DALLAS JEWISH COMMUNITY FOUNDATION

The Advisor

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ESTATE PLANNER'S TIP

The Emergency Economic Stabilization Act of 2008, which included a provision extending qualified charitable distributions (QCD) from IRAs for those age 70½ and older, was signed October 3, but some clients may not have learned of this gift opportunity before receiving IRA distributions. Under Code §402(c)(3)(A), IRA owners have 60 days within which to make a rollover of a distribution to another IRA, without having to recognize the amount in income. If a client has taken a required minimum distribution in the last 60 days, it might be possible to have the funds put into another account and direct the custodian or trustee of the new account to make a QCD to a favorite charity. The IRA owner will avoid the tax on the distributed amount. Year-end reviews should include a discussion of this option with eligible clients, along with an explanation of the benefits of making charitable contributions in this manner.

SOCIAL SECURITY – MORE OR LESS

Social Security recipients will enjoy the largest boost in benefits since 1982, when a 5.8% increase takes effect in 2009. In 2008, the increase from the prior year was only 2.3%. For the average retiree, the increase will mean an additional $63 per month. The maximum monthly check will jump from $2,185 to $2,323.

Recipients ages 62 to 66 (full retirement age for those born from 1943 to 1954) will be able to earn more before benefits are reduced. In 2009, $1 of Social Security benefits will be lost for every $2 of earned income over $14,160, compared with $13,560 in 2008.

For those still paying in to Social Security, the earnings limit will be rising. The 7.65% rate paid by both the employer and employee for Old Age, Survivors and Disability Insurance will continue until earnings reach $106,800 in 2009, compared with $102,000 in 2008. The Medicare Hospital Insurance portion applies to all earned income.

NEW NUMBERS FOR NEW YEAR

Thanks to inflation, various tax numbers have been adjusted for 2009 (Rev. Proc. 2008-66). Among the changes:

	2008	2009
Personal and dependent exemption	$3,500	$3,650
Standard deduction		
Single	$ 5,450	$ 5,700
Joint	10,900	11,400
Head of household	8,000	8,350
Married filing separately	5,450	5,700
Personal exemption phaseout (2% for each $2,500 of income over AGI threshold x 1/3 in 2009)		
Single	$159,950	$166,800
Joint	239,950	250,200
Tax brackets		
25% bracket starts		
Single	$32,550	$33,950
Joint	65,100	67,900
Head of household	43,650	45,500
Married filing separately	32,550	33,950
28% bracket starts		
Single	$ 78,850	$ 82,250
Joint	131,450	137,050
Head of household	112,650	117,450
Married filing separately	65,725	68,525
33% bracket starts		
Single	$164,550	$171,550
Joint	200,300	208,850
Head of household	182,400	190,200
Married filing separately	100,150	104,425
35% bracket starts		
Single, joint, head of household	$357,700	$372,950
Married filing separately	178,850	186,475
Itemized deduction cutbacks (reductions equal 3% of amount by which AGI exceeds threshold x 1/3 in 2009, up to 80% of certain deductions)	$159,950	$166,800
Kiddie tax	$1,800	$1,900
Annual gift tax exclusion	$12,000	$13,000
Annual gift tax exclusion for non-citizen spouse	$128,000	$133,000
Special use valuation for real property devoted to farming or closely held business use	$960,000	$1,000,000

PHILANTHROPY PUZZLER

Generally Big, a publicly traded company, announced a cash dividend on December 1 for all shareholders of record on December 5. Payable date of the dividend was December 19. Harold, a GB shareholder, planned to transfer shares of the stock for his annual gift to his favorite charity. He has asked when he should make the transfer of the GB shares.

COUPLE AGREE TO JOINT CUSTODY OF UNITRUST

George established a charitable remainder unitrust that was to pay income to him for life, with payments to continue for the life of his wife, Marsha, if she survived him. He retained the right to designate the charitable remainderman in writing during his lifetime.

George and Marsha entered into a divorce agreement on the same day that he named an irrevocable remainder beneficiary. The

agreement called for the charitable remainder trust to be split into two equal trusts. George would receive all income from one trust, with payments to continue to Marsha for her life if she survived George and if she provided the funds to pay any federal estate tax or state death taxes for which the trustee might be liable (a marital deduction would no longer be available). The second trust would pay Marsha for life, with George as contingent beneficiary. On the death of the survivor, assets would pass to the charity named by George.

The IRS ruled that the division of the trust into two trusts would not cause them to fail to qualify as charitable remainder trusts under Code §664. Prior to the divorce, George owned the entire income interest in the trust, with Marsha having only a future contingent interest in the income. Under the divorce agreement, her interest became immediate in 50% of the assets in the original trust. While George's interest has declined significantly, Marsha's interest has increased, said the IRS. Normally, gain or loss would be recognized under Code §1001 on the transfer. However, under Code §1041(a), no gain or loss is recognized on a transfer to a spouse or former spouse if incident to a divorce, noted the IRS. George is not liable for gift taxes because the transfer is made under the terms of a written agreement relative to their marital and property rights [Code §2516]. The transfer is therefore deemed to be made for full and adequate consideration, ruled the IRS (Ltr. Rul. 200832021).

