SEPTEMBER 25, 2012

Colvin Questions on Issue Ads, IRS/Treasury Answers: the Oral Exchange

On Friday, September 14, 2012, the Tax Section of the American Bar Association met in Boston. The Exempt Organizations Committee held a panel entitled "News from the IRS and Treasury," including Lois G. Lerner, Director, EO Division, TE/GE, IRS, and Ruth M. Madrigal, Attorney-Advisor, Office of Tax Policy, Department of Treasury.

What follows is the transcript of questions I posed and answers received on the topic of election-year "issue" advertisements, along with my reflections in italics.

COLVIN:
Greg Colvin, San Francisco. I think you know my question—

I wrote Lois Lerner asking four brief questions about how to reconcile Revenue Rulings 2004-6 and 2007-41, distinguishing tax-exempt issue advocacy from political intervention during elections, and requesting a General Information Letter to clear up any perceived discrepancies between them. My letter, and the key language of the rulings, is posted here.

LERNER:
I think you know my answer. (laughter)

COLVIN:
Has to do—I'll ask it anyway—

LERNER:
Good.

COLVIN:
Actually I don't know your answer, and I'd love to hear it. Issue ads during elections:

We have two revenue rulings—one from 2004, that applies to the 527(f) tax, provides multiple factors. Another one, 2007, applies to the 501(c)(3) prohibition.
And the question seems to be, biggest question is for 501(c)(4) organizations trying to meet a primary purpose test, what test do they use? I have it down to multiple choice:
A: The old test
B: The new test
C: Both are the same test, they're just worded differently
D: I don't like these tests any more than you do (laughter)
E: All of the above

I was hoping she'd pick C.

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LERNER:
Well I think when looking at the primary activities of a c4 organization you need to not look at what they are doing that's not c4 activity, you need to look at what they are doing that is c4 activity.

So what you need to be looking at is their social welfare activity and what fits neatly into that box and what might not fit neatly into that box.

But that's not really what you're asking me. And you're not going to get an answer from any of us on any of the above that you've asked.

But what we will tell you is the revenue rulings are based on facts and circumstances and if you change any of the facts or the circumstances you know that you're out of the safe harbor.

Wait, what? Did she say "safe harbor"? There are no safe harbors in these multi-factor tests, unless perhaps you have all the listed factors in your favor. Or maybe she means that if you have the same (or better) factors as those appearing in the examples that accompanied the revenue rulings, you're safe.

And what—We put those revenue rulings out there to give you a sense of how we think about issues because we can't answer each and every scenario, factually, in a revenue ruling. As Janine pointed out we tried not to do the bookends in that one.

That's right. The two rulings do address scenarios in the middle, gray area, where there is a mix of good and bad factors.

We tried to give you a lot of different ways that the IRS might approach those issues and so you need to look at your particular facts and circumstances in the context of how we've done the analysis there and try to make the best judgment you can because if your scenario's at all different, you know, it'll be different.

That's really all we can say.

She missed the point. I wasn't asking about different facts and circumstances, but assuming the evidence was exactly the same as in the rulings, which ruling would apply to the tax question of 501(c) primary purpose? Or are the two rulings intended to reach the same result on the same facts so it doesn't matter?

I think what she's saying essentially is that it is tough for the IRS to issue guidance to the tax-exempt sector, especially on political matters, and so they don't do it very often. In between those times, they are reluctant (more so now than in the past, in my experience) to explain what they mean. So… do the best you can with what you've got.

TO MADRIGAL: Do you have anything else to add?

MADRIGAL:
I'll just note, and I've said it before, that you guys are going to come up with questions, more questions than we can possibly answer in guidance on particular, specific questions.

And what you have to do as an adviser or as a taxpayer, when there isn't specific guidance, is to take a reasonable position in good faith and to try to comply with the law. You have to reasonably try to comply with the law.

And in determining what's reasonable, I think you have to, look at, like Lois says, look at what we've said in other places and look at your facts and your circumstances.

I mean when I look at these two rulings that you mentioned, I see in each case you've got an all the facts and circumstances test. In each one, it says all the facts and circumstances.

And while each of them lay out some specific facts and circumstances, and do an application of law to facts specific and list some specific factors, the test is ALL.

And so when I mean, I just it seems like all the facts and circumstances is used in both places.

OK, so it seems what Ruth is adding is that each test goes beyond the specific factors listed and may involve unlisted factors. Each test is open-ended and may include factors listed in the other test, as well as factors that don't appear in either test.

LERNER:
One other thing I guess I would point out is I remember when each of those came out. The community was very, very complimentary to the IRS that we had laid out our thinking process. So it's always a frustration from this end that that was yesterday, what can you give me today?

But that's the nature of what we do, because it is facts and circumstances.

Yes, it was a step forward when the rulings came out, though still puzzling why they were worded differently. The IRS usually pays more attention to continuity of expression, and that's what I was asking about.

Sorry to hear she's frustrated that we keep asking, but the world has changed a bit since the last ruling in 2007. The Citizens United decision for one, which was highly critical of the FEC's open-ended, multi-factor tests and which resulted in hundreds of millions of dollars now being spent on television attack ads by tax-exempt 501(c) organizations making very loose interpretations of IRS rulings. The stakes are very high.

COLVIN:
Right, and so what I take from that is since both tests are open-ended, facts and circumstances, it doesn't necessarily limit those considered facts and circumstances to those that are listed in the ruling, they're both open-ended.

When I leave the microphone, I'm going to tell my clients that all factors in both rulings apply to all tax judgments about these kinds of issue ads unless you tell me that I'm crazy.

LERNER:
I don't think either of us said that.

But do they disagree with it? I think that's a reasonable restatement of what Ruth, in particular, said, stressing the importance of ALL the facts and circumstances.

To Lois and Ruth, I would say:

This was a slow-pitch softball question, right over the plate. I suggested an answer that would be most favorable to the IRS—that both rulings would produce the same result on the same facts and would apply to the 501(c) primary purpose test—so that political practitioners wouldn't play the two rulings off against each other or claim that there's no guidance applicable to the question of primary purpose. But they didn't swing. I call strike.

All the more reason why the IRS should issue a written General Information Letter in response to my August 24 request to clear up the uncertainty.

By the way, the Congressional Research Service recently looked at the two rulings and concluded from the examples that they mean to say the same thing, in a report issued August 29, 2012.

To political tax law practitioners, I would say:

Whether we get a precise answer or not, you can see where the IRS is heading. Do not confine your advice to the factors that appear in only one ruling, such as the seven factors in the 2007 ruling.

For instance, geographical targeting appears in the 2004 ruling but not in the 2007 version. We don't know why the later one is worded differently, but this does not mean that the IRS would ignore the fact that a particular issue ad was targeted to battleground states, swing districts, or close races. And if you blast out an email to your nationwide list, not targeted to any specific location, that should work in your favor.

To those who care about reforming the political tax rules, to reduce vagueness, ambiguity, unpredictability, excessive caution, and abuse, I would say:

We need bright lines for tax-exempt political speech, and real safe harbors.

Ask Lois, and all the responsible officials at IRS and Treasury, to make good on her July 17, 2012, letter to Democracy 21 and the Campaign Legal Center, in which she promised to "consider proposed changes" in the "regulations and other published guidance" that govern political activity by 501(c)(4) organizations. If that promise is timely and sincere, the topic should be in their 2012-13 Priority Guidance Plan.

For more on this debate, see here.