**Office of Chief Counsel**
**Internal Revenue Service**
# Memorandum

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subject: Contribution of inventory approaching “best by” date

This memorandum responds to your request for assistance. This advice may not be used or cited as precedent.

LEGEND

ABC Group =
Brand Z =
Food Products =
$X =
M% =
N% =
O% =
P% =
Product A =
Product B =
Product C =
Product D =
Product E =
Tax Year 1 =
Taxpayer =
XYZ Division =

ISSUES

1. Is the Taxpayer entitled to a deduction under section 170 of the Internal Revenue Code?
2. If the Taxpayer is entitled to a deduction, is the Taxpayer entitled to an enhanced deduction under section 170(e)(3)?

CONCLUSIONS

1. The taxpayer is not entitled to a deduction under section 170 because the Taxpayer did not attach the required Forms 8283 signed by the donees to its tax returns; nor did the Taxpayer show that such omissions were made in good faith. Treas. Reg. § 1.170A-13(c)(4).
2. Even if the Taxpayer's failure to file a Form 8283 does not preclude a deduction, the Taxpayer is not entitled to the enhanced deductions because it failed to properly value the contributed property.
    a. The Taxpayer did not value the property by using the price which it would have received in its usual market at the time and place of contribution and in the quantity contributed under section 1.170A-1(c)(2). The Taxpayer failed to adjust the gross price of the Food Products by vendor allowances provided. In determining the price which the taxpayer would have received in its usual market, the gross price charged by the taxpayer must be offset by any vendor allowances provided. Therefore, under a best case scenario, the value of the contributed property (prior to the required reductions under section 170(e)(3)) is limited to the net sales price in the usual market. Moreover, as the Taxpayer failed to establish the price it could have received in its usual market *at the time and place of the contribution* and in the quantity contributed, it is not entitled to any enhanced deductions.
    b. In addition, even if the Taxpayer correctly determined usual selling price, the Taxpayer improperly valued the property at its usual selling price at a time when it could not reasonably have been expected to realize such price under section 1.170A-1(c)(3). Inventory approaching its "best by" date is not properly valued at full wholesale price unless the taxpayer could sell such aged inventory at full wholesale price, and in sufficient quantities so as to constitute meaningful sales. As the Taxpayer has not substantiated that such sales could, or did, occur, it must value the contributed property not at the usual selling price, but at the amount for which the quantity of property contributed would have been sold by the donor at the time of the contribution. As the Taxpayer has failed to show the amount it could have received for the property at the time of the contribution, the Taxpayer has not met its burden of establishing fair market value and is not entitled to any enhanced deductions.

FACTS

The Taxpayer manufactures Food Products and sells such products to wholesalers. The inventory “turn” rate is 5, or about 74 days. This means manufactured goods are held in inventory, on average, 74 days before sale to third parties.

The Taxpayer is on the accrual basis of accounting. The Taxpayer routinely allows certain discounts, or vendor allowances, to its customers at the time of sale of goods to its customers. For tax and financial reporting, net sales (after these allowances) are reported in determining its gross margin (also referred to as gross profit percentage). These allowances were included in “returns and allowances” on the Taxpayer’s return.

For Tax Year 1, it deducted a charitable contribution of $X for donation of Food Products. The Taxpayer determined the fair market value for the donated inventory by using the cost of the product plus a mark-up. The mark-up equaled the Taxpayer’s computed “gross profit percentage,” which was determined pursuant to the following formula:

(Gross Sales – Cost of Sales)/Gross Sales = Gross Profit %

For Tax Year 1, the Taxpayer calculated a gross profit percentage or mark-up of M%. The third party sales used for this calculation were the sales of the Taxpayer’s XYZ Division, as the contributed inventory primarily came from this division. In determining the mark-up for a contributed product, the Taxpayer used all sales[1] of the XYZ Division, not just sales of that particular product. Thus, the mark-up was the same for all products contributed during Tax Year 1. Taxpayer’s customers may receive pre-arranged discounts such as volume allowances, cash discounts. In determining its mark-up, the Taxpayer used “gross sales,” not “net sales,” data. Gross sales are the sum of all sales during a time period, while net sales are gross sales minus returns and allowances. Therefore, the Taxpayer did not take vendor allowances into account in determining fair market value. Had the taxpayer taken such allowances into account, the mark-up would have been lower. Division 1 had a gross margin of N% per the tax return for Tax Year 1, and the gross margin on the return for any division was not greater than N%. The company’s overall gross margin for book and tax purposes was approximately O%.

All of the donated products were within 110 days of their “best by” date, which is a date the Taxpayer places on its Food Products. According to the Taxpayer, this date is an internally developed, subjective assessment made on a product-by-product basis that reflects the date the product could be perceived to fall below the Taxpayer’s standards for quality, meaning flavor, strength, appearance, granularity, etc. The “best by” date does not pertain to the expiration of the usefulness or safety of the product. The products do not have expiration dates (i.e., they can be used for years beyond the best

[1] The Taxpayer excluded sales of Brand Z products, as Brand Z products were not contributed to charity. These sales were approximately P% of the XYZ Division’s gross sales.

by date). There is no federal or state law that requires, or industry standard to determine, the “best by” date for the Food Products. While a “best by” date is not legally required, the Taxpayer emphasizes the importance of such date on its website and recommends that consumers dispose of products past their “best by” date.

According to the Taxpayer’s dating system, its products have an average life of 29 months before the expiration of the “best by” date. No adjustment was made to the fair market value of the contributed inventory for the fact the donated products were contributed within 110 days of their “best by” date (110-day date). The Taxpayer does not sell products after the 110-day date. The Taxpayer does not offer discounts for goods approaching the 110-day date.

The Taxpayer provided sales data for certain products[2] sold at full price near the 110-day date in Tax Year 1. These sales compare to contributions of the same products as follows:

| Item | Quantity Donated (in cases) | Days before 110-day date | Quantity Sold (in cases) | Days before 110-day date |
|---|---|---|---|---|
| Product A | | | | |
| Product B | | | | |
| Product C | | | | |
| Product D | | | | |
| Product E | | | | |

The Taxpayer determined the gross margin on the sales of the above products to be greater than N% for Products A through E, and greater than M% for Products A, B, and E. With respect to these sales, the only documentation provided by the Taxpayer was a copy of print screens from its computer system reflecting an item overview of the related order. Although the Service requested all of the following information, the Taxpayer did not provide: Detailed sales information with respect to these orders or information regarding any vendor allowances received by the purchasers; sales of the contributed products at other points in time and/or to other customers; any detailed sales information for Tax Year 1, such as information that would allow the IRS to determine the timeframe in which most goods were sold, pricing specifics for a particular product,

[2] The Taxpayer provided 5 examples of sales near the 110-day date, all of which involved sales of 10 cases or less. In fact, sales of three of the products were for only 1 case. The Taxpayer’s donation of such products significantly exceeded these sales.

including variations in price between customers or over time, etc; information regarding vendor allowances provided in Tax Year 1 and the circumstances under which such allowances were provided. In refusing to provide this information, the Taxpayer claimed the request was too burdensome.

The Taxpayer contributed the inventory to food banks and other organizations that deliver food to the ill, needy, and infants. The Taxpayer provided sufficient acknowledgement documentation as to the donated goods to verify they were qualified contributions. In calculating the amount of its contribution, the Taxpayer first reduced the amount of its charitable contribution by one-half the amount of gain which would not have been long-term capital gain if the property had been sold by the taxpayer at its fair market value on the date of its contribution, and further reduced this amount to an amount which is equal to twice the amount of the basis of the property. No appraisal of the contributed goods was performed, and no Forms 8283 were filed with the return substantiating this contributed amount.

