

The Deduction is in the Details: Substantiating Charitable Gifts

Barbara Rhomberg
May 17, 2019



© Kavanagh Rhomberg LLP 2019

**“All generalizations are false,
including this one.”**

**This presentation provides general information, and
should not be considered legal advice with respect to any
particular charitable gift.**

Basic Substantiation Rules for Income Tax Charitable Deductions

IRC §170

Treas. Reg. §1.170A-13

Treas. Regs. § § 1.170A-15, -16, &-17

© Kavanagh Rhombert LLP 2019



Why are substantiation rules so important?

Donors have to follow them in order to deduct their charitable gifts.

Section 170(a):

“A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the [IRS].”

Why are substantiation rules so important?

Donors have to follow them in order to deduct their charitable gifts.

Section 170(f) includes a number of provisions that mandate disallowance of a charitable deduction if certain substantiation requirements are not met.

Gifts of Money

Cash, check, or other monetary gift

Donor must have a **bank record** or a **written communication from the charity** showing

- (1) the name of the charity,
- (2) the date of the contribution, and
- (3) the amount of the contribution.

AND, if the gift is for \$250 or more, the donor must have a contemporaneous written acknowledgement.

Gifts of Property – Deduction of \$500 or less

General Rule

Donor must keep a **receipt from the charity** showing

- (1) The name and address of the charity
- (2) The date of the contribution
- (3) A description of the property in sufficient detail to show that the described property is the donated property.
- (4) For securities, the name of the issuer, type of security, and whether they are publicly traded

Gifts of Property - Deduction of \$500 or less Exception

A receipt isn't required if the donation is made in circumstances where it is impractical to obtain a receipt, e.g., a charity drop box.

But the donor must keep "reliable written records" with respect to donated items showing the information required on receipts (charity name and address, date of contribution, description of donated property).

Gifts of Property - Deduction of \$500 or less Additional Information

Donors also need written records to show:

- The FMV of the donated property;
- The method used to determine FMV; and
- If the donation is clothing or a household item, the condition of the item.

Gifts of Property

Contemporaneous Written Acknowledgment

If claimed deduction is \$250 or more, the donor **ALSO** needs a contemporaneous written acknowledgement.

Gifts of Property – Deduction of \$500 - \$5,000

General rule

- Donor must have a contemporaneous written acknowledgement
- Donors must file a completed Form 8283 (Section A) with the return claiming the deduction.
(Some C-corps don't have to file Form 8283).

Gifts of Property – Deduction of \$500 - \$5,000

Form 8283 (Section A) requires:

- Charity name and address, date of contribution, and description of donated property
- FMV of donated property
- Method used to determine FMV

and

Gifts of Property – Deduction of \$500 - \$5,000

Form 8283 (Section A) also requires

- **Approximate date donor acquired the property**
(but, for publicly traded securities, a representation that they have been held more than a year is sufficient)
- **Manner of donor acquired the property**
- **Donor's cost basis in property**
(but, for publicly traded securities held more than a year, basis isn't required)

§1.170A-16(c)

Gifts of Property – Deduction of \$500 or more

What if the donor doesn't know the date of acquisition or basis of the donated property?

If the donor has "reasonable cause" for being unable to provide the required information, the donor should attached an explanation to Form 8283.

If taxpayer has "reasonable cause," the deduction will still be allowed.

Gifts of Property – Deduction of \$500 - \$5,000

Form 8283 (Section A) also must include:

- For **real estate or tangible property**, the condition of the property
- For **securities**, the issuer/type of security/whether securities are publicly traded
- For **tangible property**, whether charity certified it for a related use
- Any other information required in the Form 8283 instructions

Gifts of Property – Deduction of \$500 or more Special rule for qualified vehicles

If the gift is a vehicle, boat or plane:

The donor must have a special contemporaneous written acknowledgement from the charity (Form 1098-C) that includes:

- The name and tax ID of the donor
- The VIN or similar number of the donated vehicle
- A certification from the charity regarding its use or disposition

and this must be attached to Form 8283.

