CHAPTER 1

Introduction: Joint Ventures Involving Exempt Organizations

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§ 1.4 UNIVERSITY JOINT VENTURES

p. 11. ***Add the following new paragraph at the end of this section:***

There is continued congressional focus on university endowments in light of the soaring cost of tuition and the perceived relatively low rate of financial assistance provided by colleges and universities with substantial endowments. See Chapter 14 for a discussion on policy changes that are being proposed, including imposing an annual payout requirement on endowment funds.

§ 1.5 LOW-INCOME HOUSING AND NEW MARKETS TAX CREDIT JOINT VENTURES

pp. 13–14. ***Delete the last paragraph on p. 13 and replace with the following:***

The CDFI Fund has made 1,254 allocation awards totaling $61 billion in allocation authority since the NMTC Program's inception. Since inception through FY 2019, CDEs have disbursed a total of $52.5 billion in QEI proceeds to low-income community businesses (QALICBs).

§ 1.6 CONSERVATION JOINT VENTURES

p. 15. ***Add the following to the last paragraph of this section:***

In January 2014, Treasury and the IRS issued Revenue Procedure 2014-12, 2014-3 I.R.B. 414, which established a safe harbor for federal historic tax credit investments made within a single tier through a master lease pass-through structure. The guidance was issued in response to the Historic Boardwalk decision referenced earlier.

§ 1.8 REV. RUL. 98-15 AND JOINT VENTURE STRUCTURE

p. 18. ***Add the following to the end of footnote 65:***

PLR 201744019 (revocation of exemption of a § 501(c)(3) exempt hospital that was not operated exclusively for § 501(c)(3) purposes because it lacked the ability to require a for-profit manager to operate for charitable purposes).

§ 1.10 ANCILLARY JOINT VENTURES: REV. RUL. 2004-51

p. 21. ***Add the following new paragraph to the end of this section:***

In Section 4.10, there is an analysis of a virtual joint venture hypothetical, as to which a similar rationale should apply in a case in which the IRS proposes the revocation of an existing 501(c)(3) organization, alleging impermissible private benefit following an examination of its relationship with a for-profit entity. This commentator believes that the rationale should apply, notwithstanding the fact that no formal joint venture arrangement exists between the parties.

§ 1.14 THE EXEMPT ORGANIZATION AS A LENDER OR GROUND LESSOR

p. 28. ***Insert the following at the end of this section:***

The Internal Revenue Service recently issued final guidance for private foundations that updates examples that relate to program-related investments that pass muster under § 4944(c). The Final Rules (T.D. 9762) provide changes and examples that were first provided in the 2012 Proposed Regulations. See subsection 6.5(b) for a detailed discussion of the new examples.

In April 2016 the IRS issued final guidance for private foundations that updates a number of examples of program-related investments that won't trigger excise taxes. The Final Rules (T.D. 9762) illustrate changes to

the examples provided in the 2012 Proposed Regulations. In one change involving Example 11, a private foundation that invested in a drug company subsidiary developing a vaccine for disease predominantly affecting poor people in developing countries recognizes that, in addition to distributing the vaccine at affordable prices, the subsidiary is allowed to sell the vaccine to those who can afford it at fair market value prices. In Chapter 6, each of the examples and its revised Treasury guidelines are set forth.

§ 1.15 PARTNERSHIP TAXATION

(a) Overview

p. 30. ***Add the following new paragraph to the end of this subsection:***

In the Bipartisan Budget Act of 2015, the partnership audit rules have been revised, the effect of which is that adjustments of income, gain, loss, deduction, and credit are to be determined at the partnership level, and the taxes attributable thereto will be assessed and collected at the partnership level. The new rules are effective beginning taxable years after December 31, 2018, although small partnerships may opt out before then. See Chapter 3 for a discussion of the application of the new rules.

(b) Bargain Sale Including "Like Kind" Exchange

p. 30. ***Add the following to the end of footnote 101:***

See the discussions regarding the contribution of LLC/partnership interests to charity in subsection 2.11(f), *infra,* and Section 3.11, Sale or Other Disposition of Assets or Interests.