## LAW AND ANALYSIS

Deductions are a matter of legislative grace, and the taxpayer bears the burden of proving the entitlement to any deduction claimed. INDOPCO, Inc. v. Commissioner, 503 U.S. 79, 84 (1992); New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934). A taxpayer is required to maintain records sufficient to establish the amount of his or her income and deductions. I.R.C. § 6001; Treas. Reg. § 1.6001–1(a), (e); Treas. Reg. § 1.170A-13(b).

Internal Revenue Code section 170(a)(1) allows a deduction for charitable contributions made within the taxable year, but only if verified under regulations prescribed by the Secretary.

Treasury Regulation section 1.170A-1(c)(1) provides that, when “a charitable contribution is made in property other than money, the amount of the contribution is the fair market value of the property at the time of the contribution, reduced as provided in section 170(e)(1) and paragraph (a) of section 1.170A-4, or section 170(e)(3) and paragraph (c) of section 1.170A-4A.”

Section 170(e)(1)(A) provides that the amount of any charitable contribution of property otherwise taken into account under section 170 shall be reduced by “the amount of gain which would not have been long-term capital gain (determined without regard to section 1221(b)(3)) if the property contributed had been sold by the taxpayer at its fair market value (determined at the time of such contribution).” Thus, as a general rule, the deduction for charitable contributions of inventory property is limited to the lesser of fair market value or the taxpayer’s basis in the contributed property.

However, section 170(e)(3)(A) provides an exception to the limited-to-basis general rule for qualified contributions of appreciated inventory. The exception, which is often called an “enhanced deduction,” allows the taxpayer to claim a higher amount. In order to qualify for the enhanced deduction, the following requirements must be met:

> (i) the use of the property by the donee must be related to the purpose or function constituting the basis for its exemption under section 501 and the property must be used by the donee solely for the care of the ill, the needy, or infants;
> (ii) the property must not be transferred by the donee in exchange for money, other property, or services;
> (iii) the taxpayer must receive from the donee a written statement representing that its use and disposition of the property will be in accordance with the provisions of clauses (i) and (ii); and
> (iv) in the case where the property is subject to regulation under the Federal Food, Drug, and Cosmetic Act, as amended, the property must fully satisfy the applicable requirements of such Act and regulations promulgated thereunder on the date of transfer and for one hundred and eighty days prior thereto.

Section 1.170A-4A(b)(4) explains the requirements for the written statement that must be provided by the donee organization to the taxpayer.

The amount of the enhanced deduction is determined under section 170(e)(3)(B), which provides that, in the case of qualified contributions of inventory, the reduction pursuant to paragraph (1)(A) “shall be no greater than the sum of --

> (i) one-half the amount computed under paragraph (1)(A) (computed without regard to this paragraph), and
> (ii) (ii) the amount (if any) by which the charitable contribution deduction under this section for any qualified contribution (computed by taking into account the amount determined in clause (i), but without regard to this clause) exceeds twice the basis of such property).”

Section 1.170A-4A(c)(1) describes section 170(e)(3)(B) as requiring two reductions, as follows:

> The amount of the first reduction is equal to one-half the amount of gain which would not have been long-term capital gain if the property had been sold by the donor-taxpayer at its fair market value on the date of its contribution, excluding, however, any amount described in paragraph (d) of this section. If the amount of the charitable contribution which remains after this reduction exceeds twice the basis of the contributed property, then the amount of the charitable contribution is reduced a second time to an amount which is equal to twice the amount of the basis of the property.

Section 1.170A-4A(c)(3) provides that generally the donor of inventory under this section must make a corresponding adjustment to cost of goods sold by decreasing the cost of goods sold by the lesser of the fair market value of the contributed item or basis.

