

Internal Revenue Service

Number: **201848005**

Release Date: 11/30/2018

Index Number: 170.00-00, 170.11-05

Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:ITA:B01

PLR-107092-18

Date:

August 31, 2018

TIN:

Legend

Taxpayer A =

Taxpayer B =

Contributed
Shares =

Stock 1 =

Stock 2 =

Corporation 1 =

Corporation 2 =

Private
Foundation =

LLC 1 =

LLC 2 =

Trust 1 =

Trust 2 =

Date 1 =

Year 1 =

Contribution =
Date

Approved Plan =

Exchange =

Dear :

This responds to your letter dated March 2, 2018, and supplemental letter dated April 30, 2018, requesting a ruling under § 170 of the Internal Revenue Code (the Code). Taxpayer A and Taxpayer B (collectively “Taxpayers”) request a ruling that the Contributed Shares of Stock 1 of Corporation 1 indirectly contributed by Taxpayers to Private Foundation constitute “qualified appreciated stock” (QAS) within the meaning of § 170(e)(5)(B) of the Internal Revenue Code.

FACTS

Taxpayer A is the sole settlor and trustee of Trust 1. Trust 1 is wholly revocable by Taxpayer A. Trust 1 is the sole member of LLC 1, which is a disregarded entity for federal income tax purposes. Taxpayers are managers of LLC 1. LLC 2 is a wholly-owned subsidiary of LLC 1. Corporation 2 is an organization described in § 501(c)(4). LLC 2 has the power to designate the members of Corporation 2’s board of directors. Taxpayer A is also the sole settlor and trustee of Trust 2.

On the Contribution Date, LLC 1 contributed the Contributed Shares of Stock 1 of Corporation 1 to Private Foundation. Private Foundation is a private foundation within the meaning of § 509(a) but is not considered a private foundation described in § 170(b)(1)(F). Taxpayer A is the sole trustee of Private Foundation.

Stock 1 of Corporation 1 is listed and regularly traded on Exchange, a national securities exchange registered with the Securities Exchange Commission (SEC) under section 6 of the Securities Act of 1934 (the Exchange Act). Additionally, Taxpayers state that the Contributed Shares could at all times on or after the Contribution Date be sold on Exchange at Exchange prices pursuant to an exemption from the registration requirement set forth in section 4(a)(1) of the Securities Act of 1933 (the Securities Act) and the safe harbor set forth in SEC Rule 144.

Taxpayers, and entities over which they exercise control, are subject to Corporation 1 insider trading policies that require Taxpayers and such entities to conduct purchases and sales of Corporation 1 securities pursuant to SEC Rule 10b5-1 written trading plans.

In the instrument effectuating the contribution of the Contributed Shares, LLC 1 agreed not to take, and to cause any person with which it would be required to aggregate sales under SEC Rule 144 not to take, any action that would restrict the ability of Private Foundation to sell the Contributed Shares as a result of the volume restrictions contained in SEC Rule 144(e).

Neither the exemption to the registration requirement, nor an SEC Rule 10b5-1 written trading plan, nor the SEC Rule 144(e) volume restrictions subject the Contributed Shares to a restriction that materially affects the value of the Contributed Shares to the donor or prevents the Contributed Shares from being freely traded.