Gifts of Property

Special rules for qualified vehicles

For more on donations of vehicles, boats, and planes:

- IRS Pub. 4302, "A Charity's Guide to Vehicle Donation" and
- IRS Pub. 4303, "A Donor's Guide to Vehicle Donations"

Gifts of Property – Deduction of up to \$5,000

- Regulations don't squarely address what records the donor have to substantiate the **claimed value** for deductions of up to \$5,000
- **But, taxpayer has the burden to show entitlement to deductions – and the burden to prove the amount of a charitable deduction**
- IRS Pub. 526 advises donors to keep records of how they determined fair market value

Gifts of Property - Deduction of more than \$5,000

General Rule

- Donor must obtain a “qualified appraisal” from a “qualified appraiser”
- File a completed Form 8283 (Section B) with return
- If the deduction is over \$500,000, the appraisal itself must be attached to the return.
- Donor must have a contemporaneous written acknowledgement from the charity

Appraisal Requirement- Deduction of over \$5,000
Exception for publicly traded securities

No appraisal is required, and donor fills out Section A of 8283 (not Section B), for a gift of **publicly traded securities**

- BUT – securities are not “publicly traded” if they are subject to any restrictions that materially affect the value or prevent the securities from being publicly traded.

Treas. Reg. Section 1.170A-13(c)(7)(xi)(C)

Example: Stock with transfer restrictions

- PLR 9247018 (1992): Taxpayer held stock in a public company. Under SEC Rule 144, taxpayer was prohibited from selling until a future date.
- IRS ruled that stock was not “publicly traded” and thus not qualified appreciated stock if donated to a private foundation.

Appraisal Requirement- Deduction over \$5,000
Other Exceptions

No appraisal is required, and donor fills out Section A of 8283 (not Section B), for:

- Some intellectual property gifts
- Business inventory
- A qualified vehicle, if the deduction is limited to charity's sale price

Appraisal Requirement – Deduction over \$5,000 Similar property

Appraisal is required when the aggregate deduction is over \$5,000 for all **items of similar property** given by the donor in the tax year (even if the items are donated to different charities).

“Items of similar property” means property of the same generic category or type.

Example: Gifts of Similar Property

Donor claims charitable contributions deductions for three separate gifts of books made in a single year:

- \$2,000 for books given to College A
- \$2,500 for books given to College B
- \$900 for books given to College C

Donor must get a qualified appraisal

Appraisal Requirement – Deduction over \$5,000

Property may need an appraisal even though it seems straightforward to value.

- Bitcoin
- Beneficiary's life interests in a CRT

Appraisal Requirement – Deduction over \$5,000 Disappearing Exception

Under old regulations, an appraisal was not required for gifts of non-publicly traded stock if the deduction didn't exceed \$10,000

Treas. Reg. Section 1.170A-13(c)(2)(ii)(B)(1)

This exception is not included in the new regulations effective for gifts after July 30, 2018.

Treas. Reg. Section 1.170A-16(d)

Qualified Appraisal

“Qualified Appraisal” and “Qualified Appraisal” are defined in Treas. Reg. Section 1.170A-17 for gifts made after January 1, 2019.

In addition: Appraiser must regularly perform appraisals for compensation.

Qualified Appraisal Tips

Appraise the property that was donated

- If the donor gives an LLC or corporation holding real property, the LLC interest must be appraised.

See Estate of Evenchik, TC Memo 2015-87

- If partial interest is donated, the appraisal must be of the partial interest

Treas. Reg. §1.170A-13(c)(2)(i)(A) and Treas. Reg. 1.170A-17(a)(12).

Qualified Appraisal Tips

Appraiser needs to consider the gift terms.

By regulation, the appraisal must include:

“The terms of any agreement or understanding by or on behalf of the donor and donee that relates to the use, sale, or other disposition of the contributed property ...

Continued next slide

Qualified Appraisal Tips

...including, for example, the terms of any agreement or understanding that—

- (A) Restricts temporarily or permanently a donee's right to use or dispose of the donated property;
- B) Reserves to, or confers upon, anyone, other than a donee any right to the income ...or to the possession of the property, including the right to vote donated securities, to acquire the property by purchase or otherwise... or
- C) Earmarks donated property for a particular use

Qualified Appraisal Tips

Take care that the appraiser is “qualified” under the rules. Regulations provide that the donor, charity, and certain related parties cannot perform the appraisal.

