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ARTICLES

3
IRS GUIDANCE ON CONTRIBUTIONS TO A CHARITY'S WHOLLY-OWNED LLC STILL MISSING
Jamison K. Shipman
A ten-year-old promise remains unfulfilled.

13
UBIT ROYALTY TREATMENT EXTENDED TO INCOME FROM INSURANCE SALES
Richard F. Riley Jr. and Jason J. Kohout
Bellco extends the UBIT royalty precedents to new areas and new activities.

21
FINAL TAX SHELTER REGS. REDUCE SIGNIFICANT TAX-EXEMPT INVESTORS' CONCERNS
Jodi P. Pellettiere
The Treasury deleted one 'party' line.

26
COURTS ILLUMINATE THE CRITERIA FOR TAX EXEMPTION
David L. Bea and Daniel J. Mays
Sometimes the lure of exemption from taxation leads organizations to push the envelope.

COLUMNS

32
UNRELATED BUSINESS INCOME TAX
WHEN ARE CAMPUS HOUSING RENTALS 'SUBSTANTIALLY RELATED?'
Michael A. Lehmann

38
CHARITABLE GIVING
THE IMPACT OF THE 2010 TAX RELIEF ACT ON CHARITABLE GIVING
Renee M. Gabbard and Megan G. Acosta

46
CURRENT DEVELOPMENTS
DONATION OF CONSERVATION EASEMENT DID NOT QAULIFY AS CHARITABLE CONTRIBUTION

WG&L

IRS GUIDANCE ON CONTRIBUTIONS TO A CHARITY'S WHOLLY OWNED LLC STILL MISSING

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Announcement 99-102, 1999-2 CB 545, was issued in October 1999. It provides that an entity disregarded for tax purposes under the Section 7701 entity classification regulations is to be treated as part of its tax-exempt sole member for purposes of reporting information pertaining to the finances and operations of the disregarded entity on annual information returns to the IRS. Ann. 99-102 also expressly states that this conclusion is required by the regulations. Thus, Ann. 99-102 confirms that a limited liability company (LLC) with a sole member that is an entity exempt from taxation under Section 501(a) must, absent a contrary election, be disregarded as an entity separate from such member, at least for certain purposes.

The entity classification regulations provide that a single-member LLC (absent an election to be treated as an association) is to generally be "disregarded."[1] Logically, that would seem to allow a taxpayer to make a charitable contribution to a single-member LLC whose sole member is an organization described in Section 501(c)(3), and claim the contribution as a charitable deduction under Section 170.[2] Notwithstanding the regulations, however, the IRS refuses to rule in advance that a contribution made to such an entity that is wholly owned by a tax-exempt charitable organization will qualify for a charitable contribution deduction.[3] At the time of its publication in 2000, the CPE Text indicated that the IRS intended "in the near future" to provide "guidance" on the availability of a charitable contribution deduction for contributions made to single-member LLCs. It has been over ten years since the CPE Text was published, however, and the IRS has not yet provided any guidance on this issue.

The Service's refusal to rule in advance or offer guidance on this issue creates a potential trap on the ability to claim a charitable contribution deduction under Section 170 when the taxpayer makes a contribution to a single-member LLC that has, as its sole member, a charitable organization. As discussed below, it is clear under the Code and the regulations that such a contribution should be treated as a charitable contribution under Section 170.

There is no logical or policy-based reason for denying a taxpayer a deduction for charitable contributions made to a single-member LLC whose sole member is a Section 501(c)(3) organization.

Disregarded entity classification

The starting point for this analysis is the entity classification regulations under Section 7701. Several provisions of the regulations regarding the classification of organizations for federal tax

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purposes are relevant to the classification of a single-member LLC for such purposes. According to Reg. 301.7701-1(a)(1), the Code prescribes the classification of various organizations for federal tax purposes. Whether an organization is an entity separate from its owners for federal tax purposes is a matter of federal law and does not depend on whether the organization is recognized as an entity under local law. Certain organizations that have a single owner can choose to be recognized or disregarded as entities separate from their owners.

With regard to the proper classification of a single-member LLC for federal tax purposes, two principles are established by the foregoing general rules. One principle is that a single-member LLC's classification as an LLC under state law does not govern its classification for federal tax purposes.[4] A second such principle is that a single-member LLC, because it has a single owner, may be permitted to choose for such purposes to be recognized or disregarded as an entity separate from its owner under Regs. 301.7701-2(c)(2)(iv) and (v). A single-member LLC may make this choice if it is one of the "certain organizations" that are referred to in Reg. 301.7701-1(a)(4).

