where the Single Member LLC Will Be Useful

Prior to the issuance of the final charitable remainder trust regulations that allow existing NIMCRUTs to convert to standard unitrusts,[54] another use for the single member LLC was to allow some existing NIMCRUTs that did not explicitly provide for an allocation of capital gain to income to effectively achieve that result. Many existing NIMCRUTs simply provide that trust income is determined according to the principal and income act of the state in which the trust is being administered.

In a state that has adopted the RUPIA rule that allocates most distributions from entities to income if the distribution is not more than 20% of the entity's value, many distributions from an LLC could be allocated to income.

The flip trust in the regulations will allow deferral of payments to the beneficiary until a date certain in the future. This may be useful in planning for retirement using a charitable remainder trust. Prior to the flip, however, the trust will need to be managed to control the occurrence of trust income to avoid distributions. The single member LLC could be used to control trust accounting income in these circumstances. In addition, under the regulations, any makeup due to a beneficiary in a flip trust is eliminated when the trust changes to a standard unitrust. If the flip trust were drafted to provide that distributions from the LLC generated by post-contribution capital gain will be allocated to income, the LLC could help the beneficiary receive a makeup distribution prior to the flip, which would terminate the trust's ability to pay that makeup amount. If a donor wishes to start and stop distributions using a single member LLC, a NIMCRUT, and not a flip trust, likely should be used.

Each of the existing methods for deferring income in a NIMCRUT - zero coupon bonds, growth stocks, variable annuities and partnerships - have certain disadvantages. For many donors, the single member LLC may offer all of the advantages of deferral without any of the disadvantages of the prior structures for deferral. In addition, the single member LLC can work hand in hand with flip trusts to allow donors the maximum flexibility in achieving their philanthropic and financial goals.

Subchapter S Corporation Funding of a Charitable Remainder Trust

S corporations are popular business organizations because S corporations are not subject to tax at the corporate level. Instead, all of the income of the S corporation is reported to the shareholders and taxed at their individual tax rates.[55] The income is taxable to the shareholders without regard to whether it is actually distributed by the

[54] Treas. Reg. §1.664-3(a)(2)(i)(f)(3).
[55] I.R.C. §1363(a).

corporation to the shareholders. In contrast, C corporation income is taxed at the corporate level.[56] In the event that the income is distributed to the shareholders, it is taxed again at the shareholder level as a dividend.[57] Because of the single layer of tax for S corporations, the effective tax rate on S corporation income is significantly less than the total tax on C corporation income that is distributed to the shareholders.

Not all corporations are eligible to be S corporations. S corporations may have only 100 shareholders.[58] Further, the shareholders must be U.S. citizens or certain trusts for the benefit of eligible shareholders.[59] Charitable organizations are permitted to own S corporation shares, but all of the income of the S corporation as well as any gain on the sale of the S corporation's shares is unrelated business income for the charitable organization.[60] S corporation shares cannot be transferred to a charitable remainder trust because charitable remainder trust is not an eligible shareholder of an S corporation.[61]

In circumstances where the S corporation is an ongoing business and the taxpayer intends to sell the business as a whole, a charitable remainder trust may not provide many benefits to the taxpayer. On occasion, the taxpayer may consider foregoing the S election in order to take advantage of the charitable remainder trust. In most circumstances, however, maintaining the S election throughout a sale under such circumstance provides significant tax benefits to the purchaser and the seller.[62] In other circumstances, however, the S corporation may own only or primarily a single appreciated asset such as a piece of real estate. In such circumstances, the shareholder may be able to avoid taxation in the gain of the sale of the asset by having the S corporation transfer the appreciated asset to a charitable remainder trust of which the S corporation is the beneficiary. There are three main issues that need to be addressed in using this plan: (1) proper structuring of the charitable remainder trust, (2) avoiding a deemed liquidation of the corporation, and (3) determination of the taxpayer's deduction.

The S corporation must be both the donor and the beneficiary to the charitable remainder trust. If the S corporation is a donor to the charitable remainder trust, but the shareholders are named as the beneficiaries of the charitable remainder trust, the transaction will be treated as if the S corporation distributed the property to the

---

[56] I.R.C. §1361(a)(2).
[57] I.R.C. §301(c)(1).