Mohamed v. Comm’r, TC Memo 2012-152

- Donor was a certified real estate appraiser and broker, and valued his own charitable gifts
- Also failed to complete 8283s correctly

Held: No deduction for millions of dollars of charitable gifts, even though court concluded that donor did not overvalue the gifts.

Gifts of Property – Deduction of over \$5,000

Donor must file Form 8283 (Section B). Regulations require the form to include:

- Charity name and address, and tax ID number
- Date that charity received the property
- Description of donated property

and

Form 8283 (Section B)

Regulations also require the form to include:

- Condition of real estate and tangible property
- Donor's date of acquisition, manner of acquisition, and basis

RERI Holdings I, LLC v. Comm’r

149 TC No. 1 (2017)

Partnership paid **under \$3 million** in 2002 for a remainder interest in property. In 2003, the partnership donated this remainder interest to a university and claimed a **\$33 million** charitable deduction.

On the Form 8283, the partnership left blank the space for “donor’s cost or other adjusted basis.”

Held: No deduction. Disclosure of basis would have alerted IRS to a potential valuation issue, so omission cannot be excused on “substantial compliance” grounds.

© Kavanagh Rhombert LLP 2019

Form 8283 (Section B)

Regulations also require the form to include:

- A statement explaining whether the charitable contribution was made by means of a bargain sale, and if so, the amount of any consideration received
- Any other information required in the 8283 instructions

Form 8283 (Section B)

Appraiser information. Must include the appraiser's name, address, taxpayer ID, and signature.

Must also include specific appraiser declarations (which aren't yet in the form).

If two appraisers contribute to a single appraisal, both must sign the appraisal and Form 8283.

Form 8283 (Section B)

Charity's signature. A representative of the charity must sign and date the form.

The person who signs on behalf of the charity must be either (1) an officer authorized to sign the charity's tax returns, or (2) a person specifically authorized by such an officer to sign Forms 8283.

Form 8283 (Section B)

Regulations provide that the form must be largely complete when the charity signs.

But the charity can sign before the form includes:

- Information about or signature of the appraiser
- Donor's manner or date of acquisition
- Donor's basis
- Appraised value
- Amount of the claimed deduction.

Form 8283 (Section B)

Effect of charity's signature:

- Charity does not have to verify or agree with donor's claimed value
- Charity's signature acknowledges receipt of the property described the form, on the date specified, and
- Acknowledges that the charity understands its Form 8282 obligations

Carryovers of unused deductions

New rule:

If a donor carries the unused portion of a charitable deduction for a gift of property over to subsequent years, Form 8283 (and the appraisal, if required) must be attached to the donor's return **for each carryover year.**

Substantiation of Deduction for Life Income Gifts

Application of Basic Rules

© Kavanagh Rhomberg LLP 2019



Life Income Gifts

The general rules for documenting charitable gifts apply when property is given to a charitable remainder trust, charitable lead trust, pooled income fund, or for a charitable gift annuity.

- If the donor gives property (other than publicly traded securities) and claims a deduction of over \$5,000, a qualified appraisal of the donated property is required and a completed Form 8283 (Section B) must be filed with the return.

Life Income Gifts

- The donor must **also** attach a statement to the tax return showing computation of the deduction, based on the value of the donate property, age, etc.
- And, if the donor elects to use the AFR from a previous month, an election must be attached to the return.

Life Income Gifts

One **exception** to the general rules:

- Usually, for monetary gifts, a charity receipt or bank record is required
- New IRS regulations **waive** that requirement for gifts to charitable remainder trusts and charitable lead trusts. (Still applies to pooled income fund and charitable gift annuity contributions.)

Contemporaneous Written Acknowledgement

IRC § 170 (f)(8)

© Kavanagh Rhomberg LLP 2019



Contemporaneous written acknowledgement

A “contemporaneous written acknowledgement” from the charity is required for **any contribution of \$250 or more**.