The regulations then go on to define "business entity," which is used to distinguish certain kinds of entities. Reg. 301.7701-2(a) describes a business entity as any entity recognized for federal tax purposes (including an entity with a single owner that may be disregarded as an entity separate from its owner under Reg. 301.7701-3) that is not properly classified as a trust under Reg. 301.7701-4 or otherwise subject to special treatment under the Code. A business entity with only one owner is classified as a corporation or is disregarded. If the entity is disregarded, its activities are treated in the same manner as a sole proprietorship, branch, or division of the owner. Except as otherwise provided in the regulations, a business entity that has a single owner and is not a corporation under Reg. 301.7701-2(b) is disregarded as an entity separate from its owner.[5]

The application of the rules defining "business entity" to a single-member LLC formed under state law appears to be as follows. First, a single-member LLC generally is not classified as a trust under Reg. 301.7701-4 and is not subject to any type of special treatment under the Code. Therefore, a single-member LLC is a "business entity" as that term is used in the definitional rules of Reg. 301.7701-2(a). Second, under these definitional rules, because a single-member LLC has only one owner, it either must be classified as a corporation or its existence must be disregarded. Finally, if the existence of a single-member LLC is disregarded, its activities must be treated as if conducted by a branch or division of its sole member.

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1 There are specific exceptions with respect to certain employment and excise tax matters described in Regs. 301.7701-2(c)(2)(iv) and (v).

2 Except as otherwise provided, any reference to a "single-member LLC" refers to one that has elected to be disregarded and whose sole member is a tax-exempt organization described in Section 501(c)(3).

3 See McCray and Thomas, "Limited Liability Companies as Exempt Organizations," *Exempt Organizations Continuing Professional Education Technical Instruction Program for FY 2001* (2000) (hereinafter the "CPE Text"); Ltr. Rul. 200150027.

4 The Tax Court recently ruled that state law governs the determination of the "property interest" that a donor gives for gift tax purposes and not the Section 7701 entity classification regulations. Pierre, 133 TC 24 (2009). The majority opinion concluded that under state law the donor had made a gift of LLC interests and not the underlying assets held by the LLC. The majority opinion stated: "The question before us (i.e., how a transfer of an ownership interest in a validly formed LLC should be valued under the Federal gift tax provisions) is not the question addressed by the check-the-box regulations (i.e., whether an LLC should be taxed as a separate entity or disregarded so that the tax on its operations is borne by its owner)." Thus, the majority opinion does not purport to provide an exception to the principle under the regulations that state law does not govern "classification" of a single-member LLC for federal tax purposes.

5 Reg. 301.7701-2(c)(2)(i).

6 Reg. 301.7701-2(c)(2) (emphasis added).

7 *See* Regs. 301.7701-2(c)(2)(iv), (v).

8 Reg. 301.7701-3(a).

9 *Id.*

10 Reg. 301.7701-3(b)(1).

11 To elect a classification other than its default classification, a single-member LLC generally would need to file Form 8832, "Entity Classification Election," with the IRS. Reg. 301.7701-3(c)(1); Ann. 97-5, 1997-3 IRB 15. In addition, it has been suggested that if an LLC that is owned by a tax-exempt organization were disregarded, it might then somehow be deemed, by reason of being part of the tax-exempt organization, to have made the deemed election to be treated as a corporation that is prescribed under certain circumstances by Reg. 301.7701-3(c)(1)(v)(A). This illogical position has, fortunately, been publicly disavowed by IRS officials. See letter from Marvin Friedlander to Catherine E. Livingston dated 10/27/99, Tax Notes Today document 1999-35218, 1999 TNT 212-16 ("Announcement 99-102 recognizes that a disregarded entity that has not been determined to be, nor claims to be, exempt from taxation in its own right is not treated as an organization to which section 508(a) applies. Accordingly, there is no notice requirement under section 508(a) for a disregarded entity. The disregarded entity does not have to file Form 1023. Filing Form 1023 would result in treatment of the entity as other than a disregarded entity.").

12 Sections 170, 2055, 2522.

13 See note 3, *supra*.

14 In 2001, the author's law firm sought on behalf of a client a private letter ruling to the effect that contributions made to a single-member LLC would be deductible under Section 170. The IRS initially stated that this request was pending with the Office of Chief Counsel. However, the IRS subsequently stated it would not issue a ruling on this issue.

