It Takes Two (Transactions) to Fix Things Right:

A Review of *Giant Eagle* and a Potential Way Forward for Taxpayers

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The thought of earning rewards at a store at which you already shop can be considered a win-win for both the consumer and the offering entity. Consumer loyalty programs drive initial sales at a store, repeat sales, and overall loyalty to that brand. Many of these programs, especially those in the retail space, provide points or discount coupons that can be redeemed with a future purchase, thereby driving future sales. Other loyalty programs allow customers to collect points to use for items such as airline miles, goods or services, or cash back. While the tax implications of a customer loyalty program may not rank highly, or at all, as a decision factor in implementing a program, recent court decisions and IRS guidance highlight the uncertainty of when an entity's liability to its customer becomes fixed under the "all events test" of IRC § 461.[1] Upcoming financial statement guidance may potentially impact how revenue is recorded for these programs which could, in turn, impact the tax treatment of these programs.

The uncertainty surrounding when the deduction is available is potentially unclear for tax purposes and not uncertain under the Financial Accounting Standards Board (FASB) Topic 606—Revenue From Contracts With Customers. The FASB 606 standard could be a potential vehicle for taxpayers to defer the recognition of some revenue related to the sale that generates a customer reward. *Giant Eagle Inc. v. Commissioner*[2] focuses on the expense side of the transaction between the company and the customer. However, the transaction can also be viewed through the lens of the revenue side—the customer is making a payment for qualifying items and a prepayment toward a future item.

Giant Eagle, a recent decision on the timing of the tax deduction for a loyalty program, is a perfect example to highlight the uncertainty of when to deduct the loyalty program expense. Giant Eagle Inc. operates a chain of supermarkets and pharmacies, as well as gas stations and convenience stores. In the years at hand (2006 and 2007), Giant Eagle operated a customer loyalty program called fuelperks!, which gave participating customers 10 cents off per gallon of a future gasoline purchase for every $50 spent on qualifying items at grocery checkout.

When a customer purchased groceries from Giant Eagle and swiped their customer loyalty card, the amount of qualifying items was tracked and once $50 of qualifying items were purchased the customer earned a reward of a ten-cent reduction in the price per gallon of fuel. Rewards could be accumulated and the customer had the ability to select whether to redeem their accumulated fuelperks! at the pump or to save them for another day when they had accumulated more rewards, allowing for a greater reduction of the cost of gasoline—sometimes down to $0 per gallon. The fuelperks! expired three months after the last day of the month in which they were earned and could not be redeemed for cash. In addition, a customer could not selectively use a specific amount of rewards—all eligible rewards would be used if a customer selected "Yes" to using their fuelperks! in a fuel transaction. The customer could discount up to a maximum of 30 gallons of gasoline in a transaction and any remaining fuelperks! not utilized would be carried over.

At the time a customer earned fuelperks!, Giant Eagle recorded a liability to estimate the costs to fulfill the redemption of the fuelperks! rewards. For income tax purposes, Giant Eagle deducted the estimated costs of unexpired and unredeemed fuelperks! at the end of the year rather than at the time the customer redeemed the rewards. The IRS disagreed with the timing of this deduction, arguing that the customer reward liability did not meet the all-events test under § 461 to be deductible for federal income tax purposes. Giant Eagle claimed that the all-events test was met since the loyalty program constituted a unilateral contract at the time of checkout, absolutely fixing the fact of the liability. As an alternative argument, Giant Eagle claimed that the loyalty program qualified as a premium coupon or trading stamp under Reg. § 1.451-4(a)(1) and the net addition to provision for future redemptions should be taken into account as a reduction to gross receipts in the year issued.

Becoming Absolutely Liable

For an accrual method taxpayer, a liability is deductible in the year in which the fact of the liability is established, the amount of the liability can be determined with reasonable accuracy, and economic performance has occurred with respect to the liability.[3] As provided previously, Giant Eagle asserts that a participating customer's qualifying purchase at checkout creates a unilateral contract between the entity and the customer, thus fixing the fact of the liability. The IRS disagreed, stating that the subsequent purchase of gasoline created a condition precedent to the fixing of the liability.

