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“Understanding Charitable Gifts in Business Planning”

Most advisors have clients who are business owners that are interested in incorporating charitable planning in regards to their corporate stock. In this article, we will discuss charitable planning in regards to two of the most common corporations which are C Corporations and S Corporations.

► Using Charitable Gifts in Business Planning -- The C Corporation

Double Taxation

There are various forms under which an individual or group can establish a business. One such form is a corporation. There are two different types of corporations, a C corporation and an S corporation. Unlike other business structures, a C corporation is a taxable entity that is separate from the individual or individuals who own it. A C corporation is frequently created to shield the shareholders from liability.

It is quite possible to form a C corporation without taxable consequences to the shareholders. Under Internal Revenue Code (IRC) Sec. 351(a), it is permissible to transfer assets to corporations without the realization of tax. Thus, a person who owns a piece of highly appreciated real estate may transfer it to a C corporation, under Sec. 351 without recognizing the gain on the transfer.

Because a C corporation is its own taxable entity, the corporation files Form 1120 and pays tax at corporate rates, which may be as high as 35%. Further, a corporation does not have the lower, favorable capital gains rate of an individual taxpayer. In addition to federal taxes, most corporations also pay state income taxes.

After payment of tax, the corporation may distribute dividends to shareholders. These dividends are often subject to a second tax at the shareholder level. Whether or not the dividend is taxable depends on the corporation's accumulated earnings and profits. For any profitable corporation, distributions of dividends will almost always be taxable to the shareholder at ordinary income rates. Currently, there is a favorable 15% tax rate on qualified dividends of domestic corporations.

While it is easy to establish a C corporation without recognition of gain, it is not as easy to transfer assets out of the corporation without tax. When a corporation distributes assets to its shareholders, the

corporation must pay taxes on the gain in the assets. The shareholder in almost all cases will then pay taxes on the distribution.

Bypassing Gain

A charitable remainder unitrust or "CRUT" is one method that can be used to bypass capital gain. Because a CRUT is tax-exempt, it can sell assets or stock without having to recognize any gain. There are two ways in which a CRUT can be established using a C corporation. The first is by the shareholder transferring stock to a CRUT and the second is where the C corporation transfers some of its assets to the CRUT.

The Stock CRUT

The stock CRUT, rather than the asset CRUT, is the more commonly preferred trust and often provides better tax advantages. In the stock CRUT, the shareholders, usually of a closely held corporation, transfer all or part of their C corporation stock to the trustee of the CRUT. The CRUT is generally established for the lives of the shareholders, but it can also be created for a term of 20 years or less.

When the stock is transferred to the CRUT, the CRUT becomes the owner or a shareholder of the C corporation. The transfer of stock does not affect the taxation of the C corporation because the C corporation is its own taxable entity.

Once the CRUT is funded, the trustee will attempt to locate a buyer for the stock. Because the CRUT is a tax-exempt trust, there will not be capital gains tax when the stock is sold to the new buyer. Therefore, the client will not recognize capital gain when the stock is sold by the CRUT because of the CRUT's tax-exempt status. Again, the transfer of stock will have no effect on the corporation's tax status.

However, the buyer may wish to purchase the assets from the corporation rather than the stock of the corporation. Often a buyer prefers an asset purchase over a stock purchase for two reasons. First, the buyer does not want to assume any potential liabilities of the corporation it is acquiring and second, when it purchases the assets it gets a cost basis in the asset equal to the purchase price. This allows the purchasing corporation to take larger depreciation deductions.

If the buyer purchases the assets rather than the stock, it is the corporation who is selling rather than the shareholder. Therefore, the corporation will recognize gain on the sale of its assets. If the stock is purchased instead, the seller (i.e., the CRUT) recognizes no gain because it is tax-exempt. Thus, it is more advantageous to the shareholders for the stock to be sold rather than the corporate assets.

The Asset CRUT

Another method is for the corporation itself to establish the CRUT. The corporation owns assets and, therefore, it could transfer some of its assets to the CRUT. In this scenario, because the corporation is establishing the CRUT, the length of the CRUT can only be for a term of 20 years or less. This is because a C corporation does not have a life expectancy and therefore, cannot have a lifetime CRUT.

