E. IN-KIND CONTRIBUTIONS

by
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1. Introduction

Today's technology informs the public about the political, social, and economic crises that plague many parts of our world. Americans are deluged with reports on starving adults, children, and families, and are motivated to assist them by providing food, medical supplies and shelter.

As a result, numerous prepared and perishable food rescue programs have come into existence. Many of these organizations seek contributions of property - sometimes referred to as "in-kind" contributions - from businesses, which they in turn distribute to individuals needing assistance. Sometimes, too, a soliciting organization acts as an intermediary between a business having property to donate and IRC 501(c)(3) organizations whose charitable programs involve assisting needy individuals. While undoubtedly an overwhelming majority of these organizations serve real charitable needs, the Service is aware of organizations that take advantage of donors' good intentions and tax provisions designed to provide an incentive for in-kind donations.

In dealing with "problem" organizations that solicit in-kind contributions, the Service must perform a delicate balancing act. In the view of some, food service companies are being discouraged from instituting donations of food or increasing existing donations by overly restrictive interpretation of the tax law. Part of that law, in particular IRC 170(e)(3), was enacted to provide an incentive to donate. In applying relevant tax law provisions, however, the Service must be mindful not only of the policy of encouraging donations of property used to assist needy individuals, but also of the need to prevent this well-intended provision's use for fraudulent purposes.

This article will discuss in-kind contributions, particularly those which may come within the enhanced deduction provisions in IRC 170(e)(3). It will focus on two areas in which abuses have come to light - valuation of donated goods and actual use of donated goods in programs serving the needy.

2. Overview of IRC 170(e)(1)

To understand the enhanced deduction provisions in IRC 170(e)(3), one must first examine the basic rules governing contributions of ordinary income and capital gain property contained in IRC 170(e)(1).

Generally, individuals and corporations can deduct charitable contributions under IRC 170(a)(1). For contributions of property, the amount of the deduction is generally the fair market value of the donated property at the time of donation. See Reg. 1.170A-1(c)(1). Under IRC 170(e)(1), however, the fair market value must be reduced by the amount of gain that would not be long-term capital gain if the property had been sold by the donor at the property's fair market value (determined at the time of the contribution). Under this rule, deductions for donated inventory are limited to the property's basis (generally its cost), where the fair market value exceeds the basis.

The rationale for this reduction provision lies in the fact that a business's sale of inventory property produces ordinary income. The legislative history of the provision makes this clear. IRC 170(e)(1)(A) was added by the 1969 Tax Reform Act. The Senate Finance Committee explained the reasons for enacting this section, as follows:

> [I]n some cases it actually is possible for a taxpayer to realize a greater after-tax profit by making a gift of appreciated property than by selling the property, paying the tax on the gain and keeping the proceeds. This is true in the case of gifts of appreciated property which would result in ordinary income if sold, when the taxpayer is at a high marginal tax bracket and the cost basis for the ordinary income property is not a substantial percentage of the fair market value. For example, a taxpayer in the 70 percent tax bracket could make a gift of $100 of inventory ($50 cost basis) and save $105 in taxes (70 percent of the $50 gain if sold, or $35, plus 70 percent of the $100 fair market value of the inventory, or $70).
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> The committee does not believe that the charitable contributions deduction was intended to provide greater - or even nearly as great - tax benefits in the case of gifts of property than would be realized if the property were sold and the proceeds were retained by the taxpayer. In cases where the tax savings is so large, it is not clear how much charitable motivation actually remains. It appears that the Government, in fact, is almost the sole contributor to the charity. Moreover, an unwarranted tax benefit is allowed these taxpayers, who

> usually are in the very high income brackets. The committee, therefore, considers it appropriate to narrow the application of the tax advantages in the case of gifts of certain appreciated property.

S. Rep. No. 552, 91st Cong., 1st Sess. 80 (1969).

3. The IRC 170(e)(3) Exception

A. General Requirements

The basis standard for deduction of contributions of inventory and similar property came under heavy fire even at the outset, according to 1976 public hearings on general tax reform before the House Committee on Ways and Means. Charitable organizations complained that donors of inventory discontinued contributions rather than deal with the restrictions. A substantial amount of evidence was presented to show that charitable organizations most affected by IRC 170(e) were those involved in distributing food, medicine, clothing, and other basic necessities.