IRC § 170 (f)(8)

“If a taxpayer fails to meet the strict substantiation requirements of section 170(f)(8), the entire deduction is disallowed.”

Bayne French, et ux., TC Memo 2016-53 (2016)

Content of Acknowledgement

Charity acknowledgement must state:

- The amount of cash and a description (but not value) of property other than cash that was contributed, and
- Whether the charity provided any goods or services in consideration for the donation, and if so,
- A description and good faith estimate of the value of any goods or services provided (other than "intangible religious benefits").

Is a date of gift required?

The contemporaneous written acknowledgement rules do not require the acknowledgement to include the date of gift.

But if there is no date of gift on the acknowledgement, it cannot serve as a receipt for a monetary contribution or for property contribution.

One letter can serve as both a receipt and an acknowledgement if it meets all the requirements for each.

Hubbard v. Comm'r

TC Summ. Op. 2004-148 (not precedent)

- Taxpayer claimed a \$6,239 for gifts to church made during 2000.
- He had a contemporaneous written acknowledgment from the church that stated the total amount donated, and stated that no goods or services were provided in consideration of the gifts.
- However, he had no records of the individual gifts made during the year, and the church letter did not itemize the gifts.

Held: Only \$750 deductible under the *Cohan* rule, because minimum gift substantiation requirements were not met.

What is “contemporaneous”?

The donor must obtain the acknowledgement on or before **the earlier of:**

- The **date the donor files an original tax return** for the year when the contribution was made, or
- The **due date (including extensions) for the original return.**

After return is filed, it's too late

Durden v. Comm'r, TC Memo 2012-140 (2012):

- When taxpayers were audited, they had cancelled checks and a letter from their church acknowledging their contributions. However, the letter did not include any statement about whether goods or services were provided in consideration for the contributions.
- The taxpayers then got a second acknowledgement from the church that included a "no goods and services" statement.

HELD: No deduction.

Gifts of \$250 or more

Quid pro quo transactions

- Contemporaneous written acknowledgement not required for a payment to charity of over \$250 when the value of return benefits **reduces the contribution** to under the \$250 threshold.

Example: Don pays \$1000 at a charity auction for two opera tickets with a FMV of \$800. The contribution is less than \$250, so Don doesn't need a contemporaneous written acknowledgement.

Gifts of \$250 or more

Multiple gifts

- Separate contributions of less than \$250 to one charity are not subject to the requirements of section 170(f)(8)
- True even for payroll contributions – amount withheld from each paycheck is considered a separate contribution.

(For payroll contributions, requirement is met with a pay stub from employer showing withholding for contribution, please pledge card from charity with no goods or services language.)

Content of Acknowledgement

Charity acknowledgement must state:

- The amount of cash and a description (but not value) of property other than cash that was contributed, and
- Whether the charity provided any goods or services in consideration for the donation, and if so,
- A description and good faith estimate of the value of any goods or services provided (other than "intangible religious benefits")

Meaning of “In consideration for”

- Return benefits are “in consideration for” the donor’s payment if, at the time of the payment, the **donor receives or expects to receive goods or services in exchange** for the gift
- Includes goods or services provided in a year other than the year of the donation

What if the benefits are provided in consideration of the gift by **a third-party** (i.e., another donor or an affiliate) and not the charity that receives the gift?

- The IRS argued in litigation that such benefits need to be disclosed on the acknowledgement, but the issue is not resolved.
- Best practice: Include them if the charity tells the donor they will be provided or is involved in three-party negotiations.

What if the charity requires a **cash gift** in order to accept a gift of property?

If the taxpayer receives “no specific benefit” other than charity’s agreement to accept property, the cash payment has no return benefit and is deductible in full.

Meaning of “Goods or Services”

- Goods or services means “cash, property, services, benefits, and privileges”
- But some benefits with **insubstantial value** can be disregarded (and don’t need to be mentioned in the acknowledgement)

Insubstantial Benefits

Certain “token items” don’t count

1. Benefits worth less than 2% of the value of the donor’s gift, and also worth less than \$111,* are insubstantial.

Example: Donna gives \$500 to a charity in return for a book that sells for \$9.99. The return benefit is insubstantial, and doesn’t reduce Donna’s deduction (and can be ignored on the acknowledgement).

