

Gifts and Bequests to U.S. Charities by Non-U.S. Donors

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Gifts to Charity – U.S. Donors (§170)

Deduction Limits	Public Charity*	Private Foundation
Individuals - Cash	50%	30%
Individuals - Appreciated Property	30%	20%
Corporations	10%	10%
Trusts (IRC 642(c))**	100%	100%

- No income tax deduction for gifts to non-U.S. charities
- Ordinary income/STCG property effectively limited to basis
- LTCG property to PF limited to lesser of FMV and basis, except for "qualified appreciated stock"
- Tangible property generally limited to lesser of FMV and basis unless used for exempt purpose
- Other restrictions (e.g., "split interest" gifts)

* Also private operating foundations and "conduit" private foundations.
** Not limited to domestic charities.



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U.S. Citizen or Resident

- Income tax: U.S. Citizens and Residents taxed on worldwide income
 - "substantial presence test" (183 days in current year or 183 days or more during three-year period, using weighted formula)
 - See also "closer connection" test
 - "green card test"
 - Treaty may affect determination of residence
- Gift and Estate Tax: U.S. citizens and domiciliaries taxed on worldwide assets
 - Physical presence and intent to remain indefinitely
 - Facts and circumstances
 - Treaty may affect determination of domicile



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Gifts to Charity – U.S. Donors (§2522)

- Gifts to charities are subject to gift tax unless §2522 applies.
- U.S. citizens or residents (§2522(a))
 - U.S. governmental agency
 - Foreign or domestic charitable corporation or trust which meets §501(c)(3) requirements
 - Fraternal society (foreign or domestic) which will use assets exclusively for charitable purposes
 - Domestic war veterans' post
- Split interest transfers (other than CRATs, CRUTs, qualified annuities)
- DAFs
 - No deduction if sponsoring organization is fraternal society, war veterans' post or Type III non-functionally integrated supporting organization
 - Contemporaneous written acknowledgement from DAF sponsor that sponsor has exclusive legal control over assets
- Qualified easements
- Tangible personal property fractional gift restrictions



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Bequests to Charity – U.S. Donors (§2055)

- Bequests to charities are subject to gift tax unless §2055 applies
- U.S. citizens or residents (§2055)
 - U.S. governmental agency
 - Foreign or domestic charitable corporation which meets §501(c)(3) requirements
 - Trust or fraternal society (foreign or domestic) which meets §501(c)(3) requirements and will use assets exclusively for charitable purposes
 - Veteran's organization incorporated by Act of Congress
 - Certain bequests to ESOPs
- Split interest restrictions (§2055(e)(2))
- DAF restrictions (§2055(e)(5))



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Gifts by Non-U.S. Entities

- Foreign Corporations (§882(c)(1)(B))
 - 10% of §882(b) income
 - §882(b)(1): U.S. source income not effectively connected with U.S. trade or business
 - §882(b)(2): Income effectively connected with U.S. trade or business
 - Deduction allowed whether or not charitable contributions are related to ECI
 - §170 restrictions apply
- Foreign Non-grantor Trusts (§642(c))



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Gifts by Non-U.S. Individuals (§873(b)(2))

- Charitable deduction only against §871(b) income
 - §871(a): U.S. source income not connected with U.S. trade or business (flat 30% tax, no deductions)
 - §871(b): Income connected with U.S. trade or business (graduated tax rate, some deductions)
 - §871(d): Income from real estate – may be able to elect (a) or (b)
- All §170 limitations apply
 - Deduction only for gifts to US charities
 - Subject to percentage limitations
 - Appreciated property – generally same basis limitation rules
- Must file accurate income tax return to claim deduction (§873(a))



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Income Tax Treaties – Charitable Gifts

