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David Frederick

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Clearing Obstacles to Sound Tax Policy: The Case Against the Anticipatory Assignment of Income Doctrine in the Charitable Context

David Frederick[*]

ABSTRACT

The Internal Revenue Code is replete with policy preferences in the form of deductions, credits, and deferrals, commonly called tax expenditures. The law prevents these tax expenditures from impairing the revenue function of the tax code by providing caps, time limits, and recapture rules that are meant to moderate their effects and prevent abuses. While these limitations are generally prudent, they themselves require frequent review to ensure they are not unduly disrupting the legitimate functions of the tax code. Indeed, it is possible, perhaps common, for reasonable limits on tax expenditures to evolve into unreasonable obstacles to effective tax strategy.

This article expounds upon this disruptive evolution by examining the Anticipatory Assignment of Income Doctrine as one such limit that began as a reasonable guard against abuse, but has contorted over time into a troublesome obstacle. The context for this examination is a tax-saving strategy for the liquidation of a business employing a Charitable Remainder Unitrust. The tax code presents clear policy endorsements for both entrepreneurs selling their businesses and for charitable gifting, and the Charitable Remainder Unitrust strategy is specifically established by the Internal Revenue Code. However, the judicially created Anticipatory Assignment of Income doctrine disrupts this strategy and prevents its effective usage. This article argues that this disruption is inappropriate and concludes with suggestions for curing it.

[*] Director of Wealth Strategy at First Bank Wealth Management and Adjunct Professor of Economics at Washington University in St. Louis. The author would like to thank Stephen J. Smith, Jim Tyrrell, Scott Dolan, Mark Sandvos, and Justin Meyer, all of them colleagues past and present who contributed to this article, though likely unaware of their contributions. The author would like to dedicate this article to his wife, Amanda, who offers constant love, support, guidance, insight, and devil's advocacy.

I. INTRODUCTION

The Internal Revenue Code ("IRC" or "the Code") abounds with policy preferences. Famously described as "tax expenditures" by Stanley Surrey, these preferences are deeply ensconced in the Code as deductions, credits, exclusions, deferrals, preferential rates, and exemptions.[1] A cursory review shows that Congress has used the IRC to favor home ownership,[2] retirement savings,[3] charitable giving,[4] military service,[5] higher education,[6] community development,[7] farming,[8] and ministry of the gospel.[9] On the one hand, the Code's favoritism may be in support of an activity Congress would like to encourage, such as a deduction for charitable giving or deferral for retirement savings.[10] On the other hand, this favoritism is sometimes also a means for Congress to counter difficulties that might otherwise arise from the IRC, such as offering a preferred long term capital gains rate to combat capital lock-in.[11]

However, even deeply ensconced policy preferences are often limited in their scope or effect. While the Code offers tax expenditures for preferred behavior or to prevent disruptive results of its own operations, no tax expenditure offers *carte blanche* to avoid taxation.[12] Nearly every benefit comes with a floor, cap, time limitation, recapture rule, or prohibitive ancillary doctrine that prevents the expenditures from swallowing the revenue raising ability of the IRC.[13] Most of these limits on tax expenditures—and thus the limits on tax mitigation strategies they imply—are written into the Code itself by Congress. However, some substantial limits on

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1. STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES 3 (1985). ("The tax expenditure concept . . . consists of the special preferences found in every income tax. These provisions, often called tax incentives or tax subsidies, are departures from the normal tax structure and are designed to favor a particular industry, activity, or class or persons. They take many forms, such as permanent exclusions from income, deductions, deferrals of tax liabilities, credits against tax, or special rates. Whatever their form, these departures from the normative tax structure represent government spending for favored activities or groups, effected through the tax system rather than through direct grants, loans, or other forms of government assistance.").

2. I.R.C. § 163(a), (h), (h)(2)(D) (2018) (taken together, the mortgage interest deduction).

3. I.R.C. § 219 (2018) (qualified retirement contributions to individual retirement accounts).

4. I.R.C. § 170 (2018) (charitable contribution deduction).

5. I.R.C. § 112 (2018) (exclusion of combat zone compensation for armed forces members).

6. I.R.C. §§ 529, 221 (2018) (exemption for qualified tuition program and deduction for student loan interest, respectively).

7. I.R.C. § 1400Z-2 (2018) (deferral of gain for investment in opportunity zones).

8. I.R.C. § 1301 (2018) (income averaging for farming and fishing).

9. I.R.C. § 107 (2018) (exclusion of parsonage rental value).

10. *E.g.,* Martin J. McMahon, Jr., *Random Thoughts on Applying Judicial Doctrines to Interpret the Internal Revenue Code*, 54 SMU L. REV. 195, 205 (2001) ("The Code abounds with provisions that not only influence economic behavior, but that also are intended to influence economic behavior.").

11. I.R.C. § 1(h) (2018); *See also* Sven-Olov Daunfeldt et al., *Do High Taxes Lock-in Capital Gains? Evidence from a Dual Income Tax System*, 145 PUB. CHOICE 25, 27 (2010) ("Our results indicate that higher taxes on capital gains prevent investors from realizing capital gains.").

12. *See, e.g.*, Daniel N. Shaviro, *Selective Limitations on Tax Benefits,* 56 U. CHI. L. REV. 1189, 1191-93 (1989) (discussing selective tax limitations as a mechanism for mitigating effects of tax exclusions and deductions).

13. *See, e.g.*, I.R.C. § 219(b) (2018) (maximum deduction for qualified retirement deductions); I.R.C. § 170(b) (2018) (percentage limitation for the charitable deduction); I.R.C. § 221(b) (2018) (maximum deduction for student loan interest); *See also* Peter J. Wiedenbeck, *Charitable Contributions: A Policy Perspective*, 50 MO. L. REV. 85 (1985) (examining the policy and limitations underlying tax treatment of charitable contributions).

tax strategies have also come from the courts in the form of judicial tax doctrines.[14] Courts have introduced doctrines that clarify the Code's processes, cover gaps in its legislation, and commonly limit strategies available to taxpayers in the name of fairness.[15] Historically, such judicial doctrines have helped ensure the smooth operation of the tax law, especially in the earliest days of the Code when gaps and ambiguities were common.[16] But judicial tax doctrines, like all laws, deserve regular review and subjugation to the democratic process, lest they lapse into forms that do more harm than good.[17]

Most limits on tax expenditures and the resulting tax mitigation strategies are perfectly reasonable restraints. The IRC is inherently a compromise and the limits on tax expenditures often demonstrate the competing interests at work in the Code.[18] Effective limits help keep policy preferences in relative balance according to arrangements reached in Congress. Tax expenditures can also lend themselves to

14. *See* Daniel M. Schneider, *Use of Judicial Doctrines in Federal Tax Cases Decided by Trial Courts, 1993-2006: A Quantitative Assessment*, 57 CLEV. ST. L. REV. 35, 37–40 (2009) (analyzing the rise of judicial doctrines in tax cases starting with *Gregory v. Helvering*); *See also* McMahon, *supra* note 10, at 195 ("The myriad of judicial doctrines that may be applied to police an overly literal application of the Code and regulations that could produce an absurd or unintended result cannot be neatly sorted in readily distinguishable piles. . . . [Some] of these doctrines, loosely speaking, can be said to be judicial tools to determine exactly what constitute the relevant fact findings, determined from the welter of evidence, to which the law in turn can be applied.").

15. Jay A. Soled, *Use of Judicial Doctrines in Resolving Transfer Tax Controversies*, 42 B.C. L. REV. 587, 588 (2001) ("The use of judicial doctrines to curtail tax avoidance is pervasive in the area of income taxation. . .. [C]ourts believe that if the Internal Revenue Code . . . were read literally, impermissible tax avoidance would become the norm rather than the exception."); *Contra* Joseph Isenbergh, *Musings on Form and Substance in Taxation*, 49 U CHI. L. REV. 859, 880 ("A justification frequently offered for extrastatutory or remedial forays by the courts in tax cases is that the tax laws cannot possibly reach all the artful forms of transaction used by taxpayers to reduce taxes and, therefore, that the courts have an important function in filling gaps left open by an imperfectly expressed congressional intent. Few myths so persistent are as easily dispelled. It is hard to think of a single case that has ever permanently staunched any fissure in the congressional dyke.").

16. *See, e.g.,* Gregory v. Helvering, 293 U.S. 465 (1935) (creating the Substance over Form Doctrine, perhaps the most famous judicial tax doctrine); Commissioner v. Glenshaw Glass*,* 348 U.S. 426 (1955) (creating the Realization Event Doctrine); Commissioner v. P.G. Lake Inc*.*, 356 U.S. 260 (1958) (creating the Acceleration of Income Doctrine). Tax doctrines can also come from Treasury Regulations interpreting the Internal Revenue Code. *See, e.g.*, Treas. Reg. § 1.451-2(a) (1979) (creating the constructive receipt doctrine).

17. In fact, a skeptical perspective would hold all judicial tax doctrines as inherently undemocratic since they only tend to arise as a tool for the government to curtail a tax-reducing transaction engaged by a taxpayer following a strict application of the Code's text. *See S*chneider, *supra* note 14, at 37 ("The common wisdom about these judicial doctrines is that they are used only to justify decisions in favor of the government. They are not neutral because they cannot be used to rationalize decisions on behalf of the taxpayer. And, unlike [other] methods of construction . . . , they do not explicitly reach beyond the words of a statute, even if they set aside the effect of those words."). Moreover, analyses have shown that judges tend to rely on these judicial doctrines relatively more than the actual text of the Code or regulations when engaging in statutory interpretation. *See* Nancy Staudt et al., *Judging Statutes: Interpretive Regimes*, 38 LOYOLA L.A. L. REV. 1909, 1911 (2005) ("Taken as a whole, the data depict a Court that has privileged its own precedent and judge-made rules over the preferences of the legislative or executive branches."). On the other hand, judicial doctrines themselves may also create opportunities for taxpayers to exploit the Code and avoid taxes in a way not available absent a given judicial doctrine. *See* Martin D. Ginsburg, *Making Tax Law Through the Judicial Process*, 70 A.B.A. J. 74, 76 (1984) ("Reliable maxims do not abound in the tax field, but there are a few. One relates to Moses' rod. It reminds us that every stick crafted to beat on the head of a taxpayer will metamorphose sooner or later into a large green snake and bite the commissioner on the hind part.").

