

# Legal Update

## Facilitating the Life Sciences Industry Response to the COVID-19 Crisis – Key Tax Aspects of Contributions of Pharmaceuticals and Medical Equipment

According to Giving USA, corporations gave over \$20 billion in charitable contributions in 2019, one of the highest years on record for charitable giving.<sup>1</sup> While charitable contributions are closely correlated to economic factors<sup>2</sup> and 2020 will certainly be a challenging year for multinational companies, the COVID-19 crisis has already proven to be a call to action for the corporate community. Companies in the life sciences industry are uniquely positioned in this regard as they are able to make targeted charitable contributions in the form of cash as well as life-saving products. Industry leaders such as Gilead Sciences<sup>3</sup> have already made significant contributions of medical equipment and pharmaceuticals to hospitals and the US Department of Health and Human Services.

The United States and many other countries encourage philanthropy through tax deductions for charitable contributions. This Legal Update reviews some of the key US domestic and international tax issues associated with corporate contributions of medical equipment and pharmaceuticals. This Legal Update first addresses basic issues surrounding characterization of charitable contributions and discusses incentives for contributions of life-saving equipment. It then focuses on international tax issues associated with charitable contributions, including foreign tax credit aspects and issues arising when charitable contributions are made by foreign subsidiaries. Finally, this Legal Update discusses the rules for charitable contributions in certain countries, including new incentives to encourage contributions in response to COVID-19.

### United States

#### ***Characterization – Trade or Business Expense or Charitable Contribution***

When a taxpayer transfers money or property to a charity without receipt of economic benefit in return, a charitable contribution deduction will be allowed under Section 170<sup>4</sup> within the limits prescribed in that section. On the other hand, where a taxpayer transfers money or property to a charity in connection with a trade or business and there is a reasonable expectation of a financial return commensurate with the amount transferred, a charitable contribution deduction will not be allowed. Instead, the transfer may be deductible as a business expense under Section 162, which

allows a deduction for ordinary and necessary expenses paid or incurred during the taxable year in carrying on a trade or business.

Whether a payment from a corporation is considered a business deduction under Section 162 or a charitable contribution deduction under Section 170 depends on whether such payment is gratuitous or whether it bears a direct relationship to the taxpayer's business and is made with a reasonable expectation of a financial return commensurate with the amount of the payment.<sup>5</sup>

For example, expenditures related to patronage the taxpayer might reasonably expect in the future, such as expenditures for institutional or goodwill advertising that keeps the taxpayer's name in the public, are generally deductible as ordinary and necessary business expenses under Section 162 even when the payment is made to a charitable organization.<sup>6</sup> In a Chief Counsel Advice (CCA), the IRS described a company engaged in a sales program which made donations to charities that purchasers recommended.<sup>7</sup> The CCA stated that the company's donations to charities were deductible under Section 162 as the company had a reasonable belief that its donations would enhance and increase its business and a reasonable expectation of commensurate financial return from the donations. The IRS reached a similar conclusion in a private letter ruling that involved a supermarket's promotional program which donated to charities, extensively advertised the donation programs, and asked any charity receiving funds to allow the use of its name in the supermarket's advertising.<sup>8</sup> The IRS held that the payments to the charities were deductible as ordinary and necessary business expenses under Section 162, because the donation program was believed to enhance its ability to compete and was a form of goodwill advertising related to future patronage the taxpayer might reasonably expect.<sup>9</sup>

### ***Comparing Section 162 and Section 170***

Depending on its tax position, a corporation might have a preference between a Section 162 deduction and Section 170 charitable contribution. Under Section 170(b)(2), a corporate donor may only deduct charitable contributions up to 10% of taxable income.<sup>10</sup> As discussed below more fully, the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") increased the 10% limitation to 25%, for cash contributions made in the 2020 tax year to a public charity or a private operating foundation.<sup>11</sup> Excess charitable contributions are generally deductible for each of the succeeding five years.<sup>12</sup>

Accrual basis corporations may elect to treat a charitable deduction as made in the taxable year if the board of directors authorizes the charitable contribution anytime during the taxable year and payment of the contribution is made on or before the 15<sup>th</sup> day of the fourth month following the close of such taxable year.<sup>13</sup>

Business expense deductions under Section 162 have no parallel percentage limitations. Therefore, taxpayers engaged in a trade or business making payments to charity may prefer to characterize such payments as business expenses, rather than as charitable contributions, to prevent them from being subject to the percentage limitations.