- Canada
 - Contribution by Canadian resident to U.S. college or university at which the taxpayer or a family member is or was enrolled is deductible for Canadian income tax purposes, as if to a Canadian charity
 - Otherwise, contributions to U.S. charities are deductible to the extent they would have been treated as a contribution to a Canadian charity, but limited to percentage of U.S. source income
 - Reciprocal rules apply to U.S. donors to Canadian charities. A Canadian charity is treated as a private foundation under U.S. law unless the Canadian charity has demonstrated to the IRS that it is a public charity.
- Mexico
 - Contribution to a U.S. charity deductible to the extent it would have been treated as a contribution to a Mexican charity
 - Limited to Mexican income limits applied to U.S. source income
- Israel
 - Contributions to an U.S. charity deductible to the extent the contribution would have been treated as a charitable contribution to an Israeli charity
 - Limited to 25% of adjusted gross income from U.S. sources



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Gifts by Non-US Individuals (§2522(b))

- NRAs subject to gift tax for gifts of real property or tangible personal property situated in the U.S.
- Gift tax charitable deduction for gifts to:
 - U.S. governmental agency
 - **Domestic** 501(c)(3) corporation
 - Trust (foreign or domestic) which will use assets exclusively for charitable purposes within the U.S.
 - Fraternal society (foreign or domestic) which will use assets exclusively for charitable purposes within the U.S.
 - Domestic war veterans' post
- §2522 exceptions apply (split gifts, DAF restrictions, easements, etc.)
- Gift of U.S. real or tangible personal property to foreign charity (1) does not generate an income tax deduction and (2) may be subject to gift tax (but see treaties).



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NRA Bequests to Charities (§2106(a)(2))

- Charitable deduction allowed only for property passing to:
 - U.S. governmental agency
 - **Domestic** charitable corporation which meets §501(c)(3) requirements
 - Trust or fraternal society (foreign or domestic) which meets §501(c)(3) requirements AND will use assets exclusively for charitable purposes within the U.S.
- Charitable bequest **must be paid from U.S. situs property** to get deduction
 - PLR 9040003: No deduction for bequest of art collection located outside the U.S. to U.S. art galleries against estate tax generated by NRA's separate U.S. situs property
- Will **must require** that bequest be made to **U.S. charity**
 - PLR 9135003: Charitable deduction denied for gift of U.S. situs assets to U.S. charity where executor *could have* distributed the property to foreign charities
 - TAM 199925043: Charitable deduction allowed where local court construed trust as requiring distribution of U.S. situs assets to U.S. affiliate of foreign charity.



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NRA Bequests to Charities (§2106(a)(2))

- NRAs subject to US estate tax on property "situated in the U.S." (§2104)
 - U.S. real and tangible personal property
 - Stock or option in a U.S. corporation (including U.S. mutual funds)
 - Certain bank deposits (mostly where connected to trade or business)
 - Debt obligations of a U.S. person or governmental entity
 - See *Estate of Henry K. Schwartz v. Comm'r*, 83 T.C. 943 (1984) ("The general rule reflected in section 2104(c) is that the location of the debt obligations is governed by the location of the obligor, not by the location of the obligee.")
 - Transfers within the meaning of §§ 2035 through 2038 involving U.S. situs assets. Such property is deemed situated in the U.S. "if so situated either at the time of transfer or at the time of the decedent's death."
 - See TAM 9507044 (Trust of expatriate with no U.S. situs property subject to U.S. estate tax where trust was originally established with U.S. situs property and expatriate retained right to income and power of appointment over trust property).
 - Partnership interests – unclear
 - Certain trust interests



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Estate and Gift Tax Treaties

- 16 countries have estate and gift tax treaties with the U.S. (Australia, Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Netherlands, Norway, South Africa, Switzerland, U.K.)
- In addition, Article XXIX B of the Canadian income tax treaty deals with transfers of property on death (see Fifth Protocol)
- Four treaties (Canada, Denmark, France, Germany) may allow a U.S. deduction for property left to a charity in the other country
 - Only for bequest of property included in the U.S. gross estate. If other property used, prorated deduction or credit may be available. See *Estate of Avrom Silver*, 120 T.C. No. 14 (May 14, 2003).
 - Treaty-specific definitions of "exempt organizations"
 - Reciprocal: Foreign tax deductions may be available for donations to U.S. charities
 - Treaties may affect assumptions about residence
 - Treaties may affect what is deemed to be "situated in the U.S."
 - Treaty disclosure statement (Form 8833) may be required



