taxanalysts special report

Deductibility of Charitable Contributions to Single-Member LLCs Organized in a U.S. and a Foreign Jurisdiction Under IRS Notice 2012-52

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Introduction

Subject Matter and Scope of Notice 2012-52

IRS Notice 2012-52 illuminated two issues affecting deductibility of contributions to single-member limited liability companies (SMLLCs) formed by charities.[1] The first issue was whether this entity could be disregarded under section 170.[2] The second issue was, in the event that the SMLLC were disregarded, whether the transfers qualified as contributions to or for the use of the parent charity under section 170(b)(1)(A) or section 170(b)(1)(B).[3]

Under the notice, donors now may deduct gifts to domestic SMLLCs.[4] These entities must be wholly owned and controlled by domestic charitable organizations described in section 170(c)(2).[5] The notice is effective as of July 31, 2012, and for prior years for which the statutory period of limitations remains open. Contributions to an SMLLC are treated as transfers to a branch or a division of the parent charity for purposes of section 170.[6] Likewise, the owner charity is the donee for purposes of the substantiation and disclosure requirements under section 170(f) and section 6115.[7]

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[1]Notice 2012-52, 2012-35 IRB 318. *See* sections 170(b)(1)(A)(vi) and -(c)(2)(A). Even though Notice 2012-52 applies to single-member limited liability companies that are wholly owned and controlled by a public charity or a private foundation, gifts to most private foundations never can qualify for the higher deduction limit applicable to a contribution to a charitable organization enumerated in section 170(b)(1)(A), which excludes most private foundations. *See* reg. sections 1.170A-8(b) (1972) (setting forth a 50 percent limitation for gifts to some charitable organizations) and 8(d) (setting forth the criteria for a 30 percent limitation on deductibility of contributions to organizations described in section 170(c), which refers more broadly to section 501(c)(3) organizations, of which private foundations and public charities both are subsets). *See also* section 170(c)(2)(B). This article discusses contributions to SMLLCs established by public charities.

[2]*See generally* section 170(a)(1) (allowing a deduction by a donor for a contribution to qualifying charitable organizations). Before the notice was issued, for a decade the IRS refused to rule on whether a gift to an SMLLC owned and controlled by a section 501(c)(3) charity was deductible in the same way as a gift directly to the charity. *See* LTR 200150027 (Aug. 7, 2001). *See also*

(Footnote continued in next column.)

Marina Vishnepolskaya, "Deductibility of Gifts to Domestic, Single-Member LLCs as Contributions 'to the Charity' Under Recent Guidance," 69 *Exempt Org. Tax Rev.* 135 (2012) (arguing that such gifts should be deductible as contributions "to the charity" as long as particular discretion and control were established, the position that ultimately appeared to be adopted in the notice).

[3]*See* section 170(b)(1).

[4]*See* Notice 2012-52.

[5]Section 170(c)(2) (describing a "corporation, trust, or community chest, fund or foundation" that, generally, meets the requirements for a federal income tax exemption as described under section 501(c)(3)); Notice 2012-52.

[6]*See* section170(b)(1)(A)(vi) (applicable only to charities described in section 170(c)(2)); reg. section 301.7701-2(a) (as amended in 2012) (stating that "a business entity with only one owner is classified as a corporation or is disregarded; if the entity is disregarded, its activities are treated in the same manner as a sole proprietorship, branch, or division of the owner"); Ann. 99-102, 1999-43 IRB 545 (Oct. 25, 1999) (providing similarly that the operations of a disregarded entity with a single owner will be treated as a branch or division of the owner); Notice 2012-52 (applying this rule to contributions to SMLLCs with parent charities).

[7]Section 170(f)(8) (requiring the donor to substantiate a contribution above $250 in value for purposes of the deduction under section 170(a) with a written, contemporaneous acknowledgment provided by the donee in the form set forth in the statute); section 6115(a) (requiring some charitable organizations to disclose in writing to the donor the deductible amount of a contribution above $75 in value and, if applicable, the estimated value of the goods or services contributed).

The limitations of section 170(b) apply as though the gift to the SMLLC were made to the parent organization.[8] The notice does not restrict the term ''limitations.'' Accordingly, it could be given its plain meaning and interpreted broadly to include deduction limits under section 170(b)(1) applicable to gifts ''to'' or ''for the use of'' the charity. Such an interpretation suggests that as long as the transfer meets the given criteria, either deduction limit could apply.[9] This means a gift to an SMLLC could qualify as a gift to the charity subject to a deduction limit of up to 50 percent of the contribution base under section 170(b)(1)(A).[10]

The notice has the limited scope of treating SMLLCs as disregarded only for purposes of section 170.[11] Furthermore, the notice would cover an SMLLC only if it is a disregarded entity (DRE) within the meaning of the check-the-box regulations of section 7701.[12] An SMLLC that has only one owner and is not a corporation[13] is treated as a DRE.[14] DRE status means the code disregards the existence of the SMLLC as an entity separate from its owner for most federal tax purposes.[15] The parent charity does not have to elect disregarded status for a domestic, wholly owned eligible entity because this tax status generally is its default classification, but the charity would have to file IRS Form 8832 to elect such status for a non-U.S. SMLLC.[16]

Issues Presented

The notice fails to address whether a donor may deduct contributions to an SMLLC established by a domestic charity outside the United States. Section 170 does not permit a deduction for funds donated to a foreign organization, even if it qualified as a charity generally exempt from federal income taxation as an organization described under section 501(c)(3). But, under the notice, a contributor could take a deduction for a charitable transfer to a foreign SMLLC wholly owned and controlled by a domestic charity, which also is chartered under state law. This article primarily refers to these entities as ''foreign domesticated,'' ''dual-charter,'' or ''dually chartered'' SMLLCs.

This structure seems not to have been in use, but practitioners should implement this arrangement to facilitate and maximize the benefits of contributions to international charities. One reason why this practice may not have become more common is that only two states in the U.S. appear to allow domestication as SMLLCs of non-U.S. entities. Also, reg. section 301.7701-5(a), which is cited in the notice and permitted dual-charter entities, including SMLLCs, to be treated as domestic, was promulgated only eight years ago, in 2006.

There are several situations in which a U.S. charity may wish to use a foreign domesticated SMLLC. The charity may want to establish an SMLLC in a foreign jurisdiction in order to accept money or property received from a local individual eligible for a charitable deduction under section 170(b)(1). The organization may decide to hold the donated property in the offshore SMLLC to shield the parent charity from liability under local laws. Or the U.S. charity would use the donations for its charitable program abroad. Likewise, the U.S. institution may identify a particular foreign organization to which the charity, in furtherance of its exempt purpose, would make grants from funds received by the SMLLC.

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[8] *See* section 170(b)(1); Notice 2012-52.

[9] *See* discussion in *Vishnepolskaya*, *supra* note 2, at 145 (summarizing the discretion and control requirements for deducting a gift to the charity under section 170(b)(1)(A)(vi)), 146-147 (summarizing the separate discretion and control test for absence of proscribed earmarking of the gift to the charity).

[10] *See* section 170(b). *But see* American Taxpayer Relief Act of 2012, P.L. 112-240, sections 101(b)(2)(A) and (B), 126 Stat. 2316-2317 (itemized deductions, including charitable deductions allowable under section 170, reduced above certain income thresholds by lesser of (a) 3 percent of the amount of the adjusted gross income of taxpayer in excess of the applicable threshold or (b) 80 percent of the itemized deductions otherwise allowable for the tax year).

[11] *See* reg. sections 301.7701-2(c)(2)(iii), (iv)(B), (iv)(D), and (v) (as amended in 2012); temp. reg. sections 301.7701-2T(c)(iv)(A) and (iv)(C) (as amended in 2012) (setting forth the circumstances in which a disregarded entity would be treated as an entity separate from its owner, including for employment and some excise tax purposes).

[12] Sections 7701(a)(3) (defining the term ''corporation'' for purposes of the code, 26 U.S.C. sections 1 et seq.) and 7701(a)(4) (describing generally a domestic corporation or partnership). *But see* reg. section 301.7701-3(a) (as amended in 2006) (providing that an eligible entity with a single owner may elect to be classified as an association or to be disregarded as an entity separate from its owner, in which case would not be treated as a corporation to which the definition of a domestic entity under section 7701(a)(4) applied).

[13] *See* reg. sections 301.7701-2(b) (as amended in 2012) (defining a corporation for federal tax purposes) and -3(a) (as amended in 2006) (stating that a business entity that is not otherwise a corporation (an eligible entity) and that has a single owner may elect to be classified as an association taxable as a corporation or to be disregarded as an entity separate from its owner).

[14] *See* reg. section 301.7701-2(a).

[15] *Id.*; *see also* proposed reg. section 301.7701-2(c)(2)(v)(A)(5), 78 Fed. Reg. 218, 253 (Jan. 2, 2013) (regarding a business entity with a single owner for purposes of imposition of an ''assessable payment'' for failure by an ''applicable large employer'' to offer ''minimum essential coverage'' to some employees under an eligible employer-sponsored plan, as provided in section 4980H, and of penalties assessable in connection with failure to meet annual informational reporting requirements under section 6056 with respect to health coverage such employer may offer to its full-time employees); *see generally* sections 36B, 4980H, 5000A, 6056.