18*. See Tax Equity and Ad Hoc Tax Legislation,* 84 HARV. L. REV. 640, 642–54 (1971) (providing an excellent consideration of competing interests in the Code).

fraud and abuse, and effective limits may curtail such improprieties.[19] Moreover, limits are needed to maintain consistent revenue and prevent tax revenue from being swallowed by the tax expenditures.[20]

But some limits are merely obstacles that prevent taxpayers from availing themselves of reasonable and policy-appropriate tax strategies.[21] These obstacles often originate as sensible restrictions, but through changing circumstances or misapplication to new situations, they may develop into unreasonable barriers. Such an otherwise worthwhile limitation becomes an obstacle when it no longer protects the effective functioning of the Code and the tax expenditures, but instead, disrupts the reasonable use of a tax expenditure. These limitations-*cum*-obstacles betray inadvertent ambiguities toward otherwise clear policy positions, disrupt reasonable use of expenditures, and prevent effective realization of the Code's policy goals. Far from being reasonable caps and limitations, these obstacles serve only to cause unnecessary confusion, complexity, and cost. Identifying the distinction between reasonable restraints and disruptive obstacles may be more art than science. However, considering individual limitations on policy-based tax expenditures may expose those limitations that have crossed the threshold from reasonable restraint meant to maintain the tax base or prevent an abuse to unnecessary obstacles that only serve to complicate and disrupt otherwise policy-consistent use of existing tax expenditures.

This article will suggest that the Anticipatory Assignment of Income Doctrine is one such limit that started as a reasonable restraint on tax evasion strategies but has twisted and contorted through multiple iterations and restatements to rise to the level of a policy-disrupting obstacle. This judicial doctrine has become an inappropriate barrier to sound tax policy, especially in the realm of liquidating closely held businesses and using charitable structures to mitigate the resulting taxation. This article will consider a putatively effective and appropriate tax strategy for selling a closely held business by employing a charitable structure specifically ordained by the Code, but which the Anticipatory Assignment of Income Doctrine fecklessly disrupts. Part II of this article considers aspects of liquidating closely held businesses and tax-saving charitable strategies. Part III of this article discusses the history and development of the Anticipatory Assignment of Income Doctrine and its effect on charitable liquidation strategies. Part IV identifies how the Doctrine interferes with the charitable liquidation structure and suggests remedies. Finally, Part V of this article concludes with perspectives on tax expenditures and their appropriate limitations.

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19. *See* Ian Ayres & Robert McGuire, *Using the False Claims Act to Remedy Tax-Expenditure Fraud*, 66 DUKE L.J. 535 (2016).

20. *See generally* Martin Feldstein, *Raising Revenue by Limiting Tax Expenditures*, 29 TAX POL'Y. & THE ECON. 1 (2015).

21. *See, e.g.*, Ramsay H. Slugg, *Good Deeds Done Badly: Charitable Giving Missteps*, 44 EST. PLAN. 12, 13 (2017) ("One result of all of the rules surrounding the federal income tax charitable deduction is a greater opportunity to inadvertently run afoul of those rules. The author is not talking about intentional abusive transactions[.] Rather, the more rules that exist, the more opportunities there are to make a mistake.").

II. CHARITABLE STRATEGIES FOR BUSINESS LIQUIDATION

A. General Considerations for Selling a Business

Closely held business owners often spend their lives building the value of their companies.[22] Forgoing traditional wage and employment relationships, business owners embrace extra risks attendant to developing an enterprise and competing in the market.[23] While owning and running a successful business can be lucrative, for many business owners the end goal of building a company is realizing the fruit of their labor through a sale and exit.[24] However, while a sale may mean a large payday and the start of retirement, it can also mean a substantial income tax burden for the seller.[25] Business owners often have a low basis in their business, especially if the business had ever been incorporated as a pass-through entity and the owner took deductions for losses and capital depreciation.[26] This means that for many owners, the entire sales price of their company may come as taxable gains.[27] If the income tax burden is too high, the owner may choose not to sell at all and may become locked-in to the business.[28]

The Code has several provisions designed to mitigate some of this tax burden and prevent lock-in. First, and perhaps most notably, the long-term capital gains tax rate is set substantially below the ordinary income tax rate.[29] This rather broad relief to capital lock-in applies not only to the seller of a closely held business but also to any taxpayer selling a capital asset.[30] The Code further offers § 1202, which excludes a substantial portion (or potentially all) of the gain from a sale of a qualified small business, albeit as a very hard-to-hit target for maximum tax relief.[31] The

22. Tobias J. Moskowitz & Annette Vissing-Jorgensen, *The Returns to Entrepreneurial Investment: A Private Equity Premium Puzzle?*, 92 AM. ECON. REV. 745, 750-53 (2002) (defining a closely-held business as an incorporated entity, that is not a personal service business, and that has at least 50% of its outstanding ownership shares owned by five or fewer individuals.). INTERNAL REVENUE SERVICE, U.S. DEP'T OF THE TREASURY, PUB. NO. 542, CORPORATIONS (2019) (This article uses closely-held business owner to mean the controlling owner (or sole owner) of a closely-held business. This definition is less formal, but is held consistently throughout the article.).

23. Lowell W. Busenitz, *Entrepreneurial Risk and Strategic Decision Making: It's a Matter of Perspective*, 35 J. APPLIED BEHAV. SCI. 325, 326 (1999).

24. *See generally* Dawn R. DeTienne, *Entrepreneurial Exit as a Critical Component of the Entrepreneurial Process: Theoretical Development*, 25 J. BUS. VENTURING 203, 211 (2010) (discussing the importance of planning for a business sale and exit as part of the entrepreneurial process).

25. In general, closely-held business interests will qualify as "capital assets" under I.R.C. § 1221 and their sale will be taxable according to terms laid out in §§ 1, 1001, 1222, and other relevant provisions. *See* I.R.C. § 1221 (2017); I.R.C. § 1 (2019); I.R.C. § 1001 (1993); I.R.C. § 1222 (2014).

26. *See* I.R.C. §§ 167, 1011.

27. This taxable gain may include basis recapture taxed as ordinary income—not preferred long term capital gains rates—if the business has been taking depreciation deductions and the sale is structured as an assets sale. *See* I.R.C. § 1250 (2018).

28. Sven-Olov Daunfeldt et al., *supra* note 11, at 27 ("Our results indicate that higher taxes on capital gains prevent investors from realizing capital gains."); *See also* Zhonglan Dai et al., *Capital Gains Taxes and Asset Prices: Capitalization or Lock-In?* 63 J. OF FIN. 709, 713 (2008).

29. I.R.C. § 1(h) (2019).

30. I.R.C. §§ 1221, 1222.

31. I.R.C. § 1202 contains several substantial restraints which tend to limit this rather striking section's actual effectiveness. For instance, a taxpayer hoping to avail him or herself of the benefits of § 1202 generally must hold the business stock for at least five years before the sale (§ 1202(a)(1)), be the original incorporator of the business (§ 1202(c)), and is limited by a cap on the excludible income (§ 1202(b). Yet the harshest restriction arguably comes with § 1202(c)(2)(A), which requires the business to have

Code also endorses certain types of business sales with tax relief, such as a sale to an Employee Stock Ownership Plan ("ESOP") with § 1042 allowing for the non-recognition of gain when the sale proceeds are reinvested.[32] These provisions seem to collectively indicate that the Code favors business liquidations, at least insofar as to allow a closely held business owner to sell and exit his or her firm.

Selling a business is complex work, and the act can take many forms. A business owner may sell to a partner, a family member, a third party, or the public at large through an initial public offering.[33] A sale can be in the form of a stock sale, asset sale, or statutory merger.[34] In exchange for his or her stock or assets, the seller may accept cash, debt, equity in the purchaser, or a combination thereof.[35] Some sales close very quickly with the buyer and seller parting ways, but other sales feature earn-out structures and consulting restrictions that may take several years to fully complete.[36] Additionally, some corporate forms are easier to sell than others. C Corps offer maximum flexibility in who can be a shareholder as well as sale structures and strategies, while S Corps are severely restricted as to who can be owners and therefore can be much more difficult to sell.[37] With all of these variations, there is no such thing as a standard business sale. Instead there are nearly endless permutations of structures and strategies for passing a business from party to party in exchange for consideration.

When this article describes a business sale, it means a sale of 100% of C Corp stock as a going concern from one individual to a third party in exchange for cash at the time of closing. This sale avoids the relative complexities of trying to sell an S Corp's stock,[38] or of marshalling together all the corporate assets, dividing the sales price amongst them, and effectively retitling them to the buyer in an asset sale.[39] Most importantly, this sale structure is likely to result in immediate,

always been a C corporation. This greatly disrupts the common strategy of commencing a small business as an S Corp, growing the business under the relative benefits of a pass-through tax regime, then revoking the S Corp election under § 1362(d)(1)(B) and converting to a C Corp ahead of a sale, and then selling the corporate stock under the far less restrictive ownership rules of C Corp.

32. Under I.R.C. § 1042, a "leveraged ESOP" can be an excellent way for a closely-held business owner to exit the business and diversify his or her investment without realizing taxable gain, though basis-carryover rules keep the gain in place to be realized later. For more on this structure, see Sarah J. Westendorf, *Compensation Through Ownership: The Use of the ESOP in Entrepreneurial Ventures*, 1 ENTREPRENEURIAL BUS. L.J. 195 (2006).

33. *See* E. THOM RUMBERGER, JR., THE ACQUISITION AND SALE OF EMERGING GROWTH COMPANIES: THE M&A EXIT §1.1 (2d ed. 2018).

34. *See id.* § 5.2; *See also* Jeffrey L Kwall, *What is a Merger?: The Case for Taxing Cash Mergers Like Stock Sales*, 32 J. CORP. L. 1, 18 (2006) (discussing the relative tax discrepancy between the three sale forms, despite the identical outcome from each transaction.).

35. *See* E. THOM RUMBERGER, JR., THE ACQUISITION AND SALE OF EMERGING GROWTH COMPANIES: THE M&A EXIT §5.34 (2d ed. 2018).

36. *See id.* § 5.38.

37. I.R.C. § 1361(b) (2018). S Corp stock can only be held by 1) one hundred shareholders or fewer, 2) individuals or specialized trusts, and 3) American citizens or residents. The one hundred shareholder cap means that an S Corp cannot be publicly traded or liquidate with an initial public offering. Also, as a general matter, corporate entities cannot acquire the stock of S Corps. An S Corp can revoke its S Corp election under I.R.C. § 1362(d), become a C Corp, and avail itself of a larger market for its stock. In fact, it is a common exit strategy for a business that begins life as an S Corp, grows successfully, and converts to a C Corp for a private sale, merger, or initial public offering. But it also means that many potential buyers hoping to acquire a pass-through corporation cannot do so by way of a stock acquisition, which thus tends to limit the market for such stock.

38. *Id.*

39. *See* William W. Potter, *Section 338(h)(10) Elections of S Corporations, Incremental Costs, and Considerations Following Tax Reform*, 45 CORP. TAX. 1, 4 ("An actual asset sale can be impractical and

maximum taxable gain to the seller. Whereas sales that involve stock swaps may avoid taxation,[40] and sales involving take-back debt may draw the gain out over time,[41] an "all cash up front" sale is likely to give the seller an income spike and an attendant tax spike. A seller may find it worthwhile to alleviate such an income tax spike using any tool available.