1. Taxpayers' beneficial ownership of Stock 1 and Stock 2 of Corporation 1 has not materially changed during the period beginning on Date 1 and ending on the date of this ruling request.
2. The Contributed Shares were at all times held as a capital asset, as defined in § 1221(a), in the hands of LLC 1.
3. On the Contribution Date, the adjusted basis of the Contributed Shares was lower than the fair market value of the Contributed Shares.
4. On the Contribution Date, LLC 1 held the Contributed Shares for more than one year.
5. None of Taxpayers, Trust 1, Trust 2, LLC 1, LLC 2, Corporation 2, or Private Foundation are or have ever been an "issuer" of Corporation 1 securities within the meaning of the Securities Act.
6. None of Taxpayers, Trust 1, Trust 2, LLC 1, LLC 2, Corporation 2, or Private Foundation are or have ever been a "dealer" within the meaning of the Securities Act.
7. The Contributed Shares are "restricted securities" within the meaning of SEC Rule 144(a)(3).
8. Each of Taxpayers, Trust 1, Trust 2, LLC 1, LLC 2, Corporation 2, and Private Foundation are "affiliates" of Corporation 1 within the meaning of SEC Rule 144(a)(1).
9. None of the Contributed Shares are or will be subject to an effective registration statement within the meaning of section 5 of the Securities Act.
10. On the Contribution Date, each of Taxpayers, Trust 1, and LLC 1 could satisfy all requirements under SEC Rule 144 to sell on Exchange at Exchange prices a number of shares of Stock 1 of Corporation 1 equal to the number of Contributed Shares.

11. On the Contribution Date, Private Foundation could satisfy all requirements under SEC Rule 144 to sell on Exchange at Exchange prices a number of shares of Stock 1 of Corporation 1 equal to the number of Contributed Shares.
12. Private Foundation expects to be able to satisfy all requirements under SEC Rule 144 to sell on Exchange at Exchange prices Stock 1 of Corporation 1 at the times and in the amounts contemplated by Private Foundation's Approved Plan.
13. Following LLC 1's contribution of the Contributed Shares to Private Foundation, Taxpayers, Trust 1, Trust 2, LLC 1, and LLC 2 will not have gifted in aggregate more than ten percent by value of Corporation 1 stock to Private Foundation, taking into account prior gifts of Corporation 1 stock by such persons to any private nonoperating foundation.
14. Other than as described in this ruling request, there are no legal restrictions on the ability of Taxpayers, Trust 1, LLC 1, or Private Foundation to sell or otherwise dispose of the Contributed Shares.
15. On the Contribution Date, Taxpayers did not possess any material nonpublic information with respect to Corporation 1.
16. LLC 1's contribution of the Contributed Shares to Private Foundation on the Contribution Date, during Taxpayers' Year 1 taxable year, constituted a "charitable contribution" within the meaning of § 170(c).
17. At all times, Taxpayer A, as trustee of Private Foundation, will engage in reasonable best efforts to ensure that the amount of Corporation 1 stock held by Private Foundation does not exceed, when aggregated with all other private foundations described in § 4946(a)(1)(H) two percent of the voting stock and two percent of the value of the outstanding shares of all classes of Corporation 1 stock.
18. Any sales of the Contributed Shares pursuant to Private Foundation's Approved Plan will occur via open market transactions on Exchange, and, to the best of Taxpayers' knowledge, will not be sold to any person related to Taxpayers or any entity controlled by or related to Taxpayers within the meaning of § 267.
19. Taxpayers will value the Contributed Shares for purposes of the value of their deduction under § 170 at the Contributed Shares' market value on the Contribution Date by calculating the average price between the highest and lowest quoted selling price on Exchange on the Contribution Date.

LAW AND ANALYSIS

Internal Revenue Code and Income Tax Regulations

Section 170(a) allows a deduction for any charitable contribution (as defined in § 170(c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary.

Section 1.170A-1(c)(1) of the Income Tax Regulations provides 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).

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

Section 170(e)(5)(A) provides that § 170(e)(1)(B)(ii) shall not apply to any contribution of QAS. Section 170(e)(5)(B) defines QAS as any stock of a corporation (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).

Section 170(b)(1)(C)(iv) provides that for purposes of this paragraph, the term “capital gain property” means, with respect to any contribution, any capital asset the sale of which at its fair market value at the time of the contribution would have resulted in gain which would have been long-term capital gain.

Section 1222(3) provides that “long-term capital gain” means gain from the sale or exchange of a capital asset held for more than one year, if and to the extent such gain is taken into account in computing gross income.