[58] I.R.C. §1362(b)(1)(A).
[59] I.R.C. §1362(b)(1)(C); I.R.C. §1362(d)(2).
[60] I.R.C. §1361(c)(6).
[61] I.R.C. §1361(c)(2).
[62] I.R.C. §338(h)(10) (allowing buyer to have tax basis in assets of S-Corporation based on purchase price of shares).

shareholders who then formed the charitable remainder trust. This would result in taxation on all of the appreciation of the property.[63]

Since the beneficiary of the charitable remainder trust is not a natural person, if it is funded by an S corporation, the charitable remainder trust must have a term of years not in excess of 20 years. If the life expectancy of the shareholders of the S corporation is not materially different from 20 years, this is not a significant limitation on the technique. Prior to the 1986 Tax Act, a corporation could distribute its property to its shareholders without triggering taxation of the property's appreciation. The General Utilities Doctrine, as it was known, was repealed as a part of the many reforms in the 1986 Tax Act. The IRS has issued regulations that state that a transfer of all or substantially all of the assets of a taxable corporation to a tax exempt corporation is treated as a distribution of those assets to the shareholders followed by a contribution of the assets to the tax exempt corporation resulting in taxation of any appreciation of those assets.[64] For purposes of these regulations, the distribution of all or substantially all the assets of a taxable corporation to a charitable remainder trust is a deemed liquidation of the taxable corporation.[65] Generally, 80% of the corporation's assets are substantially all of the assets.[66] But other cases and rulings have held that 70% of a corporation's assets are substantially all of the assets.[67] In the case of an S corporation that has several assets, only one of which will be contributed to a charitable remainder trust, the deemed liquidation issue should not be a concern unless the asset is significantly more valuable than all of the other assets of the corporation.

When an S corporation makes a charitable gift of cash, the shareholder's basis in the S corporation shares is reduced by the gift, and the charitable contribution deduction cannot exceed the shareholder's basis. Accordingly, if an S corporation makes a $20,000 cash charitable gift and the shareholder's basis is $15,000, the shareholder's basis will be reduced to zero and the deduction will be limited to $15,000.[68] The $5,000 excess can be carried forward and used if the shareholder has more basis in the future.[69]

In the case of a gift of appreciated property, the rule depends on whether a temporary change first enacted in 2006 remains in effect. Prior to 2006, if an S corporation made

[63] *See, e.g.*, PLR 200203034 where partial life interest in CRT resulted in deemed distribution. Since S-Corp was co-grantor of CRT with shareholders, it was deemed an association, not trust and not qualified.
[64] Treas. Reg §1.337(d)-4(a)(1).
[65] *Id*.
[66] Treas. Reg. §1.337(d)-4(c)(3), 1.368-2(d)(2)(ii).
[67] *See* Laura Peebles, *A Hidden Trap for Generous Corporations*, http://www.pgdc.com/pgdc/hidden-trap-generous-corporations.
[68] I.R.C. §1366(a)(1)(A); 1367(a)(2)(A), 1367(b)(2)(B).
[69] I.R.C. §1366(d)(2)(A); Treas. Reg. §1.1366-2(b).

a gift of appreciated property to charity, the shareholder's basis was reduced by the fair market value of the donated property.[70]

Under a temporary code provision, the donor can deduct the fair market value of the property, but the shareholder's basis is reduced only by the corporation's basis in the property.[71] The committee report gives an example of a gift by an S corporation of property worth $500 in which the corporation has a basis of $200.[72] In that case, assuming the shareholder has $200 of basis, that basis is reduced by $200, and the shareholder can claim a charitable deduction of $500. This provision was last extended until the end of 2013.

If an S corporation was a C corporation within the last 10 years, a sale of its appreciated property is subject to a built in gains tax equal to the corporate tax that would have applied had the corporation remained a C corporation.[73] If the S corporation donates the property to a charitable remainder trust, the built in gains tax is not triggered.[74] If the charitable remainder trust distributes a part of the capital gain from the sale of the appreciated property, then under the four-tier rules to the S corporation, that distributed gain will be subject to the built in gains tax.[75]

The charitable remainder trust will not work with many S corporation situations, but consider the possibility of the S corporation as the donor to the CRT when the situation arises. Generally, if the CRT will be effective, it will be the S corporation and not its shareholders that will be the donor.

Gift of Encumbered Property to a Charitable Remainder Trust

It is often suggested that a donor cannot donate property that is encumbered by debt to a CRT. This is because there are many risks to funding a charitable remainder trust with encumbered property. Some of the significant risks to the trust are disqualification of the trust or 100% taxation on some or all of the trust's income. There is not even a private letter ruling much less any formal guidance to support most of the potential plans for funding a charitable remainder trust with encumbered property. Donors with appreciated real estate often have encumbered the real estate. They, however, want to explore the possibility of funding a charitable remainder trust with that real estate. There are several issues to consider before funding a charitable remainder trust with encumbered property.