B. Basic Charitable Structure

One such tool for income tax mitigation may be the use of charitable structures. Non-profit institutions have a special place in the Code. Not only are they tax exempt,[42] but contributions to charitable entities are deductible,[43] and bequests to charities will lower the size of taxable estates.[44] Moreover, charitable organizations are flexible and range in size and structure from small charitable trusts,[45] to private foundations,[46] to massive operating charities.[47] Charities are certainly not offered free rein in the Code; they must contend with strict oversight of their operations and purpose,[48] limitations on deductions for donors,[49] and ancillary rules that may tax some of their income.[50] Even in light of these reasonable limitations and restrictions, several charitable structures that are deeply entrenched and well endorsed by the policies of the Code provide powerful mechanisms for mitigating tax burdens.[51]

The basic tax strategy for using a charitable structure to mitigate the tax from the sale of an appreciated asset is straightforward. A business owner must simply contribute some of his or her shares to a tax-exempt entity ahead of the sale and

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time consuming, involving the retitling of assets and renegotiation of certain contracts and governmental permits. Additionally, in an asset sale, the selling corporation may remain responsible for past liabilities[.]"); RICHARD D. BLAU ET AL., S CORPORATIONS FEDERAL TAXATION §§ 15.1 (2019) ("But asset sales are not always possible. There may be nontransferable contracts, licenses or other assets that cannot be transferred or cannot be transferred quickly enough in the particular transactional context . . . . Or, it may simply be that a stock sale, given the magnitude or condition of title to the assets is required as a practical matter.").

40. I.R.C. § 354(a) (1998).

41. I.R.C. § 453(a) (2004).

42. I.R.C. § 501 (2019).

43. I.R.C. § 170 (2019).

44. I.R.C. § 2055 (2019).

45. *See, e.g.*, I.R.C. § 664 (2018).

46. I.R.C. § 509 (2006).

47. For example, the United Way Worldwide has a total revenue just under $4 billion and Feeding America has total revenue of more than $2.7 billion. *See The 100 Largest U.S. Charities*, FORBES, https://www.forbes.com/top-charities/list/#tab:rank.

48. *See generally* Maxwell B. Kallenberger, *Policing Charitable Organizations: Whose Responsibility is it?* 76 LA. L. REV. 661, 669 (2015).

49. I.R.C. § 170(b) (2019).

50. I.R.C. § 511.

51. For instance, the Charitable Lead Trust is a split interest gift to a charitable entity and taxable person that can mitigate both the Gift Tax and Estate Tax. *See* I.R.C. § 2522(c)(2)(B); *See also* I.R.C. § 2055(e)(2)(B). Also, the Donor Advised Fund allows a taxpayer to make a deductible contribution to a charitable fund while maintaining reasonable control over the investments and distributions of that fund. *See* I.R.C. § 4966. Moreover, these charitable strategies can be used in combination with each other to maximize donor control and charitable benefit, while minimizing a donor's tax burdens. For example, some donor's find great success with a Charitable Lead Trust that pays its charitable contributions into a Donor Advised Fund controlled by the donor. Or consider the combination of a Charitable Remainder Unitrust that pays its charitable remainder into a private foundation that the donor's family or other heirs control. *See infra* notes 55–56.

likely garner a charitable deduction for the contribution.[52] Crucially, the sale to the third-party buyer can then be completed with the charity standing in as the seller instead of the taxable owner. As the charity is tax exempt, it will realize no tax at the time of the sale and will be entitled to keep the full sale proceeds.[53]

In this most basic form, the tax strategy may be unappealing to a business owner. The notion of mitigating income tax and benefiting a favored charity may be appealing, but few are the business owners who will hand their companies over to the United Way or the Red Cross ahead of a sale. The value would be entirely unlikely to flow back to the owner.[54] For the strategy to be effective as a profitable exit, the business owner must be able to participate in reaping the value from the sale of the business along with the charitable entity. This is what makes the Charitable Remainder Unitrust and some other charitable structures so valuable.[55] These structures are established by the terms of the Code, and each could be used as part of a sale strategy to mitigate income taxes and provide a benefit for charitable entities, all while allowing the owner to enjoy the benefits of his or her lifetime's investment.

In considering the Code's favorable treatment for owners selling closely held businesses as well as the tax preference for non-profit organizations,[56] it seems that Congress would especially favor business owners who utilize charitable structures to mitigate the tax resulting from the sale of their firms while sharing in the benefits. And yet, although these tools are fully consistent with the policies of the underlying

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52. I.R.C. § 170 (2019). However, under § 170(e), such charitable deduction may be limited to the donor's basis in the asset contributed if the contribution is being made to a private foundation under § 509(a). Moreover, a business owner will likely need a qualified appraisal of his or her shares ahead of the contribution to secure the deduction at market value. I.R.C. § 170(f)(11). Of course, a business owner with an offer in hand to buy his or her business should not have a hard time convincing a qualified appraiser of the fair market value of his business.

53. *See* Daniel Haleperin, *A Charitable Contribution of Appreciated Property and the Realization of Built-in Gains*¸56 TAX L. REV. 1, 1 (2002); Joel S. Newman, *Sales and Donations of Self-Created Art, Literature, and Music*, 12 PITT. TAX REV. 57, 62–67 (offering an effective history of the tax treatment of contributions of appreciated property); Henry Ordower, *Charitable Contribution of Services: Charitable Gift Planning for Nonitemizers*, 67 TAX LAW. 517, 522–23 (2014) ("The charitable exclusion results from the failure of the income tax to impute taxable gain to the contributing taxpayer from the appreciated property at any time--not upon contribution and not upon sale of the property by the charity . . . . Even if the charity sells the contributed property immediately following the contribution, neither the contributing taxpayer nor the charity recognizes gain on the contribution or from the contribution[.]").

54. Any tax exempt organization that does allow the value of the liquidation to flow back to the donor, without special authorization from the Code, probably will not be tax exempt for long considering the private benefit rules baked into I.R.C. § 501(c)(3).

55. I.R.C. § 664 (2018). For instance, a private foundation structure will allow a business owner to contribute his or her business to the charitable structure, liquidate the business tax-free, and then pay some of the proceeds back to the owner as earned income for services in running the foundation. This option has much to recommend it as it allows business owners to become active and engaged philanthropists in retirement as well as create a legacy that secures employment for family members while allowing the family name to be remembered for charitable endeavors. Several notable business owners have followed this path, notably Bill Gates in his exit from Microsoft to the Bill and Melinda Gates Foundation. *See* Devin Thorpe, *The Real Reason the World Will Remember Bill Gates (Hint: It's not Windows 8)*, FORBES (Sept. 5, 2012, 10:24 AM), https://www.forbes.com/sites/devinthorpe/2012/09/05/the-real-reason-bill-gates-the-world-will-remember-bill-gates-hint-its-not-windows-8/#70551141a00f. Of course, the private foundation strategy has limitations of its own, notably the restriction that appreciated assets, such as closely-held stock, being deductible only to the extent of its basis and not fair market value. I.R.C. 170(e) (2019). Consideration of the private foundation strategy and its attendant limitations are beyond the scope of this article.

56. *See supra* text accompanying notes 29–32, 42–51.

tax expenditures, ancillary tax rules have created obstacles that severely disrupt their effective use. Eliminating these obstacles may free up key strategies that will help catalyze business sales and provide increased contributions to charitable entities.

C. The Charitable Remainder Unitrust

The Charitable Remainder Unitrust ("CRUT") is expressly established by IRC § 664.[57] With a CRUT structure, a grantor creates a trust whereby the trustee pays a percentage of the trust assets back to the grantor (and his or her spouse, if desired) for a specified time (usually through the life of the second to die of the grantor and spouse) and then pays the remainder to a charitable entity when the trust terminates.[58] The CRUT can be an effective way to liquidate an appreciated asset because the CRUT itself is exempt from income tax.[59] With this strategy, a business owner could establish a CRUT, contribute some (or all) of his or her closely held stock to the trust, and proceed with a sale of the business to a third party with the CRUT as the new seller. The CRUT does not pay income taxes on any gains realized from the sale.[60] In addition, the CRUT can invest the sale proceeds into the market where its portfolio will likewise grow income tax free.[61]

For purposes of administering CRUT requirements, the Code assumes the trust's assets will grow at a predetermined rate defined in § 7520.[62] With this statutory growth rate in mind, the CRUT must payout a predetermined percentage of its assets (between 5% and 50%) every year to the grantor, and payments must be set such that the charity is actuarially expected to receive at least 10% of the CRUT's initial holdings at the end of the CRUT's term.[63] Under these reasonable restrictions, CRUTs can be (and often are) "optimized" to return the maximum amount to the grantor and leave as close to 10% for the charity as can be actuarially determined.[64] Distributions from the CRUT back to the grantor will be taxable and maintain the tax characteristics they developed in the CRUT, resulting in tax deferral, not tax forgiveness, for such distributions.[65] When the CRUT term expires, typically upon

57. For a detailed analysis of the CRUT structure *see* Paul D. Callister, *Charitable Remainder Trusts: An Overview*, 51 TAX LAW. 549 (1998).

58. I.R.C. § 664(d)(2)(A)-(B) (2018).

59. § 664(c)(1).

60. *Id.*

61. *Id.*

62. I.R.C. § 664(d)(2)(D) (2018); Trent S. Kiziah & Ryan Velo-Simpson, *A Proposal to Resuscitate the Charitable Remainder Annuity Trust*, 30 QUINNIPIAC PROB. L.J. 21, 26 (2016).

63. I.R.C. § 664(d)(2)(A) and (D).

64. *See* Kiziah & Velo-Simpson, *supra* note 62, at 26 ("[S]ome grantors will establish a CRT in order to maximize its payout rate while staying within the requirements, so as to provide the greatest current benefit, yet still retain the tax-exempt status of a CRT.").

65. § 664(b). That a CRUT's income benefits from tax deferral, but not tax forgiveness, is itself a very reasonable cap on the power of a CRUT. Without the presence of § 664(b), the tax mitigating power of the CRUT (and CRAT) would be immense. With such tax forgiveness available, the CRUT structure could run amok and it is not unreasonable to believe that a host of liquidations would take place in short term CRUT structures with high distribution rates back to grantors. Grantors certainly prefer to pay 10% to a charity at the end of a short term CRUT rather than 23.8% to the government at the time of liquidation. Consequently, § 664(b) is a good and proper limitation on a CRUT structure's effectiveness and its restrictions should remain a key aspect of the CRUT strategy.

the latter death of either the grantor and his or her spouse, the CRUT pays over all remaining assets to the charity selected by the grantor.[66]

The true power of the CRUT lies in the fact that over the long run this strategy will bring higher returns on a business sale to a third-party purchaser than an outright, fully taxable sale. Consider an example:

A 65-year-old business owner (with a 65-year-old spouse) has arranged to sell a business, with a tax basis of $0 and a fair market value of $10 million, to a third party according to the terms of a business sale outlined *supra.* In a fully taxable sale with a total tax rate of 23.8%,[67] the owner will net $7.62 million. He could then invest the proceeds into a taxable account that grows at an assumed rate of 6% per year, paying tax on long-term capital gains and qualified dividends as it grows.[68] With a good payday for his business and reasonable returns on subsequent investments, the business owner would do pretty well in retirement.