In determining whether the fact of a liability is fixed, taxpayers and the courts generally look to two Supreme Court cases, *United States v. General Dynamics Corp.*[4] and *United States v. Hughes Properties Inc*.[5] Neither of these cases are directly on point with the facts in *Giant Eagle,* but a review of these cases provides insight into when a liability fixes for income tax purposes.

Ultimately decided by the Supreme Court in 1986, the case involving Hughes Properties Inc., a casino operator in the state of Nevada, revolved around the operator's slot machines that had the potential to pay out a "progressive" jackpot. The taxpayer claimed a deduction for the annual increase in the progressive jackpot liability, arguing that regulations promulgated by the Nevada Gaming Commission absolutely fixed the fact of liability. The Supreme Court agreed, concluding "that an extremely remote and speculative possibility existed that the jackpot might never be won, did not change the fact, as a matter of state law, [that Hughes] had a fixed liability for the jackpot which it could not escape."[6] Further disagreeing with the IRS arguments, the Supreme Court stated that there is no need to have a winning player identified for the liability to be fixed. The liability of the casino operator is there, regardless as to who ultimately hits the winning spin.

Next, the taxpayer in *General Dynamics* maintained a company-administered, self-insured medical plan for its employees. To receive reimbursement for medical treatment, an employee was required to submit a claim form directly to the company, which then reviewed the claim for appropriateness and submitted the claim to the plan administrators. In determining whether the fact of the liability was fixed, the Supreme Court concluded that, among other things, an otherwise covered employee could choose to not submit a claim to avoid disclosure of a medical condition to their employer. The Supreme Court distinguished *General Dynamics* from *Hughes Properties* in its conclusion that "the failure to file a claim [did not] represent the type of 'extremely remote and speculative possibility' that [the Supreme Court] held in *Hughes.*"[7] Instead the filing of a claim was "crucial to the establishment of the liability on the part of the taxpayer."[8] The Court held that the employee's submission of the claim form to the employer was a condition precedent to the fixing of the liability.

Giant Eagle's first argument mirrors that of the argument in *Hughes Properties*—the fuelperks! program created a unilateral contract under state law with its customers at checkout, thus fixing the fact of the liability at year- end. The U.S. Tax Court disagreed, rejecting this argument and asserting that the program was "structured as a discount against the price of gas" and "consequently, the purchase of gas was necessarily a condition precedent to the redemption of fuelperks!."[9] As to the alternative argument, the Tax Court again disagreed with Giant Eagle, stating that the reward program did not qualify as a premium coupon or trading stamp under Reg. §

1.451-4(a)(1) since the "redemption of fuelperks! is conditioned on a subsequent purchase, making them not redeemable for merchandise, cash or other property."[10]

Revisiting Fixed Liability

Giant Eagle appealed the Tax Court determination that the fact of the liability was not fixed at the time a customer purchased $50 of qualifying groceries. The U.S. Court of Appeals, Third Circuit, reviewed the all-events test and concluded that the fact of the liability was indeed fixed under Pennsylvania state contract law.[11] The court provided additional distinction as to when the fact of a liability was fixed, looking to *Massachusetts Mutual Life Insurance Co. v. United States,*[12] *Gold Coast Hotel & Casino v. United States*,[13] and *Lukens Steel Co. v. Commissioner.*[14] In *Mass Mutual,* the Federal Circuit Court of Appeals held that the taxpayer could deduct future life insurance policy dividends to participating policyholders since the minimum amount payable had been approved by the company's board of directors prior to year-end. The ultimate beneficiary of the future dividends was unknown at the time of the board resolution, but the resolution guaranteed payment of the dividend to a group of policyholders. That is, if a policyholder were to cancel and not be entitled to its dividend, the total amount of the dividend paid would not change, only the amount allocated to each eligible policyholder. In fact, even if there was only one eligible member, that member would receive the entirety of the guaranteed dividend approved by the board of directors.