---

70 I.R.C. §1367(a)(2)(B); Rev. Rul. 2008-16, 2008 I.R.B. 11.
71 Section 1203(a) of the Pension Protection Act of 2006 commenting I.R.C. §1367(a)(2)(B).
72 Joint Committee on Tax'n, Tech. Expl. of H.R.4, "The Pension Protection Act of 2006", JCX-38-06 (Aug. 3, 2006) at 271.
73 I.R.C. §1374.
74 PLR 200644013 (June 21, 2006).
75 *Id.*

First, transfer of encumbered property to a charitable remainder trust is generally treated as a bargain sale in which the donor is treated as selling a portion of the property for the amount of the debt on the property.[76] Second, when a charitable remainder trust earns income from property that is subject to a debt, that income is often taxed at 100% rate as unrelated business taxable income.[77] If the donor is personally liable for the debt, the charitable remainder trust to which the property is transferred will be treated as a grantor trust which disqualifies it from being a charitable remainder trust.[78] The recourse also might create a self-dealing issue if the trust did manage to qualify as a charitable remainder trust.

The simplest and the most reliable way for a donor to fund a charitable remainder trust with property that is subject to an encumbrance is to pay off the encumbrance. If the debt is small and the donor has adequate liquidity, the donor can simply pay off the remaining balance of the note prior to contributing the property to the a charitable remainder trust. If the donor does not have sufficient liquid resources to repay the note, the donor may be able to refinance other property owned by the donor to repay the loan or get the lender to agree to remove its security interest in the property to be donated in exchange for a security interest in other property.

If the donor does not remove the debt from the property prior to its contribution, the contribution of the property to the charitable remainder trust will be treated as a bargain sale.[79] The donor will be treated as having an amount realized equal to the amount of the debt.[80] Even if the donor's basis in the property is equal to the amount of the debt, the donor will have a gain assuming that the fair market value of the property exceeds the debt, as will typically be the case. This is because under the bargain sale rules, the donor is required to allocate the basis between the contribution and the sale based on the proportionate fair market value.[81] Accordingly, if the donor has a property worth $400,000 that is subject to a debt of $100,000 and the donor has a $100,000 basis, the following would be the bargain sale treatment of the contribution of the property. The sale portion of the transaction is equal to 25% of the value of the property ($100,000 divided by $400,000). The gift portion of the transaction is equal to 75% of the value of the property ($300,000 divided by $400,000). 25% of the $100,000 basis, or $25,000, is allocated to the sale portion of the property. $75,000 of the basis is allocated to the gift portion of the property. With $25,000 allocated against the $100,000 realized with respect to the debt, the donor has $75,000 taxable gain. The bargain sale treatment may be avoidable if the donor keeps a portion of the property out of the trust and fully retains the obligation for the debt as is described below. Once the property is sold,

---

76 Treas. Reg. §1.1011-2.
77 *See* I.R.C. §664(c)(2).
78 Treas. Reg. §1.677(a)-(d), Priv. Ltr. Rul. 9015049.
79 Treas. Reg. §1.1011-2.
80 Treas. Reg. §1.1011-2(a)(3).
81 I.R.C. §1011(b).

however, the donor would still recognize the gain, so the bargain sale result is only deferred, not completely avoided.

The next issue to be addressed with respect to encumbered property is unrelated business income. Charitable organizations are subject to tax on income generated by businesses unrelated to their exempt purpose.[82] Broad categories of investment income, however, are excluded from the definition of unrelated business income including rents, dividends, royalties and interest.[83] If the property generating the income, however, is debt financed, even these excluded categories of income will become unrelated business income.[84]

For a charitable organization, unrelated business income is undesirable because of the added burden of filings related to the unrelated business income tax and the reduction of the return by 30% or 40% depending upon the applicable tax rate. Unrelated business income of charitable remainder trust, however, is subject to a 100% tax rate.[85] Under previous law, a charitable remainder trust that had any unrelated business income in a taxable year lost its tax exempt status for the year that it received that income. In 2006, however, the law was changed to subject unrelated business income of charitable remainder trust to a 100% tax, but the charitable remainder trust would not otherwise lose its tax exempt status. In the circumstances in which the charitable remainder trust has only a small amount of unrelated business income, the 100% tax is preferable to losing its tax exempt status and paying tax on all of its income. If, however, a significant portion of the trust income is unrelated business income, the consequences can be disastrous. In particular, if a charitable remainder trust is funded with appreciated property that is highly appreciated, and most of that gain is characterized as debt finance income that is unrelated business income, then most of the value of the trust could be wiped out by the 100% unrelated business income tax.