On the other hand, the business owner could put his shares into a CRUT he established prior to the arranged sale. With a § 7520 rate of 3.4%,[69] the CRUT is "optimized" and termed for two lives who are each aged 65, resulting in a payout rate of 11.288% per year.[70] The CRUT would make the sale on the grantor's behalf, realize the full $10 million, invest in a portfolio earning 6% per year, and make its distributions to the grantor at the end of each year, starting at the end of the first year. As each distribution is entirely gain in the hands of the CRUT, each distribution will be fully taxable as capital gains to the grantor.[71] The grantor would take in distributions, pay the tax, and invest the remainder into a taxable account. The taxable account would likewise grow at 6% per year and the grantor would pay tax on long-term capital gains and qualified dividends as these investments grow.

Comparing these two scenarios, the owner making the taxable sale starts off in a better position by taking in a large lump sum following the sale, while the grantor of the CRUT takes in nothing initially. But, due to the constant stream of tax-preferred returns from the CRUT, the amount available to the owner using the CRUT strategy grows at a faster rate than the funds resulting from the taxable sale. Within

66. This charitable remainder also keeps the assets in the CRUT out of the grantor's estate for estate tax purposes. I.R.C. § 2055(a) (2019).

67. 20% top marginal tax rate for long term capital gains (I.R.C. § 1(h)(1)(d)) plus 3.8% Unearned Income Medicare Contribution (I.R.C. § 1411). For simplicity, state and local taxes are assumed to be zero.

68. It is possible that the owner turned investor could invest in accounts that do not produce any dividends or capital gains, but merely provide deferred growth appreciation throughout. Such an investment scheme seems highly unlikely and unadvisable in all but the most outlying of circumstances.

69. This is the § 7520 rate for January 2019. *See Section 7520 Interest Rates*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/section-7520-interest-rates (last updated Feb. 19, 2020). The higher the § 7520 rate available, the greater the distribution the CRUT can make back to the grantor and still be qualified as tax exempt. The greater the distribution, the quicker the CRUT strategy surpasses the outright sale strategy in total returns, as discussed *infra*.

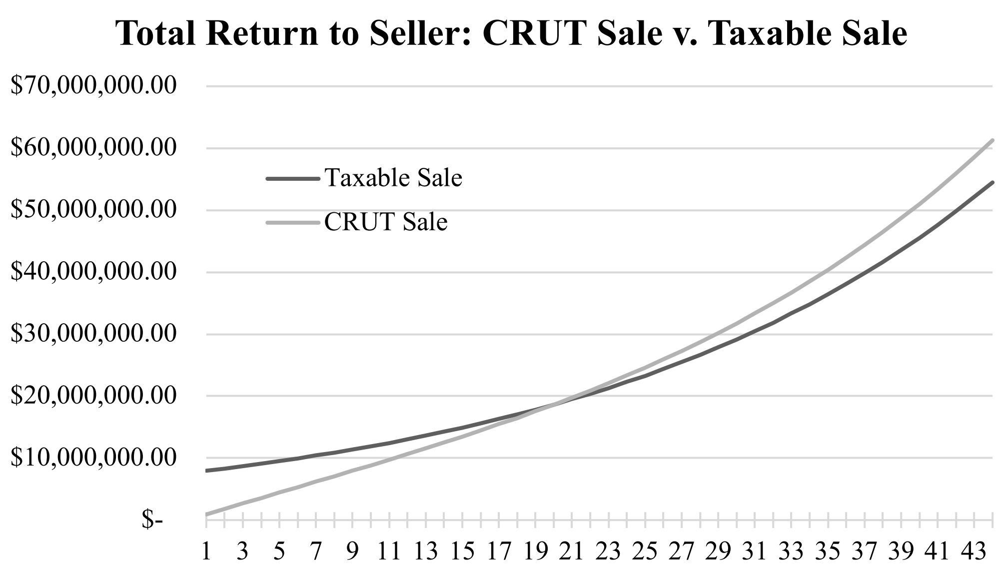
70. Calculation of the optimized CRUT payout rate is complex and requires either 1) a sophisticated understanding of I.R.C. § 7520, the unitrust and valuation process outlined in 26 CFR 25.2512-5, the valuation tables contained in 26 CFR 20.2031-7, and a working understanding of linear interpolation calculations; *or* 2) an effective tax planning calculator. The calculator used for the purposes of this article is contained in Brentmark's Estate Planning Tools software, available for purchase at BRENTMARK, https://www.brentmark.com/software/estate-planning/estate-planning-tools (last visited Mar. 13, 2020).

71. I.R.C. § 664(b) (2018).

21 years the total return of the CRUT strategy to the owner will exceed the total return of a taxable sale.[72]

Total Return to Seller: CRUT Sale v. Taxable Sale[73]		
End of Year	CRUT Sale Total Return to the Seller	Taxable Sale Total Return to the Seller
1	$911,754.34	$7,968,386.40
5	$4,458,024.68	$9,528,664.64
10	$8,852,483.86	$11,915,413.37
15	$13,479,905.39	$14,899,997.13
20	$18,628,373.89	$18,632,162.19
21	$19,746,529.60	$19,484,024.64
25	$24,597,314.50	$23,299,163.40
30	$31,716,434.75	$29,135,159.39

Expressed graphically, the long-run benefits of the CRUT strategy over an outright taxable sale are apparent:



72. As a side note, the strategy does not work with a Charitable Remainder Annuity Trust ("CRAT"), also expressly instituted by I.R.C. §664. The CRAT pays the grantor a set annuity amount every year, rather than a set proportion of its assets. As such, the grantor is unable to participate in the upside of the CRAT's tax-preferred market growth and is limited in total benefit it offers to the grantor. CRATs also suffer from a "probability of exhaustion" problem that CRUTs do not, and which may affect their tax exempt status, making their implementation as an actuarial matter quite tricky. *See* Kiziah & Velo-Simpson, *supra* note 62, at 26. For these reasons, CRATs are not the preferred charitable strategy for business liquidation.

73. *See* calculations in Appendix A.

Contributing stock to a CRUT ahead of a liquidation is an effective way for a business owner to potentially realize a larger return from the sale of his or her business over the long run, while benefitting from the dual tax policies of increasing charitable giving and aiding business owners in their liquidations.[74] Of course, contributing the business to the CRUT also results in a gift to charity at the end of the trust's term that may not have occurred with a taxable sale. While there are other sale strategies that incorporate charity, when this article refers to a charitable liquidation strategy, it is meant to refer to this CRUT strategy. The only problem with the CRUT strategy is that if it is implemented correctly, it almost certainly violates the Anticipatory Assignment of Income Doctrine.[75]

III. The Anticipatory Assignment of Income Doctrine

A. Evolution of the Doctrine

The Anticipatory Assignment of Income Doctrine ("AAI Doctrine" or "the Doctrine") is a judicial construct from the early days of the income tax that cannot be traced directly back to the Code. While it started as a reasonable restriction meant to prevent bracket manipulation of earned income, it eventually grew to disrupt and curtail myriad other transactions, including certain charitable contributions, many with otherwise legitimate means and ends. Reciting the AAI Doctrine clearly can be difficult because this doctrine covers several disparate transactions, including some applications that are justifiable and others that are far less so. For the purposes of this article, the basic AAI Doctrine states that if a taxpayer has a right to the proceeds from labor performed or the disposition of property and transfers that right by either assigning the earned income or gifting the property ahead of the realization to a third party, then the transaction is deemed an anticipatory assignment of income, the transfer is effectively nullified for tax purposes, and the income is taxable to the attempted transferor.[76] This part will briefly trace the historical development of the AAI Doctrine and demonstrate how it has grown (or mutated) beyond its purpose. This part will also demonstrate that the AAI Doctrine needs to be completely reconsidered in the present tax environment, especially in the context of gifts to charity.

The AAI Doctrine was first introduced by the Supreme Court in *Lucas v. Earl* as a mechanism to prevent tax avoidance and bracket manipulations, especially

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74. *See* J. Eric Sims, *CRAT, CRUT, NiCRUT, and NimCRUT: Vehicles for High Net Worth Clients,* 99 Practical Tax Strategies 31, 31 (July 2017) ("Charitable Remainder Trusts (CRTs) are very useful financial arrangements for individuals who hold highly appreciated assets and who want to make tax deductible charitable donations, while avoiding the associated capital gains taxes."); *See also* Brett M. Larson & Nathan J. Nelson, *CRTS: A Powerful Tool for Income-Tax Planning,* 72 Bench and B. Minn. 22, 23–24 (April 2015).

75. Slugg, *supra* note 21, at 5 ("A commonly encountered issue is that of pre-arranged sales. These arrangements implicate the assignment of income doctrine, which attributes income back to the economic owner of the income even if the asset generating the income has been transferred. This is most often encountered in either indirect-giving situations, to private foundations or donor advised funds, or split-interest-giving arrangements, such as charitable remainder trusts (CRTs) or charitable gift annuities.").

76. This is a composite definition that has been pieced together from many cases over the Doctrine's lifespan. *See e.g.* Lucas v. Earl, 281 U.S. 111, 114-15 (1930); Helvering v. Horst, 311 U.S. 112, 120 (1940); Rollins v. United States, 302 F.Supp. 812 (1969); Ferguson v. Comm'r, 108 T.C. 244 (1997).

within a family.[77] In *Lucas*, a husband and wife entered into a binding contract whereby all the husband's earned salary and professional fee income would be divided equally between the two.[78] In light of this contract, the taxpayers argued that half of the income should be taxed to the husband and the other half should be taxed to the wife, who was ostensibly in a lower tax bracket.[79] The Court rejected this assignment of the husband's income:

> There is no doubt that the statute could tax salaries to those who earned them, and provide that the tax could not be escaped by anticipatory arrangements and contracts, however skillfully devised, to prevent the salary when paid from vesting even for a second in the man who earned it. That seems to us the import of the statute before us, and we think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew.[80]

As it applies to earned income, the AAI Doctrine is eminently reasonable. Strangely, the *Lucas* version of the AAI Doctrine pertaining to the assignment of earned income prior to its payment has not been formally incorporated into the Code through either legislation or regulation.[81] As such, the *Lucas* statement remains the much-cited authority for this version of the AAI Doctrine, which will be known here as the "Earned AAI Doctrine." Despite not being codified, the Earned AAI Doctrine has become a staple of American tax law, and earned income diversion schemes that would challenge it have become rare.[82]

A decade after the Court established the Earned AAI Doctrine*,* the Court in *Helvering v. Horst* expanded the AAI doctrine to include the assignment of unearned income.[83] In *Horst*, a father gifted negotiable interest coupons to his son shortly before payment on the coupons was due.[84] When the obligor made payment on the coupons, the father argued that it was his son—again, likely in a lower tax bracket than the taxpayer—who incurred the income and thus the tax.[85] To the contrary, the Court held that payment on the transferred coupons would accrue to the father, and not his lower-taxed son. Specifically, the Court held that

> the purpose of the statute to tax the income to him who earns or creates and enjoys it [cannot] be escaped by "anticipatory arrangements . . .

