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July 17, 2008

The Honorable Max Baucus
Chairman
Committee on Finance
United States Senate
511 Hart Senate Office Building
Washington, DC 20210
Via Fax: (202) 224-0515

The Honorable Charles B. Rangel
Chairman
Committee on Ways & Means
House of Representatives
2354 Rayburn House Office Building
Washington, DC 20515
Via Fax: (202) 225-0816

The Honorable Charles E. Grassley
Ranking Member
Committee on Finance
United States Senate
135 Hart Senate Office Building
Washington, DC 20510
Via Fax: (202) 224-3744

The Honorable Jim McCrery
Ranking Member
Committee on Ways and Means
House of Representatives
242 Cannon House Office Building
Washington, DC 20515
Via Fax: (202) 225-8039

The Honorable Charles E. Schumer
United States Senate
313 Hart Senate Office Building
Washington, DC 20510
Via Fax: (202) 228-3027

The Honorable Michael McNulty
Committee on Ways and Means
House of Representatives
2210 Rayburn House Office Building
Washington, DC 20515
Via Fax: (202)225-5077

The Honorable Hillary Rodham Clinton
United States Senate
476 Russell Senate Office Building
Washington, DC 20510
Via Fax: (202) 228-0282

The Honorable Joseph Crowley
Committee on Ways and Means
2404 Rayburn House Office Building
Washington, DC 20515
Via Fax: (202) 225-1909

The Honorable Thomas M. Reynolds
Committee on Ways and Means
232 Cannon House Office Building
Washington, DC 20515
Via Fax: (202) 225-5910



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Re: Comments on Charitable Contribution Deductions for Shareholders of S Corporations

Dear Senators and Representatives:

The New York State Society of Certified Public Accountants, representing 30,000 CPAs in public practice, industry, government and education, submits the following comments to you regarding legislation that affects the ability of an S corporation to make charitable contributions of appreciated property without affecting basis.

The NYSSCPA Closely Held and S Corporations Committee deliberated this issue and has prepared the attached comments for your consideration. If you would like additional discussion with the committee, please contact Stewart Berger, Chair of the Closely Held and S Corporations Committee, at (212) 303-1881, or Ernest J. Markezin, NYSSCPA staff, at (212) 719-8303.

The NYSSCPA thanks you for the opportunity to have its opinion considered.

Sincerely,



Sharon Sabba Fierstein
President

Attachment



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**COMMENTS ON CHARITABLE CONTRIBUTION DEDUCTIONS
FOR SHAREHOLDERS OF S CORPORATIONS**

July 17, 2008

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**NEW YORK STATE SOCIETY OF
CERTIFIED PUBLIC ACCOUNTANTS**

Closely Held and S Corporations Committee

**Comments on Charitable Contribution Deductions for Shareholders of
S Corporations**

Summary

The Pension Protection Act of 2006 contained charitable giving incentives, including a provision that permitted an S corporation that made charitable contributions of appreciated property to pass through to its shareholders the portion of the contributions represented by the appreciation without regard to the basis limitations. That provision expired at the end of 2007. Other flow-through entities such as partnerships have been and are currently permitted to pass through to their owners the full amounts of their charitable contribution deductions without regard to basis limitations. We suggest that the expiring provisions be extended or made permanent to ensure consistent application of tax policy. Alternatively, we suggest that the entire amount of S corporation charitable contributions (not only the appreciation) could be passed through to shareholders, without regard to basis limitations.

Background

“The Pension Protection Act of 2006” amended Code Section 1367(a)(2) dealing with decreases in basis of S corporation shareholders’ stock and loans to their S corporations. The change provides that the decrease in basis by reason of a charitable contribution of property (as defined in Section 170(c)) shall be the amount equal to a shareholder’s pro rata share of a corporation’s adjusted basis of such property. This is the same result that a partnership now obtains as set forth in IRS Revenue Ruling 96-11, 1996-1 CB140. This change does not apply to contributions made in taxable years beginning after December 31, 2007.

