

**Noncash Contributions and Pre-arranged Sales
an update**

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the seminal case

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 for redemption

context

strong income tax incentive for contribution of
appreciated property to 170(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

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

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, possibly cross purchase

for real estate, "buyer in the wings"

IRS may argue step transaction, substance over form,
i.e., recognition event followed by
contribution of proceeds

practical certainty

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
third party purchase of stock warrants was
"practical certainty" where not yet legally
enforceable at time of transfer

partial summary judgment for taxpayer

fixed right, ability to alter

Ferguson v. Commissioner, 108 T.C. 244 (1997),
aff'd 174 F.3d 997 (9th Cir. 1999)

- gift of stock in closely held enterprise while tender offer pending
- contingencies minimum tender, material changes
- "ultimate question" is whether transferor had "fixed right" to income at time of transfer
- "ability of transferee to alter prearranged course" merely "cogent evidence"
- here, closing "practically certain" to occur

also not a precedent

PLR 200821024

- taxpayer to transfer minority interest in closely held corp to donor advised fund
 - fund sponsor will seek to diversify
 - possible purchase by inter vivos QTIP trust of which taxpayer is trustee and successor beneficiary
 - no fixed commitments, no options to purchase
 - therefore no assignment of income
- cites *Rauenhorst* for proposition that form may be disregarded if transaction is in substance assignment of income

promissory estoppel

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

- contribution of publicly traded stock
- nominal basis, sold for > 700k
- proceeds used to purchase yacht for 685k
- yacht later sold for 246k, somewhat below potential market price
- recipient org bound by promissory estoppel
- stock gift would not otherwise have been made

virtual certainty

Chrem v. Commissioner, T.C.Memo. 2018-164

- stock transferred to community foundation immediately prior to buyout by ESOP
- transferors agreed to exert "all reasonable efforts" to persuade foundation to tender
- failing which, purchaser would attempt "squeeze-out"
- restricted use appraisal report, fairness opinion letter
- cross motions for partial summary judgment both denied
- stipulated decision

not a precedent

PLR 200321010

- taxpayer would propose to transfer closely held stock to CRUT
- proposal itself would trigger buyback option
- but corp would "likely" not exercise
- later effort by CRUT to sell would also trigger
- corp would almost certainly exercise
- but no indication corp could force redemption
- therefore no assignment of income

cites *Rauenhorst* as characterizing rev. rul. as "bright line" rule

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 had waived restriction, citing anticipated tender by Fidelity

on the other hand

under a promissory estoppel analysis,

- did Fidelity promise to tender stock for redemption?
- to whom was promise made?
- 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?

Fairbairn, cont'd

- motion to dismiss for lack of standing to assert claim on behalf of DAF itself
- denied, court finds "special relationship"
- summary judgment motion arguing estoppel by inconsistency w/ tax reporting position
- denied, court notes return was still open
- re "unclean hands," court says no evidence Fidelity was harmed by undisclosed info

a brief detour re DAFs

contemporaneous written acknowledgment

- Code section 170 (f) (8)
 - amount of cash, description of property
 - whether goods or services given in exchange
 - description and good faith estimate of value

specific to donor advised funds

- Code section 170 (f) (18)
 - express statement that fund sponsor "has exclusive legal control over the assets contributed"

Fairbairn, cont'd

- bench trial over seven days in October 2020
- submitted December 04
- opinion issued February 26
 - some alleged promises not broken, others not proven
 - standard of care re negligence claim
 - advisor acting for client account vs. DAF acting on its own account

as applied

Fairbairn v. Fidelity Charitable, 18-cv-04881 (N.D.Cal. 02/26/21)

- large block of publicly traded stock to DAF
- price spike immediately preceding contribution
- Fidelity sold entire block w/in hours, as price fell sharply [causation?]
- alleged promises re how Fidelity would sell, negligence resulting in losses to
 - value of tax deduction,
 - amounts subject to advisory privilege

relatedly

Pinkert v. Schwab Charitable, No. 3:20-cv-07657 (N.D.Cal. 07/12/21)

- class action on behalf of DAF donors
- alleged breach of fiduciary duty
- accounts invested in Schwab funds w/ higher admin fees, lower returns
- claimed standing premised on
 - "robust" advisory privileges
 - "reputational and expressive interests"
- dismissed on motion

Pinkert, cont'd

aff'd 48 F.4th 1051 (9th Cir. 09/14/22)

- reputational harm speculative
- advisory privileges not contractual, nor a "contingent property interest"
- comparison w/ *Fairbairn*
 - no allegation here of broken promises in inducing the gift

more recently

Hoensheid v. Commissioner, T.C.Memo. 2023-34
(03/15/23)

- stock in closely held corporation, pending merger
- transfer to Fidelity DAF completed July 13
- closing w/ third party purchaser July 15

- stock certificate backdated to June 11
- change in control bonus paid July 10
- cash stripping July 14

- nonqualified appraisal by financial advisor

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