

Storm Warning:

Dickinson and Fairbairn
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,

- 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?

meanwhile

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

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 is still open
- re "unclean hands," court says no evidence Fidelity was harmed by undisclosed info

Fairbairn, cont'd

- bench trial over seven days in October
- 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

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