77. Lucas v. Earl, 281 US 111, 115 (1930).
78. *Id.* at 113–14.
79. *Id.* at 113.
80. *Id.* at 114–15; *See also* Burnet v. Leininger, 285 U.S. 136 (1932) (applying the AAI Doctrine where the assignment of earned income preceded the rendering of services that would earn the income).
81. *See generally* MERTENS LAW OF FEDERAL INCOME TAXATION § 5.23 (2019) (outlining the Anticipatory Assignment of Income Doctrine with no reference to statute or regulation).
82. *See* Ronald H. Jensen, *Schneer v. Commissioner: Continuing Confusion Over the Assignment of Income Doctrine and Personal Service Income*, 1 FLA. TAX REV. 623, 628 (1993) ("[T]he assignment of income doctrine [states] one is taxable on all income earned through one's personal services, regardless of who actually receives that income. This principle is so deeply embedded in our tax jurisprudence it is difficult to consider it afresh."). Though rare, taxpayers still make the occasional attempt to assign earned income for tax purposes. *See, e.g.*, Zaal v. Comm'r, 75 T.C.M. (CCH) 2532 (1998).
83. Helvering v. Horst, 311 U.S. 112, 121 (1940).
84. *Id.* at 114.
85. *Id.*

> however skillfully devised" to prevent the income from vesting even for a second in the donor. Nor is it perceived that there is any adequate basis for distinguishing between the gift of interest coupons here and a gift of salary or commissions.[86]

The rule stated in *Horst* may be reasonably known as the "Unearned AAI Doctrine." The policy behind the Unearned AAI Doctrine—preventing bracket manipulation within a family through the gifting of income producing or appreciated assets ready for sale—is also eminently reasonable. However, while a judicially-created Unearned AAI Doctrine may have been necessary early in the life of the income tax, the rule has been largely subsumed by new rules in the Code itself. For instance, the gift tax,[87] kiddie tax,[88] and the advent of married filing jointly status[89] all address problems of bracket manipulation strategies taxpayers may pursue with their family and friends. These are all appropriate measures to prevent bracket manipulation, and though they should have largely replaced the Unearned AAI Doctrine, the judicially-made Doctrine and the statutory rules continue in equal force.

While the AAI Doctrine seemed appropriate in the context of taxpayers trying to shift income to lower-income family and friends and was reinforced by similar policies in the Code, the Doctrine eventually expanded to include anticipatory assignment of income to charities, referred to here as the "Charitable AAI Doctrine."[90] This application of the Doctrine is really just an offshoot of the Unearned AAI Doctrine whereby a taxpayer transfers productive or appreciated assets to a tax-exempt entity, rather than another taxpayer, in hopes of eliminating taxes arising from the assets' unearned income. Upon the creation of the Charitable AAI Doctrine, this once unquestioned and rather innocuous judicial canon embarked on an expedition of disruption to the carefully and statutorily balanced realm of non-profit tax exemptions and deductions. Since this expansion of the AAI Doctrine, in-kind charitable gifts have become much more complex and uncertain.[91]

The Supreme Court has restricted its application of the AAI Doctrine to transfers of income between individuals, generally within families, and has not yet embraced the Charitable AAI Doctrine.[92] Indeed, the misadventure of the AAI Doctrine into the charitable realm arises entirely from the jurisprudence of circuit courts and the Tax Court. Tracing the precise course of that misadventure is difficult. It appears the first such application of the AAI Doctrine to charitable contributions occurred in the early 1960s (two decades after *Horst*) with *Friedman v. Commissioner*.[93] Other applications of the Charitable AAI Doctrine quickly followed, with cases such as *Hudspeth v. United States*,[94] *Kinsey v. Commissioner*,[95] and *Jones v.*

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86. *Id.* at 120. For an excellent analysis of *Horst*, *see* Jerome M. Hesch & David J. Herzig, *Helvering v. Horst: Gifts of Income from Property*, 42 ACTECT L.J. 35 (Spring 2016).
87. I.R.C. § 2501 (2015).
88. I.R.C. § 1(g) (2019).
89. I.R.C. § 6013 (2013).
90. *See, e.g.*, Estate of Applestein v. Comm'r Internal Revenue, 80 T.C. 331, 342–43 (Tax 1983).
91. *See generally* Slugg, *supra* note 21, at 15.
92. *See e.g.*, Comm'r Internal Revenue v. Sunnen, 68 S.Ct. 715, 725 (1948); Comm'r Internal Revenue v. Culbertson, 69 S.Ct. 1210, 1211 (1949).
93. Friedman v. Comm'r, 41 T.C. 428, 436 (1963), *aff'd*, 346 F.2d 506 (6th Cir. 1965).
94. Hudspeth v. United States, 471 F.2d 275 (8th Cir. 1972).
95. Kinsey v. Comm'r, 477 F.2d 1058 (2d Cir. 1973).

United States.[96] However, possibly due to the lack of Supreme Court involvement, the Charitable AAI Doctrine was not applied consistently.[97] Consequently, numerous cases containing similar facts that arguably should have been considered anticipatory assignments to charities escaped the repercussions of the Doctrine. For instance, courts held that the Charitable AAI Doctrine did not apply in *Grove v Commissioner*,[98] *Crosby v. United States*,[99] *Sheppard v. United States*,[100] and *Wekesser v. Commissioner.*[101] On the whole, the early landscape of the Charitable AAI Doctrine was one of confusion and inconsistent application.[102]

B. The Palmer Rule and Revenue Ruling 78-197

A clarifying decision for the Charitable AAI Doctrine came in *Palmer v. Commissioner.*[103] In *Palmer*, the individual taxpayer owned stock in a company which he fully controlled.[104] The taxpayer also controlled a non-profit, tax-exempt foundation.[105] On August 31, 1966, the taxpayer gifted a substantial portion of his company stock to the foundation and took a charitable deduction for the gift.[106] The very next morning, at 10:00 a.m., the board of directors of the company (with the taxpayer as chairman) convened and offered to redeem the stock from the foundation.[107] At 2:00 p.m. that afternoon, the trustees of the foundation (which again included the taxpayer as chairman) accepted the offer of the company and allowed the stock to be redeemed under its terms.[108] The taxpayer did not include the gain on the sale of stock that took place within the foundation as taxable income.[109] Naturally, the IRS invoked the Charitable AAI Doctrine and argued that the gain from the sale of stock should be attributed to the taxpayer and not to the foundation.[110]

The Tax Court considered the IRS's argument under the AAI Doctrine and the related but distinct "Step Transaction" Doctrine.[111] The Tax Court noted that the IRS had often attacked such transactions in recent cases, saying "[s]imilar attacks have been presented by the [IRS] in a variety of cases involving gifts of stock followed by its redemption, and the attacks have generally been rejected by the

96. Jones v. United States, 531 F.2d 1343 (6th Cir. 1976).

97. *See, e.g.,* J. Drew Diamond, *Taxpayers Liable for Gain in Stock Donated to Charity During a Tender Offer: Ferguson v. Commissioner*, 51 TAX LAW. 441, 444 (1998) ("[T]he evolution of the doctrine of anticipatory assignment of income has been fact driven, with each new case adding a gloss peculiar to its own unique circumstances. As such a piecemeal product, the doctrine required extensive reengineering for the particulars of the [present] facts, which differed considerably from the prior cases[.]").

98. Grove v. Comm'r Internal Revenue, 490 F.2d 241, 247 (2d Cir. 1973).

99. Crosby v. United States, No. 72S-39(N), 1973 WL 528, at *14 (S.D. Miss. Apr. 23, 1973).

100. Sheppard v. United States, 361 F.2d 972, 973–82 (Ct. Cl. 1966).

101. *See* Wekesser v. Comm'r Internal Revenue, 35 T.C.M (CCH) 936 (1976).

102. *See* Jensen, *supra* note 82, at 624 ("The Supreme Court has described . . . the assignment of income doctrine [] as the 'first principle of income taxation.' Yet despite its venerable lineage and importance, the doctrine remains today beset by confusion and uncertainty.").

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

104. *Id.* at 688.

105. *Id.* at 687.

106. *Id.* at 689.

107. *Id.*

108. *Id.* at 689–90.

109. *Id.* at 690.

110. *Id.*

111. *Id.* at 691.

courts."[112] In an attempt to add clarity to the situation, the Tax Court carefully delineated the contours of the AAI doctrine:

> [a]s a general rule, a taxpayer cannot insulate himself from taxation merely by assigning a right to income to another . . . . However, if the entire interest in the property is transferred and the assignor retains no incidence of either direct or indirect control, then the tax on the income rests on the assignee.[113]

The Court then observed:

> "[t]he only question is whether [the taxpayer] really made a gift, thereby transferring ownership of the stock prior to the redemption . . . . Even though the donor anticipated or was aware that the redemption was imminent, the presence of an actual gift and the absence of an obligation to have the stock redeemed have been sufficient to give such gifts independent significance.[114]

Based on these considerations, the Court concluded that

> [w]hen the foundation received the gift of stock from the petitioner, no vote for the redemption had yet been taken. Although we recognize that the vote was anticipated, nonetheless . . . that expectation is not enough. In these circumstances, at the time of the gift, the redemption had not proceeded far enough along for us to conclude that the foundation was powerless to reverse the plans of the petitioner. In light of the presence of an actual, valid gift . . . we hold that the gift of stock was not in substance a gift of the proceeds of redemption.[115]

The *Palmer* case, therefore, stands for the point of law that if the donee receives assets with no binding obligation to sell such assets (i.e. "no strings attached"), and the donee then sells the property of its own volition, then the Charitable AAI Doctrine shall not be used to attribute the gain from such sale back to the donor. This rule holds true even if the donor controls both the charitable donee and the entity that later purchases the stock. In other words, the same person can contribute property to a charity he or she controls and then direct the charity to sell the stock back to the company he controls, and not trigger the Charitable AAI doctrine so long as the initial gift to the charity was with "no strings attached."

