BY BRADFORD S. COHEN, SARAH M. JOHNSON, AND CHARLES K. KOLSTAD

Estate and Tax Guidance for Artists and Collectors

THE STRUGGLING ARTIST HAS NEVER had an organized lobby in Congress, a fact reflected in the Internal Revenue Code's different treatment of artists and art collectors. While based in logic, certain code provisions can leave artists feeling jilted, especially when compared to the tax treatment of their patrons, the art collectors. Lawyers who represent artists or collectors should therefore be aware of how tax rules affect artists and collectors differently.

For example, one should hesitate before accepting a gift of art from an artist. Owners of art are treated differently for income tax purposes when art is sold compared to when art is donated to charity. When a work of art is sold, it can be classified as either ordinary income property or capital gain collectible property. If a work of art is held by a collector for more than one year, it is usually a capital gain collectible property, gain on the sale of which is subject to tax at a maximum federal rate of 31.8 percent (28 percent plus the 3.8 percent net investment income tax that was phased in beginning in 2013).[1] Gain from the sale of art that is ordinary income property is taxed at a maximum federal rate of 39.6 percent.[2] A work of art is ordinary income property in four circumstances:

- It has been owned for one year or less at the time of the sale,
- It is part of the inventory of an art dealer,
- It was created by the seller, or
- It was received by the seller as a gift from the creator.[3]

Should the recipient of a work of art gifted by the donor or creator later try to sell the work, the seller will pay tax on the gain at higher, ordinary income rates. How is this gain calculated? At the most basic level, gain is the difference between the sales price of the work of art and the seller's basis in the work. Like the federal tax rates, basis is also determined differently for collectors and artists. The collector's basis is the purchase price; the artist's basis is the cost of the materials used to create the work of art. Paint brushes can be expensive, but their cost would get allocated over multiple paintings sold during their useful life. Unless one is sculpting out of gold, an artist's basis in a creation is likely to be insignificant. Until a work of art is sold or the owner dies, that almost-zero basis stays with the work.

For example, imagine that a contemporary Edvard Munch paints *Scream* with canvas, brushes, and paints costing $150 and sells the painting to a billionaire some time later for $120 million.[4] The artist's tax liability is determined as follows: $120 million sale price less $150 cost basis equals $119,999,850. Applying the 39.6 percent ordinary income tax rate results in a tax liability of approximately $49.5 million.

If instead the painter had given *Scream* to his sister, Sophie, shortly after he painted it, and Sophie sold the work several years later for $120 million, she would also have to pay federal ordinary income taxes of about $49.5 million. The result is different, however, if Edvard had sold the work to his sister for its fair market value immediately after he painted it. In this scenario, he charges her only the cost of his materials, $150. When Sophie sells the work several years later for $120 million, she still has a basis of $150 (her purchase price), so the amount of her gain is the same, but her federal tax rate is 31.8 percent. Her tax liability is just over $38 million—a tax savings of over $11 million in comparison to having received the painting as a gift from the artist.

RICHARD EWING

This example is extreme, but it shows why it is better to buy art than to receive it as a gift. When the recipient later sells the work, he or she will be taxed at the collectible capital gain tax rate and not the higher ordinary income tax rate.

Donations to Charities

There is almost no income tax incentive for an artist to donate his or her works to charity during the artist's life. An artist's charitable contribution deduction is limited to his or her basis in the work of art—the cost of materials.[5] So the artist will receive little to no income tax benefit from the contribution. However, if the artist makes the donation at death, the artist's estate will receive an estate tax charitable contribution deduction of 100 percent of the full fair market value of

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A recipient of a gift of art from an artist is subject to the same charitable contribution rules as the artist. If Sophie from the example received *Scream* as a gift from its creator, her charitable income tax deduction would also be limited to $150—the cost of her brother's materials. On the other hand, if the billionaire donated the work to a museum immediately after purchasing *Scream* for $120 million, the billionaire would receive a charitable contribution deduction up to the full fair market value of the work, which should be the $120 million purchase price.

When a collector makes a charitable contribution of a work of art, the collector is entitled to deduct up to 30 percent of his or her adjusted gross income (AGI).[6] Alternatively, a collector can elect to deduct up to 50 percent of his or her AGI if his or her deduction is limited to the basis in the work rather than the work's fair market value.[7] Immediately after a purchase would be the perfect time to make the 50 percent deduction election, as the collector's basis and fair market value should be the same. This may be an unusual scenario, however, as one wonders why a collector would want to donate a recently purchased work to charity. The collector could have second thoughts, or the work could not fit its intended use. Contributions of cash to charity are also eligible for the 50 percent of AGI limitation, so one would not likely buy a work of art and then donate it for the sole purpose of increasing the percentage limitation. Instead, one would simply donate cash to the charity.

An ideal time to make the 50 percent deduction election would be when the beneficiary of an estate receives a work of art on account of a person's death. All assets get an adjustment to basis at death that resets the basis to the asset's fair market value.[8] If an artist has charitable inclinations and is married, the artist could leave his or her collection to the surviving spouse, and the surviving spouse could then make the charitable donation and deduct 50 percent of his or her AGI, because the basis of the collection would equal its fair market value due to the basis adjustment at the artist's death.

Charitable contribution deduction rules apply when the work of art is donated to a public charity or an operating foundation only if the donee organization uses the work in a manner related to its exempt purpose.[9] A use is presumed to be related to the charitable purpose if art is donated to a museum that generally displays art of a similar type. When the use is either not related, or when the charity is a private foundation (as opposed to a public charity or an operating foundation), the charitable contribution deduction will be limited to the donor's basis in the work, regardless of whether the donor is a collector or an artist. Donations of art to a private foundation are also capped at lower levels—20 percent of the collector's AGI and 30 percent of the artist's AGI (as opposed to 30 percent and 50 percent caps, respectively, for deductions to a public charity for a related use).

A public charity is an organization that is primarily funded by the general public, such as a university, hospital, museum, or other organization that actively conducts its charitable purpose. An operating foundation also actively conducts its charitable purpose, but it receives most of its funding from one family. The Crystal Bridges Museum of American Art in Bentonville, Arkansas, is a prime example of an operating foundation that engages in activities in furtherance of its charitable purpose, having been funded with three endowments from the Walton family totaling $800 million.[10] The world-class art museum offers free admission to the public.

None of these complicated rules about related use, type of organization, or varying percentage limitations for creators and collectors applies to the contribution of art to a charity at death. The estates of both artists and collectors are able to deduct 100 percent of the fair market value of the property contributed to a charitable organization at death, for any type of charity, whether it is a public charity, an operating foundation, or a private foundation.[11] Many high-profile artists and collectors, such as Andy Warhol, Robert Rauschenberg, Robert Motherwell, and Frederick Weisman left their art collection to a private foundation at death. Doing so allows the art to be kept together as a collection and avoids the need for a fire sale of the art at death in order to raise funds to pay estate taxes. The foundation can hire staff to archive the works, create catalogues raisonne, and continue to promote the artist or the collection after death by arranging retrospectives or exhibitions with museums.

Copyright

When an artist creates a work of art, he or she also creates a copyright in the work. The U.S. copyright laws treat a work of art and the related copyright as two separate property interests, but our tax laws have always treated works of art and the copyrights therein as two interests in the same property.[12] This inconsistency makes it impossible to obtain a lifetime charitable income tax deduction for a donation of art to a charity if the copyright

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is not also specifically transferred with the work. The Code disallows the charitable contribution income tax deduction for gifts of partial interests in property.[13]

For yet another reason to wait until death to donate an artist's works to charity, the estate tax rules were changed in 1981 to treat the work of art and the copyright as two separate property interests. Therefore, a charitable contribution deduction from the estate tax is available in certain situations if the artist gives a work of art to charity at death but leaves the copyright to the surviving spouse, children, or other heirs. To receive a charitable contribution deduction for the art given to charity when the charity does not also receive the copyright, the art must be given to a public charity or operating foundation, and the use of the property by the organization must be related to its exempt purpose.[14] These are the same requirements that allow a collector to deduct the full fair market value of a charitable contribution of art. If the work of art is donated without the copyright to a private foundation or to a charity that cannot use the work of art in a manner related to its exempt purpose, the estate tax charitable contribution deduction for the value of the work of art is denied.

So, Edvard could leave *Scream* to the Getty Foundation at his death (which would display the work for the benefit of the general public), leave the copyright to his sister Sophie, and receive an estate tax charitable deduction of $120 million—the fair market value of *Scream*. Each time the Getty Center store sold a book, postcard, mug, or T-shirt with the *Scream* image, Sophie would receive a royalty. On the other hand, if Edvard left *Scream* to the hospice that cared for him in his dying days and the copyright to Sophie, his estate may have to pay a 40 percent estate tax on the value of *Scream* (a liability of $48 million) if it is determined that the painting was not related to the charitable purpose of the hospice. No estate tax charitable deduction would be allowed. The hospice, however, could take the position that the art on its walls is therapeutic and helpful to its patients, so that the relatedness test would be satisfied. This position is frequently taken by hospitals, which accounts for much of the art on their walls. Whether the IRS would accept the therapeutic-use argument in the case of a hospice rather than a hospital is unclear.

Artists need to be careful when specifically bequeathing works of art to charity in their wills. A bequest of "my painting entitled 'XYZ' to the ABC Church; all the rest and residue of my property to my children" would probably result in the copyright's passing with the residue under state law. If the ABC Church cannot satisfy the related-use test, the estate tax charitable contribution is

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denied. The safest course of action is to specifically include the copyright in the bequest unless the artist has confirmed with the charity in advance that its use of the art will be related to its exempt purpose. Collectors do not typically own the copyrights in the works of art they have purchased, so these rules usually apply only to artists.

Like-Kind Exchanges

In certain cases, it may be possible for an artist or art collector to do a tax-free exchange of art under Section 1031. There are several hurdles that must be overcome to qualify for like-kind exchange treatment. First, the owner must qualify as an investor and not as a dealer or collector (collectors buy and hold the art for their own appreciation, not for the appreciation in the value of the art). Both pieces of art must be held for investment and must be of "like kind."[15] For example, an exchange of an oil painting for a sculpture or a photograph would not constitute a like-kind exchange. In addition, the transaction needs to be accomplished through a qualified intermediary, and the other technical rules for these exchanges must be properly followed, such as filing Form 8824.

If the requirements for a like-kind exchange are satisfied, then the owner does not recognize gain at the time of the exchange unless cash is received in an adjustment to properly reflect the respective fair market values of the art. Furthermore, the tax basis of the old art becomes the tax basis of the new art.

When an artist or art collector sells a piece of art, generally sales tax is collected and paid to the appropriate state tax agency. There are exceptions for a sale to a buyer who has a valid resale permit, for occasional sales (under California's sales tax rules, this means selling one or two pieces of art a year), or if the art is shipped out of California under a contract requiring that the art be shipped out of state. California aggressively seeks to impose and collect its sales tax. California's Resale Royalty Act requires the payment of a 5 percent royalty to certain artists when their works are sold. If the seller is a California resident or if the sale occurs in California, the royalty may be due. There are several pending court cases on the validity of this act.

The Auction House

When artists or collectors choose to leave their art to their family and not to charity, one concern is often the lack of liquid assets to pay any estate tax that results from the inclusion of the art collection in the taxable estate. For an artist with an estate under the $5 million, inflation-adjusted federal estate tax exemption,[16] this is not a concern. But for the successful artist or wealthy collector, estate tax will often be assessed on the art left to fam-

ily members. Careful planning must be undertaken to avoid a grossly unfair result if the estate sells the works after the artist's or collector's death.