The debt finance income rules, however, provide a limited opportunity for charities to accept a gift of property subject to a debt and not have unrelated business income for a period of time. If the charity receives property by gift or bequest that is subject to a debt, the charity will not have debt finance income for a period of ten years following the contribution if certain conditions are met.[86] The donor must have owned the property for at least five years prior to its contribution, and the debt must have been on the property for at least five years.[87] This is referred to as the “five and five rule.” The five-year clock for the debt is reset if there is a refinancing that increases the principal amount of the debt. If there is a refinancing that does not increase the principal amount of the debt, then the refinancing does not reset the five-year clock. When receiving the

---

[82] I.R.C. §664(c)(2)(A).
[83] I.R.C. §512(b).
[84] I.R.C. §512(b)(4).
[85] I.R.C. §664(c)(2).
[86] *See* I.R.C. §514(c)(2)(B).
[87] *Id*.

property, the charity must not assume the debt and must simply take the property subject to the debt.[88] If all of these conditions are satisfied, then for the ten-year period following the contribution of the property, the charity will not be treated as having acquisition indebtedness with respect to the property that could result in debt finance income. If the charity is still holding the property after ten years and still has indebtedness with respect to the property, then that indebtedness will be treated as acquisition indebtedness, and the property will generate debt finance unrelated business taxable income.

A charitable remainder trust can avoid unrelated business income with respect to a gift of encumbered property for a ten-year period if all of the requirements of the five and five rules can be satisfied. There must be a high degree of certainty that the property can be sold within the ten years and the debt paid off, or other arrangements made to pay off the debt prior to the expiration of the ten-year period. If the debt cannot be satisfied within the ten-year period, the options available are for the donor to make a contribution sufficient to pay off the debt or for the donor and the charity to agree to the termination of the charitable remainder trust. The encumbered property is then distributed out to the charity, it may get a fresh start on the ten-year clock for which the debt is not treated as acquisition indebtedness.

When a person borrows money that is secured by property, that debt can be either recourse debt or non-recourse debt. In the case of recourse debt, the lender has the right to sell the property if the borrower defaults on the loan, but if the proceeds of the sale of the property are not sufficient to satisfy the amount owed to the lender, the lender can pursue other assets of the borrower. In the case of non-recourse debt, the borrower's only remedy is to sell the property securing the debt. If the sale of the property does not generate sufficient funds to cover all the amounts owed to the lender, the lender cannot pursue any other assets of the borrower. Private Letter Ruling 9015049 provides some guidance for situations in which a donor contributes property subject to a recourse obligation to a charitable remainder trust. The IRS held that a charitable remainder trust funded with property subject to a recourse debt would not qualify as a charitable remainder trust. Since the debt was a recourse obligation, the IRS concluded that a foreclosure on the property held by the charitable remainder trust would result in the property of the trust being taken to satisfy a personal obligation of the donor. The IRS noted that under I.R.C. Section 677, if the trust property can be used to satisfy the personal obligations of its creator, the creator will be treated as the owner of the trust under the grantor trust rules. One of the requirements to be a charitable remainder trust, however, is that the trust is not treated as a grantor trust.[89] Accordingly, the recourse debt by causing the trust to be treated as a grantor trust disqualified it from being a charitable remainder trust. Although the IRS has not ruled on the consequences of a contribution of property subject to a non-recourse debt, the assumption is that such a debt would not cause the trust to be a grantor trust, and

---

[88] *Id*.

[89] Treas. Reg. §1.664-1(a).

therefore a charitable remainder trust that received property subject to a non-recourse obligation could qualify as a charitable remainder trust.

Whether or not a debt is a recourse debt is determined based upon the terms of the loan documents and applicable state law regarding debtors and creditors. In some circumstances, the ability of the lender to pursue the borrower will depend upon the remedies that the borrower pursues upon default. It seems likely that if the lender has any possibility of recourse under the terms of the debt and state law, the IRS will treat the debt as recourse debt for purposes of the grantor trust rule.