*In 2019. These figures are inflation adjusted each year.

Insubstantial Benefits

Certain “token items” don’t count

2. If gift is at least \$55.50,* and only benefits are token items bearing charity’s name or logo that cost in aggregate less than \$11.10,* the token items are insubstantial.

Example: Phil gives \$60 to charity and receives a coffee mug and tote bag with the charity’s logo that cost \$10. The benefit is insubstantial.

*In 2019. These figures are inflation adjusted each year.

Insubstantial benefits

Certain "token items" don't count

1. Benefits worth less than 2% of the value of the donor's gift, and also **worth** less than \$111,* are insubstantial.
2. If gift is at least \$55.50,* and only benefits are token items bearing charity's name or logo that **cost** in aggregate less than \$11.10,* the token items are insubstantial.

- *In 2019. These figures are inflation adjusted each year.
-

Insubstantial Benefits

Some membership benefits are insubstantial

- Membership payment is \$75 or less, and
- Benefits consist of
 1. Rights and privileges that donor can exercise frequently, like free or discounted admission or parking, preferred access to events, or discounts
 2. Admission to member-only events if cost per person is less than \$11.10*

Insubstantial Benefits

- The IRS has traditionally treated naming rights as insubstantial.
- Newsletters / program guides (other than “commercial quality” publications) are insubstantial if their primary purpose is to inform members about the organization, and they aren’t sold by subscription or newsstands.
- Other benefits might be insubstantial depending on the facts and circumstances

Content of Acknowledgement

General rule:

- The amount of cash and a description (but not value) of property other than cash that was contributed, and
- Whether the charity provided any goods or services (other than insubstantial benefits) in consideration for the donation, and if so,
- A description and good faith estimate of the value of any goods or services provided (other than “intangible religious benefits”).

Content of Acknowledgement Special Rules

If there are “intangible religious benefits”

- Contemporaneous written acknowledgement must “include a statement to that effect.”

Content of Acknowledgement Special Rules

Gifts to Donor Advised Funds:

- Contemporaneous written acknowledgement must state that the sponsoring charity has exclusive legal control over the assets contributed.
- This is required gifts of any amount (even gifts of less than \$250).

§170(f)(18)

Content of Acknowledgement Special Rules

Donations for Charitable Gift Annuities:

- Contemporaneous written acknowledgement must state whether any goods or services in addition to the annuity were provided in consideration for the gift.
- But it is not required to state the value of the annuity.

Content of Acknowledgement Special Rules

Donations to Pooled Income funds:

- Contemporaneous written acknowledgement must state that the contribution was transferred to the charity's PIF and indicate [whether any goods or services in addition to the income interest](#) were provided in consideration for the gift.
- But it is not required to state the value of the income interest.

Content of Acknowledgement Special Rules

Gifts to Charitable Remainder Trusts:

- Contemporaneous written acknowledgement **is not required.**

Gifts to Charitable Lead Trusts:

- **Also not required.**

Content of Acknowledgement Special Rules

Unreimbursed expenses incident to rendition of services for charity

Donor must have adequate records to substantiate amount, and must obtain a statement from the charity containing:

- A description of the services provided by the donor
- A statement of whether the charity provided any goods or services in consideration for the unreimbursed expenditures, and
- If so, a good faith estimate of the value of the benefits

Content of Acknowledgement Special Rules

IRA Rollover Gifts.

- A contemporaneous written acknowledgement **is required** for gifts of \$250 or more.
- But there cannot be any return benefits (other than insubstantial or intangible religious benefits).

Donor reliance on charity's acknowledgement

- In general, a donor may rely on the charity's acknowledgement (or quid pro quo disclosure statement) for the fair market value of return benefits.
- But the donor cannot use the charity's estimate as the FMV of return benefits if the donor "knows, or has reason to know, that such treatment is unreasonable."

