

The Art of Donating Art: The Charitable Contribution of Art, Antiques and Collectibles*

By Joy Gibney Berus

Joy Gibney Berus discusses the potential benefits of donating art, antiques and collectibles, and describes several factors to consider and requirements that must be met to obtain and maximize these benefits.

Donations of objects such as fine art and collectibles have always been problematic. With the recent higher level of scrutiny and the additional requirements and penalties of the Pension Protection Act,¹ the rules related to qualified charitable contributions have been “stepped up.” This article will provide you with 12 steps to consider in donating personal property items such as art, antiques and collections, so that you may assist your clients in maximizing all of the benefits to which they may be entitled.

U.S. tax laws provide an incentive for clients to contribute, during their lifetime or upon their death, works of art to U.S. tax exempt organizations such as qualified museums and universities, and other organizations that display and make use of works for art in furtherance of their tax-exempt purposes.²

Donating art, antiques and other collectible objects to appropriate qualified organizations may provide your clients with the following possible benefits:

- An immediate income tax deduction
- Avoidance of the tax on capital gains on appreciated assets
- An estate and gift tax deduction
- The creation of a lasting legacy with their organization of choice

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Here are 12 steps to consider in the process of determining whether or not a client should make a charitable contribution of artworks and other such personal property objects, including what to donate, the different ways to donate and the process of making a qualified charitable contribution.

Step 1: Donate Appreciated Objects

Your clients generally will receive a higher income tax deduction if they donate an art object or collection that has appreciated in value over the time they have owned it. Art objects and collections held more than one year are capital gain property. Generally, property is capital gain property if its sale at fair market value on the date of the contribution would have resulted in *long-term capital gain*. Capital gain property includes capital assets held *more* than one year. The general rule is that a client can usually deduct the full fair market value of the donation as of the date of the contribution.

Step 2: Donate Long-Term Capital Gain Objects

Donated property that is appreciated long-term capital gain property can be deducted at its full fair market value.

On the other hand, the amount your client can deduct for a contribution of *ordinary income* property is generally *only the client's basis in the property (his or*

her cost), not the full fair market value. Property is ordinary income property if its sale at fair market value on the date it was contributed would have resulted in ordinary income or in short-term capital gain.

Examples of ordinary income property are:

- business inventory items,
- works of art created by the donor artist,
- manuscripts prepared by the donor author, and
- capital assets held one year or less.³

Unfortunately, the donor cannot be the artist or creator of the object. The amount the artist may deduct for a contribution of ordinary income property is generally only his or her basis in the property (the client's original cost).

Taxidermy. The Pension Protection Act reduced the tax deduction rules related to the charitable contribution of Taxidermy type property. Now, a donation of Taxidermy property to a qualified charitable institution is limited to a deduction of the donor's cost basis in the property or its fair market value, whichever is less. The cost basis is now limited to the cost of preparing, stuffing and mounting the property. (No more safari trip deductions.)

Step 3: Donate to a Public Charity

In order to maximize your client's charitable deduction benefits, the qualified organization must be a public, not private, charitable organization.

In general, qualified public charitable organizations include nonprofit groups that are religious, charitable, educational, scientific or literary in purpose, or that work to prevent cruelty to children or animals. You can ask the organization whether it is a qualified organization, and most will be able to tell you. Or, you can check IRS Pub. 78, which lists most qualified organizations.

In most cases, your client will only receive a deduction of his or her cost for a contribution of appreciated art objects to a private charity. However, that same donor client would be allowed a deduction of the full fair market value if the contribution was made to a public charity.

Step 4: Make Sure the Public Charity Meets the "Related Use Rule"

The "related use rule" applies to capital gains property that is tangible personal property (objects) contrib-

uted to a public charity. The related use rule requires that the use of the art object by the organization be related to the purpose or the function constituting the basis for the organization's charitable exemption under Code Sec. 501.

This means that the donated object must be of a type normally retained and exhibited by that charitable organization, such as a museum or educational institution that normally has a collection of similar paintings, or silver, or sports memorabilia. *All of the appreciated value of the donated art object will be lost as a charitable deduction if the related use rule is not satisfied.*

Example

As an example, we will look at Mr. Donor Client's donation and the tax deduction benefit he would receive if he made his donation to three different institutions.