In general, the *only* classification options for a single-member LLC are treatment as a corporation or being disregarded. The regulations provide that a "business entity that has a single owner and is not a corporation ... *is* disregarded as an entity separate from its owner."[6] There are certain narrow exceptions to a single-member LLC being treated as a disregarded entity in the case of employment taxes and certain excise taxes under the regulations.[7] However, there is not a similar exception in the regulations with respect to treating such an organization as a separate entity for purposes of determining whether a taxpayer is entitled to a charitable contribution deduction.

The regulations generally permit a business entity to elect between being treated as a corporation and being disregarded. A business entity that is not required to be classified as a corporation under Reg. 301.7701-2 (i.e., an eligible entity) can elect its classification for federal tax purposes.[8] An eligible entity with at least two members can elect to be classified either as a corporation or a partnership, and an eligible entity with a single owner can elect to be classified as a corporation or to be disregarded as an entity separate from its owner.[9] The regulations provide a default classification for an eligible entity that does not make an election. The default classification for a domestic eligible entity with a single owner is "disregarded entity."[10]

Under this rule, the existence of a single-member LLC must be disregarded for federal tax purposes because it is not an entity that is required to be treated as a corporation under Reg. 301.7701-2, assuming the single-member LLC has not elected to be treated as a corporation.[11] Therefore, a single-member LLC *must* be disregarded as an entity separate from its sole member. The requirements of the regulations are absolute in this respect and should apply by their terms for all relevant federal tax purposes.

The foregoing analysis, although mandated by the regulations, was not confirmed by the IRS until the issuance of Ann. 99-102. Ann. 99-102 specifically provides that a disregarded entity is to be treated as part of a tax-exempt sole member for purposes of reporting information pertaining to the finances and operations of the disregarded entity on annual IRS information returns. Ann. 99-102 also expressly states that this conclusion is required by the Section 7701 regulations, analyzed above. Thus, Ann. 99-102 confirms that an LLC with a sole member that is an entity that is exempt from taxation under Section 501(a) must, absent a contrary election, be disregarded as an entity separate from such member.

Charitable contribution deduction

Because the regulations require that existence of a single-member LLC be disregarded for all federal tax purposes if it does not elect to be classified as a corporation, and because the regulations also require that a single-member LLC be treated as a branch or division of its tax-exempt member for such purposes, it necessarily follows that charitable contributions made to a single-member LLC should be treated for federal tax purposes—and specifically for purposes of the Code's charitable contribution deduction rules[12]—as having been made to the tax-exempt charitable member. Thus, it further follows that donors to a single-member LLC would be entitled to deduct their contributions under (and subject to all of the limitations set forth in) such rules.

The IRS refuses to rule in advance that a contribution to such an entity will qualify for a charitable contribution deduction.

Notwithstanding that such deductibility necessarily follows from applying the applicable regulations consistently (when the contribution is otherwise deductible), the CPE Text indicates that the IRS believes that there is a deduction issue under Section 170 in these situations.[13] Furthermore, the IRS subsequently declined to rule on the issue of deductibility in Ltr. Rul. 200150027.[14] The letter ruling involved a community trust that was an organization described in Sections 501(c)(3) and 170(b)(1)(A)(vi) that had formed an LLC in order to receive contributions of real property. The community trust sought rulings on various issues including: (1) the LLC would be disregarded for return and public disclosure requirements and the assets of the limited liability company would be treated as the community trust's assets for such purposes; (2) the LLC was not required to file an application in accordance with Section 508 to obtain recognition by the IRS of its status as part of the community trust; and (3) contributions to the LLC would be deductible under Section 170. The letter ruling concludes that the LLC should be disregarded and that the assets it owns should be treated as assets owned by the com-

munity trust for return and public disclosure requirements. The letter ruling also concludes that the LLC was not required to file a tax-exemption application with the IRS in accordance with Section 508. However, the IRS declined to rule on the deductibility of contributions of property to the LLC on the basis of the Service's ruling guidelines, which provide that the IRS will not provide a letter ruling on an issue that cannot be resolved before a regulation or any other published guidance is issued.[15]

The IRS has failed to issue regulations or other published guidance on this specific issue since the letter ruling was issued ten years ago. A 2010 information letter initially appears to suggest—given the nature of an information letter—that the IRS is getting more comfortable with the idea that a taxpayer could claim a charitable deduction for a contribution made to a single-member LLC.[16] The information letter provides that for purposes of Sections 4942 and 4945, distributions by a private foundation to the wholly owned LLC of a public charity would be treated as a distribution directly to the public charity on the basis that the LLC was disregarded for tax purposes under the entity classification regulations. However, the information letter does not specifically address a possible concern of the IRS regarding whether a contribution to a single-member LLC is made to a "corporation, trust, or community chest, fund, or foundation" in satisfaction of Section 170(c)(2).