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[16] Reg. sections 301.7701-3(a), (b)(1)(ii) (default disregarded entity status for certain domestic, single-owner, eligible entities). *But see* reg. section 301.7701-3(b)(2)(ii) (default disregarded entity status for certain foreign, single-owner, eligible entities only if the owner does not have limited liability). If the SMLLC is not domesticated, it would be deemed a foreign entity. See reg. section 301.7701-5(a). Members of not-for-profit corporations generally are afforded limited liability under applicable state statutes. *See* reg. section 301.7701-3(b)(2)(ii) (defining limited liability). Accordingly, the parent charity would have to file IRS Form 8832 in order to elect disregarded entity status for the foreign undomesticated SMLLC.

Although the practice seems permissible under section 170, it is not known for sure whether a donor may deduct a gift made directly to a foreign domesticated SMLLC because of ambiguous language in the notice. First, it is unclear whether the SMLLC would be created or organized in or under the laws of the United States for purposes of the notice. Second, ambiguity exists regarding whether a foreign domesticated SMLLC is a domestic entity within the definition of that term in the notice.

This uncertainty could be resolved by additional IRS guidance.

Definition of a Domestic Business Entity

The notice applies to domestic SMLLCs that are treated as DREs. An SMLLC that qualifies as a DRE is one type of a business entity under the entity classification regulations.[17] Under reg. section 301.7701-5(a), a business entity, including a DRE, qualifies as domestic "if it is created or organized as any type of entity . . . in the United States, or under the law of the United States or of any State. Accordingly, so long as it is not a corporation per se,[18] a business entity that is created or organized both in the United States excluding U.S. possessions and in a foreign jurisdiction is a domestic entity."[19]

The notice paraphrases this definition of a domestic business entity, but only in part. The notice says, "A business entity (including a disregarded entity) is domestic if it is created or organized within the United States, or under the law of the United States or of any state. See § 301.7701-5(a)." In this way, the notice omits the crucial detail that under the regulation section it cites, an SMLLC, which is a DRE, would be domestic even if also created in a foreign country.

'Created or Organized In or Under the Laws of' Rule

Section 170(a) permits a charitable deduction for individuals and corporations subject to percentage income limitations in section 170(b).[20] Section 170(c)(2) provides that a corporation, among other entities, is a permissible donee for purposes of the deduction.[21]

Section 170 does not mention the term "domestic." Also, section 170(c)(2) technically does not apply to SMLLCs. But section 170(c)(2)(A) sets forth a requirement that is similar to the definition of a domestic business entity in the check-the-box regulations. Under section 170(c)(2), a corporation has to satisfy particular criteria, including being "created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States."[22] It is not clear whether a charity chartered both abroad and in the U.S. would meet this nationality test.

Domestic Status of Covered SMLLCs in the Notice

Under the heading "Contributions to Domestic SMLLCs," the notice provides:

> "If all other requirements of § 170 are met, the [IRS] will treat a contribution to a disregarded SMLLC that was created or organized in or under the laws of the United States, a United States possession, a state, or the District of Columbia, and is wholly owned and controlled by a U.S. charity, as a charitable contribution to a branch or division of the U.S. charity."[23]

Here, the notice describes, but *does not define*, a covered SMLLC. The definition may be inferred only by juxtaposing the enumerated geographic characteristics and the reference to "domestic SMLLCs." Thus, in relevant part a domestic SMLLC is one "that was created or organized in or under the laws of the United States, a United States possession, a state, or the District of Columbia," according to the notice.

In this manner, the IRS employs clearly the definition in section 170(c)(2)(A), which includes charities formed in United States possessions. When the agency actually *defines* a domestic unit, it uses an abbreviated version of the definition of a domestic business entity in reg. section 301.7701-5(a). Accordingly, in either instance, the IRS shies away from stating that a covered SMLLC under the notice includes an SMLLC formed in the foreign country and in the United States or a possession.

Note on Certain Bilateral Tax Treaties

The United States had entered into bilateral treaties with Canada, Mexico, and Israel, which apply to organizations formed under the laws of a participating country.[24] The treaties modify the rule under section 170(c)(2)(A). Covered charities would qualify as donees

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[17]Reg. section 301.7701-2(a) (as amended in 2012). ("A business entity is any entity recognized for federal tax purposes . . . that is not properly classified as a trust under § 301.7701-4 or otherwise subject to special treatment under the Internal Revenue Code.")

[18]A corporation per se may not elect to be treated as a DRE. *See* reg. sections 301.7701-2(b)(8)(i) (as amended in 2012) (enumerating some foreign entities that automatically would be deemed corporations and therefore would not be able to elect to be treated as a corporation, partnership, or a disregarded entity under the code) and -2(b)(9) (providing that entities with multiple charters first would have to be classified and only then assigned domestic or foreign status). Accordingly, to ensure applicability of the notice, the domesticating subsidiary might not be an entity whose status under foreign law would cause it to be deemed a corporation per se in the regulation.

[19]Reg. section 301.7701-5(a) (as amended in 2006).

[20]*See* sections 170(a)(1) (charitable contribution deduction allowed) and (b)(1)-(3) (percentage limitations for individuals and corporations, special rule for some farmers or ranchers).

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

[22]Section 170(c)(2)(A). The article also refers to this requirement in the abbreviated form, "created or organized in the U.S."

[23]Section 170(c)(2)(A); Notice 2012-52.

[24]*See* Second Protocol Amending the Convention With Respect to Taxes on Income, U.S.-Isr., Art. X, Dec. 30, 1994, 4 U.S. Tax Treaties (CCH), ¶4605, at 107,064 (adding new article 15-A providing that any contribution to a charitable organization created or organized under the laws of Israel would be treated as a charitable contribution under U.S. income tax laws as long as the contribution does not exceed 25 percent of Israel-source adjusted gross income of a U.S. citizen or resident for a given tax year); *see also* Convention With Respect to Taxes on Income and on Capital, U.S.-Can., Art. XXI, ¶5, Aug. 16, 1984, 2 U.S. Tax Treaties (CCH), ¶1903.21, at 41,026; Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income, U.S.-Mex., Art. XXII, ¶2(b),

(Footnote continued on next page.)

for purposes of section 170(c)(2). The treaties do not affect the analysis of whether an SMLLC subject to U.S. and foreign laws meets the jurisdictional criteria for a deduction.

Executive Summary

An entity that is created or organized in the U.S. is deemed domestic only in IRS guidance and not in section 170(c)(2)(A). Conversely, a domestic entity is deemed created or organized in the U.S. only under section 7701. Thus, there is no direct link between an entity created or organized in the U.S. being domestic and a domestic entity being deemed created or organized in the U.S. for purposes of section 170(c)(2)(A). Therefore, under the statutory scheme, an entity that is created or organized in the U.S. is not necessarily a domestic entity if it is created in the U.S. and in a foreign jurisdiction.

However, the recently amended reg. section 301.7701-5(a) specifies that a domestic entity is one created or organized in the U.S. (but not in a U.S. possession), and that this rule applies to a foreign and domesticated SMLLC. The definitions in section 7701 and the regulations generally apply for purposes of the entire code, and the legislative history of section 170 does not appear to conflict with defining a dually chartered SMLLC as a domestic entity.

Also, the Tax Court ruled that whether the entity is created or organized in the U.S. for purposes of section 170 is determined based on whether the entity is deemed created or organized under the applicable state law, bypassing the analysis of whether an entity was domestic. The IRS, in related guidance, has allowed a deduction in arrangements very similar to the use of a foreign domesticated SMLLC (although the exact deduction limit was uncertain). Finally, consistent treatment under the code of similarly situated entities and public policy support extending domestic status to SMLLCs organized in the U.S. possessions and abroad.

Therefore, a dually chartered SMLLC should be domestic for purposes of the notice, thereby granting the tax benefit to a donor for a gift to the SMLLC. Accordingly, the IRS may clarify that the notice applies to SMLLCs created or organized in or under the laws of a state or a U.S. possession and a foreign jurisdiction to sanction this important component of charitable giving.

The 'Created or Organized in or Under the Laws of' Rule in Section 170

This section of the article discusses the legislative history of section 170(c)(2)(A) and how the IRS and the Tax Court have interpreted this provision. The analysis demonstrates that deeming an SMLLC created in both a non-U.S. jurisdiction and the United States as created or organized in or under U.S. law does not conflict with the requirements of the statute. This conclusion also is consistent with Tax Court jurisprudence.

Legislative History of Section 170(c)(2)(A)

The Act of 1913 excluded from income tax ''any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual.''[25] Under the Revenue Act of 1918, Congress for the first time provided that in ''the case of a nonresident alien individual this deduction shall be allowed only as to contributions or gifts made to domestic corporations.''[26] The Revenue Act of 1921 amended section 214(a)(11) to provide that a nonresident alien could deduct amounts to ''domestic corporations, or to community chests, funds, or foundations, created in the United States.''[27]

In the Revenue Act of 1935, Congress limited charitable contributions by corporations to amounts given ''to or for the use of a domestic corporation, or domestic trust, or domestic community chest, fund, or foundation.''[28] Under the Revenue Act of 1938, Congress promulgated the predecessor to section 170(c)(2)(A). Section 23(o)(2) confined the charitable contribution deduction by individuals to payments to or for the use of, among other entities, ''a domestic corporation, or domestic trust, or domestic community chest, fund, or foundation.''[29]

Congress explained that the exemption was based on the theory that charitable distributions compensated the federal government for the loss of revenue by appropriating funds it otherwise would have spent. ''The United States derives no such benefit from gifts to foreign institutions, and the proposed limitation is consistent with the above theory.''[30] However, domestic charities could appropriate funds for use in other countries.[31]

In 1939 the predecessor to section 170(c)(2)(A) was expanded to allow deductions for contributions made to any corporation, trust, or community chest, fund, or foundation created or organized in, or under the laws of, any possession of the United States.[32] Congress focused on extending the territorial scope of charitable gifts that qualified for deductions. Legislators referred to donees as ''some hospital or charitable institution in the Philippines

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Dec. 28, 1993, 3 U.S. Tax Treaties (CCH), ¶5903.25, at 137,026-137,027 (contributions to an organization determined under Mexican law to meet the standards for a U.S. charitable organization deductible to the extent permitted under U.S. income tax laws).