EXECUTOR'S SHORTCUTS PROVE COSTLY

George Cronic drafted Ollie Mae Williams' will, in which she directed that a trust fund not exceeding $25,000 be established to provide scholarships. She also left $25,000 specific bequests to two cemeteries and a $20,000 bequest to a third cemetery.

Rather than fund the trust, Cronic distributed $25,000 outright to the residuary legatee. He gave $25,000 to two individuals who agreed to maintain one of the cemeteries, but was unable to locate anyone representing either of the other two private cemeteries. He treated those bequests as lapsed and distributed the proceeds to the residuary legatees.

The Georgia Attorney General brought suit against Cronic, claiming that the bequests created charitable trusts and that Cronic had breached his fiduciary duty by failing to fully fund them. The Superior Court ordered that the trusts be fully funded and that Cronic forfeit any fees earned as executor. He appealed, arguing that the attorney general lacked standing and the court erred in ordering the fee forfeiture.

The Supreme Court of Georgia noted that the attorney general has standing in cases in which the rights of beneficiaries under a charitable trust are involved. The court ruled that the bequests to the cemeteries were outright, not in trust, so the attorney general lacked standing to enforce those provisions. The scholarship was intended as a trust, the court found, so the attorney general could enforce that provision.

Cronic took no action to fulfill his duties to create the educational trust and did not seek any direction from the court, instead simply giving the funds outright. Therefore, ruled the court, he violated his fiduciary duties and forfeited his right to compensation (*Cronic v. Baker*, S08A0693).

PUZZLER SOLUTION

Harold is entitled to deduct the average between the high and low selling prices for the shares on the date of the gift. If the gift is completed between December 1 and December 5, the market price will already be increased because the shares are considered "pregnant" with a dividend. Therefore, it will take fewer shares to reach Harold's annual gift amount (or he can increase his gift). Charity will receive the dividend [Reg. §1.61-9(c)]. If Harold's gift is completed after December 5, he will receive the dividend from GB, even though he no longer owns the shares on December 19. The selling price for GB will reflect that the shares are selling without the dividend.

RESTRICTING THE USE OF CONTRIBUTED PROPERTY

Philanthropic clients increasingly seem interested in giving to specific projects or programs of a charity, rather than for the general use of the organization. Some donors also evidence a desire for continuing involvement and participation after a gift occurs, demanding a greater degree of accountability.

Gift restrictions clearly have practical implications for the donee organization, but tax issues may arise for the donor, as well. For example, suppose an individual contributes a farm to a Midwestern university, with the restriction that the land always be used for agricultural research.

Assuming the donee agrees to the restriction, three issues arise: (1) Is the restriction so severe as to cause the gift to be one of a partial interest, for which no deduction may be allowed? (2) How will the restriction be enforced? (3) What is the measure of the donor's contribution?

In the example of the gift of a farm, the restriction would not seem so great as to cause the gift to be considered a gift of a partial interest, assuming the donee has an agricultural program. But other restrictions may have a different effect.

For example, where an individual contributed a rare book collection to a university under an agreement that permitted him to use the collection during his life, and also allowed him to deny permission for others to use the collection, he was held to have contributed a nondeductible future interest (Rev. Rul. 77-225).

Restrictions that are not severe enough to disqualify the donor from a deduction generally will not reduce the charitable deduction.

One donor gave her art collection to a museum but retained approval rights over how the pieces were displayed (subject to "good museum practice") and the editorial content of all publicity concerning her collection during her lifetime. If a dispute arose over the gallery design, a mutually acceptable museum curator would be named to decide the issue. The IRS ruled that the chance of the collection coming back to the donor was so remote as to be negligible, and the donor was therefore entitled to a charitable deduction for the full value of the gift (Ltr. Rul. 9152036).

There are several ways a restriction might be enforced. The deed of gift for the farm could provide that if the land is ever contemplated for use other than as an agricultural research area, the university shall petition a court for instructions regarding the future use of the land. Or the donor could provide that if the restriction is ever violated, he or his heirs shall regain ownership of the land automatically (*i.e.*, by making the gift one of a fee simple determinable) or shall have the right to reenter the property (*i.e.*, by making the gift one of a fee simple subject to a condition subsequent). Finally, the donor might provide that if the restriction is ever violated, some other charitable organization shall take ownership of the property or have the right to enter it.

Lifetime gifts involving restrictions typically occur in the context of consultation and negotiation with the donee organization. Restricted bequests, however, are frequently made without charity's input, sometimes with unfortunate results. Clients should be encouraged to consult with charities before attaching restrictions to testamentary transfers.

Jacob Feldman Building | 7800 Northaven Road | Dallas, Texas 75230-3296
(214) 615-9351 | info@djcf.org | www.djcf.org