Mr. Client purchased a sculpture by an unknown artist for \$1,000 15 years ago. It has appreciated over the years as the artist has gained notoriety. Mr. Client obtains a qualified appraisal by a qualified appraiser. The fair market value on January 1, 2008, the date of his donation, is appraised at \$15,000.

Example Donation 1. Mr. Client donates the sculpture to a private charity. He will only be able to receive a deduction for his cost, \$1,000.

Example Donation 2. Mr. Client donates the sculpture to a public charity (a charitable hospital), but the charity's charitable exemption purpose is unrelated to his donated sculpture. He will only be able to receive a deduction for his cost, \$1,000.

Example Donation 3. Mr. Client donates the sculpture to a public charity (an art museum with a collection of similar type sculptures), and the use of the sculpture by the organization is related to the purpose or the function constituting the basis for the organization's charitable exemption. He will be able to receive a deduction for the full fair market value of the sculpture as of the date of donation, \$15,000.

Step 5: Verify Acceptance of the Donation by the Qualified Organization

It is important to make sure your client's designated public charity *wants* the object, and that it meets the

criteria necessary for your client to receive an income tax deduction for the donation of the artwork to the institution. The contemplated donation should be discussed with the designated charitable institution. The organization should provide a written acceptance indicating that the organization is a qualified public charity, and that it satisfies the related use rule regarding the particular donation.

Step 6: Consider a Donation of a Partial (Fractional) Interest in the Artwork or Collection over Time (Caveat: The Benefits Have Been Reduced by the Pension Protection Act)

Before the Pension Protection Act

In certain circumstances, a donor may want to gift a partial interest (referred to as an “undivided fractional interest”) in a work of art or collectible. “The allowable deduction under section 170(a) was equal to that value which bears the same ratio to the value of the entire interest that the donated undivided present interest in the art object bears to the entire interest therein.”⁴

All of the appreciated value of the donated art object will be lost as a charitable deduction if the related use rule is not satisfied.

Example

Ms. Donor has collected antique silver over the years. She may donate a percentage of ownership of the antique silver collection, while retaining the remaining portion of ownership for herself, with the promise that full ownership will ultimately go to the qualified charitable organization at a future date of her choice, such as the donor’s date of death.

As an example, using Ms. Donor’s choice of a qualified museum as the charitable organization to receive her donation, the receiving museum would retain possession of the entire antique silver collection based upon its percentage of ownership. If a gift of a one-third interest was given, and Ms. Donor retained the remaining two-thirds interest, then the museum would have possession of the entire antique silver collection for display four months of each year, and Ms. Donor would have possession of the entire antique silver collection for the remaining eight

months. The museum would ultimately acquire a 100-percent interest in the antique silver collection at the designated future date.

Ms. Donor’s benefit in gifting the partial interest would be the allowable income tax deduction of one-third of the appraised fair market value of the antique silver collection at the date of donation. Additionally, Ms. Donor would have the continuing use and enjoyment of the entire antique silver collection for two-thirds of each year. Ms. Donor would also be able to make another partial interest donation to the same museum in the future, such as a second donation of another one-third interest in the antique silver collection five years later.

This time, the second donation of another one-third interest in the antique silver collection had a higher fair market value at the time of donation, not only because of the passage of five years time, but also because the provenance of the object now includes its history as part of the collection of the museum! The museum would now own a two-thirds interest in the entire antique silver collection and would

have possession for eight months of the year. Ms. Donor would have an additional income tax deduction equal to one-third of the fair market value at the time of the second donation. She would still have a one-third owner-

ship interest in the silver collection and the use and enjoyment of the entire silver collection for four months of the year until the ultimate transfer of the entire remaining interest at the designated date.

After the Pension Protection Act

The Act created new limitations on the donation of fractional interests after August 17, 2006. These limitations are now memorialized in IRS Pub. 526.⁵

Once a fractional gift is made, the value of any subsequent gifts is now limited to the LESSER of the initial fair market value of the contribution or the later fair market value of the contribution. *In other words, if the value of the item goes down, the fair market value deduction goes down, but if the value of the item goes up, the deduction does not go up, the donor is only entitled to the same value as the initial fractional interest contribution.*

The gift must be completed within the earlier of 10 years or the death of the taxpayer. This means that the

donation of *all* fractions owned by the donor must be completed and donated within 10 years.

