H. EDUCATION, PROPAGANDA, AND THE METHODOLOGY TEST

by
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What is truth?
Pontius Pilate (John 18:38)

1. Introduction

The Internal Revenue Code has exempted organizations operated exclusively for "educational" purposes since the inception of the federal income tax (and has allowed deductions for contributions to such organizations for nearly as long). Also, common law regards public trusts to advance education as charitable.

What is an "educational" organization? Neither the Service nor the courts have had much trouble recognizing the educational nature of traditional schools, colleges, and universities. However, it is far less clear under what circumstances an organization is educational if it advocates a particular view as a substantial activity. The Service view is that an organization's mere dissemination of words or a viewpoint to the public does not necessarily benefit the public sufficiently to warrant the organization's tax exemption under IRC 501(c)(3).

This article will discuss the administrative history of the "educational" exemption as it pertains to advocacy organizations, the current "methodology" test, and its relationship to other provisions under IRC 501(c)(3).

2. Evolution of the Methodology Test

Developing a satisfactory standard to determine whether an organization has an educational purpose vexed the Service for years. There arose differing tests in distinguishing permissible education from impermissible "propaganda." First came an "ends" test (is the organization's ultimate purpose to achieve a goal other than education of the individual or public?) with a "controversial" gloss (is the subject matter controversial?) The Service later focused on a "means" or "methodology" test (does the organization employ educational methods to achieve its desired result?)

A. Reg. 45

A Treasury regulation promulgated in 1919 provided as follows:

> ***Educational corporations may include an association whose sole purpose is the instruction of the public . . . . But associations formed to disseminate controversial or partisan propaganda are not educational within the meaning of the statute.***

Reg. 45, Art. 517.

The regulation overruled two Solicitor's Memoranda published by the Bureau of Internal Revenue in 1918 (S. 400 and S. 455) that recognized exemption of organizations whose sole purpose was to educate the public sentiment in favor of a doctrine or change in the law. A 1920 Memorandum of the Solicitor of Internal Revenue explained Reg. 45 as follows:

> ***The prime purpose of education is to benefit the individual . . . . Propaganda is that which propagates the tenets or principles of a particular doctrine by zealous dissemination . . . . propaganda in the popular sense is disseminated not primarily to benefit the individual at whom it is directed, but accomplish the purpose or purposes of the person instigating it . . . . I believe that it was Congress' intention, when providing for the deduction of contributions to educational corporations, not to benefit and assist the aims of one class against another, not to encourage the dissemination of ideas in support of one doctrine as opposed to another, to the profit of one class and to the detriment perhaps of another, but to foster education in its true and broadest sense, thereby advancing the interest of all, over the objection of none.***

S. 1362, 2 C.B. 152, 154.

B. Early Cases and Subsequent Developments

It is difficult to discern a uniform approach in the early court cases with regard to the "controversial" or "ends" tests of Reg. 45. Some of the leading cases are discussed below. (Because "advocacy" organizations typically seek change that requires implementation by government, the early law on "educational" purposes is intertwined with that of action organizations, although the statutory bans on substantial legislative activity and on political campaign intervention did not appear until 1934 and 1954, respectively. For a review of the following authorities from the perspective of the development of the law on lobbying restrictions, see "Lobbying Issues" in this year's CPE text.)

Slee v. Commissioner, 42 F.2d 184 (2d Cir. 1930), held that the American Birth Control League was not educational. The organization disseminated information on the relationship of national and world problems to uncontrolled procreation, sought to repeal anti-contraception laws through direct lobbying, and operated a clinic to advise women on how to prevent conception. Judge Learned Hand's opinion reasoned that the purpose to change the law would have been permissible if ancillary to the purpose of conducting the clinic, but the purpose to change the law was regarded as an end in itself under the circumstances, and was not considered an exempt purpose. However, the Second Circuit did not assert the "controversial propaganda" regulation as a ground of denial, as the Board of Tax Appeals had done (15 B.T.A. 710, 715 (1929)). Judge Hand reasoned as follows:

> ***Political agitation as such is outside the statute, however innocent the aim, though it adds nothing to dub it "propaganda," a polemical word used to decry the publicity of the other side.***

42 F.2d at 185.

Weyl v. Commissioner, 18 B.T.A. 1092 (1930), held not educational the League for Industrial Democracy, whose purpose was to promote a new social order based on production for use rather than production for profit, and which conducted research, published the views of its members (who differed on the method to best bring about the desired social order), and held lectures and debates. The court reasoned that the organization did not educate in the sense of presenting both sides of the matter, but only advocated its side, and that it was not Congressional intent to exempt organizations that advocate drastic political and economic change. The Second Circuit reversed (48 F.2d 811 (1931)), finding the activities educational in that they were of interest and informative to students of political economy, and finding that the organization had "no legislative program hovering over its activities."

