

INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

November 21, 2000

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CASE MIS No.: TAM-114563-00/CC:ITA:B3

Taxpayer's Name:
Taxpayer's Address:

Taxpayer's Identification No:
Years Involved:
Date of Conference:

LEGEND:

Company =

Organization =

ISSUE:

Is the amount of Company's charitable contribution of its film library reduced under §170(e)(1) of the Internal Revenue Code?

CONCLUSION:

Yes. Company's film library is excluded under §1221(3)(B) from the definition of a capital asset and, therefore, the amount of Company's charitable contribution is reduced under §170(e)(1)(A).

FACTS:

Company is a broadcasting company operating as an S corporation. During the years at issue, Company incrementally contributed its film library to Organization, a charity described in §170(c) that is not a private foundation described in §509(a). The film library consists of footage documenting local news stories. Company states that the contributed materials have been copyrighted or are eligible for copyright protection.

The costs associated with establishing the library were expensed as incurred; therefore, Company's basis in the film library is zero. The library is composed of footage produced by Company's employees. The contributed materials were not included in Company's inventory and were not held for sale to customers. On Company's federal income tax returns for the years at issue, Company reported contributions of the film library in amounts equal to fair market value. Organization's use of the film library was for a purpose related to the basis for its exemption under §501.

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LAW AND ANALYSIS:

The authorities discussed below are as in effect for the years at issue.

Section 170(a) of the Internal Revenue Code allows, with certain requirements and limitations, a deduction for contributions and gifts to or for the use of organizations described in §170(c).

Section 1.170A-1(c)(1) of the Income Tax Regulations provides that the amount of a contribution made in property other than money is the fair market value of the property at the time of the contribution reduced as provided in §170(e)(1) and §1.170A-4(a).

Section 170(e)(1)(A) provides that the amount of any charitable contribution of property is reduced by the amount of gain that would not have been long-term capital gain if the property contributed had been sold by the taxpayer at its fair market value. (The limitations in §170(e)(1)(B) do not apply because the film library will be used by Organization in a manner related to its purpose or function, and Organization is not a private foundation described in § 509(a).)

Section 1.170A-4(a)(1) provides that §170(e)(1) requires that the amount of the charitable contribution that would be taken into account under §170(a) without regard to §170(e) shall be reduced in the case of a contribution by a corporation of ordinary income property, as defined in paragraph (b)(1) of this section, by the amount of gain that would not have been long-term capital gain if the property had been sold by its donor at its fair market value.

Section 1.170A-4(b)(1) defines “ordinary income property” as property any portion of the gain on which would not have been long-term capital gain if the property had been sold by the donor at its fair market value at the time of its contribution to the charitable organization.

Section 1.170A-4(b)(4) provides that, for purposes of applying §1.170A-4(b)(1), property that is used in the trade or business, as defined in §1231(b), shall be treated as a capital asset.

Under §1231(b)(1)(C), the term “property used in the trade or business” means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in §167, held for more than 1 year, and real property used in the trade or business, held for more than 1 year, which is not a copyright, a literary, musical, or artistic composition, a letter or memorandum, or similar property, held by a taxpayer described in §1221(3).

The term “capital asset,” as defined in §1221, includes all classes of property not specifically excluded by §1221(1)-(5).

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Section 1221(3) excludes from the definition of capital asset a copyright, a literary, musical, or artistic composition, a letter or memorandum, or similar property, held by – (A) a taxpayer whose personal efforts created the property, (B) in the case of a letter, memorandum, or similar property, a taxpayer for whom the property was prepared or produced; or (C) a taxpayer in whose hands the basis of the property is determined, for purposes of determining gain from a sale or exchange, in whole or part by reference to the basis of such property in the hands of a taxpayer described in subparagraph (A) or (B).

Section 1.1221-1(c)(1) provides that a copyright, a literary, musical, or artistic composition, and similar property are excluded from the term “capital assets” if held by a taxpayer whose personal efforts created such property. For purposes of §1.1221-1(c)(1), “similar property” includes a theatrical production, a radio program, a newspaper cartoon strip, or any other property eligible for copyright protection.

With respect to a letter, memorandum, and similar property, §1.1221-1(c)(2) provides that “similar property” includes a draft of a speech, a manuscript, a research paper, an oral recording, a transcript of an oral recording or interview, a personal or business diary, a log or journal, a corporate archive, office correspondence, a financial record, a drawing, a photograph, or a dispatch. Section 1.1221-1(c)(2) does not apply to property to which §1.1221-1(c)(1) applies.

Section 1.1221-1(c)(3) states that, for purposes of §1.1221-1(c), a taxpayer, such as a corporate executive, who merely has administrative control of personnel and who does not substantially engage in the direction and guidance of the work does not create property by personal efforts.

In Chronicle Publishing Co. v. Commissioner, 97 T.C. 445 (1991), reconsideration denied, 63 TCM 1899 (1992), a newspaper publisher claimed a deduction for the contribution of its newspaper clippings library to a charity described in §170(c). The amount of the charitable contribution claimed was the fair market value of the clippings library at the time of contribution. The Tax Court held that, under §1221(3)(B), the clippings library was excluded from the definition of capital asset and, therefore, the amount of the charitable contribution is reduced by the amount of gain that would not have been long-term capital gain if the property had been sold at its fair market value. Under §1221(3)(B), the clippings library was property similar to a letter or memorandum that was prepared or produced for the newspaper publisher. Referring to §1.1221-1(c)(2) for examples of property similar to a letter or memorandum, the court determined that the clippings library was a corporate archive. The court cited the definition of “archive” in Webster’s Third New International Dictionary (1981) and Webster’s New Dictionary of Synonyms (1968), noting in particular that an archive is a collection of information, an institutional record that has been preserved, and includes a library.

Company’s film library is a corporate archive because it is a collection of information and a library as well as an institutional record that has been preserved. The fact that

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Chronicle Publishing involved written news stories while Company's contribution involved film footage of news stories is not a significant distinction for purposes of categorizing the properties as corporate archives. Although the film library may also be "similar property" under §1.1221-1(c)(1), it is not held by an individual or entity whose personal efforts created the property. Therefore, the property is not property to which §1.1221-1(c)(1) applies.

The film library is property similar to a letter or memorandum prepared or produced for Company as described in §1221(3)(B) and is therefore excluded from the definition of capital asset under §1221. The film library is excluded from "property used in a trade or business" under §1231 because the library is a "letter, memorandum, or similar property" held by an entity for whom the property was produced.

Because the film library is not a capital asset, its sale at fair market value would have produced a gain that would not have been long-term capital gain. The charitable contribution for a donation of ordinary income property is limited to the basis of the property. Because Company's basis in the library is zero, Company's charitable contribution for its donation to Organization is reduced to zero.

We might also have arrived at our conclusion by finding that the film library falls within other categories of similar property under §1.1221-1(c)(2), such as an oral recording, a log or journal, or a photograph. See Glen v. Commissioner, 79 T.C. 208 (1982) (tapes of interviews are "oral recordings"); Rev. Rul. 82-9, 1982-1 C.B. 39 (records, logs, and histories are substantially similar to memorandums or such similar property as business diaries, logs or journals, office correspondence, drawings, or photographs). Moreover, the list of similar property in §1.1221-1(c)(2) is prefaced with the terms "includes, for example." It is a well-settled rule of statutory construction that this phrase, followed by a list of items, means that the list is representative and not exhaustive. A film library is sufficiently similar to the items listed to consider it as part of the list.

CAVEAT

A copy of this technical advice memorandum is to be given to Company. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.