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# REVENUE RULING 84-132: SIDELINED, BUT NOT FORGOTTEN

*Nina R. Murphy\**

## I. INTRODUCTION

Virtually all colleges and universities have scholarship programs designed to support their athletic teams.<sup>1</sup> The programs are generally in the form of membership clubs<sup>2</sup> which are tax-exempt under section 501(c)(3) of the Internal Revenue Code and therefore eligible to receive donations which provide tax deductions to their patrons.<sup>3</sup> The fact that an organization is an "eligible receiver," however, does not ensure that all payments to it are deductible.<sup>4</sup> For example, the cost of football tickets is not deductible since the purchaser is receiving value for his payment.<sup>5</sup>

Most alumni have pressure exerted on them to support their team by joining the university's athletic scholarship program.<sup>6</sup> As an inducement, a majority of these programs offer preferential seating at football or basketball games as a benefit of club membership.<sup>7</sup>

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1. Letter from Sheldon Elliot Steinbach on behalf of American Council on Education, Association of Catholic Colleges and Universities, National Association for Equal Opportunity in Higher Education, National Association of Independent Colleges and Universities, National Association of State Universities and Land-Grant Colleges submitted to Associate Chief Counsel (Technical), Internal Revenue Service (Dec. 17, 1984).

2. See, e.g., University of Florida 1985 Ticket Information Brochure 3 ("Gator Boosters, Inc., exists for the purpose of elevating the quality of Florida's athletes through charitable contributions.").

3. See I.R.C. § 170 (All citations are to the Internal Revenue Code of 1954, as amended).

4. Rev. Rul. 67-246, 1967-2 C.B. 104; IRS Publication 526, 2 IRS PUBLICATIONS (CCH) 22,451 (revised Nov. 1984).

5. Ryan v. Commissioner, 28 T.C.M. (CCH) 1120, 1122 (1969).

6. See, e.g., University of Florida, 1985 Ticket Information Brochure 3 ("Gator Boosters is made up of friends of the University of Florida who believe a strong program of intercollegiate athletics can increase Florida's national visibility while enhancing individual character and university spirit.").

7. Statement of John L. Toner, President, National Collegiate Athletic Association to the Internal Revenue Service on the Implications of Revenue Ruling 84-132, Jan. 7, 1985, re-

Recently, the Commissioner, applying the rule of *quid pro quo* to these clubs, issued Revenue Ruling 84-132.<sup>8</sup> The ruling holds that, if preferential seating is the only benefit of membership, no new members are admitted unless preferred seats are available, and there is a waiting list for membership, then there is no deduction since the value of the benefit received is equal to the amount paid.<sup>9</sup>

Colleges and universities nationwide, fearing loss of support for their athletic programs because of the ruling, protested to both the Internal Revenue Service and Congress.<sup>10</sup> As a result of this protest, the ruling has been temporarily suspended.<sup>11</sup>

This article will briefly discuss the background of deductibility of charitable contributions. Revenue Ruling 84-132 is then analyzed with reference to the established rules regarding the deductibility of charitable contributions outside the context of alumni contributions.<sup>12</sup> Using these existing rules, a recommendation for determining the deductibility of alumni contributions is discussed.

## II. BACKGROUND

A contribution or gift to or for the use of a charity is defined as a voluntary transfer of money or property without receipt or expectation of a financial or economic benefit.<sup>13</sup> Such contribution is deductible by the donor in the year paid,<sup>14</sup> subject to percentage limitations<sup>15</sup> based on the donor's adjusted gross income.<sup>16</sup> Colleges and universities are organizations eligible to receive contributions.<sup>17</sup>

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porting on the results of an NCAA survey of its member schools that 77% of the schools responding had preferential seating as a benefit of membership.

8. Rev. Rul. 84-132, 1984-36 I.R.B. 5.

9. *Id.* at 6.

10. See *infra* notes 59-64 and accompanying text.

11. I.R. 84-111 (Oct. 19, 1984), reported in DAILY TAX REP. [BNA] No. 204, at E-4 (Oct. 22, 1984).

12. See *infra* notes 70-81 and accompanying text.

13. Treas. Reg. § 1.170A-1(c)(5); H. R. REP. No. 1337, 83d Cong., 2d Sess. A44 (1954); S. REP. No. 1622, 83d Cong., 2d Sess. 196 (1954).

14. I.R.C. § 170(a).

15. *Id.* § 170(b).

16. Id. § 170(b)(1)(f). Taxpayer's contribution base as defined by the I.R.C. is adjusted gross income with the parenthetical that such adjusted gross income is computed without regard to any net operating loss carryback.

17. *Id.* § 170(c)(2)(B).

