DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
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INTERNAL REVENUE SERVICE NATIONAL OFFICE SERVICE CENTER ADVICE

MEMORANDUM FOR PENNSYLVANIA DISTRICT COUNSEL
ATTENTION: DAVID A. BREEN

FROM: Heather Maloy by George Baker
Associate Chief Counsel (Income Tax & Accounting)
CC:IT&A

SUBJECT: Significant Service Center Advice

This responds to your request for Significant Advice dated November 14, 2000, in connection with a question posed by the Centralized Quality Review Site in Philadelphia.

ISSUE

Whether an individual may deduct a fee charged by a credit card company for using a credit card to pay the individual's personal income taxes due.

CONCLUSION

We conclude that no deduction is allowed under § 212(3) for a fee charged by a credit card company for using a credit card to pay the individual's personal income taxes due; rather, the fee should be considered as a nondeductible personal expense under § 262.

FACTS

Section 6311(d)(2) provides that the Secretary may not pay any fee or provide any other consideration under any contract for the use of credit, debit, or charge cards for the payment of income taxes.

Section 301.6311-2T(a) of the Temporary Procedure and Administration regulations provides that internal revenue taxes may be paid by credit card or debit card as authorized under these regulations. Section 301.6311-2T(e) provides that the government may not impose any fee or charge on persons making payment of taxes

by credit card or debit card. This does not prohibit the imposition of fees or charges by issuers of credit cards or debit cards or by any other financial institution or person participating in the credit card or debit card transaction. You state that customer service representatives receive many taxpayer inquires concerning the deductibility of this fee.

DISCUSSION

Section 212(3) of the Internal Revenue Code provides that in the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in connection with the determination, collection, or refund of any tax.

Section 212-1(l) of the Income Tax Regulations states that expenses paid or incurred by an individual in connection with the determination, collection, or refund of any tax, whether the taxing authority be Federal, State, or municipal, and whether the tax be income, estate, gift, property, or any other tax, are deductible. Thus, expenses paid or incurred by a taxpayer for tax counsel or expenses paid or incurred in connection with the preparation of the taxpayer's tax returns, or in connection with any proceedings involved in determining the extent of the taxpayer's tax liability, or in contesting the taxpayer's tax liability are deductible.

Although the legislative history concerning §212(3) is brief, S. Rep. No. 1622, 83rd Cong., 2d Sess. 218 (1954) provides that subsection 3 of Section 212 is designed to permit the deduction by an individual of legal and other expenses paid or incurred in connection with a contested tax liability whether the contest be Federal, State, or municipal taxes, or whether the tax be income, estate, gift, property, and so forth. Any expenses incurred in contesting any liability collected as a tax or as a part of the tax will be deductible.

Section 262 provides that except as otherwise provided for in this chapter, no deduction shall be allowed for personal, living, or family expenses. Section 1.262-1(b) further provides some examples of personal, living and family expenses such as (1) premiums paid for life insurance by the insured, (2) cost of insuring a dwelling owned and occupied by the taxpayer as a personal residence, and (3) expenses of maintaining a household.

We have not found any precedent that we believe dictates a specific conclusion on this issue. Consequently, we are left to draw inferences from the statute, its history, and the following principles derived from certain precedents.

In Rev. Rul. 89-68, 1989-1 C.B. 82, the Service concluded that fees paid for the preparation and submission of a ruling request concerning the deductibility of a

medical care expense, and the user fee paid in connection with the ruling request, were paid in connection with determining the extent of the individual's tax liability deductible under § 212(3). Although not discussed, this revenue ruling makes clear that the deduction of an expense under § 212(3) for determining the extent of the taxpayer's personal liability for income tax is allowed even if the liability so determined does not arise in connection with any trade or business, or income producing activity, of the taxpayer.

The analysis in Rev. Rul. 58-180, 1958-1 C.B. 153, is instructive. That revenue ruling considered whether § 212(3) permitted a deduction of a fee for an appraisal to establish a casualty loss sustained by residential property as a result of subsoil shrinkage due to a prolonged drought. The ruling first noted that a prior revenue ruling established that such a loss constituted a casualty loss but that the taxpayer had to prove both that the loss resulted from subsoil shrinkage and the amount of the resulting loss. The ruling then concluded that an appraisal fee to establish the deductible casualty loss was deductible under § 212(3).

Luman v. Commissioner, 79 T.C. 846 (1982) is also instructive. The taxpayers sought to deduct $20,000 paid for documents used to create a family trust to ensure the orderly transfer of assets to their children. Although the payment entitled them to advice from a lawyer and a CPA, no legal or accounting advice was sought in the year of payment. Further, the taxpayers conceded that tax considerations did not influence the decision to create the family trust. As no part of the fee was shown to be related to determining the extent of any tax liability, the Tax Court found no basis for allowing a deduction under § 212(3).

Based on the foregoing authority, Congress intended to allow a deduction to an individual in connection with determining the extent of the tax liability or in contesting the tax liability. It is our opinion, however, that this authority does not support a broader interpretation of § 212 to allow a deduction for the expenses involved in paying that liability after its extent has been determined.

Once the full extent of the taxpayer's liability is determined, the obligation to pay that liability does not depend on the nature of the income giving rise to it. Further, the taxpayer may discharge that liability using any assets the taxpayer personally controls, again, without regard to the nature of the income giving rise to the liability.

The payment of the liability cannot further affect the determination of the extent of the taxpayer's liability. Consequently, the approach in Rev. Rul. 58-180, that of first finding a necessary component of determining liability and then allowing deduction of a fee paid in connection with resolving that necessary component of liability, does not support deductibility of the credit card fee. Like the fee in *Luman*,

the credit card fee should be viewed as incurred in a transaction unrelated to determining the extent of the taxpayer's liability.

We think the expenses of paying one's liability fall outside the scope of section 212(3). Thus, we feel that the payment of a credit card fee should be considered as the payment of a nondeductible personal expense similar to the personal expenses that are not deductible by reason of § 262.

If you have any additional questions, please contact George Baker at (202) 622-4920.