[25]Act of 1913, P.L. 63-16, section II(G)(a), 38 Stat. 172.

[26]Revenue Act of 1918, P.L. 65-254, section 214(a)(11), 40 Stat. 1068 (1919).

[27]Revenue Act of 1921, P.L. 98-136, section 214(a)(11), 42 Stat. 241 (1921).

[28]Revenue Act of 1935, P.L. 407-829, sec. 102(c), section 23(r), 49 Stat. 1016 (1935).

[29]Revenue Act of 1938, P.L. 554-289, section 23(o)(2), 52 Stat. 463 (1938).

[30]H.R. Rep. No. 75-1860, at 19 (1938).

[31]*See id.*; 83 *Cong. Rec.* 5,041 (1938), *reprinted in Seidman's Legislative History of Federal Income Tax Laws*, 1938-1861, at 18 (J.S. Seidman ed., 2003) (hereinafter, Seidman). (''It would make no difference if the outlay were outside the United States. If the corporation is a domestic corporation, the exemption applies.'')

[32]Revenue Act of 1939, P.L. 155-247, sec. 224(a), section 23(o)(2), 53 Stat. 880 (1939) (applicable to contributions by individuals); S. Rep. 76-648, at 8 (1939), *in* Seidman, *supra* note 31, at 1,373.

or Puerto Rico'' and ''charities in our possessions,'' comparing them to ''charitable institutions in this country.''[33]

But Congress did not distinguish organizations that could exist concurrently in a domestic and a foreign jurisdiction. It is possible that legislators were aware of, but it is not evident that they considered, the potential that a corporation could be chartered under domestic law and the law of a foreign country.[34] Thus, it cannot be established that Congress intended to exclude dually chartered entities from the scope of organizations described in section 170(c)(2)(A). Either way, if a multijurisdictional entity had a charter in a U.S. jurisdiction, its domestic status would not have conflicted with the plain meaning of the statute.

IRS Guidance Under Section 170(c)(2)(A)

In Revenue Ruling 63-252, cited most frequently in situations involving contributions to domestic charities that used funds abroad, the IRS ruled that contributions earmarked or received by a domestic charity as a conduit for a foreign donee were not deductible.[35] The ruling discussed the definitions of a foreign organization and a domestic organization it described in the five examples.

A foreign organization was chartered in a foreign country and was ''so organized and operated that it [met] all the requirements of [section 170(c)(2)] excepting the requirement set forth'' in section 170(c)(2)(A), the revenue ruling said. On the other hand, the IRS assumed a domestic organization to have satisfied all of the section 170(c)(2) criteria. This set of definitions suggested the possibility that an organization chartered in a foreign country may be organized and operated in a manner that would result in meeting the section 170(c)(2)(A) requirement.

In Rev. Rul. 76-195, a charitable foundation was created by an executive agreement between the United States and a foreign country under their respective laws.[36] Property contributed equally by the two countries financed the foundation. In the event of dissolution, the assets of the organization, including the contributed property, would be equally divided between the U.S. and the foreign country.[37]

The IRS interpreted section 170(c)(2) literally as failing to provide for binational entities formed by sovereign governments.[38] The agency ruled that because the entity was not formed exclusively under U.S. law, it was not deemed created or organized in or under the laws of the United States. Therefore, the foundation did not qualify as a section 170(c)(2) organization.[39]

But the ruling addressed only an ''organization of an international character in which the United States participates by executive agreement.''[40] This type of an international organization could not have elected to be disregarded under the check-the-box regulations because it had two owners, each a sovereign.[41] The ruling did not extend expressly to entities that simply would qualify under the respective laws of each country.

Nor did it contemplate the existence of SMLLC laws, or of state domestication statutes enacted a decade later to allow a non-U.S. entity to be organized in a U.S. jurisdiction. Moreover, at that time, the check-the-box regulations applied only to corporations or partnerships. Also, in 1976 the predecessor to reg. section 301.7701-5(a) failed to acknowledge existence of dually chartered organizations.[42]

A private letter ruling, LTR 9651031, addressing a ''friends of'' organization, cited Rev. Rul. 76-195 for the proposition that ''donations made directly to a foreign charity or a foreign government are not deductible under [section 170] because those entities are not described in'' section 170(c).[43] Thus, the letter ruling only underscored that the organization created by executive agreement under the laws of both nations was a foreign charity. Neither the IRS nor the courts have addressed whether, within the meaning of section 170(c)(2)(A), a private entity chartered under the laws of the U.S. and of another jurisdiction would fail to be a qualified donee.[44]

Tax Court Jurisprudence Interpreting Section 170(c)(2)(A)

The seminal opinion interpreting the meaning of ''created or organized in or under'' requirement for purposes of a section 170 deduction is *Bilingual Montessori School of Paris, Inc. v. Commissioner*, 75 T.C. 480 (1980).[45] The petitioner was a private school in Paris, the director of which incorporated it as a Delaware non-stock, not-for-profit corporation. The entity did not have any assets or operations in the United States.

The IRS argued that the school was organized solely to funnel contributions to a preexisting foreign entity. The

[33]84 *Cong. Rec.* 7805-7806, (1939).

[34]The Supreme Court, as early as 1883, *in dicta* had contemplated the possibility of a dually chartered legal entity. *See Canada S. R. Co. v. Gebhard*, 109 U.S. 527, 537 (1883) (holding that foreign law applied to determine legal relationships outside of that jurisdiction between parties to a contract).

[35]Rev. Rul. 63-252, 1963-2 C.B. 101, *amplified by* Rev. Rul. 66-79, 1966-1 C.B. 48.

[36]Rev. Rul. 76-195, 1976-1 C.B. 61.

[37]*Id.*

[38]Rev. Rul. 76-195.

[39]*See* Rev. Rul. 76-195; *see also* LTR 9651031 (Sept. 20, 1996). *Cf.* Rev. Rul. 63-252.

[40]Rev. Rul. 76-195.

[41]*See* reg. section 301.7701-2(a) (as amended in 2012).

[42]See reg. section 301.7701-5(a) (as amended in 2006) discussed below.

[43]*See* Rev. Rul. 76-195.

[44]*See, e.g.*, *Bilingual Montessori School of Paris, Inc. v. Comm'r*, 75 T.C. 480 (1980), *acq.*, 1981-2 C.B. 1 (organization formed in U.S. operating a school in France, deductible). *Cf. Welti v. Comm'r*, 1 T.C. 905 (1943) (contributions to Swiss church organizationally connected to but as a legal entity separate from the parent Massachusetts church not deductible because the Swiss entity was not an organization described in section 170(c)(2)(A)); *ErSelcuk v. Comm'r*, 30 T.C. 962 (1958) (contributions to Burma organizations not deductible even though missionary had ties to the United States, because they were not organizations described in section 170(c)(2)(A)).

[45]*Bilingual Montessori School of Paris, Inc. v. Comm'r*, 75 T.C. 480 (1980), *acq.*, 1981-2 C.B. 1.

agency also contended that deducting such contributions contradicted the legislative intent of Congress in enacting section 170. For these two reasons, the IRS asked the Tax Court to disregard the incorporation under Delaware law. The IRS asserted that petitioner was not an organization created or organized in the United States or under the law of any state within the meaning of section 170(c)(2)(A) then in effect.

The Tax Court ruled that the school did not distribute any of its funds to a foreign organization. Rather, the entity operated a school abroad and used the contributions to fund its operations. Regarding the nationality requirement, the court stated:

> It is axiomatic that in determining whether a corporation is created or organized under the laws of a State, we must look to State law. . . . Congress, in enacting . . . predecessor to section 170 . . . might have set forth tests to be applied in determining the precise meaning of ''created or organized under the law of any State. . . .'' However, Congress did not do so and we are both unwilling and unable to legislate by judicial fiat a test not embodied in the clear language of section 170. [Citations omitted.][46]

The court found that petitioner filed the certificate of incorporation, at which time its existence commenced under Delaware laws. Therefore, the Tax Court held that the entity was ''not a sham or artifice but rather a legal entity existing pursuant to the laws of the State of Delaware.''[47] Accordingly, donors could deduct contributions to the school under section 170(a). *Bilingual Montessori* does not address specifically the status under section 170(c)(2)(A) of a dually chartered entity that is a wholly owned subsidiary of a domestic charity. However, the decision is squarely on point in determining whether an SMLLC chartered abroad and under state law meets the ''created or organized in or under'' requirement in section 170(c)(2)(A).

Impact of Section 170 on Foreign Domesticated SMLLCs

Inconsistent Section 170 Treatment of SMLLCs and Charities

The notice subjects gifts to SMLLCs to the restrictions of section 170(b). Under the notice, ''the limitations of § 170(b) apply as though the gift were made to the U.S. charity.''[48] Section 170(b)(1)(A)(vi) permits the deduction of a contribution to ''an organization referred to in subsection (c)(2).''[49] Therefore, section 170(c)(2)(A), cited directly in the notice, controls the determination of whether an SMLLC would be deemed created or organized in or under the laws of a U.S. jurisdiction.