Section 170(e)(5)(C)(i) provides that in the case of any donor, the term QAS 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 this paragraph) 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 stock in such corporation) exceeds 10 percent (in value) of all of the outstanding stock of such corporation. Section 170(e)(5)(C)(ii) provides that for purposes of clause (i), an individual shall be treated as making all contributions made by any member of his family (as defined in § 267(c)(4)).

Section 170(e)(5) was added to the Code by the Tax Reform Act of 1984, Pub. L. 98-369. Congress believed “that deductibility at full fair market value for gifts of appreciated stock to private nonoperating foundations should be permitted in certain situations in which the potential for abuse, including overvaluations, is minimized.” H. Rep. No. 432, Part 2, 98th Cong., 2d Sess. 1464 (1984); Joint Committee on Taxation Staff, General Explanation of Revenue Provisions of the Deficit Reduction Act of 1984, 98th Cong. 667 (1984).

While § 170(e)(5) does not specify under what circumstances “market quotations are readily available on an established securities market,” the Tax Court has concluded that this requirement is satisfied if the requirements under § 1.170A-13(c)(7)(xi)(A) are satisfied. See Todd v. Commissioner, 118 T.C. 334, 346 (2002).

Section 1.170A-13(c)(7)(xi)(A) provides that publicly traded securities means securities (within the meaning of § 165(g)(2)) for which, as of the date of the contribution, market quotations are readily available on an established securities market. Market quotations are readily available on an established securities market with respect to a security if the security is regularly traded in the national or regional over-the-counter market for which public quotations are available. Section 1.170A-13(c)(7)(xi)(A)(2).

Section 1.170A-13(c)(7)(xi)(C)(1) provides, in part, that securities described in § 170A-13(c)(7)(xi)(A) shall not be considered publicly traded securities if the securities are subject to any restrictions that materially affect the value of the securities to the donor or prevent the securities from being freely traded.

Securities Act and SEC Rules

Section 5 of the Securities Act provides, in part, that unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly, to sell such security to the public. 15 U.S.C. § 77e(a). Section 4(a)(1) however, provides that section 5 shall not apply to transactions by any person other than an issuer, underwriter, or dealer. 15 U.S.C. § 77d(a). SEC Rule 144 sets forth a safe harbor that, if satisfied, deems certain persons not to be “underwriters” of securities. 17 C.F.R. § 230.144(b).

SEC Rule 10b5-1 defines when a purchase or sale constitutes trading “on the basis of” material nonpublic information in insider trading cases brought under Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. 17 C.F.R. § 240.10b5-1. Additionally, SEC Rule 10b5-1(c) provides a number of affirmative defenses that, if demonstrated by a person making the purchase or sale of a security, would establish that such purchase or sale was not “on the basis of” material nonpublic information when the person made the purchase or sale. 17 C.F.R. § 240.10b5-1(c). Specifically, SEC Rule 10b5-1(c)(i)(A)(3) provides, in part, that subject to paragraph (c)(1)(ii) of this section, a person’s purchase or sale is not “on the basis of” material nonpublic information if the person making the purchase or sale demonstrates that before becoming aware of the information, the person had adopted a written plan for trading securities. 17 C.F.R. § 240.10b5-1(c)(1)(i)(A)(3).

SEC Rule 10b5-1(c)(1)(ii) provides, in part, that paragraph (c)(1)(i) is applicable only when the plan to purchase or sell securities was given or entered into in good faith

and not as part of a plan or scheme to evade the prohibitions of this section. 17 C.F.R. § 240.10b5-1(c)(1)(ii).