The donee institution must take substantial physical possession or make use of the property during its allotted time period each year.

If any of these conditions are not met, then the deduction previously taken by the taxpayer will be recaptured with interest at 10 percent.

Step 7: Consider a Charitable Bargain Sale

The bargain sale is the only donation plan that can:

- give your client both a lump sum of cash, and
- a charitable deduction.

A bargain sale of personal property to a qualified charitable organization (a sale or exchange for less than the property's fair market value) is partly a charitable contribution and partly a sale or exchange. With the bargain sale, your client sells his or her art object or collection to the charitable organization at less than fair market value. The transaction gives your client cash, plus a charitable income tax deduction for the discount your client took from the market value.

Generally, if the art object sold was capital gain property, your client's charitable contribution is the fair market value of the contributed portion.

Step 8: Retain a Qualified Appraiser

The questions regarding the qualifications of the appraiser are raised on audit (after the tax report due date). Therefore, there is no second chance for the client who submitted the tax return.⁶ If the client or the client's professionals choose unwisely, and the appraiser is found to be unqualified or an excluded individual, the appraised value may be rejected. The client may then be subject to additional taxes as well as interest and penalties.

The Qualified Appraiser in Charitable Contributions of Art and Collectibles

The Pension Protection Act of 2006, signed on August 17, 2006, increased the requirements of a qualified appraiser in charitable contributions of personal property such as art and collectibles. The new requirements are now set forth in IRS Pub. 561.⁷

For returns filed after February 16, 2007, a qualified appraiser is an individual who meets ALL of the following requirements:

1. The appraiser has earned an appraisal designation from a recognized professional appraiser organization for demonstrated competency in valuing the type of property being appraised. Alternatively, the individual has met certain minimum education and experience requirements, which, for personal property, includes:
 - A. successful completion of college or professional-level coursework that is relevant to the property being valued,
 - B. at least two years of experience in the trade or business of buying, selling or valuing the type of property being valued, and
 - C. the individual must fully describe in the appraisal his or her qualifying education and experience.
2. The individual must regularly perform appraisals for which the appraiser receives compensation.
3. The individual must demonstrate verifiable education and experience in valuing the type of property being appraised. To do this, the appraiser can make a declaration in the appraisal that, because of his or her background, experience, education and membership in professional associations, he or she is qualified to make appraisals of the type of property being valued.
4. The individual has not been prohibited from practicing before the IRS under 31 USC §330(c) at any time during the past three-year period ending on the date of the appraisal.
5. The individual is not an excluded individual (as defined below).

More than one appraiser may appraise the property, provided that each complies with the requirements, including signing the qualified appraisal and Form 8283, *Noncash Charitable Contributions*, Section B, Part III.

Excluded Individuals

As set forth in IRS Pub. 561, an appraiser is considered an interested party, and is therefore considered an unqualified appraiser as an excluded individual if the person is:

1. The donor of the property or the taxpayer that claims the deduction.
2. The donee of the property.
3. A party to the transaction in which the donor acquired the property being appraised, unless the

property is donated within two months of the date of acquisition and its appraised value does not exceed its acquisition price.⁸ This applies to the person who sold, exchanged or gave the property to the donor, or any person who acted as an agent for the transferor or donor in the transaction.

4. Any person employed by any of the above persons. For example, if the donor acquired a painting from an art dealer, neither the dealer nor persons employed by the dealer can be qualified appraisers for that painting.
5. Any person related under Code Sec. 267(b) to any of the above persons, or married to a person related under Code Sec. 267(b) to any of the above persons.
6. An appraiser who appraises regularly for a person in (1), (2) or (3), and who does not perform a majority of his or her appraisals made during his or her tax year for other persons.⁹

A person is not a qualified appraiser for a particular donation if the donor had knowledge that would cause a reasonable person to expect the appraiser to falsely overstate the value of the donated property. In addition, in accordance with the generally accepted standard of care for appraisers, the appraiser must have no past, present or future interest in the object(s) being appraised and declare so within the appraisal report.