Section 170(e)(3)(C) provides a special rule for contributions of food inventory made on or before December 31, 2011. This rule requires contributions of food inventory to be “apparently wholesome food,” which has the meaning given to such term by section 22(b)(2) of the Bill Emerson Good Samaritan Food Donation Act. This act defines “apparently wholesome food” as “food 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.” 42 U.S.C. § 1791(b)(2).

Section 170(f)(8)(A) provides that no deduction shall be allowed under section 170(a) for any contribution of $250 or more unless the taxpayer substantiates the contribution by a contemporaneous written acknowledgement of the contribution by the donee organization. Section 170(f)(8)(B) provides the acknowledgement must contain the following information:

> (i) The amount of cash and a description of any property other than cash contributed;
> (ii) whether the donee organization provided any goods or services in consideration, in whole or in part, for any property contributed; and
> (iii) a description and good faith estimate of the value of any goods or services referred to in (ii).

Section 170(f)(8)(C) provides that an acknowledgement is contemporaneous if it is obtained on or before the earlier of (i) the date on which the taxpayer files a return for the taxable year of the contribution or (ii) the due date (including extensions) for filing such return.

Because inventory is ordinary income property, the amount of the Taxpayer’s deduction is limited to the lesser of fair market value or its basis in the contributed property under section 170(e)(1)(A), unless the enhanced deduction under section 170(e)(3)(A), applies.

In this case, the Service does not dispute that --

(a) The Taxpayer made a “qualified contribution” under section 170(e)(3)(A) as the Taxpayer donated the Food Products to food banks and other organizations that, in turn, provided the Food Products to the ill, needy, and infants in accordance with their exempt purposes;
(b) the Taxpayer did not receive money, other property or services in exchange for the donation;

(c) the Taxpayer received sufficient acknowledgement documentation from the donees as required by sections 170(e)(3)(A)(iii) and section 170(f)(8); and
(d) the Taxpayer appears to be in compliance with the Federal Food, Drug, and Cosmetic Act; and
(e) the donated Food Products were “apparently wholesome food” under section 170(e)(3)(C).

However, the Taxpayer did not attach the required Forms 8283 to its return and thus is not entitled to an deduction. In the alternative, if it is entitled to any deduction, the Taxpayer failed to properly value the contributed inventory in calculating the amount of its enhanced deduction.

Form 8283

In 1984, Congress required the Secretary to establish regulations regarding the substantiation of noncash contributions of property exceeding $5,000. Deficit Reduction Act of 1984 (DEFRA), § 155(a), Pub. L. No. 98-369, 98 Stat. 691 (1984). Pursuant to the statutory mandate in § 155(a) of DEFRA, the Secretary promulgated Treasury Regulation section 1.170A-13(c).

Generally, § 155(a) of DEFRA and Treasury Regulation section 1.170A-13(c) require taxpayers to obtain qualified appraisals to substantiate deductions in excess of $5,000 for noncash charitable contributions. For contributions under section 170(e)(3), the $5,000 threshold refers to the difference between the amount of the claimed deduction and cost. Treas. Reg. § 1.170A-13(c)(2)(ii).

However, more limited substantiation requirements apply for C corporations with respect to contributions of inventory. See Treas. Reg. 1.170-13(c)(2)(ii); see also I.R.C. § 170(f)(11)(A)(iii) (for contributions made after June 3, 2004, heightening substantiation requirements for C corporations, but providing an exception in the case of contributions of inventory and certain other property). Section 1.170A-13(c)(2)(ii) provides that, if a C corporation makes a charitable contribution exceeding the $5,000 threshold, “a qualified appraisal is not required, and only a partially completed appraisal summary form (as described in paragraph (c)(4)(iv)(A) of this section) is required to be attached to the tax . . . return.” The appraisal summary needs to be made on a form prescribed by the Service and signed and dated by the donee. Treas. Reg. § 1.170A-13(c)(4)(i)(A) & (B), (iv)(A)(1). The instructions for Form 1120 for Tax Year 1 state that all corporations generally must complete and attach Form 8283 to their returns for contributions of property other than money if the total claimed deduction for all property contributed was more than $5,000. The Taxpayer was required to but did not attach properly completed Forms 8283 to its income tax return for Tax Year 1.

