

Part III - Administrative, Procedures, and Miscellaneous

Guidance Regarding Public Inspection of Unrelated Business Income Tax Returns

Notice 2007-45

SECTION 1. PURPOSE

This notice provides interim guidance on section 6104(d)(1)(A)(ii) of the Internal Revenue Code (the Code), which was added by section 1225 of the Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (2006) (the PPA). This provision imposes a new requirement on all organizations exempt from Federal income tax under section 501(a) of the Code and described in section 501(c)(3) (charities) to make available for public inspection a copy of any annual return filed under section 6011 relating to the tax imposed under section 511. The annual return subject to this public disclosure requirement is filed on Form 990-T, *Exempt Organization Business Income Tax Return*. The requirement applies to any Form 990-T filed by a charity with the IRS after August 17, 2006.

The Internal Revenue Service (IRS) and the Treasury Department expect to revise the regulations under section 6104(d) of the Code to take account of the change to the

statute. Until those revised regulations are effective, charities may rely on this notice to comply with section 6104(d)(1)(A)(ii).

SECTION 2. BACKGROUND

Section 6104(d) of the Code requires tax-exempt organizations to make available for public inspection and copying certain annual returns, reports, applications for recognition of exemption, and notices of status. The annual returns must be made available by an organization for inspection during regular business hours by any individual at the principal office of such organization and, if such organization regularly maintains one or more regional or district offices having three or more employees, at each such regional or district office. Also, an organization must provide, upon request of an individual made at such principal office or such a regional or district office, copies of annual returns to such individual without charge other than a reasonable fee for any reproduction and mailing costs.

Prior to the passage of the PPA, annual returns filed under section 6011 relating to the tax imposed under section 511 were not subject to the requirements of section 6104(d). Following enactment of section 6104(d)(1)(A)(ii) in the PPA, the Code requires charities to make available for public inspection and copying by any individual a copy of annual returns the charity files under section 6011 that relate to any tax imposed by section 511. Therefore, except as provided in this notice, the requirements of section 6104(d) apply to any Form 990-T a charity files with the IRS after August 17, 2006.

Section 501(a) of the Code provides for the exemption from Federal income tax for organizations described in section 501(c). Section 501(c)(3) describes organizations that are organized and operated exclusively for religious, charitable, scientific, testing

for public safety, literary, or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual. Section 511(a), in part, imposes a tax for each taxable year on the unrelated business taxable income of any charity, any college or university described in section 511(a)(2)(B), and any corporation wholly owned by one or more such colleges or universities. A college or university is described in section 511(a)(2)(B) if it is an agency or instrumentality of any government or any political subdivision thereof, or is owned or operated by any government or any political subdivision thereof, or by any agency or instrumentality of one or more governments or political subdivisions (state colleges and universities). Section 115(1) of the Code provides that gross income does not include income that is derived from a public utility or from the exercise of any essential governmental function, and accruing to a State or any political subdivision thereof.

Section 301.6104(d)-1 of the Procedure and Administration Regulations sets forth general guidance on making annual returns available for public inspection. Section 301.6104(d)-2 describes how a tax-exempt organization can make its annual return widely available and, therefore, not subject to the requirement to provide copies in response to individual requests, although the regulation stipulates that the organization still must make the annual return available for public inspection. Section 301.6104(d)-3 addresses the standards that apply in determining whether a tax-exempt organization is the subject of a harassment campaign, such that it may, under applicable procedures, obtain relief from the requirement that copies be provided in response to individual requests.

Under section 6652(c)(1)(C) of the Code, a penalty may be imposed on any person for failure to make available for public inspection and copying a copy of Form 990-T. The penalty is payable by the person who fails to comply with the requirements of section 6104(d). The penalty is \$20 on each person for each day that the failure continues, not to exceed \$10,000 on all persons with respect to any one return. Additionally, a penalty under section 6685 of the Code for willful failure to comply with the requirements of section 6104(d), and a penalty under section 7207 for willfully furnishing fraudulent or false information, may apply.

SECTION 3. INTERIM GUIDANCE

The IRS and the Treasury Department expect to revise regulations under section 6104(d) of the Code to include the new requirements under section 6104(d)(1)(A)(ii). Until the revised regulations are effective, charities may rely on sections 301.6104(d)-1, 301.6104(d)-2, and 301.6104(d)-3 of the regulations, except as otherwise provided in this notice, for guidance on how to comply with section 6104(d)(1)(A)(ii).

Pursuant to this notice, all charities that file Form 990-T are required to make the return public, regardless of whether the charity is otherwise subject to the disclosure requirements of section 6104. For example, although churches are not required to file Form 1023 or Form 990 with the IRS, they are required to file the Form 990-T with the IRS to report unrelated business taxable income. Thus, churches are required, under this notice, to disclose Form 990-T to the public.