Leubuscher v. Commissioner, 54 F.2d 998 (2d Cir. 1932), involved two organizations. One had the following purposes:

> ***teaching, expounding, and propagating the ideas of Henry George . . . especially what are popularly known as the single tax on land values and international free trade.***

54 F.2d at 999.

The other was the Manhattan Single Tax Club, founded by Henry George, which had a purpose to advocate the abolition of taxes on industry and replacement with a single tax upon land. The court held that the former organization

was educational, reasoning that its purpose was to teach rather than to lobby. But the court also held that the latter organization was not exclusively educational, reasoning that to advocate is not an educational purpose, and that the organization's purpose was not to educate but to effect change. The Board of Tax Appeals had held the former organization also not exempt, on the ground that it had a purpose to effect legislation, though the Board also stated that the controversial nature of the single tax theory did not render the teaching of it non-educational. 21 B.T.A. 1022 (1930). Thus, the Second Circuit reversed as to the former organization.

Cochran v. Commissioner, 30 B.T.A. 1115 (1934), held not educational the World League Against Alcoholism, formed by organizations (some of which favored prohibition and some of which opposed it) from various countries to gather, research, and disseminate information about alcoholism. Its purpose expressed in its constitution was to attain the total suppression throughout the world of alcoholism, through education and legislation, although the reference to "legislation" was later dropped and the organization never had a legislative program. The organization distributed literature both supporting and opposing prohibition, and did not promote particular methods for eliminating alcoholism. The court reasoned that the organization disseminated information that was highly controversial in nature and was like an agent to its members, serving their prohibition or anti-prohibition causes. The Fourth Circuit reversed, reasoning that the elimination of alcoholism (as opposed to alcohol) was not a controversial cause, that the organization disseminated information on both sides of the prohibition issue, and that the controversial views of the members did not detract from the organization's educational nature:

> ***If a public library has on its shelf books of a highly controversial character, it is none the less educational if it is not operated and maintained for the purpose of giving only one side of a question.***

78 F.2d 176, 179 (4th Cir. 1935).

See also Seasongood v. Commissioner, 227 F.2d 907 (6th Cir. 1955).

As previously mentioned, Congress passed the restriction against substantial legislative activities in 1934. The original bill would also have prohibited substantial "participation in partisan politics," but such language was later struck. H.R. Rep. No. 1385, 73d Cong., 2d Sess. 3-4, 17 (1934), 1939-1(Pt. 2) C.B. 629. Some commentators inferred from this action that Congress did not object to the exemption of organizations that advocated a position on controversial or "political" issues (in the broad sense of affecting government policy, as opposed to the narrow sense of supporting or opposing the campaigns of

candidates). However, the Service did not eliminate the "controversial or partisan propaganda" test from its educational regulation when the regulations were subsequently amended in 1935.

In 1938, Treasury amended the educational regulation by adding, in part, the following language:

> ***An organization formed, or availed of, to disseminate controversial or partisan propaganda is not an educational organization within the meaning of the Act. However, the publication of books or the giving of lectures advocating a cause of a controversial nature shall not of itself be sufficient to deny an organization the exemption, if carrying on propaganda, or otherwise attempting, to influence legislation forms no substantial part of its activities, its principal purpose and substantially all of its activities being clearly of a nonpartisan, noncontroversial and educational nature.***

Reg. 101, Art. 101(6)-1.

As of 1954, the Service regarded the law as establishing that an organization could have as its ultimate objective the creation of public sentiment favorable to one side of a controversial issue and still secure exemption, provided that its methods were educational and that it did not attempt to influence legislation to a substantial degree. See Hearings Before the Special Committee to Investigate Tax-Exempt Foundations and Comparable Organizations, H.R. Res. 217, 83d Cong., 2d Sess., pt. 1, 433 (1954) (testimony of Norman A. Sugarman, Assistant Commissioner of Internal Revenue). The Service regarded the caselaw as favoring a methodology test.

C. 1959 Regulations

The regulations under the 1954 Code (finalized in 1959) basically adopted a methodology test (referred to below as the educational regulation or "full and fair" test) for determining whether an organization was educational, by including the following statement which remains in the regulation today:

> ***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.***

Reg. 1.501(c)(3)-1(d)(3)(i).

Applying the educational regulation, Rev. Rul. 68-263, 1968-1 C.B. 256, held not educational an organization that, as a substantial activity, distributed publications that sought to discredit particular institutions and individuals on the basis of unsupported opinions and incomplete information about their affiliations and activities. The organization had a purpose to alert the American citizenry to the dangers of an extreme political doctrine, and distributed materials that included many allegations that certain individuals and institutions were of questionable national loyalty. Such charges were primarily developed by the use of disparaging terms, insinuations, innuendoes, and the suggested implications to be drawn from incomplete facts. For instance, the organization based many of its conclusions on incomplete listings of an individual's organizational affiliations without stating the extent or the nature of the affiliations or attempting to present a full and fair exposition of the pertinent facts about those organizations.

