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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR DISTRICT COUNSEL, BROOKLYN
ATTN. MARK L. HULSE

FROM: Associate Chief Counsel, CC:EBEO
CC:EBEO:Br.7

SUBJECT: I.R.C. § 4972 liability

This Field Service Advice responds to your memorandum dated November 9, 1999. (Copy attached). Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND

Exempt Organization -
Plan X -

ISSUE

Whether the Exempt Organization is liable for the excise tax under I.R.C. § 4972(a), if it is liable for tax under the provisions of I.R.C. § 6033(e)(2).

CONCLUSION

Under the facts of this case the Exempt Organization is not liable for the excise tax under I.R.C. § 4972(a), although the Exempt Organization is liable for the tax under the provision of I.R.C. § 6033(e)(2).

FACTS

The Exempt Organization in this case is an I.R.C. § 501(c) organization. The Exempt Organization maintains several pension plans which are qualified plans under I.R.C. § 401(a). One of these, Plan X, is a defined benefit plan. For the plan year ending , the Exempt Organization made contributions to the Plan in excess of the otherwise deductible limits under I.R.C. § 404(a).

For the tax year of the Exempt Organization ending , the Exempt Organization filed a Form 990-T, Exempt Organization Business Income Tax Return (and proxy tax under section 6033(e)). On this From 990-T, the Exempt Organization reported a liability for the proxy tax under I.R.C. § 6033(e)(2)(A). However, the Exempt Organization did not claim any deductions with respect to any contributions to any of its plans, including Plan X.

Under I.R.C. § 162(e)(1) a taxpayer is not allowed to deduct any amount paid for the purpose of influencing legislation. Section 6033(e)(1)(A)(ii) requires an exempt organization to provide a notice containing a reasonable estimate of the portion of the organization's dues allocable to lobbying expenses to each person making a payment of dues to the organization. If the exempt organization fails to provide the required notice, or if it fails to include in the notice amounts that should have been included, I.R.C. § 6033(e)(2)(A) imposes the proxy tax on the exempt organization at the highest corporate tax rate. The liability for the proxy tax in this case is a result of the Exempt Organization's lobbying expenses exceeding the estimated cost of such expense.

LAW AND ANALYSIS

Code § 4972(a) imposes an excise tax equal to 10% of any nondeductible contributions made to a qualified employer plan. Citrus Valley Estates, Inc. v. Commissioner, 99 T.C. 379, 461 (1992). aff'd in part and remanded in part, 49 F.3d 1410 (9th Cir. 1995); Frick v. Commissioner, T.C. Memo. 1989-86, aff'd, 916 F.2d 715 (7th Cir. 1990); Bilena v. Comissioner, T.C. Memo. 1983-661. The tax imposed under I.R.C. § 4972(a) is paid by the employer making the nondeductible contributions. Citrus Valley Estates, supra, 99 T.C. at 461; I.R.C. § 4972(b). The term nondeductible contribution includes the excess of any amount of allowable deduciton under I.R. C. § 404(a). Pugh v.Commissioner, T.C. Memo. 1985-67, aff'd, 817 F.2d 755 (5th Cir. 1987); I.R.C. § 4972(c). Section 4972 was added to the Code by Public Law 99-514 effective for taxable years beginning after December 31, 1986.

There is an exception to this excise tax for exempt organizations which satisfy certain criteria. Under I.R.C. § 4972(d)(1)(B), a plan described under I.R.C. § 4980(c)(1)(A) is exempt from the excise tax imposed pursuant to I.R.C. § 4972(a).

In order to be eligible for this exception, § 4980(c)(1)(A) provides that the employer maintaining the plan must have been exempt from tax under subtitle A at all times. This exception was added to section 4972 by § 1011A(e)(2) of the Technical and Miscellaneous Revenue Act of 1988, effective for taxable years beginning after December 31, 1986. Senate Report No. 100-445 provides guidance on this exception.

> The bill provides that the excise tax on nondeductible contributions does not apply in the case of an employer that has been exempt from income tax at all times. Under rules to be prescribed by the Secretary, this exception does not apply to the extent that the employer has been subject to unrelated business income tax or has otherwise derived a tax benefit from the qualified plan.

S. Rep. No. 100-445, 100th Cong., 2d Sess., (1988), reprinted in 1988 U.S.C.C.A.N 4515, 4704.

In this case, the Exempt Organization reported a liability for the tax under the provisions of I.R.C. § 6033(e)(2)(A). However, the Exempt Organization asserts that it satisfies the criteria for the exemption of I.R.C. § 4972(d)(1)(B) because the § 6033(e)(2)(A) liability is imposed under subtitle F of the Code and not subtitle A. Therefore, it is argued, that the Exempt Organization satisfies the criterion of I.R.C. § 4980(c)(2)(A) because the "employer has, at all times, been exempt from tax under subtitle A."

This argument is not persuasive. In this regard, I.R.C. § 6033(e)(2)(C) states in full:

> For purposes of this title, the tax imposed by subparagraph (A) shall be treated in the same manner as a tax imposed by chapter 1 (relating to income taxes).

The "chapter 1" referred to is chapter 1 of subtitle A - Income Taxes. Thus, the statute indicates by its terms that the tax is not considered as a tax imposed pursuant to subtitle F, Procedure and Administration. Rather the statute provides that the tax of § 6033(e)(2) is treated as being imposed under chapter 1 of subtitle A, relating to income taxes.

Notwithstanding the foregoing, we note that the Secretary has provided no regulatory guidance on the exception of § 4972(d)(1)(B). In the absence of such guidance, we suggest that the limited legislative history of this provision is helpful. As noted above, the Senate Report suggests that the exception will not be available

if the plan sponsor has been "subject to unrelated business income tax or otherwise derived a tax benefit from the qualified plan." We also note that no court cases have construed this exception.

In this case no facts have been asserted indicating that the Exempt Organization has been subject to unrelated business income tax. In this case no facts have been asserted that the Exempt Organization has ever derived a tax benefit from Plan X, or any other plan it maintains. Under the facts of this case the Exempt Organization is not liable for any tax pursuant to I.R.C. § 4972.

Please call Don Parkinson of my staff if you have any further questions. Don can be reached at (202) 622-6090.

Associate Chief Counsel, CC:EBEO
CC:EBEO:Br.7

By: _____
MICHAEL J. ROACH
Chief, CC:EBEO:Br.7

Attachment (1)