Section 1.170A-13(c)(4)(iv)(H) states that the failure to attach an appraisal summary (i.e., Form 8283) shall not cause a deduction to be disallowed, provided that the failure to attach the appraisal summary was a good faith omission, and the Form 8283 is supplied within 90 days of request by the Service. Although the Forms 8283 were requested, the Taxpayer did not supply them within 90 of the request, and the Taxpayer has not made a showing that such failure was a good faith omission.

Therefore, the Taxpayer is not entitled to a deduction under section 170.

Fair Market Value - Price in the Usual Market

Even if a deduction were allowed, the Taxpayer has failed to support it with an acceptable determination of fair market value in calculating the amount of the enhanced deduction.

In determining the amount of the enhanced deduction, as an initial matter it is necessary to determine both the fair market value and the basis of the contributed property. Section 1.170A-1(c)(2) defines fair market value as "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts. If the contribution is made in property of a type which the taxpayer sells in the course of his business, the *fair market value is the price which the taxpayer would have received* if he had sold the contributed property in the usual market in which he customarily sells, at the time and place of the contribution and, in the case of a contribution of goods in quantity, in the quantity contributed. The usual market of a manufacturer or other producer consists of the wholesalers or other distributors to or through whom he customarily sells, but if he sells only at retail the usual market consists of his retail customers." (emphasis added). Thus, as an initial step in determining the amount of the enhanced deduction, the Taxpayer is required to show "the price which the taxpayer would have received" for the contributed property,

Section 61(a)(3) defines gross income generally as all income from whatever source derived, including gains from dealings in property.

Section 1.61-3(a) provides that, in a manufacturing, merchandising, or mining business, gross income means the total sales, less the cost of goods sold, plus any income for investments and from incidental or outside operations or sources.

Section 471(a) provides that, whenever in the opinion of the Secretary the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer on such basis as the Secretary may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting income.

Section 1.471-3(b) provides that cost means, in the case of merchandise purchased since the beginning of the taxable year, the invoice price less trade or other discounts, except strictly cash discounts approximately a fair interest rate, which may be deducted or not at the option of the taxpayer, provided a consistent course is followed.

In determining the price which the taxpayer would have received, trade discounts must be taken into account. Trade discounts and allowances represent adjustments to the purchase price granted by a vendor. The discount may vary depending upon volume or quantity purchases, or other factors established by the vendor. If a discount is always allowed irrespective of time of payment, it is considered to be a trade discount, regardless of the purported conditions which must be met in order for the discount to apply. See Thomas Shoe Co. v. Commissioner, 1 B.T.A. 124 (1924); Rev. Rul. 84-41, 1984-1 C.B. 130. Cash discounts, on the other hand, represent a reduction in the invoice or purchase price attributable to payment within a prescribed time period; the discount is only available if the purchaser makes payment within such time period. See Rev. Rul. 84-41, 1984-1 C.B. 130.

In determining gain or loss, trade discounts and allowances are applied to reduce gross sales. See Pittsburgh Milk Co. v. Commissioner, 26 T.C. 707 (1956), acq. 1962-2 C.B. 5, (citing American Lace Mfg. Co. v. Commissioner, 8 B.T.A. 419 (1927); American Cigar Co. v. Commissioner, 21 B.T.A. 464 (1930); Albert C. Becken, Jr., 5 T.C. 498, 505 (1945)). This principle is reflected by Form 1120, U.S. Corporation Income Tax Return, which makes specific provisions, in line 1 thereof, for the reduction of “gross receipts or sales” by “returns and allowances.” See Pittsburgh Milk, supra at 716.