The fact that a charity uses the money or property it receives for charitable purposes does not guarantee the donor a charitable contribution deduction.<sup>18</sup>

The Commissioner has established in a series of cases that the donor's anticipated benefit, if any, controls whether a gift has been made. In the first of these cases, *Channing v. United States*,<sup>19</sup> the Commissioner indicated that a payment to a charity would be closely scrutinized to determine if the taxpayer receives a benefit. In *Channing*, the taxpayer attempted to deduct the tuition costs for sending the taxpayer's children to parochial school.<sup>20</sup> The taxpayer argued that this tuition was a "contribution" to a charitable organization. The district court rejected the taxpayer's arguments and concluded that, in light of the legislative history of the charitable deduction section,<sup>21</sup> the term "contribution" was intended to be synonymous with "gift."<sup>22</sup>

Thirty years later, the Tax Court was confronted with a similar argument for deductibility of parochial school tuition. In *De Jong v. Commissioner*,<sup>23</sup> a taxpayer attempted to deduct the full tuition "contribution" for his children, pointing to the fact that the school considered such contributions entirely voluntary.<sup>24</sup> The Commissioner argued that the court should follow an objective test which would allow the De Jongs to deduct only that portion of their tuition payments which exceeded the actual educational costs per pupil, an amount stipulated to by both parties.<sup>25</sup> The Tax Court rejected both arguments, applying instead, a subjective test: "if a payment proceeds primarily from the incentive of anticipated benefit to the payer beyond the satisfaction which flows from the per-

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18. Rev. Rul. 67-246, 1967-2 C.B. 104. For a thorough discussion of the history of charitable contributions, see Hobbet, *Charitable Contributions—How Charitable Must They Be?*, 11 SETON HALL L. REV. 1 (1970).

19. 4 F. Supp. 33 (D. Mass.), *aff'd per curiam*, 67 F.2d 986 (1st Cir. 1933), *cert. denied*, 291 U.S. 686 (1934).

20. *Channing*, 4 F. Supp. at 34.

21. *Channing* actually discussed section 23(n)(2) of the Revenue Act of 1928. This section was the predecessor to the present section 170.

22. *Channing*, 4 F. Supp. at 34.

23. 36 T.C. 896 (1958), *aff'd*, 309 F.2d 373 (9th Cir. 1962).

24. The amount the school requested as contributions from the parents of its students was based on the education society's estimation of education costs per pupil and the parents' ability to pay. Although the school derived its primary support from parents' contributions, children were admitted to the school without regard to how much was contributed. *De Jong*, 309 F.2d at 374-79.

25. *Id.*, 36 T.C. at 900.

formance of a generous act, it is not a gift."<sup>26</sup> The Tax Court's opinion was later affirmed by the Ninth Circuit Court of Appeals.<sup>27</sup>

Since *De Jong*, the courts have indicated their dissatisfaction with the subjective test. In a case involving the deductibility of tuition to a parochial school, *Haak v. United States*, the district court stated in a footnote that "[t]o distinguish those members whose contribution is based upon a bona fide belief in tithing from those who contribute for other reasons would be a nearly impossible task."<sup>28</sup> Even before *Haak*, the Commissioner announced that the donor's state of mind when transferring money or other property to a charitable organization is not relevant in deciding if a contribution has been made.<sup>29</sup>

The only recent case that has suggested examining each donor's motive and individual situation is *American Bar Endowment (ABE) v. United States*.<sup>30</sup> In *ABE*, the court analyzed one of ABE's fundraising projects, an insurance program which was structured so that all premium refunds were assigned to ABE by the members. The members attempted to deduct the percent of their premiums refunded to ABE by the underwriting insurance companies, arguing that the insurance payment had a dual purpose, i.e., part insurance premium, part donation.<sup>31</sup> According to the Commissioner, to establish a dual payment the taxpayer must demonstrate that he bought goods or services for more than their economic value, with the intention that the excess be used to benefit a charitable enterprise.<sup>32</sup> The Claims Court concluded that, taking into account all the facts and circumstances, an insurance purchase through the Endowment plan may be a good deal for some but not for others, thereby necessitating a separate inquiry into each member's motivation and circumstances.<sup>33</sup> The court then performs the "impossible task"<sup>34</sup> of making a separate determination for each individual insurance purchaser.

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26. *Id.* at 899.

27. 309 F.2d 373 (9th Cir. 1962).

28. *Haak v. United States*, 451 F. Supp. 1087, 1092 n.5 (W.D. Mich. 1978).

29. Rev. Rul. 67-246, 1967-2 C.B. 104, 105.

30. 4 Cl. Ct. 404, 84-1 U.S.T.C. ¶ 9204 (1984).