The plain language of section 170(c)(2)(A) does not limit entities created or organized in or under the laws of the United States or the possessions. Consistently, section 170(b)(1)(A)(vi) appears to apply to transfers to U.S. charities without limitation on the jurisdictions of their other charters. Interpretation by the Tax Court of the created or organized in or under requirement supports this reading.[50]

There is a lack of support for distinguishing dual-charter SMLLCs from dual-charter section 501(c)(3) organizations in considering their permissible nationalities. The notice confirms that SMLLCs would be treated as branches or divisions of charities for all other section 170 requirements. The IRS allows this treatment as long as the charitable entity has the mandated discretion and control over the SMLLC, as discussed below. In this case, the subsidiary is disregarded, and ''its activities are treated in the same manner as a sole proprietorship, branch, or division of the owner.''[51] Thus, applying section 170(b) but excluding dually chartered SMLLCs from its benefits is incompatible with the language of the statute.

No Contradiction With Section 170 Legislative Intent

In turn, legislative history fails to indicate that Congress excluded from the statutory scope entities that were created in the United States but also in a foreign jurisdiction. An SMLLC is disregarded as a separate entity and the contributions are under discretion and control of the parent U.S. charity. The SMLLC merely is a division of the U.S. charity and itself is an entity domesticated under state law. Therefore, the concern voiced early by legislators that a donor would deduct a gift to a foreign organization, from which the U.S. would not derive a public benefit, is inapposite. Consequently, the legislative intent of section 170(c)(2)(A) fails to support excluding foreign domesticated SMLLCs from the scope of entities created under U.S. law.

Domestic Status Under Reg. Section 301.7701-5(a)

This part of the article traces the history of the term ''domestic'' with respect to SMLLCs, as used in recently amended Treasury regulations. The segment also discusses the development of and the requirements under the two principal domestication statutes, of Delaware and Nevada. These state laws enabled entities, eventually including SMLLCs, to be formed in both a foreign and a U.S. jurisdiction.

Finally, the section addresses related jurisprudence, which supports confirming domestic status of dual-charter SMLLCs.

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[46] *Id.* at 484.

[47] *Bilingual Montessori School of Paris, Inc. v. Comm'r*, 75 T.C. 480, 485 (1980), *acq.*, 1981-2 C.B. 1.

[48] Notice 2012-52. The term ''U.S. charity'' in the notice is defined and refers to a section 170(c)(2)(A) organization. *See id.*

[49] Section 170(b)(1)(A)(vi).

[50] Although the Tax Court ruled favorably regarding deeming a dually chartered charity as meeting the requirements of section 170(c)(2)(A), the IRS has not adopted a formal position on this issue in its guidance. The issue of whether a section 501(c)(3) organization created in a foreign country and in the U.S. is ''created or organized in or under'' the laws of the United States is beyond the scope of this article.

[51] Notice 2012-52; *see also* Ann. 99-102.

Legislative History of Section 7701(a)(4) and Section 7701(a)(5)

Under the Revenue Act of 1918, a domestic corporation or partnership was one that was ''created or organized in the United States.''[52] Likewise, a foreign entity was created or organized outside the United States.[53] In 1924 Congress amended the definition to provide that a domestic corporation or partnership was ''created or organized in the United States or under the law of the United States or of any State or Territory.''[54] On the other hand, a foreign corporation or partnership was one that was not a domestic entity.[55] Thus, if a dually chartered company were deemed created or organized in or under the laws of the U.S., it could qualify only as a domestic entity under the code.

Original Reg. Section 301.7701-5

In 1960 the IRS promulgated a regulation that reflected the mutually exclusive principle. Reg. section 301.7701-5 provided that a ''domestic corporation is one organized or created in the United States, including only the United States . . . and under the law of the United States or of any State or Territory. A foreign corporation is one which is not domestic.''[56]

This definition comported with section 7701(a)(9), defining the term ''United States'' when used in a geographical sense as ''only the United States and the District of Columbia.''[57] In contrast to the description in section 170(c)(2)(A), section 7701(a)(4) — and similarly, the regulation — excluded U.S. possessions from the scope of domestic jurisdictions. The provision, which preceded the passage of state domestication statutes for foreign entities, did not address the characterization of their nationalities.

The Advent of Non-U.S. Entity Domestication Statutes

Delaware: Domestication as a Limited Liability Company

Two decades after promulgation of reg. section 301.7701-5, states began to enact provisions enabling a business to be treated as created or organized in or under the laws of a domestic and a non-U.S. jurisdiction.[58] In 1984 Delaware adopted a statute allowing domestication of an entity organized under the laws of a foreign country. Delaware General Business Corporation Law (DGCL) section 388 permitted any non-United States entity, including a limited liability company, to become domesticated as a corporation.[59]

The entity had to file a certificate of domestication and a certificate of incorporation with the Delaware secretary of state.[60] Upon effective filing of the certificates, the entity became ''domesticated as a corporation in this State and the corporation shall thereafter be subject to all of the provisions of'' the DGCL.[61] The existence as a domestic corporation commenced retroactively on the date it first was formed in a foreign country.[62] Delaware law applied to the non-U.S. entity to the same extent as if the non-U.S. entity had been incorporated as a corporation of this state on that date.[63]

The domesticated Delaware corporation was considered the same entity as the domesticating non-U.S. entity.[64] The domestication merely resulted in a continuation of the existence of the foreign unit in the form of a Delaware corporation.[65] Moreover, all of the rights, privileges, and powers and all of the property, causes of action, and debts due to the domesticating entity remained vested in the Delaware corporation.[66] Similarly, all liens and creditor rights, debts, liabilities, and duties of the domesticating organization remained attached to the Delaware corporation and to the foreign entity as long as it existed.[67]

Thus, domestication did not mean the company had to dissolve itself in the foreign jurisdiction.[68] On the contrary, the Delaware corporation and the non-U.S. company constituted ''a single entity formed, incorporated, created or otherwise having come into being, as applicable, and existing under the laws of the State of Delaware and the laws of such foreign jurisdiction.''[69]

However, this resulted in the entity acquiring the status of a corporation per se for purposes of federal income tax laws.[70] The per se status rendered the corporation ineligible to elect to be disregarded as an entity separate from its owner under the check-the-box regulations.[71] Accordingly, a foreign SMLLC domesticated in Delaware would have lost the benefits of the notice, irrespective of its nationality.

But in 1996, the Delaware legislature enacted a provision under its Limited Liability Company Act (LLCA) to allow for domestication of non-U.S. entities as Delaware LLCs.[72] Section 18-212 of the act was similar to the parallel statute for corporations, and section 18-212(b) provided expressly for domestication of non-U.S. entities as domestic LLCs.[73]

Domestication Under the ABA Model Acts

In 2001 the American Bar Association adopted a provision in its Model Business Corporation Act for

[52]Revenue Act of 1918, P.L. 65-254, section 1, 40 Stat. 1058 (1919).
[53]*Id.*
[54]Revenue Act of 1924, P.L. 68-234, section 2(a), 43 Stat. 253 (1924).
[55]*Id.*
[56]Reg. section 301.7701-5 (1961).
[57]Section 7701(a)(9).
[58]*See* 69 F.R. 49,809, 49,809 (Aug. 12, 2004) (preamble to final regulation explaining the legislative history and recent developments leading to promulgation of the regulation).
[59]Del. Gen. Corp. Law sections 388(a), (b).
[60]Section 388(b).
[61]Section 388(d).
[62]*Id.*
[63]Del. Gen. Corp. Law section 388(f).
[64]Section 388(i).
[65]*Id.*
[66]*Id.*
[67]*Id.*
[68]Del. Gen. Corp. Law section 388(j).
[69]*Id.*
[70]Reg. section 301.7701-2(b)(1) (as amended in 2012).
[71]*See* reg. section 301.7701-3(a) (as amended in 2006).
[72]70 Del. Laws 107 (1996); *see* Del. Limited Liab. Co. Act section 18-212.
[73]Del. Limited Liab. Co. Act section 18-212(b).

domestication of foreign corporations. The model act allowed domestication of non-U.S. organizations.[74] However, the provision referred only to corporations as domesticated entities.

Several years later, the ABA published the Model Entity Transactions Act (META). Chapter 5 covered LLCs and resembled DGCL section 388 and Model Business Corporation Act section 9.20.[75] However, META section 501 did not set forth procedures for non-U.S. organizations.[76] Rather, section 501(a) applied to entities seeking to become domesticated as the same type of entity in a foreign jurisdiction if the latter permitted domestication.[77] Moreover, in section 503, META recommended requiring approval of both the jurisdiction of the domesticating entity and the jurisdiction where the organization was seeking to become domesticated.[78] It is unclear whether and how the model rules would affect decisions of other states in enacting non-U.S.-entity domestication statutes.

