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June 12, 2019

Karin Gross
Special Counsel
Income Tax and Accounting
Office of the Chief Counsel
Internal Revenue Service
1111 Constitution Ave., NW
Washington, DC 20224

RE: Interpretation of “Similar Items” in Publication 561

Dear Ms. Gross:

The American Society of Appraisers (ASA) is writing to express concern with the current interpretation of the phrase “similar items” as it appears in Internal Revenue Service Publication 561¹ and in reference to § 1.170A-13 (c) (7) (iii). We believe the current interpretation creates undue burdens for donors and appraisers and does not provide additional benefit to donees or the Service. Additionally, we believe that the current interpretation may instead provide a vehicle for taxpayer fraud and abuse. We strongly encourage the Service to revisit its interpretation and either provide a Safe Harbor Letter that will reduce burdens on qualified appraisers who typically write one appraisal for property most appraisers consider similar or make the necessary changes to relevant Service Publications and Forms to update its interpretation.

The current interpretation’s view of what constitutes “similar items” focuses only on the medium, and not on broader concepts.

As currently written, the phrase “similar items” focuses only on the “category or type” of items involved. As the relevant sections goes on to read, it specifically calls out “lithographs, paintings, [and] photographs” as three examples of categories. We believe this narrow focus obscures larger commonalities that often accompany donated items. For example, numerous artists have worked in different mediums throughout their career, and a compelling argument exists that the common factor (the artist) makes these items “similar” in nature, irrespective of the fact that the medium changes. The same argument can be extended to artists who share a similar style or came from similar schools or periods – the overarching themes and motifs contained in the works make them “similar,” no matter the medium used to express those ideas.

¹ See p. 9, Publication 561, *Determining the Value of Donated Property*, published April 2007.

Broadening out further, when an individual donates a larger collection, that collection tends toward having a shared focus or message, even if it contains multiple artists or media. Through the individual collector’s selection process, they have instilled in that specific collection a message or messages they wish it to convey. Separating out the items into individual appraisals runs counter to the donor’s intent that the collection be viewed holistically. Similarity applies here through the conscious decisions of the collector/donor.

Backing out the focus to consider antiques, this issue only grows in scope and impact. One client may have multiple items as part of a single donation, all of which fall broadly under the scope of furnishings, but because the type of items varies (a grandfather clock, dining room table, and lamp, for example), the appraiser must complete both a separate appraisal report and Form 8283 for each item. To the donor taxpayer, there is no logical reason why these seemingly related items (furnishings, to their mind) must be siloed into separate appraisal and separate 8283s, especially when being donated to a single recipient.

Where there is no clear linkage between items, we would agree with the Service that separate appraisals are likely appropriate; however, a significant volume of donative behavior falls into one of the three examples discussed above – where the items are “similar” in ways that go beyond simply looking at the medium used, either through a shared artist, style, school, period, or the collecting intent of the donor. To rely only on medium in determining whether items are “similar” ignores broader artistic and cultural factors.

Neither the donor, the donee, the appraiser, nor the Service benefit from the creation of multiple appraisals – and may, in fact, be creating a vehicle for fraud and abuse.

The idea that isolating items into different appraisals based on media improves the overall process of claiming a deduction for a noncash charitable contribution can be considered faulty:

- For donors, breaking one intended charitable contribution across multiple appraisals adds a level of cost and complexity to the donation, and may dissuade those looking to donate large collections or those whose mediums are diverse.
- For donees, to the extent that they wish to review the supporting appraisal as part of receiving the donation, it provides no more substantive information that if the items had been valued in one appraisal report, and places increased pressure on their recordkeeping resources to ensure that all appraisals are properly grouped together with each donation.
- For appraisers, this augments the boiler-plate work that goes into each appraisal report – defining the scope of work, efforts made to ensure competence, ethics, and a declaration that the appraiser meets the Service’s requirement of being a “qualified appraiser.” None of that repeated work does anything to improve the overall quality or reliability of the appraiser’s opinions.

Each of the above gives enough reason for allowing a more inclusive interpretation of what constitutes “similar items.” However, the Service has an additional consideration that, if left unattended, may provide unscrupulous taxpayers an opportunity to manipulate claimed donation values while avoiding additional scrutiny.

It is well understood that, where an individual claimed deduction exceeds \$50,000, any audit of the return for which the deduction is claimed will see the deduction receive extra scrutiny. Using the current interpretation of “similar items,” a taxpayer could donate multiple items that, because of differences in medium, would require both their own appraisal for each item and their own Form 8283 that accompanies the return. By disambiguating the items, the taxpayer has three distinct deductions, each with their own value, and each able to stay well below the \$50,000 threshold – even if the total claimed amount would exceed the threshold. This approach avoids the extra scrutiny the donations would otherwise receive.

A more nefarious event could, however, occur under the current interpretation. Since each item is isolated into its own appraisal and Form 8283, there exists incentive for the taxpayer or their representative to seek out inflated values for the claimed deduction. By using the current interpretation advantageously, the taxpayer can reduce their tax liability and escape increased scrutiny of their donative activities should they be audited – thereby benefitting twice through the current interpretation. Neither outcome could have been intended by the Service.

By keeping all donated property inside of one appraisal report, it accomplishes the twin goals of reducing burdens to the taxpayer (in the form of reduced cost and total documentation), and provides the Service with a single, unifying touchpoint against which multiple 8283s can be compared. Reliance on a single appraisal removes the ability of unscrupulous taxpayers to seek inflated values on donated items, as they would no longer be able to disaggregate those values across several appraisals, and instead would be forced to justify why they chose to rely on multiple appraisals – inverting the current environment in a positive way.

This approach still allows for the use of multiple 8283s where such use is appropriate – to be clear, we do not object to the use of multiple 8283s – but instead provides a single underpinning appraisal against which all donative activity (whether in a single 8283 or across several 8283s) can be compared. We believe this approach is in the best interest of all parties involved in the donative activity.

By allowing appraisers to use professional judgment as to when items are “similar,” both the burden to those seeking to claim a deduction and the potential for fraud and abuse are addressed.

Qualified appraisers are exposed to a broad range of items within their individual areas of competency or expertise. This exposure places the appraiser in the best position to determine whether the items to be donated (and whose donation is the basis for a claimed deduction) are “similar” enough to be contained in one appraisal report, or if the items are dissimilar enough that their amalgamation in the same report would be materially misleading to the donor, donee, or the Service in some way.

One possible way to address this situation is for the Service to issue a Safe Harbor Letter, indicating that it will defer to the reasonable interpretation of the appraiser to determine when items are or are not “similar”, possibly also providing examples developed in conjunction with the appraiser community to provide clarity around the kinds of situations the Service foresees as involving “similar items” under this new approach.

Should the Safe Harbor Letter not be preferred, we would suggest the Service consider the following language, or something similar, be used in place of the current language used in Publication 561:

The phrase “similar items” means those items who share physical, artistic, social, cultural, or financial characteristics and whose value can be fairly represented in one appraisal report without being materially misleading.

This would also require conforming changes to Publication 526, Form 8283, and the instructions that accompany Form 8283.

We believe this approach leaves the determination of whether an item is “similar” in the hands of a qualified appraiser who is best situated to make such a decision, reduces cost burdens to the donor taxpayer, simplifies receipt for the donee institution, and eliminates unneeded duplication by the appraiser. And, most critically, heads off a potential avenue for abuse.

If you have any questions or wish to discuss our views further, please contact John D. Russell, JD, Senior Director of Government Relations and Business Development for the American Society of Appraisers at 703-733-2103, or by email at jrussell@appraisers.org.

Sincerely,
American Society of Appraisers