

IRS Provides New “Checklist” to Determine Whether a Foreign Charity Qualifies to Receive Tax-Deductible Gifts from Americans without Triggering an Excise Tax

Publication Date 11/02/2017 / by Ted Hart, ACFRE, CAP®

Originally published by Bloomberg BNA

For the first time, the IRS has clearly defined and expanded upon what tax attorneys, CPAs, and enrolled agents should take into consideration when facilitating cross-border gifts to foreign charities.

On September 14, 2017 the IRS surprised many when it released Rev. Proc. 2017-53, further defining the process of equivalency determination (ED), or, as it is often referred to, a good-faith determination. These new guidelines add to the body of knowledge



international grantmakers and their legal counsel need to determine if a foreign charitable organization is the equivalent of a U.S. 501(c)(3) public charity, thereby allowing grants to be made to it without triggering an excise tax. It is important to note that ED, now with more clearly defined parameters, is one of two IRS procedures that can lead to tax-effective support of foreign charities and charitable projects by Americans. The other is expenditure responsibility (ER), which is the

procedure a private foundation, and some public charities, may follow for grants made to an organization that is not recognized by the IRS as a public charity.

Qualified tax practitioners (tax attorneys, CPAs, and enrolled agents) are the professionals who conduct the legwork for establishing the equivalency of a foreign charity. Rev. Proc. 2017-53 essentially provides a checklist for what the IRS calls “preferred written advice” — document(s) that summarize important information about the foreign charitable organization, and the professional’s argument why the foreign organization should be deemed the equivalent of a U.S. 501(c)(3) public charity.

It is clear the IRS was concerned about the lack of clear guidelines available to those providing ED reviews, as well as the challenges faced when trying to provide a deep review leading to a good-faith determination of equivalency. This “checklist” makes it very clear there is a great deal of due diligence expected from every charity reviewed under these guidelines.

Some of the most important information for qualified tax practitioners is contained within Section 3.03(5) of Rev. Proc. 2017-53. This section provides the closest thing to a checklist for written advice, stating that qualified tax practitioners should:

“(i) Base the written advice on reasonable factual and legal assumptions (including assumptions as to future events);

(ii) Reasonably consider all relevant facts and circumstances that the practitioner knows or reasonably should know;

(iii) Use reasonable efforts to identify and ascertain the relevant facts;

(iv) Not rely upon representations, statements, findings, or agreements (including projections, financial forecasts, or appraisals) of the taxpayer or any other person if reliance on them would be unreasonable, which is the case if the practitioner knows or reasonably should know that one or more representations or assumptions on which any representation is based are incorrect, incomplete, or inconsistent;

(v) Relate applicable law and authorities to facts; and

(vi) Not base the advice on consideration of the possibility that a return will not be audited or that a matter will not be raised by the IRS on audit.”

While not necessarily new information for those who regularly conduct equivalency determinations, this checklist is nonetheless useful. What is new, however, and should be noted is that:

- Section 5.06 states that a grantee affidavit is suitable for determining whether the grantee conducts political activity and lobbying;
- Section 5.09 prescribes that the written advice must confirm that the grantee is not subject to sanctions or is designated as a terrorist organization by the U.S. government;
- Section 5.11 provides that foreign schools must have a nondiscrimination policy in their governing documents and they need to provide evidence that this policy is enforced in practice.

These sections, and in general the entirety of Rev. Proc. 2017-53, show that in many cases the IRS was concerned the “written advice” organizations were relying on was likely not up to desired IRS standards. Compliance within the scope of international grantmaking is complicated. However, with a thorough understanding of the IRS guidelines, along with the experience to conduct the due diligence needed, a foreign charity can be successfully vetted to receive tax-effective charitable gifts from Americans.