Therefore, the museum or other qualified charitable institution that will receive the donated artworks or objects may not provide the appraisal for the artworks.

Additional Requirement to the Appraiser Declaration

The appraiser's declaration contained in the appraisal must now include a statement that the appraiser understands that a Substantial and Gross Overstatement of Valuation (SGVM) resulting from an appraisal that the appraiser knows is for tax purposes may be subject to a penalty.

Caveat: The Opinion of a Qualified Appraiser Is Not Binding on the Court

Using a qualified appraiser is essential, but it is not enough. It is merely passing the first hurdle in the

process of substantiation of the appraised value. The Court is not bound by the opinion of any expert witness, and may accept or reject expert testimony in the exercise of the Court's own judgment.¹⁰ The Court may be selective in its use of any part of an expert's opinion.¹¹

In other words, if the value of the item goes down, the fair market value deduction goes down, but if the value of the item goes up, the deduction does not go up, the donor is only entitled to the same value as the initial fractional interest contribution.

"Finally, because valuation necessarily involves an approximation, the figure at which we arrive need not be directly traceable to specific testimony if it is within the range of values that may be properly derived from consideration of all the evidence."¹²

It is essential, therefore, that both the criteria of the qualified appraiser

as well as the qualified appraisal (discussed below) be met.

Step 9: Know the Requirements of a Qualified Appraisal

As set forth in Form 8283's Instructions regarding appraisal requirements, the appraisal must be made by a qualified appraiser (as defined above) in accordance with generally accepted appraisal standards. It also must meet the relevant requirements of Reg. §1.170A-13c and Notice 2006-96.¹³

The Uniform Standards of Professional Appraisal Practice (USPAP) is the generally accepted standard of care for appraisers, including personal property appraisers. Thus, the law determining a qualified appraisal as well as a qualified appraiser in a charitable contribution appraisal matter has been based on the tax court's interpretations of the tax regulations, the standard of care for appraisers commonly used (USPAP), the ethical requirements of the professional association of the appraiser (such as the American Society of Appraisers) and relevant case law precedents interpreting the regulations and standard of care.

Form 8283, *Noncash Charitable Contributions*

Contributions of art objects and other personal property are reported on IRS Form 8283, Section A, for all contributions for the year over \$500.

For deductions of art objects and other personal property over \$5,000, Form 8283 Section B must be completed. This is signed by the donor, the donee and the appraiser. *The donor must also obtain a separate qualified written appraisal of the donated property from a qualified appraiser.*

For deductions of art objects and other personal property over \$20,000, Form 8283 Section B must be completed. This is signed by the donor, the donee and the appraiser. *The donor must also obtain a separate qualified written appraisal of the donated property from a qualified appraiser and this appraisal must be attached to Form 8283 when it is submitted to the IRS.*

Using a qualified appraiser is essential, but it is not enough. It is merely passing the first hurdle in the process of substantiation of the appraised value.

The Appraisal and Its Content Requirements

The Pension Protection Act of 2006 also increased the requirements of a qualified appraisal for charitable contributions. As set forth in IRS Pub. 561, as revised in April 2007, a qualified appraisal is an appraisal document that:

1. is made, signed and dated by a qualified appraiser *in accordance with generally accepted standards* (e.g., if the appraisal is consistent with the substance and principles of USPAP);
2. meets relevant requirements of Reg. §1.170A-13(c)(3) and Notice 2006-96;
3. relates to an appraisal made not earlier than 60 days prior to the date of contribution of the appraised property;
4. does not involve a prohibited appraisal fee (generally, no part of the fee for a qualified appraisal can be based on a percentage of the appraised value of the property)¹⁴; and
5. includes certain information.

