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Civic Engagement and Community Organizing: Obstacles to Exemption

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Two rulings from 2014[1] highlight the hurdles the IRS may put in the way of a prospective 501(c)(3) organization seeking to promote community organizing and civic engagement.[2] In each instance there may have been valid independent grounds for denying exemption, but both rulings prominently feature the citation of an old ruling that has subsequently been modified, without recognition of the fact that the point for which it is cited can no longer be supported by that ruling. One ruling affirmatively misstates the text of regulations, and while the other correctly quotes the regulation, it seems to rely on a reading of it that is more consistent with the misstated version of the text.

These PLRs also highlight a problematic application of the regulations defining "educational" in the context of individual skills training.

Because IRS rulings can tend to recycle language, especially in the section citing authority, it may be helpful to explain the errors of these rulings in detail, and to set out some counter-arguments that can be made to rebut improper assertions.

The Rulings in Question

Both rulings denied 501(c)(3) status to applicants that had close relationships with an existing 501(c)(4) organization. The first is described as conducting research on issues affecting low and moderate income communities. The product of this work would be used in subsequent public policy campaigns, and the organization planned to conduct skills trainings for community leaders. The second sought to support community organizations by, among other activities, providing education and training on community organizing skills (such as door knocking and how to talk to the media) as well as training on methods of organizing and lobbying.

In both cases the IRS cited a failure to adequately distinguish the 501(c)(3) applicant from its related 501(c)(4) organization, and a lack of clear distinction between the activities of each. For this and other reasons the denials may have been proper, but the rationale put forward in each case raises troubling issues of the misuse of precedent and misapplication of authority.

Problem 1: Rev. Rul. 60-193

Both rulings cite Rev. Rul. 60-193[3], and at first look this precedential ruling is troubling for an organization seeking to qualify for 501(c)(3) status by training people on the skills necessary for civic engagement. As summarized in both rulings:

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[1] Both were 1023 denials released as PLRs.
[2] PLR 201408030; PLR 201415007.
[3] 1960-1 C.B. 195.

> An organization is not operated exclusively for educational purposes where its activities are primarily directed toward encouraging business men and women to become more active in politics and government, and in promoting business, social, or civic action, as distinguished from the cultivation, development, or improvement of the capabilities of the individual through instruction or training. The ancillary gathering and/or disseminating of information through publications, workshops or other media as a means of accomplishing such an objective does not itself give it an educational character for exemption purposes.

This is a fair enough summary of what that the 1960 ruling held. Indeed, it is a word-for-word quotation of the holding. However, the IRS's repeated[4] reliance on this ruling is misplaced. Critically, Rev. Rul. 60-193 was modified by Rev. Rul. 66-258. The outcome with respect to the organization in question in the 1960 ruling was not disturbed, as it was supported by the alternate grounds that the purpose statement in its charter was too broadly stated to meet the organizational test of § 501(c)(3). However, the ruling was "modified to the extent that it holds that the activities therein described could not qualify as educational within the meaning of section 501(c)(3) of the Code."[5]

So far, so clear. In 1960 the Service took the position that skills training to develop civic engagement cannot qualify as educational, and in 1966 it reversed that position.[6] Apparently the 1960 ruling was based on draft regulations that had not yet been published. The regulations would have provided that an organization was not educational within the meaning of § 501(c)(3) "if its principal, primary, and predominant purpose may be attained only by…the promotion of BUSINESS, SOCIAL, OR CIVIC ACTION." Reversing a position based on regulations that were never promulgated in favor of an outcome consistent with the existing regulations is wholly appropriate.