The Ninth Circuit Court of Appeals also gets a mention in *Giant Eagle* for its holding in *Gold Coast*. Gold Coast operates a casino in Las Vegas and maintains a customer loyalty program in which members accumulate slot club points redeemable for various prizes at the casino or an off-site retailer. In order to claim a prize, a member must accumulate a minimum of 1,200 points. The point at which the member accumulated 1,200 points, Gold Cost claimed its liability to the customer for the value of the slot club points fixed for federal income tax purposes. The court agreed, stating that "Gold Coast's liability to redeem accumulated slot club points is fixed and unconditional under state law once a slot club member accumulates 1,200 points."[15] The court distinguishes *Gold Coast* from *General Dynamics* by concluding that, as the slot club member has no need for a third party to substantiate the member's right to payment, the liability is fixed at the time the required amount of points are accumulated, not at the time the member redeems the points. In addition, the court also concluded that since the taxpayer was provided the cash value of a reward point, the amount of the liability determined is reasonable. It should be noted that the deductions in question in *Gold Coast* are for tax years 1989 and 1990, which are prior to the effective date of the economic performance regulations under Reg. § 1.461-4.

Finally, the Third Circuit looks to its own previous decision in *Lukens Steel*, in which it held that a contingent liability account was deductible as the collective bargaining agreement between the company and its employees mandated that certain amounts would be paid to the plan based upon hours worked by eligible employees and the company could not cancel the liability.[16]

The aforementioned cases provide guidance as to when a liability becomes fixed for federal income tax purposes. In its arguments for why the fuelperks! program created an absolute liability, the company described this reward program as a unilateral contract made at the time of checkout. This contract created a liability to Giant Eagle when a participating customer completed the required performance stipulated in the contract—purchasing $50 of qualifying groceries. The court cites a Pennsylvania Superior Court ruling—*Cobaugh v. Klick-Lewis Inc.*—to support its holding and reasons that a customer participating in Giant Eagle's program takes the reward program into account in their decision to shop at Giant Eagle versus shopping at a competitor.[17] In line with *Lukens Steel* and *Hughes Properties*, the court concludes that "it is irrelevant that neither the total *amount* of Giant Eagle's anticipated liability nor the identity of all the customers who eventually applied discounts toward gasoline purchases could be conclusively identified at year's end."[18]

There's Just You and Me and We Just Disagree

It can be said that the IRS never takes a loss lightly and the appellate ruling in *Giant Eagle* is no exception. Shortly after the May 2016 decision, the IRS released an action on decision on *Giant Eagle,* stating that "the Service will not follow *Giant Eagle.*"[19] It will however, follow *Giant Eagle*, with respect to cases appealable to the Third Circuit "if the opinion cannot be meaningfully distinguished."[20]

The IRS does not now disagree with the Third Circuit in the fact that the reward program was a unilateral contract created at checkout. Where the disagreement lies is the determination that the purchase of groceries creates an absolute liability at the time of checkout upon Giant Eagle to pay the discount. Rather than being controlled by *Hughes Properties* or *Gold Coast*, the IRS again argues the case is controlled by *General Dynamics*, stating "although a customer's purchase of $50 worth of groceries obligated [the] taxpayer to provide a 10-cent-per-gallon discount on a future purchase of gasoline, the discount itself was not absolute until the customer actually purchased gasoline" (i.e., the purchase of gasoline is a condition precedent to the fixing of the discount liability).[21] The dissenting opinion in *Giant Eagle* comes to the same ultimate conclusion as the IRS—the liability was not fixed until redemption.

The dissenting opinion distinguishes *Hughes Properties, Mass Mutual,* and *Lukens Steel* from the facts in the *Giant Eagle* matter by reviewing the terms of the reward program and highlighting the expiration period of the discount. The terms and conditions of the fuelperks! reward program stipulated that the customer must use the earned reward within three months after the last day of the month in which they're earned, while the jackpot in *Hughes Properties*, the dividend in *Mass Mutual,* and the contingent liability in *Lukens Steel* were all truly absolutely fixed without any opportunity within the ordinary course of business by the companies to retract the benefits. Even though the fuelperks! reward program made no mention of retraction and retraction was never contemplated, the dissent does not distinguish between extinguishment by retraction or expiration.