Treas. Reg. §1.170A-1(h)(4)

Undisclosed return benefits

Addis v. Comm’r, 374 F.3d 881 (9th Cir. 2004)

- Donors engaged in a split-dollar life insurance arrangement with charity before enactment of section 170(f)(10)
- Donor’s cover letter stated expectation that donation would be used to pay premium, but **said this was a request and not a legal obligation.**
- Charity’s acknowledgement letter said that no good or services were provided.

Held: No deduction because Section 170(f)(8) requirements were not satisfied; donors couldn’t rely on letter because they knew they would receive substantial consideration.

Undisclosed return benefits – Continued

Cohan et ux v. Comm’r, TC Memo 2012-8 (2012)

- In a “highly negotiated” bargain sale transaction, charity’s acknowledgement omitted some items of return consideration.
- Court found that the donors and charity knew items of consideration were left out of the gift letter.

Held: No deduction because Section 170(f)(8) requirements were not satisfied. Charity’s letter didn’t include a good faith estimate of the total consideration, and donors couldn’t rely on it because they knew the letter failed to value some return benefits.

“The consequences: total denial of a deduction”

“Section 170(f)(8) provides that when its substantiation provisions are not satisfied “[n]o deduction shall be allowed” for payments over \$250. The plain language of the provision forbids a deduction ...

“A partial deduction is foreclosed by the statutory language. The deterrence value of section 170(f)(8)'s total denial of a deduction comports with the effective administration of a self-assessment and self-reporting system.”

Addis v. Comm’r, 374 F.3d 881 (9th Cir. 2004)

Form of charity's acknowledgement

- The charity can send a paper copy or provide the acknowledgement by email to the donor.
- The contemporaneous written acknowledgement "need not take any particular form" if it satisfies the statutory requirements.

French et ux., TC Memo 2016-53 (2016)

Deed of Easement as a contemporaneous written acknowledgement

e.g. 310 Retail, TC Memo 2017-164

- In several cases, courts have found that deeds of easement satisfied the acknowledgement requirement where they were **signed by the charity** and included all required information.
- Inclusion of a **merger clause** was pivotal in a number of cases

For the lack of a nail....

15 West 17th Street LLC, 147 TC No. 19 (2016):

- LLC donated a historic preservation easement to qualified charity. Appraisal valued the easement at \$64 million.
- Trust send an acknowledgement letter that failed to state whether goods or services were provided in consideration.
- IRS audited and disallowed the deduction entirely.

HELD: No deduction, because there was no contemporaneous written acknowledgement.

Quid Pro Quo Disclosure Requirement

IRC § 6115

© Kavanagh Rhomberg LLP 2019



- The tax code and regulations require donors to obtain charity receipts or acknowledgements
- But generally, there is no mandate that requires charities to provide them.

Exception: “quid pro quo contributions”

Quid Pro Quo Contribution

Definition

“Quid pro quo contribution” means:

A payment to a charity made partly as a contribution and partly in consideration for goods or services provided to the donor by the charity.

Quid Pro Quo Contribution Exception

“Quid pro quo contribution” does NOT include:

A payment to a charity organized for religious purposes, in return for intangible religious benefits generally not sold in a commercial transaction outside the donative context.

Quid Pro Quo Contribution

Required disclosure

A charity that receives a quid pro quo contribution of **more than \$75** must provide a written statement that:

- Informs the donor that amount of the contribution that is deductible is limited to the excess of the amount of money or value of property contributed over the value of the goods and services provided by the charity
- Provides the donor with a good faith estimate of the value of such goods and services.

Quid Pro Quo Contribution

Required disclosure

- A charity can ignore the benefits considered “insubstantial” for the purposes of a contemporaneous written acknowledgement.
- The written statement can be provided before or after the contribution.

Quid Pro Quo Contribution

Valuing return benefits

- Charity can use “any reasonable methodology” to make a good faith estimate
- If the goods/services are not commercially available, the can use comparable goods/services (even if they lack the unique qualities of the charity’s benefits).
- Regulations indicate that celebrity presence can be disregarded.

Questions?

Barbara Rhomberg



BRhomberg@
KRnonprofit.Law