“The Technical Corrections Act of 2007” added subsection (d)(4) to Section 1366 dealing with the pass through of items to shareholders. This change provides that if any charitable contribution of property to which the second sentence of section 1367(a)(2) applies (relating to the decrease in basis by reason of a charitable contribution), the basis limitation of Section 1366(d)(1) will not apply to the excess (if any) of a shareholder’s pro rata share of the contribution over a shareholder’s pro rata share of the S corporation’s adjusted basis of the contributed property.

The Need for Change

The basis limitations on shareholder deductions would not apply to the appreciation in the value of any contributed asset over its basis to the corporation. “The Technical Corrections Act of 2007” stated that the effective date of this amendment would be as if the basis limitation had been included in the provisions of the “The Pension Protection Act of 2006” to which it relates.

The result of the amendment is to clearly provide that the basis limitation does not apply to the charitable contribution deduction portion that is represented by the appreciation in the value of contributed property. The basis limitation does apply to the portion of the donated property represented by a corporation’s basis for the donated property.

The need for this change is because the provision described above expired on December 31, 2007.

Example

If a single owner S corporation contributed publicly traded stock with a basis of \$2,000 and a fair market value of \$5,000, the shareholder would be treated as having made a \$5,000 contribution (or a lesser amount if the special rules of Section 170(e) apply), and will reduce the basis of his S corporation stock and/or his loans to the corporation by \$2,000 if the basis was more than \$2,000 before the reduction of basis. If the shareholder’s basis for his S corporation stock and his loans was zero, the \$3,000 of appreciation would be currently deductible and the remaining \$2,000 would be subject to the carryover provisions of Section 1366(d). This is further illustrated in Revenue Ruling 2008-16.

A partnership would achieve a better result according to the fourth ruling set forth as part of Private Letter Ruling (PLR) 8405084 that was issued on November 3, 1983. This ruling indicates that the charitable contribution deduction allowed to each of the donating partners for their shares of a partnership charitable contribution of appreciated real property was not in any way limited by the adjusted basis of each partner’s interest in the partnership.

A private letter ruling represents the conclusion of the Internal Revenue Service as it pertains to a specific case for which it was issued and therefore cannot be relied on for other cases.

The Solution: Extension of Provision

Because the above provisions will not apply to contributions made in taxable years beginning after December 31, 2007, House Ways and Means Committee Chairman Rangel’s substitute for “The Energy and Tax Expenditures Act of 2008” (HR 6049)

issued on May 14, 2008, would amend the last sentence of Section 1367(a)(2) by striking “December 31, 2007” and substituting in its place “December 31, 2008.” This would extend the basis adjustment provision by one year.

However, it is not clear that the basis limitation provision in Section 1366(d)(4) allowing a deduction for the appreciation would also be extended.

We believe that *both* of these provisions should be extended and the necessary statutory language should be inserted to give effect to this result.

Alternate Solution

Another possible solution would be to provide that the basis limitations of Section 1366(d) would not apply to any portion of a charitable contribution deduction. Thus, in the preceding example, only the appreciation in the value of the contributed asset escapes the basis limitation provisions. An alternative solution would be to exempt the entire amount of charitable contributions from the basis limitation provisions of Section 1366(d)(1). This would give S corporations the same result that partnerships now receive as described in PLR 8405084.

The statutory language to accomplish this result would be to make permanent the provisions of Section 1367(a)(2) and to amend Section 1366(d) by deleting subparagraph (4) and amending subparagraph (1) to read as follows:

“Except for charitable contributions, the aggregate amount of losses and deductions taken into account by a shareholder under Subsection (a) for any taxable years shall not exceed”

Conclusion

We recommend that the provisions of Section 1367(a)(2) and the provisions of Section 1366(d)(4) be extended or made permanent.

Alternatively, we recommend that the basis limitation should not apply to any part of S corporation charitable contributions so that the treatment of S corporations and partnerships with respect to charitable contributions would be identical.

We thank you for the opportunity to present our comments for consideration.