In Pittsburgh Milk, the Tax Court addressed whether allowances made by a milk producer to certain purchasers of its milk were adjustments to the sales price of the milk, or ordinary and necessary business expenses under section 162. The allowances were computed by applying a specific percentage to list prices fixed by the Milk Control Commission, resulting in a net cost to the customer that was below the list price in violation of state law. 26 T.C. at 711-13, 715. The court opined that, when determining gain from the sale of property, the amount realized “must be based on the actual price or consideration for which the property was sold, and not on some greater price for which it possibly should have been, but was not, sold.” Id. The Tax Court found that the allowances were part of the sales transaction, and concluded that gross income must be computed with respect to the agreed prices (net of rebate) at which milk was sold. Id. at 715-17. The court noted the allowances were “not contingent upon any subsequent performance or consideration from the purchaser.” Id. at 717. Accordingly, the Tax Court held that the purpose and the intent of the allowance was to reach an agreed-upon net selling price, and the allowance was properly viewed as an adjustment to the sales price. Id.

Revenue Ruling 2008-26, 2008-21 I.R.B. 985, clarifying and superseding Revenue Ruling 2005-28, 2005-1 C.B. 997, involves Medicaid rebates a drug manufacturer pays to a state Medicaid agency. The ruling holds such rebates are adjustments to the sales price in calculating gross receipts, rather than deductions from gross income under section 162 of the code. The ruling notes “the Medicaid rebate is a factor used in setting the actual selling price, negotiated and agreed to before the sale to W takes place."

The Taxpayer in this case contributed inventory to charity. The amount of the contribution equals the fair market value of the inventory (reduced as necessary pursuant to section 170(e)(1) and (3) and the associated regulations). Treas. Reg. 1.170A-1(c)(1). The fair market value of the property is "the price which the taxpayer would have received if he had sold the contributed property in the usual market in which he customarily sells, at the time and place of the contribution and, in the case of a contribution of goods in quantity, in the quantity contributed." As the Taxpayer is a manufacturer, its usual market consists of wholesalers or other distributers to or through whom it customarily sells. Treas. Reg. 1.170A-1(c)(2).

However, in determining the fair market value of the inventory, the Taxpayer did not use the prices it would have received in "the usual market in which he customarily sells," the wholesale market. The Taxpayer used gross sales without any reduction for vendor allowances, which must be considered in determining the actual prices received. See Rev. Rul. 2008-26; Pittsburgh Milk, 26 T.C. at 715-17. Thus, because the Taxpayer used prices prior to any adjustment for vendor allowances, the Taxpayer did not use actual market prices.

The Taxpayer argues that the donated products were not contributed in such quantities or under such circumstances so as to warrant vendor allowances. As the Taxpayer has not provided detailed sales information or information regarding the vendor allowances it normally provides, the Taxpayer has failed to substantiate this assertion. See INDOPCO, Inc., 503 U.S. at 84; New Colonial Ice Co., 292 U.S. at 440; see also I.R.C. § 6001; Treas. Reg. § 1.6001–1(a), (e). Moreover, the Taxpayer chose to include sales involving vendor allowances in the "usual market" for purposes of determining price and, having included such sales, for consistency must use the actual prices received in such sales. Neither section 170, the regulations thereunder, nor applicable case law, provide authority for using a price other than the agreed-upon prices in the Taxpayer's usual market. In determining pricing, the Taxpayer must use the actual prices or consideration received in the market and not some greater price which possibly could have been, but was not, received. See Pittsburgh Milk, 26 T.C. at 715.

Moreover, as the Taxpayer generally did not even sell 110-day inventory, the Taxpayer has not provided evidence it could have received any amount, let alone the excessive amount claimed, for such inventory in its usual market "*at the time and place of the contribution*." Treas. Reg. § 1.170A-1(c)(2) (emphasis added). Therefore, the Taxpayer has not met its burden of establishing fair market value as an initial determination in claiming the enhanced deduction.