Is it possible, for the C corporation to fund the CRUT with its assets, but have the income paid to the shareholders for their lives? While this might be possible, it is usually not tax advantageous. If the corporation were to contribute assets to the CRUT and then have it pay to the shareholders, this action would be treated as a distribution to the shareholders. Thus, the shareholders would be taxed on the present value of the income stream of the trust. That amount is the difference between the fair market value of the assets transferred to the CRUT minus the charitable deduction. Further, the tax benefits for establishing the CRUT would belong to the corporation and that is generally not helpful as described below.

When the C corporation establishes the CRUT, it is the corporation that is entitled to the charitable deduction. Unfortunately, a C corporation is more restricted than an individual in the amount of the charitable deduction that it can use each year. A C corporation can only use a charitable deduction for up to 10% of its taxable income. This is unlike an individual who can use a deduction for gifts of appreciated property for up to 30% of his or her adjusted gross income.

Potential Reg. 1-337(d)-4 Gain Recognition

When a corporation is liquidated, there is potential tax payable at the corporate level. If it were permissible for a corporation to distribute all of its assets to charity or to a charitable trust, then this tax could be avoided. In order to limit this type of transaction, Reg. 1.337(d)-4 requires recognition of gain at the corporate level if "substantially all" the assets are given to charity or to a charitable remainder trust.

The phrase "substantially all" is not defined in Sec. 337(b)(2) or in Reg. 1.337(d)-4. However, there are several other places in the Code in which the phrase "substantially all" is interpreted to mean 85%. Reg. 1.514(b)-1(b)(1)(ii). Reg. 53.4942(b)-1(c). Reg. 53.4946-1(b)(2). Reg. 1.401(k)-1(d)(1)(ii). While these regulations cover a variety of tax issues, it is significant that they uniformly interpret the phrase "substantially all" to mean 85%.

Since the exception under Sec. 337 refers to "an 80%" subsidiary, some counsel have also expressed the belief that "substantially all" could be interpreted to be 80%. Regardless, it is apparent that a transfer of perhaps 65% of assets to charity or to a charitable trust would be permissible under Sec. 337(b)(2). Cautious counsel would be prudent in remaining at or below that level with transfers to charity.

Planning Strategies

Using a CRUT to sell a C corporation can have great tax benefits for those who are charitably inclined. For example, Bob and Ann Edwards established a C corporation 50 years ago. The corporation has done well over the years, but Bob and Ann are now ready to retire. Bob and Ann have two children, but they both have their own successful careers and, therefore, have no interest in taking over the business. Another corporation that wishes to acquire their business has approached Bob and Ann. The price offered was higher than they had expected, and thus, they are carefully considering the offer.

Because Bob and Ann started the corporation with very little capital, they have a very low cost basis in their stock. If they were to sell, Bob and Ann would realize a very large capital gains tax. Throughout the years, Bob and Ann have worked in their community supporting numerous local charities. They would like to continue their support of the various charities when they sell the corporation.

Also, now that Bob and Ann are retiring, Bob has dreams of purchasing a motor home and traveling across the country with Ann. Bob would like to use some of the sale proceeds to purchase the RV that he has always dreamed of having. Is there a way for Bob and Ann to achieve their goal? Bob and Ann could transfer some of their stock to a charitable remainder unitrust. They would continue to own the balance of the stock.

While it is permissible for Bob and Ann to serve as trustees, because they have chosen to do a "unitrust and sale," they felt it would be better to have another party serve as trustee. Bob and Ann have chosen their local bank to be the trustee of the CRUT. Further, Bob and Ann have created a revocable trust with the bank also as trustee. Bob and Ann have placed the balance of their shares into the revocable trust. This two trust plan allows the trustee to negotiate the sale more easily, since there is only one legal owner of the stock, the trustee.