§ 1.17 USE OF A SUBSIDIARY AS A PARTICIPANT IN A JOINT VENTURE

p. 34. ***Add the following paragraph after the first full paragraph on this page:***

In September 2015, the National Geographic Society formed a joint venture with 21st Century Fox, called the National Geographic Partners, a for-profit media joint venture. In this new venture, Fox contributed a substantial amount of cash to National Geographic, which increased its endowment to nearly $1 billion, in exchange for the contribution of significant assets, including its television channels and related digital and social media platforms. See subsection 6.3(b)(iv) for an analysis of the structure.

§ 1.22 LIMITATION ON PRIVATE FOUNDATIONS' ACTIVITIES THAT LIMIT EXCESS BUSINESS HOLDINGS

p. 45. ***Add the following footnote to the end of this section:***

163.1 See the discussion regarding the contribution of LLC/partnership interests to charity in subsection 2.11(f).

§ 1.24 OTHER DEVELOPMENTS

p. 47. ***Add the following as footnote 175 to the last sentence of this section:***

175 In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court cited p. 555 in this book, which described Google.org advancing its charitable goals while operating as a for-profit corporation. See footnote 24 of the *Hobby Lobby decision*, 134 S.Ct. 2751 (2014). The court recognized that while operating as a for-profit corporation, it is able to invest in for-profit endeavors, do lobbying, and tap Google's innovative technology and workforce. It acknowledged that states have increasingly adopted laws formally recognizing hybrid corporate forms.

p. 47. ***Add the following at the end of the subsection:***

With the growing impact of COVID-19, many business owners are interested in providing financial assistance to their furloughed or terminated employees, even though they cannot afford to keep them on their payroll. An attractive option is the creation of an employer-sponsored charity to raise tax-deductible contributions to be distributed to former employees who demonstrate need. In addition, a supplemental unemployment benefit trust under § 501(c)(17) can be formed as part of a plan to pay supplemental unemployment compensation benefits. Under section 139, employers can provide assistance directly to an employee free of income tax, provided the funds are used to pay or reimburse amounts that are reasonably expected to be incurred for incremental personal, family, or living expenses as a result of the COVID-19 crisis.

Under section 139, payments may cover the following expenses: (1) unreimbursed medical expenses and health-related expenses, (2) home expenses due to telecommuting, (3) housing costs for additional family members, (4) increased childcare and tutoring costs due to school closings, (5) additional commuting expenses, and (6) increased costs of home office supplies.

An employer-sponsored charity may cover not only those employees who are suffering under the impact of COVID-19 but may cover future hardships as well. However, charities benefiting individuals are permissible if the class of eligible beneficiaries is broad enough to be considered "indeterminable." For example, a charity designed to benefit past, current, and future employees of an entire restaurant group due to the pandemic and future disasters is broad enough and the beneficiaries are not

immediately identifiable because unknown future employees and current employees who are victims of future disasters are eligible beneficiaries. In addition, the individuals who are invested with the authority to make the grants—the board of directors or a committee appointed by the board—must consist of a majority of individuals who do not exert "substantial influence" over the business with rank-and-file employees and should be included among the decision makers. Finally, individuals who demonstrate a financial need are eligible to receive assistance, but the charity should avoid giving a one-size-fits-all grant to every employee. Acceptable purposes for such grants include payment of necessary health care expenses, providing cost of childcare or educational expenses for children of employees, or short-term grants meant to cover basic living expenses.

CAVEAT

The charity should retain documentation regarding the employee's eligibility for a grant and verification that the employee used the funds for eligible purposes.[176]

CAVEAT

Businesses that contemplate severance payments to workers should consider structuring such payments so that they qualify under section 139. If so, the payments would appear to be exempt from income tax and most payroll taxes. However, any payments pursuant to a legal or contractual obligation to pay severance would be difficult to categorize as section 139 payments. In addition, section 139 contemplates payments commensurate with expenses they intend to offset, while severance payments are often computed based upon years of service and salary levels.

In Notice 2020-46, the IRS provided guidance to employers for how to exchange employee elections to forgo vacation, sick, or personal leave for cash payments that the employer makes to charitable organizations for COVID-19 relief. An employee who elects to relinquish aid leave will not be taxed on the value of the leave, if the payments in exchange for the leave are made by the individual's employer prior to January 1, 2021, to a § 170(c) organization that provides "relief to victims of the COVID-19 pandemic."

[176] It is important to note that as an alternative, employers may be able to assist their employees by making qualified disaster relief payments on a tax-free basis under section 139 of the Code, previously discussed.