The Service's position is unfortunate, as it muddles a situation in which the applicable law, as embodied in the Section 7701 regulations, is clear.[17] There is no legitimate legal, logical, or policy-based reason for questioning deductibility. (The situation created by the CPE Text is similar to the situation noted in note 11, *supra,* and similarly illogical.) In view of the statement made in the CPE Text and Ltr. Rul. 200150027, it is questionable whether the IRS will allow a taxpayer to claim a charitable deduction under Section 170 for a contribution made to a single-member LLC until it issues further guidance. The following illustrates that the applicable law allows for a deduction under Section 170, and that the IRS should therefore issue guidance to that effect.

Applicable law allows deductibility. The applicable law, which includes two distinct sets of legal requirements, is clear. One set of applicable legal requirements is set out in Section 170. Section 170(c)(2) defines "charitable contribution" to include a contribution or gift to or for the use of a "corporation, trust, or community chest, fund, or foundation" that meets certain criteria. These criteria require, *inter alia,* that the organization be "created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States," and that it be "organized and operated exclusively for religious,

[15] See Rev. Proc. 2000-1, 2000-1 CB 4, section 5.14(3). Section 6.09 of Rev. Proc. 2011-1, 2011-1 IRB 1, which is the most recent iteration of the rules and procedures governing the private letter ruling request process, provides for the same rule.

[16] IRS Information Letter 2010-0052 (3/15/10). An information letter issued by the IRS calls attention to a "well-established interpretation or principle of tax law" without applying it to a specific set of facts. An information letter may be issued if a taxpayer's request indicates a need for general information or if the IRS thinks general information will help the taxpayer. Rev. Proc. 2011-4, 2011-1 IRB 123.

[17] See Livingston, "The Tax Consequences of Accepting Charitable Contributions through a Single-Member LLC," 13 Exempts 107 (Nov/Dec 2001). The article states that the reasoning in the U.S. Supreme Court decision in Davis, 495 U.S. 472, 65 AFTR2d 90-1051 (1990), provides a basis for concluding that a gift to a single-member LLC "is a gift 'to' the charity." The article further states: "Specifically, the Court stated that a 'contribution made in trust for a charity does not give the charity immediate possession and control, as does a donation directly to the charity.' The charity lacks control because a trustee who is a party distinct from the charity retains discretion.... Where the charity is a single member of an LLC, it is as if the charity were serving as the trustee of a trust for its own benefit. The charity has control over assets held in single-member LLC just as it would over assets contributed to it directly." However, the author recognizes that Davis alone may not be enough to support the conclusion that a contribution to a single-member LLC is a charitable contribution under Section 170 because of policy considerations, but that when combined with the entity classification rules for single-member LLCs "it becomes clear that this is a unique circumstance in which a contribution to an entity that is not an eligible donee is nonetheless a contribution to a Section 501(c)(3) charity."

[18] Sections 2055(a)(2) and 2522(a)(2) have definitions of "charitable contributions" very similar to that of Section 170(c)(2). The reasoning and analysis for purposes of the application of the charitable contribution deduction allowed under Section 170 to a disregarded entity should apply equally to the charitable contribution deduction allowed under Sections 2055(a)(2) and 2522(a)(2).

[19] See McCarden, "The Deductibility of Contributions to Single-Member LLCs Owned by Tax-Exempt Organizations," 2005 TNT 115-36; see also Livingston, *supra* note 17.

[20] A somewhat analogous situation in terms of the relevance of the Section 7701 regulations was considered in GCM 34257, 1/23/70. The Chief Counsel in that memorandum reasoned: "The fact remains, however, that the existing section 7701 regulations are not, by their terms, specifically applicable to profit organizations only. Furthermore, these regulations purport to be controlling generally with respect to classification of unincorporated organizations generally. Consequently, until regulations specifically applicable in the case of non-profit organizations are issued, *the Service is, of course, bound to follow the existing regulations in classifying such organizations.*" (emphasis added).

