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memorandum

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to: Anthony J. Kim
Senior Counsel (CC:LB&I:CTM:SF:1)

from: Christopher F. Kane,
Chief, Branch 3
Associate Chief Counsel, Income Tax & Accounting

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subject: POSTU-118158-15

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent. The advice we provide below in response to the issues you have presented for our consideration confirms in writing our telephone response of June 16, 2015.

LEGEND

Taxpayer =
A =
B =
Program X =

ISSUES

Issue 1: Whether amounts remitted as part of Program X in tax years (TYs) 2011 and 2012 to various organizations were paid by Taxpayer or by its customers?

Issue 2: Assuming Taxpayer paid amounts to tax exempt charitable and educational organizations (described in § 170 of the Internal Revenue Code) as part of Program X in TYs 2011 and 2012, whether such amounts are deductible as ordinary and necessary business expenses under § 162?

Issue 3: Assuming Taxpayer paid such amounts to (not described in § 170) as part of Program X in TYs 2011 and 2012, whether such amounts are deductible as ordinary and necessary business expenses under § 162?

Issue 4: Assuming Taxpayer paid amounts to certified B corporations (for profit entities with a social mission included in its corporate bylaws) as part of Program X in TYs 2011 and 2012, whether such amounts are deductible as ordinary and necessary business expenses under § 162?

FACTS

Taxpayer is engaged in the business of providing services. Taxpayer has operated Program X since its incorporation, advertising that it

from Program X. The actual list of selected recipients includes organizations that are exempt from federal income taxation as well as other non-profit and for-profit entities. One past recipient is exempt from federal income taxation but not described in § 170 and was engaged in limited political activity.

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LAW AND ANALYSIS

Issue 1: Whether amounts remitted as part of its Program X in TYs 2011 and 2012 to various organizations were paid by Taxpayer or by its customers?

As a general matter, a taxpayer may not deduct payments voluntarily made on another's behalf, even where there is a moral obligation to do so. Williams v. Comm'r, T.C. Memo 1960-19.

United States v. American Bar Endowment, 477 U.S. 105 (1986), deals with a similar issue. The respondent was an exempt organization described in § 170 that, among other things, offered group insurance policies to its members. Respondent received a dividend from the underwriter equal to the excess of premiums over costs. It retained this dividend for use in its charitable endeavors rather than returning the dividend to members. Id. at 108. The Court ruled that individual members' portion of the dividend was not a charitable donation to the respondent, in part because there was no practical way for the members' to retain their share of the dividend for themselves. Id. at 113-14.

Here, it does not appear that Taxpayer's customers have a right to a share of the amounts in Program X. The fact that the does not by itself appear to give the

customers control over these funds such that Taxpayer is the agent of the customer or is acting as a mere conduit for the dispersal of these funds.

You have indicated that factual development of this issue is ongoing. If you wish to pursue the agency theory, we suggest that you develop the facts consistent with the criteria set out in National Carbide v. Commissioner, 336 U.S. 422 (1949) and Commissioner v. Bollinger, 485 U.S. 340 (1988). If you wish to pursue a conduit theory, you may want to review Seven-Up Co. v. Commissioner, 14 T.C. 965 (1950) acq. in result, 1974-2 C.B. 1. It does not appear from the facts supplied so far that the funds in Program X belong to and are donated by Taxpayer's customers.

Issue 2: Assuming Taxpayer paid amounts to tax exempt charitable and educational organizations (described in § 170) as part of Program X in TYs 2011 and 2012, whether such amounts are deductible as ordinary and necessary business expenses under § 162?

Section 170 of the Internal Revenue Code provides for a deduction for a contribution to, or for the use of, any organization described in § 170(c) payment of which is made within the taxable year.

Section 162(a) provides that all ordinary and necessary expenses paid or incurred during the taxable year in carrying on a trade or business shall be allowed as a deduction.

Section 162(b) provides that no deduction shall be allowed under subsection (a) for any contribution or gift that would be allowed as a deduction under § 170 were it not for the limitations set forth in that section.

Section 1.162-15(a) of the Income Tax Regulations states that no deduction is allowed under § 162(a) for a contribution or gift if any part of it is deductible under § 170.

Section 1.170A-2(c)(5) states that transfers of property to an organization described in § 170(c) which bear a direct relationship to the taxpayer's trade or business and which are made with a reasonable expectation of commensurate financial return may constitute valid expenses of a trade or business, deductible under § 162. See also Dharma Enterprises v. Commissioner, 194 F.3d 1316 (9th Cir. 1999); Marquis v. Commissioner, 49 T.C. 695 (1968).

Here, Taxpayer offers relatively non-differentiable goods for sale to the public— . Taxpayer prominently advertises Program X and its . Taxpayer appears to have acted with the reasonable belief that in establishing Program X, it would enhance and increase its business. You indicate that you are still developing the facts in this area. The preliminary information supplied in your request suggests that Taxpayer had a reasonable expectation of commensurate financial return for its donations through

Program X, and its donations to organizations described in § 170(c) are therefore deductible under § 162(a) as business expenses to the extent not disallowed by other provisions of §162 and to the extent they are not contributions under § 170.

