

# *Estate of Bullard v. Commissioner: Interaction of Sections 170(e)(1) and 1011(b)*

## I. INTRODUCTION

A bargain sale to a charity is a transaction that is in part a gift and in part a sale for federal income tax purposes. “A bargain sale occurs when property is sold to a charity for an amount less than its fair market value.”<sup>1</sup> Such a sale presents complex statutory construction problems in complying with the requirements of Internal Revenue Code sections 170(b)(1), 170(e), and 1011(b).<sup>2</sup> Although other problems exist in the application of section 170 in conjunction with section 1011(b), this Note will examine the interaction of the two sections that existed in the case of *Estate of Bullard v. Commissioner*.<sup>3</sup> An explanation of relevant code sections is necessary for the analysis.

The amount of charitable contribution in a bargain sale is generally the difference between the fair market value of the property sold and its sale price.<sup>4</sup> Under section 170(b)(1)(C), the taxpayer’s annual deduction for the contribution of capital gain property to a public charity is limited to thirty percent of the taxpayer’s adjusted gross income.<sup>5</sup> If the taxpayer elects application of section 170(e)(1), however, the annual deduction limitation is fifty percent rather than thirty.<sup>6</sup> Section 170(e)(1)(A) requires the amount of contribution be reduced by the amount of the gain that would not have been long-term capital gain if the property had been sold at its fair market value.<sup>7</sup> In addition, section 170(e)(1)(B) requires that if capital gain property which is tangible personal property is contributed to a donee whose use of the property is unrelated to its tax exempt function or is contributed to a private foundation, the amount of contribution must be reduced by fifty percent of the gain that would have been long-term capital gain had the property been sold at its fair market value.<sup>8</sup>

Section 1011(b) provides the following with respect to bargain sales:

Bargain sale to a charitable organization—If a deduction is allowable under section 170 (relating to charitable contributions) by reason of a sale, then the adjusted basis for determining the gain from such sale shall be that portion of the adjusted basis which bears

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1. Jackson, *The New Rules Governing Bargain Sales to Charitable Organizations Under the Tax Reform Act of 1969*, 24 TAX LAW. 279 (1971).

2. Taggart, *The Charitable Deduction*, 26 TAX L. REV. 63, 126 (1970).

3. 87 T.C. 261 (1986).

4. *Id.* at 265.

5. I.R.C. § 170(b)(1)(C)(i). Unless otherwise indicated, all statutory references are to the Internal Revenue Code of 1954, as amended and in effect during 1977. In addition, all references to Treasury regulations refer to those in effect during 1977.

6. I.R.C. § 170(b)(1)(C)(iii), (d)(1), (e)(1).

7. *Id.* § 170(e)(1)(A).

8. *Id.* § 170(e)(1)(B). The regulations provide some guidance in determining whether property is unrelated to a donee’s tax exempt function. For example, regulation 1.170A-4(b)(3)(i) provides that if a painting is contributed to an educational institution and that organization uses it for educational purposes, such as placing it in the library for display and study, the use is a related use; but if the painting is sold and the proceeds are used for educational purposes, the use is unrelated. Private foundations are generally defined in section 509(a), but the charitable provisions addressed in this Note do not apply to some private foundations. See I.R.C. § 170(e)(1)(B)(ii), (b)(1)(D).

the same ratio to the adjusted basis as the amount realized bears to the fair market value of the property.

The regulations issued under that section require that in determining whether a charitable contribution deduction is allowable under section 170, the amount by which the contributed portion of property must be reduced under section 170(e)(1) is the amount determined by taking into account the gain that would have resulted if the *entire* property had been sold by the donor at its fair market value.<sup>9</sup> The Internal Revenue Service's ("Service") position, therefore, is that no deduction is allowable unless the contribution (*i.e.*, excess of fair market value over sales price) exceeds the *appreciation reduction* of section 170(e)(1) for the *entire* property.<sup>10</sup> Examples in the regulations confirm this position.<sup>11</sup>