Nevada: Domestication as an LLC

In 2001 Nevada promulgated a provision that allowed domestication of any "undomesticated entity,"[79] which included any non-U.S. entity.[80] The Nevada Legislature modeled the provision after the Delaware corporation statute.[81] Subsequent amendments in 2009 added LLCs within the definition of undomesticated entities.[82]

Section 92A.270 of the Nevada Revised Statutes (NRS) provided for domestication as a domestic entity.[83] A foreign company applied for domestic status by filing, among other documents, "the appropriate charter document for the type of domestic entity."[84] Conforming amendments in 2009 referenced LLCs as domestic entities in accordance with NRS section 92A.270.[85]

Also, Nevada required the filing of articles of domestication.[86] Accordingly, a person was admitted as a member of the LLC "as of the time set forth in and upon compliance with the articles of domestication or in the operating agreement of the resulting domestic limited-liability company." If not so specified, the person gained membership as of the time of admission as reflected in the records of the resulting domestic company.[87]

In contrast with the DGCL, NRS section 92A.270 also called for a registered agent filing. As a result of amendments in 2009, the statute mandated the filing of the foreign charter and a certificate of good standing in the foreign jurisdiction.[88] The Nevada Legislature made these changes to conform to the amendment permitting out-of-state, not just foreign, companies to become domestic.[89] But the Legislature applied the additional filing requirements to all undomesticated entities.[90] Consequently, its requirements for foreign entities were more stringent than those of Delaware, albeit less burdensome than META-suggested provisions.[91]

The Promulgation of State SMLLC Statutes

The code initially applied the classification as domestic or foreign only to corporations or partnerships. SMLLCs were relatively new forms of business entities under state laws. As of 1993, only Arkansas and Texas permitted an SMLLC.[92] In 1995 Delaware amended the LLCA to allow formation of LLCs with one or more members.[93] Previously, a Delaware LLC had to have two or more members.[94] In May 1996 the IRS promulgated final regulations granting to SMLLCs passthrough treatment under the code.[95]

SMLLC Treatment Under Reg. Section 301.7701-5(a)

In 2006 the IRS amended reg. section 301.7701-5 to address both of these state law developments. Reg. section 301.7701-5(a) set forth rules for the determination of whether the entity was domestic or foreign for federal tax purposes. The regulation included nationality rules for SMLLCs under domestication or continuance state statutes.

Reg. section 301.7701-5(a) officially extended a reference to SMLLCs in classifying a business entity chartered in the U.S. and abroad as a domestic entity.[96] A business entity included "an entity that is disregarded as separate from its owner" under reg. section 301.7701-2(c).[97] It was domestic if it was "created or organized as any type of entity (including, but not limited to, a . . . limited liability company) in the United States, or under the law of the United States or of any State."[98]

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[74]The Committee on Corporate Laws, "Changes in the Model Business Corporation Act Relating to Domestication and Conversion — Final Adoption," section 9.20, official comments 1, 2, 58 Bus. Law. 219 (2002).

[75]*See* Model Entity Transactions Act sections 501-506 (2008).

[76]Section 501.

[77]Section 501.

[78]Sections 503(a), (b).

[79]Nev. Rev. Stat. section 92A.270(1) (2013).

[80]*See* section 92A.270(10)(b).

[81]*See generally* Nev. Rev. Stat. sections 92A.270(1)-(9) (2013).

[82]2009 Nev. Stat. 1720, ch. 361, section 63, section 9.

[83]Nev. Rev. Stat. section 92A.270(1).

[84]Section 92A.270(1)(b)(2).

[85]2009 Nev. Stat. 1693, ch. 361, section 29(3).

[86]Nev. Rev. Stat. section 92A.270(1)(b)(1) (2013).

[87]2009 Nev. Stat. 1693, ch. 361, section 29(3).

[88]*See* Nev. Rev. Stat. sections 77.310(1) (requirement for appointment of a commercial or a noncommercial registered agent); 92A.270(1)(b)(1)-(5) (Nevada domestication filing requirements). *Cf.* Del. Gen. Corp. Law section 388(b) (Delaware domestication filing requirements).

[89]2009 Nev. Stat. 2869, ch. 488, section 53.5, section 10(b).

[90]*See* Nev. Rev. Stat. section 92A.270(1)(b) (2013).

[91]*Compare* Model Entity Transactions Act section 503 (2008), Del. Gen. Corp. Law section 388(b) *and* Nev. Rev. Stat. section 92A.270(1)(b).

[92]*See* Jimmy G. McLaughlin, "The Limited Liability Company: A Prime Choice for Professionals," 45 *Ala. L. Rev.* 231, 253-254 (1993).

[93]70 Del. Laws 107 (1995).

[94]*See* Del. Limited Liab. Co. Act section 18-101(6) (1994) (defining an LLC and a domestic LLC before the 1995 amendment); *see also* 68 Del. Laws. 1329, ch. 434, section 1 (1992) (adopting the Limited Liability Company Act).

[95]61 F.R. 21,989, 21,991 (May 13, 1996).

[96]Reg. section 301.7701-5(a) (as amended in 2006).

[97]*See* reg. sections 301.7701-2(c)(2)(i) (as amended in 2012) and -5(a) (as amended in 2006).

[98]Reg. section 301.7701-5(a).

The regulations provided that before determining whether a company was domestic or foreign, it had to be classified for federal tax purposes. Generally, if an entity with a single owner did not meet the definition of a corporation under reg. section 301.7701-2(b), it was a DRE.[99] The preamble explained, ''the temporary regulations in this document clarify that this same definition applies to dually chartered entities.''[100]

For example, if an entity were a corporation per se under reg. section 301.7701-2(b)(8)(i) because of its treatment under foreign law, it could not become a DRE for federal tax purposes by domesticating as an SMLLC under state law.[101] This rule ensured that in order to be disregarded under the code, the wholly owned entity could not have multiple owners or the structure of a corporation under foreign law.

In LTR 201126023, the IRS confirmed that a foreign corporation that domesticated under a state statute and elected S corporation treatment qualified as a domestic S corporation within the meaning of the regulation. The domestication also was a section 368(a)(1)(F) tax-free reorganization. But the letter ruling may not be used as precedent, and does not state a position on the nationality of foreign domesticated SMLLCs for purposes of a section 170(b) deduction.

Judicial Interpretation of the Nationality Criteria

Courts have determined the nationality of an entity for various purposes consistent with the notion that the nationality of a company is in the jurisdiction where it has its charter. The sole opinion that appears currently to have referenced reg. section 301.7701-5(a) involved a state tax controversy, in which the appellate court reversed a state tax court decision.

In *Manpower Inc. v. Commissioner of Revenue*, the Minnesota Supreme Court held that the source from which a subsidiary derived its status as a separate legal person remained the laws of the foreign country where it was formed.[102] The court based its holding on its interpretation of section 7701(a)(4) defining a domestic entity. The court held that a French LLC that elected federal partnership status did not become created or organized under federal law because a partnership could be created or organized only under a state statute. The court confirmed that reg. section 301.7701-5(a) did not have to apply retroactively.

Similarly, if an entity lacked a charter in a U.S. jurisdiction, the U.S. Supreme Court held that the laws of the foreign country where it was formed applied to the dispute. In 1883 the majority in a U.S. Supreme Court decision, *Canada S. R. Co. v. Gebhard*, stated:

> A corporation of one country may be excluded from business in another country, but, if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country, be taken, both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation.[103] [Citation omitted.]

The Supreme Court, applying principles of international comity, held that Canadian bankruptcy law applied to rights of bondholders of a Canadian railroad who were residents in New York state. Neither decision would be a precedent for an issue under reg. section 301.7701-5(a) litigated in federal court. But both opinions illuminate the significance of deeming entities subject to the laws of the jurisdictions where they were chartered, especially laws governing corporate enterprises.

Impact of Section 7701 Rules on Foreign Domesticated SMLLCs

Domestic SMLLC Status Not Incompatible With the Code

The notice applies expressly to domestic SMLLCs and cites the definition of this term in the regulation. It is unclear whether the IRS in the notice intended to employ the full description of a domestic entity set forth in the regulation. But the universal application of the term for code purposes, and the decision by the IRS to accommodate domesticated SMLLCs under the code, support the application of the full definition of domestic under the notice.

Section 7701(a) definitions apply for purposes of the entire code unless otherwise distinctly expressed or manifestly incompatible with the code.[104] As discussed above, applying the regulation to SMLLCs described in the notice does not violate either the plain language or the legislative intent of section 170(c)(2)(A). Moreover, the regulation would trump any contrary authority in Rev. Rul. 76-195 for an organization created by sovereigns.[105]

Also, section 170(c)(2)(A) does not reflect recent state statutory developments regarding domesticated SMLLCs. But the IRS in reg. section 301.7701-5(a) addressed specifically the nationality of a dually chartered SMLLC for purposes of the entire code. As long as the company is created in the U.S., its foreign charter does not preclude its domestic status.[106] Accordingly, the treatment of a foreign domesticated SMLLC as a domestic SMLLC is not otherwise distinctly expressed or manifestly incompatible with the code.

Sufficient Statutory and Regulatory Safeguards for SMLLCs

In addition, procedures in the domestication statutes ensure that the foreign-origin SMLLC would have to

[99] *See* reg. section 301.7701-3(a) (as amended in 2006).

[100] 69 F.R. 49,809, 49,809 (Aug. 12, 2004) (preamble to temporary regulations).

[101] *See* reg. section 301.7701-2(b)(9), Ex. 1 (as amended in 2012).

[102] *Manpower v. Comm'r of Rev.*, 724 N.W.2d 526, 530 (Minn. Sup. Ct. 2006).

[103] *Canada S. R. Co. v. Gebhard*, 109 U.S. 527, 537 (1883).

[104] *See* section 7701(a).

[105] *See Taproot Admin. Servs. v. Comm'r*, 133 T.C. 202, 228 (2009) (''Revenue rulings don't trump regulations. We thus agree with Taproot that Revenue Ruling 92-73's skimpy analysis, if relevant at all to this case, was overturned by the 1995 regulation and the Commissioner's later analysis of S-Corporation ownership eligibility for ESOPs'').