On the other hand, as discussed further below, for taxpayers with international operations, a charitable contribution may be preferable depending on the taxpayer's foreign tax credit position. In addition, a corporation transferring appreciated property to a charity might also prefer to characterize its transfer as a charitable contribution instead of a business expense. Generally, a transfer of appreciated property as a charitable contribution is deductible based on the fair market value of the property transferred.<sup>14</sup> In addition, there is no gain recognition on the transfer of appreciated

property to a qualified charity for less than adequate consideration, except for certain cases.<sup>15</sup> In contrast, gain is recognized where appreciated property is transferred to pay a business expense.<sup>16</sup>

### ***The Section 170(e)(3) "Bump"***

Charitable contributions may be valued either at fair market value or the donor's basis in the property. For charitable contributions of *inventory* the deduction is generally limited to the taxpayer's basis (usually its cost) in the inventory, or if less, the fair market value of the property.<sup>17</sup>

However, subject to the 10% limitation on charitable deductions described above under Section 170(e)(3), contributions of inventory used for the care of the ill, the needy or infants may be allowed an enhanced deduction if the following criteria are met:<sup>18</sup>

1. the corporation's contribution is inventory<sup>19</sup> of the corporation;
2. the corporation's contribution is made to a charitable organization described in Section 501(c)(3) (except for private non-operating foundations);
3. the donee must:
  - a. use the property consistent with the donee's purpose or function that constitutes the basis for its exemption;
  - b. use the property solely for the care of the ill, the needy, or infants;
  - c. not exchange money, other property, or services, for the property; and
  - d. provide the donor with a written statement representing that its use and disposition of the property will be consistent with the above;<sup>20</sup> and
4. for property subject to the Federal Food, Drug, and Cosmetic Act, the corporation must fully satisfy the Act's requirements on the date of transfer and for 180 days prior.<sup>21</sup>

The enhanced deduction is equal to the lesser of (1) the cost of the inventory plus half of the gain that would be realized on the sale of the inventory at fair market value or (2) two times the basis.<sup>22</sup> The basis and the enhanced deduction may be further reduced by the 10% income limitation, if applicable. The following example illustrates this rule:

X Corporation makes a contribution of inventory (e.g., medical devices, drugs, etc.) to a hospital for the care of the needy. X Corporation's basis in the inventory is \$5,000 and the fair market value of the inventory at the time of the contribution is \$11,000.

Under Section 170(e)(3), X Corporation is able to claim an enhanced charitable contribution deduction of \$8,000 ( $\$5,000 + 1/2 \times (\$11,000 - 5,000) = \$8,000$ ) instead of \$5,000 under the normal rules for non-medical inventory.<sup>23</sup>

The Department of Treasury's priority guidance plan has included Section 170(e)(3) for a number of years to address computation of the deductible amount and adjustment to the cost of goods sold for contributions of inventory property. As currently drafted, the Treasury Regulations do not encourage the use of Section 170(e)(3)'s enhanced deduction in certain cases (e.g., when the fair market value of the item exceeds basis and the income limitation applies).<sup>24</sup>

### ***CARES Act Enhanced Deduction for Cash and Food Inventory***

As noted above, the CARES Act temporarily allows enhanced deductions for certain contributions of cash and food inventory donated during the 2020 calendar year. A deduction is allowed for qualified contributions only to the extent that the aggregate of such contributions does not exceed the excess of 25% of the corporation's taxable income over the amount of all other charitable contributions.<sup>25</sup>

The CARES Act defines "qualified contribution" as any charitable contribution paid in cash during the 2020 calendar year to a tax-exempt organization (such as a public charity, church, hospital, educational organization)<sup>26</sup> other than a supporting organization or donor-advised fund. An election must be made in order to apply the 25% enhanced limitation to the qualified contribution.<sup>27</sup>

For donations of inventory of "apparently wholesome food"<sup>28</sup> during 2020, the limitation on the deduction for C corporations<sup>29</sup> was raised from 15% to 25%<sup>30</sup> of the corporation's taxable income for the year. It should be noted that the deduction for donated food inventory is not limited to corporations, but is available to any taxpayer that donates food from his or her trade or business.<sup>31</sup>

In contrast to the general rules for the donation of inventory property, the basis computation issues discussed above generally do not arise because Section 170(e)(3)(C)(iv) provides that the fair market value of the donated food inventory is determined by reference to the selling price at which the same or similar food items are sold without regard to the internal standards or lack of market. This provision presumes that the taxpayer's normal selling price of food inventory exceeds the cost of the inventory.