SEC Rule 144(e) provides a limitation on the amount of securities sold. SEC Rule 144(e) provides that the amount of securities sold for the account of an affiliate of the issuer in reliance upon this section is generally determined as follows:

(1) If any securities are sold for the account of an affiliate of the issuer, regardless of whether those securities are restricted, the amount of securities sold, together with all sales of securities of the same class sold for the account of such person within the preceding three months, shall not exceed the greatest of:

(i) One percent of the shares or other units of the class outstanding as shown by the most recent report or statement published by the issuer, or

(ii) The average weekly reported volume of trading in such securities on all national securities exchanges and/or reported through the automated quotation system of a registered securities association during the four calendar weeks preceding the filing of notice required by paragraph (h), or if no such notice is required the date of receipt of the order to execute the transaction by the broker or the date of execution of the transaction directly with a market maker, or

(iii) The average weekly volume of trading in such securities reported pursuant to an effective transaction reporting plan or an effective national market system plan as those terms are defined in § 242.600 of this chapter during the four-week period specified in paragraph (e)(1)(ii) of this section. 17 C.F.R. § 230.144(e).

Analysis

Under § 170(e)(5)(B) the Contributed Shares are stock for which, as of the Contribution Date, market quotations are readily available on an established securities market.

Taxpayers represent that LLC held the Contributed Shares at all times as a capital asset, and that LLC 1 held the Contributed shares for more than one year. Taxpayers also represent that, as of the Contribution Date, the fair market value of the Contributed Shares exceeded their adjusted basis.

Taxpayers represent that, following LLC 1's contribution of the Contributed Shares to Private Foundation on the Contribution Date, Taxpayers, Trust 1, Trust 2, LLC 1, and LLC 2 will not have contributed in aggregate more than ten percent by value of Corporation 1 stock to Private Foundation when aggregated with prior gifts of Corporation 1 stock by such persons to any private nonoperating foundation.

Taxpayers represent that the Contributed Shares could at any time be sold in their entirety on Exchange at Exchange prices pursuant to the exemption to the registration requirement set forth in section 4(a)(1) of the Securities Act and the safe harbor set forth in SEC Rule 144.

Based on Taxpayers' representations, the fact that Taxpayers, and entities over which they exercise control, are subject to insider trading policies that require Taxpayers and such entities to conduct purchases and sales of Corporation 1 securities pursuant to an SEC Rule 10b5-1 written trading plan does not subject the Contributed Shares to any restriction that materially affects the value of the Contributed Shares to Taxpayers as the donors or prevents the Contributed Shares from being freely traded.

Based on Taxpayers' representations, the SEC Rule 144(e) volume limitations do not subject the Contributed Shares to any restriction that materially affects the value of the Contributed Shares to Taxpayers as the donors or prevents the Contributed Shares from being freely traded.

RULING

Based on the information submitted and representations made by Taxpayers, we rule as follows:

Provided the requirements of § 170 are otherwise satisfied, the Contributed Shares of Stock 1 of Corporation 1 indirectly contributed by Taxpayers to Private Foundation constitute "qualified appreciated stock" within the meaning of § 170(e)(5)(B) of the Code.

CAVEATS

The rulings contained in this letter are based on facts and representations submitted by Taxpayers and accompanied by a penalty of perjury statement executed by an appropriate party. This office has not verified any of the materials submitted in support of the request for rulings. Verification of the information, representations, and other data may be required as part of the examination process.

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.

No opinion is expressed or implied regarding whether the contribution of the Contributed Shares constitutes a "charitable contribution" within the meaning of § 170(c).

No opinion is expressed or implied regarding the tax consequences of any potential future transaction involving Corporation 1 securities.

No opinion is expressed or implied regarding the assignment of income doctrine.

No opinion is expressed or implied regarding excess business holdings within the meaning of § 4943(c).

No opinion is expressed or implied regarding private inurement within the meaning of § 501(c)(3).

No opinion is expressed or implied regarding any issues under Chapter 42 of the Code, affecting private foundations.

PROCEDURAL STATEMENTS

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representatives.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

Sincerely,

Norma C. Rotunno
Branch Chief, Branch 1
(Income Tax & Accounting)