[106] Reg. section 301.7701-5(a) (as amended in 2006).

meet requirements identical to those of SMLLCs chartered only in the U.S. Accordingly, dual-charter SMLLCs would have to abide by the same statutory corporate governance standards as SMLLCs organized only in the U.S. Moreover, reg. section 301.7705-3 ensures that the SMLLC would not have a different structure in the foreign jurisdiction that could compromise discretion and control by the parent charity.

Deducting Foreign-Bound Contributions Under Section 170 Generally

This section of the article begins with an overview of the characteristics of permitted organizations under section 170 that may use the donated funds in a foreign country. Second, it explains briefly the difference between gifts to and for the use of a charity, and why a deduction might not be limited solely because of the use of a charitable contribution abroad. Third, it explains concisely the deductibility rules under section 170 as they appear to apply to solely domestic SMLLCs. Fourth, it discusses the authorities that may determine deductibility under section 170 of donations used offshore. Finally, it sets forth three general categories of foreign-bound contributions found in IRS rulings pertaining to section 170.

Permissible Donees of Foreign-Bound Gifts Under Section 170

Under section 501(c)(3), an organization may qualify as a charity exempt from U.S. income tax even if it has a location in a foreign country. However, under section 170(c)(2)(A), a gift to the foreign charity would not qualify for a deduction. A domestic organization described in section 170(c)(2), gifts to which would be deductible under section 170, also has to be organized and operated exclusively for, among others, religious, charitable, scientific, literary, or educational purposes.[107] The same requirement applies under section 501(c)(3) in order to qualify for exempt status.[108]

In Rev. Rul. 71-460, the IRS ruled broadly that a U.S. charity that carried on some or all of its exempt activities in a foreign country qualified under section 501(c)(3).[109] For example, an organization with the purpose of educating the poor in Latin America worked with a group in that region to provide services, and a U.S. government agency office coordinated the program. The IRS ruled that the charity was an educational organization exempt as an organization described under section 501(c)(3) but did not address deductibility.[110]

Under reg. section 1.170A-8(a)(1), finalized in 1972, an individual may deduct a charitable contribution even if the donee may use some or all of its funds in a foreign country for charitable or educational purposes.[111] In Rev. Rul. 75-65, which followed the publication of the final regulation, the IRS also confirmed that the sole exempt purpose of the donee might exist outside the U.S. or the possessions.[112] In that ruling, the agency allowed a deduction for contributions to a domestic charity formed to deal with ecological issues in a foreign country.

Similarly, in Rev. Rul. 80-286, the IRS ruled that a U.S. charity sponsoring a foreign exchange program was operated exclusively for charitable and educational purposes and therefore was exempt as described under section 501(c)(3), allowing a deduction.[113]

Gifts 'to' or 'for the Use of' the Charity When Used Abroad

Deduction Limits for Gifts to or for the Use of a Charity

A contribution to a charitable organization may qualify either as a gift to the charity under section 170(b)(1)(A) or for the use of the charity under section 170(b)(1)(B). Section 170(b)(1)(A) allows the donor generally to deduct the value of the contribution in the amount not exceeding 50 percent of the contribution base for the tax year of the deduction.[114] The contribution base is the adjusted gross income of the individual, with some modifications.[115] However, section 170(b)(1)(B) allows a deduction generally of only up to 30 percent of the contribution base of the donor for the tax year of the gift.[116]

The Test for a Donation to the Charity under Section 170

Briefly, to be deductible as a contribution to a charity, a donation has to satisfy a three-point test derived from section 170, the regulations, jurisprudence, and IRS guidance. First, when transferred by the donor, the gift is not subject to trustee or similar independent, intermediate discretion over access of the parent charity to the funds. Second, the parent charity acquires control of the value of the entire donation. Third, the charity has full control and discretion as to its use, and it is not earmarked for the SMLLC. Thus, the prohibition on earmarking of a gift to the charity itself is expressed as a discretion and control test.

Earmarking Guidance Inconclusive on Deduction Limit

Rev. Rul. 62-113 was the first IRS ruling to address the earmarking issue. In the ruling, a taxpayer made the contributions to a church fund established to reimburse the living expenses of missionaries, rather than to his son, who was one of the missionaries. The test for the deduction was "whether the organization has full control of the

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

[108]Sections 501(a), 501(c)(3).

[109]Rev. Rul. 71-460, 1971-2 C.B. 231.

[110]Rev. Rul. 68-165, 1968-1 C.B. 253. *See also* Rev. Rul. 69-400, 1969-2 C.B. 114 (organization conducting a foreign exchange program qualifying under section 501(c)(3)); Rev. Rul. 65-191, 1965-2 C.B. 157 (U.S. charity operating a hospitality center in the United States to foster international exchange is an organization with charitable and educational purposes described in section 501(c)(3)).

[111]Reg. section 1.170A-8(a)(1) (1972); *see generally* Rev. Rul. 63-252, *amplified by* Rev. Rul. 66-79.

[112]Rev. Rul. 75-65, 1975-1 C.B. 79.

[113]Rev. Rul. 80-286, 1980-2 C.B. 179. The IRS also ruled that the organization was operated exclusively for charitable and educational purposes and therefore, was exempt as described under section 501(c)(3). *Id.*

[114]Section 170(b)(1)(A).

[115]Section 170(b)(1)(G). See section 62(a) for the general definition of adjusted gross income. Section 62(a).

[116]Section 170(b)(1)(B)(i). The test for deducting a contribution deemed to be "for the use of" the organization is beyond the scope of this article.

donated funds, and discretion as to their use, so as to insure that they will be used to carry out its functions and purposes.'' Rev. Rul. 62-113 did not specify which deduction limit applied. Similarly, in Rev. Rul. 63-252, donations to be used offshore, which were not earmarked by the donor and were under the control of a domestic organization that was deemed the ultimate donee, simply were ''considered to be deductible.''[117]

In a departure, in Rev. Rul. 66-79, which amplified Rev. Rul. 63-252 and addressed a ''friends of'' charity, the IRS concluded that ''contributions received by the domestic organization from such solicitations are regarded as for the use of the domestic corporation and not for the organization receiving the grant from the domestic organization.''[118] Likewise, the IRS interpreted the contributions analyzed in Rev. Rul. 62-113 to be ''for the use of the organization and not as a gift to an individual for whose benefit the amount given may be used by the donee organization.''[119]

A decade later, in LTR 7943102, the IRS ruled that contributions to a ''friends of'' organization were for the use of the domestic entity, but the ruling described the donee as a foundation.[120] Section 170(b)(1)(A) includes only limited foundations. But taking into account the holding in Rev. Rul. 66-79, it appeared the IRS was not willing to extend the higher deduction limit, at least for gifts to ''friends of'' organizations assisting foreign charities.

It is uncertain whether this rule would extend to other types of contributions to be used abroad, such as when an international charity operates offshore without making grants or helps a number of foreign charities. Similar to the other guidance discussed above, in Rev. Rul. 62-113 the work of the missionaries who received the reimbursements from the domestic church fund involved ''serving missions in various parts of the world.''[121] However, it would have been unprecedented for the IRS to conclude retroactively that contributions were for the use of the church fund solely because of the global nature of the mission of its representatives.[122] A more likely justification could have been that the funds were transmitted to individual beneficiaries to reimburse them for expenses. Thus, there appears to be a lack of authority characterizing contributions of funds to be used in foreign countries necessarily as gifts for the use of the domestic organizations.

Public Policy on a Deduction Limit for Foreign-Bound Gifts

Rev. Rul. 66-79, which applies to a domestic ''friends of'' charity rather than a foundation, may not be used as a precedent in court. As long as the contribution satisfies the requirements for a gift to the charity under section 170 and the earmarking guidance, it appears inconsistent to deem it a gift for the use of the charity based solely on the offshore use of the funds.

But factors may exist that might favor such a distinction. A more elaborate discussion of whether or not the higher deduction limit applies, or should apply, to gifts to the charity that are used in a foreign country is outside the scope of this article. Presently, it is unclear whether a gift to the foreign domesticated SMLLC, which meets the deductibility requirements consistent with section 170, would qualify for the 50 percent AGI deductibility threshold.

Principles for Deducting Foreign-Bound Contributions

The notice requires the SMLLC to be wholly owned and controlled by the U.S. charity. The notice does not explain what these two requirements mean, but complete ownership and control of the SMLLC is consistent with the requirements for discretion and control and absence of earmarking to deduct a contribution to an SMLLC under section 170(b)(1)(A)(vi).

However, because of a foreign home of the SMLLC, there are additional concerns not addressed by the rules and guidance under section 170(b)(1)(A) that test deductibility of a contribution to an SMLLC located only in the U.S. Therefore, it would not be appropriate to apply the three-factor deductibility test described above to a dually chartered SMLLC without any modifications.

The standards for a deduction of a contribution to a dually chartered SMLLC may be gleaned from IRS guidance that addresses the application of section 170 to gifts used abroad by charities. The criteria set forth in these revenue rulings and private letter rulings respond to concerns in connection with charitable contributions with foreign uses.

But IRS rulings are not binding authorities in courts.[123] Therefore, a test for whether a gift used abroad qualifies for a deduction cannot be definitive absent further guidance from Treasury and the IRS. Presently, these criteria illuminate how the IRS might treat contributions deployed offshore within the limits of administrative authority.

Overview of Three Categories of Foreign-Bound Contributions

The test for deductibility of charitable donations for foreign uses may vary slightly based on the circumstances. In a number of situations, a domestic charity may use the contributed funds in a foreign country without precluding the donor from receiving a deduction. In each case, the exempt purpose of the organization may be in the U.S. and abroad or entirely outside the U.S.[124] Based on IRS guidance, these permissible grants may be divided broadly into three categories.[125]

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[117]Rev. Rul. 63-252.

