

Internal Revenue Service

Department of the Treasury

Number: **200112022**
Release Date: 3/23/2001
Index Number: 170.11-05

Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:

CC:IT&A:03/PLR-114527-00

Date:

December 19, 2000

Legend

Corporation A =
Corporation B =
Taxpayer =
Taxpayers =

Individual A =
Stock 1 =
Stock 2 =
Exchange A =
Exchange B =
Country A =
Date 1 =
Date 2 =
Date 3 =

Dear

This is in response to your letter dated July 25, 2000, requesting a ruling under §170(e)(5)(C) of the Internal Revenue Code ("Code") with regard to proposed future contributions of qualified appreciated stock to certain private foundations.

RULINGS REQUESTED

Taxpayer requests the following rulings:

1. For purposes of applying the 10 percent limitation of §170(e)(5)(C)(i) of the Code with respect to future contributions of Corporation A stock by one of the Taxpayers to a Private Foundation, the only stock of Corporation A to be treated as having been contributed by Taxpayers to the Private Foundations will be the following:

(i) the stock of Corporation A owned by a Private Foundation at the time of the future contribution, but only to the extent

such stock was converted in the Merger from Corporation B stock to Corporation A stock, and

(ii) any Corporation A stock actually contributed to a Private Foundation by one of the Taxpayers (taking into account the attribution rules of §170(e)(5)(C)(ii)) and owned at the time of the future contribution by a Private Foundation.

2. For purposes of applying the 10 percent limitation of §170(e)(5)(C)(i) with respect to future contributions of Corporation A stock by one of the Taxpayers to a Private Foundation, the stock of Corporation B received from Individual A's estate and converted in the Merger into Corporation A stock will not be treated as having been contributed by Taxpayers.

3. For purposes of applying the 10 percent limitation of §170(e)(5)(C)(i) with respect to future contributions of Corporation A stock by one of the Taxpayers to a Private Foundation, values of both prior contributions of stock and any future contributions of stock, and of all of the outstanding stock of Corporation A itself, will be based on the values of Corporation A stock as of the date of the future contribution.

FACTS

Taxpayers are cash-basis, calendar-year individuals and are members of a family under §267(c)(4). Prior to Date 1 Taxpayers made charitable contributions of appreciated Stock 1 of Corporation B to certain private foundations defined in §509(a) but not described in §170(b)(1)(E), (the "Donee Private Foundations"). With respect to a small portion of those contributions, fair market value deductions were taken. However, the largest portion of those contributions was made at a time when §170(e)(1)(B)(ii) was in effect, but §170(e)(5) was not. With respect to those latter contribution, fair market value deductions were not taken.

At all material times prior to Date 1, Corporation B was a publicly held corporation. Stock 1 of Corporation B was traded on Exchange A. Exchange A is a United States exchange in which quotations are published on a daily basis and, thus, is an established security market. On Date 1, Corporation B was merged with and into Corporation A under §§368(a)(1)(A) and 368(a)(2)(D) of the Code (the "Merger"). Corporation A is a publicly held Country A corporation, the stock of which is traded on Exchange B. Exchange B is a foreign exchange in which quotations are published on a daily basis and, thus, is an established security market. Pursuant to the Merger, each share of Stock 1 of

Corporation B was converted into cash and shares of American depository receipts ("ADRs") 1 and 2 of Corporation A.¹ ADR 1 represents shares of Stock 1 of Corporation A, and ADR 2 represents shares of Stock 2 of Corporation A. ADRs 1 and 2 of Corporation A are traded on Exchange A, and Stock 1 and 2 of Corporation A are traded on Exchange B. Hereinafter, we shall refer to ADRs 1 and 2 in their Stock 1 and 2 converted form. Each share of Stock 2 of Corporation A is convertible into shares of Stock 1 of Corporation A at any time until Date 2.

Prior to Date 1, Individual A, who was a related party to one of the taxpayers under §267(c)(4)), died. Pursuant to the terms of the Individual A's estate, shares of Corporation B stock were donated to a Donee Private Foundation. No income tax deduction was claimed or allowable with respect to that contribution under §170 of the Code. However, an estate tax deduction was taken under §2055(a)(2) of the Code.