If the debt is recourse debt, one strategy is to remove the debt from the property using one of the techniques described above. A second possibility would be for the donor to obtain a written waiver of recourse from the lender prior to the donor contributing the property to the charitable remainder trust. Some commercial lenders were willing to waive recourse in the 1990's when the amount of the debt was significantly less than the value of the property securing the debt. For example, a lender might waive recourse when a $200,000 loan was secured by a property worth $1 million. After the real estate crash, it is highly unlikely that a typical commercial lender would be willing to waive recourse even in circumstances in which the value of the borrower's collateral greatly exceeded the loan amount. If the lender is a private party, however, it may still be possible for the borrower to obtain a waiver of recourse.

If the donor cannot remove the debt on the property or obtain a waiver of recourse from the lender, the final option is for the donor to keep the debt and a portion of the property out of the charitable remainder trust. First, the donor would estimate the portion of the property that would be required to pay off the debt as well as the taxes on the gain from the sale of that property. This can be a complicated interrelated calculation if estimated taxes will take into account the charitable deduction for creating the charitable remainder trust. The donor then contributes a fractional interest in the property to the charitable remainder trust. In order to avoid the potential self-dealing issues described in Private Letter Ruling 9114025, the donor should enter into a co-tenancy agreement that limits the donor's rights as a co-tenant to avoid any use of the charitable remainder trust's interest in the property for the donor's benefit. The donor also needs to agree to indemnify, defend and hold the trust harmless for the debt on the property.[90] The IRS has not issued a ruling confirming that this would address the grantor trusts status issue created by recourse debt, but arguably the structure does.

Funding a charitable remainder trust with encumbered property presents numerous challenges. Many donors may choose to find a different asset or not pursue the gift at all. For donors who can pay off the debt or transfer it to another property, a straight forward method of funding the charitable remainder trust is available. For the donors who cannot remove the debt, even if it is recourse debt, possibilities may exist, but the

[90] *See* PLR 9533014.

donors must be able to understand and be comfortable with the complexities and uncertainties of the transaction.

Conclusion

For donors with highly appreciated assets, a small amount of philanthropic intent can be combined with substantial tax and financial benefits to make a charitable remainder trust attractive. For donors with large charitable intent, a charitable remainder trust and its benefits will allow a much larger gift than the donor might have thought possible. Planners may not have been talking about charitable remainder trusts as much in the past decade. Now is the time to bring charitable remainder trusts to the forefront of conservations with donor who have highly appreciated assets, or other circumstances that would be addressed by a charitable remainder trust.

The illustrations attached show the real financial benefit of a charitable remainder trust – the ability to reinvest and generate income from the pretax value of the property contributed to the trust. In the case of a zero basis asset the present value of the tax savings from the charitable remainder trust and the larger income stream can exceed the present value of a taxable sale of the property. As the donor's basis increases, the financial benefit of the charitable remainder trust declines. But it must be kept in mind that the charitable remainder trust provides a substantial gift to charity that is missing in the taxable sale.

Many of these donors will have straight forward assets for funding the charitable remainder trusts and be satisfied with the basic charitable remainder trusts structures. Planners who are comfortable with and understand the options for more complicated assets and structures of charitable remainder trusts, however, will be able to meet the needs of even more donors.

Reynolds T. Cafferata
Rodriguez, Horii, Choi & Cafferata LLP
777 South Figueroa St., #2150
Los Angeles, California 90017
v 213-892-7704
f 213-892-7777
reynolds@rhcclaw.com
www.rhcclaw.com

Asset Value	$1,000,000					
Ordinary Tax Rate	0.512					
Capitals Gains Rate	0.342	(State Inc. Tax Deduction at Fed CG rate)				
Rate of Return on Assets	7%					
Discount Rate	3%					
	0 Basis		25% Basis		50% Basis	
Sale No Trust	Pmts Pre Tax	Pmts Post Tax	Pmts Pre Tax	Pmts Post Tax	Pmts Pre Tax	Pmts Post Tax
Proceeds	$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000
Capital Gains Tax	$342,000	$342,000	$256,500	$256,500	$171,000	$171,000
Net	$658,000	$658,000	$743,500	$743,500	$829,000	$829,000
Annual Income	$46,060	$22,477	$52,045	$25,398	$58,030	$28,319
PV for 20 Years	$1,237,649	$603,973	$1,398,469	$682,453	$1,559,288	$760,932
PV of Return of Principal	$364,319	$364,319	$411,658	$411,658	$458,997	$458,997
Total PV	$1,601,968	$968,292	$1,810,127	$1,094,111	$2,018,285	$1,219,930
Form CRT						
Proceeds	$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000
Annual Income	$70,000	$34,160	$70,000	$34,160	$70,000	$34,160
PV for 20 Years	$1,880,926	$917,892	$1,880,926	$917,892	$1,880,926	$917,892
Present Value Deduction	$34,200.0	$34,200.0	$34,200.0	$34,200.0	$34,200.0	$34,200.0
Total PV	$1,915,126	$952,092	$1,915,126	$952,092	$1,915,126	$952,092