[118]Rev. Rul. 66-79, *amplifying* Rev. Rul. 63-252.

[119]Rev. Rul. 66-79; Rev. Rul. 62-113, C.B. 1962-2.

[120]LTR 7943102 (July 27, 1979).

[121]Rev. Rul. 62-113.

[122]*See* Rev. Rul. 66-79.

[123]*See Bilingual Montessori School of Paris, Inc. v. Comm'r*, 75 T.C. 480, 485 (1980), *acq.*, 1981-2 C.B. 1 (''Revenue rulings merely state respondent's position concerning a particular issue and do not constitute authority for deciding a case in this Court'' (citations omitted)).

[124]*See* Rev. Rul. 68-165 (organization with sole exempt purpose of educating or otherwise assisting the poor in Latin America is deemed a section 501(c)(3) charity whose purpose is educational).

[125]Following publication of the notice, the IRS has not retracted its no-ruling position regarding deductibility of contributions to SMLLCs wholly owned and controlled by charities.

First, a U.S. charity may be an international organization with operations in a number of foreign countries but without any foreign, independent grantees.[126] Second, a U.S. charity may have an exempt purpose that would involve activities abroad and may donate some or all of its funds to foreign organizations.[127] Third, a U.S. charity may be formed in the U.S. for the sole purpose of supporting a specific foreign charity, commonly recognized as a ''friends of'' organization.[128]

Deductibility of Contributions Through Dually Chartered SMLLCs

This part of the article discusses the criteria used for deducting foreign-use contributions, derived from the IRS guidance that deals with the prohibition on earmarking of the foreign-bound donations. Following the discussion of the test is an explanation of how the deductibility rules would apply if the donor made the foreign-bound charitable contribution to a dual-charter SMLLC.

The Discretion and Control Test for Deductibility

Under Rev. Rul. 63-252, the IRS required the domestic organization to control every facet of operations of the foreign subsidiary formed for administrative convenience. The use of the contributions had to be subject to control of the domestic organization. The ruling did not mention the discretion element in Rev. Rul. 62-113, which did not refer explicitly to foreign-bound donations.

In Rev. Rul. 66-79, the IRS borrowed the discretion element from the earmarking test in Rev. Rul. 62-113. The agency framed the issue in the ruling as whether impermissible earmarking of funds for the foreign grantee occurred. The IRS conditioned deductibility on two factors. First, the domestic charity might solicit for specific grants when it had reviewed and approved them as furthering its purposes. Second, under the terms of its bylaws, the charity might make such solicitations only on the condition that it should have control and discretion as to the use of the contributions it received. Accordingly,

[126] *See* Rev. Rul. 80-286 (charity operating a foreign exchange program, no foreign grantees); Rev. Rul. 71-460 (charity conducting some or all of its exempt activities in the foreign country qualifies as section 501(c)(3) organization); Rev. Rul. 69-400 (charity conducting a foreign exchange program; paying for enrollment of students, transportation, and tours; and whose selection committee screens bona fide goals of applicants, qualifies under section 501(c)(3)); Rev. Rul. 68-165 (international organization to educate the poor in Latin America whose activities are coordinated by a U.S. government agency office and that works with a group abroad to provide services, qualifying as an educational organization under section 501(c)(3)); Rev. Rul. 65-191 (charity operating a hospitality center in the U.S. to foster international exchange, with foreign and domestic members, qualifying under section 501(c)(3) as a charity with educational purposes); Rev. Rul. 63-252, Ex. 5, *amplified by* Rev. Rul. 66-79; LTR 8034139 (May 30, 1980); LTR 8042173 (July 28, 1980); LTR 8225046 (Mar. 23, 1982) (foundation formed to accept contributions and transfer them to the parent social welfare organization so that the latter entity can distribute equal amounts in foreign currency in a country where it operates but where its funds are blocked is deemed not a mere conduit; contributions deductible under section 170); LTR 8346038 (Aug. 12, 1983) (contributions to foreign trust created by a domestic charity whose purpose is to restore the birthplace of a figure in the foreign country are deductible under section 170, provided listed controls and procedures are adopted); LTR 8608027 (Nov. 22, 1985) (charity to establish and maintain a college in a foreign country, procedures and controls established, contributions deductible under section 170).

[127] *See* Rev. Rul. 75-65; Rev. Rul. 71-460 (section 501(c)(3) status of a U.S. charity that carries on some or all of exempt activities in foreign country); Rev. Rul. 63-252, Ex. 4, *amplified by* Rev. Rul. 66-79; LTR 8043026 (July 30, 1980) (donations to organization with the exempt purpose of providing services to foreign country inhabitants, which transmits some or all of its funds to offshore charities, are deductible under section 170(b)); LTR 8124124 (Mar. 20, 1981) (religious organization making grants to foreign religious organizations in support of specific projects or activities in furtherance of exempt purposes, donations deductible under section 170(b)); LTR 8142167 (July 24, 1981) (domestic religious institution, which may make grants to foreign charities for specific projects; donated funds deductible under section 170(b)); LTR 8230151 (Apr. 30, 1982) (U.S. charity, the exempt purpose of which is to train religious leaders in foreign countries, and that makes grants to foreign religious organizations; donations deductible under section 170(b)); LTR 8340031 (June 29, 1983) (contributions to U.S. charity making grants of some of its funds to a foreign section 501(c)(3) organization; donations deductible under section 170(b)); LTR 8714050 (Jan. 6, 1986) (section 170(b) ruled to apply to gifts to a U.S. charity with exempt purpose of promoting garden history, which operates in the U.S., maintains a foreign exchange program, and funds projects of a foreign entity). *But see* LTR 201113036 (Jan. 7, 2011) (U.S. entity making grants to foreign non-charitable organizations, which through a related person operates a website accepting contributions forwarded to the foreign organizations, and that has the exempt purpose of encouraging and facilitating contributions through the website, denied section 501(c)(3) status for failure to operate for exempt purposes, failure to have discretion or control over the contributions, and for engaging in private inurement).

(Footnote continued in next column.)

[128] *See* Rev. Rul. 66-79; LTR 7943102 (contributions to religious organization to support specific projects of a foreign charitable institution found as deductible for the use of the foundation under section 170(b)(1)(B)); LTR 9129040 (Apr. 23, 1991) (contributions to a foundation making grants to a foreign charity to build a sports arena in a foreign country deductible under section 170); LTR 9651031 (foundation organized by a U.S. alumni group of a foreign school, a charitable organization, to support the school; contributions to foundation deductible under section 170). *But see* LTR 200945068 (Aug. 11, 2009) (U.S. ''friends of'' organization with purpose to promote, foster, and advance programs and activities of a foreign entity operating to provide financial aid to needy students not a section 501(c)(3) charity and contributions to it not deductible under section 170 because of U.S. organization being a conduit for the foreign entity); LTR 201222069 (Mar. 8, 2012) (''friends of'' organization to support a religious school in a foreign country not a section 501(c)(3) charity because it is not deemed operated for exempt purposes and deemed not to have adequate discretion and control over distributed funds because of lack of controls and procedures, thereby failing organizational and operational tests under the statute); LTR 201303017 (Oct. 26, 2012) (organization with a foreign exempt purpose effectively supporting a farm of a related person found not to be a section 501(c)(3) charity for failure of the operational test, failure to maintain discretion and control over funds, and for engaging in private inurement).

the contributions received by the domestic charity from such solicitations were regarded as for the use of the domestic corporation and not for the organization receiving the grant from the domestic organization.

What did discretion and control entail practically? Under the facts in the ruling, the board of directors had discretion to receive and allocate contributions to any charity, and the making of grants was within its exclusive power. Furthermore, the board at all times had the right to withdraw an approval, and the charity could solicit funds for the approved projects only if it had discretion and control over their use. The board had absolute discretion to refuse to make any grants or contributions.

The IRS modified the test under Rev. Rul. 75-65 by requiring the domestic organization to maintain ''control and responsibility over the use of any funds granted a foreign organization,'' which was accomplished as follows. First, the charity made a field investigation of the purpose for which any of the donees would use the amounts. Second, the charity entered into a written agreement with the foreign recipients. Finally, the domestic institution investigated continuously to see that the money was expended in accordance with the agreement. This test was not followed in later private letter rulings.

Some private letter rulings contained other departures from the test in Rev. Rul. 66-79.[129] For example, some letter rulings required complete control over the transmission of funds abroad. But, similar to other guidance, complete control generally was accompanied by approval of the board of directors of specific projects furthering the exempt purpose of the domestic organization, a complete accounting by the foreign grantee, and the exclusive power of the board to refuse any conditional or earmarked grant.[130] Thus, it is not clear whether complete control differed in substance from the control and discretion required under Rev. Rul. 66-79.

LTR 9651031, the latest to permit a deduction for gifts to a ''friends of'' organization, set forth the following factors, consistent with the criteria in Rev. Rul. 66-79.[131] The IRS highlighted that the foundation was organized and operated in a charitable manner and its general purpose was to make grants to a foreign charity for projects that met the standards of the foundation; the board had sole discretion as to the use of funds; the supported foreign school had to provide a periodic accounting; the foundation had discretion to refuse grants to the foreign school and would refuse to accept earmarked contributions; and the foundation determined that the foreign school was a charitable institution.[132]

The IRS ruled that ''exercising discretion and control over the use of contributions in order to make grants for projects that further charitable purposes of Foundation'' resulted in the foundation not deemed to be acting as a mere conduit.[133] Accordingly, a section 170 deduction applied.