[21] Section 170(c)(2).

charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition ... or for the prevention of cruelty to children or animals."[18]

A second set of applicable legal requirements is set out in the Section 7701 regulations. Under these regulations, which are discussed in detail above, the existence of a single-member LLC must be disregarded for all federal tax purposes, and the single-member LLC must be treated as a branch or division of its sole member (i.e., a charitable organization). Under these rules, contributions made to a single-member LLC must be considered for all federal income tax purposes to have been made to the charitable organization.

Any position that might be taken to the effect that a single-member LLC itself must be a "corporation, trust, or community chest, fund, or foundation" that satisfies all of the requirements of Section 170(c)(2) flies in the face of the Section 7701 regulations. If the IRS were to take this position, it would necessarily be taking the somewhat remarkable position *either* that the Section 7701 regulations implicitly require LLCs to be transparent for certain purposes but not for others, *or* that the Section 7701 regulations are inconsistent with the Code (specifically with Section 170).[19]

There is certainly nothing in the regulations that could lead to the conclusion that different treatment is required in different situations. Rather, the regulations clearly provide that the disregarded entity treatment prescribed therein is applicable for almost all federal tax purposes and, to the extent that such treatment is not applicable, the regulations specifically provide when such treatment does not apply (i.e., employment taxes and certain excise taxes). Likewise, there is at least no overt suggestion in the CPE Text that the regulations are at least to some extent invalid. This conclusion would necessarily follow, however, from taking the position that the regulations do not mean what they clearly say.[20]

Further, even if the Section 7701 regulations are not viewed as being conclusive with respect to the question of deductibility under Section 170, and even if a single-member LLC was required to satisfy all of the conditions imposed by Section 170 as a prerequisite to deductibility, a single-member LLC would likely satisfy each such requirement, as the following illustrates.

Corporation, trust, or community chest, fund, or foundation. First, a deductible charitable contribution may only be made to a "corporation, trust, or community chest, fund, or foundation."[21] The words "corporation" and "trust," as they appear in Section 170 refer to specific types of entities that are defined in the Code and regulations. A single-member LLC is neither a corporation nor a trust. Neither the Code nor the regulations defines the words "community chest, fund, or foundation," and certainly most state business entity statutes do not provide for the creation or existence of any such entities. It seems clear, however, that a single-member LLC is a "fund" or "foundation" within the meaning of the statute.

The most recent case that appears to deal with the qualification of a particular legal structure for deductibility under Section 170 is *Emerson Institute,* 356 F.2d 824, 17 AFTR2d 362 (DC Cir., 1966). In this case the District of Columbia Circuit held merely that a partnership owned by private individuals did not qualify as a community chest, fund, or foundation. It appears from a fair reading of the case, however (the opinion is brief), that this holding had more to do with the donee's noncharitable nature than with its particular legal structure. More specifically, it appears that the court viewed the words "community chest, fund, or foundation" as defining an entity in which the possibility of private benefit is all but precluded. Under this analysis, the partnership in the case could not qualify as a community chest, fund, or foundation because it was owned by private individuals.

In general, the *only* classification options for a single-member LLC are treatment as a corporation or being disregarded.

In this regard, *Emerson Institute* is consistent with a seminal line of cases that were decided under the pre-1954 Code and uniformly held that the phrase "community chest, fund, or foundation" was sufficiently broad to allow any truly charitable body, almost without regard to its legal status, to qualify as a charitable donee. For example, one of these early cases, *Fifth-Third Union Trust Co.,* 56 F.2d 767, 10 AFTR 1415 (CA-6, 1932) involved the tax-exempt status of a charitable trust established by an individual under a Code provision that granted such status to "corporations, and any community chest, fund, or foundation." The sole issue decided in the case was whether the trust was a "community chest, fund, or foundation." The trust conceded that it was not a corporation, and the IRS conceded the trust's charitable na-

ture and the absence of private inurement or benefit.

