

REPLY TO REQUEST FOR COMMENTS ON  
EXCLUDING CHARITABLE CONTRIBUTIONS  
FROM THE DEFINITION OF “COLLATERAL SOURCE”

The following comments represent the individual views of the members of the Section of Taxation who prepared them and do not represent the position of the American Bar Association or the Section of Taxation.

These comments were prepared by individual members of the Committee on Exempt Organizations and the 9/11 Tax Task Force of the Section of Taxation. Principal responsibility was exercised by Victoria B. Bjorklund and Jennifer L. Franklin. Substantive contributions were made by Betsy Buchalter Adler, Michael Hirschfeld, Chair of the 9/11 Tax Task Force, and Professor Jill Manny.

Although many members of the Section of Taxation who participated in preparing these comments have clients who would be affected or have advised clients on the application of such principles, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matters of these comments.

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H.R. 2926, the Air Transportation Safety and System Stabilization Act (the “Act”), was signed into law by President George W. Bush on September 22, 2001. Title IV of the Act, entitled “September 11<sup>th</sup> Victim Compensation Fund of 2001,” provides for the payment of compensation by the U.S. government to those individuals (or their relatives, in the case of deceased individuals) who were “physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001.” The amount of compensation payable pursuant to Title IV of the Act, however, is reduced “by the amount of the collateral source compensation the claimant has received or is entitled to receive as a result of the terrorist-related aircraft crashes of September 11, 2001” (see Section 405(b)(6) of the Act). Section 402(4) of the Act provides that “the term ‘collateral source’ means all collateral sources, including life insurance, pension funds, death benefit programs, and payments by Federal, State or local governments related to the terrorist-related aircraft crashes of September 11, 2001.”

In its Proposed Rules dated November 5, 2001, at Topic #6, the Department of Justice (the “DOJ”) requested comments on “whether the [H.R. 2926, the Air Transportation Safety and System Stabilization] Act indeed permits the Department to exclude [charitable] contributions from the definition [of collateral source].” For the reasons stated below, we believe that the Act permits the DOJ to do so, on the ground that the definition of collateral source does not extend to payments made by charities to injured victims and relatives of deceased victims of the September 11<sup>th</sup> terrorist attacks.

As an initial matter, Section 402(4) of the Act provides that the “term ‘collateral source’ means all collateral sources, including life insurance, pension funds, death benefit programs and payments by Federal, State or local governments . . . .” The Act does not specifically list payments to victims from charities among the items included in the definition of “collateral source.” Had Congress intended to include charitable contributions, it could have specified them. Since it did not, statutory-construction rules would argue for excluding charitable contributions unless they are clearly of the same kind as the enumerated payments. An examination of state laws and cases that address the treatment of collateral sources in connection with tort damage awards reveals no consensus on this point. Therefore, charitable contributions could be excluded on statutory-construction grounds.

The “collateral source rule” generally refers to the legal principle that a plaintiff’s recovery in tort may not be reduced by certain “collateral source” payments, such as payments made under plaintiff- or third party-maintained insurance, employment benefits, and pension benefits (see Restatement (Second) of Torts, § 920A, cmts. b and c (1977)). State law differs, however, as to the question of whether gratuitous payments and services (e.g., forgiveness of all or a portion of a hospital bill) offset tort damage awards. Few cases specifically discuss charitable contributions in this context. Therefore, state-law precedents do not require charitable contributions to be included.

Finally, charitable contributions are arguably not items of the same kind as those specifically enumerated in the Act. First, charitable contributions cannot be purchased by a victim in the same way that life insurance can be purchased. Second, charitable contributions cannot be earned by a victim by virtue of an employment relationship in the same way that pension funds or death-benefit programs can be earned. Third, charitable contributions cannot be government entitlements in the same way that payments by Federal, State or local governments are entitlements. Stated differently, while the payments from the September 11<sup>th</sup> Victim Compensation Fund, as well as collateral source payments, fulfill a commitment made by statute or by contract to compensate for losses (e.g., to make victims “whole”), the charitable contributions to such persons are voluntary payments to relieve the distress that victims and their families suffer as a result of the disaster.

Furthermore, under section 501(c)(3) of the Internal Revenue Code (the “Code”), the net earnings of a charity cannot inure to the benefit of any private individual. The Treasury Regulations promulgated pursuant to Code section 501(c)(3) further provide that a charity is not organized or operated exclusively for one of more exempt purposes unless “it serves a public rather than a private interest” (see Treas. Reg. § 1.501(c)(3)-1(d)(ii)). Thus, the charity must direct its assistance toward the members of a charitable class and not to specific individuals who have bargained to receive assistance under specified circumstances. Although a clear rationale exists for offsetting government payments with the payments the victims are entitled to receive for the same compensatory purpose, this rationale need not be extended to charitable contributions, as these contributions do not satisfy a private or public legal obligation and are made not for a compensatory purpose but instead to relieve distress. Therefore, the well-settled law of charity would appear to allow charitable contributions to be excluded from the definition of collateral source.

As the DOJ states that it “appreciates the strong policy reasons for excluding charitable contributions from the definition of ‘collateral source,’” we do not reiterate those strong policy reasons here.

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