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THE GETTY
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The Honorable David Kautter
Acting Commissioner, Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Via email to Notice.Comments@irs.counsel.treas.gov

Comments on Application of Excise Taxes with Respect to Donor-Advised Funds (Notice 2017-73)

Dear Acting Commissioner Kautter:

The J. Paul Getty Trust (Getty) appreciates the opportunity to comment on Internal Revenue Service (IRS) Notice 2017-73 regarding the application of excise taxes with respect to donor-advised funds (DAFs). As set forth below, the Getty respectfully requests that the Department of the Treasury (Treasury) and the IRS reconsider their position on the use of distributions from DAFs to pay the deductible portion of memberships with charitable organizations and/or the deductible portion of the cost of tickets to charity-sponsored events.

I. BACKGROUND

a. The J. Paul Getty Trust

The Getty, a charitable trust established in 1953 in Los Angeles, California, is a cultural and philanthropic institution dedicated to the presentation, conservation, and interpretation of the world's artistic legacy. Through its four constituent programs – the Getty Conservation Institute, the Getty Foundation, the J. Paul Getty Museum, and the Getty Research Institute – the Getty Trust pursues its mission in Los Angeles and throughout the world, serving both the general interested public and a wide range of professional communities in order to promote a vital civil society through an understanding of the visual arts. The Getty is tax-exempt under § 501(c)(3) of the Internal Revenue Code (IRC) and is classified as an exempt operating foundation under IRC § 4940(d)(2).

b. Getty Fundraising and Engagement with Donors

Although the majority of the Getty's operating budget derives from its endowment, the Getty has a growing base of external support among individuals, foundations, and corporate sponsors who are committed to helping the Getty carry out its mission around the world. Contributions from external sources have steadily risen over the past six years and the Getty has increasingly come to rely on these contributions. For the fiscal year ending June 30, 2017, contributions totaled \$22,329,000.

One of the most significant ways the Getty has engaged individual donors is through its various councils. These councils are groups of donors who pay dues annually to support the work of specific programs or departments.¹ Council dues vary by council but most dues have a deductible portion and a non-deductible portion (equivalent to the fair market value of goods and services provided in exchange for the dues payment), as is typical of higher-level museum memberships.

Whether and the extent to which council members may pay the deductible portion of their council dues by recommending a grant from a DAF is not clear under present law and so the Getty welcomes the prospect of guidance in this area. At least some of our council members use DAFs as vehicles for their philanthropy, and the Getty naturally is interested in maximizing the number of ways these donors can support the Getty's work. Accordingly, we support adoption of a rule that expressly permits DAFs to make distributions to cover the deductible portion of memberships with charitable organizations and/or the deductible portion of the cost of tickets to charity-sponsored events, provided that the donor or donor-advisor² who uses such memberships or tickets pays separately for the non-deductible portion and receives no related tax deduction.

II. DISTRIBUTIONS FROM DAFs FOR MEMBERSHIPS AND TICKETS

a. "More than incidental benefit"

IRC § 4967 imposes taxes on "more than incidental benefit[s]" received by donors, donor-advisors, their family members, or controlled entities, directly or indirectly, as a result of a distribution from DAF. The tax is imposed on the donor or donor-advisor and on the DAF manager who approved the distribution knowing it would result in such a benefit.

Prior to Notice 2017-73 the IRS had not issued any guidance on the meaning of "more than incidental benefit" in the DAF context, but commentators frequently cited a statement in the Joint Committee on Taxation's (JCT) Technical Explanation of the Pension Protection Act of 2006. The JCT stated that in general, a benefit received by a donor as a result of a distribution from a DAF was "more than incidental" if the benefit would have "reduced (or eliminated) a charitable contribution deduction if the benefit was received as part of the contribution to the sponsoring organization."³

¹ The Getty currently has eight such councils, supporting the Getty Villa, the Getty Museum's Departments of Photographs, Paintings, and Drawings, the Getty Conservation Institute, the Getty Research Institute, the Getty Museum Director's Office, and the Getty President's Office. Council dues vary by council and for fiscal year 2017, annual council dues ranged from \$7,500 to \$50,000.

² Recognizing that not all donors to DAFs exercise their advisory privileges, the language of § 4967 recognizes both "donors" and "donor-advisors." For brevity this letter uses the term "donors" to refer to both donors and donor-advisors.

³ Staff of the Joint Committee on Taxation, Technical Explanation of H.R. 4, The "Pension Protection Act of 2006" as Passed by the House on July 28, 2006, and as Considered by the Senate on August 3, 2006 (JCX-38-06) at 350.

Under this analysis, the tax deductibility (or not) of the benefit received is the key to determining whether that benefit is “more than incidental.” Unclear from this legislative history is whether the benefit received by the donor would continue to be “more than incidental” if the donor in fact paid for the benefit and received no associated tax deduction.