The *Palmer* case by itself may not be all that significant, just a lone decision in the sea of the larger AAI doctrine jurisprudence. However, in 1978, four years after the *Palmer* decision was handed down, the IRS adopted Revenue Ruling 78-197.[116] In Revenue Ruling 78-197, the IRS concedes to the decision of the *Palmer* case and

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112. *Id.* at 693.
113. *Id.* at 693–94 (emphasis added).
114. *Id.* at 693.
115. *Id.* at 695.
116. Rev. Rul. 78-197, 1978-1 C.B. 83 (1978).

says that it will no longer contest arrangements that are substantially similar to those in that case.[117] Specifically, Revenue Ruling 78-197 says, in relevant part, that

> [a] taxpayer with voting control of a corporation and an exempt private foundation who donates shares of the corporation's stock to the foundation and, pursuant to a prearranged plan, causes the corporation to redeem the shares from the foundation does not realize income as a result of the redemption. The Service will treat the proceeds as income to the donor under facts similar to those in the *Palmer* decision only if the donee is legally bound, or can be compelled by the corporation, to surrender the shares for redemption.[118]

The IRS was probably tired of fighting this battle over the AAI doctrine and purposely set forth the safe harbor outlined above. As long as the donor gives the stock to the charity absent a legal obligation to redeem the stock back to the company, an ensuing redemption of the stock by the charity shall not attribute gain back to the donor, even if the donor controls both the charity and the redeeming company. While IRS Revenue Rulings are not laws binding on the court, the Tax Court has noted that they *are* binding on the IRS, and so long as Revenue Ruling 78-197 remains in circulation without being changed, the IRS cannot renege on the position stated in the Revenue Ruling.[119] As the IRS has not yet reversed Revenue Ruling 78-197, and there is no indication that it will any time soon, this safe harbor from the IRS and the *Palmer* rule appears to be reliable for planning purposes.[120]

IV. CLEARING AN OBSTRUCTIVE DOCTRINE

A. Difficulties with Palmer and the Current Doctrine

While the *Palmer* rule is clear enough, the rule is also deeply unsatisfying for several reasons. First, in addition to laying out the new rule, *Palmer* also endorses a convoluted form-over-substance strategy for circumventing the rule.[121] Drawing a distinction between a taxpayer who contributes stock to a charity, subject to a binding obligation to redeem the stock, and a taxpayer contributing stock to a charity he controls, with the stock being redeemed by the company the taxpayer controls

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117. *Id.*
118. *Id*. at 1.
119. *See* Rauenhorst v. Comm'r of Internal Revenue, 119 T.C. 157, 171 (2002) ("We agree with respondent that revenue rulings are not binding on this Court, or other Federal courts for that matter. However, we cannot agree that the Commissioner is not bound to follow his revenue rulings in Tax Court proceedings. Indeed, we have on several occasions treated revenue rulings as concessions by the Commissioner where those rulings are relevant to our disposition of the case.")
120. *But see*, Blake v. Comm'r Internal Revenue., 42 T.C.M. 1336 (1981), *aff'd*, 697 F.2d 473 (2d Cir. 1982); Ferguson v. Comm'r of Internal Revenue*,* 108 T.C. 244 (1997).
121. Robert E. Madden and Lisa H.R. Hayes, *No Anticipatory Assignment of Income by Making Charitable Gift of Stock Warrants Rauenhorst, 119 T.C. 157 (2002)*, 30 EST. PLAN. 132, 134 (2003) ("[I]n the wake of Palmer and Rev. Rul. 78-197, the IRS had taken a relatively liberal position in this area. As long as the closely held corporation cannot compel the charity to tender the donated stock for redemption, and as long as the stock is redeemed for its fair market value, the IRS would not take a substance-over-form position and declare the transaction a gift by the taxpayer of redemption proceeds.").

later the same day, ignores the substance of the two transactions and is simply an exercise in ridiculous formalism.

Moreover, the *Palmer* rule also indirectly endorses other equally absurd form-over-substance strategies to circumvent the rule. Suppose a taxpayer contributes stock to a charity he or she controls. Instead of using the entity to redeem the stock out of the charity, the taxpayer offers to buy the stock back from the charity for market value.[122] As long as the repurchase was not prearranged, it would not violate the *Palmer* rule and the resulting gains would be realized in the tax-exempt entity. With this strategy, the taxpayer would raise his or her basis in the stock with the repurchase, and the stock could be sold to a third-party buyer according to a prearranged sale with the taxpayer realizing little or no gain due to his or her increased basis in the shares.

The *Palmer* rule also ignores the fact that the efforts of the donor to prearrange the third-party sale actually adds value to the private securities donated to the charity. If a donor contributes a minority position in a company to a charity, the gift may be all but worthless. The shares may have an appraised value, which the donor will likely be able to take as a charitable deduction, but there would be very little market for the shares—making them of little real value to the charity. This relative lack of market arises as investors are typically uninterested in buying a minority position in a company. Also, depending on shareholder agreements, the charity may not be able to sell its shares to a third party without approval from the majority, nor would the charity be able to compel the majority to allow the sale. A donor's effort to prearrange a sale for the shares prior to the contribution actually creates a market, and adds value to the charitable gift. It seems inappropriate that the Code should punish the donor for taking steps to add such value to a charitable gift.

In this way, the *Palmer* rule also disadvantages holders of private securities as compared to holders of publicly traded securities. A donor may transfer appreciated, publicly traded securities to a tax-exempt entity, and that entity may sell them freely and realize the gain tax free with no fear of that the Charitable AAI Doctrine will ascribe the income to the donor. The tax-exempt entity would not be following through on a pre-arranged sale—merely availing itself of an existing market. It seems incongruous that the AAI Doctrine should apply to the donation and sale of private securities where the donor had to work to establish a market (i.e., the third-party sale) while the pre-existence of the public market should relieve the donor of publicly-traded assets of a similar burden.

Prohibiting the donor from prearranging a sale may also put the charity into an odd sort of double bind. If the donor has not created an effective market to sell the shares on, the charity would likely have to hold them. However, the fiduciary controlling a charitable entity has a general obligation to keep the entity's assets safely invested and diversified.[123] If a charitable entity receives a concentrated position (i.e., a substantial share of stock in a single entity), the fiduciary will rightly seek to

122. The taxpayer is not concerned with the wash sale rules of I.R.C. § 1091 because the taxpayer is not looking to claim a deductible loss with this transaction. Consequently, the contribution and buy-back could happen almost instantaneously without a tax repercussion.

123. Fiduciaries managing the assets of nonprofit institutions are generally governed by the Prudent Investor Acts of the nonprofit's governing state. Uniform Prudent Investor Act § 3 states "A trustee shall diversify the investments of the trust[.]" *See also* Susan N. Gary, *Is it Prudent to be Responsible: The Legal Rules for Charities that Engage in Socially Responsible Investing and Mission Investing*, 6 NW J. L. & SOC. POL'Y 106 (2011).

liquidate the concentrated position and diversify the proceeds.[124] But without a market for such shares, the charity has no place to sell them. If a charity is not allowed to hold the shares, and it has no place to sell them, its only real option is to decline the donation.

Finally, the Charitable AAI Doctrine makes it all but impossible to effectively use the CRUT strategy as part of a business liquidation. For the strategy to work, the business owner would either have to contribute his or her shares to the CRUT well ahead of the sale or work out a substance-over-form strategy where the contributed stock is redeemed or bought back by the donor. Without such extraordinary measures, the shares would have to be appraised prior to contribution to determine the CRUT's distribution and remainder value. The unitrust distributions to the grant would likely have to be made at least partly in-kind and based on annual appraisals of the CRUT assets. Taking the CRUT strategy away from business owners looking to sell exacerbates capital lock-in—a problem the Code otherwise usually seeks to solve.

B. Correcting the Anticipatory Assignment of Income Doctrine

The original Earned AAI Doctrine, as stated in *Lucas v. Earl,* is an effective rule for preventing abuses of the income tax and should be codified. The Unearned AAI Doctrine of *Helvering v. Horst* is also an effective rule, and while it may likewise be codified (as mentioned *supra*), it has largely been supplanted by an intricate system of tax provisions governing the transfer of productive assets. Consequently, it is significantly less urgent for Congress to codify the Unearned AAI Doctrine. However, with both of these applications of the Doctrine, codification may have the benefits of clarifying the law, creating consistent terminology, strengthening government's reliance on the rule, and alleviating judicial inconsistency.[125]

Conversely, there is no good reason for the AAI Doctrine to apply to any transfers to charities, especially under the tortuous rules created by *Palmer*. Indeed, the Charitable AAI Doctrine is simply an improper mutation of the Unearned AAI Doctrine and merely disrupts transactions that are otherwise consistent with policies embedded in the Code. It may be true that without the AAI Doctrine applying to charitable transfers the Treasury may end up with less total revenue due to expanded use of charitable structures. As a general matter, such loss of revenue is contemplated by the mere existence and combination of §§ 501 and 170. But to the extent the Charitable AAI Doctrine is presently justified by its ability to mitigate loss of federal revenue, the Code would be far better served by controlling the availability of charitable tax strategies through strengthening existing restrictions in the Code or creating appropriate new statutory caps or limitations.

The prohibition of the Charitable AAI Doctrine in the CRUT context could be achieved by adding new, simple language to § 664. The following could be added for instance:

124. A fiduciary of a § 501(c)(3) charitable entity holding shares in a closely-held business may lose the entity's tax-exempt privilege anyway under the unrelated taxable business income rules of I.R.C. § 512. The CRUT strategy would be taxable on such business income under I.R.C. § 664(c)(2)(A); Treas. Reg. § 1.664-1(a)(1)(i) (2018).

125. Linda D. Jellum, *Codifying and "Miscodifying" Judicial Anti-Abuse Tax Doctrines*, 33 VA. TAX REV. 579, 621–22 (2014).

§ 664(h) No Attribution of Income back to Grantor

> Except as otherwise provided in subsection (b), no income realized by a charitable remainder annuity trust or a charitable remainder unitrust shall be taxable to the grantor of such trust.

Adding this language to § 664 will cure the AAI Doctrine as it relates to the CRUT structure for liquidating businesses that is discussed throughout this article.

But just adding language to § 664 may be a half measure. For a complete cure to the Charitable AAI Doctrine, new language should also be added to the Code that entirely erases the Doctrine from the charitable landscape. The most natural place to add such a wide-ranging correction is likely Part III of Subchapter B, pertaining to Items Specifically Excluded from Gross Income for purposes of the Income Tax under Subtitle A. The new exclusion preventing application of the Charitable AAI Doctrine could be codified as a new § 139H, which might simply state:

§ 139H. Income realized by entity exempt from taxation

> Gross income does not include any amount received by, realized by, or paid or incurred to any entity that is exempt from taxation under this subtitle.

This rough statement of the rule welcomes elaboration and clarification. Additionally, Congress could add language allowing inclusion of income to a taxpayer in extenuating circumstances, such as in the case of fraudulent transfers or other specifically listed abuses. If Congress deems Part III of Subchapter B inappropriate for a new general exclusion meant to counter an existing judicial doctrine, the Code could be amended by adding new language to §§ 501 or 170. Wherever it may be added, a correction for the Charitable AAI Doctrine will remove an unnecessary obstacle to sound and consistent use of established tax policies.

