

Legal Fact Sheet

New Hampshire Food Donation: Tax Incentives

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Federal tax incentives provide important financial incentives that make food donation more cost-effective and economically beneficial. These tax incentives have been extraordinarily successful in motivating food donation. In the past, federal tax incentives for food donations were limited to C-corporations.¹ Tax incentives for donations were temporarily expanded to cover more businesses in 2005. Following a series of temporary extensions, Congress subsequently made the expansion permanent in 2015,² providing all businesses with added incentive to increase food donations and prevent food waste. At the federal level, tax incentives are available in the form of general or enhanced deductions, each of which are discussed in this fact sheet.

In addition to the federal tax incentives, a number of states have enacted state-level tax incentives. As of October 2018, New Hampshire state law does not provide a state-level tax credit for food donations. However, New Hampshire has adopted most of the Internal Revenue Code, as in effect on December 31, 2016, for the calculation of business income and deductions.³ The provisions that cover the federal food donation tax deductions are included within those adopted by New Hampshire.⁴ New Hampshire businesses are therefore eligible to count federal tax deductions for food donations in the calculation of their income for both federal and state purposes.⁵

Federal Tax Incentives

How are the tax incentives calculated?

General (non-enhanced) tax deduction: Businesses that donate inventory may claim a tax deduction in the amount of the property's basis,⁶ which is usually the value of the property's cost to the business, and is often lower than the fair market value (the value at which goods can be sold). Businesses other than C-corporations—including S-corporations,⁷ sole proprietorships,⁸ and some LLCs⁹—cannot deduct more than either 30% or 50% of the business' total taxable income each year, depending on the type of organization to which the business is donating.¹⁰ C-corporations generally cannot deduct more than 10% of their taxable income each year.¹¹

Enhanced tax deduction: The enhanced tax deduction provides an extra incentive for donation by allowing the donating business to deduct the lesser of (a) twice the basis value of the donated food or (b) the basis value of the donated food plus one-half of the food's expected profit margin (if the food were to be sold at fair market value).¹² Under the enhanced deduction, all businesses may deduct up to 15% of their taxable income for food donations.¹³

Example: A grocery store donates potatoes with a fair market value of \$100. The basis value of these potatoes was \$30. The expected profit margin is the fair market value minus the basis value (\$100 - \$30), which is \$70. Under the enhanced deduction, the grocery store is eligible to deduct the smaller of:

(a) Basis Value x 2 = \$30 x 2 = \$60, or (b) Basis Value + (expected profit margin / 2) = \$30 + (\$70 / 2) = \$65

The enhanced deduction would be \$60, which is substantially higher than the general deduction (the \$30 basis value).

Businesses that do not account for inventories and are not required to capitalize indirect costs will have the option to calculate the basis value at 25% of the products' fair market value.¹⁴ Businesses also have the option to calculate the fair market value of certain products—i.e., those that cannot be sold because of failure to meet internal standards, lack of a market, or similar reasons—by using the price of the same or substantially similar, saleable food items.¹⁵

How can a donating business know if they are eligible for a tax deduction?

General tax deduction requirements: In order for a charitable contribution to qualify for a federal tax deduction, the donation must be used for charitable purposes and given to a qualified organization as laid out under section 170 of the Internal Revenue Code (IRC).¹⁶

Enhanced tax deduction requirements: In order to qualify for the enhanced tax deduction, a business must donate to a recipient organization that meets several criteria. First, the recipient must be a qualified 501(c)(3) not-for-profit as defined by the IRC.¹⁷ Additionally, the donor and recipient must meet the following requirements:¹⁸

(A) The recipient must use the donated food in a manner consistent with the purpose constituting that organization's exempt status under IRC 501(c)(3), which means that the donated food must be used exclusively for charitable purposes;

(B) The food must be used for the care of the ill, needy, or infants;

(C) The food may not be transferred by the recipient organization in exchange for money, other property, or services; however, the recipient organization may charge another organization a nominal amount for "administrative, warehousing, or other similar costs."

Example: If a business donates food to a food bank (the recipient organization), the food bank may not charge a soup kitchen for the donated food, and the soup kitchen may not charge the individuals eating at the soup kitchen. The food bank can, however, charge the soup kitchen a nominal fee for reimbursement of the costs of storing the food in a warehouse;

(D) The donating business must receive a written statement from the recipient organization. The statement must describe the contributed property and represent that the property will be used in compliance with the requirements outlined above; and

(E) The donated property must satisfy the requirements of the Federal Food, Drug, and Cosmetic Act (FDCA) at the time of donation and for the preceding 180 days. For food that did not exist for 180 days prior to donation, this requirement is satisfied if the food was in compliance with the FDCA for the period of its existence and at donation, and any similar property held by the donor during the 180 days prior to donation was also held in compliance with the FDCA.