31. For a discussion of the basis of this "dual purpose" argument, see *infra* note 45 and accompanying text.

32. See Rev. Rul. 67-246, 1967-2 C.B. 104, 105.

33. See B. BITTKER, *FEDERAL TAXATION OF INCOME, ESTATE & GIFTS* 83,257 (1981).

34. See *Haak*, 451 F. Supp. at 1092 n. 5. There were only four individuals involved in the *ABE* case; there are 55,000 members of the ABE who are enrolled in the insurance plan.

*ABE* clearly is not supported by the present state of the law, and even if the donor can prove a charitable intent, there is still no contribution if a benefit is, in fact, received.<sup>35</sup> As indicated by the First Circuit Court of Appeals: "Were the deductibility of a contribution under section 170(c) of the Internal Revenue Code of 1954 to depend on [subjective intent], an important area of tax law would become a mare's nest of uncertainty woven of judicial value judgments irrelevant to eleemosynary realities."<sup>36</sup>

Courts that have rejected the subjective test for determining whether a donation constituted a gift have instead focused on benefits received by the donor because of the contribution. In *Oppewal v. Commissioner*,<sup>37</sup> the Court of Appeals for the First Circuit focused, not on the donative intent of the taxpayer, but on the *quid pro quo* the taxpayer received, stating that:

However the payment was designated, and whatever motives the taxpayer had in making it, was it to any substantial extent, offset by the cost of services rendered to the taxpayers in the nature of tuition? If so, the payment, to the extent of the offset, should be regarded as tuition . . . .<sup>38</sup>

The Court of Appeals for the Second Circuit adopted a similar objective test in *Winters v. Commissioner*.<sup>39</sup>

In 1979, the Commissioner attempted to apply the logic and reasoning of those courts adopting the objective *quid pro quo* test by issuing Revenue Ruling 79-99.<sup>40</sup> In this Ruling, the Commissioner held that even if payments to a parochial school were voluntary and were credited to a general fund rather than for a specific stu-

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35. Technical Information Release-747 (June 30, 1965), cited in J. MERTENS, LAW OF FEDERAL INCOME TAXATION 1961-1965 Rulings M.A.P. 376, 378 (1966) ("The Revenue Service emphasized . . . that the mere fact that tickets or other privileges are not used does not entitle the patron to any greater charitable contribution deduction. The test of deductibility is not whether the right to admission is exercised, but whether the right was available."). Many taxpayers lose a charitable deduction by showing an unused ticket to justify the deduction, B. BITTKER, *supra* note 33, ¶ 35.1.3, at 35-10. See also Rev. Rul. 74-348, 1974-2 C.B. 80 (donor returning \$5.00 ticket, purchased for \$3.00, as part of a series to the charity to resell entitled to a \$3.00 deduction under § 170(e)(1)(A)).

36. *Crosby Valve & Gage Co. v. Commissioner*, 380 F.2d 146, 146 (1st Cir.), cert. denied, 389 U.S. 976 (1967).

37. 30 T.C.M. (CCH) 1177 (1971), *aff'd*, 468 F.2d 1000 (1st Cir. 1972).

38. *Id.*, 468 F.2d at 1002.

39. 468 F.2d 778 (2d Cir. 1972).

40. Rev. Rul. 79-99, 1979-1 C.B. 108.

dent's tuition, the payments could not be deducted.<sup>41</sup>

Congress reacted quickly to this overly general ruling by passing a law which denied funds for the enforcement of any revenue ruling which held that a "taxpayer is not entitled to a charitable deduction for general purpose contributions which are used for educational purposes by [an exempt] religious organization."<sup>42</sup> The Commissioner responded with Revenue Ruling 83-104 which outlined situations where a transfer of money made by a parent to a school organization would be deductible. Under the Ruling, the deductibility of the transfer depends upon whether the payment is voluntary and made without expectation of receiving a commensurate benefit in return. The payment will not be deductible if the facts and circumstances of the case indicate that enrollment in the school was, in any way, contingent upon making the payment. In addition, there can be no plan, express or implied, to convert non-deductible tuition into charitable contributions, and the benefit received by the contributing parents cannot otherwise depend upon the making of the payment.<sup>43</sup>

Once it is determined that a benefit has been received by a donor of a charitable organization, the issue becomes how to value that benefit.<sup>44</sup> A payment to a charity may have a dual character—part purchase price, part contribution.<sup>45</sup> By use of twelve examples, the Commissioner, in Revenue Ruling 67-246<sup>46</sup> describes the types of benefits which are deemed to have monetary value to the donor and thus will reduce the contribution part of a payment. The burden is placed on the donor to value the benefits received. In the absence of a showing to the contrary, the Commissioner will assume that the benefit received is equal to the amount paid.<sup>47</sup>

When the taxpayer assesses the value of a benefit received, the correct measure is fair market value.<sup>48</sup> This figure is not difficult to

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41. *Id.* at 109.

42. Pub. L. No. 96-74, 96th Cong., H.R. 4393 (Sept. 29, 1979).

43. Rev. Rul. 83-104, 1983-2 C.B. 46, 46-48.

44. In Technical Information Release-747, issued in 1965, the Internal Revenue Service, while attempting to have the charities value what they are giving a donor in return for a contribution, put the burden of valuing the benefit on the donor.

45. See *American Bar Endowment v. United States*, 4 Ct. Cl. 404, 84-1 U.S.T.C. ¶ 9204 (1984); *Singer v. United States*, 449 F.2d 413 (Ct. Cl. 1971).

46. Rev. Rul. 67-246, 1967-2 C.B. 104.

47. *Id.*

48. Rev. Rul. 78-189, 1978-1 C.B. 68. Fair market value is defined in Treasury Regulation § 1.170A-1(c)(2) as "the price at which the property would change hands between a willing

determine if there is an established market for the benefit received.<sup>49</sup> When there is no established market, however, the issue of assessment becomes more difficult. In those cases where no market exists for the benefit received, the Commissioner requires a "reasonable estimate of the fair market value" to be made by the taxpayer.<sup>50</sup> The deductibility of the contribution must be reduced by this estimated amount.

The Commissioner has looked to the donee-charitable organization for help in valuing the benefit a donor receives. In a 1967 Revenue Ruling, the Commissioner suggested that these recipients of charitable contributions—in exchange for benefits such as tickets, meals or mementos—advise the donor of the fair market value of the item received.<sup>51</sup> This has never been made a requirement, however, and the burden of valuing the benefit still remains upon the donor. In fact, the donor cannot even rely upon statements made by the charitable organization regarding the deductibility of his contribution, unless an amount reasonably setting the benefit's fair market value is provided.<sup>52</sup>

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buyer and a willing seller, neither being under any compulsion to buy or sell and both having a reasonable knowledge of relevant facts."

49. See, e.g., Rev. Rul. 67-246, 1967-2 C.B. 104. See also Rev. Rul. 82-201, 1982-2 C.B. 5 (holding that purchasing of a book sold by the local committee of a national political party at a price greater than its fair market value entitles the buyer to a political contribution credit equal to the difference between the price paid for the book and its fair market value).

50. See Rev. Rul. 67-246, 1967-2 C.B. 104, 106. Technical Information Release-747 (June 30, 1965); Pvt. Ltr. Rul. No. 8229113, 1982 P-H FED. TAXES—PRIVATE LTR. RUL. ¶ 4020(82). In the private letter ruling, a tax-exempt organization, in order to raise money to build a bronze statue of a longhorn steer and a mounted brand inspector of the 1880's, will distribute miniature bronze statuettes and brochures to persons who pay X dollars to the project. The Commissioner determined that donors will be allowed a charitable deduction only to the extent that the amount of money transferred can be shown to exceed the fair market value of the miniature bronze statue and the brochure. The burden is on the donor to establish that the amount paid is not the purchase price of the brochure and statue and that part of the payment in fact qualifies as a gift. The cost of the statuette to the organization does not establish fair market value.

51. See Rev. Rul. 67-246, 1967-2 C.B. 104, 106.

52. The Commissioner expressed concern in Rev. Rul. 67-246, 1967-2 C.B. 104 that there are an increasing number of instances where taxpayers are erroneously advised by the charities as to deductibility of their payments. There is no suggestion whether this is intentional or not. See, e.g., *Plainfield Hails Home Grown Talent*, Plainfield Today, Aug. 9, 1984, at 9; col. 1-2 (Plainfield, N.J.) (Tickets for a local talent show to benefit the YWCA are announced with a statement in the article that "all ticket purchases are tax-deductable [sic], according to the committee planning the evening."); *India Festive Feasting, Crafts*, Richmond Times-Dispatch, July 8, 1984 at H-14, col. 3-4. (Richmond, Va.) (announcing that a bazaar sponsored by the Hindu Center of Virginia would offer an authentic Indian meal at a cost of \$6.00; article noted that "[t]he meal ticket is a tax-deductible donation, according to the festival's organizers.").



Valuation is particularly speculative when the benefit received is simply a memento acknowledging the gift. Nonetheless, the Commissioner will not allow the fair market value of the memento to be deducted as part of the charitable contribution.<sup>53</sup> The burden of valuation placed upon the donor is even more difficult and speculative when the benefit given in exchange for the contribution is an intangible—such as a preferred seating privilege.<sup>54</sup> Receipt of just such an intangible was the situation addressed by the Commissioner in Revenue Ruling 84-132.<sup>55</sup>

### III. THE RULING

In Revenue Ruling 84-132, the Commissioner presents a situation in which an individual made a payment of \$300 to a university's athletic scholarship program thereby becoming a "member" of the program. The only benefit of membership is the privilege (for an additional \$120) of purchasing a season's ticket to the university's home football games with preferred seating between the 40-yard lines. No tickets for such seats are available to non-members. A person is made a member only when a season's ticket between the 40-yard lines becomes available. There are approximately 2,000 people on the waiting list to become members.<sup>56</sup>

In the facts of this ruling, the Commissioner has drawn the tightest possible case for holding that the full amount of the membership fee is paid in exchange for the privilege of purchasing preferred seats. The ruling held that a taxpayer could not deduct any part of the membership fee under section 170 unless he could establish that the payment exceeds the monetary value of the right to purchase preferred seats. According to the Commission, "fair market value of the privilege of having choice reserved seats . . .

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Some charities take the hedging approach—while not stating that the full amount of the payment is deductible, they give no indication that it is not. *See, e.g., Decision 84: Pledge and Information* (Radio station WRFK-FM's annual solicitation brochure where gifts vary with contribution level clearly falling within Example 4 of Rev. Rul. 67-246, 1967-2 C.B. 104, 108; the statement appears: "Remember that all contributions to WRFK are tax-deductible, as allowed by the IRS.") (emphasis added).

53. *See* Pvt Ltr. Rul. No. 8229113, 1982 P-H FED. TAXES-PRIVATE LTR. RUL. ¶ 4020(82). For a discussion of how one might value these mementos for purposes of determining deductibility of contributions, see *infra* notes 90-93 and accompanying text.

54. There has never been any suggestion that the price paid for the tickets themselves is deductible; it is only the right to buy those tickets that is at issue in Revenue Ruling 84-132.

55. Rev. Rul. 84-132, 1984-36 I.R.B. 5.

56. *Id.*

would *in all likelihood*, exceed the amount of payment.”<sup>57</sup>

The result reached in the Revenue Ruling is an accurate reflection of the law as it currently exists. “The fundamental principle . . . remains unchanged, if the payment brings the payor some benefit, it’s not deductible.”<sup>58</sup>

The reaction to Revenue Ruling 84-132 by the colleges, and ultimately by Congress, was immediate.<sup>59</sup> The pressure led to a temporary suspension of the ruling<sup>60</sup> and the unusual procedure of the scheduling of a public hearing on the revenue ruling.<sup>61</sup> The National Collegiate Athletic Association (NCAA), through its President, John L. Toner, expressed fear that “as written, the Ruling will lead to enormous confusion and ultimately to serious erosion in our members’ fund-raising capacities.”<sup>62</sup> Toner does not dispute the fact that some benefits should be valued,<sup>63</sup> but requests the permanent withdrawal of the Ruling to avoid a chilling effect on contributions to athletic scholarship programs.<sup>64</sup>

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57. *Id.* (citing Rev. Rul. 67-246, 1967-2 C.B. 104) (emphasis added). The Commissioner also cites Rev. Rul. 76-185, 1976-1 C.B. 222. Reliance on that ruling, in which taxpayer restored a historic mansion in exchange for the right to live there for 15 years, seems misplaced, as a fair rental value should not be difficult to compute.

58. Prepared Statement of Professor Richard L. Kaplan, College of Law, University of Illinois, before the Internal Revenue Service, Washington, D.C. (January 7, 1985).

59. The ruling was issued September 4, 1984. Senate Finance Committee Chairman Robert Dole (R-Kan.), after being lobbied by other members, announced on the Senate floor on Oct. 11, 1984, that the Treasury Department was committed to withdrawing the ruling until after a public hearing. Rep. Norman Dicks (D-Wash.) introduced H. R. 6389 to repeal the revenue ruling.

60. I.R.B. 84-111 (Oct. 19, 1984), *cited in* DAILY TAX REP. (BNA) No. 204, at G-4 (Oct. 22, 1984) (stating that the ruling was suspended until “its implications upon the varied athletic scholarship programs in existence throughout the country” are determined).

61. The hearing is the second in IRS history to be held on a revenue ruling or procedure. DAILY TAX REP. (BNA) No. 5, at G-5 (Jan. 7, 1985).

62. Statement of John L. Toner, President, National Collegiate Athletic Association to the Internal Revenue Service on the Implications of Revenue Ruling 84-132, at 5 (January 7, 1985). Evidence of this confusion can be seen in letters to Senator Mark Hatfield, characterizing the ruling as disallowing tax deductions for athletic contributions. Letter from Bill Byrne, University of Oregon’s Director of Athletics, to Senator Mark Hatfield (Oct. 22, 1984); Letter from Bob Herndon, Executive Director of the Beaver Club, to Senator Mark Hatfield (Oct. 16, 1984) (stating that the Beaver Club supports the Oregon State University’s Athletic Department).

63. *See* Statement of John L. Toner, *supra* note 62, at 4 (suggesting benefits such as reduced ticket prices or free parking).

64. *See* Legislative History, Tax Reform Act 1969 Section 170 [2 Series 1-Primary Sources] Tax MGMT (BNA) 170.39, stating that

[I]n addition to the economic motivations for charitable giving, the American Association of Fund-Raising Counsel recognized many non-economic incentives for giving. These include responses to social awareness, generosity, social pressure, pity, and

## IV. RECOMMENDATION

Revenue Ruling 84-132 must be reissued in a revised format. Apparently, the Ruling was issued without a thorough knowledge of the package of benefits generally offered by athletic scholarship programs.<sup>65</sup> The reissued ruling must take account of the variations in these programs throughout the country.<sup>66</sup> A proposed format would combine the approaches used in other charitable contribution rulings: Revenue Rulings 67-246,<sup>67</sup> 68-432<sup>68</sup> and 83-104.<sup>69</sup>

Revenue Ruling 67-246, by means of twelve examples, illustrates typical fund-raising techniques used by charities in soliciting donations and advises the taxpayer/donor of the tax consequences of receiving benefits offered by the charities in return for "donations." For example, if a charity sponsors a concert and the "donation" per ticket approximates the established admission charge for this type of concert, there is no gift and no tax-deductible contribution.<sup>70</sup> If the taxpayer pays more than the established admission charge for similar tickets, then only the excess is deductible.<sup>71</sup> In another example, a symphony, in order to support free public concerts, solicits contributions from its patrons. As an inducement, the symphony offers free admission to the premiere showing of a motion picture and choice reserved seats to the public concerts for a \$20 membership fee. No part of the membership fee is deductible, even if the contributor does not wish to attend the premiere showing of the film. "[U]nder these circumstances the fair market value of the privilege of having choice reserved seats for attending the concerts would, in all likelihood, exceed the amount of the pay-

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habit. To the extent that non-economic factors influence charitable giving patterns, changes in the tax treatment of charitable donations have little repercussion on level of contributions." These non-economic factors, largely nonquantifiable, have a strong influence.

65. Letter from Sheldon Elliot Steinbach, *supra* note 1.

66. See *Survey Summary of Results of NCAA Division I Institutions Regarding IRS Charitable Contribution Ruling* [hereinafter cited as *Survey Results*]; statement of John L. Toner, *supra* note 62.

Charles M. Morgan III, Associate Chief Counsel (Technical), Internal Revenue Service, said at the conclusion of the hearings that additional information about the workings of college sports programs would aid the agency in reconsidering its ruling. *DAILY TAX REP.* (BNA) No. 5, at G5 (Jan. 8, 1985).

67. 1967-2 C.B. 104.

68. 1968-2 C.B. 104.

69. 1983-2 C.B. 46.

70. 1967-2 C.B. at 107, ex 1.

71. *Id.* at 107-08, ex. 2.

ment.”<sup>72</sup> Other examples in the Ruling cover charity bazaars,<sup>73</sup> charity luncheons<sup>74</sup> and balls,<sup>75</sup> and charity catalogues offering various merchandise depending on contribution level.<sup>76</sup> In each instance, the Commissioner analyzes the facts and circumstances and applies to each situation the law of charitable contributions discussed above.

In Revenue Ruling 68-432, the Commissioner analyzes the deductibility of contributions for various museum memberships. The Commissioner compared the various benefits and contributions for each category of membership in distinguishing those groups which were receiving a non-deductible *quid pro quo* for their payments from those groups which were clearly making a charitable contribution. Since all members received equal benefits to a certain extent, the minimum amount for any membership was determined to be equal to the benefits received and, therefore, non-deductible.<sup>77</sup> In those instances where the monetary contributions greatly exceeded the value of the benefits received, the Commissioner indicated that it would treat the contribution as of a “dual character . . . [and] give due consideration to the possible separation on a uniform basis of that portion of the total payment that may properly be treated as a charitable contribution.”<sup>78</sup>

Revenue Ruling 83-104, issued in response to the congressional reaction precipitated by Revenue Ruling 79-99,<sup>79</sup> takes into account the various ways parochial schools handle their fund raising and admission programs. For example, if the private school requests from parents a set “contribution,” and if parents do not make this contribution they are charged tuition equalling the same amount, no portion of the payment may be deducted as a charitable contribution.<sup>80</sup> Similarly, if contributions are solicited as part of the admission process but the private school does not charge tuition, no deduction will be allowed to the extent of the per pupil cost.<sup>81</sup> By contrast, if a church operates a school as only one of its

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72. *Id.* at 109-10, ex. 7.