Immediately prior to Date 1, the Donee Private Foundations owned shares of Stock 1 of Corporation B. Some of the shares had been contributed by Taxpayers and some had been received from Individuals A's estate. In addition, many years ago the Taxpayers contributed shares of Corporation B stock that the Donee Private Foundations later disposed of in various manners.

Immediately after the Merger, the Donee Private Foundations owned shares of Stock 1 and 2 of Corporation A. Some of those shares were attributable to the shares of Corporation B stock received from Individual A's estate. Since the merger Taxpayers have made no gifts of Corporation A stock to any private foundation.

On Date 3, the Donee Private Foundations sold all of their

¹An American depository receipt ("ADR") is a negotiable receipt issued in certificate form representing stock in a non-United States company. An ADR certificate is issued by a United States depository bank when the foreign shares are deposited abroad in a custodian bank. The holder of an ADR is entitled to demand delivery of the underlying shares. The American bank converts dividends, interest, and principal from the foreign security into United States dollars. Once issued, an ADR certificate may be freely traded in United States dollars in the United States on the over-the-counter market. If certain SEC filings are made, it may be listed and traded on a national exchange.

shares of Stock 1 of Corporation A to unrelated third parties for fair market value. They sold none of their shares of Stock 2 of Corporation A.

Taxpayers want to make significant lifetime contributions of Corporation A stock to Donee Private Foundations and, perhaps, to other private foundations referred to in §170 (e)(1)(B)(ii) of the Code (collectively "Private Foundations") in the current calendar year and in future years. The Taxpayers represent that any Corporation A stock that they hereafter contribute to a Private Foundation will constitute stock for which as of the date of the contributions market quotations will be readily available on an established securities market. They also represent that such stock will constitute property that would give rise to long-term capital gain if sold on the date of contribution by Taxpayers at its fair market value, determined as of the date of contribution. Taxpayers add that the focus of this ruling request is the application of the 10 percent limitation rule set forth in §170(e)(5)(C) to any future contributions of Corporation A stock by the Taxpayers to Private Foundations.

LAW AND ANALYSIS

Section 170 of the Code permits a deduction for any charitable contribution payment which is made within the taxable year. Section 1.170A-1(c)(1) of the Income Tax Regulations provides, that, if a charitable contribution is made in property other than money, the amount of the contribution is the fair market value of the property at the time of the contribution, reduced as provided in §170(e)(1) and §1.170A-4(a) of the Regulations.

Section 170(e)(1)(B)(ii) of the Code provides that, in the case of a charitable contribution to or for the use of a private foundation (as defined in §509(a)), other than a private foundation described in §170(b)(1)(E), the amount of the charitable contribution of property otherwise taken into account under §170 is reduced by the amount of gain that would have been long-term capital gain if the property had been sold at its fair market value (determined at the time of the contribution).

Section 170(e)(5) provides an exception to this reduction rule in the case of the contribution of "qualified appreciated stock," which is defined in §170(e)(5)(B) as stock--

(i) for which (as of the date of the contribution) market quotations are readily available on an established securities market, and

(ii) which is capital gain property (as defined in §170(b)(1)(C)(iv)).

To meet the requirements of §170(e)(5)(B)(i), a stock must have market quotations readily available on an established securities market. Under an analogous provision in §1.170A-13(c)(7)(xi)(A)(1) of the Regulations, market quotations are considered to be "readily available on an established securities market" if the securities are

listed on the New York Stock Exchange, the American Stock Exchange, or any city or regional exchange in which quotations are published on a daily basis, including foreign securities listed on a recognized foreign, national, or regional exchange in which quotations are published on a daily basis.

"Capital gain property" is defined in §170(b)(1)(C)(iv) as any capital asset the sale of which at its fair market value at the time of the contribution would have resulted in gain that would have been long-term capital gain. Section 1221 defines a capital asset as property held by the taxpayer, excluding stock in trade, property held primarily for sale to customers in the ordinary course of the trade or business, and certain other items not relevant here.

