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[Third Party Communication:

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From:

Sent: October 20, 2014

To:

Cc:

Bcc:

Subject: IRC 162(f) Issue

We have reviewed the documents you submitted regarding the taxpayer's payment to the government in lieu of forfeiture and discussed the various issues. We have concluded that the payment is not deductible under section 162(a) based on the exception contained in section 162(f) and the regulations thereunder. Specifically, the code and regulations state that no deduction shall be allowed under section 162(a) for any fine or similar penalty paid to the government of the United States. Treas. Reg. section 1.162-21(b)(1)(iii) states that a fine or similar penalty includes an amount paid in settlement of the taxpayer's actual or potential liability for a civil or criminal fine or penalty. The deferred prosecution agreement (DPA) states that the taxpayer has violated several criminal statutes and provides for a forfeiture payment in lieu of proceedings that would result in criminal and/or civil forfeiture under 18 U.S.C. sections 981 and 982 and 28 U.S.C. section 2461(c). The DPA is a settlement for purposes of the regulation as it is an agreement between the taxpayer and the government that resolves all issues associated with the taxpayer's criminal conduct in exchange for certain consideration outlined in the DPA, including a payment in lieu of forfeiture. It is the Service's longstanding position that a monetary forfeiture under the U.S.C. sections the taxpayer violated, as well as the sections referenced above, is a civil or criminal fine or penalty for purposes of the regulation. As such, the money paid in lieu of forfeiture pursuant to the DPA resolves the taxpayer's actual or potential liability for a civil or criminal fine or penalty and is not deductible under section 162.

The taxpayer argues that Treas. Reg. sections 1.162-21(b)(1) and (2) do not prohibit it from deducting the forfeiture payment because (1) it has not pled guilty or nolo contendere in any court proceeding and (2) the forfeiture payment is earmarked for restitution to the victims of the fraud. The first argument requiring a plea of guilty or nolo contendere has no merit, as a settlement of the taxpayer's actual or potential liability is included under section 1.162-21(b)(1)(iii). Likewise, the taxpayer's second argument that the forfeited funds will be used to compensate victims has no merit, as the DPA specifically states that the payment is in lieu of criminal and/or civil forfeiture. The DPA

is a negotiated settlement between the government and the taxpayer that specifically requires a forfeiture payment rather than requiring that part or all of the payment be allocated as restitution. The Department of Justice has the authority to use forfeited funds at its discretion for various uses including payment to victims. DOJ's stated intention for the use of the funds does not change the character of the payment from a non-deductible forfeiture to a potentially deductible restitution payment.

I have attached some filed briefs from an ongoing case involving similar issues. These briefs should be instructive as to the service's position and case law on this subject. Please let me know if you have any questions or would like to discuss this further.

Regards-

Attachments: Joseph P. Nacchio and Anne M. Esker v. United States of America,
No. 12-20 T (Court of Claims)

- (1) Motion of the United States for Summary Judgment;
- (2) Plaintiffs' Opposition to the Motion of the United States for Summary Judgment and Plaintiffs' Cross-Motion for Partial Summary Judgment;
- (3) The United States' Reply Brief in Support of its Motion for Summary Judgment and Response to Plaintiffs' Cross-Motion for Partial Summary Judgment;
- (4) The United States' Supplemental Brief in Support of its Motion for Summary Judgment