As a result, the Tax Reform Act of 1976 added IRC 170(e)(3), effective for contributions made after October 4, 1976. In March 1980, proposed regulations were published; final regulations were adopted incorporating certain changes effective January 29, 1982.

IRC 170(e)(3) provides an exception to the basis standard and gives prospective donors business reasons to consider making charitable donations of inventory. If a corporation, other than an S corporation, contributes section 1221(1) or (2) property, it may deduct an amount exceeding the property's basis (determined in accordance with Reg. 1.170A-4A(c)(2)).

To be eligible to receive deductions qualifying under IRC 170(e)(3), the donee must be an IRC 501(c)(3) organization and a public charity or a private operating foundation. Of course, other requirements for deductibility under IRC 170(c)(2) must be met. Thus, the contribution must be to or for the use of a domestic organization. See Rev. Rul. 63-252, 1963-2 C.B. 101; and Rev. Rul. 66-79, 1966-1 C.B. 48, regarding the use of "conduit" organizations for foreign charities.

To receive the enhanced deduction, four requirements must be met:

(1) Donated property must be used solely for the care of the ill, the needy, or infants, and in a manner related to the donee's exempt purpose. IRC 170(e)(3)(A)(i); Reg. 1.170A-4A(b)(2). A third party may not use the property unless that use is incidental to the primary use of caring for the ill, needy, or infants. Reg. 1.170A-4A(b)(2)(ii).

(2) Donated property cannot be transferred by the donee in exchange for money, other property, or services. IRC 170(e)(3)(A)(ii); Reg. 1.170A-4A(b)(3).

(3) The donee must furnish a written statement to the donor that the above requirements will be met. IRC 170(e)(3)(A)(iii); Reg. 1.170A-4A(b)(4).

(4) The property must satisfy certain requirements of the Federal Food, Drug and Cosmetic Act (if applicable). Compliance is required not only for the time the contribution is made, but for the 180 day period preceding the contribution as well. IRC 170(e)(3)(A)(iv); Reg. 1.170A-4A(b)(5).

To ascertain the deduction amount, start with the fair market value of the donated inventory property, less one-half the amount of the reduction computed under IRC 170(e)(1) (i.e., the unrealized appreciation). The resulting amount must be reduced by any amount exceeding twice the property's basis. IRC 170(e)(3)(B). Reg. 1.170A-4A(c)(4) illustrates how the required formula is applied:

> **Example (1)**. During 1978 corporation X, a calendar year taxpayer, makes a qualified contribution of women's coats which was [inventory] property. The fair market value of the property at the date of contribution is $1,000, and the basis of the property is $200. The amount of the charitable contribution which would be taken into account under section 170(a) is the fair market value ($1,000). The amount of gain which would not have been long-term capital gain if the property had been sold is $800 ($1,000 - $200). The amount of the contribution is reduced by one-half the amount which would not have been capital gain if the property had been sold.
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> **$800/2 = $400**

> After this reduction, the amount of the contribution which may be taken into account is $600 ($1,000 - $400). A second reduction is made in the amount of the charitable contribution because this amount (as first reduced to $600) is more than $400 which is an amount equal to twice the basis of the property. The amount of the further reduction is $200 [$600 - (2 x $200)], and the amount of the contribution as finally reduced is $400 [$1,000 - ($400 + $200)]....

For the donor to claim the enhanced deduction, donor and donee must observe certain formalities. Reg. 1.170A-4A(b)(4) imposes an affirmative obligation on the donee to provide the donor with a written statement containing the following:

(1) A description of the contributed property, including the date of its receipt;

(2) A statement that the property will be used in compliance with the requirements of IRC 170(e)(3);

(3) A statement that the donee is an organization recognized as exempt from federal income tax under IRC 501(c)(3); and

(4) A statement that adequate books and records will be maintained and made available to the Service upon request.

Where the value of donated goods exceeds $5,000, the donee must also acknowledge the contribution on Form 8283 (Noncash Charitable Contributions), Reg. 1.170A-13(b); and file Form 8282 (Donee Information Return) if it disposes of contributed property valued at more than $500 for which it received Form 8283 (IRC 6050L and Reg. 1.6050L-1). Form 8282 is not required, however, where the donee consumes or distributes the property in furtherance of its exempt purposes. Reg. 1.6050L-1(a)(3). Reg. 1.6050L-1(c) states that IRC 6050L also applies to certain successor donees.