CAVEAT

Although not explicit in the IRS notice, the use of the phrase "victims of the COVID-19 pandemic" can be read to mean that the permissible use of the donations extends not only to assist people who contract the disease but also to people who lose their jobs or are otherwise financially harmed by the pandemic.[177]

The CARES Act expanded the definition of educational assistance for purposes of section 127 of the Internal Revenue Code of 1986, as amended, to include certain employer payments made after March 27, 2020, under an "educational assistance program"[178] for repayment of employee student loans. As a result, through the end of the 2025 taxable year, an employer can make tax-free payments to its employees for student loan assistance of up to $5,250 per year. Payments in excess of $5,250 per year (and payments that are not made pursuant to an educational assistance program [as described below]) would be included in the employee's gross income. Additional rules and requirements related to qualified payments and educational assistance programs are described below.

- The payments can be made to the employee or directly to the lender, for repayment of either principal or interest, so long as the payments are made with respect to a "qualified education loan" and certain requirements under section 127 of the Code are met. A qualified education loan would generally include any student loan that is part of a federal postsecondary education loan program that is incurred for "qualified education expenses" of the employee's education, such as tuition and fees, room and board, books, certain supplies and equipment, and certain other necessary expenses for the employee's

[177] Employers will have the choice of deducting these contributions either under the rules of Code § 170, as a charitable contribution deduction, or under section 162, which relates to the deduction for ordinary and necessary business expenses. The benefit of taking a deduction under Code § 162 as opposed to Code § 170 is that the employer will not be subject to certain limitations that section 170 imposes on the amount of the payment that is deductible in the year of the payment.

[178] The term "educational assistance" means (a) the payment, by an employer, of expenses incurred by or on behalf of an employee for education of that employee (including, but not limited to, tuition, fees, and similar payments, books, supplies, and equipment); (b) in the case of payments made before January 1, 2021, the payment by an employer, whether paid to the employee or to a lender, of principal or interest on any qualified education loan (as defined in § 221(d)(1)) incurred by the employee for education of the employee; and (c) the provision, by an employer, of courses of instruction for such employee (including books, supplies, and equipment) but does not include payment for, or the provision of, tools or supplies that may be retained by the employee after completion of a course of instruction, or meals, lodging, or transportation. The term "educational assistance" also does not include any payment for, or the provision of, any benefits with respect to any course or other education involving sports, games, or hobbies. (See § 127(c)(1).)

education. The qualified education expenses must generally be paid or incurred with student loan proceeds within a reasonable period of time before or after the employee takes out the loan.

- For the payments to employees to qualify for the gross income exclusion, the payments must be made pursuant to a separate written educational assistance program established for the exclusive benefit of the employer's employees so as to provide them with educational assistance.
- The employer can establish certain restrictions (subject to the nondiscrimination rules under section 127 of the Code, discussed below) on an employee's eligibility under the program such as job relationship requirements, limitation on when and where the courses can be taken, preapproval by the program manager or the employee's supervisor, proof of completion of the course, minimum course grades, and completion of a certain period of employment after completion of the course.
- The following are additional requirements of the educational assistance program under section 127 of the Code:
  - The program benefits employees who qualify under rules set up by the employer (such as those described above in the immediately preceding bullet point) that do not discriminate in favor of highly compensated employees (i.e., an employee who (i) during the current or preceding tax year is or was a more than 5 percent owner with respect to the employer, or (ii) earned compensation in excess of $130,000 (for the 2021 tax year) unless such employee was not also in the top 20 percent of employees by pay for the preceding year and the employer chooses not to treat such individual as a highly compensated employee);
  - The program does not provide for more than 5 percent of its total benefits during the year to its more than 5 percent shareholders or owners (or their spouses or dependents);
  - The program does not allow the employees to receive cash or other benefits that must be included in gross income instead of educational assistance; and
  - The employer must give reasonable notice of the program to its eligible employees.
- An employer can choose to treat the following individuals as employees for purposes of the income exclusion rules: a current employee; a former employee who retired, left on disability, or was laid off; a leased employee who provided services under the employer's

primary direction or control on a substantially full-time basis for at least a year; and self-employed individuals (such as an owner of a business if the employer is a sole proprietorship, or a partner who performs services for a partnership if the employer is a partnership).

- The program does not need to be funded to qualify.
- The employer may, but is not required to, obtain a determination letter from the IRS that the program is a qualified educational assistance program.