Secondly, the dissent highlights what is termed as an "analytical error." While the majority opinion deemed it "irrelevant that neither the total amount of Giant Eagle's anticipated liability nor the identity of all the customers who eventually applied discounts toward gasoline purchases could be conclusively identified by year's end," the dissent considers the majority's conversion of an individual liability with each shopper into a group liability a distinguishing factor from *Mass Mutual* and *Lukens Steel*. In each of those cases, the liability was with a group whereas the liability of Giant Eagle was to each individual customer who earns the reward. In what looks to be agreement with the IRS, the opinion concludes, "While Giant Eagle

became liable to a shopper at checkout, it did not become absolutely liable to that shopper unless and until the shopper redeemed fuelperks! prior to their expiration."[22]

What's GAAP Got To Do With It?

To better understand the potential way forward for taxpayers, a brief review of current financial accounting guidance is necessary. Under current generally accepted accounting principles (GAAP), a customer loyalty program such as the one operated by Giant Eagle would appear to be an arrangement that should be accounted for as a multiple-deliverable arrangement (i.e., more than one item has been sold to the customer—the product sold in the initial transaction and a portion of the product that will be provided in the future upon redemption of the issued points).[23] Accounting for the program as a multiple-deliverable arrangement requires the company to either (1) allocate and recognize revenue for each separate deliverable as it is provided or (2) combine the deliverable into one unit of accounting, depending on certain factors. In either situation this would result in a partial deferral of revenue on the initial sale. Under current GAAP, point and loyalty programs are specifically excluded from this type of accounting—but companies may elect to apply this multiple-deliverable arrangement accounting to such programs. In practice this election is not frequently made, and companies instead use an accounting policy that allocates no revenue to the points and accrues a liability for the costs of the future products/services to be provided on redemption of the points.[24]

For example:

> A customer purchases $50 worth of qualifying items from Giant Eagle. The customer is a member of Giant Eagle's loyalty program, fuelperks!. When the customer purchases $50 of qualifying groceries, he is entitled to receive 10 cents off per gallon of fuel purchased. In this example, the sole $50 purchase would entitle the customer to receive 10 cents off per gallon of fuel. Based on historical redemptions, Giant Eagle estimates that each customer purchases approximately 15 gallons of fuel at redemption, discounting their fuel by $1.50. Further assume that the cost of redemption to Giant Eagle is 9 cents per gallon.
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> Following the current guidance described above, Giant Eagle would record $50 of revenue and the related cost of sales for groceries. It would then accrue a liability for the costs/discount on the future products/services to be provided on redemption of the points in the amount of $1.35 ($.09 * 15 gallons) while recognizing $1.35 in the income statement in the period in which the groceries are purchased.
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> For federal income tax purposes, these incremental costs required to fulfill the contract, would generally be added back into taxable income until the customer redeems the rewards, fixing the liability and satisfying the economic performance tests of Reg. § 1.461-4.

Accounting Standards Update (ASU) 2014-09: Revenue From Contracts With Customers, released in 2014 and generally effective for public companies in reporting periods after Dec. 15, 2017 (for all other entities, in reporting periods after Dec. 15, 2018), could result in a deferral of the recognition of revenue related to the points in these situations.[25]

ASU 2014-09 provides updated guidance for financial statement revenue recognition accounting and aims to remove inconsistencies and weaknesses in revenue requirements; provide a more robust framework for addressing revenue issues; improve comparability of revenue recognition practices across entities, industries, jurisdictions, and capital markets; provide more useful information to users of financial statements through improved disclosure required; and simplify the preparation of financial statements by reducing the number of requirements to which an entity must refer.[26]

The framework includes five steps:

1. Identify the contract with a customer;
2. Identify the performance obligations in the contract;
3. Determine the transaction price;
4. Allocate the transaction price to the performance obligations in the contract; and
5. Recognize revenue.