As explained below, we believe that when the donor personally pays for the value of the benefit received and receives no related tax deduction, the benefit is not “more than incidental,” regardless of whether a DAF has made a distribution as part of the transaction. Alternatively, to the extent that the donor personally pays for the value of the benefit received, then the donor’s receipt of such benefit is the result of the donor’s personal, non-deductible payment, and not the result of the distribution by the DAF. Either way, we believe that IRC § 4967 should be interpreted to permit such bifurcated payments in the context of memberships with charitable organizations and/or the deductible portion of the cost of tickets to charity-sponsored events.

b. DAFs differ from private foundations in key respects

In the absence of express guidance on the meaning of “more than incidental” benefits, practitioners have looked by analogy to the private foundation context, which imposes excise taxes on acts of self-dealing between the private foundation and disqualified persons. This includes the “transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a private foundation.”⁴ A disqualified person may, however, receive benefits that are only “incidental or tenuous.”⁵

In a 1977 Revenue Ruling, a private foundation’s payment of church dues on behalf of a disqualified person was held to be self-dealing, because it provided a benefit that was “not incidental or tenuous.”⁶ Citing Treas. Reg. § 53.4941(d)-2(f)(2), the IRS reasoned that “the foundation’s payment results in a direct economic benefit to the disqualified person because that person would have been expected to pay the membership dues had they not been paid by the foundation.”⁷ That, in the IRS’s view, created a presumption that “the disqualified person is being relieved of the obligation, whether or not legally enforceable, to make such payment.”⁸

In the same vein the IRS has expressly disapproved of a bifurcated payment for a ticket to a charitable fundraiser.⁹ In that scenario, the disqualified person paid the portion of the ticket price allocable to the fair market value of the benefits provided, and the private foundation paid the remainder. Again citing Treas. Reg. § 53.4941(d)-2(f)(2), the IRS determined that because “admission to a fund-raising event is a fixed price that includes both a fair market

⁴ IRC § 4941(d)(1)(E).

⁵ Treas. Reg. § 53.4941(d)-2(f)(2)

⁶ Rev. Rul. 77-160.

⁷ Id.

⁸ Id.

⁹ Private Letter Ruling 9021066.

value and a charitable element,” the private foundation’s “payment of the charitable portion of a fund-raising event will be made on [the disqualified person’s] behalf entitling [the disqualified person] to attend the event. The payment represents an amount that [the disqualified person] would have been expected to pay had it not been paid by [the private foundation].”¹⁰

To the extent these authorities focus on the extent to which the private foundation’s expenditure relieves a disqualified person of a financial obligation, resulting in a benefit that is not “incidental or tenuous” and thus self-dealing, we respectfully submit that the DAF context is distinguishable, and that the differences between the private foundation context and the DAF context support different treatment of a bifurcated payment from a DAF and a donor for a ticket to a charitable event or a membership.

First, DAFs are owned and controlled by the sponsoring organization, not the donor.¹¹ Unlike in the private foundation context, where disqualified persons exercise control over foundation expenditures, in the DAF context, the decision to make a grant rests with the DAF, and the donor’s role is advisory only.¹² Private foundations are subject to more stringent regulation than DAFs, which in many respects are treated more like public charities than private foundations.¹³ Indeed, the prohibition on self-dealing contained in IRC § 4941 by its terms does not apply to DAFs, and the self-dealing precedents on the issue of whether a benefit is “incidental or tenuous” accordingly should not apply in the same way to the issue of whether, under IRC § 4967, a benefit is “more than incidental.”

Second, as Notice 2017-73 acknowledges when discussing DAF distributions and the satisfaction of charitable pledges, “the relationship between a private foundation and its disqualified persons typically is much closer than the relationship between a DAF sponsoring organization and its Donor/Advisors.” On this ground, the Notice proposes permitting DAF distributions to be treated as satisfying a donor’s binding pledge to a donee charity, while continuing to prohibit this practice in the private foundation context. If relieving a financial obligation of the donor does not confer “more than incidental benefit” in the pledge context, nor should it in the ticket or membership context. IRC § 4967 should be read to permit DAFs and donors to split payments for tickets and memberships, notwithstanding the fact that the DAF’s payment relieves the donor of the financial obligation of paying the full price.

Stated differently, when analyzing a bifurcated payment for a ticket or membership in the DAF context, the Getty believes it is appropriate to look to the tax treatment of the benefits received by the donor, and not to the extent to which a distribution from a DAF has enabled the receipt of those benefits. When the donor pays fair market value for any benefits

¹⁰ Id.

¹¹ IRC § 4966(d)(2)(A)(ii).

¹² IRC § 4966(d)(2)(A)(iii).

¹³ For example, DAFs are not subject to tax on failure to distribute income under IRC § 4942, and contributions to DAFs are not subject to the 30% limitation on charitable contribution deductions applicable to private foundations.

received, and does not receive any associated tax deduction, then those benefits (or, more accurately, the opportunity to purchase those benefits) should be treated as merely incidental.

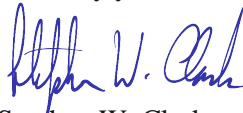
III. CONCLUSION

In 2016 there were more than \$85 billion tax-exempt dollars held in DAFs—an all-time high—and yet the rate at which those funds were being paid out to donee charities fell slightly compared to previous years.¹⁴ Meanwhile, membership programs and charity events continue to be popular and effective ways for nonprofits to engage with their audiences. IRS and Treasury policy towards DAFs should make it easier for DAFs to give to charities, while maintaining safeguards against abuse. Allowing bifurcated payments would meet these policy goals.

The Getty believes that new DAF guidance should expressly permit a donor and a DAF to bifurcate payment for a membership or charity-sponsored event ticket or, in the alternative, permit a distribution from a DAF for the full amount of a membership or charity-sponsored event ticket provided that the donor (1) pays directly an additional amount equivalent to the fair market value of any goods or services received and (2) claims no deduction for this additional payment. The adoption of such a rule would be consistent with the JCT's description of "more than incidental benefit" as quid pro quo benefits that would reduce the value of a charitable donation and would encourage the legitimate flow of funds from DAFs to donee charities.

We would be pleased to discuss these comments with you or your staff if it would be helpful. Thank you for your consideration.

Sincerely yours,



Stephen W. Clark

¹⁴National Philanthropic Trust, 2017 Donor Advised Fund Report, 13, 15, available at <https://www.nptrust.org/daf-report/index.html>.