INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM
July 7, 1999

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Taxpayer's Name:
Taxpayer's Address:

Taxpayer's Identification No:
Years Involved:
Date of Conference:

LEGEND:

S Corporation =

Individual =

University =

Foundation =

Date 1 =

Date 2 =

Date 3 =

Year 1 =

Year 2 =

$A =

$B =

$C =

$D =

$E =

$F =

$G =

$H =

Z =

Y =

X =

W =

ISSUES:

(1) Is a portion of the payment to a state university's foundation, for which the donor receives the right to purchase tickets for seating in a skybox at athletic events in an athletic stadium of such university, deductible under 170(l)?

(2) Is a portion of the payment to a state university foundation, for which the donor receives the right to purchase tickets for seating in a skybox at athletic events in an athletic stadium of such university, that is otherwise deductible under § 170(l), disallowed because of the limitations of § 274(l)?

(3) If an accrual-basis subchapter S corporation authorizes a charitable contribution on the last day of its taxable year and pays the contribution by the 15th day of the third month following the close of its taxable year, may the S corporation elect to treat such charitable contribution as paid during such taxable year under § 170(a)(2), or is the charitable deduction properly taken when paid under § 170(a)(1)?

CONCLUSIONS:

(1) The portion of the payment to a state university's foundation, for which the donor receives the rights to purchase tickets for seating in a skybox at athletic events in an athletic stadium of such university, is deductible under 170(l).

(2) No, under the provisions of § 274(f), § 274(l) does not disallow a deduction determined under § 170(l) that is specifically allowed a taxpayer without regard to the payment's connection with the taxpayer's trade or business (or income-producing activity).

(3) The special rule for charitable deductions by accrual-basis corporations set forth in § 170(a)(2) does not apply to S corporations because charitable deductions by S corporations are not allowed to the S corporation but, rather, are passed through to shareholders. Therefore, the deduction for a charitable contribution made by an S corporation is properly passed through to shareholders and taken in the year that the contribution is actually paid.

FACTS:

S Corporation is an accrual-basis subchapter S corporation whose taxable year ends on Date 1. On Date 2, the last day of S Corporation's fiscal year, S Corporation authorized a payment of $A to University's foundation (Foundation). Foundation is represented to be an organization described in § 170(b)(1)(A)(iv) that is organized and operated exclusively to receive, hold, invest, and administer property and to make expenditures to or for the benefit of University, a state university, which is represented to be an educational organization described under § 170(b)(1)(A)(ii) and an institution of higher education as defined in § 3304(f). On Date 3, the 15th day of the third month following the close of S Corporation's taxable year, in the next calendar year, S Corporation paid $A to Foundation.

Individual, S Corporation's 100% shareholder and a calendar year taxpayer, took a charitable deduction for a portion (as discussed below) of the $A on his Year 1 income tax return.

S Corporation represented that, in return for its payment, it received: (1) a lease for a specific skybox for University home football games in University's stadium for Y years; (2) parking for X cars for each game; and (3) passes for W guests to visit persons sitting in the skybox before the game and at halftime. The terms under which S Corporation could use the Z seats in the skybox were embodied in a license agreement.

S Corporation received a receipt from Foundation, as well as an opinion provided to Foundation by Counsel regarding valuation of the personal benefits received in return for the payment of $A. Foundation provided S Corporation with a receipt in which it calculated as follows:

Y season skybox license value	$D
Pre-game parking	$E
Passes to visit skybox	+$H
Total:	$C
Payment	$A
less benefits valued	-$C
Amount subject to § 170(l)	$B
Times 80%	.80
Deduction claimed	$F

In filing his Year 1 return, Individual took a charitable deduction of $F. On audit, the revenue agent proposed disallowance of the $F deduction under § 274(l) on the grounds that it represented an amount paid for use of a skybox for more than 1 event. Technical Advice was sought on the disallowed deduction of $F pursuant to § 274(l).

S Corporation's representatives now concede that $G of the $B was paid for the tickets for Z seats in the skybox. They concede that the claimed deduction under § 170(l) should be reduced by 80% of that $G (which equals the amount incorrectly deducted). We understand that the per seat ticket price paid by S Corporation was the same as paid for other non-luxury seat tickets in the University's stadium.

LAW AND ANALYSIS:

(1) Is a portion of the payment to a state university's foundation, for which the donor receives the rights to purchase tickets for seating in a skybox at athletic events, deductible under 170(l)?