Unfortunately, subsequent developments muddied the waters a bit. The 1966 ruling was, in turn, modified and superseded by Rev. Rul. 76-456.[7]

By way of context, the 1976 and 1966 rulings concerned the same organization. After being ruled exempt under section 501(c)(3) in 1954, it lost its exempt status in 1960 because it was publicizing the names of candidates who had or had not signed a code of fair campaign practices.[8] However, the Service informed the organization that its status would be given further consideration if it could establish that it had ceased to publicize the names of candidates who had or had not signed the code. When the 1966 ruling was issued, the organization had assured the IRS that although it would ask candidates to endorse its code of campaign practices it would not publicize the results or information pertaining to allegations of code violations. When the organization nonetheless publicized the pledges, the IRS General Counsel's office recommended

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[4] These two rulings are the only recent published instances of reliance on the 1960 ruling, but the author has seen at least one other attempt to cite it in a proposed denial that was successfully appealed and therefore not publicly disseminated.

[5] Rev. Rul. 66-258, 1966-2 C.B. 213.

[6] GCM 32841 (May 8, 1964).

[7] 1976-2 C.B. 151

[8] GCM 36557 (Jan. 19, 1976) sets out the history.

a new ruling to forbid even solicitation of candidate pledges because publication (which the Counsel saw as having the potential to influence an election) was "but a logical extension of the solicitation process."[9] Because Rev. Rul. 66-258 had allowed the solicitation but not the publication of candidate pledges, the subsequent ruling modified 66-258 to say that now even the solicitation[10] of candidate pledges constitutes intervention in a political campaign:

> Rev. Rul. 66-258 is modified to the extent that it implies that the organization described therein qualifies under section 501(c) (3) of the Code even though it directly approaches candidates for public office and asks that they sign or endorse the code. . . Rev. Rul. 66-258 is modified and, as modified, is superseded since this position is restated in this Revenue Ruling. **Rev. Rul. 60-193**, 1960-1 C.B. 195, which was originally modified by Rev. Rul. 66-258, **remains modified** to the extent that it holds that the activities described therein could not qualify as educational within the meaning of section 501(c) (3) of the Code.[11]

In other words, the prior modification – overturning the position that the activities described in Rev. Rul. 60-193 could not qualify as educational – remains in effect. That modified ruling should not therefore be relied on to deny a 501(c)(3) applicant or for any other reason. To the contrary, the later rulings make clear that an organization's educational efforts may have the goal of allowing citizens to "participate more effectively in their selection of government officials."[12]

It would surely have been anomalous had the Service maintained a position that education in the field of civic engagement does not qualify for exemption, while education and skills training in any other field does. Organizations that have been recognized as serving an educational purpose include those providing training in securities management,[13] sailboat racing,[14] and drag car racing[15]; it would make little sense to hold that training in the skills of being an engaged citizen would be a disqualifying activity.

That this position has not been sustained is evident in practice, and is indicated by the record in the *American Campaign Academy* case.[16] In that case, the organization's primary activity was to operate a school to train political campaign professionals. Its purposes included "Organizing and operating a school to train individuals for careers as campaign managers, communications directors, finance directors or other political campaign professionals."[17] The Service conceded that "petitioner is organized exclusively for exempt purposes, i.e., educational purposes."[18] While the Academy was ultimately found not to be exempt, it was not because training

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[9] GCM 36557.
[10] With respect to candidate pledges, it is worth noting that even in this more restrictive ruling the organization was allowed to develop and publicize its code of fair campaign practices. It was only prohibited from directly approaching candidates to ask that they sign on.
[11] Rev. Rul. 76-456 (emphasis added).
[12] Rev. Rul. 76-456.
[13] Rev. Rul. 68-16, 1968-1 C.B. 246.
[14] Rev. Rul. 64-275, 1964-2 C.B. 142.
[15] *Lions Assoc. Drag Strip v. U.S.*, 64-1 U.S.T.C. para. 9283 (S.D. Cal. 1963).
[16] *American Campaign Academy v. Comm'r*, 92 T.C. 1053 (1989).
[17] Id. at 1056.
[18] Id. at 1064.

participants as political activists was not sufficiently "educational," but because the school ultimately served the private benefit of a specific non-501(c)(3) entity, the Republican party.