As noted above, most concerns the Service may have about the propriety of allowing an enhanced deduction in a particular case fall into two areas: 1) demonstrating that the property will be used for the care of the ill, needy, or infants, and in a manner consistent with the donee's exempt purpose, and 2) establishing the fair market value of the donated property.

Definition of Care of the Ill, Needy, or Infants

The first major issue under IRC 170(e)(3) is whether the donee's use of property is related to its exempt purposes, and "solely for the care of the ill, the needy, or infants." Reg. 1.170A-4A(b)(2)(ii) defines relevant terms. Reg. 1.170A-4A(b)(2)(ii)(B) defines an "ill" person broadly as one who requires medical care within the meaning of Reg. 1.213-1(e). Under Reg. 1.170A-4A(b)(2)(ii)(C), "care" of the ill means alleviation or cure of an existing illness and includes care of the physical, mental, or emotional needs of the ill.

A "needy" person is one who lacks the necessities of life, involving physical, mental, or emotional well-being, as a result of poverty or temporary distress. Reg. 1.170A-4A(b)(2)(ii)(D). "Care" of the needy consists of alleviating or satisfying a particular need. Reg. 1.170A-4A(b)(2)(ii)(E).

Finally, an "infant" is a minor child (as determined under local law). Reg. 1.170A-4(b)(2)(ii)(F). "Care" of an infant means performing parental functions or providing for the infant's physical, mental, and emotional needs. Reg. 1.170A-4A(b)(2)(ii)(G).

Record-keeping Requirements

As noted above, the enhanced deduction is not available unless the donee provides a written statement affirming that certain requirements will be met, and that the donee will maintain adequate books and records concerning the donation. With regard to this record-keeping requirement, Reg. 1.170A-4A(b)(4)(i) further provides as follows:

> The books and records . . . need not trace the receipt and disposition of specific items of donated property if they disclose compliance with the requirements by reference to aggregate quantities of donated property. The books and records are adequate if they reflect total amounts received and distributed (or used), and outline the procedure used for determining that the ultimate recipient of the property is an ill or needy individual or infant. However, the books and records need not reflect the names of the ultimate individual recipients or the property distributed to (or used by) each one.

Whether books and records maintained satisfy these requirements will, of course, depend on the facts and circumstances of the particular case. In PLR 8737002 (May 7, 1987), for example, a public charity maintained a log recording all distributions of books to inmates. The letter ruling concluded that maintaining the log would satisfy the record-keeping requirement.

Indirect Assistance

Reg. 1.170A-4A(b)(2)(ii) provides, in part, that persons other than the "ill, needy, or infants" may not use donated inventory except as incidental to primary use in the care of the ill, needy, or infants. Nevertheless, the enhanced deduction may be available where donated inventory will be used indirectly in the care of such persons. For example, in PLR 8420036 (Feb. 13, 1984), a company was permitted to take the IRC 170(e)(3) deduction where it donated copying machines to health centers, laboratories, and hospitals for use in copying patient records, health educational materials, and laboratory results.

B. Intermediary Organizations

The regulations contemplate that donations made to one qualified organization may be subsequently transferred to another organization, for qualifying purposes. Reg. 1.170A-4A(b)(4)(ii) imposes written statement and record-keeping requirements on subsequent transferees.

PLR 8638006 (June 13, 1986) permitted a fishing equipment business to take an enhanced deduction for donations to an intermediary fund that transferred donated property to subsequent donees. The donated property - fishing equipment - would ultimately be used in recreational programs for disadvantaged persons. Similarly, PLR 8547028 (Aug. 26, 1985) permitted the enhanced deduction for donations of property to an organization that transferred the property twice before it was ultimately used in the care of the ill, needy, and infants.

Intermediary organizations thus play a recognized and legitimate role in distributing donated inventory. The Service is aware, however, of situations where title to donated property passes through several intermediary organizations which appear to play little (if any) role in facilitating distribution of the property for qualified purposes. In such situations, the chain of transactions should be carefully examined to verify that donated property is ultimately used for qualified purposes. In addition, one may question whether that provision has been satisfied, where an intermediary organization, despite lacking either physical possession or control over donated goods, nevertheless gives a written statement purporting to comply with IRC 170(e)(3)(A)(ii) and Reg. 1.170A-4A(b)(4).