Once the desired amount of stock is placed into the CRUT, the trustee will negotiate the sale and sell all of the stock to the new buyer. The CRUT will then receive its share of cash from the sale. The revocable trust that Bob and Ann established will also receive its share of the proceeds. Because the CRUT is tax-

exempt, it will not have to pay any capital gains tax on the sale of its stock. Bob and Ann's revocable trust is not tax-exempt, however, so Bob and Ann will have to pay capital gains taxes on the sale of that stock.

However, an excellent benefit is that even though Bob and Ann will have a capital gains tax on the stock sold by the revocable trust, they also will receive a large charitable deduction for establishing the CRUT. The charitable deduction will be taken at their highest income tax bracket while the capital gains tax will be paid at a favorable 15% tax rate. This tax arbitrage allows Bob and Ann use their charitable deduction to offset the capital gains tax owed. Therefore, Bob and Ann will receive enough cash to purchase their RV, benefit from an income stream for their two lives from the CRUT and enjoy the ability to benefit favorite charities with the CRUT remainder.

Conclusion

There are a number of charitable strategies that can be used when selling a business. Bob and Ann could have transferred all of their stock to the CRT. They also could have used a charitable gift annuity. The charitable gift annuity is especially beneficial when the children wish to continue to operate the business.

► Using Charitable Gifts in Business Planning -- The S Corporation

The most common type of corporation is a traditional "C Corporation." All companies whose stock is publicly traded are C Corporations. C Corporations pay tax on their net income at the corporate level. When that income is distributed to shareholders in the form of dividends, the shareholders also pay tax. The result is that C Corporation income is taxed twice - once at the corporate level and once at the shareholder level.

"S" Election

"S Corporations" resemble C Corporations except that they elect to be taxed differently. Not all corporations are eligible to make this election. To make the election, a corporation must have only one class of stock and less than 75 shareholders who are all individuals, estates, and certain types of trusts and charities. IRC Sec. 1361. Charitable remainder trusts or "CRT" are not permissible holders of Subchapter S stock.

"Pass Through" Taxation

An S Corporation does not pay tax at the corporate level. Instead, the shareholders of an S Corporation must include their share of the S Corporation's income, deductions and credits on the shareholder's personal tax return, even if that income isn't actually distributed. This is called "pass through" taxation because the S Corporation "passes" its income, deductions and credits "through" to its shareholders.

Inside and Outside Basis

The concept of tax basis appears regularly in the context of charitable giving. A person's tax basis in an asset is generally equal to his or her investment in that asset. Often, tax basis is the amount a person paid for an asset (i.e., the asset's "cost" to the owner). When the fair market value of an asset is more than its tax basis, the asset is appreciated and, if sold, will result in taxable gain to the owner. Charitable giving often allows the owner of an asset to bypass gain or defer part of the gain.

When working with S Corporations, the concept of basis can be confusing. This is because there are two types of basis at issue. The first is the S Corporation's basis in its assets; this is often referred to as inside basis. The second is the shareholder's basis in his or her S Corporation stock; this is often referred to as outside basis.

When a shareholder sells his S Corporation stock, his gain or loss on the sale is determined by the difference between the sale price and his outside basis. In the same way, when an S Corporation disposes of an asset, the gain or loss to the S Corporation is determined by the difference between the sale price and the S Corporation's inside basis in the asset.

Gifts of S Corporation Stock -- Issues Relating to the Client

Certain tax-exempt organizations are permissible shareholders of Subchapter S stock. Sec. 1361(c)(6). Therefore, an owner of S Corporation stock is able to make a gift of the stock to a charitable organization and receive an income tax deduction. There are a few issues the client needs to be aware of, however, before making a gift of Sub S stock to charity.

First, the client's ability to use the charitable deduction from the gift of the Sub S stock will be limited to the client's cost basis in his or her S Corporation stock. Sec. 1366(d)(1) limits the amount of deductions and losses to the client's basis in stock and debt of the Sub S corporation. Often the client of Sub S stock is also the person who established the business. Generally, the business was started with very little capital. Because of this it is likely that the client's cost basis will be very low. If the client's basis in his or her stock is very low, the client will only be able to use a small portion of the charitable deduction.

