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Person To Contact:
, ID No.

Telephone Number:

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Date:
February 01, 2016

LEGEND

Taxpayer =
State =
Date 1 =
Date 2 =

Dear :

This responds to your request for a private letter ruling, dated July 30, 2015, regarding the application of §1033 of the Internal Revenue Code to your transaction. Specifically, you request a ruling that the sale or other disposition of the spectrum-based content distribution rights currently associated with the Taxpayer's broadcast services pursuant to the actions of the Federal Communications Commission (FCC) constitutes a sale under a threat of an involuntary conversion of its FCC licenses and related property for purposes of § 1033 of the Internal Revenue Code.

FACTS

Taxpayer owns and operates a full-power television station in the State market that operates in the "upper 600 MHz band". Taxpayer's UHF TV station operates pursuant to licenses and permits issued by the FCC, which authorize the station to deliver video, audio, data, and other content over specific broadcast frequencies.

Pursuant to applicable provisions of the Middle Class Tax Relief and Job Creation Act of 2012 (Spectrum Act),¹ the FCC is implementing a mandate by Congress to repurpose spectrum in the 600 MHz band currently used by television broadcasters to help meet the nation's accelerating needs for mobile broadband and other new bandwidth-intensive technologies. The Spectrum Act calls for the FCC to undertake two related, but independent, processes to reclaim spectrum currently used for television broadcasting: (i) an "Incentive Auction" and (ii) a "Repacking". The Incentive Auction is intended to motivate existing television broadcasters to relinquish some or all of their spectrum usage rights to accommodate the requirements of the wireless carriers within the repurposed spectrum. Repacking is an involuntary reassignment of remaining broadcast television stations to a narrower segment of spectrum lower in the band. This Repacking will allow the FCC to assemble a near nation-wide contiguous band of spectrum in the upper 600 MHz band for reallocation to mobile broadband.

The Spectrum Act provides broadcasters with three relinquishment options for participating in the Incentive Auction. First, broadcasters can relinquish their spectrum-based content distribution rights in their entirety and cease broadcasting (Go Off- Air). Second, broadcasters currently operating on frequencies in the UHF band can voluntarily agree to relocate to frequencies in the VHF band² (Move to VHF). Third, broadcasters can relinquish their rights to deliver content over a television broadcast channel and, instead, agree to share a single channel with another broadcaster (Sharing Arrangement).

Alternatively, broadcasters can also forgo participation in the Incentive Auction altogether and remain on the air. However, that would mean accepting, as part of the Repacking process, the potential to be reassigned to a different, possibly inferior, less valuable, UHF channel without compensation (other than reimbursement from a limited fund for the cost of moving to the new channel).

On Date 1, the FCC released a *Report and Order*³ adopting rules to implement the Spectrum Act, including the broadcast television spectrum Incentive Auction and Repacking. Under the rules, the Incentive Auction will consist of a "reverse" auction and a "forward" auction. The reverse auction will determine the price at which a broadcast station would be willing to relinquish some or all of its spectrum-based content distribution rights. The forward auction will set the price that the wireless carriers will pay for the new licenses for repurposed spectrum. After the auction is completed, broadcasters whose bids were accepted in the auction will receive their payments from the forward auction proceeds. The FCC will also use proceeds from the forward auction

¹ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96 §6403.

² It is widely accepted within the industry that VHF spectrum is grossly inferior to UHF spectrum for distribution of video, audio, data and other content in digital form.

³ *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd.

to reimburse certain spectrum relocation costs of broadcasters who do not elect to sell. Any remaining proceeds will be deposited with the federal treasury.

As stated, broadcasters who choose to forego the Incentive Auction and instead remain on the air are subject to mandatory relocation to different operating frequencies at the direction of the FCC. Non-participating stations that currently operate in that portion of the upper 600 MHz band that will be repurposed for mobile broadband licenses will almost certainly be forced to change to a new channel in a lower portion of the existing UHF band. Non-participating stations that do not currently operate in the purposed band may still be required to operate on new channels, as necessary, to accommodate other stations being moved to other frequencies.