Section 170(a) of the Internal Revenue Code allows as a deduction any charitable contribution (as defined in § 170(c)[1]) the payment of which is made within the taxable year.[2]

Rev. Rul. 67-246, 1967-2 C.B. 104, states that, to be deductible as a charitable contribution for Federal income tax purposes under § 170, a payment to or for the use

[1]Section 170(c) defines "charitable contribution" as a contribution to or for the use of, among others, a State or a foundation organized and operated exclusively for educational purposes.

[2]Under § 170(b)(1), the percentage limitation on charitable contributions for an individual is 50%, 30%, or 20% of the taxpayer's contribution base (generally adjusted gross income) for the taxable year depending generally on the type of property and the type of qualified donee. Under § 170(b)(2), the percentage limitation on charitable contributions by a corporation is 10% of the taxpayer's taxable income with certain adjustments.

of a qualified charitable organization must be a gift. To be a gift for such purposes, there must be, among other requirements, a payment of money or transfer of property without adequate consideration. The Supreme Court has stated that the "*sine qua non* of a charitable contribution is a transfer of money or property without adequate consideration." U.S. v. American Bar Endowment, 477 U.S. 105, 118 (1986) (American Bar Endowment).

In American Bar Endowment, the Court observed that a payment to charity might have a dual character and adopted a two-part test to determine whether part of the payment is deductible as a charitable contribution. First, the payment is deductible only to the extent that the payment exceeds the fair market value of the privileges or benefits received. Second, the taxpayer must make the excess payment with the intention of making a gift.

Generally, where a transaction involving a payment is in the form of a purchase of an item of value, the presumption arises that no gift has been made for charitable contribution purposes, the presumption being that the payment in such case is the purchase price. Rev. Rul. 67-246. Thus, where consideration is received in connection with payments to a charitable organization, the presumption generally is that the payments are not gifts. If a charitable contribution deduction is claimed with respect to a payment, generally the burden is on the taxpayer to establish that the amount paid is not the purchase of the privileges or other benefits and that part of the payment, in fact, does qualify as a gift. Rev. Rul. 86-63, 1986-1 C.B. 88, superseding Rev. Rul. 84-132, 1984-2 C.B. 55.

Under § 170(l),[3] the taxpayer in certain circumstances is relieved of the burden of establishing what portion of a dual payment does, in fact, qualify as a gift. Section 170(l) provides that 80 percent of the amount paid by a taxpayer to or for the benefit of an educational organization, which is described in subsection (b)(1)(A)(ii) and which is an institution of higher education (as defined in § 3304(f)), is allowable as a charitable contribution deduction, if such amount would be allowable as a deduction under § 170 but for the fact that the taxpayer receives (directly or indirectly) as a result of paying such amount the right to purchase tickets for seating at an athletic event in an athletic stadium of such institution.

Section 170(l)(2) provides that, if a donor makes a payment to or for the benefit of an educational institution both for the right to purchase tickets and for the purchase of the tickets themselves, the portion of the payment subject to the 80 percent rule and the portion representing the ticket purchase are treated as separate amounts for purposes of § 170(l).

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[3]Section 170(l) was enacted by the Technical and Miscellaneous Revenue Act of 1988, P.L. 100-647, § 6001(a), 102 Stat. 3683 (1988), and is effective for taxable years beginning after December 31, 1983.

In this instance, the benefits that S Corporation received for its payment to Foundation consisted of the right to purchase tickets, the tickets themselves, the right to use the skybox, passes to visit the skybox, and parking. S Corporation made the payment to Foundation, which has been represented to be an organization described in § 170(b)(1)(A)(iv)[4] that is organized and operated exclusively the benefit of University, which is represented to be an educational organization described under § 170(b)(1)(A)(ii)[5] and an institution of higher education (as defined in § 3304(f)[6]).

The tickets that S Corporation received the right to buy were for seating at athletic events in University's athletic stadium. Section 170(l) is applicable despite the fact that the seating is located in a special viewing area within the athletic stadium. Thus, the portion of S Corporation's payment to Foundation for the right to buy tickets for seating is considered as paid for the benefit of University under § 170(l), and 80 percent of such portion is deductible under § 170, subject to the percentage limitations and other requirements of that section.

The remainder of the payment, which was for the ticket purchase, the right to use the skybox, passes to visit the skybox, and parking privileges, is not deductible under § 170.

