Office of Chief Counsel
Internal Revenue Service

memorandum

CC:SER:IDD:IND:TL-N-1102-99
RTJordan

date:

to: Chief, EP/E.O. Division, Delaware-Maryland District
Case Manager Sanford Ayers and Team Coordinator Mike Bieloski

from: RONALD T. JORDAN
Special Litigation Attorney

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subject: [redacted]
Advisory Opinion
Taxation of Costs of Political Communications to the Membership

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

The purpose of this memorandum is to provide further advice on the following issue that was discussed during meetings held in Baltimore, Maryland on February 24, 25, and 26, 1999.

ISSUE

Is the [redacted] subject to tax under I.R.C. § 527 for expenses that it incurs in communications with its membership in which it endorses a candidate for public office?

CONCLUSION

The plain language of I.R.C. § 527(f) suggests that communications with members endorsing a candidate for public office is an exempt function under section 527(e)(2), and therefore taxable. However, in the year 1976, when regulations were [illegible] regarding section 527, [redacted] , (b)(5)(DP) [redacted] 527 and FECA. The Service ruled that when such regulations were issued, they would be prospective. The FECA laws do not treat the expenses associated with communications between a membership organization and its membership advocating the election of a candidate as unlawful political expenditures. Therefore, in the absence of regulations that suggest a different conclusion, such expenses should not be taxed under section 527. However, only those expenses relating to communications with members of the [redacted] should not be taxed. The costs of any mailings and any other communications made to any other persons are subject to tax.

FACTS

The [redacted] is an organization exempt from tax as a civic organization under I.R.C. § 501(c)(4). The [redacted]'s stated exempt purpose is to promote [redacted]. Unlike an organization exempt from tax under section 501(c)(3), [redacted] may engage in political or lobbying activities without losing its exempt status.

[redacted] formed a suborganization called the [redacted] for the purpose of lobbying to support [redacted] rights and to counter the recent push for laws [redacted]. As stated above, [redacted] may engage in lobbying and political activities without losing its exempt status under section 501(c)4). However, under I.R.C. § 527, [redacted] is subject to tax on certain types of expenditures made in connection with political activities. The political activities for which [redacted]'s expenditures may be taxed are called "exempt functions" and are defined in section 527(e)(2). Section 527(e)(2) defines "exempt function" as:

> [T]he function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization . . . .

Under section 527, [redacted] may, without incurring tax under section 527(f), promote the exempt function activities described above through a separate political organization known as a political action Committee (PAC). In order to engage in such exempt activities, [redacted] formed a PAC known as the [redacted]. The activities of a PAC are funded by separate contributions made (usually by [redacted]'s members) to the PAC. So long as the activities directly associated with attempting to influence the election of a political candidate are conducted by [redacted] no tax is incurred under section 527.

During the course of the IRS' examination of [redacted]'s 1120POL for the years [redacted] and [redacted], political expenditures incurred by [redacted] were examined. During the course of that examination it has been determined that [redacted], through [redacted], incurred a substantial amount of postage and printing expenses in communicating with its membership concerning candidates in elections for public office. These communications took the form of specific endorsements of candidates that supported the [redacted]'s goals and policies. The question that EPEO has raised is whether these expenses are direct expenses associated with an exempt function, and, thus, taxable under section 527(f).

DISCUSSION

The issue under consideration in this memorandum is whether [redacted] is subject to tax under section 527(f) on expenses it incurred in communicating with members advocating the election of candidates for public office. As stated below, it is concluded that [redacted] should not be taxed on the costs of such communications with its members.

The issue in this case turns on whether communications with a membership organization's own membership body in which endorsements of candidates in elections for public office are made, constitute "exempt functions" under section 527(e)(2). As stated above, an exempt function is the function of "influencing or attempting to influence the selection, nomination, election or appointment" of a candidate for public office. I.R.C. § 527(e)(2). The act of endorsing a candidate for public office can only be interpreted as an attempt to influence the election of a candidate for public office. Therefore, based upon the plain meaning of the statute, [redacted] is engaging in a taxable exempt function activity when it endorses a candidate for public office to its membership. However, as explained below, that is not the end of the matter.

Section 527 was adopted, effective for taxable years beginning after December 31, 1974, in section 10(a) of Public Law 93-625 (88 Stat. 2116). Regulations interpreting section 527 were proposed on November 24, 1976 (41 FR 51840). , (b)(5)(DP)

[redacted]

The dispute concerned whether the scope of the term "exempt functions" under section 527 should be consistent with the political activities regulated by certain amendments that were made in 1976 to the Federal Election Campaign Act of 1971. The disagreement between the Service and Treasury's Assistant Secretary for Tax Policy is described in a memorandum dated August 22, 1980, which transmitted Treasury Decision 7744 to the Treasury Department for final approval. Based on a statement made by Representative Ullman during debates over the FECA amendments, the Assistant Secretary believed Congress intended that the scope of political activities taxed by section 527 should be consistent with FECA. In other words, if FECA permitted the political activity engaged in by a tax exempt entity, the Assistant Secretary believed that section 527 should not apply to expenses relating to that activity. The statement from the debates over FECA which was relied upon by the Assistant Secretary is as follows:

> The tax-writing committees in connection with the enactment of section 527 of the Internal Revenue Code, understood that those particular categories [those permitted under the Campaign Act of 1976] of expenditures would not be subject to tax under section 527, when made by labor unions exempt under section 501(c)(5) of the Internal Revenue Code or when made by trade associations exempt under section 501(c)(6)of the Internal revenue Code.