In addition, this notice clarifies the application of the statute to state colleges and universities (and their wholly owned corporations). State colleges and universities are generally eligible to exclude their income from gross income under section 115 of the

Code. The application of section 115 effectively provides an exemption from income tax. A state college or university may also be exempt from income tax under section 501(a) as an organization described in section 501(c)(3) if it applies for and receives a determination letter in accordance with section 508 of the Code. The exclusion from gross income under section 115 applies regardless of whether the state or college or university elects to apply for a determination letter. Nonetheless, some state colleges and universities may seek exemption under section 501(a) as well in order to be listed in IRS Publication 78, which many donors and grantmakers use to confirm that an organization is eligible to receive deductible contributions under section 170. State colleges and universities (and their wholly-owned corporations) that rely solely on section 115 to relieve them of liability for income tax are nonetheless subject to UBIT under section 511(a)(2)(B). State colleges and universities (and their wholly-owned corporations) that receive determination letters confirming that they are exempt under section 501(a) as organizations described in section 501(c)(3) are subject to UBIT under section 511(a)(2)(A), and possibly also under section 511(a)(2)(B).

Section 6104(d)(1)(A)(ii), as enacted, requires disclosure by all organizations that are exempt from tax under section 501(a) that are described in section 501(c)(3). The statute does not provide an exception for organizations that also benefit from the income exclusion provided by section 115. Thus, the statute requires that state colleges and universities that have been recognized by the IRS as exempt under section 501(a) as organizations described in section 501(c)(3), disclose Form 990-T to the public. However, the statute does not require state colleges and universities that are subject to tax under section 511(a) solely by virtue of section 511(a)(2)(B), and that

have not been recognized by the IRS as exempt under section 501(a) as organizations described in section 501(c)(3), to make public their Forms 990-T.

The guidelines on making annual returns available for public inspection set forth in section 301.6104(d)-1 of the regulations generally apply, except that for purposes of section 6104(d)(1)(A)(ii), the definition of “annual information return” in section 301.6104(d)-1(b)(4)(i) includes an exact copy of the Form 990-T filed by a charity with the IRS after August 17, 2006, including all schedules, attachments, and supporting documents, and the exclusion of the Form 990-T from that definition in section 301.6104(d)-1(b)(4)(ii) does not apply.

Charities that make their Form 990-T widely available in accordance with the provisions in section 301.6104(d)-2 of the regulations do not need to comply with an individual request for a copy of such return, though they still must make such return available for public inspection. The widely available exception requires that the Form 990-T be posted in a format that exactly reproduces the image of the return as it was originally filed with the IRS after August 17, 2006, including all schedules, attachments, and supporting documents. For instance, the organization will be treated as having made its Form 990-T for a given year widely available if it posts its Form 990-T as a PDF file on the organization’s website.

The provisions of section 301.6104(d)-3 are applicable to a request for a charity’s Form 990-T that is part of a harassment campaign. An organization that believes that the requests for Form 990-T are part of a single coordinated effort to disrupt the operations of the tax-exempt organization, rather than to collect information about the organization, may apply for a determination from the IRS that the organization is the

subject of a harassment campaign and suspend compliance with the requests for copies of Form 990-T, provided that it files the request for determination with 10 business days of the suspension. The IRS's determination that the organization is the subject of a harassment campaign allows an organization not to comply with any requests for copies of Form 990-T that it reasonably believes are part of the campaign.

SECTION 4. EXCEPTION WHERE FORM 990-T USED SOLELY TO REQUEST TELEPHONE EXCISE TAX REFUND

For 2006, exempt organizations must use Form 990-T if they wish to request a refund of telephone excise tax paid after February 28, 2003, and before August 6, 2006. See Notice 2006-50, 2006-25 I.R.B. 1141, for more information regarding the telephone tax refund.

A charity that files a Form 990-T solely to request a refund of the federal telephone excise tax is not required to make that Form 990-T available for public inspection and copying. However, if a charity files a Form 990-T to request a refund of the federal telephone excise tax and to report unrelated business taxable income under section 511, the charity is required to make that Form 990-T available for public inspection and copying in its entirety.

SECTION 5. REQUEST FOR COMMENTS

The IRS and the Treasury Department invite comments on implementation of the public inspection requirement of section 6104(d)(1)(A)(ii). Comments are requested specifically on the application of the public inspection requirement of section 6104(d)(1)(A)(ii) to organizations that are exempt from Federal income tax under

section 501(a) and described in section 501(c)(3), that may also exclude their income from gross income under section 115(1) or other legal principles.

Comments should refer to Notice 2007-45 and be submitted by June 30, 2007, to:

Internal Revenue Service
CC:PA:LPD:PR (Notice 2007-45)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4:00 p.m. to:

Courier's Desk
Internal Revenue Service
1111 Constitution Ave., N.W.
Washington, DC 20224
Attn: CC:PA:LPD:PR (Notice 2007-45)

Alternatively, taxpayers may submit comments electronically to notice.comments@irs.counsel.treas.gov. Please include "Notice 2007-45" in the subject line of any electronic communications.

All comments will be available for public inspection and copying.

SECTION 6. DRAFTING INFORMATION

The principal author of this notice is Mary Jo Salins of the Exempt Organizations, Tax Exempt and Government Entities Division. For further information regarding this notice, contact Ms. Salins at (202) 283-9453 (not a toll-free call).