The second issue for the client to be aware of is minority discount. Generally, when a client makes a gift of stock, the amount transferred to the charity represents a minority interest in the corporation. When a minority interest is given, it is very likely that the qualified appraiser will apply a discount to the value of the stock.

Finally, the client of S Corporation stock must be aware that there cannot be a binding agreement with the charity to repurchase the stock. If there is a binding agreement, the client will have to recognize the income from the redemption of the stock and will not receive the benefit of a bypass of capital gain. Because S Corporations are closely-held entities, there generally is not a large market for the sale of the stock. Therefore, it is very likely that the corporation will repurchase the stock. The repurchase is permissible, but a binding agreement before the gift is prohibited. Rev. Rule. 78-197.

Gifts of S Corporation Stock -- Issues Relating to the Charity

While it is allowable for a charity to own Subchapter S stock, the tax benefits are not as advantageous as the ownership of C Corporation stock. With C corporation stock, the charity is not taxable on any stock dividends, nor is it taxable on the gain when it sells the stock. This is not true with S Corporation stock. Any income received by the charity for its ownership of Sub S stock is taxable to the charity as unrelated business taxable income. Sec. 512(e). In addition, when the charity sells the stock the gain from the sale is also taxable to the charity as unrelated business taxable income. Sec. 512(e)(1)(B)(ii). Because a charity is often established as a corporation itself, the tax on the gain will be taxed at corporate income tax rates. (Corporations do not have a lower, favorable capital gains rate like individual taxpayers.)

It is also important for a charity not to enter into a binding agreement with the client for the sale of the stock. While there are no adverse tax consequences to the charity if such an agreement is made, there are adverse tax consequences to the client as discussed above. If the charity is aware of the unfavorable tax consequences to the client from having a binding agreement, it can prevent having an unhappy client.

The S Corporation Unitrust

A charitable remainder unitrust or "CRUT" is not a permissible owner of subchapter S stock. Therefore, if an S Corporation shareholder were to transfer even one share of his or her S stock into a CRT, the S Corporation election would be terminated and the corporation would become a C Corporation the day

after the transfer. This would mean that the corporation would be subject to two layers of tax, one at the corporate level and one at the shareholder level.

It is permissible, however, for the S Corporation itself to establish a CRUT. Because the S Corporation does not have a life expectancy, the CRUT must be established for a term of years not to exceed 20. The S Corporation would fund the CRUT with some of its assets. However, it must be careful not to fund the CRUT with substantially all of its assets as discussed below. Because the S Corporation is funding the CRUT, it would receive the charitable deduction and also would be the income beneficiary of the CRUT.

Even though the S Corporation is entitled to the income tax deduction, because of its pass through taxation, the charitable deduction will flow through to the S Corporation shareholders. As mentioned above, however, the deduction to the shareholders will be limited to the shareholders' cost basis in their Sub S stock.

Potential Reg. 1.337(d)-4 Gain Recognition

When a corporation is liquidated, there is potential tax payable at the corporate level. If it were permissible for a corporation to distribute all of its assets to charity or to a charitable trust, then this tax could be avoided. In order to limit this type of transaction, Reg. 1.337(d)-4 requires recognition of gain at the corporate level if "substantially all" the assets are given to charity or to a charitable remainder trust.

Even though an S Corporation is not subject to tax like a C Corporation, if an S Corporation liquidates the corporation must recognize gain as if the assets were sold. The S Corporation does not pay taxes on the gain, but the gain passes through to the shareholders who must report the taxable gain.

The phrase "substantially all" is not defined in Sec. 337(b)(2) or in Reg. 1.337(d)-4. However, there are several other places in the Code in which the phrase "substantially all" is interpreted to mean 85%. Reg. 1.514(b)-1(b)(1)(ii). Reg. 53.4942(b)-1(c). Reg. 53.4946-1(b)(2). Reg. 1.401(k)-1(d)(1)(ii). While these regulations cover a variety of tax issues, it is significant that they uniformly interpret the phrase "substantially all" to mean 85%.