A qualified appraisal must include *all* of the following information¹⁵:

1. A description of the property in sufficient detail for a person who is not generally familiar with the type of property to determine that the property appraised is the property that was (or will be) contributed
2. The physical condition of any tangible property¹⁶
3. The date (or expected date) of contribution
4. The terms of any agreement or understanding entered into (or expected to be entered into) by

or on behalf of the donor, that relates to the use, sale or other disposition of the donated property (such as restrictions on the right to sell or use the property, earmarks for a particular use, any reservation of a right to income from the property or the possession of the property for someone other than the donee)¹⁷

5. The name, address and taxpayer identification number of the qualified appraiser and, if the appraiser is a partner, an employee or an independent contractor engaged by a person other than the donor, the name, address and taxpayer identification number of the partnership or the person who employs or engages the appraiser
6. The qualifications of the qualified appraiser who signs the appraisal, including the appraiser's background, experience, education and any membership in professional appraisal associations
7. A statement that the appraisal was prepared for income tax purposes
8. The date (or dates) on which the property was valued
9. The appraised fair market value on the date (or expected date) of contribution
10. The method of valuation used to determine fair market value, such as the income approach, the comparable sales or market data approach, or the replacement cost less depreciation approach
11. The specific basis for the valuation, such as any specific comparable sales transaction

Works of Art and Collectibles

Additionally, the following are examples, as set forth in IRS Pub. 561, of the information that should be included in a description of donated works of art and collectibles:

1. A complete description of the object, indicating the:
 - a. size,
 - b. subject matter,
 - c. medium,
 - d. name of the artist (or culture), and
 - e. approximate date created
2. The cost, date and manner of acquisition¹⁸
3. A history of the item, including proof of authenticity¹⁹

4. A professional quality image of the object²⁰
5. The facts on which the appraisal was based, such as the following:
 - a. Sales or analysis of similar works by the artist, particularly on or around the valuation date
 - b. Quoted prices in dealer's catalogs of the artist's works or works of other artists of comparable stature
 - c. A record of any exhibitions at which the specific art object had been displayed
 - d. The economic state of the art market at the time of valuation, particularly with respect to the specific property
 - e. The standing of the artist in his profession and in the particular school or time period

Collections

A separate qualified appraisal is required for each item of property that is not included in a group of similar items of property. One qualified appraisal for a group of similar items of property contributed in the same tax year may be provided. A qualified appraisal for a group of similar items must provide all of the required information for each item of similar property. The appraiser, however, may provide a group description for selected items, the total value of which is not more than \$100.²¹

Step 10: The Required Time of Receipt of the Appraisal by the Client

The client must receive the qualified appraisal before the due date, including extensions, of the tax return on which the charitable contribution deduction is first claimed for the donated property.²² If this deadline is not met, the client's entire charitable deduction is lost.

Step 11: Consider Requesting a Statement of Value if the Donated Object of Art Has Been Appraised at \$50,000 or More

At the request of the donor, the IRS will issue a Statement of Value that can be relied on by the donor of the object of art. This helps the donor in avoiding penalties. If your client is considering donating an

object of art that has been appraised at \$50,000 or more, you can recommend that he or she request a Statement of Value for that object from the IRS.

The donor must request the Statement of Value after the donor's donation but before filing the tax return that reports the donation. The request must include a copy of the qualified appraisal of the artwork(s), the completed Form 8283 including Section B, and the \$2,500 fee. (This fee is for one to three items, add \$250 for each additional item over three.) If the donor's request lacks essential required information, the donor will be notified and given 30 days to provide the missing information.

Step 12: Consider Obtaining the Advice and Assistance of Attorneys, CPAs, Qualified Appraisers and Other Professionals Experienced in Charitable Contributions of Art, Antiques and Other Collectibles

To ensure that all requirements for a qualified charitable contribution of art and other collectibles are met, a team approach is necessary. A team approach assists the professional and the client in maximizing the ability of the client to make the appropriate charitable contribution decisions, and then assists in the actual qualified contribution as required by law so that the client will obtain the full fair market value tax deduction to which he is entitled.

The total value of your client's charitable contribution deduction and certain other itemized deductions may be limited, depending upon your client's adjusted gross income and the amount and type of donation. There are many other estate planning options available which are beyond the scope of this article, such as charitable remainder trusts, charitable remainder unitrusts, pooled income fund trusts, charitable lead trusts, charitable lead unitrusts and charitable annuities.

Conclusion

The above steps are examples of just a few of the variety of issues to be aware of when your client owns a valuable work of art, antique or collection that he or she may consider donating to a charitable organization. There may be many options available

that you can recommend to your clients so that they may maximize their charitable deductions benefits. Both your client and a qualified charitable organization may thank you.

