Rev. Rul. 74-404, 1974-2 C.B. 382

Private foundation; capital gain from sale of donated stock. Capital gain realized by an exempt private foundation from the sale of stock donated to it during its taxable years 1970 through 1972 and immediately disposed of upon receipt will not be taken into account for purposes of the tax on net investment income under section 4940(a) of the Code.

Advice has been requested whether under the circumstances described below capital gain realized on the sale of stock by a private foundation exempt from Federal income tax under section 501(a) of the Internal Revenue Code of 1954 is to be taken into account for purposes of the excise tax imposed by section 4940(a) of the Code.

A private foundation received numerous gifts of common stock during its taxable years beginning in 1970, 1971, and 1972. By direction of the foundation's governing body each gift of stock was sold immediately after its acceptance in the calendar year it was received.

Section 4940(a) of the Code imposes on each private foundation which is exempt from taxation under section 501(a) an excise tax equal to 4 percent on the net investment income of such private foundation for the taxable year.

Section 4940(c)(1) of the Code defines net investment income for purposes of section 4940(a) to include net capital gain.

Section 4940(c)(4)(A) of the Code provides that for purposes of determining net capital gain there shall be taken into account only gains and losses from the sale or other disposition of property used for the production of interest, dividends, rents, and royalties, and property used for the production of income included in computing the tax imposed by section 511 (except to the extent gain or loss from the sale or other disposition of such property is taken into account for purposes of such tax).

Section 53.4940-1(f)(1) of the Foundation Excise Tax Regulations provides that in determining net capital gain there shall be taken into account only capital gains and losses from the sale or other disposition of property held by a private foundation for investment purposes (other than program-related investments, as defined in section 4944(c) of the Code), and property used for the production of income included in computing the tax imposed by section 511 except to the extent gain or loss from the sale or other disposition of such property is taken into account for purposes of such tax. The regulations further provide that:

> For taxable years beginning after December 31, 1972, property shall be treated as held for investment purposes even though such property is disposed of by the foundation immediately upon its receipt, if it is property of a type which generally

> produces interest, dividends, rents, royalties, or capital gains through appreciation (for example, rental real estate, stock, bonds, mineral interests, mortgages, and securities).

Since section 53.4940-1(f)(1) of the regulations by its terms applies only for taxable years beginning after December 31, 1972, the regulation has no application to the gifts of stock received by the private foundation in 1970, 1971, and 1972 that were immediately sold upon receipt. Accordingly, capital gains realized on sale of the stock, in the instant case, will not be taken into account for purposes of the excise tax imposed by section 4940(a) of the Code.