Taxpayers represent that any Corporation A stock that they hereafter contribute to a private foundation will be stock for which market quotation will be readily available on an established securities market as of the date of contribution. Further, Taxpayers represent that any Corporation A stock that they hereafter contribute to a Private Foundation will constitute property that would give rise to long-term capital gain if sold on the date of contribution by Taxpayer at its fair market value. Thus, it is assumed for purposes of this ruling request that the Corporation A stock donated in the future will be qualified appreciated stock.

Ruling Request #1.

Ruling request #1 pertains to whether in determining the 10 percent limitation stock previously contributed to a Private Foundation but not owned by that foundation at the time of a future contribution is included in the calculation. In the case at hand the Donee Private Foundations sold all of their shares of Stock 1 of Corporation A on Date 3 to unrelated third parties for fair market value.

Section 170(e)(5)(C)(i) of the Code provides that, in the case of any donor, the term "qualified appreciated stock" shall not include any stock of a corporation contributed by the donor in a contribution to which §170(e)(1)(B)(ii) applies (determined without regard to §170(e)(5)) to the extent that the amount of the stock so contributed (when increased by the aggregate amount of all prior such contributions by the donor of that stock) exceeds 10 percent (in value) of all of the outstanding stock of the corporation. Section 170(e)(5)(C)(ii) provides a special rule that for purposes of §170(e)(5)(C)(i), an individual shall be treated as making all contributions made by any member of the individual's family (as defined in section 267(c)(4)). Section 267(c)(4) provides that an individual's family shall include only the individual's brothers and sisters (whether by the whole or half blood) spouse, ancestors and lineal descendants.

In applying the 10 percent limitation, §170(e)(5)(C)(i) requires that all prior "such contributions" be aggregated. The term "such contributions" means previous contributions of the stock covered by §170(e)(1)(B)(ii) determined without regard to §170(e)(5), *i.e.*, previous contributions of stock that is §170(e) capital gain property to a private foundation. Furthermore, the legislative history for §170(e)(5) provides that "the nonreduced deduction ... for qualified appreciated stock applies only to the extent that the cumulative aggregate amount of donations (including donations made prior to July 19, 1984) made by the donor to one or more private nonoperating foundations...of stock in a particular corporation does not exceed 10 percent in value of all the outstanding stock of that corporation." Joint Committee on Taxation Staff, General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984, 98th Cong., 2d Sess. 669 (1984). The legislative history continues that "in the case of a contribution of stock in a particular corporation made by a donor (or related person) to a private nonoperating foundation, the contribution is aggregated with all other contributions of stock in the same corporation made by the donor (or related persons) to all other related or unrelated private nonoperating foundations." *Id.* at 669, n.8.

Thus, the statutory language requires that previous contributions of stock that is §170(e) capital gain property to a private foundation be aggregated in determining whether the 10 percent limitation has been exceeded. The statutory language does not provide an exception to this rule for contributed stock disposed of by a private foundation. Therefore, once stock covered by §170(e)(1)(B)(ii) is donated to a private foundation, it is taken into account in determining the 10 percent limitation, regardless of what happens to the stock in the

future. The fact that a private foundation disposes of qualified appreciated stock after receiving it is irrelevant. Thus, for purposes of applying the 10 percent limitation of §170(e)(5)(C)(i) with respect to future contributions of Corporation A stock by any of the Taxpayers to a Private Foundation, all previous contributions by Taxpayers of Corporation A and B stock covered by §170(e)(1)(B)(ii) to Private Foundations (taking into account the attribution rules of §170(e)(5)(C)(ii)) will be included in the calculation.

Ruling Request #2.

In Ruling Request #2, Taxpayer asks us to rule that, for purposes of applying the 10 percent limitation with respect to future contributions of Corporation A stock by one of the Taxpayers to a Private Foundation, the stock of Corporation B received from Individual A's estate will not be treated as having been contributed by any of the Taxpayers.

As previously stated, the 10 percent limitation in §170(e)(5)(C)(i) applies to a contribution to which §170(e)(1)(B)(ii) applies. As stated in the facts, when the Corporation B stock was donated by Individual A's estate, no income tax deduction was claimed or allowable with respect to the contributions under §170. Instead an estate tax deduction was taken under §2055(a)(2) of the Code. Section 170(e)(1)(B)(ii) did not apply to the contributions. Therefore, the contribution by Individual A's estate does not fall within the scope of §170(e)(5)(C)(i) and is not included in determining whether the 10 percent limitation of that section is exceeded. Thus, for purposes of applying the 10 percent limitation of §170(e)(5)(C)(i) with respect to future contributions of Corporation A stock by any of the Taxpayers to a Private Foundation, the stock of Corporation B contributed to a Donee Private Foundation from Individual A's estate will not be treated as having been contributed by any of the Taxpayers. Accordingly, Ruling Request #2 is granted.