If the artist's or collector's estate sells the works through an auction house or an art broker, it will pay the auction house or art broker a commission on the sale of the works. Often, the commission can be as high as 20 to 35 percent of the sale price. If a work sells for $100,000, for example, the estate will receive only $65,000 to $80,000. Also, if the work of art is sold during the period of estate administration, the sales price usually is deemed to be the work's fair market value. At a 40 percent rate, this results in an estate tax of $40,000. If the family pocketed only $65,000 from the sale and owes a tax of $40,000, then they will receive only $25,000 on the sale of a $100,000 painting. This sad result can be avoided with proper planning.

The expenses of the sale of estate assets, including broker's commissions, are only deductible if the estate assets must be sold in order to pay the decedent's debts, taxes (including estate taxes), or to effect distributions.[17] If the decedent had other liquid assets that allow for the art's not being sold in order to pay the estate tax, no deduction will be permitted for the broker's commissions. If, however, the artist's or collector's will mandates that the art be sold and the proceeds distributed to the family, the expenses should be deductible, as the sale is necessary to effect the distribution of the estate in accordance with the will. If the will of the decedent in the example above had included this instruction, the family would have owed the 40 percent estate tax on only the $65,000 pocketed after the sale, walking away with $39,000 instead of $25,000.

An even better result, however, would be to find a broker who would be willing to serve as the art executor of the estate. This broker would receive commissions by way of an executor's fee. The executor's fee is always deductible as an expense of administration, regardless of whether the will mandates that the art be sold or not. In California, an executor is entitled to a statutory fee ranging from 4 percent (for small estates) down to .5 percent (for large estates) of the estate assets. This fee would be paid to the broker in lieu of commissions. The broker could serve as executor along with other family members who would not take a commission.

The tax rules applicable to artists and art collectors can be surprising and have divergent results depending on whether the taxpayer created, purchased, or received the art as a gift. Understanding these rules can help mitigate some of the feelings of unfairness that may be experienced by the artist or the gift recipient and can ensure the best possible result for the heirs and the art community. ■

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[1] I.R.C. §§1(h)(4), 1411(a)(1).
[2] I.R.C. §§1(a)-(e).
[3] I.R.C. §1221(a)(3)(C).
[4] Edvard Munch's *Scream* was auctioned for almost $120 million. Kelly Crow, *An Art Mystery Solved: Mogul Is* Scream *Buyer: Financier Leon Black Paid Nearly $120 Million for Munch Pastel at May Auction,* Wall Street J. (July 11, 2012).
[5] I.R.C. §170(e)(1)(A). Treas. Reg. §1.170A-4(b)(1) defines "ordinary income property" to include, for example, "property held by the donor primarily for sale to customers in the ordinary course of his trade or business, a work of art created by the donor, a manuscript prepared by the donor, and letters and memorandums prepared by or for the donor." This is consistent with the definition of property denied characterization as a capital asset under I.R.C. §1221(a)(3).
[6] I.R.C. §170(b)(1)(B)(i).
[7] I.R.C. §170(e)(1)(B); Treas. Reg. §1.170A-4(b)(2).
[8] I.R.C. §1014(a).
[9] I.R.C. §170(e)(3).
[10] Press Release, Crystal Bridges Museum of American Art Announces Endowment Gifts from Walton Family Foundation (May 4, 2011), *available at* http://crytabridges.org/press-releases/crystal-bridges-museum-of-american-art-announces-endowment-gifts-from-walton-family-foundation.
[11] I.R.C. §2055.
[12] I.R.C. §170(f)(3); Treas. Reg. §1.170A-7.
[13] I.R.C. §170(f)(2), (3).
[14] I.R.C. §2055(e)(4).
[15] I.R.C. §1031(a)(1).
[16] I.R.C. §2010(c)(3).
[17] Treas. Reg. §20.2053-3(d)(2).

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