If Taxpayer does not participate in the Incentive Auction, it is almost certain that Taxpayer would be Repacked into a different, lower channel. Taxpayer is one of only a limited number of broadcast television stations that the FCC will force to relocate to another channel under virtually any scenario. Taxpayer's TV station is located in the premium location of State, one of the nation's largest television and wireless markets. In addition, its assigned station on the spectrum (in the upper 600 MHz band) is optimal for use in mobile broadband and the new bandwidth technologies. These circumstances make Taxpayer's station strategically important to the FCC's spectrum reclamation project -- virtually ensuring that the FCC would compel Taxpayer to relocate to a new channel in the Repacking process if Taxpayer fails to participate in the Incentive Auction.

The FCC is obligated to use "all reasonable efforts" to replicate a station's coverage area and population served. However, the FCC is not required to account for all of the real and substantial technical, commercial and economic differences between the current value of Taxpayer's UHF spectrum and the future value of residual lower band UHF spectrum.

In light of the Spectrum Act, and the FCC's activities implementing Congress' directive, Taxpayer plans to sell the spectrum-based content distribution rights currently associated with its broadcasting services as part of the Incentive Auction and reinvest such proceeds in property that is similar or related in service or use.

On Date 2, Taxpayer filed its application with the FCC electing to participate in the Incentive Auction. Taxpayer's application notified the FCC that it is retaining all three relinquishment options: (i) Go Off-Air, (ii) Move to VHF and (iii) enter into a Sharing Arrangement. However, this private letter ruling deals only with the first option, to Go Off-Air, to the exclusion of options (ii) and (iii). This private letter ruling only addresses the transaction as currently proposed.

REQUESTED RULING

The sale or other disposition of the spectrum-based content distribution rights and related assets currently associated with Taxpayer's broadcast services constitutes a sale under a threat of an involuntary conversion for purposes of § 1033.

LAW AND ANALYSIS

Section 1033(a)(2) of the Code provides, in part, that if property (as a result of its destruction in whole or in part, theft, seizure, or requisition or condemnation or threat or imminence thereof) is compulsorily or involuntarily converted into money and if the taxpayer during the period specified in § 1033(a)(2)(B), for the purpose of replacing the property so converted, purchases other property similar or related in service or use to the property so converted, then, at the election of the taxpayer, the gain shall be recognized only to the extent that the amount realized upon such conversion exceeds the cost of such property.

Repacking under Section 1033

One of the circumstances in which a § 1033 requisition or condemnation occurs is where a taxpayer's property is subjected to a compensable governmental taking for public use under the Fifth Amendment of the U.S. Constitution. *American Natural Gas Co. v. United States*, 279 F.2d 220 (Ct. Cl. 1960); *Behr-Manning Corp. v. United States*, 196 F. Supp. 129 (D.C. Mass. 1961); Rev. Rul. 69-254, 1969-2 C.B. 162; Rev. Rul. 58-11, 1958-1 C.B. 273. The Fifth Amendment provides, in part, that no "private property be taken for public use without just compensation." However, the meaning of condemnation or requisition for purposes of § 1033 of the Code is not strictly limited to takings within the meaning of the Fifth Amendment.

In Rev. Rul. 82-147, 1982-1 C.B. 190, a federal law prohibited the use of motor boats with motors of greater than 25 horsepower on designated lakes in wilderness areas. It also provided that, if the horsepower restriction made the operation of a resort uneconomical, the owner of the resort could require the government to purchase its resort at its fair market value (determined without regard to the horsepower restrictions). The horsepower restriction made the operation of the taxpayer's resort uneconomical and the taxpayer sold its fishing lodge to the federal government. In holding that the government's purchase of the resort constituted a condemnation within the meaning of § 1033, the Service did not refer to a Fifth Amendment taking, but instead emphasized that the horsepower restriction "in addition to the provision authorizing purchase of a resort at its fair market value without regard to the restriction, effectively constitutes a taking of property upon payment of fair compensation."