C. Valuation of In-Kind Contributions

In determining the proper amount of a deduction under IRC 170(e)(3), there are two pertinent questions: (1) What is the basis of the inventory and (2) What is the inventory's fair market value? As an initial matter, if the fair market value of the inventory is less than its basis, then no question under IRC 170(e) generally arises - the deduction is limited to the fair market value of the donated property, under general principles. (But see Reg. 1.170A-4A(c)(2)-(3), regarding adjustments to cost of goods sold where basis is less than fair market value.)

General guidance on determining fair market value of donated property is found in the regulations. Reg. 1.170A-1(c)(2) and (3) provide as follows:

> (2) The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts. If the contribution is made in property of a type which the taxpayer sells in the course of his business, the fair market value is the price which the taxpayer would have received if he had sold the contributed property in the usual market in which he customarily sells, at the time and place of the contribution and, in the case of a contribution of goods in quantity, in the quantity contributed. The usual market of a manufacturer or other producer consists of the wholesalers or other distributors to or through whom he customarily sells, but if he sells only at retail, the usual market consists of his retail customers.
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> (3) If a donor makes a charitable contribution of property, such as stock in trade, at a time when he could not reasonably have been expected to realize its usual selling price, the value of the gift is not the usual selling price but is the amount for which the quantity of property contributed would have been sold by the donor at the time of the contribution.

(Emphasis supplied.) The emphasized portions of the regulations highlight recurring valuation issues.

"Usual Market"

In general, the most persuasive evidence of value in the donor's "usual market" for goods would be actual sales. One way to obtain such information is to secure catalogues, brochures, or other documents that list prices of items which the donor sells in the ordinary course of business. In most situations, an appraisal is not more persuasive than documentation showing the price that buyers actually paid for similar property.

The regulation also highlights that where the donor sells property in (for example) a wholesale market, it is inappropriate to value the contribution at (for example) the property's retail sales price.

"Time and Place"

The "time" of a contribution may be of particular relevance with perishable or dated items, such as food, drugs, and agricultural products. Perishable items may have a lower market value if sold shortly before they will become spoiled, for example. In addition, a donor may be unable, practically or legally, to sell items in any market when the expiration date is close at hand or past.

Rev. Rul. 85-8, 1985-1 C.B. 59, illustrates this problem. This ruling considered donations of dated pharmaceutical inventory shortly before expiration. The donor claimed a deduction for the inventory's full retail selling price (10x dollars); at the time of the donation, however, the donor "could not reasonably have been expected to realize its usual selling price for the products due to the imminence of the expiration date after which the products could not be sold legally." Accordingly, the donor's deduction was limited to 2x dollars, the value of the products if sold at the time they were actually donated, reduced in accordance with IRC 170(e)(3). The ruling emphasizes that fair market value of donated products depends "on the facts and circumstances surrounding those particular products at that particular time."

"Quantity"

When considering quantity, the question arises whether fair market value is determined for each unit of property or in bulk. The regulations specifically refer to the quantity contributed, as opposed to quantities normally sold in the usual market in the ordinary course of business. Thus, the value of a quantity of goods exceeding normal retail amounts may be less than the retail value, even where the donor's "usual market" is a retail one.

The quantity contributed may also affect the determination of fair market value where the donation itself has an effect on the market for the donated property. Where the market in which the donation occurs is not large enough to absorb the quantity of goods donated, for example, a lower valuation may be appropriate.

Safe harbor valuation for food product donations?

The Service has received many inquiries from organizations in the rapidly growing field of prepared and perishable food rescue programs, which distribute surplus prepared and perishable food from restaurants, hotels, and caterers to food banks, shelter, and feeding programs. According to these organizations, given questions about valuation of perishable food, food service companies are reluctant to donate because they have no assurance of the amount of the deduction that will be allowed. Thus, these organizations believe current tax laws discourage food service companies from donating food, contrary to the policy underlying IRC 170(e)(3).

The Service is currently considering various proposals by such organizations to amend the regulations to provide a "safe harbor" for valuing food donations. No decision has been made as to whether any such proposals should be adopted.