ENDNOTES

- * This article appears with permission from the JOURNAL OF PRACTICAL ESTATE PLANNING, Vol. 10, No.2.
- ¹ The Pension Protection Act of 2006 (P.L. 109-280).
- ² Code Sec. 170(c).
- ³ IRS Pub. 526 (2007).
- ⁴ Rev. Rul. 57-293, 1957-2 CB 153.
- ⁵ IRS Pub. 526.
- ⁶ Reg. §1.170 A-13(c)(3)(i)(A).
- ⁷ IRS Pub. 561 (April 2007).
- ⁸ Reg. §1.170 A-13(c)(5)(iv)(B).
- ⁹ Reg. §1.170 A-13(c)(5)(iv)(F).
- ¹⁰ *National Grocery Co.*, SCt, 38-2 USTC ¶9312, 304 US 282, 58 SCt 932; *J.C. Shepherd*, 115 TC 376, Dec. 54,098 (2000), *aff'd*, CA-11, 2002-1 USTC ¶60,431, 283 F3d 1258.
- ¹¹ *R.E. Parker*, 86 TC 547, Dec. 42,966 (1986); *A.D. Davis Est.*, 110 TC 530, Dec. 52,764 (1998); *M. Green Est.*, 86 TCM 758, Dec. 55,384(M), TC Memo. 2003-348.
- ¹² *H.A. True, Jr. Est.*, 82 TCM 27, Dec. 54,398(M), TC Memo. 2001-167 (*citing S. Silverman*, CA-2, 76-2 USTC ¶13,148, 538 F2d 927, *aff'g*, 33 TCM 1321, Dec. 32,831(M), TC Memo. 1974-285); as also cited in *P.S. Peracchio*, 86 TCM 412, Dec. 55,307(M), TC Memo. 2003-280.
- ¹³ Notice 2006-96, IRB 2006-46, 902.
- ¹⁴ Reg. §1.170A-13(c)(6)(ii).
- ¹⁵ IRS Pub. 561.
- ¹⁶ See where the failure to physically inspect the artwork or antique and the appraiser's reliance on photographs alone led to the rejection of the appraised value by the tax court due to problems with condition, age and authenticity issues not capable of being observed by reliance on photographs alone and physical inspection of the object was possible. *M.G. Sammons*, 51 TCM 1568, Dec. 43,212(M), TC Memo. 1986-318; *A. Posner*, 35 TCM 943, Dec. 33,919(M), TC Memo. 1976-216; *J.D. Shein*, 53 TCM 1292, Dec. 44,019(M), TC Memo. 1987-329; *F.C. Johnson*, 85 TC 469, Dec. 42,383 (1985).
- ¹⁷ See where having the accepting institution sign an agreement not to sell or otherwise dispose of the object within two years, the court found that the agreement itself reduced the fair market value of the donated object. *T.G. Murphy*, 61 TCM 2935, Dec. 47,415(M), TC Memo. 1991-276.
- ¹⁸ See *R.D. Jennings*, 56 TCM 595, Dec. 45,161(M), TC Memo. 1988-521, whenever a purchase and donation are close in time, the IRS will give the charitable deduction careful examination.
- ¹⁹ "The authenticity of the donated art must be determined by the appraiser. Certificates of authenticity may be useful, but this depends on the genuineness of the certificate and the qualifications of the authenticator." IRS Pub. 561. See also *G.O. Doherty*, 63 TCM 2112, Dec. 48,011(M), TC Memo. 1992-98, *aff'd*, CA-9, 94-1 USTC ¶50,112, 16 F3d 338. In a battle of two qualified experts over the authenticity of a Charles M. Russell painting, where one expert thought it was authentic and the other thought it was a forgery, the court ruled that the dispute over the authenticity in and of itself was a depressant on the painting's value.
- ²⁰ See the IRS Office of Art Appraisal Services, Photographic Requirements, which now allow digital images, available at www.irs.gov/pub/irs-utl/art_appraisal_services_photographic_requirements.pdf.
- ²¹ IRS Pub. 561.
- ²² Reg. §1.170A-13(c)(3)(iv)(B).

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