In the present case, the FCC's Repacking process is functionally equivalent to a direct physical taking of private property for a public use without the consent of the property owner because it effectively deprives the Taxpayer of its assets. Taxpayer's choice to participate in the Incentive Auction is not a meaningful choice. Choosing to forgo the

Incentive Auction would mean subjecting itself to the Repacking process. Due to Taxpayer's unique circumstances, if Taxpayer does not participate in the Incentive Auction, it is virtually assured of being Repacked into a different, lower band channel without compensation other than reimbursement from a limited fund for the cost of moving to the new channel.

Sale under Threat of Repacking

In Rev. Rul. 63-221, 1963-2 C.B. 332, the Service stated that for purposes of § 1033, threat or imminence of condemnation is generally considered to exist where a property owner is informed, either orally or in writing, by a representative of a governmental body that the government entity has decided to acquire his property and the property owner has reasonable grounds to believe, from the information conveyed to him by such representative, that the necessary steps to condemn the property will be instituted if a voluntary sale is not arranged.

In Rev. Rul. 81-180, 1981-2 C.B. 161, the Service considered a situation where a taxpayer learned through newspaper reports that a city intended to acquire its property by condemnation for public use if a sale could not be negotiated. City officials confirmed the accuracy of the reports. The taxpayer sold its property to a third party thereafter, but before the city actually condemned the property. The Service concluded that the sale was made under the "threat or imminence of condemnation" because the property was sold after the taxpayer was given reasonable grounds to believe that its property would be taken.

These authorities indicate that a voluntary sale qualifies as an involuntary conversion under § 1033 if the threat or imminence of condemnation is present at the time of sale. However, the threat need not be a certainty. A threat exists if the taxpayer may reasonably believe from representations of the government and surrounding circumstances that a forced sale is likely to take place.

In the present situation, the FCC's decision to impose on Taxpayer mandatory modification of its broadcast facilities if it decides not to participate in the Incentive Auction (including forced relocation to a different operating frequency, and the potential to incur service losses, unreimbursed out-of-pocket costs, and reduced value for its remaining assets), creates the reasonable grounds to believe that condemnation is forthcoming. The involuntary conversion is the FCC's threat of Repacking Taxpayer's station to a different frequency and the consequent loss of economic utility of its related property.

The FCC has provided Taxpayer with notice, through the Spectrum Act and the *Report and Order*, of its intent to acquire the type of spectrum-based distribution rights that Taxpayer possesses. Under its unique circumstances, Taxpayer reasonably believes that if it does not participate in the Incentive Auction, the FCC will take Taxpayer's

spectrum, resell it to wireless carriers, and then force Taxpayer to relocate its station to an inferior frequency.

Accordingly, under the relinquishment option to Go Off Air, Taxpayer's sale of spectrum-based content distribution rights and related assets currently associated with its broadcast services to the FCC constitutes a disposition under the threat or imminence of condemnation for purpose of § 1033 of the Code.

CONCLUSIONS

Under the relinquishment option to Go Off Air, the sale or other disposition of the spectrum-based content distribution rights and related assets currently associated with Taxpayer's broadcast services to the FCC constitutes a sale under a threat of an involuntary conversion for purposes of § 1033.

CAVEATS

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. Thus, as noted above, we do not express any opinion about the tax consequences under § 1033 or any other provision of the Code if Taxpayer proceeds with relinquishment option (ii) Move to VHF or relinquishment option (iii) enter into a Sharing Arrangement. The Service does not issue letter rulings on alternative plans of proposed transactions or on hypothetical situations. See section 6.12 of Rev. Proc. 2016-1, 2016-1 I.R.B. 1, 21.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent. In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representatives.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

The ruling contained in this letter is based upon information and representations submitted by the Taxpayer and accompanied by a penalty of perjury statement

executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

J. Peter Baumgarten
Assistant to the Branch Chief, Branch 4
Office of Chief Counsel
(Income Tax & Accounting)