4. Exempt Status Concerns

The availability of the enhanced charitable deduction for certain in-kind contributions may in part explain the existence of "questionable" organizations having as their purported exempt purpose the distribution of donated inventory. Consider the following hypothetical:

> We Care About Hunger, Inc., is a 501(c)(3) organization created and controlled by an individual most recently employed in the direct mail industry. WCAH's stated exempt purpose is to provide humanitarian assistance to Romanian orphans. It solicits contributions of frozen food, pharmaceutical products, and infant formula, from manufacturing corporations. Many of these items are close to or past the expiration date printed on the package. WCAH also solicits books and used clothing (adult sizes). WCAH solicits financial support from the general public; its solicitation materials discuss its purpose of assisting Romanian orphans, and indicate WCAH itself provides

infant formula and medical programs overseas.

> WCAH reports donations of inventory on its Form 990 as "contributions received" at their full retail value on the date of donation. It reports as program expenses the retail value of items transferred to other organizations. WCAH provides no assistance directly to Romanian orphans. It transfers donated inventory to other 501(c)(3) organizations, which in turn frequently transfer title to additional IRC 501(c)(3) organizations. Although WCAH receives written statements from its donees that facially comply with the requirements under IRC 170(e)(3)(A)(iii), it cannot demonstrate that donated goods are actually used to benefit Romanian orphans (or other "ill, needy, or infants"). Its transfers to other organizations are the only program expenses reported on Form 990; 100% of its financial support is paid out to the founder and members of his family as administrative and fund-raising costs.

In determining if an organization that solicits and distributes in-kind contributions is exempt under IRC 501(c)(3), the Service must determine whether the organization's activities primarily further exempt purposes (Reg. 1.501(c)(3)-1(c)(1)), and whether those activities provide benefits to private individuals, other than benefits which are incidental to furthering exempt purposes (see Reg. 1.501(c)(3)-1(d)(2)). Concerns underlying IRC 501(c)(3) are similar to those underlying the enhanced deduction provision: ensuring use of donated property exclusively for charitable purposes. Thus, in considering the exemption of this kind of organization, similar considerations apply.

(a) Existence of exempt purpose: Can the organization demonstrate that its role in soliciting and distributing in-kind contributions furthers exempt purposes? The record-keeping requirements imposed by Reg. 1.170A-4A(b)(4)(i) may provide a source of information for verifying that such purposes exist. Where an organization cannot establish, through books and records, that it meets the requirements for exemption, exemption may be revoked. See, e.g., Reg. 1.6033-1(h)(2) and 1.6001-1(c), which provide record-keeping requirements for exempt organizations.

As discussed above, intermediary organizations whose activities consist of distributing in-kind contributions for use in the programs of other organizations may further charitable purposes. Care should be taken to distinguish legitimate intermediaries, such as community food banks, from organizations whose exempt purposes cannot be verified.

In the hypothetical situation outlined above, for example, WCAH's books and records do not demonstrate that in-kind contributions were ever used to benefit needy individuals. In addition, the facts provide a basis for questioning whether some items could have been used to further WCAH's stated exempt purposes. One may ask, for example, of what benefit English-language books and adult clothing could possibly be to Romanian orphans. Similarly, WCAH should be required to demonstrate that expired pharmaceutical products (for example) retained their potency at the time they were dispensed to patients, or whether the products otherwise have diminished in value, for example by being hazardous to use or consume, or illegal.

(b) Private benefit/inurement: Particularly where doubt exists as to whether in-kind contributions actually benefit needy persons, careful examination of the use of the organization's financial resources is warranted. The facts may show that the organization operates for the substantial non-exempt purpose of benefiting the business interests of related parties. See, e.g., Rev. Rul. 67-5, 1967-1 C.B. 123; International Postgraduate Medical Foundation v. Commissioner, T.C.M. 1989-36; Church by Mail, Inc. v. Commissioner, 765 F.2d 1387 (9th Cir. 1985), aff'g T.C.M. 1984-349. These interests may include for-profit fundraising organizations and entities which are paid for securing in-kind contributions (or for otherwise acquiring property) purportedly distributed as part of a charitable program.