The IRS argued that the trust had to be either a community chest, a community fund, or a community foundation to be tax exempt. According to the opinion in the case, the IRS provided no rationale for this argument, other than that it was based on a literal reading of the statute and that the burden of proof was on the trust to provide support for any other reading. The Sixth Circuit rejected this argument. In its place, the court found that the "plain meaning" of the phrase "community chest, fund, or foundation" was that the word "community" modified only the word "chest." The court also found that there was no reason to believe that Congress would have intended to discriminate against a trust established by an individual as contrasted with a trust established by community gifts. Based on this reasoning, the Sixth Circuit held that the trust was a tax-exempt fund or foundation.[22]

In yet another of these early cases, the Board of Tax Appeals held that a charitable contribution made to an unincorporated committee (i.e., a group of people with no legal structure whatsoever) was a deductible contribution.[23] The court stated:

> As we view it the case turns on the characterization of the 'Anisfield Award Committee', i.e., whether it was such an entity as comes within the statute.... Whether the committee was an entity within the requirement of the statute is to be determined by a study of all the facts relating to its creation, composition, activity, and functions. We take it that the absence of the words "trust" or "fund" or "foundation" can not be determinative. Nor, in our opinion, is it material that no more formal document marked the creation of the committee.... We are of the opinion that the Anisfield Award Committee was such an entity as entitles it to classification within the provisions of section 23(o)(2) and that petitioner's donation to it was deductible.[24]

In 1935, the IRS General Counsel adopted the reasoning of these cases and, citing in particular the Sixth Circuit's reasoning in *Fifth-Third Union Trust Co.*, accepted the position that a charitable trust was a "fund" or a "foundation" and as such qualified for tax exemption.[25] In January 1968, this memorandum was declared obsolete by Rev. Rul. 68-207, 1968-1 CB 577, as part of a program for reviewing rulings published prior to 1953. Despite having been declared obsolete, GCM 15778 has been cited with approval by the IRS Chief Counsel in rulings issued subsequent to Rev. Rul. 68-207.[26] It does not appear that the IRS has rejected its fundamental acceptance of the reasoning of *Fifth-Third Union Trust Co.*, *Bok*, and *Wolf*.

In view of a single-member LLC's status under state law (i.e., an organization formed under state law), it is considerably more like a "fund" or "foundation" than was the committee at issue in the *Wolf* case. Regardless of such legal status, under the rationale of *Emerson Institute*, and under the express holdings of *Fifth-Third Union Trust Co.*, *Bok*, and *Wolf*, a single-member LLC should fit within the meaning of a "fund" or "foundation" under Section 170.

Organized under state law. Pursuant to the second requirement under Section 170(c)(2), a deductible charitable contribution may be made only to an entity that is organized under, among other things, a law of a state.[27] A single-member LLC is generally organized under state law. Accordingly, a single-member LLC meets this statutory place-of-organization requirement.

Organizational and operational tests. Third, a deductible charitable contribution may be made only to an entity that is clearly both organized and operated for charitable purposes.[28] A single-member LLC's articles of organization and operating agreement can—but do not have to—provide that the single-member LLC may not take any action that would, if taken by its sole member, be inconsistent with the member's Section 501(c)(3) status in order to satisfy the organizational requirement.[29]

Similarly, the operating agreement can—but does not have to—provide that the charitable organization, as the sole member of the single-member LLC, has the discretion to cause the single-member LLC to make distributions to its sole member from time to time as it sees fit and that upon dissolution the assets of the single-member LLC will be distributed to the mem-

[22] Another of the early leading cases is Bok v. McCaughn, 42 F.2d 616, 8 AFTR 11205 (CA-3, 1930). In that case a charitable contribution made to a trust established by the donor was held to be deductible, with the Third Circuit finding that "this trust *is a 'foundation'* in the accepted sense of that term." 42 F.2d at 618 (emphasis added).

[23] Wolf, 40 BTA 1232 (1939).

[24] 40 BTA at 1237-1238.

[25] GCM 15778, XIV-2 CB 115.

[26] See, e.g., GCM 33988, 12/3/68; GCM 34257, 1/23/70; GCM 38212, 12/20/79.

[27] Section 170(c)(2)(A).

[28] Section 170(c)(2)(B).

[29] The CPE Text states that the IRS does not require that the articles of organization for a disregarded entity independently satisfy the organizational test of Section 501(c)(3); rather, "because the entity is treated as an activity of the owner, it is the owner's articles that matter."

[30] The LLC could be formed in a jurisdiction that expressly permits limited liability companies to be organized for charitable purposes.

[31] Section 170(c)(2)(C).

[32] Section 170(c)(2)(D).

ber. While it is not mandatory that the articles of organization and operating agreement satisfy the organizational requirements if the LLC does not apply separately for recognition as a tax-exempt organization, the CPE Text provides that, if they do not, the IRS should "closely scrutinize the past and planned activities of the LLC to ensure that the entire entity (including the disregarded entity) complies with the 501(c)(3) operational test."