Ruling Request #3.

In Ruling Request #3 Taxpayer asks us to rule that for purposes of applying the 10 percent limitation with respect to future contributions of Corporation A stock by one of the Taxpayers to a Private Foundation, values of both prior contributions of stock and any future contributions of stock, and of all of the outstanding stock of Corporation A itself, will be based on the values of Corporation A stock as of the date of the future contribution.

Section 170(e)(5)(C)(i) requires that the stock contributed (when increased by the aggregate amount of all prior such contributions by the donor of stock in such corporation) not exceed ten percent (in value) of the stock outstanding. This language requires us to aggregate the value of the stock to be contributed currently with previous "such contributions." "Such contributions" means previous contributions of the stock covered by §170(e)(1)(B)(ii) determined without regard to §170(e)(5), i.e., previous contributions of stock that is §170(e) capital gain property to a private foundation.

There is no discussion in the legislative history about when to value previous contributions of stock covered by §170(e)(1)(B)(ii). However, the statutory language refers to "the aggregate amount of all prior such contributions." Because the statute looks at prior contributions, it is reasonable to interpret the language to mean that the value of prior contributions of stock covered by §170(e)(1)(B)(ii) at the time of their original donations are the values that are aggregated at the time of each current contribution of qualified appreciated stock to determine if the 10 percent limitation has been exceeded. In applying the 10 percent limitation, the prior contributions of stock covered by §170(e)(1)(B)(ii) are not revalued each time there is a new contribution.

Thus, for purposes of applying the 10 percent limitation with respect to future contributions of Corporation A qualified appreciated stock by one of the Taxpayers to a Private Foundation, values of prior contributions of Corporation A and B stock covered by §170(e)(1)(B)(ii) will be based on the stock's value at the time of its original contribution. Values of any future contributions of Corporation A qualified appreciated stock and all of the outstanding stock of Corporation A will be based on the values of Corporation A's qualified appreciated stock and all of its outstanding stock as of the date of the future contribution.

CONCLUSIONS

(1) For purposes of applying the 10 percent limitation of §170(e)(5)(C)(i) with respect to future contributions of Corporation A stock by any of the Taxpayers to a Private Foundation, all previous contributions by Taxpayers of Corporation A and B stock covered by §170(e)(1)(B)(ii) to Private Foundations (taking into account the attribution rules of §170(e)(5)(C)(ii)) will be included in the calculation.

(2) For purposes of applying the 10 percent limitation of

§170(e)(5)(C)(i) with respect to future contributions of Corporation A stock by any of the Taxpayers to a Private Foundation, the stock of Corporation B received by a Donee Private Foundation from Individual A' estate and converted in the Merger into Corporation A stock B will not be treated as having been contributed by Taxpayers.

(3) For purposes of applying the 10 percent limitation with respect to future contributions of Corporation A qualified appreciated stock by any of the Taxpayers to a Private Foundation, values of prior contributions of Corporation A and B stock covered by §170(e)(1)(B)(ii) will be based on the stock's value at the time of its original contribution. Values of any future contributions of Corporation A qualified appreciated stock and all of the outstanding stock of Corporation A will be based on the values of that stock as of the date of the future contribution.

The rulings contained in this letter are based upon information and representations submitted by Taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. Because this office has not verified any of the material submitted in support of the request for ruling, it is subject to verification on examination.

This ruling is directed only to the taxpayer requesting it. Section 6110(j)(3) of the Code provides that it may not be used or cited as precedent. Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

A copy of this letter must be attached to any income tax return to which it is relevant.

Sincerely yours,
Associate Chief Counsel
(Income Tax and Accounting)
By: Michael D. Finely
Branch Chief, Branch 3

Enclosures (2)
Copy of letter
Copy for section 6110 purposes

cc: