



Armstrong  
Teasdale

## IRS May Challenge Future Formula Gift Clauses

11.27.12

In October, the IRS dropped its appeal of the Tax Court decision in *Wandry v. Commissioner*, T.C. Memo 2012-88. That does not mean the IRS accepts the holding of the Court. In fact, the IRS just announced that it will not do so in other cases.

In *Wandry*, the Tax Court upheld the validity of a defined value formula gift. A defined value formula gift is one for a specific amount of a hard to value asset, like \$10,000 in the stock of a closely-held business, rather than a fixed percentage or number.

The Wandry family had formed a limited liability company. The father then made gifts of units in that LLC to his children and grandchildren. The gifts were not for a specified numbers of units but rather for that number of units equal to available annual gift tax exclusions and additional gifts up to the then \$1 million lifetime gift tax exemption.

The Tax Court upheld the use of this formula despite the contention by the IRS that such a clause violates public policy.

This is the first time that a court had ruled on the effectiveness of a defined value formula gift clause not tied to a charitable gift adjustment clause. As such, it may provide another way for a person to make gifts of hard to value assets without incurring a gift tax if the IRS challenges the valuation of the asset being given away.

The fact that the IRS has not acquiesced in this decision means that the IRS may challenge such clauses when used by other taxpayers.