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[4]An organization described in § 170(b)(1)(A)(iv) is an organization which, as pertinent here, normally receives a substantial part of its support from any State or from direct or indirect contributions from the general public, and which is organized and operated exclusively to receive, hold, invest, and administer property and to make expenditures for the benefit of a college or university that is an educational organization (as described in § 170(b)(1)(A)(ii)) and that is an agency or instrumentality of a State or which is owned or operated by a State or by an agency or instrumentality of a State.

[5]An education organization defined in § 170(b)(1)(A)(ii) is one which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on.

[6]Under § 3304(f), the term "institution of higher education" means an educational institution in any State which–

> (1) admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such certificate;
>
> (2) is legally authorized within such State to provide a program of education beyond high school;
>
> (3) provides an educational program for which it awards a bachelor's or higher degree, or provides a program which is acceptable for full credit toward such degree, or offers a program of training to prepare students for gainful employment in a recognized occupation; and
>
> (4) is a public or other nonprofit institution.

S Corporation contends that it is entitled to rely upon the allocation made by Foundation for purposes of determining the value of goods and services S Corporation received in exchange for the contribution. S Corporation cites § 1.170A-1(h)(4)(i) of the Income Tax Regulations, which provides that:

> Donee estimates of the value of goods or services may be treated as fair market value – For purposes of section 170(a), a taxpayer may rely on either a contemporaneous written acknowledgment provided under section 170(f)[7] and 1.170A-13(f) or a written disclosure statement provided under section 6115 for the fair market value of any goods or services provided to the taxpayer by the donee organization.

Regulation § 1.170A-1(h)(4)(ii) provides an exception that a taxpayer may not treat an estimate of the value of goods or services as their fair market value if the taxpayer knows, or has reason to know, that such treatment is unreasonable.

We are not addressing the donee's valuation of the skybox, of the right to buy tickets, of the passes to visit the skybox, or of the parking privileges in this technical advice memorandum. Valuation involves determinations of fact that are best handled in the field.

(2) Is a portion of the payment to a state university foundation, for which the donor receives the right to purchase tickets for seating in a skybox at athletic events, that is otherwise deductible under § 170(l), disallowed because of the limitations of § 274(l)?

Section 274(a)(1)(B) provides that no deduction otherwise allowable under the chapter (§§1-1400C) shall be allowed with respect to a facility used in connection with an activity referred to in § 274(a)(1)(A) (relating, generally, to entertainment). Section 1.274-2(b)(1)(i) of the Income Tax Regulations further provides that the term "entertainment" means any activity which is of a type generally considered to constitute entertainment, amusement, or recreation.

When § 274(a)(1)(B) was amended in 1978 to read as it applies to the year in question, the legislative history provided that § 274(a)(1)(B) would be inapplicable to expenditures for tickets to sporting and theatrical events regardless of whether the tickets are

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[7]Section 170(f)(8) provides that no deduction shall be allowed under § 170(a) for any contribution of $250 or more unless the taxpayer substantiates the contribution by a contemporaneous written acknowledgment of the contribution by the donee organization that includes the following information: (1) the amount of cash and a description (but not value) of any property other than cash contributed; (2) whether the donee organization provided any goods or services in consideration, in whole or in part, for any property described in (1); and (3) a description and good faith estimate of the value of any goods or services referred to in (2) or, if such goods or services consist solely of intangible religious benefits, a statement to that effect.

purchased by a fee which entitles the taxpayer to use a seat, sky-box, lounge, box or other similar facility which provides a viewing area for such a sporting or theatrical event. These costs generally would be subject either to the existing provisions of law relating to entertainment activities, or to those which govern the deductibility of business gifts. H. Rept. No. 1800 95th Cong., 2d Sess. 250 (1978), 1978-3 C.B. (Vol 1) 521, 585.

Section 274(l)(2), added by the Tax Reform Act of 1986, provides that in the case of a skybox or other private luxury box leased for more than one event, the amount allowable as a deduction with respect to such events shall not exceed the sum of the face value of non-luxury box seat tickets for the seats in such box covered by the lease.

Section 274(f) provides that § 274 shall not apply to any deduction allowable to the taxpayer without regard to its connection with his trade or business (or with his income-producing activity). In the case of a taxpayer which is not an individual, the preceding sentence shall be applied as if it were an individual. The legislative history is brief:

> The restrictions provided by your committee's bill are not to apply with respect to items which are deductible under specific provisions of law which apply both to business and nonbusiness taxpayers. Thus deduction for interest paid on a loan to acquire an entertainment facility or property taxes paid with respect to it would continue to be allowed as a deduction, whether or not the entertainment facilities meet the tests of the new provision.

