INTERNAL REVENUE SERVICE

Number: **200143006**
Release Date: 10/26/2001
CC:ITA:03 July 10, 2001
TL-N-5008-00
UILC: 162.25-08

INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR ASSOCIATE AREA COUNSEL, CC:LM:RFP:CHI
ATTN CHRISTA A. GRUBER

FROM: Associate Chief Counsel CC:ITA

SUBJECT: Treble Damage Payments under the Antitrust Laws

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

This Chief Counsel Advice responds to your memorandum dated April 30, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

LEGEND

A =
B =
C =
Date 1 =
Date 2 =
Date 3 =
Date 4 =
Date 5 =
Date 6 =
Date 7 =
U.S. Court A =
U.S. Court B =

$A =
$B =
$C =
$D =

ISSUE:

Whether payments made by A to B and C to settle a pending and an anticipated civil suit, respectively, arising from alleged price-fixing and antitrust violations are deductible in full.

CONCLUSION:

A's deduction for a payment to B to settle a pending civil suit under section 4 of the Clayton Act is limited by I.R.C. § 162(g), but A's payment to C to settle an anticipated civil suit may be deducted in full.

FACTS:

On Date 1, A pled guilty to two counts of a two-count Criminal Information filed in U.S. Court A, charging A with two violations of the Sherman Antitrust Act, relating to sales of point-of-purchase displays to B and C. The information asserted a conspiracy in unreasonable restraint of interstate trade and commerce concluding in Date 2. U.S. Court A imposed a fine of $A. A and the United States agreed, in light of pending antitrust treble damage litigation in U.S. Court B between A and B, and likely antitrust treble damage litigation in U.S. Court A between A and C, that an order of restitution would not be appropriate.

A and B entered into a settlement agreement on Date 3 whereby A agreed to pay B $B in seven installments over seven years, six of which installments would pay off a promissory note given by A to B for a portion of the amount due. No interest or legal fees were included in the agreement.

A subsequently made two payments to B on Date 4 and Date 5 in complete satisfaction of the liability, and the promissory note between A and B was cancelled.

On Date 6, A entered into a settlement agreement and release with C whereby A agreed to pay C $C and $D to C's law firm in complete satisfaction of all claims "arising from, relating to, or resulting from matters alleged or investigated in the Justice Department Action." The Justice Department Action refers to the above-mentioned criminal case and the criminal antitrust investigation of the Point-of-Purchase Display industry. The agreement and release provided that each party shall bear its own costs and expenses in reaching the agreement. On Date 6, A made payments to C in accordance with the settlement agreement.

For the year ended Date 7, A deducted the total amount of all settlement payments made to B and C resulting in an NOL carry-back in almost the full amount of the settlement payments. A characterized the NOL as a specified liability pursuant to I.R.C. § 172(f) and carried it back to each of the ten prior years. The revenue agent is proposing disallowance of the deduction pursuant to section 162(g).

LAW:

Section 162(g) provides that if in a criminal proceeding a taxpayer is convicted of

a violation of the antitrust laws, or his plea of guilty or nolo contendere to an indictment or information charging such a violation is entered or accepted in such a proceeding, no deduction shall be allowed under subsection (a) for two-thirds of any amount paid or incurred–

> (1) on any judgment for damages entered against the taxpayer under section 4 of the [Clayton] Act... or
>
> (2) in settlement of any action brought under such section 4 on account of such violation or related violation.

Treas. Reg. § 1.162-22(d) provides that an amount may be considered as paid in settlement of an action even though the action is dismissed or otherwise disposed of prior to such settlement or the complaint is amended to eliminate the claim with respect to the violation or related violation.

ANALYSIS:

For both settlement payments at issue, A meets the first requirement of section 162(g) which is a criminal conviction of a violation of the antitrust laws, or a plea of guilty or nolo contendere to an indictment or information. It is the second part of the law which brings two different results for A's payments to B and C.

The analysis is straightforward and based on the unambiguous words in the statute. Section 162(g)(2) imposes the two-thirds limitation on a deduction of any amount paid or incurred "in settlement of any **action** brought under section 4...." The settlement cannot relate to an anticipated action; it must be an action brought. The payment to B is subject to the two-thirds limitation as the payment was made to settle civil antitrust litigation between the parties. The settlement with C, though clearly stemming from the criminal antitrust investigation and the Information to which A pled guilty, did not settle an action brought under section 4.

In S. Rept. No. 91-552 (1969), 1969-3 C.B. 597, the Committee discusses the criminal underpinning for the partial denial of the deduction. The criminal requirement of section 162(g) has been met in this case with respect to the payment to C, but the requirement for a civil action has not been met. The Senate Report states:

> ...[I]t is provided that if a taxpayer is convicted in a criminal proceeding for the violation of the Federal antitrust laws (or pleads guilty or nolo contendere), then no deduction is to be allowed for two-thirds of any amount paid on any judgment for damages against the taxpayer or for settlement of any action brought under section 4 of the Clayton Antitrust Act.

Id.

There is nothing in the legislative history for section 162(g) which indicates any legislative intent to forego the requirement for a civil action brought under the Clayton

Act. Rather, Treas. Reg. § 1.162-22(d) does extend the scope of the statute but only to settlements of actions brought which are no longer active at the time the settlement is made. That is, the regulation applies the two-thirds limitation to settlements of an action that has been dismissed or otherwise disposed of prior to the settlement and to settlements where the claim has been amended to eliminate the requisite claim prior to the settlement.

It is our opinion that section 162(g) does not apply to civil settlements where no civil action has been brought. As discussed above, the statute is unambiguous on this point. Further, the Government lost this exact issue in Fisher Companies, Inc. v. Commissioner, 84 T.C. 1319 (1985), aff'g another issue 806 F.2d 263 (9th Cir. 1986) (unpublished table decision). In Fisher, the court held that section 162(g) does not apply to amounts paid prior to the commencement of an action under section 4 of the Clayton Act. The court read the plain language of section 162(g)(2) as requiring "an action brought under section 4 of the Clayton Act" in order to trigger the two-thirds disallowance. Because the claimant in Fisher settled with the taxpayer prior to filing a complaint under the Clayton Act, the court held that section 162(g) did not apply to the payments made to the claimant. In this case, since C did not commence a civil action under section 4 of the Clayton Act against A, A's settlement payment to C is fully deductible.

[redacted]

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