



Florida Department of Revenue
Technical Assistance and Dispute Resolution

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Questions: Whether Taxpayer is regarded as a “private trust?”

Whether Taxpayer’s unrelated business taxable income (“UBTI”) is subject to Florida Corporate Income Tax?

Answers: No. The Department does not view Taxpayer as a “private trust”, excluded from the definition of “corporation” as defined in s. 220.03(1)(e), F.S.

Yes. Taxpayer will be required to file a Florida Corporate Income Tax return under the facts as stated above and pay Florida Corporate Income Tax on the UBTI allocable to Florida.

November 3, 2023

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Via email to: [REDACTED]

Re: Modification to Technical Assistance Advisement – TAA# 23C1-002M
Corporate Income Tax – Filing
[REDACTED] (“Taxpayer”)
Sections 220.13, 220.02, and 220.03, and 220.22, Florida Statutes (“F.S.”)
Rule 12C-1.022, Florida Administrative Code (“F.A.C.”)
FEIN: [REDACTED]
BP#: [REDACTED]

Dear [REDACTED]

This is in response to your request dated [REDACTED], for a Technical Assistance Advisement (“TAA”) pursuant to section 213.22, F.S., and Rule Chapter 12-11, F.A.C., regarding your request for the applicability of the Florida Corporate Income Tax to a charitable trust pursuant to s. 220.02, F.S. An examination of your letter has established that Taxpayer has complied with the statutory and regulatory requirements for issuance of a TAA. The Department granted your request for a TAA, and issued a TAA to you on June 5, 2023. Upon review of additional authorities, it appears the Department’s initial guidance regarding the Taxpayer being a private trust was incorrect. The Department is hereby modifying TAA# 23C-002, regarding the nature of the trust at issue. This TAA prospectively supersedes the TAA issued on June 5, 2023.

ISSUES PRESENTED

Whether Taxpayer is regarded as a “private trust?” Whether Taxpayer’s unrelated business taxable income (“UBTI”) is subject to Florida Corporate Income Tax?

FACTS SUPPLIED BY TAXPAYER

Taxpayer is a qualified national charitable trust, under I.R.C. ss. 170(b)(1)(A)(viii) and 509(a)(3)¹, headquartered in [REDACTED]. It was established by [REDACTED], as settlor, on [REDACTED], and is a qualified 501(c)(3) trust for federal income tax purposes. Taxpayer receives contributions of various types of property, including stock, membership interests in limited liability companies, partnership interests, and other property.

The trust instrument identifies that Taxpayer is established “exclusively for charitable, religious, and educational purposes” and “for the support or benefit of, to perform the functions of, or to carry out the purposes (collectively, the ‘Qualifying Purposes’)...of the class of organizations defined” (“Qualified Organizations”) in the trust instrument. The list of Qualified Organizations is not exclusive, and “[e]ach Qualified Purpose must constitute a charitable purpose under State Law.” The duration of the trust is “forever,” unless the Trustees decide to terminate the trust.²

From time-to-time Taxpayer disposes of the assets that have been contributed to it, which dispositions may result in unrelated business taxable income (“UBTI”). Taxpayer allocates that UBTI to states in which the property is located or originates and, if state law requires, pays that respective state’s income tax on the UBTI allocable to that state. Subsequently, Taxpayer files Form-990T with the Internal Revenue Service.

Taxpayer has been operational since [REDACTED] and had been advised that it was not subject to Florida’s Corporate Income Tax, as it is not a corporation. Recently Taxpayer has questioned whether this characterization is correct under Florida law. Taxpayer desires to be compliant with Florida’s tax laws if it is determined that it indeed is characterized under Florida law as being subject to the Florida Corporation Income Tax. Taxpayer has also filed a voluntary disclosure with the Florida Department of Revenue (“Department”) in the event that it is determined to be taxable under the Florida Corporate Income Tax law. Taxpayer is not under audit by the Department.

LEGAL AUTHORITY AND REGULATIONS

The Florida Income Tax Code adopts the meaning of terms as they are used in the Internal Revenue Code, unless a different statutory definition specifically applies. Section 220.13(2)(c), F.S. The Florida Income Tax Code does not specifically define “private trust.” The meaning of “private trust” for the purposes of the Internal Revenue Code in turn is derived from the common law.³

Section 220.02(1), F.S., states, in part:

¹ As noted in [REDACTED] provided.

² *Id.* at Section 1.1 and 2.2.

³ Ward L. Thomas and Leonard J. Henzke, Jr., *Trusts: Common Law and IRC 501(c)(3) and 4947*, at pg. 19 (Available at <https://www.irs.gov/pub/irs-tege/eotopica03.pdf>, last accessed Oct. 26, 2023).

- (1) It is the intent of the Legislature in enacting this code to impose a tax upon all corporations, organizations, associations, and other artificial entities which derive from this state or from any other jurisdiction permanent and inherent attributes not inherent in or available to natural persons, such as perpetual life, transferable ownership represented by shares or certificates, and limited liability for all owners. . . .

Section 220.03(1), F.S., states, in part:

(e) "Corporation" includes all domestic corporations; ... The term "corporation" does not include proprietorships, even if using a fictitious name; partnerships of any type, as such; limited liability companies that are taxable as partnerships for federal income tax purposes; state or public fairs or expositions, under chapter 616; estates of decedents or incompetents; testamentary trusts; or private trusts.