Since the exception under Sec. 337 refers to "an 80%" subsidiary, some counsel have also expressed the belief that "substantially all" could be interpreted to be 80%. Regardless, it is apparent that a transfer of perhaps 65% of assets to charity or to a charitable trust would be permissible under Sec. 337(b)(2). Cautious counsel would be prudent in remaining at or below that level with transfers to charity.

Planning Strategies

While the use of a CRT is more limited with an S Corporation than with a C Corporation, there is still the possibility of utilizing a CRT when selling a business. For example, Tom and Suzie started a business years ago creating designer clothing for dogs. Tom and Suzie liked the idea of having a corporation to protect them from potential liabilities, but they did not like the idea of the double tax system. Therefore, they established their business as an S Corporation. Tom and Suzie are the sole shareholders and are now planning to retire. Over the years they have supported a number of charities that assist in the prevention of cruelty to animals. Tom and Suzie are hoping to use some of the money they receive from the sale of the business to continue to support such charities.

Recently Tom and Suzie have had a number of inquiries for the sale of their business. It seems that designer clothing and accessories for dogs has become a booming business. Tom and Suzie met with the gift planner from their favorite charity and like the idea of a CRUT that would pay them an income stream over their two lives. However, they discovered that because they have an S Corporation they cannot transfer the stock to a CRT without losing their S election status. Tom and Suzie do not want to convert their business to

a C Corporation. Tom and Suzie, however, can have the S Corporation use some of its assets to fund a CRUT that would pay for 20 years. However, they must take steps to ensure that the CRT is not disqualified.

First, Tom and Suzie have to carefully choose which assets the S Corporation will use to fund the CRUT. The value of those assets cannot be substantially all of the value of the corporation. Further, they have to ensure that there is not any unrelated business taxable income while the assets are in the CRUT. Even \$1 of unrelated business taxable income will disqualify the tax exempt status of the CRUT. If Tom and Suzie decide to use any of the corporation's equipment or inventory, the deduction of the CRUT will be limited to the corporation's cost basis in those assets, which is very low. The S Corporation does own the building and land on which it operates and the value of the land and building represent about 50% of the S Corporation assets.

To make sure that the CRUT will work, Tom and Suzie enter into lease agreements with two of their key employees. Under the first lease, the employees will lease the operating assets of the S Corporation. Under the second lease, the two employees will lease the building and land. Both leases are fixed payment leases. By establishing the leases, the S Corporation can transfer some of its assets into the CRUT and avoid the unrelated business income tax problem.

Once the leases are established, the S Corporation will transfer title of the real estate to the CRUT. To avoid potential self-dealing issues, Tom and Suzie decide to select their local bank to serve as trustee of the CRUT. Once the land is transferred to the CRT, the trustee along with Tom and Suzie will negotiate for the sale of the assets and the land and building. After the sale is completed, the CRUT will receive the proceeds from the sale of the real estate and the S Corporation will receive the proceeds from the sale of the operating assets.

The sale of the operating assets will trigger gain for the S Corporation that will flow through to Tom and Suzie as the shareholders. It is important for Tom and Suzie to leave this cash in the S Corporation. This is because the gain from the sale will increase Tom and Suzie's cost basis in their S Corporation stock. The increase in the cost basis will allow them to use more of the charitable deduction that will flow through to them from the S Corporation. Over the years the S Corporation unitrust will make payments to the S Corporation. So long as the S Corporation was not a prior C corporation, the passive income from the CRUT will not pose any problems for the S Corporation.

Tom and Suzie are very happy with the sale of their business and that they are able to provide a very nice gift to their favorite charity. They are also very happy that they now are able to take a long needed vacation.

Conclusion

There are a number of charitable strategies that can be used when selling a business. Tom and Suzie could also have established a gift annuity with their Sub S stock. They also could have employed a gift and sale strategy. Further, there are other options available to Tom and Suzie if they chose not to keep the S Corporation alive for the 20-year term of the trust.

As you can see, charitable planning and corporations can be very advantageous if structured properly.

