

TAX AND NON-TAX CONSIDERATIONS OF OFFERING MINORITY INTERESTS IN CLOSELY HELD BUSINESSES TO KEY EMPLOYEES

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Internal Revenue Code § 83

Property transferred in connection with performance of services

(a) **General rule.** If, in connection with the performance of services, property is transferred to any person other than the person for whom such services are performed, the excess of-

(1) the fair market value of such property (determined without regard to any restriction other than a restriction which by its terms will never lapse) at the first time the rights of the person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture, whichever occurs earlier, over

Internal Revenue Code § 83

(2) the amount (if any) paid for such property,

shall be included in the gross income of the person who performed such services in the first taxable year in which the rights of the person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture, whichever is applicable. The preceding sentence shall not apply if such person sells or otherwise disposes of such property in an arm's length transaction before his rights in such property become transferable or not subject to a substantial risk of forfeiture.

Internal Revenue Code § 83

(b) **Election to include in gross income in year of transfer.**

(1) **In general.** Any person who performs services in connection with which property is transferred to any person may elect to include in his gross income, for the taxable year in which such property is transferred, the excess of-

(A) the fair market value of such property at the time of transfer (determined without regard to any restriction other than a restriction which by its terms will never lapse), over

Internal Revenue Code § 83

(B) the amount (if any) paid for such property.

If such election is made, subsection (a) shall not apply with respect to the transfer of such property, and if such property is subsequently forfeited, no deduction shall be allowed in respect of such forfeiture.

(2) **Election.** An election under paragraph (1) with respect to any transfer of property shall be made in such manner as the Secretary prescribes and shall be made not later than 30 days after the date of such transfer. Such election may not be revoked except with the consent of the Secretary.

Internal Revenue Code § 83

(c) **Special rules.** For purposes of this section-

(1) **Substantial risk of forfeiture.** The rights of a person in property are subject to a substantial risk of forfeiture if such person's rights to full enjoyment of such property are conditioned upon the future performance of substantial services by any individual.

(2) **Transferability of property.** The rights of a person in property are transferable only if the rights in such property of any transferee are not subject to a substantial risk of forfeiture.

(3) **Sales which may give rise to suit under Section 16(b) of the Securities Exchange Act of 1934.** So long as the sale of property at a profit could subject a person to suit under section 16(b) of the Securities Exchange Act of 1934, such person's rights in such property are-

Internal Revenue Code § 83

- (A) subject to a substantial risk of forfeiture, and
- (B) not transferable.

(d) **Certain restrictions which will never lapse.**

(1) **Valuation.** In the case of property subject to a restriction which by its terms will never lapse, and which allows the transferee to sell such property only at a price determined under a formula, the price so determined shall be deemed to be the fair market value of the property unless established to the contrary by the Secretary, and the burden of proof shall be on the Secretary with respect to such value.

Internal Revenue Code § 83

(2) **Cancellation.** If, in the case of property subject to a restriction which by its terms will never lapse, the restriction is canceled, then, unless the taxpayer establishes-

(A) that such cancellation was not compensatory, and

(B) that the person, if any, who would be allowed a deduction if the cancellation were treated as compensatory, will treat the transaction as not compensatory, as evidenced in such manner as the Secretary shall prescribe by regulations,

the excess of the fair market value of the property (computed without regard to the restrictions) at the time of cancellation over the sum of-

Internal Revenue Code § 83

(C) the fair market value of such property (computed by taking the restriction into account) immediately before the cancellation, and

(D) the amount, if any, paid for the cancellation, shall be treated as compensation for the taxable year in which such cancellation occurs.

Internal Revenue Code § 83

(e) **Applicability of section.** This section shall not apply to

- (1) a transaction to which section 421 applies,
- (2) a transfer to or from a trust described in section 401(a) or a transfer under an annuity plan which meets the requirements of section 404(a)(2),
- (3) the transfer of an option without a readily ascertainable fair market value,
- (4) the transfer of property pursuant to the exercise of an option with a readily ascertainable fair market value at the date of grant, or
- (5) group-term life insurance to which section 79 applies.

Internal Revenue Code § 83

(f) **Holding period.** In determining the period for which the taxpayer has held property to which subsection (a) applies, there shall be included only the period beginning at the first time his rights in such property are transferable or are not subject to a substantial risk of forfeiture, whichever occurs earlier.

(g) **Certain exchanges.** If property to which subsection (a) applies is exchanged for property subject to restrictions and conditions substantially similar to those to which the property given in such exchange was subject, and if section 354, 355, 356, or 1036 (or so much of section 1031 as relates to section 1036) applied to such exchange, or if such exchange was pursuant to the exercise of a conversion privilege-

Internal Revenue Code § 83

- (1) such exchange shall be disregarded for purposes of subsection (a), and
- (2) the property received shall be treated as property to which subsection (a) applies.

(h) **Deduction by employer.** In the case of a transfer of property to which this section applies or a cancellation of a restriction described in subsection (d), there shall be allowed as a deduction under section 162, to the person for whom were performed the services in connection with which such property was transferred, an amount equal to the amount included under subsection (a), (b), or (d)(2) in the gross income of the person who performed such services. Such deduction shall be allowed for the taxable year of such person in which or with which ends the taxable year in which such amount is included in the gross income of the person who performed such services.