H. Rept. No. 1447, 87th Cong. 2d. Sess., *reprinted in* 1962-3 C.B. 402, 430.

In this case, the amount S Corporation paid to Foundation in connection with the use of a skybox for more than 1 event exceeded the sum of the face value of non-luxury box seat tickets for the seats in the particular skybox. Under § 274(l), the excess would not be deductible unless, in accordance with § 274(f), a deduction would be specifically allowed, under another Code provision, to a taxpayer (treating as an individual a taxpayer that is not an individual) without regard to the payment's connection with the taxpayer's trade or business (or income-producing activity). As discussed in Issues (1) and (3), a deduction of a portion of S Corporation's payment is specifically allowed, pursuant to § 170, without regard to the payment's connection with its trade or business. Accordingly, under § 274(f), § 274(l) does not disallow a deduction determined under § 170 with respect to S Corporation's payment to Foundation.

(3) <u>If an accrual-basis subchapter S corporation authorizes a charitable contribution on the last day of its taxable year and pays the contribution by the 15th day of the third month following the close of its taxable year, may the S corporation elect to treat such charitable contribution as paid during such taxable year under § 170(a)(2), or is the charitable deduction properly taken when paid under § 170(a)(1)?</u>

As discussed above, § 170(a) of the Internal Revenue Code allows as a deduction any charitable contribution the payment of which is made within the taxable year. Under § 170(a)(2), however, a corporation reporting its taxable income on the accrual basis may elect to deduct a charitable contribution in the year in which the board of directors authorizes the contribution, if the payment is made by the 15th day of the third month following the close of the taxable year.[8]

The legislative history to § 170(a)(2) provides that this exception for accrual basis corporations was desirable because corporations intending to make the maximum charitable contribution allowable as a deduction had experienced difficulty in determining before the end of the taxable year what constituted 5 percent of their net income [the § 170(b) gross income limitation for corporations at the time of enactment]. S. Rep. No. 831, 81st Cong., 1st Sess. (1949), 1949-2 C.B. 289.

Section 1363(b)(2) of the Code states that the taxable income of an S corporation is computed in the same manner as in the case of an individual with certain exceptions, among which is an exception that the deductions referred to in § 703(a)(2), including the deduction for charitable contributions provided in § 170, are not allowed to the corporation.
Section 1366(a)(1)(A) provides that in determining the tax of a shareholder, each shareholder takes into account the shareholder's pro rata share of the corporation's items of income (including tax-exempt income), loss, deduction or credit the separate treatment of which could affect the liability for tax of any shareholder. Section 1366(a)(1) provides further that the items referred to in § 1366(a)(1)(A) include amounts described in § 702(a)(4). Section 702(a)(4) refers to charitable contributions (as defined in § 170(c)).

The legislative history of § 1366 provides that the corporate limitation on charitable contributions will no longer apply. Instead, charitable contributions by S corporations will pass through to the shareholders and be subject to the individual limitations on deductibility. See H.R. Rep. No. 826, 97th Cong., 2d Sess. 14 (1982); S. Rep. No. 640, 97th Cong., 2d Sess. 16 (1982).

Under § 1363(b), an S corporation computes its taxable income in the same manner as an individual. The election in § 170(a)(2) is not available to an individual. An individual taxpayer may deduct a charitable contribution only in the year in which payment is actually made to the charitable organization.

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[8]The election may be made only at the time of the filing of the return for such taxable year and is made by reporting the contribution on the return. § 1.170A-11(b)(2). The regulations require the taxpayer to attach to the return: (1) a written declaration, made under the penalties of perjury, by an officer authorized to sign the return, stating that the resolution authorizing the contribution was adopted by the board of directors during the taxable year; and (2) a copy of the resolution by the board of directors.)

Accordingly, in this case, S Corporation should have reported the charitable contribution on its tax return for the year in which it actually paid the charitable contribution, and S Corporation's shareholder, Individual, is not entitled to a charitable contribution deduction until Year 2.

CAVEAT(S)

A copy of this technical advice memorandum is to be given to the taxpayer(s). Section 6110(j)(3) of the Code provides that it may not be used or cited as precedent.

SIGNED BY: MICHAEL D. FINLEY
BRANCH CHIEF
CC:DOM:IT&A:3