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From: [redacted]
Sent: Tuesday, February 21, 2017 5:32:42 PM
To: [redacted]
Cc: [redacted]
Bcc:
Subject: RE: 163(j) Issue

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My apologies for my delay on this, but over the past week I have been working on this again, particularly in light of the Tax Court opinion in *15 West 17th Street LLC v. Commissioner*, 147 T.C. No. 19 (Dec. 22, 2016). That case involved the rules for charitable contributions under section 170(f)(8)(A) through (D). Specifically, section 170(f)(8)(A) requires a taxpayer to have received a contemporaneous written acknowledgment of a donation in order to claim the deduction. But section 170(f)(8)(D) provides that this is not required if the donee-organization files a return "on such form and in accordance with such regulations as the Secretary may prescribe" that includes information required by 170(f)(8)(B). The IRS never finalized any regulations under section 170(f)(8) and therefore never prescribed a form or filing procedures. However, the donee-organization did file an amended Form 990 with information about the petitioner's gift.

The Tax Court found that section 170(f)(8)(D) was inoperable and that the petitioners could not take the deduction because they did not have the required acknowledgment. In reaching this conclusion, the Court cited *Hillman* and reasoned that a court's usual role is to review the regulations an agency has issued, not to conjure what regulations might look like had they been promulgated. In addition, the Court emphasized that the language in 170(f)(8)(D) was a permissive delegation of rulemaking authority and the fact that there were no cases in which the language "may prescribe" resulted in a finding of a self-executing statute. The Court also found that the legislative history of the provision did not indicate a self-executing statute because it acknowledged concerns associated with donee returns. The majority opinion did not cite to the *International Multifoods* case at all. One of the concurrences did mention that case, but mostly to criticize the "imprecise test" of "delving into extra-statutory sources" such as the "entrails of committee reports, floor statements and Blue Books."

Given the nature of the rulemaking authority in section 163(j), I am comfortable with the conclusion in your original memo that the statute is clear and controls the outcome. Further, the regulatory authority in that section is permissive in a way that is similar to 170(f)(8)(D) and allows for (but does not require) a discretionary exercise of rulemaking authority. Your reliance

on *Hillman* is appropriate, particularly in light of the permissive language of the statute and the lack of an indication in the legislative history that Congress intended the Service to modify the definition of adjusted taxable income, let alone to modify it to include the items at issue in your case.

[redacted]

If you have any questions about this or would like to discuss, please let me know. I am generally available tomorrow except between 11 and 11:30 eastern.

Thanks,