73. *Id.* ex. 9.

74. *Id.* at 108-09, ex. 6.

75. *Id.* at 111, ex. 12.

76. *Id.* at 108, ex. 4.

77. 1968-2 C.B. at 105.

78. *Id.*

79. See discussion *supra* notes 40-43 and accompanying text.

80. Rev. Rul. 83-104, 1983-2 C.B. at 48, ex. 1.

81. *Id.* ex. 2.

activities, receives contributions from all its members which are placed in the general fund to support all church activities, and solicits contributions from church members with children in the school with the same methods as members without children, then a deduction by parents will be allowed.<sup>82</sup>

A reissued Revenue Ruling 84-132 must give examples of the more common scholarship charitable contributions.<sup>83</sup> Most schools offer a package of benefits comparable to one or more of the situations in Revenue Rulings 67-246, 68-432, and 83-104. Preferred seating, as in Revenue Ruling 67-246, example 4, is only one instance. There are usually pre and post game parties, monthly newsletters, meetings with coaches, name in the program, free parking, et cetera, depending on various contribution levels.<sup>84</sup>

Apparently most schools are not in the enviable position of the hypothetical university in Revenue Ruling 84-132, having a waiting list to buy season's tickets.<sup>85</sup> A study of the hundreds of letters submitted to the Technical Division of the Internal Revenue Service in response to this ruling presents a picture of the situation at both large and small colleges and evidences a fear that, if allowed to stand, the ruling will cost the colleges a significant amount of money.<sup>86</sup> On the other side, if the ruling is completely withdrawn, some colleges will continue to abuse the section 170 charitable contribution by offering their patrons significantly more benefits than just preferred seating in exchange for a tax deductible contribution.<sup>87</sup>

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82. *Id.* ex. 4.

83. See generally Letter from David A. Sachs and Joseph B. Whitebread, Jr., representing the Maryland Educational Foundation, Inc., to Charles M. Morgan III, Associate Chief Counsel (Technical), Internal Revenue Service 3 (Dec. 14, 1984) (stating that "Rev. Rul. 84-132 does not represent normative fund-raising programs sponsored by universities"); see also Statement from John L. Toner, *supra* note 7.

The NCAA survey submitted by Toner would be an ideal starting place, but obviously any final result should not be formulated until input is received from many sources—for example, the American Council on Education. Letter from Sheldon Steinbach, General Counsel, American Council on Education to Charles M. Morgan III, Associate Chief Counsel (Technical), Internal Revenue Service (Dec. 17, 1984).

84. See, e.g., University of Florida 1985 Ticket Information Brochure 4.

85. *Survey Results*, *supra* note 66 (Of schools that offered preferred seating, only 17% had a waiting list).

86. Mr. Roscoe Egger, Jr., a Commissioner of the Internal Revenue Service, and Charles M. Morgan III, Associate Chief Counsel (Technical) for the Internal Revenue Service received over 50 letters to this effect. Copies of these letters are on file with the author.

87. An example of this type of abuse is found in the Bull Gator Club at the University of Florida. For a donation of \$10,000 per year, members receive 1) official Blazer and Bull

In following the formats of Revenue Rulings 67-246, 68-432 and 83-104, the Commissioner, after studying the athletic scholarship program formats around the country, can set up general principles for deductibility—for example, benefits such as free parking and preferred seating privileges must be valued and that value subtracted from the membership fee while one's name in a program or on a plaque memorializing the contribution would not reduce the deductibility of the membership fee.<sup>88</sup> Once general principles have been outlined, a number of typical fund-raising programs should be described with a full analysis of the tax consequences of each. In addition, the Commissioner should list factors to be considered in determining deductibility of contributions to a program which is a hybrid of the ones described.<sup>89</sup> A study of the three rulings mentioned will make it obvious that the Commissioner need make no new law; what is required is the marshalling of those factors which are applicable to athletic scholarship programs in one revenue ruling.