Overall, there are four factors the presence or absence of which in other guidance distinguish the deductibility criteria in this letter ruling. The first is the requirement of review and approval by the board of all requests for funds from foreign organizations, which is stated separately in some rulings.[134] In LTR 9651031, this prong is present in less stringent form as the requirement that the funded projects meet the standards of the foundation.

The second variable is the type of accounting required of the foreign donee. Some rulings mention complete accounting, which nevertheless could occur, and therefore is not necessarily inconsistent with the periodic basis under LTR 9651031.[135]

The third distinguishing factor is the presence of an agreement between the foreign grantee and the domestic charity regarding the use of funds, which may be more relevant in circumstances in which the charity makes grants to more than one foreign organization.

The final variable is the requirement that any potential donor be made aware of the prohibition on earmarking by the domestic organization.[136]

SMLLC Does Not Interfere With Discretion or Control

Several analogies in the IRS guidance on deductibility of foreign-bound gifts indicate that contributions to SMLLCs established abroad and domesticated in the United States are deserving of passthrough treatment for section 170 purposes.

In Example 5 in Rev. Rul. 63-252, a domestic charity formed a subsidiary in a foreign country to facilitate its operations there. Similar to an SMLLC, the foreign subsidiary was formed for purposes of administrative convenience, and the charity controlled every facet of its operations. But by contrast to an SMLLC arrangement, the domestic institution transmitted funds it received for its foreign operations directly to the foreign entity. The IRS ruled that the charity was not a conduit for the offshore subsidiary and that section 170 applied.[137]

There does not appear to be a substantive difference between a transfer by the domestic charity of funds to a foreign subsidiary and a contribution of such funds by a donor directly to the foreign subsidiary. In each case, a domestic charity controls the foreign entity, and the

[129] *See* LTR 8230151, LTR 8225046, LTR 8142167, LTR 8124124, and LTR 8043026.

[130] *See* LTR 8043026.

[131] *See* Rev. Rul. 66-79, *amplifying* Rev. Rul. 63-252; LTR 9651031.

[132] The bylaws of the foundation also stated that it might solicit contributions for approved projects only if the board has full control and discretion at all times as to the use of the contribution, but this bylaw language was not highlighted by the IRS and appears as more of an additional formality than a substantive requirement for the deduction. *See* LTR 9651031; *see also* LTR 9129040 (in another ''friends of'' organization ruling,

(Footnote continued in next column.)

board of the foundation under its bylaws permitted to solicit funds for an approved project).

[133] LTR 9651031.

[134] *See, e.g.*, Rev. Rul. 66-79, *amplifying* Rev. Rul. 63-252; LTR 8230151 (domestic charity reviewing and approving activities of foreign religious organizations as charitable); LTR 8340031 (domestic charity reviewing and approving the program of the foreign section 501(c)(3) organization to which it would make grants).

[135] *See, e.g.*, LTR 8124124.

[136] *See* LTR 8346038.

[137] Rev. Rul. 63-252, *amplified by* Rev. Rul. 66-79.

domestication of an SMLLC ensures that the control requirement is met under the laws of a U.S. jurisdiction. Accordingly, there is no concern, as expressed in Rev. Rul. 63-252, that the funds would "rest momentarily in a qualifying domestic organization." To wit, "since the foreign organization is merely an administrative arm of the domestic organization, the fact that contributions are ultimately paid over to the foreign organization does not require a conclusion that the domestic organization is not the real recipient of those contributions."[138]

In LTR 8034139, the IRS allowed a deduction for contributions to an agent of a domestic religious organization, which was located in a foreign country, which then transferred the funds to a local organization with which the domestic charity was affiliated. According to the agency agreement, title to all donations rested in the domestic organization, and the foreign agent did not have authority to transfer any funds from the escrow account without prior approval of the principal. The domestic entity maintained full authority and control of all funds and property received as gifts.

An SMLLC technically does not have an agency relationship under state law with the parent charity unless otherwise agreed. However, in reaching the conclusion that donations were deductible, the IRS applied the discretion and control test to the relationship between the domestic charity and its foreign agent. The agency agreement was not dispositive to the outcome of the ruling. The IRS permitted the deduction because the charity had full control over the use of the donated funds, all projects funded by it received its advance approval, the affiliate-donee had to render an accounting, and the charity could terminate funding that did not further its exempt purposes.

The IRS characterized the arrangement as donations made to the domestic religious organization through its agent in the foreign country. This way, the IRS sanctioned contributions to a foreign entity as long as the entire arrangement met the discretion and control test, irrespective of whether the offshore unit was an agent of the charity. Thus, the situation in LTR 8034139 is completely analogous to a donation to a dual-charter SMLLC that is under the discretion and control of the parent U.S. charity.

An even closer parallel may be drawn from LTR 8042173. In this ruling, the charity held an option to purchase an offshore island from a donor for nominal value, which it would have used to further its exempt purposes. The charity could assign its rights to exercise the option to a wholly owned and controlled subsidiary established in the province where the island was situated. The foreign subsidiary could own or take title to the island to comply with local laws. Alternatively, the domestic charity could register as a foreign entity under the applicable provincial law to take title.

The IRS ruled that as long as the charity was not a conduit of the donor and received a substantial benefit from the contribution to its assignee, a deduction was allowable. In this instance, the subsidiary-assignee receiving the property directly from the donor was a foreign entity without a domestication component.[139] Total ownership of the foreign unit by the domestic charity proved sufficient to find the requisite control by the charity of the donated property. Therefore, a donation to a foreign SMLLC, wholly owned and controlled by a domestic charity, which, by comparison to the subsidiary in the ruling also is subject to the laws of a U.S. jurisdiction, would exceed the threshold for a section 170 deduction.

Status of Gifts to Foreign SMLLCs Domesticated in a U.S. Possession

As an exception, SMLLCs organized in U.S. possessions would qualify under section 170(c)(2)(A) jurisdictional requirements but would be considered foreign entities for purposes of entity classification rules. For example, Puerto Rico is considered a U.S. possession under section 7701(d).[140] Using the reg. section 301.7701-5(a) definition, an SMLLC organized in Puerto Rico and a foreign country would not be domestic for U.S. income tax purposes.

Under Delaware's LLCA, an LLC formed in Puerto Rico would be deemed a non-U.S. entity that would have to be domesticated under section 18-212 in order to be subject to these statutory requirements. If the SMLLC domesticates, there would be no concern regarding its accountability under state law. An SMLLC formed in a U.S. possession and abroad would have to domesticate only once under the Delaware statute. This convenience would alleviate concerns of the parent charity regarding additional compliance burdens.

Section 170(c)(2)(A) does not apply to SMLLCs. The notice appears merely to expand the range of permissible locations for SMLLCs to U.S. possessions to conform to the scope of jurisdictions in which the parent charities may be organized. On the one hand, treatment would be inconsistent if a parent charity organized in a U.S. possession might accept contributions deductible under section 170(b) but an SMLLC similarly situated might not.

On the other hand, there may be additional concerns with enforcement of corporate governance standards under state laws regarding an SMLLC organized in a U.S. possession. The consideration of whether being subject to U.S. possession statutory requirements is sufficient to comply with the discretion and control and lack of earmarking standards is outside the scope of this discussion. However, at minimum, it may be appropriate to permit a section 170(b) deduction for a gift to an SMLLC formed in a U.S. possession and in a foreign country if the SMLLC is domesticated under state law.

[138] *Id.*

[139] If the charity were to take title, it effectively would have been a dual-charter corporation subject to both foreign and U.S. law, albeit with its own section 501(c)(3) status.

[140] Puerto Rico has a non-U.S. entity domestication provision that applies to entities not formed under the laws of a U.S. state, similar to the rule in Delaware. *See* P.R. Laws Ann. tit. 14, section 3964 (2013).

Conclusion

Using a dual-charter SMLLC addresses two primary concerns that kept the IRS from incorporating in the notice the full definition of a domestic business entity under reg. section 301.7701-5(a), which allows domestic status for dual-charter organizations. First, the deductions do not go directly to foreign charities and thus benefit the U.S. government by supporting activities it otherwise might have funded. Second, state attorney general offices are the first line of enforcement of restrictions on charities, their governance, and giving activities. AG offices enforce these laws in domestic jurisdictions, and the IRS relies on them for its own oversight. Domesticating the SMLLC under state law enables continued surveillance of donations that ultimately benefit U.S. exempt institutions.

Accordingly, charities should take note of this possible tax planning technique to enhance their charitable giving and fundraising activities. States also should be encouraged to enact domestication statutes modeled after the laws of Delaware or Nevada in order to attract charitable funds to their jurisdictions. Finally, the IRS should clarify that the ''domestic'' and the ''created or organized in or under the laws of the United States'' factors in the notice refer to foreign SMLLCs with charters in U.S. possessions or under state laws.

The reason is that under the notice, section 170(c)(2)(A), and reg. section 301.7701-5(a), domestic treatment of dual-charter SMLLCs is warranted in light of the legislative history, the existence of state domestication statutes, Tax Court jurisprudence, and IRS guidance allowing deductibility in highly similar circumstances.

The use of a foreign domesticated SMLLC also would not interfere with the discretion and control of the funds by the parent charity, as required under the IRS guidance prohibiting earmarking, or with the discretion and control test that must be met by domestic SMLLCs for the gift to qualify as a contribution to the charity under section 170(b)(1)(A). Accordingly, the IRS should preserve the plain meaning of the section 170(c)(2)(A) criterion and confirm that a U.S. charity with a dually chartered SMLLC might avail itself of the benefits under the notice.