Notably, Representative Ullman did not mention organizations exempt from tax under section 501(c)(4) in his statement concerning the limitations as "understood" by the tax writing committees. Also notably, those limitations mentioned by Mr. Ullman never made it to the final statutory language adopted by Congress, nor are those or any other limitations referred to in Senate Report No. 93-1357 and Conference Report 93-1642, the legislative history to the legislative act in which section 527 was adopted.

, (b)(5)(DP)

the final regulations reserved a section for the future adoption of regulations on political activities not governed by FECA and state election laws. The Treasury Decision provided that when adopted, those regulations would be prospective if adverse to the parties affected. At the present time, almost twenty years later, such regulations have not been adopted or proposed.

In the absence of regulations, the plain language of a statute is still the law and may be enforced. Pittway Corporation v. United States, 102 F.3d 932 (7th Cir. 1996). Clearly, the plain language of the statute (section 527) describes as exempt functions any activity involving the influencing or attempt to influence the election of a candidate for public office. Furthermore, the legislative history to section 527 makes no mention whatsoever of any intent to limit the scope of exempt functions by the provisions of FECA. Moreover, the purpose of FECA is totally different from the purpose of section 527(f). The purpose of the FECA limitations on for profit and not for profit corporate activity is to prevent large accumulations of wealth from affecting federal elections. The purpose of section 527(f) is to subject tax exempt entities to tax on income used for activities that do not further a social goal.

Although there is authority for enforcing the plain language of a statute in the absence of regulations which interpret the statute, I do not recommend that such a position be taken in this case. I make this recommendation because the Service has stated (in Treasury Decision 7744) that any regulations governing the relationship between FECA and section 527 will be prospective. Thus, it would be fundamentally unfair to apply the plain language of the statute, even though it appears to apply to communications to [redacted]'s membership advocating the election of candidates for public office and the legislative history to section 527 does not provide otherwise.

Although, I do not recommend that you apply the plain language of section 527 in the absence of regulations, it is appropriate to make a determination whether [redacted]'s advocacy communications really were the type of communications permitted by FECA. If the communications did not fall within the scope of communications permitted by FECA, it is permissible to tax the expenses associated with those communications under section 527.

The FECA provisions applicable in this case are found at 2 U.S.C. §§ 441b(b)(2) and(b)(4)(C). Under those sections, a membership organization such as the [redacted] may engage in communications with its membership to solicit funds for a separate segregated fund used for political purposes (PAC)and for any other matter. See, Federal Election Commission v. National Right to Work Commission, 501 F. Supp. 422, 431 (D.D.C. 1980). Thus, it is permissible under the FECA laws for a membership organization to advocate to its membership the election of a candidate.[1] However, a membership organization is not permitted under law to advocate the election of a candidate to anyone other than its membership.

Generally speaking, in order to be considered a "member" of a membership organization, the organization must allow members its corporate charter or regulations and the person claiming membership must satisfy all of the organization's requirements for membership. Federal Election Commission v. National Right to Work Committee, 459 U.S. 197 (1982). A person is not a member, simply because he may have supported the organization in the past with contributions. Accordingly, in order to determine whether [redacted]'s communications satisfied the requirements of FECA, you must determine the category of individuals that received the communications from [redacted]. You must also determine [redacted]'s requirements for membership and verify that [redacted]'s charter, regulations, or other formal documents allow members. In addition, I recommend that you determine the rights associated with membership, i.e., does a member have the right to vote for [redacted]'s officers, etc. After the foregoing information is obtained, I will be in a better position to determine whether [redacted]'s communications met the requirement of FECA.

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[1]I note that during our meetings we discussed at length, the provision of the FECA laws requiring that membership organizations report to the commission membership communication expenses of greater than $2,000.00 relating to the election of a candidate. In a discussion that I had on March 12, with [redacted] (b)(6) [redacted], a law specialist for the Federal Election Commission ([redacted]), I was advised that the purpose of this disclosure was not to regulate in any way such expenses. The purpose of the disclosure according to [redacted] (b)(6) was so that the general public could have access to information concerning membership organizations' political activities. Due to the uncertainty in this area, I do not recommend that these expenses be taxed until final regulations permit us to do so. The contact that I made was a third party contact under the new section 7602(c). Accordingly, please complete the necessary disclosure form, as I do not have any of those forms available.

Please note that, due to the sensitivity of this matter, I am forwarding this memorandum to the Office of Assistant Chief Counsel (Field Service) under Chief Counsel's Significant Advice Review Program. According to the Program, Field Service has 10 working days in which to either accept or reject the advice. Thus, please do not take any action in response to this memorandum until Field Service provides a response. Meanwhile, if you wish to discuss this matter, please contact me at (317) 226-6610.

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cc: Ross E. Springer, District Counsel
cc: Roy Allison, Asst. Regional Counsel (TL)
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