A crucial element of a reissued revenue ruling is a section on valuation of benefits received<sup>90</sup> and a requirement that the colleges inform their supporters of the deductible portion of any payment.<sup>91</sup> When the benefit received is merely a memento, a *de minimus* rule would be proper. This approach is now used by the Commissioner to prevent an ordinary income tax upon a tax-exempt

gator patch, 2) official plaque, 3) Bull gator pin, 4) official Bull gator ring, 5) four seats in Florida field press box, 6) reserved name parking for football games, 7) pre-and post-football game parties, 8) subscription to "Gator Tabs" newspaper, 9) membership card-free admission to all events except football and basketball, 10) football and basketball brochures, 11) picture in football, basketball programs, 12) window decals, 13) golf course membership, 14) Gator Auto Tag, 15) right to purchase 4 tickets to Florida Field, 16) right to purchase 20 Georgia tickets, 17) right to purchase 10 FSU tickets, 18) right to purchase 10 priority basketball and 10 priority SEC basketball tournament tickets and 19) *tax deduction*. University of Florida 1985 Ticket Information Brochure 4 (emphasis added).

88. See *infra* notes 92-93 and accompanying text (discussing a *de minimus* rule in these circumstances).

89. See, e.g., Rev. Rul. 83-104, 1983-2 C.B. at 47:

[T]he presence of one or more of the following factors creates a presumption that the payment is not a charitable contribution: the existence of a contract under which a taxpayer agrees to make a 'contribution' and which contains provisions ensuring the admission of taxpayer's child; a plan allowing taxpayer either to pay tuition or to make 'contributions' in exchange for schooling; the earmarking of a contribution for the direct benefit of a particular individual; or the otherwise-unexplained denial of admission or readmission to a school of children of taxpayers who are financially able but who do not contribute.

90. For a discussion of the difficulties of valuing benefits without an established market, see *supra* notes 48-50 and accompanying text.

91. See Technical Information Release-747 (June 30, 1965).

organization which distributes "low cost articles" to all contributors.<sup>92</sup> Without a *de minimus* rule, the tax-exempt organization may be treated as selling the mementos for profit. Similarly, in the context of unrelated business taxable income, a *de minimus* rule has been applied. When adopting the sections dealing with unrelated business taxable income, the legislature indicated that "the amounts received [by the charitable organization] are not to be considered as being in exchange for the low cost articles where it is clear that the contributions, less a reasonable administrative cost, fully accrue to the exempt organization."<sup>93</sup> A similar rationale should apply here.

When valuing intangible privileges, it is necessary for the Commissioner to provide the colleges some valuation techniques.<sup>94</sup> In addition, donors need a direct statement from the colleges so there is no longer a misunderstanding regarding what portion of a contribution is deductible and what is payment for goods or services received.<sup>95</sup>

## V. CONCLUSION

By applying the law of charitable contributions to college football programs, the Commissioner of Internal Revenue has created a nationwide controversy. Rather than just withdrawing the ruling, the Commissioner must issue an expanded ruling so that college athletic programs will not consider themselves immune to the law as it applies to all other charitable institutions. The only way to put teeth in an expanded ruling is to require the college to put its patrons on notice as to what portion of any payment is a contribution. The fear that contributions will be reduced if the total amount paid is not deductible is not relevant unless one feels it necessary to rewrite the law of charitable contributions for supporters of college football teams.

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92. See Treas. Reg. § 1.513-1(b).

93. S. REP. NO. 91-552, 91st Cong., 1st Sess., reprinted in 1969 U.S. CODE CONG. & AD. NEWS 2027, 2100. While a full discussion of this suggestion is beyond the scope of this paper, a thorough discussion of the reason for the exemption can be found in *Hope School v. United States*, 612 F.2d 298 (7th Cir. 1980).

94. Farris Womack, Vice Chancellor of the University of North Carolina, representing the American Council of Education at the public hearing on Revenue Ruling 84-132, stated that guidance was needed from the IRS on how to calculate the value of benefits when there was no established marketplace for such benefits. See DAILY TAX REP. (BNA) No. 5, at G5 (Jan. 8, 1985).

95. See Rev. Rul. 67-246, 1967-2 C.B. at 107-11.

## ADDENDUM

*American Bar Endowment v. United States*<sup>1</sup> was reversed in relevant part by the U.S. Court of Appeals for the Federal Circuit on May 10, 1985.<sup>2</sup> That court found that the Claims Court applied the wrong test. After a lengthy explanation, the court held that “the general question to be posed . . . is whether the transaction between the Endowment and the taxpayers involving the assignment of dividends ‘was of a business nature and not charitable.’”<sup>3</sup> Although the test has changed, the court still requires the impossible task of making the business-charitable determination on an individual basis for each policyholder.

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1. 4 Ct. Cl. 404, 84-1 U.S. TAX CAS. (CCH) ¶ 9204 (1984); see text accompanying notes 30-34.

2. No. 84-988 DAILY TAX REP. (BNA) No. 99, at H-1 (May 22, 1985).

3. *Id.* at H-4 (citing *Singer Co. v. United States*, 449 F.2d 413, 424 (Ct. Cl. 1971)).