All but three states with corporate income tax conform to the Internal Revenue Code calculation of corporate income tax in lines 1 through 28 of IRS Form 1120.¹⁹ In states with I.R.C. conformity, businesses may be eligible to also count the federal food donation tax deduction in the calculation of their state income taxes. Businesses claim the charitable contribution deduction on Line 19 of IRS Form 1120.²⁰ The Income amount used for the calculation of state taxes is already reduced by the amount of federal deductions, including charitable contributions, when it is transferred from Line 28 or Line 30 of IRS Form 1120 to state corporate income tax return forms.²¹

New Hampshire Tax Incentives

Over ten states currently offer state level tax incentives specifically for food donations.²² New Hampshire has not created its own food donation tax incentive. However, New Hampshire has adopted nearly all of the federal Internal Revenue Code provisions related to the calculation of federal corporate income and deductions for the purposes of calculating state corporate income.²³ Therefore, New Hampshire corporations are eligible to use federal tax deductions for food donations in the calculation of their incomes for both federal and state taxes.

Conclusion

As of October 2018, New Hampshire does not have its own state tax incentive for food donations. However, New Hampshire businesses are eligible for the federal general and enhanced tax deductions for food donation. Because New Hampshire has adopted the Internal Revenue Code provisions covering food donation deductions, eligible businesses also may claim the deduction when calculating their New Hampshire State taxes.

¹ See I.R.C. § 170(e)(3)(C) (2017).

² See I.R.C. § 170(e)(3)(C) (2017); Protecting Americans Against Tax Hikes (PATH) Act of 2015, H.R. 2029, 114th Cong. § 113(a) (2015).

³ N.H. REV. STAT. ANN. § 77-A:3-b.

⁴ N.H. REV. STAT. ANN. § 77-A:3-b; 26 U.S.C. § 170(e)(3)(C) (2017); telephone Interview with Dianna, Senior Auditor, New Hampshire Department of Revenue Administration (Oct. 2, 2018).

⁵ Note that farmers who allow gleaning organizations to harvest and donate surplus crops are eligible to benefit from applicable tax incentives provided they meet all other eligibility criteria.

⁶ I.R.C. § 170(e)(1); 26 C.F.R. § 1.170A-4(a)(1) (2018); *Charitable Contributions: For Use in Preparing 2017 Tax Returns*, I.R.S., DEPT OF THE TREASURY 11, (Jan. 24, 2018), <http://www.irs.gov/pub/irs-pdf/p526.pdf> (noting the amount of the deduction is the fair market value minus the amount of income gained had the product been sold at fair market value).

⁷ I.R.C. § 170(b)(1)(B)(i); I.R.C. § 1363(b).

⁸ I.R.C. § 170(b)(1)(B)(i); *Sole Proprietorships*, I.R.S., <https://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Sole-Proprietorships> (last visited Oct. 29, 2018).

⁹ I.R.C. § 170(b)(1)(B)(i); *Single Member Limited Liability Companies*, I.R.S., <https://www.irs.gov/businesses/small-businesses-self-employed/single-member-limited-liability-companies> (last visited Oct. 29, 2018). Whether an LLC will be treated as an individual for tax purposes—and hence be subject to the 30% total charitable contribution cap—depends on the number of members in the LLC. *Id.*

¹⁰ I.R.C. § 170(b)(1)(A).

¹¹ *Id.* § 170(b)(2)(A).

¹² See *id.* § 170(e)(3)(B); 26 C.F.R. § 1.170A-4A(b)(4) (2017).

¹³ See *id.* § 170(e)(3)(C)(ii).

¹⁴ See *id.* § 170(e)(3)(C)(iv).

¹⁵ See *id.* § 170(e)(3)(C)(v).

¹⁶ See *id.* § 170(b),(c), (e)(3)(c).

¹⁷ See *id.* § 170(e)(3)(A).

¹⁸ I.R.C. § 170(e)(3)(A); 26 C.F.R. § 1.170A-4A(b).

¹⁹ Federal Tax Reform and the States, NATIONAL CONFERENCE OF STATE LEGISLATURES (Apr. 1, 2018), <http://www.ncsl.org/research/fiscal-policy/federal-tax-reform-and-the-states.aspx>. Arkansas, Mississippi, and New Jersey do not conform to federal income tax calculations.

²⁰ See I.R.S FORM 1120, U.S. CORPORATION INCOME TAX RETURN (2017).

²¹ See I.R.S FORM 1120, U.S. CORPORATION INCOME TAX RETURN (2017).

²² See e.g., Arizona, see Ariz. Rev. Stat. Ann. §§ 42-5074, 43-1025 (West 2016); California, see Cal. Rev. & Tax Code §§ 17053.12, 17053.88 (West 2016); Colorado, see Colo. Rev. Stat. Ann. § 39-22-301 (West 2016); Iowa, see Iowa Code §§ 190B.101–190B.106, 422.33(30) (West 2016); Maryland, see Md. Tax-Gen. Code Ann. § 10-745 (West 2018); Missouri, see Mo. Rev. Stat. § 135.647 (West 2016); New York, see N.Y. Tax § 210-B(52) (McKinney 2018); Oregon, see Or. Rev. Stat. §§ 315.154, 315.156 (West 2016); South Carolina, see S.C. Code Ann. § 12-6-3750 (West 2016); Virginia, see Va. Code Ann. § 58.1-439.12:12 (West 2016); and West Virginia, see W. Va. Code § 11-13DD (West 2017).

²³ N.H. REV. STAT. ANN. § 77-A:3-b.