## II. ESTATE OF PAULINE E. BULLARD

### A. Problem Presented

The taxpayers (Bullards) sold their interest in a medical center to a qualified charitable organization. They elected to apply the provisions of section 170(e) to the sale to utilize the fifty percent limitation. The amounts relating to the sale of the capital gain portion of the property are illustrated in the following manner:<sup>12</sup>

Fair market value of taxpayer's interest	\$1,106,478
Proceeds from sale of interest	941,684
Contribution portion	<u>\$ 164,794</u>
Fair market value	\$1,106,478
Adjusted basis	654,632
Total gain	<u>\$ 451,846</u>

In determining whether the taxpayers were entitled to a charitable contribution deduction under section 170, the court had to determine whether *property contributed*, as used in that section, referred to the *entire* property or the *contributed portion* of the property.

If the Service's position is accepted, the contribution of \$164,794 must be reduced by fifty percent of the gain from a hypothetical sale of the *entire* property, or \$225,923 (fifty percent of \$451,846). Thus, no contribution would be allowed.<sup>13</sup> On the other hand, if the taxpayers' position is accepted, the contribution is reduced by fifty percent of the gain from a hypothetical sale of the contributed portion, or \$33,648 (fair market value of contribution \$164,794 less basis attributed to contributed portion of \$97,498 (fair market value of contributed portion divided by

9. Treas. Reg. § 1.1011-2(a)(1).

10. Estate of Bullard v. Commissioner, 87 T.C. 261, 267-68 (1986).

11. Treas. Reg. §§ 1.170A-4(d), Examples 5-6, 1.1011-2(c), Examples 4-7.

12. Estate of Bullard v. Commissioner, 87 T.C. 261, 263 (1986).

13. *Id.* at 267.

the total fair market value, multiplied by the total adjusted basis), multiplied by fifty percent). This results in a charitable contribution deduction of \$131,146.<sup>14</sup>

### B. Tax Court Opinions in the Case

The majority opinion accepts the taxpayers' admission that the regulations under sections 170(e) and 1011(b) are consistent with the Service's position.<sup>15</sup> The majority, therefore, had to consider whether such regulations should be invalidated as asserted by the taxpayers.

The majority held that the taxpayers' position was the only rational interpretation of the statutes.<sup>16</sup> The opinion stated that the Service had failed to raise any rational basis for the allocation provisions in issue, other than the enhancement of tax revenues.<sup>17</sup> The court concluded that regulations 1.170A-4(c) and 1.1011-2 are invalid to the extent that they are inconsistent with the majority opinion.<sup>18</sup>

The majority began its analysis with an examination of the statutory language.<sup>19</sup> The first illustration of the regulation's unreasonableness is the distinction drawn between bargain sales and contributions of *less than the taxpayer's entire interest* in the property. Unlike bargain sale treatment, the regulations provide that where the taxpayer contributes a partial interest in property for which a deduction is allowable under section 170(f), the unrealized appreciation of only the contributed portion should be used in computing the section 170(e)(1) reduction.<sup>20</sup> The statute under section 170, however, provides no distinction between bargain sales and a contribution of a partial interest.<sup>21</sup>

Another basis for the majority's decision to invalidate the regulations was the inconsistency with which the regulations treat *the property contributed* within the context of bargain sales.<sup>22</sup> When the appreciation reduction (using the entire property) exceeds the contribution portion of the bargain sale, the property contributed refers to the entire property. Where the contribution exceeds the reduction, however, the regulations treat the phrase as referring to only the contributed portion of the property.<sup>23</sup> That is, once it is determined that a deduction is allowable (computed using the unrealized gain in the entire property), the regulations provide that the contribution be reduced only by the gain in the contributed portion rather than the entire property.

The majority next reasoned that the history and purpose of the statutory provisions require this result.<sup>24</sup> The opinion concluded that the history provided

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14. *Id.*

15. *See id.* at 265.

16. *Id.* at 281.

17. *Id.*

18. *Id.*

19. *Id.* at 270.

20. *Id.* at 271. *See also* Treas. Reg. § 1.170A-4(c)(1).

21. *Estate of Bullard v. Commissioner*, 87 T.C. 261, 271 (1986).

22. *Id.* at 271-72.

23. *Id.*

24. *Id.* at 273-80 (citing H.R. REP. NO. 413, 91st Cong., 1st Sess. 53-56, reprinted in 1969 U.S. CODE CONG. & ADMIN. NEWS 1645, 1699-1701).

almost no guidelines about the interaction of sections 170(e)(1) and 1011(b). Rather, the history described each rule “as if it existed in isolation.”<sup>25</sup> Further, section 1011(b) was designed to recognize the sale element of the bargain sale.<sup>26</sup>

The majority further concluded that the regulations would understate both the charitable contribution deduction and the realized gain by the amount of the taxpayers’ basis in the contributed portion when the appreciation reduction (using the entire property) equals or exceeds the contribution amount.<sup>27</sup> If the property is capital gain property, as in this case, the regulations would reduce the contribution by 100% of the gain on the contributed portion. This result places the taxpayer in a less favorable position than he or she would have been if he or she had sold the property at its fair market value and donated the excess over the bargain sale price.<sup>28</sup>

Such a result distorts Congress’ purpose in enacting the deemed sale substitute of section 170(e)(1). For example, assume capital gain property with a fair market value of \$1,000 and a basis of \$200 is sold for \$900 to a qualified charitable organization. Under the regulations the taxpayer would not be entitled to a contribution and would realize long-term capital gain of \$700, thereby increasing taxable income by \$350 (at the time of this case, the long-term capital gain deduction percentage was fifty percent). If the taxpayer had sold the property for \$1,000 and then donated \$100, however, he or she would be entitled to a \$100 charitable contribution deduction and would realize a \$800 long-term capital gain. This would result in only a \$300 taxable income increase (\$800 gain less \$400 long-term capital gain deduction less \$100 charitable contribution deduction). Under the taxpayer’s position of reducing the contribution by the unrealized appreciation of the contributed portion, an equivalent result is reached.<sup>29</sup> In each instance—bargain sale or a sale with cash contribution—taxable income is increased by \$300.

Judge Parker’s concurring and dissenting opinion concluded that the majority’s result could be attained without invalidating the regulations under sections 170(e)(1) and 1011(b).<sup>30</sup> Judge Parker refused to accept the parties’ position that the regulations, as written, precluded the taxpayers from any charitable contribution deduction.<sup>31</sup> Instead, she argued that section 170(e)(1) should be analyzed in terms of its *mandatory* and *elective* elements. That is, section 170(e)(1) *mandates* the reduction of the contribution deduction if the tangible personal property contributed is unrelated to the purpose or function of the donee or if it is contributed to certain private foundations.<sup>32</sup> Absent one of these conditions, a taxpayer may still elect to have the provisions of section 170(e)(1) apply.<sup>33</sup> Judge Parker concluded that because taxpayers in this instance had elected under section 170(b)(1)(C)(iii) to have the

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25. *Id.* at 277–78.

26. *Id.* at 279.

27. *Id.* at 280.

28. *Id.*

29. *Id.* at 280 n.10.

30. *Id.* at 286 (Parker, J., concurring in part and dissenting in part).

31. *Id.*

32. *Id.* at 293–95. See *supra* text accompanying notes 7–8.

33. See *supra* text accompanying notes 6–8.

reduction rules of section 170(e)(1)(B) apply, the appreciation reduction had no applicability to regulation 1.1011-2(a)(1).<sup>34</sup>

Under Judge Parker's analysis, a court would begin by considering section 1.1011-2(a)(1) of the regulations.<sup>35</sup> In determining whether any charitable contribution is *allowable* under section 170, the contribution must be reduced under section 170(e)(1). Section 170(e)(1), however, does not apply because the property donated was not used by the donee in a manner unrelated to the purpose of the exempt organization, and the donee was not a private foundation. Accordingly, a charitable contribution is allowable under section 170(b), subject to percentage limitation. Section 1011(b), therefore, does apply and the basis of the property must be apportioned between the sale and the contribution. After this apportionment and initial allowability test, Judge Parker concluded, section 1011(b) and the regulations issued thereunder have no applicability.<sup>36</sup> Remember, section 1.1011-2(a)(1) of the regulations is the provision that specifically uses the phrase *entire property*.

Judge Parker believes that the court should return to section 170 and treat only the contributed portion of the property as the property deemed sold under section 170(e)(1).<sup>37</sup> The charitable contribution, therefore, would be reduced by only fifty percent of the long-term capital gain that would have resulted if the contributed portion had been sold.<sup>38</sup> She bases her position on the fact that no reduction is necessary under the express language of section 170(e)(1). A deduction, therefore, is allowable under section 170(b). The taxpayer has merely elected to have the provisions of section 170(e)(1) apply to increase the percentage limitation for charitable contributions from thirty percent to fifty percent.<sup>39</sup>

Judge Wright's concurring opinion addressed separately the issues raised by Judge Parker's opinion.<sup>40</sup> The majority had not specifically addressed Judge Parker's argument. The concurring opinion concluded that no authority existed in the Internal Revenue Code or regulations to support the analysis adopted by Judge Parker's opinion. That is, no authority separates treatment of the contribution deduction into mandatory and elective elements.<sup>41</sup>

In his concurring and dissenting opinion, Judge Whitaker agreed with Judge Parker's opinion.<sup>42</sup> He concluded, however, that the government's position should be accepted if it is necessary to avoid invalidating the regulations.<sup>43</sup> Judge Whitaker believed the court should refrain from substituting its judgment about the reasonableness of the regulations for that of the Secretary of the Treasury. He maintained that Supreme Court decisions required this.<sup>44</sup> Because congressional intent was far

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34. Estate of Bullard v. Commissioner, 87 T.C. 261, 293-95 (1986) (Parker, J., concurring in part and dissenting in part).

35. *Id.* at 293.

36. *Id.* at 294.

37. *Id.* at 294-95.

38. *Id.* at 295. See *supra* text accompanying note 8.

39. See *supra* text accompanying note 6.

40. Estate of Bullard v. Commissioner, 87 T.C. 261, 282 (1986) (Wright, J., concurring).

41. *Id.* at 283-84.

42. *Id.* at 296.

43. *Id.*

44. *Id.* at 296-97 (citing National Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472 (1979); Bingler v. Johnson, 394 U.S. 741 (1969); United States v. Correll, 389 U.S. 299 (1967)).

from clear in this area and Congress had not expressed criticism of the regulations despite consideration of these statutory provisions, he accepted the regulations as valid.<sup>45</sup>

### III. ANALYSIS

#### A. *Should the Court Determine the Validity of the Regulations?*

Judge Parker concluded that the majority's result could be reached without invalidating the regulations under sections 170(e)(1) and 1011(b).<sup>46</sup> Before discussing whether the regulations should be declared invalid, this Note must first address Judge Parker's position to determine whether such analysis is necessary.

As previously stated, Judge Parker's position rests on a distinction between the *elective* and *mandatory* applications of section 170(e)(1).<sup>47</sup> This analysis is supported neither by statutory language or intent nor by the regulations. No applicable statutory provision or regulation treats *mandatory* and *elective* elements differently.<sup>48</sup> In fact, sections 1.170A-4(b)(2) and 1.170A-8(d)(2)(i)(a) of the regulations treat *elective* and *mandatory* reductions identically.

The taxpayers acknowledge that the regulations as written would deny them a charitable contribution for the year in question.<sup>49</sup> The basis of their argument, therefore, is that the regulations are invalid to the extent they require a reduction for the appreciation in the entire property.<sup>50</sup> Thus, the court should accept the taxpayers' position and determine the correctness of their argument. Judge Parker's search for a method to reach the result the taxpayers desire is both unnecessary and unwarranted. The court should consider only the parties' arguments.

Even if one were to accept Judge Parker's position, the validity of the regulations with respect to *mandatory* reductions under section 170(e) would still be in question.<sup>51</sup> For example, if the Bullards had sold property to a qualified charitable organization whose use of the property was unrelated to its tax exempt function, section 170(e) would require a reduction in the contribution. The election permitted under section 170(b)(1) would not apply. Judge Parker would not be able to use her analysis because it was based on that election. The same inconsistencies addressed by the majority opinion would still exist in such a contribution. This Note and the majority opinion, therefore, discuss issues and principles that are relevant even if one accepts Judge Parker's views.

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45. *Id.* at 296.

46. *Id.* at 286 (Parker, J., concurring in part and dissenting in part).

47. *See supra* text accompanying notes 32-34.

48. *See* I.R.C. §§ 170(e)(1), 170(b)(1)(C), 1011(b).

49. *Estate of Bullard v. Commissioner*, 87 T.C. 261, 265 (1986).

50. *See* Brief for Petitioner at 8-14, *Estate of Bullard v. Commissioner*, 87 T.C. 261 (1986).

51. If the Bullards in this case had given the capital gain property to a private foundation, § 170(e)(1)(B) would mandate reduction of the contribution amount and Judge Parker's analysis would fail.

## B. Validity of Regulations

### 1. Standard of Review

The majority opinion (through examination of Supreme Court cases) addressed the standard for determining the validity of Treasury regulations. The opinion emphasized the Supreme Court's deference to Treasury regulations, stating: "regulations command our respect, for Congress has delegated to the Secretary of the Treasury, not to this Court, the task 'of administering the tax laws of the Nation.'"<sup>52</sup> "We therefore must defer to Treasury Regulations that 'implement the congressional mandate in some reasonable manner.'"<sup>53</sup> The majority concluded, however, that under any standard of review, regulations are not valid unless they are reasonable and consistent with the statute's language, origin, and purpose.<sup>54</sup> The majority, by quoting the Supreme Court, emphasizes this principle of construction: "even if a regulation is not 'technically inconsistent' with the statutory language it seeks to interpret, if it is 'manifestly inconsistent' with what Congress 'surely . . . intended' to do, then it cannot stand."<sup>55</sup> The Tax Court, therefore, must attempt to determine what Congress intended in enacting the statutory provisions in question, and whether the regulations are consistent with that intent.

It does not follow that when alternatives exist, a court must sustain the regulation, where the alternative chosen is unrealistic. To hold otherwise would be to sustain virtually all regulations when their validity is questioned.<sup>56</sup> In *United States v. Cartwright*,<sup>57</sup> the Supreme Court invalidated a regulation despite the fact that alternatives existed in choosing the regulation. The Internal Revenue Code required that for estate tax purposes, the gross estate must include the value of property a decedent held at death. Under the regulations, open mutual funds were to be valued at their public offering price or *asked* price at the date of decedent's death. This price included a fixed sales charge. At any given time, shares of the mutual fund in question were being sold at two distinct prices because private trading in the mutual fund did not exist. Initial public purchases were made at the *asked* price, but shareholders could sell their shares only at statutorily defined redemption prices.<sup>58</sup> The issue, therefore, was whether the regulation requiring inclusion in the estate at the *asked* price was reasonable given that the taxpayer could sell the asset only at a reduced redemption price.<sup>59</sup> Over three dissenting views, the Court invalidated the regulation, stating that it assigned a value to mutual fund shares that "an estate could not hope to obtain and that the fund could not offer."<sup>60</sup>

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52. *Estate of Bullard v. Commissioner*, 87 T.C. 261, 268 (1986) (quoting *United States v. Cartwright*, 411 U.S. 546, 550 (1973); *United States v. Correll*, 389 U.S. 299, 307 (1967)).

53. *Id.* (quoting *United States v. Correll*, 389 U.S. 299, 307 (1967); *National Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472, 476-77 (1979)).

54. *Id.* (citing *National Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472, 477 (1979)).

55. *Id.* (quoting *United States v. Cartwright*, 411 U.S. 546, 557 (1973)).

56. *See United States v. Cartwright*, 411 U.S. 546, 557 (1973).

57. 411 U.S. 546 (1973).

58. *Id.* at 547-49.

59. *Id.* at 547.

60. *Id.* at 553.

According to the majority, the regulation was unreasonable.<sup>61</sup> It noted, however, that because other types of property are taxed at values above those that could be realized during a sale,<sup>62</sup> in a sense the regulation was reasonable. One could contend that where alternatives exist, the Treasury may promulgate any of these alternatives as regulations, within constitutional limits. Although these cases leave courts with abstract principles and provide little direction for their application, courts must struggle to determine what is reasonable: in the context of this Note, whether the regulations under the bargain sale provision and charitable contribution provisions are reasonable in light of the statutory language, surrounding regulations, and legislative history.

## 2. Legislative History

Absent explicit language in section 170 regarding bargain sales, the starting point in determining reasonableness must be with the legislative history of sections 170(e)(1) and 1011(b). Congress enacted section 1011(b) in 1969 to control charitable contribution abuses by high income taxpayers.<sup>63</sup> Under the old law, a full deduction was allowed for the contribution element (fair market value less the sale price), and no gain was recognized unless the sale price exceeded the adjusted basis of the entire property.<sup>64</sup> The only committee explanation of the bargain sale rule was as follows:

Bargain sales—In the case of so-called bargain sales to charities—where a taxpayer sells property to a charitable organization for less than its fair market value (often at its cost to the taxpayer)—the bill provides that the cost or basis of the property is to be allocated between the portion of the property “sold” and the portion of the property “given” to the charity on the basis of the fair market value of each portion. For example, if a taxpayer sold land with a fair market value of \$20,000 to a charitable organization (which was not a private foundation) at his cost of \$12,000, he would be required to allocate sixty percent of the cost (\$7,200) to the portion “sold” to the charity (\$12,000) and forty percent of the cost (\$4,800) to the portion “given” to the charity (\$8,000). Thus, this taxpayer would be required to include \$4,800 as gain from a sale of a capital asset in his tax return, and as under present law would be allowed a charitable contribution deduction of \$8,000.<sup>65</sup>

Note that the history does not mention denying a charitable contribution. It does not indicate that Congress intended a special rule to apply when section 170(e)(1) is involved. The example used, in fact, would not involve section 170(e)(1) because the asset was sold to an organization that was not a private foundation.<sup>66</sup>

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61. *See id.*

62. *See id.*

63. Weber & Stevenson, *Charitable Bargain Sales and the Allowability Test—A Tax Trap*, 56 TAXES 101, 107 (1978).

64. *Id.* at 107.

65. H.R. REP. NO. 413, 91ST CONG., 1ST SESS. 55–56, reprinted in 1969 U.S. CODE CONG. & ADMIN. NEWS 1701.

66. *See* I.R.C. § 170(e)(1)(B).



The government argues that because committee reports under section 170(e) did not mention bargain sales when referring to *property*, they clearly meant the entire property.<sup>67</sup> When provisions for bargain sales were added in 1969, the committee reports continued to use the word *property* to refer to the entire property transferred rather than just to the contributed portion.<sup>68</sup> Based on the limited language from the committee reports quoted above, however, the more logical view is that Congress never considered the situation involved in this case. Numerous other problems, in addition to those present in the *Bullard* case, exist in the interaction of sections 170 and 1011.<sup>69</sup> Congress did not address these problems in the legislative history. Thus, one may assume they did not approve, by their silence, of any one particular treatment of any of these problems. No guidelines, in fact, exist concerning the interaction of section 170(e)(1) and the bargain sale rule.

The explicit language of the legislative history does not provide any specific intent. Therefore, one must consider whether the regulations are reasonable in light of other applications and purposes of the statutes.

### 3. Unreasonableness of the Regulations

The first illustration of the regulations' unreasonableness, as the majority opinion points out, is the distinction drawn between bargain sales and contributions of less than the taxpayer's entire interest.<sup>70</sup> In a bargain sale, the regulations treat *property contributed* as the *entire* property in computing the section 170(e)(1) reduction.<sup>71</sup> When a taxpayer contributes only a portion of a piece of property, however, the regulations allow the taxpayer to allocate the adjusted basis of the property in computing the section 170(e)(1) reduction.<sup>72</sup> The statutes do not draw such a distinction.<sup>73</sup> In both cases the taxpayer has contributed a portion of his or her property to a qualified charitable organization. The difference is the taxpayer's use of the remaining portion. The tax law should not be concerned with whether the taxpayer sells that remaining portion along with the contribution or maintains possession of it and perhaps sells it at a later time. No tax policy or social goals appear to be furthered through this different treatment. It is doubtful Congress intended such a result.

A second problem with the regulations, as the majority illustrates, is that they treat *property contributed* differently in the context of bargain sales.<sup>74</sup> Where the section 170(e)(1) reduction exceeds the contribution (computed using the entire property), the regulations deny a charitable contribution deduction and no allocation of basis between the contributed portion and the noncontributed portion is required.<sup>75</sup>

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67. See Brief for Respondent at 19, *Estate of Bullard v. Commissioner*, 87 T.C. 261 (1986) (citing H.R. REP. NO. 1447, 87th Cong., 2d Sess. 69 (1962)).

68. See *id.* at 19-20.

69. See Taggart, *supra* note 2, at 135-40.

70. See *supra* text accompanying notes 19-21.

71. See *supra* note 9 and accompanying text.

72. Treas. Reg. § 1.170A-4(c)(1).

73. See §§ 170(e)(1), 1011(b).

74. See *supra* text accompanying notes 22-23.

75. See Treas. Reg. §§ 1.170A-4(d), Examples 5-6, 1.1011-2(c), Examples 5-6.

When the section 170(e)(1) reduction does not exceed the contribution amount, however, the regulations require the taxpayer to allocate the adjusted basis between the contributed and noncontributed portions, and the contribution is then reduced by the appreciation on only the contributed portion.<sup>76</sup> In other words, *property contributed* in one instance refers to the *entire* property while in another instance it refers to the contributed portion. The regulations, therefore, require two inconsistent interpretations of the phrase *property contributed*. The use would depend on the sales price charged as well as other factors. No indication exists, however, that Congress intended the phrase to possess more than one meaning.

As the majority opinion illustrates, the regulations under section 1011(b) put the taxpayer in a less favorable position than he or she would have been in if he or she sold the entire property at its fair market value and then donated the excess over the sales price.<sup>77</sup> This distorts Congress' purpose in enacting the section, which was to ensure that the taxpayer receives no contribution deduction without realizing an inherent gain on the portion of the property sold.<sup>78</sup> The distortion arises arbitrarily, depending on the bargain sale price.

The unreasonableness is most apparent when considering the tax laws in effect at the time the regulations were enacted. For example, consider a taxpayer selling a painting in 1977 for \$60,000. The painting's fair market value was \$100,000 and the adjusted basis was \$20,000. Assume the taxpayer was in the seventy percent tax bracket. Assuming no other limitations come into play, by decreasing the bargain sales price from \$60,000 to \$59,999, the taxpayer increases his or her after-tax proceeds by \$14,799.<sup>79</sup> It is obvious that Congress would find this result unreasonable and unintended.

#### 4. Impact of the Tax Reform Act of 1986

The Tax Reform Act of 1986<sup>80</sup> would have a significant impact in a case such as *Bullard*. Section 170(e)(1) now requires that if capital gain property used by the donee is unrelated to its tax exempt function or is for the use of a private foundation, the amount of contribution must be reduced by the full amount of gain that would have been long-term capital gain had the property been sold at its fair market value.<sup>81</sup> At the time of the *Bullard* case, only fifty percent of the gain would reduce the contribution. The change in part results from the elimination of the long-term capital gain deduction. This new treatment applies to taxable years beginning after December 31, 1986.<sup>82</sup>

This change in the law has the practical effect of treating similarly contributions of ordinary income property and certain capital gain property donated to private foundations or to donees who use it in a manner unrelated to their tax exempt

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76. See Treas. Reg. § 1.1011-2(c), Example 4.

77. See *supra* text accompanying notes 28-29.

78. Estate of Bullard v. Commissioner, 87 T.C. 261, 279 (1986).

79. See Weber & Stevenson, *supra* note 63, at 102-06.

80. Pub. L. No. 99-514, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 2085.

81. I.R.C. § 170(e)(1) (West Supp. 1987).

82. *Id.* § 301(c).

functions. That is, section 170(e)(1)(A) has required that all gain, which would *not* have been long-term capital gain if the property had been sold at its fair market value, must reduce the charitable contribution.<sup>83</sup> That section has not changed since the *Bullard* case. On the other hand, as *Bullard* indicates, section 170(e)(1)(B) required that only fifty percent of certain long-term capital gains reduce the contribution amount.<sup>84</sup> That section is amended now, requiring all of the gain to reduce the contribution deduction.<sup>85</sup> Thus, the ordinary income portion and capital gain portions are treated similarly, assuming the donation is to a private foundation or a donee whose use of the property is unrelated to its tax exempt function.

The similar treatment is significant because the *Bullard* decision has little impact if the property contributed was ordinary income property.<sup>86</sup> The regulations as written would result only in a mischaracterization of income. For example, assume ordinary income property with a fair market value of \$1,000 and a basis of \$200 is sold for \$900 to a qualified charitable organization.<sup>87</sup> Under section 170(e)(1)(A) and the regulations, the taxpayer would not be entitled to a contribution deduction and would recognize a \$700 gain, thereby increasing taxable income by \$700.<sup>88</sup>

Based on the *Bullard* decision, the basis would now be divided between the contributed portion and the sold portion. The \$100 contribution would be reduced only by the gain on the contributed portion, or \$80. This allows a \$20 charitable contribution. The gain on the portion sold is now affected because the basis is only the basis of the portion sold, or \$180 (ninety percent of property sold times total basis of \$200). The gain, therefore, is \$720 (\$900 sale price less \$180 basis). Note that the taxpayer's net taxable income is increased by \$700, the same result based on the regulations. The difference between the regulation's treatment and the court's disposition is the \$20 extra gain recognized and \$20 contribution deduction offsetting the gain. Had the taxpayer sold the property and contributed \$100, he or she would recognize an \$800 gain and be entitled to a \$100 deduction, thereby increasing his or her taxable income by the same amount, \$700.

With the change in the Tax Reform Act of 1986, capital gain property such as that sold by the Bullards will receive similar treatment.<sup>89</sup> The effect of the regulations as written, therefore, would not have the drastic impact on taxable income they had in *Bullard*. In fact, the significance of the decision is reduced.

This author believes, however, that the decision was necessary to invalidate the regulations discussed in this Case Comment and will continue to be important. First, cases may arise involving contributions of property similar to the *Bullard* situation for years prior to December 31, 1986, the effective date of the change in the Tax Reform Act of 1986.<sup>90</sup> Note that while the *Bullard* case was not resolved until the summer of

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83. *Id.* § 170(e)(1)(A) (not affected by Tax Reform Act of 1986).

84. *See supra* text accompanying note 8.

85. *See supra* note 81 and accompanying text.

86. *Estate of Bullard v. Commissioner*, 87 T.C. 261, 280 n.10 (1986).

87. *Id.*

88. The amount of contribution, \$100, must be reduced by the amount of appreciation in the *entire* property, leaving no contribution.

89. *See supra* text accompanying notes 83-85.

90. *See supra* note 82 and accompanying text.

1986, it involved the tax years 1977 through 1979. Second, the mischaracterization of items as income or deductions that will continue to occur may have significance for some taxpayers. Long-term capital gains will still be compared with other capital gains and losses and the netting process involved may result in different tax treatments. Also, percentage limitations or other limits a taxpayer must meet to obtain the full benefit of the charitable contribution will continue to exist. Finally, the elimination of the long-term capital gain deduction that caused the change in section 170(e)(1)(B) may be short-lived.<sup>91</sup> If tax rates increase, it is likely that some sort of capital gain deduction will return and section 170(e)(1)(B) will be amended accordingly. At that point, if the regulations had not been invalidated by *Bullard*, significant changes in taxable income would still result because the taxpayer was not aware of the traps in sections 170 and 1011. With the *Bullard* decision, however, tax treatment of bargain sales and outright sales and contributions are treated consistently.

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91. See Tax Reform Act of 1986, Pub. L. No. 99-514, § 301(a), 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 2085, which repealed the capital gain deduction.