

PUBLICATION

IRS Issues New Guidance on NIL Collectives

June 12, 2023

On June 9, 2023, the IRS issued memorandum number AM 2023-004, providing guidance on whether organizations that develop paid name, image, and likeness (NIL) opportunities for student-athletes are tax-exempt under section 501(c)(3) of the Internal Revenue Code.

The IRS concludes in this memorandum that many organizations, generally referred to as "NIL collectives", that develop paid NIL opportunities for student-athletes are not tax-exempt because the private benefits they provide to student-athletes are *not* incidental – both qualitatively and quantitatively – to any exempt purpose furthered by that activity.

Two Revenue Rulings are relied upon by the IRS to support this conclusion. In Rev. Rul. 76-206, the IRS held that an organization formed to generate community interest in the retention of classical music programs by a local for-profit radio station did not qualify for exemption under section 501(c)(3). The organization's activities enabled the radio station to increase its total revenue and, by increasing its listening audience, would enhance the value and salability of the station's airtime. The organization's activities benefited the station in a more than incidental way and served a private rather than a public interest. In Rev. Rul. 76-152, the IRS held that an organization formed by art patrons to promote community understanding of modern art trends did not qualify for exemption under section 501(c)(3). The organization exhibited and sold the artwork of local artists, who received 90 percent of the sales proceeds. This provision of direct benefits served the private interests of the artists and could not be dismissed as being merely incidental to its other purposes and activities, therefore the organization was not operated exclusively for educational purposes.

The IRS notes in closing that it will continue to monitor the development of NIL collectives and will take appropriate action to ensure that these collectives are not operating in a manner that violates the tax laws.

Implications for NIL Collectives

The memorandum has several implications for NIL collectives. First, the memorandum is not binding on the IRS, nor is it law. That said, the memorandum does provide guidance on how the IRS is likely to view NIL collectives for tax purposes.

Second, the memorandum makes clear that the IRS will closely scrutinize NIL collectives, even those that have already been granted exempt status, to ensure that they are not operating for a substantial nonexempt purpose. This means that NIL collectives must be careful to ensure that their activities are primarily focused on furthering an exempt purpose, such as education or public health.

Third, the memorandum suggests that NIL collectives that provide direct benefits to student-athletes, such as payments, are more likely to be classified as nonexempt. This is because such benefits are not incidental to any exempt purpose furthered by the activity.

Conclusion

This IRS memorandum provides important guidance for NIL collectives that are considering seeking tax-exempt status. NIL collectives should carefully consider the IRS memorandum's guidance and take steps to ensure that their activities are primarily focused on furthering an exempt purpose. Any NIL collective that has

already been granted tax-exempt status and provides direct payments to athletes should consider consulting with counsel and address the possibility of restructuring as a for-profit organization to avoid IRS enforcement issues. If our firm can be of assistance, please contact any attorney in the Firm's [Tax](#) Practice Group.