(c) Valuation: The instructions to Form 990 require that in-kind contributions received be reported at the property's fair market value. Principles used in determining fair market value for deduction purposes may be a useful starting point; however, IRC 501(c)(3) organizations must report fair market value using generally accepted accounting principles for non-profit organizations. The applicable AICPA standard is an appendix to this article.

In some cases, an organization that takes title to property (and reports its value on Form 990 as contributions received and grants made) plays little or no role in facilitating the property's distribution for use in a program actually benefiting needy persons. Where an organization neither takes physical possession of property, nor exercises discretion or control over its re-distribution, it may not be appropriate to report any amount as contributions received/grants made on Form 990.

Where the value assigned to donated inventory for reporting purposes greatly exceeds actual fair market value, a basis for inquiring further into the legitimacy of the organization's exempt purposes may exist. In addition, penalties may be imposed for filing incomplete or incorrect returns, under IRC 6652(c). It may also be appropriate in such cases to examine whether the organization has been helping its donors inflate their deductions. See IRC 6700, 6701.

Finally, the National Office is considering whether, and in what circumstances, revocation of exempt status may be appropriate where an organization grossly overstates the value of donated inventory on Form 990. Consideration should be given to requesting technical advice if revocation on this basis is contemplated.

Over-valuation of in-kind contributions is more than a "mere" reporting problem. Over-valuation often results in significant benefits to the organization, resulting from the fact that its program expenditures, as a percentage of overall expenditures, will be greatly enhanced. It can present itself more favorably in soliciting monetary contributions from the public, and it may qualify to participate in federated fundraising drives or other programs. Form 990 is an important disclosure document for the public, state regulatory bodies, charity "watchdog" groups, and other public and private organizations. Accordingly, examination of the return should attempt to ensure that in-kind contributions are valued accurately.

5. Conclusion

Twenty years ago, an author writing about mail fraud schemes (E. Kahn, Fraud: The United States Postal Inspection Service and Some of the Fools and Knaves It Has Known 311-17 (1973)) devoted a chapter to an organization that solicited drug companies and surgical suppliers to donate inventory, purportedly to improve health facilities in the Philippines, which its promoters resold for their own profit. Upon receiving a tax exemption determination letter from the Service, the organization's promoter reportedly waved it in the air and exclaimed "Now I have a license to steal!"

Unfortunately, too many promoters of organizations involved in soliciting in-kind contributions appear to be of the same view. The IRC 501(c)(3) determination letter (and the IRC 170(e)(3) enhanced deduction) is indeed a "license to steal" if in-kind contributions are never used for exempt purposes, while promoters and related for-profit businesses are well-paid for their services. In attempting to address this apparently persistent and growing area of abuse, however, the Service must be careful that it does not frustrate Congressional policy of providing incentives for businesses to donate inventory for qualifying charitable purposes.

APPENDIX

American Institute of Certified Public Accountants, Audits of Voluntary Health and Welfare Organizations 20-21 (1974):

Chapter 5

Donated Material and Services[1]

Donated Material

Donated materials of significant amounts should be recorded at their fair value when received, if their omission would cause the statement of support, revenue, and expenses to be misleading and if the organization has an objective, clearly measurable basis for the value, such as proceeds from resale by the organization, price lists, or market quotations (adjusted for deterioration and obsolescence), appraisals, etc. Such recording is necessary to properly account for all transactions of the organization, as well as to obtain stewardship control over all materials received.

If the nature of the materials is such that valuations cannot be substantiated, it is doubtful that they should be recorded as contributions; used clothing received as contributions and subsequently given away might, for example, fall into this category. There is, of course, no valuation problem where donated materials are converted into cash soon after receipt, since the net cash received measures the contribution.

When donated materials are used in rendering the service provided by the organization, the cost of such materials included in the service is based on the value previously recorded for the contribution. If donated materials pass through the organization to its charitable beneficiaries and the organization merely serves as an agent for the donors, the donation normally would not be recorded as a contribution.

If significant amounts are involved, the value of the materials recorded as contributions and expenditures should be clearly disclosed in the financial statements. Free use of facilities and other assets used in fulfilling the

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[1] Donated securities and fixed assets are discussed [elsewhere].

organization's purposes should also be recorded as contributions, based on criteria similar to those outlined above. The basis of valuation should also be disclosed.