

Storm Warning:

Dickinson and the problem of prearrangement

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context

strong income tax incentive for contribution of appreciated property to (b) (1) (A) charities

- deduction at FMV offsets ordinary income
- but no recognition of long-term gain

if funding life income gift

- gain recognized over twenty-plus years
- analogy to installment sale

but outright, e.g., to DAF, no recognition

unless

prearrangement

recipient org wants to sell immediately to diversify portfolio, to limit exposure to UBTI

if no ready market, needs an exit plan

for closely held business interests, typically redemption

for real estate, "buyer in the wings"

IRS may challenge, arguing form over substance, i.e., recognition event followed by contribution of proceeds

enforceability

Palmer v. Commissioner, 62 T.C. 684 (1974), *aff'd*
on other grounds, 523 F.2d 1308 (8th Cir. 1975)

transfer of controlling stock interest
to private foundation controlled by taxpayer

redemption the following day

court says

- gift complete before redemption vote
- taxpayer as foundation manager acted consistently w/ fiduciary responsibility in voting to redeem

enforceability, but by whom

Rev. Rul. 78-197, 1978-1 C.B. 83
acquiescing in result

"under similar facts," IRS will not seek to
recharacterize unless

- org receives property subject to existing obligation to sell
- "or can be compelled by [issuing] corp to surrender for redemption"

widely understood to apply outside immediate
context of stock redemption

enforceability, but by whom

the Tax Court has said it has not adopted this
formulation, but

in *Rauenhorst v. Commissioner*, 119 T.C. 157 (2002),
treated the rev. rul. as a concession

i.e., IRS would not be heard to argue redemption
was "a practical certainty"
where not yet legally enforceable at transfer

compare *Blake v. Commissioner*, 697 F.2d 473
(2d Cir. 1982), *aff'g* T.C.Memo. 1981-579

recipient org bound by promissory estoppel

which brings us to

Dickinson v. Commissioner, T.C.Memo. 2020-128
(09/03/20)

- restricted stock in closely held corp
 - subject to call by board
- transfer to Fidelity DAF
- almost immediately tendered for redemption
- several other key employees did likewise
- board of directors waived restriction,
citing anticipated tender by Fidelity

on the other hand

under a promissory estoppel analysis,

- to whom did Fidelity make a promise to tender stock for redemption?
- what action did promisee take in reliance?
- was transfer to DAF conditional?

under Rev. Rul. 78-197 rubric,

- did Fidelity receive stock under existing obligation to tender for redemption?
- could issuing corp have forced?

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