Even if Rev. Rul. 60-193 were still valid as pertains to educational activities in the area of civic engagement, the organizations in the 2014 PLRs could have distinguished themselves from the organization in the 1960 ruling. "Primary emphasis is placed upon improving the degree and quality of participation in government by the American business community." Rev. Rul. 60-193. In other words, the purposes towards which the organization's activities were directed were to amplify the voice of businesses in policy-making. Although details about its educational program are few, it appears that it was not undertaking general skills training that would be helpful to all citizens. Rather, it sought to advance a corporate business agenda. Such a purpose would further private business interests rather than those of the community at large. As the ruling states, "An organization is not operated exclusively for educational purposes where its activities are primarily directed toward *encouraging business men and women* to become more active in politics and government." (Emphasis added.) This conclusion would not apply with equal force to an organization providing trainings in general organizing skills, directed to empowering low income and historically disenfranchised communities.

To the extent the organizations in the two 2014 PLRs were providing skills training, albeit training in the skills of lobbying or community organizing or civic engagement, they should have been recognized as educational within the meaning of section 501(c)(3).

Problem 2: Action Organization Regulations

Another troubling misuse of authority is explicit in PLR 201415007, and implicit in PLR 201408030.

An organization will be disqualified from 501(c)(3) status if it is an "action organization."[19] The regulations describe three reasons an organization might be deemed an action organization: if it engages in substantial lobbying,[20] if it intervenes in a political campaign,[21] or if its primary objectives may only be attained by legislation and it advocates or campaigns for the attainment of such objective.[22]

Code section 501(h) allows a 501(c)(3) organization to elect to measure the amount of permissible lobbying under an expenditure test rather than the vague statutory "no substantial part" test. The associated regulations clearly state:

> A public charity that elects the expenditure test may nevertheless lose its tax exempt status if it is an action organization under § 1.501(c)(3)-1(c)(3)**(iii) or (iv)**. [Emphasis added.][23]

[19] Treas. Reg. § 1.501(c)(3)-3(i).
[20] Treas. Reg. § 1.501(c)(3)-3(ii).
[21] Treas. Reg. § 1.501(c)(3)-3(iii).
[22] Treas. Reg. § 1.501(c)(3)-3(iv).
[23] § 1.501(h)-1(a)(4).

In other words, the 501(h) expenditure test will not save an organization from disqualification if it intervenes in a political campaign or if its primary objective may only be attained via legislation and it campaigns for that objective. However, the regulations do not cross-reference the section of the action organization regulations that pertains to substantial lobbying. The expenditure test was intended to supplant the "no substantial part" test for lobbying by electing organizations, so the regulations ensure that an electing charity will not be disqualified for substantial lobbying activities so long as it remains under the expenditure limits established by sections 501(h) and 4911.

PLR misquotes these regulations and thereby distorts their meaning. It asserts that:

> Section 1.501(h)-1(a)(4) of the regulations provides, in part, that a public charity that elects the expenditure test may nevertheless lose its tax exempt status if it is an action organization under section 1.501(c)(3)-1(c)(3)**(ii), (iii), or (iv)**. A public charity that does not elect the expenditure test remains subject to the substantial part test. The substantial part test is applied without regard to the provisions of Code sections 501(h) and 4911 and the related regulations.[24] [emphasis added]

That regulation does not say that a public charity electing the expenditure test may lose its tax exempt status by virtue of § 1.501(c)(3)-1(c)(3)(ii), but in this ruling the IRS has affirmatively asserted that it does. The analysis that follows indicates reliance on this interpretation, including repeated references to "substantial" attempts to influence legislation, without reference to the limits of the expenditure test – even though the organization had submitted Form 5768 to make the expenditure test election.