### ***Contributions to Foreign Charities***

In general, a Section 170 charitable contribution deduction is not available when the contribution is made to a foreign charity.<sup>32</sup> That creates challenges when a taxpayer wishes to support the efforts of a foreign organization. There are two general approaches a corporation can consider in this regard.

#### **(1) Use of a Corporate Foundation**

Many multinational companies have a corporate foundation through which they conduct their charitable and corporate social responsibility functions. A corporate foundation is generally a charitable entity that is funded by a particular corporation and not through soliciting donations from the general public. As such, corporate foundations are typically classified as private foundations under Section 509(a).

A corporation may contribute inventory (or other) property to its corporate foundation, which could then donate the property or sell it and distribute the proceeds in accordance with the distribution rules for private foundations. In such a case, the corporation's charitable deduction would equal its basis in the property. The deduction for charitable gifts of appreciated property to a private foundation is reduced by the amount of gain that would have been long-term capital gain if the property had been sold at its fair market value.<sup>33</sup>

The corporate foundation may make a tax-deductible contribution to a foreign unrelated charity. Generally, the foreign charity must be the equivalent of a US public charity or private operating foundation and the corporate foundation must ensure that the contribution is used for charitable purposes.<sup>34</sup>

## (2) “Friends Of” Organizations

Corporations may also make tax-deductible charitable donations (including donations of inventory property) to so-called “Friends Of” organizations which are US public charities that generally support other charitable organizations, including foreign charities. A Friends Of organization may accept recommendations for the contribution to be made to a foreign charity, but the corporation generally may not require as a condition of the contribution that the donated funds or property be granted by the Friends Of organization to a specific foreign entity.

### *Foreign Tax Credit Issues*

In general, the foreign tax credit is limited to the amount of US income tax payable with respect to foreign source taxable income. In order to determine the amount of foreign source taxable income, expenses of the taxpayer must be allocated and apportioned between US and foreign sources under a series of complex regulations.<sup>35</sup>

Treasury Regulations finalized in 2005 provide favorable rules with respect to the allocation and apportionment of charitable contributions for foreign tax credit purposes. Under Treasury Regulation Section 1.861-8(e)(12), charitable contributions are apportioned solely against US source income.<sup>36</sup> This has the effect of increasing a US taxpayer’s foreign tax credit limitation fraction under Section 904(a) and thus increasing the taxpayer’s ability to use foreign tax credits.

### *Contributions by Controlled Foreign Corporations*

Under subpart F of the Code,<sup>37</sup> a “US shareholder” of a controlled foreign corporation (“CFC”) may be subject to income tax on the income of the CFC without regard to whether the CFC has made a distribution to the US shareholder. A “U.S. shareholder” is any US person that owns 10% or more of the total voting power or total stock value of the CFC.

The subpart F rules operate by treating a U.S. shareholder of a CFC as if it actually received its proportionate share of certain categories of the corporation’s current earnings and profits. Section 951A, which was added by the Tax Cuts and Jobs Act of 2017, significantly increased the likelihood of an income inclusion under these rules by expanding the subpart F categories to include the CFC’s global intangible low-taxed income (“GILTI”).

Subpart F and GILTI inclusions are directly determined by reference to a CFC’s “earnings and profits” (“E&P”). As a result, it is important to understand how charitable contributions are treated for E&P purposes.

E&P is a broader concept than taxable income and, with respect to a CFC, is determined under US tax principles. Deductions that may be allowed for foreign tax purposes may not be allowable for U.S. tax purposes and thus do not reduce E&P. Conversely, a deduction not allowable for foreign tax purposes may still be allowed for purposes of determining E&P.

In general, a CFC may reduce its E&P in the amount of its charitable contributions.<sup>38</sup> In a private letter ruling, a corporation was permitted to reduce its E&P by the amount of its charitable contributions to a charitable foundation even though the contributions exceeded the Section 170 limitation. In reaching its conclusion, the IRS followed the approach in Revenue Ruling 75-515, which stated that a corporation’s computation of E&P is based upon reasonable accounting concepts that take into account the economic realities of corporate transactions, as well as those that result from the application of tax law. Accordingly, charitable contributions in excess of the Section 170 limitation

and disallowed as a deduction for federal income tax purposes are still allowed as deductions in computing E&P even though they do not reduce taxable income. As a result, a CFC's charitable contributions will have the effect of reducing subpart F and GILTI inclusions.

### ***State & Local Tax Considerations***

In most states, the computation of corporate taxable income starts with federal taxable income, subject to certain modifications. That means the distinction between trade or business expenses and charitable contributions at the federal level will almost always flow down to the state and local level for income tax purposes. It also means that many states, such as New York, follow Section 170 without significant modification. However, nearly every state conforms to the Code in one of three ways: rolling conformity, static conformity, or selective conformity (i.e., by adopting certain provisions). Accordingly, several states are not conformed, or are expected to decouple, from certain CARES Act provisions, including the temporary increase to the Section 170 charitable contribution deduction limitation.<sup>39</sup> As state legislative sessions reconvene in the coming weeks, it remains to be seen how CARES Act relief will be viewed by state governments given COVID-19's impact on state budgets.

If a corporation makes a donation in a state where it is not currently doing business, it may want to consider whether the donation is a nexus-creating event. Generally, the shipment of inventory into a state would not create nexus for these purposes, but nexus could arise if, for example, the corporation retains title over the property while it is stored in state, or it provides assistance with the donated products in state. This could be an issue if the corporation has been claiming income tax protection under P.L. 86-272 related to sales into the state, and unintentionally creates an unprotected presence.

From a sales and use tax perspective, a donor may owe use tax on inventory items purchased for resale where no sales tax was charged, and the items are subsequently donated. However, some states are providing temporary relief due to COVID-19. For example, the Indiana Department of Revenue announced in April that it will waive use tax on certain donations made by manufacturers and other groups or organizations to help with COVID-19.<sup>40</sup> Some eligible items include medicine, medical supplies (such as personal protective equipment), food, clothing, soaps and sanitizers, and building supplies, beds, and other materials used to construct and furnish field hospitals and other temporary medical facilities. Companies and organizations must first email the Department of Revenue to obtain approval. Other states, such as New York, offer a similar, narrow exemption for property that is manufactured, processed, or assembled by a donor.<sup>41</sup>

## **United Kingdom**

When a company disposes of trading stock (inventory) other than in the course of its UK trade, or donates equipment used in its UK trade, this can give rise to both corporate tax and value-added tax ("VAT") issues.

For corporate tax purposes, the general rule is that the market value of the inventory disposed of must be brought into account in calculating the profits of the trade, i.e., the corporation recognizes income at the time of the contribution equal to the value of the inventory. However, the UK corporate tax regime provides exceptions to this rule in the following circumstances, which have become ever more relevant in light of the COVID-19 pandemic.

Provided certain conditions are satisfied, a company donating inventory to a charity is generally allowed to deduct the total cost of the donated goods from its taxable profits in the UK without having to bring into account the market value of the contribution as a taxable receipt.<sup>42</sup> In order to qualify for this treatment, the company must be carrying on a trade and must produce the donated items in the ordinary course of its trade. Furthermore, the donation must be made expressly for the purposes of the qualifying charity.

It should be noted that the UK's National Health Service ("NHS"), the UK's nationally funded healthcare body at the forefront of fighting the COVID-19 outbreak, does not meet the definition of charity which means that contributions of inventory to NHS are not tax deductible. However, donations can instead be made to qualifying charities which can donate such goods to the NHS.

The donor company is not required to make a specific claim to take advantage of this exception, but the company must apply the relief in the accounting period in which it makes the gift.

Companies are also able to obtain UK tax relief when trading stock of medical supplies and/or medical equipment for human use are gifted for humanitarian purposes anywhere in the world.<sup>43</sup> Much like the previous exception, and provided the relevant conditions are satisfied, the company is not required to bring into account the market value of the donated stock when calculating its trading profits, and will still be able to claim a deduction for the cost of the donated goods. In addition, the company may deduct any transportation, delivery, or distribution expenses it incurs in making the donation.

Again, the donor company does not have to make a specific claim for the relief in its corporation tax return.

Special rules exist to deny the above treatment where the donor company (or any connected person) receives a benefit which is in any way attributable to the making of the gift. The legislation does not define "benefit", meaning this provision has far-reaching consequences where there is any connection between donor and donee. Where these provisions apply, the value of the benefit is treated as a trading receipt in the period of account in which it is received.<sup>44</sup>

Donating goods will also have VAT implications for VAT-registered companies. Much like the basic rule for corporation tax, if goods forming part of the assets of a business are transferred or disposed of by, or under the directions of, the company, so that they no longer form part of the business assets, there is a deemed taxable supply of goods for VAT purposes, regardless of whether the transfer or disposition has been made for any consideration.<sup>45</sup>

However, the company may be entitled to "zero-rate" the supply in certain circumstances, including where the supply is to a charity providing care or medical or surgical treatment for human beings or animals, or engaging in medical or veterinary research of a medicinal product, where the supply by the company is solely for the use by the charity in such care, treatment or research.<sup>46</sup>

In response to the current pandemic, the UK government has announced that there will be no import duty or VAT on protective equipment, relevant medical devices or equipment brought into the UK from non-EU countries during the coronavirus outbreak.<sup>47</sup> To this end, the Government has posted a Commodities Code List which contains the items that fall within this tax exemption. However, noteworthy omissions from the list include common items such as hand sanitizer, non-fluid resistant gowns and medical scrubs.

## France

In light of the COVID-19 pandemic, the French tax authorities have decided to exempt from VAT donations of medical equipment (e.g., masks, hydro alcoholic gels, protective suits and respirators) and pharmaceuticals made to health establishments, social and medico-social establishments, health professionals or national or local administrations.

Moreover, French companies may also benefit from a corporate income tax deduction equal to 60% of donations up to a maximum of 0.5% of their annual revenue. For corporate donations over €2 million made from 2020, the corporate tax deduction is reduced to 40% depending on the fiscal year of the company making the donation. To be eligible for this benefit, donations should be made to certain organizations of general interest, foundations or associations recognized as being of public utility, provided that these organizations are of a philanthropic, educational, scientific, social or humanitarian nature.

Donations made in cash or in kind are all eligible for the deduction. In the case of donation in kind, the donation is valued at the cost of the goods donated (i.e., taxable basis). It should be noted that only donations that do not involve any direct or indirect consideration for the donor are eligible for the deduction. However, associating the name of the donating company to the donation is not treated as consideration and therefore will not preclude a deduction.

## Germany

If a company disposes of its business assets for non-business reasons (e.g., in the case of a charitable donation), such disposal can give rise to both income tax (corporate and trade tax) and VAT consequences under German law.

Under certain circumstances, a company that donates cash or assets to a German or EU charity may deduct the tax value of the donation from its taxable income in Germany.

Donations may qualify as “sponsoring” if they further the donor’s reputation (e.g., because the donations are made public). Sponsoring expenses are generally tax-deductible. Donations to help contain the pandemic may qualify as sponsoring expenses.<sup>48</sup>

For a donation in kind (not cash) that is not considered a sponsoring expense, but is a donation of business assets and services made to assist companies and organizations managing the pandemic (e.g., donations of medical equipment to hospitals), the Ministry of Finance states the donation shall be allowed as a tax-deductible business expense based on equitable grounds.<sup>49</sup> This relief measure applies through 2020.

With respect to the deductibility of certain reasonable donations made to continue business relations of business partners who are directly and seriously affected by the pandemic, equitable relief may also be granted.<sup>50</sup>

In general, donating assets has VAT implications for VAT-registered companies. For a donation in kind, there is a deemed taxable supply of goods for VAT purposes, regardless of whether the transfer or disposition was made for consideration. In light of the pandemic, VAT on such donations can be waived on equitable grounds until end of 2020. The Ministry of Finance provided that donations of medical equipment as well as the provision of personnel free of charge to organizations indispensable to overcome the pandemic (e.g., hospitals, medical practices, nursing homes and



services, rescue services, and public institutions like the police and the fire brigade) qualify for VAT relief.<sup>51</sup>

## Belgium

Generally gifts made in cash to approved social, scientific, or cultural institutions are tax deductible from total income, provided the annual aggregate amount does not exceed certain limits. For companies, the aggregate value of cash gifts, cannot exceed 5% of the company's taxable income, with a maximum of €500,000 per year.

In response to the COVID-19 crisis, the Belgian Government introduced incentives for the donation of medical devices and their accessories<sup>52</sup> and protective equipment (e.g. masks, protective clothing, antibacterial products) between March 1, 2020, and July 31, 2020, to hospitals and other similar care institutions. Such donations are deductible for corporate income tax purposes generally in the same manner as business expenses; that is, the limitation on gifts to charitable institutions does not apply. In addition, such gifts are VAT exempt.

Donations of pharmaceuticals to hospitals and similar care institutions are specifically excluded from the incentive.

## Brazil

Generally, charitable contributions may be deducted from taxable income if made to:

1. federally authorized educational or research institutions, up to 1.5% of the donor's operating profits;
2. non-governmental, non-profit entities incorporated in Brazil that provide free services for the benefit of the donor's employees or the community where they operate, up to 2% of the donor's operating profits; and
3. Civil Society Organization of Public Interest ("Oscip"), up to 2% of the donor's operating profits.

Donations of services and goods are generally deductible in the amount of the accounting cost (basis).

Currently, special incentives are only available for donations made pursuant to the National Oncology Care Support Program ("Pronon") or National Program to Support Health Care for Persons with Disabilities ("Pronas/PCD"), which may reduce up to 1% of a company's corporate income tax liability.

A similar incentive was recently introduced in Congress for donations made to combat the effects of the COVID-19 pandemic.<sup>53</sup> Donations can be made in cash, goods, or real estate, lending or assignment of the right to use real estate or equipment; conservation, maintenance or repair expenses on goods, real estate or equipment; supply of consumable materials (hospital or clinical goods), medicine, or food products. If passed, the incentive would allow the accounting cost of the donated item to reduce corporate income tax liability up to 1%; however, the cost of the donated item would not reduce taxable income.

## China

Enterprises or individuals who make donations through public welfare social organizations, people's governments at or above the county level, and other state agencies for charitable activities that comply with the law are allowed to deduct the donation costs for income tax purposes.<sup>54</sup>

Charitable organizations and other social organizations ("Social Organizations") registered as public welfare social organizations with the civil affairs department must satisfy the following conditions in order to allow donations to be tax deductible for income tax purposes:

- **Social Organizations with public fundraising qualifications:** (1) the annual expenditure for public welfare charity spent in the previous two years should not be less than 70% of the total income of the previous year; and (2) the annual management expenses spent in the previous two years should not exceed 10% of the total expenditure incurred in that year.
- **Social Organizations without public fundraising qualifications:** (1) the annual expenditure for public welfare charity in the two previous years must not be less than 8% of the net assets as at the end of the previous year; and (2) the annual management expenses incurred in the previous two years should not exceed 12% of the total expenditure in that year.

The deductible amount for monetary assets is the amount actually received; and, for non-monetary assets, it is the fair value of the assets (supported by evidence).

Donations of anti-epidemic goods directly to hospitals or through public welfare organizations or government authorities are exempted from VAT, consumption tax, urban maintenance and construction tax, education surcharge and local surcharges.<sup>55</sup>

## Philippines

On April 7, 2020, the Bureau of Inland Revenue ("BIR") issued Revenue Regulation No. 9-2020 ("RR 9-2020") for the implementation of Section 4(Z) and Section 4(EE) of the Republic Act No. 11469 ("RA 11469") under the National Internal Revenue Code of 1997, as amended ("NIRC"), granting further benefits for donations made during the period of the enhanced community quarantine. RA 11469 declared the need to partner with the private sector and other stakeholders to deliver measures quickly and effectively. RR 9-2020 provided that the following approved donations may be fully deductible from the gross income of corporate and individual donors, when made for the sole and exclusive purpose of combating COVID-19 during the period of the state of national emergency under RA 11469:

- cash donations;
- donations of all critical and needed healthcare equipment or supplies;
- relief goods, including food packs and water; and
- use of property.

To qualify for the full deduction, the approved donations must be made to the following recipients with supporting documents:

- national government or any entity created by any of its agencies (including public hospitals) which is not conducted for profit, or to any political subdivision of the government including fully-owned government corporations; and

- accredited non-stock, non-profit educational and/or charitable, religious, cultural or social welfare corporations, institutions, foundations, non-government organizations, trusts or philanthropic organizations and/or research institutions or organizations.

In addition, these approved donations may be exempt from donor's tax and fully deductible against the gross income of the corporate or individual donor if the donations are made to the following recipients with supporting documents:

- private hospitals and/or non-stock non-profit educational and/or charitable, religious, cultural or social welfare corporations, institutions, foundations, non-government organizations (including non-accredited non-government organizations), trusts or philanthropic organizations and/or research institutions or organizations; and
- local private corporations, civic organizations and/or international organizations, provided that they directly transfer the donations or partner with the approved partner to deliver the donations.

Donations of all critical or needed healthcare equipment or supplies and relief goods will not be treated as sales transactions subject to VAT. Any input VAT attributable to such purchase of goods will be creditable against any other output tax.

## Concluding Observations

In 2002, the year after the September 11 attacks, US corporations made over \$12 billion in charitable contributions representing an 8.8% increase over the previous year which also saw the initial corporate charitable response to the attacks.<sup>56</sup> That increase came in spite of a recession.

The corporate response to COVID-19 can be expected to be equally robust particularly from the life sciences industry. Tax laws in the United States and around the world facilitate philanthropy and directly enable corporations, and the life sciences industry in particular, to respond to crisis. Understanding the application of tax rules to charitable contributions will put companies in a position to maximize the impact of their contributions.

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If you wish to receive regular updates on the range of the complex issues confronting businesses in the face of the novel coronavirus, please [subscribe](#) to our COVID-19 "Special Interest" mailing list.

And for any legal questions related to this pandemic, please contact the authors of this Legal Update or Mayer Brown's COVID-19 Core Response Team at [FW-SIG-COVID-19-Core-Response-Team@mayerbrown.com](mailto:FW-SIG-COVID-19-Core-Response-Team@mayerbrown.com).

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## Endnotes

- <sup>1</sup> <https://givingusa.org/giving-usa-2020-charitable-giving-showed-solid-growth-climbing-to-449-64-billion-in-2019-one-of-the-highest-years-for-giving-on-record/>.
- <sup>2</sup> [https://philanthropy.iupui.edu/files/file/crisisgivingpaper3-24-031\\_3.pdf](https://philanthropy.iupui.edu/files/file/crisisgivingpaper3-24-031_3.pdf).
- <sup>3</sup> <https://www.cnbc.com/2020/05/03/gilead-ceo-says-remdesivir-available-to-coronavirus-patients-this-week-weve-donated-the-entire-supply.html>.
- <sup>4</sup> All “Section” or “§” references are to the Internal Revenue Code of 1986, as amended, (the “Code”) unless otherwise indicated.
- <sup>5</sup> Rev. Rul. 72-314, 1972-1 CB 44.
- <sup>6</sup> Treas. Reg. § 1.162-20(a)(2); Info. Ltr. 2016-0063 (Jun. 24, 2016).
- <sup>7</sup> Chief Counsel Adv. 201543013 (Jul. 10, 2015).
- <sup>8</sup> Priv. Ltr. Rul. 9309006 (Nov. 17, 2015).
- <sup>9</sup> *Id.*
- <sup>10</sup> Partnerships, limited liability companies (not taxed as a corporation), and S corporations are not subject to this entity level limitation on deductions. Instead, a pro rata share of charitable contributions by such entities are allocated to their partners, members, or shareholders, who in turn are subject to the income percentage limitations on charitable contributions otherwise applicable to them. Section 170(b)(1).
- <sup>11</sup> Pub. L. No. 116-136, Section 2205(a). Contributions to a supporting organization or a donor-advised fund do not qualify for the increased limitation. The corporation may elect the application of the increased limitation, and a contribution is not required to be used in connection with the coronavirus relief to be eligible for the increased percentage limitation. In the case of an S corporation, the election must be made separately by each shareholder.
- <sup>12</sup> Section 170(d)(2).
- <sup>13</sup> Section 170(a)(2).
- <sup>14</sup> Treas. Reg. § 1.170A-1(c)(1). This rule applies even where the donor’s basis exceeds the fair market value of the property.
- <sup>15</sup> There are two exceptions to the general rule of no gain recognition. The first exception occurs when a bargain sale occurs by reason of the donor’s receiving or being deemed to receive partial consideration in exchange for the appreciated property. Section 1011(b). Second, when a charity sells the property shortly after the transfer and it is determined that the sale was part of an overall plan, the donor is treated as having sold the property for cash, and, therefore, must realize and recognize gain. Rev. Rul. 60-370, 1960-2 C.B. 203.
- <sup>16</sup> Treas. Reg. § 1.1001-2(a)(1).
- <sup>17</sup> Section 170(e)(1)(A); Joint Committee on Taxation, *Explanation of Consolidated Appropriations Act, 2016 (P.L. 114-113) (JCS-1-16)*, Mar. 1, 2016.
- <sup>18</sup> Section 170(e)(3).
- <sup>19</sup> Defined as (1) stock in the trade of the taxpayer or other property of a kind in which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, and (2) property, used in his trade or business that is subject to depreciation or real property used in his trade or business. Section 1221(a)(1)-(2).
- <sup>20</sup> Section 170(e)(3)(A)(i)-(iii).
- <sup>21</sup> Section 170(e)(3)(A)(iv).
- <sup>22</sup> Section 170(e)(3)(B).
- <sup>23</sup> Treas. Reg. § 1.170A-16(f)(5)(iii)(B).
- <sup>24</sup> The IRS has taken steps to address the issue in Notice 2008-90, by providing that it will not challenge a taxpayer’s computation if made under the provisions of Section 170(e)(1) and Treas. Reg. § 1.170A-1(c) rather than Section 170(e)(3) and Treas. Reg. § 1.170A-4A(c)(2).

- <sup>25</sup> CARES Act, Section 2205(b).
- <sup>26</sup> As described in Section 170(b)(1)(A).
- <sup>27</sup> The CARES Act does not specify the manner in which the election should be made, but presumably the election will be made on the taxpayer's income tax return.
- <sup>28</sup> Section 170(e)(3)(C)(i)(II). "Apparently wholesome food" is defined as food intended for human consumption that meets all quality and labeling standards imposed by Federal, State, and local laws and regulations even though the food may not be readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions
- <sup>29</sup> Donations made by a taxpayer engaged in a trade or business other than a C corporation are permitted, but the limitation is 15% of the taxpayer's aggregate net income for such taxable year from all trades or businesses from which such contributions were made for such year.
- <sup>30</sup> CARES Act, Section 2205(b).
- <sup>31</sup> Section 170(e)(3)(C)(ii)(II).
- <sup>32</sup> The US income tax treaties with Canada, Israel and Mexico allow U.S. taxpayers a limited deduction for charitable contributions to Canadian, Israeli and Mexican charities.
- <sup>33</sup> Section 170(e)(1)(B)(ii) (to or for the use of a private foundation as defined in Section 509(a), other than a private foundation described in (b)(1)(F)). Note that this limitation does not apply to a contribution of qualified appreciated stock. Section 170(e)(5)(A).
- <sup>34</sup> Section 4942(g)(e)(3)(is a "qualifying distribution"); Section 4945(d)(is not a "taxable expenditure"); I.R.C. § 170(c)(2)(B).
- <sup>35</sup> See generally Treas. Reg. §§ 1.861-8 through 1.861-14T.
- <sup>36</sup> Treas. Reg. § 1.861-8(e)(12) provides that charitable deductions are apportioned between the statutory groupings of gross income on the basis of the relative amounts of gross income from US sources in each grouping. A special rule applies for charitable contributions allowed under U.S. income tax treaties.
- <sup>37</sup> Sections 951-965.
- <sup>38</sup> Priv. Ltr. Rul. 8129051 (Apr. 22, 1981).
- <sup>39</sup> For example, California (static conformity) currently does not conform to the changes related to charitable contributions. Massachusetts (rolling conformity) has expressed interest in keeping the temporary increase to the charitable contribution deduction for corporate excise tax purposes. Similarly, New York (rolling conformity) has not decoupled for corporate tax purposes.
- <sup>40</sup> See Indiana DOR Waiving Use Tax on Donated COVID-19 Supplies (April 6, 2020).
- <sup>41</sup> N.Y. Tax Law § 1115(l); 20 NYCRR § 528.28(a).
- <sup>42</sup> UK Corporate Tax Act (2009) Section 105.
- <sup>43</sup> UK Corporate Tax Act (2009) Section 107. It will be observed that this is a broader deduction than that available in the United States where deductions are only available for contributions to US charities.
- <sup>44</sup> UK Corporate Tax Act (2009) Section 108.
- <sup>45</sup> UK Value Added Tax Act (VATA)(1994), Sch. 4, para. 5(1).
- <sup>46</sup> VATA 1994, Sch. 8, Grp. 15, item 9.
- <sup>47</sup> Government Guidance Note dated June 4, 2020.
- <sup>48</sup> Ministry of Finance Circular IV C4 –S 2223/19/10003 no. IV.1 (Apr. 9, 2020).
- <sup>49</sup> *Id.* no. IV.3.
- <sup>50</sup> *Id.* no. IV.2.
- <sup>51</sup> *Id.* no. VII.
- <sup>52</sup> As referred to in the Royal Decree of March 18, 1999, relating to medical devices.

<sup>53</sup> No. 1,705/2020.

<sup>54</sup> Announcement [2020] No. 27 (May 13, 2020). Jointly released by the Ministry of Finance (MOF), the State Taxation Administration (STA) and the Ministry of Civil Affairs ("MCA") stipulates the requirements in order to qualify for tax relief for charitable donations made by either enterprises or individuals through public welfare charitable organizations.

<sup>55</sup> MOF and STA issued Bulletin 9 (Feb. 6, 2020).

<sup>56</sup> <http://philanthropynewsdigest.org/news/charitable-giving-held-firm-in-2002-giving-usa-report-finds>

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