The presence in a single-member LLC's organizational documents of provisions that restrict actions that are inconsistent with tax-exempt charitable activities, and that limit distributions to the sole member should be sufficient to show that the single-member LLC is organized for charitable purposes. Similarly, the presence of such provisions—if the organization is operated in accordance with them—should be sufficient to show that the single-member LLC is operated for charitable purposes. However, if satisfaction of the organizational requirements is deemed to be important by the IRS, a single-member LLC's organizational documents can be drafted or amended accordingly to satisfy these requirements.[30]

Private inurement and benefit. A deductible charitable contribution may be made to an entity only if no part of its earnings inures to the benefit of any private shareholder or individual.[31] The member would be interested in seeing that the single-member LLC avoided private inurement and benefit issues to avoid losing its tax-exempt status, given that the activities of the single-member LLC are attributable to the member under the Section 7701 regulations and Ann. 99-102. As sole member of the single-member LLC, the member will have control over the single-member LLC's business and affairs. Because it would be in the member's best interest to prevent the single-member LLC from taking any action that would be inconsistent with its own organizational documents and so jeopardize its tax-exempt status, the single-member LLC should be able to satisfy this requirement.

Lobbying and politics. Fifth, and finally, a deductible charitable contribution may only be made to an entity that (1) is not disqualified for exemption under Section 501(c)(3) by reason of attempting to influence legislation, and (2) does not participate in or intervene in any political campaign on behalf of, or in opposition to, any candidate for public office.[32] It is unlikely that the single-member LLC would engage in such activities. If the single-member LLC were to do so, the prohibited activities would be attributed to its member under the Section 7701 regulations and Ann. 99-102, and the member's tax-exempt status would be at risk. As pointed out in the analysis on private benefit and inurement, above, the member will have control over the single-member LLC's business and affairs. It would be in the member's best interest to prevent the single-member LLC from taking any action that would be inconsistent with its own organizational documents and jeopardize its tax-exempt status. Therefore, the single-member LLC should be able to satisfy this requirement.

As the foregoing discussion makes clear, even if the IRS were to require that the single-member LLC itself must be a qualifying corporation, trust, or community chest, fund, or foundation under Section 170(c)(2), such requirement would be satisfied. For the reasons discussed in detail above, there is no such requirement, and arguments to the contrary are inconsistent with the Section 7701 regulations. Therefore, under applicable law—i.e., Section 170 and the Section 7701 regulations—charitable contributions made to a single-member LLC should be treated as contributions made to its sole member.

Logic and policy dictate deductibility. It is difficult to discuss the logic of treating LLCs that are owned by a single tax-exempt charitable organization as disregarded entities for some purposes but not for Section 170 purposes. It is difficult because this treatment is not logical. The Section 7701 regulations require disregarded entity treatment for a single-member LLC for almost all federal tax purposes. To the extent that such treatment does not apply, the regulations specifically provide when such treatment does not apply. Those specific provisions do not include any reference to the charitable contribution deduction rules of Section 170.

Further it is presumed that the IRS does not intend to invalidate these regulations in the form of the "guidance" mentioned in the CPE Text that it issues under Section 170. Yet invalidation is the only logical characterization of any guidance taking the position that contributions made to a single-member LLC are not deductible as charitable contributions. Such guidance, if it were to be accepted by the courts as a correct statement of the law, would mean that the regulations are, in a critically important respect, simply wrong.

The illogic of asserting that a single-member LLC owned by a tax-exempt organization

should be disregarded for some tax purposes but not others creates a danger for some organizations. Many tax-exempt organizations' legal assistance is provided by non-tax practitioners who work on a volunteer basis. These practitioners, and even tax practitioners who do not specialize in tax-exempt organizations, would likely never suspect that an entity like a single-member LLC could be disregarded for some income tax purposes but not for others. This kind of trap is undesirable for many reasons.

While a trap for uninformed taxpayers would be justified if it were required by the Code, this trap is not. Further, there is no legitimate policy reason for the IRS to take a nondeductibility position under Section 170. If an LLC that is wholly owned by a tax-exempt charitable organization were to take any action inconsistent with the donee qualification requirements of Section 170, the IRS would be able to take appropriate action under Section 501 or Chapter 42 (or other applicable provisions) of the Code with respect to the exempt organization, of which the single-member LLC would be merely a branch or division for these purposes. The IRS would not be left without a remedy, and the remedies that the IRS did have would be just as great and just as effective as requiring such an LLC to obtain recognition by the IRS of independent and separate tax-exempt status.

