DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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Dear :

This letter responds to your request for information dated June 28, 2006. In your letter, you requested information regarding the deductibility of certain payments by taxpayers to certain Florida non-profit scholarship funding organizations under the Florida Corporate Income Tax Credit Scholarship program.

Description of the Florida credit

The Florida Corporate Income Tax Credit Scholarship program was established by the State of Florida in 2001. It permits a corporation subject to the Florida corporate income tax to make a cash payment to a qualified non-profit scholarship funding organization and reduce the state income tax that it otherwise would pay.

Generally, the law provides that up to 75 percent of the Florida corporate income tax that a corporation otherwise would be required to pay can be paid, instead, to a scholarship funding organization, and the amount reduces the Florida income tax liability. If a corporation's payment in a given taxable year to a scholarship funding organization is greater than 75 percent of its Florida income tax liability in that year, the amount in excess of 75 percent of that year's tax liability is carried forward and may be used to reduce the corporation's Florida income tax liability in the following three taxable years.

Section 220.187(3)(a) of the Florida Statutes provides:

> (a) There is allowed a credit of 100 percent of eligible contribution against any tax due for a taxable year under this chapter. However, such a credit may not exceed 75 percent of the tax due under this chapter for the taxable year, after the application of any other allowable credits by the taxpayer… The credit granted by

> the section shall be reduced by the difference between the amount of federal corporate income tax taking into account the credit granted by this section and the amount of federal corporate income tax without application of the credit granted by this section.

Section 220.187(2)(b) of the Florida Statues provides that an "eligible contribution" means a monetary contribution from a taxpayer, subject to the restrictions provided in this section, to an eligible nonprofit scholarship-funding organization. Section 220.187(2)(d) provides that an "eligible nonprofit scholarship-funding organization" means a charitable organization that is exempt from federal income tax pursuant to section 501(c)(3) of the Internal Revenue Code and that complies with the provisions of subsection (4).

Section 220.187(7)(a) and (d) of the Florida Statutes provides:

> (a) If the credit granted pursuant to this section is not fully used in any one year because of insufficient tax liability on part of the corporation, the unused amount may be carried forward for a period not to exceed 3 years; however, any taxpayer that seeks to carry forward an unused amount of tax credit must submit an application for allocation of tax credits or carryforward credits as required in paragraph (d) in the year that the taxpayer intends to use the carryforward. The total amount of tax credits and carryforward of tax credits granted each state fiscal year under this section is $88 million. This carryforward applies to all approved contributions made after January 1, 2002. A taxpayer may not convey, assign, or transfer the credit authorized by this section to another entity unless all of the assets of the taxpayer are conveyed assigned or transferred in the same transaction.
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> (d) The department (i.e., the Department of Revenue) shall adopt rules necessary to administer this section, including rules establishing application forms and procedures and governing the allocation of tax credit and carryforward credits under this section on a first-come, first-served basis.

The Florida Department of Revenue has implemented this statutory framework by prescribing a regulation contained in section 12C-1.0187 of the Florida Administrative Code. With respect to the mechanics as it applies to a contributor, the regulation states, in part that:

> (3) If a taxpayer receives an approval letter from the Department of Revenue, but fails to make the contribution, no credit is allowed. If a taxpayer receives an approval letter from the Department of Revenue, but makes the contribution to an ineligible organization, or a nonprofit scholarship funding organization does not

accept the contribution, no credit is allowed. If the contribution is made outside the tax year for which the credit was approved, no credit is allowed.

* * * *

(5) If the credit granted pursuant to this section is not fully used in any one year, the unused amount may be carried forward for a period not to exceed three years. Any taxpayer that seeks to carry forward an unused amount of credit must submit Form F-1160 to the Department in the year that the taxpayer intends to use the carry forward amount. The Department will send written correspondence to the applicant within ten working days regarding the amount of carry forward credit that the taxpayer may use or the reason the Department could not approve the use of a carry forward credit.

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(6) A taxpayer may not convey, assign, or transfer the credit authorized by this section to another entity unless all of the assets of the taxpayer are conveyed, assigned, or transferred in the same transaction.

Discussion

Charitable contribution deduction

Section 170(a)(1) of the Internal Revenue Code provides the general rule that, subject to certain limitations, there shall be allowed as a deduction any charitable contribution (as defined in section 170(c)) payment of which is made within a taxable year. See also section 1.170A-1 of the federal income tax regulations.

Generally, to be deductible as a charitable contribution under section 170, a transfer to a charitable organization or government unit must be a gift. A gift for this purpose is a transfer of money or property without receipt of adequate consideration, made with charitable intent. A transfer is not made with charitable intent if the transferor expects a direct or indirect return benefit commensurate with the amount of the transfer. If a taxpayer receives a benefit in return for a transfer to a charitable organization, the transfer may be deductible as a charitable contribution, but only to the extent the amount transferred exceeds the fair market value of the benefit received, and only if the excess amount was transferred with the intent of making a gift. See United States v. American Bar Endowment, 477 U.S. 105, 116-118 (1986); Hernandez v. Commissioner, 490 U.S. 680, 689-691 (1989); section 1.170A-1(h)(1) and (2) of the regulations.

If the benefits received, or expected to be received by a donor are substantial (that is, greater than those incidental benefits that inure to the general public from transfers for charitable purposes), then the transferor has received, or expects to receive a quid pro quo sufficient to remove the transfer from the realm of deductibility under section 170. Singer v. United States, 449 F.2d 413, 422-423 (Ct. Cl. 1971).

The tax benefit of a federal charitable contribution deduction is not regarded as a return benefit that negates charitable intent, reducing or eliminating the deduction itself. Similarly, the fact that states typically provide for a similar deduction in determining the taxable income base for state tax purposes does not affect the federal deduction under section170. However, that situation is arguably distinguishable from one in which, as a result of a payment a taxpayer makes to a governmental or charitable body, a state offsets the taxpayer's state tax liability with a credit.

Deduction for payment of state tax

Section 164 provides generally for an itemized deduction for the payment of certain taxes, including state income tax. See section 164(a)(3). Similarly, taxpayers engaged in a trade or business may deduct certain tax payments as business expenses under section 162. A charitable contribution deduction under section 170 may not be allowable for a payment that qualifies for the Florida Corporate Income Tax Credit if the credit is viewed as a quid pro quo benefit that eliminates the necessary charitable intent for federal tax purposes. However, if receipt of the credit from the state is viewed as a disqualifying benefit, arguably the taxpayer's transfer of the credit to the state to satisfy the taxpayer's state tax liability should be viewed as a payment of state tax for purposes of the federal deduction for tax payments in section 164 or for section 162.

This letter has called your attention to certain general principles of the law. It is intended for informational purposes only and does not constitute a ruling. See Rev. Proc. 2006-1, §2.04, 2006-1 (Jan. 3, 2006). If you have any additional questions, please contact our office at .

Sincerely,

Christopher F. Kane
Branch Chief, Branch 3
(Income Tax & Accounting)