V. CONCLUSION

The Code expresses myriad policy preferences through its tax expenditures. Though these preferences may blend together into complex tangles of Code sections, the policies that underlie these preferences and sections remain remarkably consistent. One clear policy of the Code is to assist business owners in the liquidation of their businesses, thus limiting capital lock-in and encouraging business growth and continuity. Another clear policy is to encourage philanthropic gifts to non-profit organizations, thus supporting charitable organizations and their altruistic purposes. It is also clear that, though these policy preferences are important and arguably worth continuing in the Code, no expenditure is absolute. Limitations to tax expenditures, such as caps and phase-outs, are effective and appropriate ways to prevent tax expenditures from swallowing the nation's ability to collect tax revenue.

The CRUT liquidation strategy outlined in this article is an effective way of meeting both policy goals of helping an entrepreneur liquidate his or her business and supporting charitable institutions. In fact, if executed correctly, the CRUT liquidation strategy can return more on the sale of a business to its owner in the long run than an outright sale, provide a lifetime stream of income to the sellers, and leave a remainder value to a charity that may not have otherwise been considered. Everyone wins with the CRUT structure. Moreover, normal restraints on tax preferences for charitable structures, especially those found in IRC § 664, are appropriate limitations that allow the structure to meet the policy preferences underlying this tax expenditure while preventing it from being used in an abusive manner.

Unfortunately, the CRUT structure for business liquidation is largely ineffective due to the judicially-created and imprudently-warped Anticipatory Assignment of Income Doctrine. While the AAI Doctrine may be a reasonable limitation in certain circumstances, applying the Doctrine to charitable gifts, especially in the context of business liquidation, is not appropriate. In these circumstances, the AAI Doctrine serves only to stifle charitable contributions, exacerbate capital lock-in, and potentially lead to numerous inefficiencies and inequities. Rather than serve as a reasonable cap or restriction on tax expenditures, the AAI Doctrine now serves to frustrate otherwise valuable transactions the Code should be encouraging. The frustration of the AAI Doctrine is well known and there are work-arounds to its obstructions. However, even these judicially created workarounds are problematic as they promote bizarre form over substance fictions that add costs and risks to liquidation structures. Instead of solving the problem, these artless workarounds merely accentuate the absurdity of the Doctrine itself.

The answer to this problem is to codify the Anticipatory Assignment of Income Doctrine in its proper context of income shifts between taxable persons, and expressly prohibit the Doctrine from applying in the charitable setting. In fact, the Doctrine has largely been codified into its proper place through mechanisms such as joint tax returns, the kiddie tax, the gift tax, and other provisions that give statutory life to its original purpose. Now, it simply remains to excise the Doctrine from the charitable context. With proper legislation, Congress can free charitable structures and strategies from the Anticipatory Assignment of Income Doctrine and allow taxpayers to pursue these beneficial structures unobstructed.

APPENDIX A

Owner Sells Business Directly

	Sale Treatments				Client Accumulation				
Year	**Asset Sale Price**	**Taxable Sale Portion**	**Tax on Sale 23.8%**	**After Tax Sale Income**	**Pre-Investment Client Value**	**Pre-Tax Investment Growth 6%**	**Tax on Investment Growth 23.8%**	**After Tax Investment Growth**	**End of Year Net Client Value**
1	$ 10,000,000.00	$ 10,000,000.00	$ 2,380,000.00	$ 7,620,000.00	$ 7,620,000.00	$ 457,200.00	$ 108,813.60	$ 348,386.40	$ 7,968,386.40
2		$ -	$ -	$ -	$ 7,968,386.40	$ 478,103.18	$ 113,788.56	$ 364,314.63	$ 8,332,701.03
3		$ -	$ -	$ -	$ 8,332,701.03	$ 499,962.06	$ 118,990.97	$ 380,971.09	$ 8,713,672.12
4		$ -	$ -	$ -	$ 8,713,672.12	$ 522,820.33	$ 124,431.24	$ 398,389.09	$ 9,112,061.21
5		$ -	$ -	$ -	$ 9,112,061.21	$ 546,723.67	$ 130,120.23	$ 416,603.44	$ 9,528,664.64
6		$ -	$ -	$ -	$ 9,528,664.64	$ 571,719.88	$ 136,069.33	$ 435,650.55	$ 9,964,315.19
7		$ -	$ -	$ -	$ 9,964,315.19	$ 597,858.91	$ 142,290.42	$ 455,568.49	$ 10,419,883.68
8		$ -	$ -	$ -	$ 10,419,883.68	$ 625,193.02	$ 148,795.94	$ 476,397.08	$ 10,896,280.76
9		$ -	$ -	$ -	$ 10,896,280.76	$ 653,776.85	$ 155,598.89	$ 498,177.96	$ 11,394,458.72
10		$ -	$ -	$ -	$ 11,394,458.72	$ 683,667.52	$ 162,712.87	$ 520,954.65	$ 11,915,413.37
11		$ -	$ -	$ -	$ 11,915,413.37	$ 714,924.80	$ 170,152.10	$ 544,772.70	$ 12,460,186.07
12		$ -	$ -	$ -	$ 12,460,186.07	$ 747,611.16	$ 177,931.46	$ 569,679.71	$ 13,029,865.78
13		$ -	$ -	$ -	$ 13,029,865.78	$ 781,791.95	$ 186,066.48	$ 595,725.46	$ 13,625,591.24
14		$ -	$ -	$ -	$ 13,625,591.24	$ 817,535.47	$ 194,573.44	$ 622,962.03	$ 14,248,553.28
15		$ -	$ -	$ -	$ 14,248,553.28	$ 854,913.20	$ 203,469.34	$ 651,443.86	$ 14,899,997.13
16		$ -	$ -	$ -	$ 14,899,997.13	$ 893,999.83	$ 212,771.96	$ 681,227.87	$ 15,581,225.00
17		$ -	$ -	$ -	$ 15,581,225.00	$ 934,873.50	$ 222,499.89	$ 712,373.61	$ 16,293,598.61
18		$ -	$ -	$ -	$ 16,293,598.61	$ 977,615.92	$ 232,672.59	$ 744,943.33	$ 17,038,541.94
19		$ -	$ -	$ -	$ 17,038,541.94	$ 1,022,312.52	$ 243,310.38	$ 779,002.14	$ 17,817,544.07
20		$ -	$ -	$ -	$ 17,817,544.07	$ 1,069,052.64	$ 254,434.53	$ 814,618.12	$ 18,632,162.19
21		$ -	$ -	$ -	$ 18,632,162.19	$ 1,117,929.73	$ 266,067.28	$ 851,862.46	$ 19,484,024.64
22		$ -	$ -	$ -	$ 19,484,024.64	$ 1,169,041.48	$ 278,231.87	$ 890,809.61	$ 20,374,834.25
23		$ -	$ -	$ -	$ 20,374,834.25	$ 1,222,490.06	$ 290,952.63	$ 931,537.42	$ 21,306,371.67
24		$ -	$ -	$ -	$ 21,306,371.67	$ 1,278,382.30	$ 304,254.99	$ 974,127.31	$ 22,280,498.99
25		$ -	$ -	$ -	$ 22,280,498.99	$ 1,336,829.94	$ 318,165.53	$ 1,018,664.41	$ 23,299,163.40
26		$ -	$ -	$ -	$ 23,299,163.40	$ 1,397,949.80	$ 332,712.05	$ 1,065,237.75	$ 24,364,401.15
27		$ -	$ -	$ -	$ 24,364,401.15	$ 1,461,864.07	$ 347,923.65	$ 1,113,940.42	$ 25,478,341.57
28		$ -	$ -	$ -	$ 25,478,341.57	$ 1,528,700.49	$ 363,830.72	$ 1,164,869.78	$ 26,643,211.35
29		$ -	$ -	$ -	$ 26,643,211.35	$ 1,598,592.68	$ 380,465.06	$ 1,218,127.62	$ 27,861,338.97
30		$ -	$ -	$ -	$ 27,861,338.97	$ 1,671,680.34	$ 397,859.92	$ 1,273,820.42	$ 29,135,159.39