Under current GAAP guidance, an entity should not recognize revenue until it is realized or realizable and earned. When the new guidance is effective, an entity should recognize revenue when (or as) it satisfies a performance obligation by transferring a promised good or service to a customer. A performance obligation is defined as a promise in a contract with a customer to transfer a good or service to the customer that meets certain criteria. If an entity promises to transfer more than one good or service to the customer, the entity should account for each promised good or service as a performance obligation only if it is (1) distinct or (2) a series of distinct goods or services that are substantially the same and have the same pattern of transfer. In addition, the entity must allocate the transaction price to the performance obligations in a contract by determining the standalone selling price of each identified performance obligation. ASU 2014-09 defines the standalone selling price as the price an entity would sell a promised good or service separately to a customer. In addition, a contract may or may not provide a price for each performance obligation, and even then, the standalone selling price may be different from the price referred to in a contract with a customer.

To illustrate the potential for change in the updated FASB guidance, use the same fact pattern as the legacy guidance example above. Under the ASU 2014-09 guidance, if an entity determined that the customer option to acquire the additional good rose to the level of a performance obligation, the entity would need to determine the standalone selling price of the customer option. Since the loyalty points provide no cash value, the entity may determine the standalone selling price of the customer option based on the discount on the underlying good to be purchased (i.e., the sales price of gasoline) and then adjust that amount for breakage or rewards that a customer will not redeem.

The entry to record the transaction at time of checkout could now look like this:

> Giant Eagle would record $48.54 of revenue and the related cost of sales for groceries and $1.46 in deferred revenue for the option to purchase of gasoline. The revenue would be allocated based on the relative standalone selling prices of the goods. Assuming $1.50 is the estimated selling price of the points and $50 is the estimated selling price of the groceries, the entity would allocate revenue to the groceries and points as follows:

Total Revenue:	$50
Allocable to groceries:	$48.54 ($50/$51.50 * $50)
Allocable to points:	$1.46 ($1.50/$51.50 * $50)

So, how does this change in financial statement accounting potentially impact the federal income tax treatment of an item?

As provided above, an entity following current guidance would generally recognize the full amount of revenue at the time of grocery purchase. Following this recognition, the entity would record a liability for the estimated costs to satisfy the customer option to acquire the additional good (i.e., fuel). Under ASU 2014-09, if an entity determined that the customer option to acquire the additional good rose to the level of a performance obligation, then the entity would be required to allocate revenue to the performance obligation and recognize revenue when the customer obtains control of the good or service. In this instance, the customer would obtain control of the fuel upon purchase of the fuel. If the discount program was deemed to be a performance obligation, the framework of revenue recognition under ASU 2014-09 would generally create deferred revenue for financial statement purposes, which could provide a concurrent deferral of revenue for federal income tax purposes.

Rock Down to Deferral Avenue

The general revenue recognition rules under Reg. § 1.451-1(a) provide that, under an accrual method of accounting, income is includible in gross income when all the events have occurred that fix the right to receive the income and the amount can be determined with reasonable accuracy. Fixing the right to receive income occurs upon the earlier of when the taxpayer completes required performance, payment is due, or payment has been received.[27] Under general tax principles, there would be no argument that Giant Eagle has received payment and would need to consider if income should be recognized. U.S. Treasury regulations and related guidance provide taxpayers several means to defer tax recognition of revenue (e.g., Reg. § 1.451-5, § 460, Rev. Proc. 2004-34) and the specific focus of this article is an advance payment under Reg. § 1.451-5 and Rev. Proc. 2004-34.

First, Reg. § 1.451-5(a) defines an advance payment as "any amount which is received in a taxable year by a taxpayer using an accrual method of accounting for purchases and sales … pursuant to, and to be applied against, an agreement for the sale or other disposition in a future taxable year of goods held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business."[28]

The second item of guidance, Rev. Proc. 2004-34 liberalizes the definition of advance payment by allowing a deferral of recognition for several other items other than goods. For purposes of Rev. Proc. 2004-34, a payment is an advance payment if:

> (1) including the payment in gross income for the taxable year of receipt is a permissible method of accounting for federal income tax purposes (without regard to this revenue procedure);
>
> (2) the payment is recognized by the taxpayer (in whole or in part) in revenues in its applicable financial statement … for a subsequent tax year (or for taxpayers without an applicable financial statement, the payment is earned by the taxpayer (in whole or in part) in a subsequent tax year); and
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> (3) the payment is for services; the sale of goods; the use of intellectual property; the occupancy or use of property if the occupancy or use is ancillary to the provision of services; the sale, lease, or license of computer software; guaranty or warranty contracts ancillary to an item or items described [above]; subscriptions; memberships in an organization; or any combination items described [above].[29]

Under either regime, advance payments are to be included in income either in the taxable year received or may be deferred to a limited extent. For Reg. § 1.451-5(a), if a taxpayer chooses the deferral method, the advance payment must be recognized in the tax year the amount is recognized for financial statement purposes with an exception for inventoriable goods. When a taxpayer has a substantial advance payment and has on hand (or available through a normal source of supply) substantially similar goods and in sufficient quantities, all advance payments with respect to the agreement that are received by the last day of the second taxable year following the year in which the substantial advance payments are received are included in income in the second taxable year.[30]

Rev. Proc. 2004-34, while expanding the advance payment categories eligible for deferral, provides a more limited deferral period. A taxpayer using the deferral method provided in Rev. Proc. 2004-34 must include the advance payment in gross income in the year of receipt (to the extent recognized in revenues in its applicable financial statement) and the remaining amount in gross income for the next succeeding tax year. An applicable financial statement includes:

1. A financial statement required to be filed with the Securities and Exchange Commission (SEC);
2. A certified audited financial statement that is accompanied by the report of an independent certified public accountant (or in the case of a foreign corporation, by the report of a similarly qualified independent professional) that is used for credit purposes, reporting to shareholders, or any other substantial non-tax purpose; or
3. A financial statement (other than a tax return) required to be provided to the federal or a state government or any federal or state agencies (other than the SEC or IRS).

For taxpayers without an applicable financial statement, or if the taxpayer is unable to determine the extent advance payments are recognized in its financial statement, the advance payment must be included in the year of receipt to the extent earned with the remainder recognized in the next succeeding tax year.

A taxpayer that adopts the deferral method under Rev. Proc. 2004-34 and receives a payment partially attributable to an item listed above and partially attributable to an item not listed above is able to defer the recognition of the payment attributable to the qualified item. The methodology used to determine the amount of payment allocable and eligible for deferral must be based on objective criteria (i.e., if the allocation method is based on payments the taxpayer regularly receives for an item or items it regularly sells or provides separately).[31]

So, What's the Catch?

The scope of Rev. 34 appears to provide a potential revenue recognition deferral for taxpayers with customer loyalty programs or any

type of contract where the entity receives payment and will now allocate some revenue to a performance obligation to be satisfied in a future tax year (this is pending the effective date of ASU 2014-09). Applying Rev. Proc. 2004-34 to the Giant Eagle example would allow for a deferral of the revenue allocated under ASU 2014-09 to the gasoline. The payment appears to meet the conditions of Rev. Proc. 2004-34 (i.e., including the full amount in gross income is a permissible method, the payment is recognized by the taxpayer in revenues in its applicable financial statement for a subsequent year, and the payment is for a qualifying item).

One potential issue is whether the IRS will respect the financial statement allocation of the transaction price to the various performance obligations. The revenue recognition standard allocates revenue to each performance obligation based on the amounts an entity expects to be entitled for that specific obligation. While the methodology of the allocation may vary, it is the economics of the transaction that support the allocation versus the form of the contract. The allocation of transaction price to each performance obligation is to be based on the obligation's standalone selling price, which may or may not be the contractually stated price or list price for a good or service.[32]

For tax purposes, the form of the contract generally must be followed versus the economic substance.[33] This disparity in allocation could create issues since the form of the contract between the entity and its customer may not provide that a customer is paying for one good and then making an advance payment for a good to be purchased at a later date. The economics of the transaction may be as such; however, that's not how the purchase is structured at the point of sale. For example, consider the purchase of a wireless telephone subscription that comes with a "free" phone. A reasonable observation would be that part of the "free" handset is being paid for in the form of the subscription price. Revenue recognition based on the underlying economics of the transaction could potentially allocate a portion of revenue to the handset and then the remainder of the revenue to the subscription period. In this circumstance, revenue could be accelerated for financial statement purposes and deferred for tax purposes since the form of the contract states that there's a free phone with subscription.