Keeping Up with the CRT

Asset Value	$1,000,00 0	
Ordinary Tax Rate	0.512	
Capitals Gains Rate	0.342	(State Inc. Tax Deduction at Fed CG rate)
Rate of Return	7%	
Discount Rate	3%	
Desired Income	$50,000	

Sale No CRT		Set Up CRT
Proceeds	$1,000,00 0	$1,000,00 0
Capital Gains Tax	$342,000	
Net	$658,000	

RODRIGUEZ, HORII, CHOI & CAFFERATA
ATTORNEYS AT LAW LLP

Year	Principal	Income	Desired Distribution	Principal Invasion	Principal	Income	After Tax
2013	$658,000	$46,060	$34,160	$11,683	1,000,000	70,000	34,160
2014	$646,317	$45,242	$34,160	$12,082	1,000,000	70,000	34,160
2015	$634,235	$44,396	$34,160	$12,495	1,000,000	70,000	34,160
2016	$621,741	$43,522	$34,160	$12,921	1,000,000	70,000	34,160
2017	$608,820	$42,617	$34,160	$13,363	1,000,000	70,000	34,160
2018	$595,457	$41,682	$34,160	$13,819	1,000,000	70,000	34,160
2019	$581,638	$40,715	$34,160	$14,291	1,000,000	70,000	34,160
2020	$567,346	$39,714	$34,160	$14,779	1,000,000	70,000	34,160
2021	$552,567	$38,680	$34,160	$15,284	1,000,000	70,000	34,160
2022	$537,283	$37,610	$34,160	$15,806	1,000,000	70,000	34,160
2023	$521,476	$36,503	$34,160	$16,346	1,000,000	70,000	34,160
2024	$505,130	$35,359	$34,160	$16,905	1,000,000	70,000	34,160
2025	$488,225	$34,176	$34,160	$17,482	1,000,000	70,000	34,160
2026	$470,743	$32,952	$34,160	$18,079	1,000,000	70,000	34,160
2027	$452,664	$31,686	$34,160	$18,697	1,000,000	70,000	34,160
2028	$433,966	$30,378	$34,160	$19,336	1,000,000	70,000	34,160
2029	$414,631	$29,024	$34,160	$19,996	1,000,000	70,000	34,160
2030	$394,635	$27,624	$34,160	$20,679	1,000,000	70,000	34,160
2031	$373,955	$26,177	$34,160	$21,386	1,000,000	70,000	34,160
2032	$352,570	$24,680	$34,160	$22,116	1,000,000	70,000	34,160
2033	$330,453	$23,132	$34,160	$22,872	1,000,000	70,000	34,160
2034	$307,582	$21,531	$34,160	$23,653	1,000,000	70,000	34,160
2035	$283,929	$19,875	$34,160	$24,461	1,000,000	70,000	34,160
2036	$259,468	$18,163	$34,160	$25,297	1,000,000	70,000	34,160
2037	$234,171	$16,392	$34,160	$26,161	1,000,000	70,000	34,160
2038	$208,010	$14,561	$34,160	$27,054	1,000,000	70,000	34,160
2039	$180,956	$12,667	$34,160	$27,979	1,000,000	70,000	34,160
2040	$152,977	$10,708	$34,160	$28,934	1,000,000	70,000	34,160
2041	$124,043	$8,683	$34,160	$29,923	1,000,000	70,000	34,160
2042	$94,120	$6,588	$34,160	$30,945	1,000,000	70,000	34,160
2043	$63,176	$4,422	$34,160	$32,002	1,000,000	70,000	34,160
2044	$31,174	$2,182	$34,160	$33,095	1,000,000	70,000	34,160
2045	-$1,921	-$134	$34,160	$34,226	1,000,000	70,000	34,160