DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224

OFFICE OF
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR ASSOCIATE AREA COUNSEL,

FROM: Associate Chief Counsel, CC:ITA

SUBJECT: Treble Damage Payments under the Antitrust Laws

This Chief Counsel Advice responds to your memorandum dated June 13, 2001. In accordance with § 6110(k)(3) of the Internal Revenue Code, this Chief Counsel Advice should not be used or cited as precedent.

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.

LEGEND

A = .
B =
C =
D =
a =
b =
c =

ISSUE:

Whether § 162(g)(2) of the limits the deductibility of settlement payments made by A to certain customers in anticipation of lawsuits arising from violations under § 4 of the Clayton Act?

CONCLUSION:

Section 162(g)(2) does not limit the deductibility of settlement payments made by A to certain customers in anticipation of lawsuits arising from violations under § 4 of the Clayton Act.

FACTS:

A is engaged in manufacturing and marketing B and C.

On a, the United States filed a criminal information in D charging A with illegally price fixing and conspiracy to suppress and eliminate competition by price fixing B in violation of § 1 of the Sherman Antitrust Act (the "Sherman Antitrust Action"). In b, A pled guilty to such charges.

As a result of the Sherman Antitrust Action, most of A's customers ("Group 1") filed civil lawsuits under § 4 of the Clayton Act, which provides for the payment of treble damages when a violation of the Sherman Act has occurred. However, some of A's customers settled their antitrust claims before filing a lawsuit ("Group 2"). Ultimately, A settled all claims related to the antitrust violations.

With respect to b and c tax years, A deducted one-third of its settlement payments made under the Clayton Act to Group 1 and deducted all such payments to Group 2. It should be noted this Field Service Advice is limited to settlement payments made by A, under § 4 of the Clayton Act, to Group 2 (the "Payments").

LAW:

Section 162(a) of the Internal Revenue Code provides in general that there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

Section 162(g) provides that if in a criminal proceeding a taxpayer is convicted of a violation of the antitrust laws, or pleads 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 § 4 of the [Clayton] Act... or
>
> (2) in settlement of any action brought under § 4 on account of such violation or related violation.

Section 1.162-22(d) of the Income Tax Regulations provides that an amount may be considered as paid in settlement of an action brought under § 4 of the Clayton Act 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:

In order for the two-thirds disallowance provided in § 162(g) to apply to the instant case, the statute and regulations require:

(1) There must be a prior criminal proceeding in which the taxpayer was convicted of violating the Federal antitrust laws, or in which he entered his plea of guilty or nolo contendere to an indictment charging violation of the Federal antitrust laws; and

(2) If the damages are paid in settlement of any action brought under § 4 on account of such violation or related violation, court proceedings must have been instituted by the plaintiff's filing a complaint for treble damages.

As stated above, A pled guilty to violating Federal antitrust charges, therefore, the first requirement has been satisfied. The remainder of this Field Service Advice will address the second requirement.

Under § 162(g), a settlement cannot relate to an anticipated action; it must be an action brought. The Payments made by A to its customers were made to settle civil antitrust litigation between the parties stemming from the criminal antitrust investigation and the information to which A pled guilty, however, the Payments did not settle an action brought under § 4 of the Clayton Act.

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 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.

There is nothing in § 162(g)'s legislative history that indicates any legislative intent to forego the requirement for a civil action to be brought under the Clayton Act. Rather, § 1.162-22(d) extends 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 § 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, 1340 (1985), aff'd another issue 806 F.2d 263 (9th Cir. 1986) (unpublished decision), acq. and nonacq. on other issues, 1990-2 C.B. 1. In Fisher Companies, the court held that § 162(g) does not apply to amounts paid prior to the commencement of an action under § 4 of the Clayton Act. The court read the plain language of § 162(g)(2) as requiring "an action brought under § 4 of the Clayton Act" in order to trigger the two-thirds disallowance. Because the claimant in Fisher Companies settled with the taxpayer before filing a complaint under the Clayton Act, the court held § 162(g) did not apply to the payments made to the claimant. Similarly, in the present case, A's customers did not file a civil action under § 4 of the Clayton Act against A, and therefore, the two-thirds limitation under § 162(g) does not apply to the Payments.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS:

If you have any further questions, please contact CC:ITA:3 at (202) 622-4950.

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