(z) "Taxpayer" means any corporation subject to the tax imposed by this code, and includes all corporations for which a consolidated return is filed under s. [220.131](#)...

Section 220.22(1), F.S., provides:

- (1) A return with respect to the tax imposed by this code shall be made by every taxpayer for each taxable year in which such taxpayer either is liable for tax under this code or is required to make a federal income tax return, regardless of whether such taxpayer is liable for tax under this code.

Rule 12C-1.022(1)(e), F.A.C., provides,

(e) Any nonprofit or other tax-exempt organization, including a private foundation, which is exempt from Federal Income Tax under I.R.C. s. 501(a), and is described in I.R.C. s. 501(c), is required to file a Form F-1120 only when such organization has "unrelated trade or business taxable income," as determined under I.R.C. s. 512, or is filing a Form 990T with the Internal Revenue Service. An organization that is required to apply for a "determination letter" in order to be exempt under I.R.C. s. 501(a), which has not timely filed such application on or before its due date as required by I.R.C. Reg. s. 1.508-1 or which has received an adverse determination, shall not be considered to be a tax-exempt organization. Such organization is subject to the Florida corporate income tax and is required to file a Form F-1120 unless the organization receives a retroactively effective determination letter. If an organization does not file Florida corporate income tax returns in reliance on this rule, and the Internal Revenue Service determines that the organization was not exempt from federal income tax for any such period, then the organization will be required to file Form F-1120 or Form F-1120X pursuant to section 220.23, F.S.

Section 220.13(2)(h), F.S., provides:

"Taxable income," in the case of an organization which is exempt from the federal

income tax by reason of s. 501(a) of the Internal Revenue Code, means its **unrelated business taxable income** as determined under s. 512 of the Internal Revenue Code; (Emphasis supplied)

DISCUSSION and ANALYSIS OF LAW

According to the Internal Revenue Service, “a private trust requires a beneficiary that is definitely ascertained at the creation of the trust or definitely ascertainable within the period of the rule against perpetuities... The members of a definite class of persons can be the beneficiaries of a private trust, but the members of an indefinite class generally cannot be.” (Citations omitted). “By contrast, a cardinal rule of a charitable trust is that the persons who are to benefit must be a sufficiently large or indefinite class that the community is interested in the enforcement of the trust.” (Citations omitted). “Another distinction between private and charitable trusts is their term. Under the common law, private trusts have a limited term, whereas charitable trusts may exist forever.”⁴

The IRS’s view is consistent with Florida case law on the question. The Florida Supreme Court has noted, for example, that “the fundamental distinction between ‘private trust’ and ‘charitable trust’ is that [in] the case of a private trust property is devoted to the use of specified persons who are designated as beneficiaries of the trust, whereas in the case of charitable trusts property is devoted to purposes beneficial to the community.” Porter v. Baynard, 28 So. 2d 890 (1946) (citation omitted). *See also Id.* (“[i]f the trust is dominantly charitable, then its perpetual character is not a vice under the law”).

The Taxpayer is to continue in perpetuity, is set up to serve charitable purposes, and there is a potentially unlimited class of recipients of trust funds, provided those entities otherwise serve Qualified Purposes. The trust is therefore a charitable trust, not a private trust.

Pursuant to Rule 12C-1.022(1)(e), F.A.C, Florida does not tax nonprofit organizations, including private foundations, unless they file a Form 990T with the IRS. Taxpayer states that it is required to file a Federal exempt organization business income tax return, specifically Form 990T. Based on the provisions of s. 220.22(1), F.S., Taxpayer is required to file a Florida Corporate Income Tax return (F-1120), even though Taxpayer may not have a Florida corporate income tax liability.

CONCLUSION

The Department does not view Taxpayer as a “private trust”, excluded from the definition of “corporation” as defined in s. 220.03(1)(e), F.S. Rather, the trust is, and holds itself out to be, a charitable trust. Therefore, Taxpayer will be required to file a Florida corporate income tax return.

This response constitutes a Technical Assistance Advisement under section 213.22, F.S., which is binding on the Department only under the facts and circumstances described in the request for this advice as specified in section 213.22, F.S. Our response is based on those facts and specific situation summarized above. You are advised that subsequent statutory or administrative rule changes or

⁴ Ward L. Thomas and Leonard J. Henzke, Jr., *Trusts: Common Law and IRC 501(c)(3) and 4947*, at pg. 19 (Available at <https://www.irs.gov/pub/irs-tege/eotopica03.pdf>, last accessed Oct. 26, 2023).

judicial interpretations of the statutes or rules upon this advice is based may subject future transactions to a different treatment than expressed in this response.

You are further advised that this response, your request and related backup documents are public records under Chapter 119, F.S., and are subject to disclosure to the public under the conditions of section 213.22, F.S. Confidential information must be deleted before public disclosure. In an effort to protect confidentiality, we request you provide the undersigned with an edited copy of your request for Technical Assistance Advisement, the backup material and this response, deleting names, addresses and any other details which might lead to identification of the taxpayer. Your response should be received by the Department within 15 days of the date of this letter.

If you have any further questions with regard to this matter and wish to discuss them, you may contact me directly at (850)717-6326.

Kind Regards,

Denise L. Smith

Denise L. Smith, MPM

Tax Law Specialist

Technical Assistance & Dispute Resolution

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