Issue 3: Assuming Taxpayer paid such amounts to exempt organizations not described in § 170 as part of Program X in TYs 2011 and 2012, whether such amounts are deductible as ordinary and necessary business expenses under § 162?

Section 1.162-15(b) of the Income Tax Regulations states that donations to organizations other than those described in § 170 which bear a direct relationship to the taxpayer's business and are made with a reasonable expectation of commensurate financial return may constitute allowable deductions as business expenses, provided the donation is not made for a non-deductible purpose.

Section 162(e)(1) of the Internal Revenue Code provides that no deduction shall be allowed under § 162(a) for any amount paid in connection with influencing legislation or participation in or intervention in any political campaign on behalf of (or in opposition to) any candidate for public office.

Section 1.162-20 of the Regulations provides rules governing the deductibility or non-deductibility of expenditures attributable to lobbying and political campaigns.

Section 6033(e)(1) of the Code generally states that organizations exempt from federal income tax, but not described in § 170(c) must provide notice to contributors of the proportion of their contributions allocable to expenditures of the organization that are covered by § 162(e)(1) or else be subject to the provisions of § 6033(e)(2).

Section 1.162-15(b) provides a similar standard as to the deductibility under § 162 of donations to organizations not described in § 170 as that provided in § 1.162-15(a) for donations to § 170 organizations. For the reasons stated above, it appears that Taxpayer has a reasonable expectation of commensurate financial return from the donations it is making through Program X. In the absence of further development of the facts that indicates otherwise, the donation expenses are deductible under § 162(a) subject to the same limitations described above.

If Taxpayer has received any § 6033 notices from donee organizations, the appropriate proportion of those donations would not be deductible. In the factual description you provided, it is most likely that an organization that is exempt from federal income tax but not described in § 170, such as A, would be subject to the reporting requirements of § 6033(e). Whether Taxpayer received any § 6033 notices or not, Taxpayer is still subject to the provisions of § 162(e) in determining its deduction under § 162(a) for donations to such organizations.

Issue 4: Assuming Taxpayer paid amounts to certified

as part of Program X in

TYs 2011 and 2012, whether such amounts are deductible as ordinary and necessary business expenses under § 162?

To the extent that these donations qualify as ordinary and necessary business expenses under § 162(a) as described above, they would qualify as deductible, subject to the various other provisions of § 162 which may act to disallow such a deduction. One such provision is § 162(e).

Section 162(e) denies a deduction for any amount paid or incurred in connection with influencing legislation, participating in any political campaign, influencing the general public or segments thereof with respect to elections or legislative matters, or any direct communication with a covered executive branch official in an attempt to influence official actions.

Section 1.162-29(b) of the Income Tax Regulations defines “influencing legislation” as “any attempt to influence legislation through a lobbying communication.” A “lobbying communication” is “any communication (other than any communication compelled by subpoena, or otherwise compelled by Federal or State law) with any member or employee of a legislative body or any other government official or employee who may participate in the formulation of the legislation that—(i) refers to specific legislation and reflects a view on that legislation; or (ii) clarifies, amplifies, modifies, or provides support for views reflected in a prior lobbying communication.”

Section 1.162-20(c)(4) denies deductions for amounts paid “in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections or referendums.” It includes as an example “grassroot” campaigns or other attempts to encourage the public to contact members of a legislative body.

Section 1.162-29(d) provides that if a taxpayer engages in activities for purposes of supporting a lobbying communication by another, the taxpayer’s activities are treated as influencing legislation. “Activities” include research, preparation, planning, and coordination.

Section 162(e)(5)(A) of the Code provides an exception to the general exclusion of § 162(e) denying deduction for lobbying expenses. Under that paragraph, a taxpayer in the trade or business of lobbying may deduct expenses incurred in conducting lobbying activities on behalf of another person, but such other person may not deduct amounts paid to the lobbyist for such activities.

Here, Taxpayer donated money to various organizations that apparently conducted some lobbying activities. The nature or extent of these organizations’ lobbying activities is not clear. However, Taxpayer’s donation to these organizations is not a direct communication with members or employees of a legislative body or other government officials, and so is not itself a lobbying communication under § 1.162-29(b). Merely donating money to an organization conducting lobbying activities is not an “activity for

purposes of supporting a lobbying communication," which according to the examples is intended to include more direct support such as research, planning, and coordination. Nor is it clear that Taxpayer is attempting to influence the general public or segments thereof with respect to legislative matters, as described in § 1.162-29(d). Even with further factual development, it is unlikely that any of these donations could be lobbying activities covered by § 1.162-29.

may be a lobbying communication under § 1.162-29(b) if it is directed at members of a legislative body or government official and expresses a view on specific legislation.

. Even if such activities were determined to result in the expenses incurred by B to do this being within § 162(e), it is not clear from the facts provided that the activities were conducted "on behalf of" Taxpayer thereby disallowing Taxpayer's donation under § 162(e)(5)(A). It appears that
for use as the organization saw fit. In addition, many of B's activities are not directed towards legislative members or legislative issues and therefore do not constitute lobbying activity.

If you have any questions, please call Timothy Azarchs at (202) 317-4615