Fair Market Value – At a Time When the Taxpayer Could Not Reasonably Have Been Expected to Realize Its Usual Selling Price

Moreover, the fair market value of the contributed inventory was less than its usual selling price because the inventory was approaching its "best by" date.

Section 1.170A-1(c)(3) provides that "[i]f a donor makes a charitable contribution of property, such as stock in trade, at a time when he could not reasonably have been expected to realize its usual selling price, the value of the gift is not the usual selling price but is the amount for which the quantity of property contributed would have been sold by the donor at the time of the contribution."

Revenue Ruling 85-8, 1985-1 C.B. 59, dealt with inventory contributed to charity shortly before its expiration date (after which such inventory could not legally be sold) by a pharmaceutical manufacturer. Under the fact pattern in the ruling, the normal selling price of the inventory was 10x dollars, but, due to the imminent expiration date, had the corporation sold the inventory in its usual market at the time of the donation it would only have realized 5x dollars. The ruling determined that the fair market value of the property was 5x dollars and that the amount of the charitable contribution was 2x dollars after the reductions imposed by 170(e)(3).

However, in Lucky Stores, Inc. v. Commissioner, 105 T.C. 420 (1995) the Tax Court held that bread stamped with a date 4 days after the delivery date without any explanatory words, such as "sell by," "fresh through," or the like, was properly valued at full retail price for purposes of valuing charitable contributions of 4-day-old bread as the taxpayer could, and did, sell 4-day-old bread at regular retail prices, and in sufficient quantities so as to constitute meaningful sales. Lucky Stores is distinguishable from this case because the Taxpayer did not sell Food Products after the 110-day mark in any meaningful quantities, whereas the taxpayer in Lucky Stores did.

In Skripak v. Commissioner, 84 T.C. 285 (1985), the Tax Court considered whether the fair market value of donated books was the publisher's catalog retail price. In rejecting petitioner's contention that the list price represented fair market value, the court noted the sheer number of books would require a discount from that price as "[t]he simultaneous marketing of all those books would substantially depress the market for each particular reprint title and for the multiple copies of each title." Skripak, 84 T.C. at 325. The court further noted the books represented excess inventory and stated "[a] willing retail buyer of the reprint books owned by petitioners would know that those books constituted excess inventory of the publisher. Such a knowing buyer would demand and receive a substantial discount for the purchase of any of this excess inventory . . . ." Id. at 326.

In this case, the Taxpayer could not reasonably have been expected to realize its usual selling price for the donated Food Products as such products were approaching their best by date. See Treas. Reg. § 1.170A-1(c)(3). Revenue Ruling 85-8 makes it clear that products approaching expiration are not worth their usual selling price

While the Taxpayer presented evidence of a few sales at full price near the 110-day mark, such sales were not in sufficient quantities so as to constitute meaningful sales. For instance, the Taxpayer sold 1 case of Product C and donated cases. Therefore, the Taxpayer has not shown Food Products after the 110-day mark could be sold at regular retail prices. Because of the small quantity of goods near the 110-day mark sold, the Taxpayer could not reasonably have expected to realize its usual selling price. See Rev. Rul. 85-8; cf. Skripak, 84 T.C. at 325-26.

Therefore, in determining the amount of the enhanced deduction, the Taxpayer is not entitled to value the Food Products at their usual selling prices. Treas. Reg. § 1.170A-1(c)(3). As the Taxpayer has failed to show the amount it would have received for the property at the time of the contribution, the Taxpayer has not met its burden of establishing its fair market value and is not entitled to an enhanced deduction.

Because the Taxpayer did not attach the required Forms 8283 to its return, the Taxpayer is not entitled to a deduction under section 170 of the Code. Even if the Taxpayer's failure to file the required Forms 8283 does not preclude a deduction, the Taxpayer is not entitled to any enhanced deductions because it failed to properly value the contributed property.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

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Please call (313) 237-6440 if you have any further questions.

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