PLR 201408030 demonstrates a similar approach. It does not misquote the regulations, but the analysis makes no reference to compliance with the limits of the expenditure test. The discussion argues that the amount of lobbying by the applicant is "substantial" rather than "insubstantial." Despite accurately citing the regulations, this analysis seems to be taking the incorrect position that substantial lobbying can preclude 501(c)(3) exemption even for an organization that has elected the expenditure test.

Worryingly, both of these PLRs also apply the "action organization" regulations expansively. For instance, advocacy of administrative agency actions is included in the discussion of attempts to influence legislation. Such advocacy is not lobbying under the 501(h)/4911 definitions, and has never been understood to be subject to the insubstantiality limitation. A 501(c)(3) may advocate before an administrative agency or a court or any other non-legislative body without limitation, provided it does so in furtherance of a charitable purpose. Other language in these rulings suggests that "action organization" is being read broadly, to disqualify an organization for encouraging social change through civic action, rather than applying the clear and specific criteria of the actual regulations.

[24] The author has also seen this exact language in the proposed denial discussed in footnote 4 above.

Problem 3: "Educational" regulations

These two rulings illustrate one final obstacle the IRS may raise for an organization seeking to provide instruction in civic engagement skills. Section 501(c)(3)-qualifying "educational" activities include "the instruction or training of the individual for the purpose of improving or developing his capabilities."[25] The regulations continue, "An organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion."[26]

This language, of course, was famously ruled unconstitutionally vague more than three decades ago.[27] In the *Big Mama Rag* case the organization in questions sought to be treated as educational under the prong of the regulations that relates to "instruction of the public on subjects useful to the individual and beneficial to the community."[28] In contrast, the educational activities of the groups in the 2014 PLRs focus more on instruction of the individual. Nonetheless, in interpreting that subsection of the regulations, the IRS relied on the same language that the D.C. Circuit held leaves too much room for subjective determinations and selective application – "the very evils that the vagueness doctrine is designed to prevent."[29]

Even if it were constitutionally enforceable, this regulatory requirement would have little meaningful application in the context of training of individuals. In teaching and developing skills, it is not generally useful to present and argue from facts. Rather, one explains and demonstrates the skill, the provides the student an opportunity to practice. For example, an organization which consisted of instructing individuals in a particular sport was held to operate for educational purposes.[30] It is unlikely that this organization devoted any instruction time to "an exposition of pertinent facts in order to permit the formation of an independent opinion or conclusion." Effective lessons would encourage the student to learn the technique being taught rather than present competing theories about how to play the game. Nonetheless, such an organization can be exempt as educational.

Another ruling that can buttress an argument against application of the "full and fair exposition" regulations can be found in Rev. Rul. 74-16. In that case, an organization assisted farmers and workers in developing nations to improve their living conditions through educational programs on credit problems. Its activities included distribution of "pamphlets and other materials providing information on the provident use of money and the need for cooperative action to solve the problems of scarcity of credit." In other words, developing the skills of individuals to address community problems and encouraging collective action were found to be 501(c)(3)-appropriate purposes and activities.

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[25] Treas. Reg. 1.501(c)(3)-1(d)(3)
[26] *Id.*
[27] *Big Mama Rag v. U.S.*, 631 F.2d 1030 (D.C. Cir. 1980).
[28] Treas. Reg. § 1.501(c)(3)-1(d)(3)(i)(b).
[29] *Big Mama Rag* at 1047.
[30] Rev. Rul. 77-365, 1977-2 C.B. 192.

Conclusion

None of this is to say that the organizations in these two PLRs had adequately established their 501(c)(3) qualification. The IRS in each case identifies multiple concerns, many of which could preclude exemption. However, the analysis and the misplaced reliance on a modified ruling and misquoted regulations, together with resort to a standard ruled unconstitutionally vague decades ago that is troubling.

If nothing else, these rulings can serve as a salutary reminder to always check primary sources and shepardize all authority – not only those that we cite in our submissions, but those relied upon by the IRS itself.