Group Lays Groundwork to Test Tax Code Political Donation Limits

by Erin McManus

A political action entity's challenge of the tax code prohibition on charitable organizations' campaign donations and lobbying efforts is being viewed as a plausible constitutional argument by observers.

The organization, Students and Academics for Free Expression, Speech, and Political Action in Campus Education Inc. (SAFE SPACE), argues that its "expression of informed and educational views on candidates and legislation in furtherance of its mission should not be silenced," and that limitations on speech under section 501(c)(3) prevent nonprofits from expressing their opinions on political issues.

SAFE SPACE filed a petition with the Tax Court March 19 seeking a declaratory judgment regarding its qualifications as an organization described under section 501(c)(3) in *Students and Academics for Free Expression, Speech, and Political Action in Campus Education Inc. v. Commissioner*.

The organization filed its petition after the IRS failed to act on its Form 1023, "Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code," within the 270-day deadline window. That was the only way the organization was going to get into court at this time, Jeff Tennenbaum of the Tennenbaum Law Group PLLC told *Tax Notes*.

SAFE SPACE plans to develop and publish a website that offers materials and information at a low cost, with the intent of reaching a wide audience at a minimal expense. The organization plans to support political campaigns regardless of their party affiliation because the ability to endorse candidates furthers its educational and charitable purposes.

A prohibition on creating a website telling the public to vote for a presidential candidate because of that candidate's defense of free speech is a "classic example of censorship," in violation of the First Amendment, SAFE SPACE says, citing *Citizens United v. Federal Election Commission*, 558 U.S. 310, 337 (2010).

The petition is a direct challenge to the constitutionality of the political activity limits in section 501(c)(3), forcing the government to litigate, Lloyd Hitoshi Mayer of Notre Dame Law School said. He added that if the IRS grants the application, it will be abrogating the congressionally enacted political activities.

Johnson Amendment

The Johnson Amendment is the provision in section 501(c)(3) that prohibits charities from carrying on propaganda or attempting to influence legislation for a political campaign on behalf of (or in opposition to) any candidate for public office.

The Johnson Amendment "serves an essential role in maintaining the integrity of the campaign finance system and the nonprofit sector," said Benjamin Leff of American University Washington College of Law.

Without the provision, there would be nothing to prevent campaign donors from funneling their contributions through charities to get a tax deduction, Leff said.

Subsidy Issue

Under current law, individuals and corporations can make unlimited expenditures through 501(c)(4) organizations to support or oppose candidates. However, if they could do the same through 501(c)(3) organizations (charities), those who deduct their charitable contributions could use these political expenditures to reduce their taxes as well, thus receiving a subsidy.

Mayer said the organization may have found a way for a lower court to get around the law by arguing that its limited resources prevent it from receiving any type of a "subsidy" from the federal government and that creating section 501(c)(4) and 527 affiliates would be unduly burdensome.

Tennenbaum noted that there wouldn't be much of a subsidy with the minimal expenditures associated with SAFE SPACE's website.

This isn't the first challenge to the prohibition on political activity by a 501(c)(3) organization. The Supreme Court in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), upheld a First Amendment free speech challenge. However, Mayer said the SAFE SPACE case would present a difficult challenge because while the Court hasn't reconsidered the decision in

more than 40 years, it has repeatedly cited it as still authoritative.

Location, Location, Location

Tennenbaum said SAFE SPACE's forum shopping was obvious, given its incorporation in Louisiana, meaning any appeal would go to the Fifth Circuit. He said that while the petitioner's counsel did an excellent job, he was surprised a petition wasn't filed earlier.

Mayer agreed about the group's location. "It is almost certainly no accident that SAFE SPACE is located in Louisiana," he said, noting that the Fifth Circuit is known for being relatively conservative, thus increasing the likelihood that the Supreme Court would agree to hear the case and reconsider *Taxation With Representation*.

SAFE SPACE's structure "permits too much expenditure of tax-deductible funds, even though the actual organization plans to spend very little," Leff said, adding that "the fundamental basis of its constitutional argument — which hasn't been made yet in the petition — could be very plausible."

The petitioner in *Students and Academics for Free Expression, Speech, and Political Action in Campus Education Inc. v. Commissioner*, Dkt. No. 4261-24 (T.C. 2024), is represented by Andrew M. Grossman, David B. Rivkin Jr., and Alexander L. Reid of Baker & Hostetler LLP. ■

Tax Court Reverses on Validity of Easement Proceeds Regulation

by Kristen A. Parillo

A Tax Court majority has concluded that Treasury's regulation on allocating judicial extinguishment proceeds is procedurally invalid — a reversal of the court's holding in a 2020 opinion involving a different conservation easement case.

In a March 28 reviewed opinion in *Valley Park Ranch LLC v. Commissioner*, seven Tax Court judges supported a holding that reg. section 1.170A-14(g)(6)(ii) is invalid under the Administrative Procedure Act (APA) because of Treasury's failure to respond to a stakeholder comment during the rulemaking process.

That holding reverses the Tax Court's May 2020 reviewed opinion in *Oakbrook Land Holdings LLC v. Commissioner*, 154 T.C. 180 (2020), in which a majority of the court's judges held that the disputed regulation was procedurally and substantively valid under the APA. The Sixth Circuit panel that heard the taxpayer's appeal in *Oakbrook* issued an opinion in March 2022 (28 F.4th 700) affirming the Tax Court's holdings. In a July 2022 order, the full Sixth Circuit rejected Oakbrook's bid for a rehearing.

Over the last several years, the validity of reg. section 1.170A-14(g)(6)(ii) — known as the proceeds regulation — has been a frequently litigated issue in conservation easement cases. Promulgated by Treasury and the IRS in the 1980s, the regulation addresses how proceeds are to be allocated between donors and donees if a conservation easement were judicially extinguished and the property sold.

As part of its enforcement campaign against alleged abuse of the conservation easement rules, the IRS has routinely sought to invalidate easement deductions at the summary judgment stage by arguing that an easement deed didn't comply with the proceeds regulation. To counter that strategy, taxpayers have argued that reg. section 1.170A-14(g)(6)(ii) was procedurally invalid under the APA because Treasury and the IRS didn't address comment letters by New York Landmarks Conservancy and others expressing concerns about the government's proposed approach to allocating proceeds.