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Hypothetical 1 – Chinese NRA

- **Facts:**
 - Chinese citizen, NRA for US purposes
 - Owns two condos in Boston – one is rental, and one occupied by son attending college in US
 - Wants to give some cash to US charities now, give or leave some property to son, some to US college, some to Chinese charity
- **Income tax (cash gift):**
 - Treaty, Art. 6 – Income may be taxed in the U.S.
 - U.S.
 - §871(d): May elect §871(a) ("gross regime") or 871(b) ("net regime")
 - If elect "net regime", expenses and charitable deduction may minimize income
 - But, must file U.S. income tax return to claim deduction and expenses
 - China
 - Likely no income tax deduction against Chinese income tax
 - Article 22 (Elimination of Double Taxation) of U.S.-China income tax treaty would provide Chinese credit for U.S. income tax paid
 - Therefore, uncertain benefit of U.S. income tax deduction

Hypothetical 2 – Canadian NRA

- **Facts:**
 - Canadian citizen, NRA for US purposes
 - Owns two condos in Boston – one is rental, and one occupied by son attending college in US
 - Both via wholly-owned Canadian corporation (set up expressly for this purpose)
 - Wants to give cash to U.S. college now, and leave U.S. condos to U.S. or Canadian charity
- **Income tax (cash gift):**
 - Treaty, Art. 6 – Income may be taxed in the U.S.
 - U.S.
 - §871(d): May elect §871(a) ("gross regime") or §871(b) ("net regime")
 - If elect "net regime", expenses and charitable deduction may minimize income
 - But, must file U.S. income tax return to claim deduction and expenses
 - Canada
 - Because gift is to a qualifying college or university (Article XXI(7)), should be treated effectively as if given to Canadian charity
 - Otherwise, credit would be limited to portion of U.S. source income

Hypothetical 1 – Chinese NRA

- **Gift tax:**
 - No treaty
 - Subject to U.S. gift tax on U.S. real or tangible personal property
 - No gift tax charitable deduction for NRA's gift to non-US charity
 - Need to give U.S. real or TPP **only to U.S. charity** (or trust exclusively to be used for charitable purposes in the U.S.)
 - If give to U.S. charity, no gift tax
- **Estate tax / Testamentary transfer tax:**
 - No treaty
 - Value of condos included in U.S. gross estate
 - May get full U.S. estate tax deduction, but **only** if leave U.S. property to U.S. charity
 - Will pay U.S. estate tax on condo left to son
 - More tax efficient to leave both condos to charity, give other property to son to buy condo after death
 - Must file Form 706NA – if only charitable deduction, no need to disclose worldwide assets
 - Massachusetts Estate Tax
 - Credit for state death taxes (Form 706) x (MA gross estate / worldwide gross estate)

Hypothetical 2 – Canadian NRA

- **Estate tax / Deemed Disposition:**
 - Article XXIX B (see Fifth Protocol)
 - Paragraph 2: Canadian NRA with U.S. property gets a prorated unified credit against U.S. estate tax
 - Paragraph 1(b): Where property from Canadian NRA's estate passes to U.S. "exempt organization" (Article XXI), effectively no capital gain (may elect to treat as disposition at cost basis)
 - "Exempt Organizations" includes a "religious, scientific, literary, educational or charitable organization" (Art. XXI(1)).
 - Must leave *U.S. situs property* to charity to get U.S. deduction (*Silver*)
 - U.S. condos to U.S. charity
 - Full U.S. estate tax deduction
 - Canada: Must be certain U.S. charity is an "exempt organization" per Art. XXI(1) of the Treaty. If so, effectively no capital gain.
 - U.S. condos to Canadian charity
 - Canadian tax credits
 - U.S.: Must be certain Canadian charity is an "exempt organization" per Art. XXI(1) of the Treaty. If so, full U.S. estate tax deduction.
 - Must file Form 706NA – if only charitable deduction, no need to disclose worldwide assets
 - Must file Form 8833 (Treaty Position Disclosure)