Second, taxpayers who fall into this trap may feel forced to litigate the validity of the Section 7701 regulations, and this could lead to years of litigation involving the proper interpretation of these rules. This is exactly the opposite of what the IRS hoped to achieve in promulgating these regulations, which were designed to end years of controversy (and huge amounts of wasted time and effort) regarding entity classification.

Third, creating a trap for the uninformed is the sort of thing that brings the IRS into public disrepute. It may be unavoidable when complexity is inherent in the Code itself. It is completely avoidable when it arises in the form of guidance with respect to a problem that does not really exist. Such complexity is certainly inconsistent with IRS Commissioner Douglas Shulman's and former IRS Commissioner Mark Everson's public statements regarding the desirability of simplification in the tax law.[33]

Fourth, an adverse position taken by the IRS under Section 170 would effectively eliminate the ability of tax-exempt charitable organizations to use single-member LLCs in many situations in which such companies would serve a legitimate purpose. The Section 7701 regulations generally represent an understandable and workable system for handling characterization issues. The ability to form disregarded entities under these regulations provides an opportunity for tax-exempt organizations to achieve legitimate objectives without having to incur substantial fees and effort.

For example, it often happens that a tax-exempt charitable organization wishes to accept donations of real property but does not want to accept the possible liabilities that might follow from being in the chain of title. It therefore wishes to form a single-member LLC to accept the donations. Such an organization's alternative is to form a separate supporting organization (involving substantial expense and effort) to accomplish this result. The workable system represented by the regulations, and the opportunities to achieve legitimate objectives without having to incur substantial fees and effort, would be lost if the IRS decides to take the position that there is no deduction under Section 170(a) in the case of a contribution to an LLC that is owned by a single tax-exempt charitable organization.

Finally, treating contributions made to a single-member LLC as having been made to its sole member is consistent with other IRS positions involving disregarded entities. For example, the IRS has ruled that a transfer of replacement property to a single-member LLC in connection with a like-kind exchange under Section 1031 is deemed to have been a transfer to the owner.[34] In each of these rulings, the taxpayers sold their relinquished property and held the proceeds with a qualified intermediary. The taxpayer in each ruling thereafter formed a wholly owned LLC to receive the replacement property.

Section 1031(a)(3) provides that the replacement property must be received *by the taxpayer* within 180 days following the date of the exchange of the relinquished property or the due date for the taxpayer's return, whichever is earlier. Thus, just as in the case of

[33] See, e.g., Commissioner Shulman's remarks before the Tax Executive Institute Mid-Year Meeting (4/4/11) and former Commissioner Everson's remarks before the National Press Club (3/15/05).

[34] See Ltr. Rul. 9807013, Ltr. Rul. 9751012.

[35] See Reg. 1.368-2(b)(1).

[36] See Prop. Reg. 1.368-2(b)(1), 45 Fed. Reg. 31115 (2000).

the guidance that is promised by the CPE Text, there could conceivably be a problem with the use of disregarded entities in Section 1031 transactions. However, the IRS properly held in each ruling that, because each wholly owned LLC would be disregarded as an entity separate from its owner for federal tax purposes, the wholly owned LLC's assets would be treated as assets of the owner-taxpayer.

Consistent with the IRS's treatment of like-kind exchanges under Section 1031 involving disregarded entities, the IRS finalized regulations issued under Section 368 with respect to mergers under Section 368(a)(1)(A) that are consistent with the analysis of the Section 7701 regulations set forth in this article.[35] The final regulations allow a merger of a corporation into a disregarded subsidiary entity to be treated as a tax-free reorganization under Section 368(a)(1)(A), reversing previously proposed regulations providing that a merger of a target corporation into such a disregarded entity would not be considered a statutory merger qualifying as a reorganization under Section 368(a)(1)(A).[36]

Conclusion

In summary, there is no logical or policy-based reason for denying a taxpayer a deduction under Section 170 for charitable contributions made to a single-member LLC whose sole member is a tax-exempt charitable organization. Rather, these contributions should be treated as contributions made to the tax-exempt charitable organization for all federal income tax purposes, including Section 170. The IRS should therefore promptly issue guidance to this effect, eliminating the potential trap that its continuing silence on this issue has created. ■