Owner Contributes Business to CRUT

	CRUT Accumulation					CRUT Distribution to Owner			Owner's Accumulation				
Year	CRUT Pre-Distribution Value	CRUT Investment Growth	CRUT Value Following Investment Growth 6%	CRUT Annual Distribution 11.288%	End of Year CRUT Value (Amount to Charity)	Gross Annual Unitrust Distribution	Tax on Distribution 23.8%	After Tax Net Distribution to Client	Pre-Investment Client Value	Pre-Tax Investment Growth 6%	Tax on Investment Growth 23.8%	After Tax Investment Growth	End of Year Net Client Value
1	$ 10,000,000.00	$ 600,000.00	$ 10,600,000.00	$ 1,196,528.00	$ 9,403,472.00	$ 1,196,528.00	$ 284,773.66	$ 911,754.34	$ -	$ -	$ -	$ -	$ 911,754.34
2	$ 9,403,472.00	$ 564,208.32	$ 9,967,680.32	$ 1,125,151.75	$ 8,842,528.57	$ 1,125,151.75	$ 267,786.12	$ 857,365.64	$ 911,754.34	$ 54,705.26	$ 13,019.85	$ 41,685.41	$ 1,810,805.38
3	$ 8,842,528.57	$ 530,551.71	$ 9,373,080.28	$ 1,058,033.30	$ 8,315,046.98	$ 1,058,033.30	$ 251,811.93	$ 806,221.38	$ 1,810,805.38	$ 108,648.32	$ 25,858.30	$ 82,790.02	$ 2,699,816.78
4	$ 8,315,046.98	$ 498,902.82	$ 8,813,949.80	$ 994,918.65	$ 7,819,031.14	$ 994,918.65	$ 236,790.64	$ 758,128.01	$ 2,699,816.78	$ 161,989.01	$ 38,553.38	$ 123,435.62	$ 3,581,380.42
5	$ 7,819,031.14	$ 469,141.87	$ 8,288,173.01	$ 935,568.97	$ 7,352,604.04	$ 935,568.97	$ 222,665.41	$ 712,903.55	$ 3,581,380.42	$ 214,882.82	$ 51,142.11	$ 163,740.71	$ 4,458,024.68
6	$ 7,352,604.04	$ 441,156.24	$ 7,793,760.28	$ 879,759.66	$ 6,914,000.62	$ 879,759.66	$ 209,382.80	$ 670,376.86	$ 4,458,024.68	$ 267,481.48	$ 63,660.59	$ 203,820.89	$ 5,332,222.43
7	$ 6,914,000.62	$ 414,840.04	$ 7,328,840.66	$ 827,279.53	$ 6,501,561.13	$ 827,279.53	$ 196,892.53	$ 630,387.00	$ 5,332,222.43	$ 319,933.35	$ 76,144.14	$ 243,789.21	$ 6,206,398.65
8	$ 6,501,561.13	$ 390,093.67	$ 6,891,654.79	$ 777,929.99	$ 6,113,724.80	$ 777,929.99	$ 185,147.34	$ 592,782.65	$ 6,206,398.65	$ 372,383.92	$ 88,627.37	$ 283,756.55	$ 7,082,937.85
9	$ 6,113,724.80	$ 366,823.49	$ 6,480,548.29	$ 731,524.29	$ 5,749,024.00	$ 731,524.29	$ 174,102.78	$ 557,421.51	$ 7,082,937.85	$ 424,976.27	$ 101,144.35	$ 323,831.92	$ 7,964,191.28
10	$ 5,749,024.00	$ 344,941.44	$ 6,093,965.44	$ 687,886.82	$ 5,406,078.62	$ 687,886.82	$ 163,717.06	$ 524,169.76	$ 7,964,191.28	$ 477,851.48	$ 113,728.65	$ 364,122.83	$ 8,852,483.86
11	$ 5,406,078.62	$ 324,364.72	$ 5,730,443.34	$ 646,852.44	$ 5,083,590.89	$ 646,852.44	$ 153,950.88	$ 492,901.56	$ 8,852,483.86	$ 531,149.03	$ 126,413.47	$ 404,735.56	$ 9,750,120.98
12	$ 5,083,590.89	$ 305,015.45	$ 5,388,606.35	$ 608,265.88	$ 4,780,340.46	$ 608,265.88	$ 144,767.28	$ 463,498.60	$ 9,750,120.98	$ 585,007.26	$ 139,231.73	$ 445,775.53	$ 10,659,395.12
13	$ 4,780,340.46	$ 286,820.43	$ 5,067,160.89	$ 571,981.12	$ 4,495,179.77	$ 571,981.12	$ 136,131.51	$ 435,849.61	$ 10,659,395.12	$ 639,563.71	$ 152,216.16	$ 487,347.54	$ 11,582,592.28
14	$ 4,495,179.77	$ 269,710.79	$ 4,764,890.56	$ 537,860.85	$ 4,227,029.71	$ 537,860.85	$ 128,010.88	$ 409,849.96	$ 11,582,592.28	$ 694,955.54	$ 165,399.42	$ 529,556.12	$ 12,521,998.36
15	$ 4,227,029.71	$ 253,621.78	$ 4,480,651.49	$ 505,775.94	$ 3,974,875.55	$ 505,775.94	$ 120,374.67	$ 385,401.27	$ 12,521,998.36	$ 751,319.90	$ 178,814.14	$ 572,505.77	$ 13,479,905.39
16	$ 3,974,875.55	$ 238,492.53	$ 4,213,368.08	$ 475,604.99	$ 3,737,763.10	$ 475,604.99	$ 113,193.99	$ 362,411.00	$ 13,479,905.39	$ 808,794.32	$ 192,493.05	$ 616,301.27	$ 14,458,617.67
17	$ 3,737,763.10	$ 224,265.79	$ 3,962,028.88	$ 447,233.82	$ 3,514,795.06	$ 447,233.82	$ 106,441.65	$ 340,792.17	$ 14,458,617.67	$ 867,517.06	$ 206,469.06	$ 661,048.00	$ 15,460,457.84
18	$ 3,514,795.06	$ 210,887.70	$ 3,725,682.76	$ 420,555.07	$ 3,305,127.69	$ 420,555.07	$ 100,092.11	$ 320,462.96	$ 15,460,457.84	$ 927,627.47	$ 220,775.34	$ 706,852.13	$ 16,487,772.94
19	$ 3,305,127.69	$ 198,307.66	$ 3,503,435.36	$ 395,467.78	$ 3,107,967.57	$ 395,467.78	$ 94,121.33	$ 301,346.45	$ 16,487,772.94	$ 989,266.38	$ 235,445.40	$ 753,820.98	$ 17,542,940.36
20	$ 3,107,967.57	$ 186,478.05	$ 3,294,445.63	$ 371,877.02	$ 2,922,568.60	$ 371,877.02	$ 88,506.73	$ 283,370.29	$ 17,542,940.36	$ 1,052,576.42	$ 250,513.19	$ 802,063.23	$ 18,628,373.89
21	$ 2,922,568.60	$ 175,354.12	$ 3,097,922.72	$ 349,693.52	$ 2,748,229.20	$ 349,693.52	$ 83,227.06	$ 266,466.46	$ 18,628,373.89	$ 1,117,702.43	$ 266,013.18	$ 851,689.25	$ 19,746,529.60
22	$ 2,748,229.20	$ 164,893.75	$ 2,913,122.96	$ 328,833.32	$ 2,584,289.64	$ 328,833.32	$ 78,262.33	$ 250,570.99	$ 19,746,529.60	$ 1,184,791.78	$ 281,980.44	$ 902,811.33	$ 20,899,911.93
23	$ 2,584,289.64	$ 155,057.38	$ 2,739,347.02	$ 309,217.49	$ 2,430,129.52	$ 309,217.49	$ 73,593.76	$ 235,623.73	$ 20,899,911.93	$ 1,253,994.72	$ 298,450.74	$ 955,543.97	$ 22,091,079.63
24	$ 2,430,129.52	$ 145,807.77	$ 2,575,937.30	$ 290,771.80	$ 2,285,165.49	$ 290,771.80	$ 69,203.69	$ 221,568.11	$ 22,091,079.63	$ 1,325,464.78	$ 315,460.62	$ 1,010,004.16	$ 23,322,651.90
25	$ 2,285,165.49	$ 137,109.93	$ 2,422,275.42	$ 273,426.45	$ 2,148,848.97	$ 273,426.45	$ 65,075.50	$ 208,350.95	$ 23,322,651.90	$ 1,399,359.11	$ 333,047.47	$ 1,066,311.64	$ 24,597,314.50
26	$ 2,148,848.97	$ 128,930.94	$ 2,277,779.91	$ 257,115.80	$ 2,020,664.12	$ 257,115.80	$ 61,193.56	$ 195,922.24	$ 24,597,314.50	$ 1,475,838.87	$ 351,249.65	$ 1,124,589.22	$ 25,917,825.96
27	$ 2,020,664.12	$ 121,239.85	$ 2,141,903.96	$ 241,778.12	$ 1,900,125.84	$ 241,778.12	$ 57,543.19	$ 184,234.93	$ 25,917,825.96	$ 1,555,069.56	$ 370,106.55	$ 1,184,963.00	$ 27,287,023.89
28	$ 1,900,125.84	$ 114,007.55	$ 2,014,133.39	$ 227,355.38	$ 1,786,778.02	$ 227,355.38	$ 54,110.58	$ 173,244.80	$ 27,287,023.89	$ 1,637,221.43	$ 389,658.70	$ 1,247,562.73	$ 28,707,831.42
29	$ 1,786,778.02	$ 107,206.68	$ 1,893,984.70	$ 213,792.99	$ 1,680,191.70	$ 213,792.99	$ 50,882.73	$ 162,910.26	$ 28,707,831.42	$ 1,722,469.88	$ 409,947.83	$ 1,312,522.05	$ 30,183,263.73
30	$ 1,680,191.70	$ 100,811.50	$ 1,781,003.21	$ 201,039.64	$ 1,579,963.56	$ 201,039.64	$ 47,847.43	$ 153,192.21	$ 30,183,263.73	$ 1,810,995.82	$ 431,017.01	$ 1,379,978.82	$ 31,716,434.75

Comparison of Net Value to Owner and Charity				
Outright Sale		**CRUT**		
End of Year Net Owner Value	**Year**	**End of Year Net Owner Value**	**Net Value to Charity (Upon Termination)**	**Total Net Value (Owner + Charity)**
$ 7,968,386.40	**1**	$ 911,754.34	$ 9,403,472.00	$ 10,315,226.34
$ 8,332,701.03	**2**	$ 1,810,805.38	$ 8,842,528.57	$ 10,653,333.95
$ 8,713,672.12	**3**	$ 2,699,816.78	$ 8,315,046.98	$ 11,014,863.76
$ 9,112,061.21	**4**	$ 3,581,380.42	$ 7,819,031.14	$ 11,400,411.56
$ 9,528,664.64	**5**	$ 4,458,024.68	$ 7,352,604.04	$ 11,810,628.73
$ 9,964,315.19	**6**	$ 5,332,222.43	$ 6,914,000.62	$ 12,246,223.06
$ 10,419,883.68	**7**	$ 6,206,398.65	$ 6,501,561.13	$ 12,707,959.78
$ 10,896,280.76	**8**	$ 7,082,937.85	$ 6,113,724.80	$ 13,196,662.65
$ 11,394,458.72	**9**	$ 7,964,191.28	$ 5,749,024.00	$ 13,713,215.28
$ 11,915,413.37	**10**	$ 8,852,483.86	$ 5,406,078.62	$ 14,258,562.48
$ 12,460,186.07	**11**	$ 9,750,120.98	$ 5,083,590.89	$ 14,833,711.88
$ 13,029,865.78	**12**	$ 10,659,395.12	$ 4,780,340.46	$ 15,439,735.58
$ 13,625,591.24	**13**	$ 11,582,592.28	$ 4,495,179.77	$ 16,077,772.05
$ 14,248,553.28	**14**	$ 12,521,998.36	$ 4,227,029.71	$ 16,749,028.07
$ 14,899,997.13	**15**	$ 13,479,905.39	$ 3,974,875.55	$ 17,454,780.94
$ 15,581,225.00	**16**	$ 14,458,617.67	$ 3,737,763.10	$ 18,196,380.76
$ 16,293,598.61	**17**	$ 15,460,457.84	$ 3,514,795.06	$ 18,975,252.90
$ 17,038,541.94	**18**	$ 16,487,772.94	$ 3,305,127.69	$ 19,792,900.63
$ 17,817,544.07	**19**	$ 17,542,940.36	$ 3,107,967.57	$ 20,650,907.94
$ 18,632,162.19	**20**	$ 18,628,373.89	$ 2,922,568.60	$ 21,550,942.49
$ 19,484,024.64	**21**	$ 19,746,529.60	$ 2,748,229.20	$ 22,494,758.81
$ 20,374,834.25	**22**	$ 20,899,911.93	$ 2,584,289.64	$ 23,484,201.56
$ 21,306,371.67	**23**	$ 22,091,079.63	$ 2,430,129.52	$ 24,521,209.15
$ 22,280,498.99	**24**	$ 23,322,651.90	$ 2,285,165.49	$ 25,607,817.39
$ 23,299,163.40	**25**	$ 24,597,314.50	$ 2,148,848.97	$ 26,746,163.47
$ 24,364,401.15	**26**	$ 25,917,825.96	$ 2,020,664.12	$ 27,938,490.07
$ 25,478,341.57	**27**	$ 27,287,023.89	$ 1,900,125.84	$ 29,187,149.73
$ 26,643,211.35	**28**	$ 28,707,831.42	$ 1,786,778.02	$ 30,494,609.43
$ 27,861,338.97	**29**	$ 30,183,263.73	$ 1,680,191.70	$ 31,863,455.43
$ 29,135,159.39	**30**	$ 31,716,434.75	$ 1,579,963.56	$ 33,296,398.32