Moving Forward

The timing of when a customer loyalty program liability is deductible can be full of uncertainty, and the impending adoption of ASU 2014-09 has the potential to further muddy the waters. Additionally, not every customer option to acquire additional goods or services will give rise to a performance obligation, and not every option that is deemed a performance obligation will give rise to deferred revenue. The IRS has requested practitioner and taxpayer commentary regarding the tax implications of ASU 2014-09, and respecting the GAAP allocation of the transaction price is an item this author believes is a practical answer to some of the issues raised in these notices.[34] While there may be circumstances where a taxpayer is allowed to defer revenue that otherwise would not have been deferred, the easing of the administrative burden of tracking deferred revenue for separately identified performance obligations for GAAP and tax is a worthwhile trade-off, both for taxpayers and IRS exam agents. ☉

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Endnotes

[1]All references herein to "section" or "§" are to the Internal Revenue Code of 1986, as amended, or the Treasury regulations promulgated thereunder.
[2]*Giant Eagle Inc. v. Commissioner*, 822 F.3d 666 (3d Cir. 2016), *rev'g*, 108 T.C.M. (CCH) 67, 2014 T.C.M. (RIA) ¶ 2014-146.
[3]Reg. § 1.461-1(a)(2).
[4]*United States v. General Dynamics Corp. et al.,* 481 U.S. 239 (1987).
[5]*United States v. Hughes Prop. Inc.,* 476 U.S. 593 (1986).
[6]*Id.*
[7]*General Dynamics,* 481 U.S. 239.
[8]*Id.*
[9]*Giant Eagle Inc. v. Commissioner,* 2014 T.C.M. (RIA) ¶ 2014-146 at 1012, *rev'd*, 822 F.3d 666 (3d Cir. 2016).
[10]*Id.* at 1014.
[11]*Giant Eagle,* 822 F.3d 666.
[12]*Massachusetts Mut. Life Ins. Co. v. United States*, 782 F.3d 1354 (Fed. Cir. 2015).
[13]*Gold Coast Hotel & Casino v. United States*, 158 F.3d 484 (9th Cir. 1998).
[14]*Lukens Steel Co. v. Commissioner*, 442 F.2d 1131 (3d Cir. 1971).
[15]*Gold Coast,* 158 F.3d 484.
[16]*Lukens Steel,* 442 F.2d 1131.
[17]*Cobaugh v. Klick-Lewis Inc.,* 561 A.2d 1248 (Pa. Super. Ct. 1989) (In describing a unilateral contract—"It is the manifested intent of the offeror and his subjective intent which determines the persons having the power to accept the offer.").
[18]*Giant Eagle*, 822 F.3d at 675.
[19]A.O.D. 2016-03, I.R.B. 2016-40.
[20]*Id.*
[21]*Id.*
[22]*Giant Eagle,* 822 F.3d at 678.
[23]Scott Taub, Revenue Recognition Guide (2015).
[24]*Id.*
[25]*Revenue From Contracts With Customers (Topic 606)*, Accounting Standards Update No. 2014-09 (Fin. Accounting Standards Bd. 2014).
[26]*Id.*
[27]*See* Rev. Rul. 84-31, 1984-1 C.B. 127.
[28]Reg. § 1.451-5(a).
[29]Rev. Proc. 2004-34, 2004-22 I.R.B. 991.
[30]Reg. § 1.451-5(c)(1).
[31]Rev. Proc. 2004-34 at § 5.02(4).
[32]*Revenue From Contracts With Customers*, *supra* note 25 at ¶ 606-10-32-32.
[33]*See Commissioner v. Danielson*, 378 F.2d 771 (3d Cir. 1967).
[34]*See* IRS Notice 2015-40 *and* IRS Notice 2017-17.