Unauthorized Entities

Introduction and Overview

Unauthorized entities engaging in insurance are a serious and growing problem in Florida for consumers and agents. Consumers are being substantially harmed with these entities failing to pay claims and defrauding through deception. Agents are unwittingly (sometimes knowingly) representing these entities and placing clients and themselves at risk. Florida law is being violated under the guise of these unauthorized entities claiming to be ERISA exempt or some type of association plan that claims to not be insurance or to be exempt from Florida regulation. All of this is simply not true! This is a problem in the state of Florida and other states.

The problem of unauthorized entities selling unauthorized products originated in the health insurance arena. These unauthorized entities promised low health insurance premiums, a promise fueled by skyrocketing health insurance premiums with legitimate health insurance carriers. In the current market, low health insurance rates just do not exist. The public and certain agents, apparently, were ripe for the picking by these scam artists. Remember, these *are* scams and the intent is to collect as much premium as possible without having to pay claims, or very few claims.

Unsuspecting licensed insurance agents are also vulnerable to this type of scam because representatives of the unauthorized entity will contact the licensed agents and send them (or give them in person) printed marketing materials touting the unauthorized entity and their bogus products which, again, gives the impression of legitimacy and credibility.

Maybe the agent is asking too many questions of the representative – is just a little too inquisitive – about who they are, where they're located, how long they've been in business, etc. The agent may even question the legitimacy of the product. Some of the scam artists are telling agents that their products do not have to be authorized by the Department because the plan is an ERISA plan, or that the plan is part of a MEWA (multiple employer welfare arrangement) or it's to be sold to labor unions – all the while stating that under any of these previously-mention circumstances, the products do not have to be approved or authorized by the Department.

The representative of the unauthorized entity might say, "It doesn't have to have approval, because this is an ERISA plan." Or "It doesn't have to have approval because this is plan is part of a MEWA plan." Or "This plan doesn't require approval of the DFS because it's for labor unions." None of this is correct! Any employee benefit plan which contains an insurance component is required, by law, to receive authorization of that component by the Department before it can be sold in Florida. Any legitimate company representative who approaches you about selling and representing their products should not mind the scrutiny you put them under by verifying their status with the Department.

It should be pointed out that the problem of representing unauthorized entities is no longer just a problem in the health insurance arena. The problem now seems to be spreading into property-casualty and general lines licensed agents are to be cautioned.

626.902 Penalty for representing unauthorized insurer.—

(1) In addition to any other penalties provided in the insurance code:

(a) Any insurance agent licensed in this state who in this state represents or aids an unauthorized insurer in violation of s. 626.901 commits a **felony of the third degree**, punishable as provided in s. 775.082 or s. 775.083.

(b) Any person other than an insurance agent licensed in this state who in this state represents or aids an unauthorized insurer in violation of s. 626.901 commits a **felony of the third degree**, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.(2) In addition to the penalties provided for in subsection (1), such violator shall be liable, personally, jointly and severally with any other person or persons liable therefore, for payment of taxes payable on account of such insurance under s. 626.938.

Agents or any other persons are prohibited from representing or aiding an unauthorized insurer. If an agent or any other person represents an unauthorized insurer, they are subject to severe penalties, including possible civil and criminal action. Agents are subject to **suspension or revocation of their licenses** and/or monetary penalties for violation of the unauthorized insurer law. Agents can be held liable for claims and losses not paid by unauthorized insurers. Agents who represent or aid an unauthorized insurer commit a **felony of the third degree**.

Don't let yourself be fooled by phony health plans that sound too good to be true – they probably are not true! Your career and personal financial security are at risk. Investigate before you sell or buy these plans. Check to determine if an entity or plan is an authorized insurer by calling the Department of Financial Services at 800-342-2762 for calls in Florida. Call 850-413-3131 for out-of-state calls.

“Understanding Charitable Gifts in Business Planning”

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The Able Trust, also known as the Florida Governor's Alliance for the Employment of Citizens with Disabilities, is a 501(c)(3) public-private partnership foundation established by the Florida Legislature in 1990. Its mission is to be the leader in providing Floridians with disabilities fair employment opportunities through fundraising, grant programs, public awareness and education. Its programs enable approximately 2,000 Florida citizens with disabilities to enter the workforce each year.

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