Rev. Rul. 78-305, 1978-2 C.B. 172, provided a useful example of an organization that satisfied the methodology test. It held educational an organization formed to educate the public about homosexuality in order to foster an understanding and tolerance of homosexuals and their problems. The organization collected factual information relating to the role of homosexual men and women in society and disseminated this information to the public. The organization presented seminars, forums, and discussion groups open to the public. Materials distributed to the public included copies of surveys, summaries of opinion polls, scholarly statements, publications of government agencies, and policy resolutions adopted by educational, medical, scientific, and religious organizations. The organization accumulated factual information through the use of opinion polls and independently compiled statistical data from research groups and clinical organizations. All materials disseminated by the organization contained a full documentation of the facts relied upon to support conclusions contained therein.

In National Association for the Legal Support of Alternative Schools v. Commissioner, 71 T.C. 118 (1978), acq., 1981-2 C.B. 2, the organization at issue, which was held to be educational under IRC 501(c)(3), collected and disseminated copies of briefs in legal actions involving alternative schools, and published a newsletter that encouraged individuals with views different from the organization's to submit them for publication. The Service argued that the organization advocated the advantages of alternative schools over public schools without presenting a sufficiently full and fair exposition of pertinent facts. The court reasoned that the dissemination of the briefs filed by the opposing parties

was an appropriate method of presenting a full and fair exposition of facts, and that the newsletter's invitation for supporting views allowed the audience to consider opposing views and form their own opinion on the subject.

D. Big Mama

Big Mama Rag, Inc. v. United States, 631 F.2d 1030 (D.C. Cir. 1980), held unconstitutional the educational regulation. The landmark case generated a great deal of controversy and is extensively discussed in 1981 CPE at 66.

The case involved an organization that published a newspaper dealing with issues of concern to women. The editors printed anything that would advance the cause of the women's movement and refused to publish material they considered damaging to the cause. The organization also devoted a considerable minority of its time to promoting women's rights through workshops, seminars, lectures, a weekly radio program, and a free library.

The lower court upheld denial of exemption under IRC 501(c)(3) for failure to meet the educational tests of Reg. 1.501(c)(3)-1(d)(3)(i) and Rev. Rul. 67-4. 494 F.Supp. 473 (D.D.C. 1979). The government argued that the one-sided editorial policy precluded a full and fair exposition of pertinent facts; that many articles presented unsupported opinion, innuendo, and inflammatory, disparaging language; and that the organization's advocacy of revolution rather than reform was not useful to the community. The organization argued that the newspaper as a whole met the full and fair test; that the full and fair test does not require presentation of opposing points of view, as religious organizations need not make the case for atheism; and that the full and fair test unconstitutionally regulated the content of speech in violation of the First Amendment and was so vague as to allow discriminatory enforcement (in this case, against the organization for its support of lesbianism). The District Court held that the organization failed to meet the "full and fair" test, reasoning that the organization need not present views inimical to its philosophy, but must be sufficiently dispassionate as to provide its readers with the factual basis from which they may draw independent conclusions (unlike organizations that further an exempt purpose other than educational); and that the full and fair test did not impermissibly regulate speech, was sufficiently clear to allow objective enforcement, and did not appear discriminatorily applied under the facts, since the Service had approved an organization promoting understanding of homosexuality in Rev. Rul. 78-305. However, the court rejected the argument that the subject matter was not "useful to the community," finding such a standard too subjective to pass constitutional muster.

The D.C. Circuit reversed, holding that the educational regulation, particularly the full and fair test, was excessively vague in violation of the First Amendment, both in describing who is subject to the test and in articulating its substantive requirements. The court reasoned that the Service defined "advocates a particular position" as synonymous with "controversial" (citing the IRM), and found the "controversial" standard overly subjective. With respect to the "full and fair" test, the court considered the phrase "sufficient . . . to permit an individual or the public to form an independent opinion or conclusion" especially vague, considered it futile to try to distinguish between fact and unsupported opinion, considered the Service's preoccupation with facts misplaced since they can be distorted, and also considered it futile to try to distinguish between appeals to the mind as opposed to the emotions, a test suggested by the government as embodied in the regulation. The court agreed with the lower court insofar as the latter had observed that the regulation does not compel an educational organization to present views inimical to its philosophy. The Circuit Court did indicate that exemption need not be accorded to every organization claiming to be educational, but only that they must be evaluated with criteria capable of neutral application.

E. National Alliance

In National Alliance v. United States, 710 F.2d 868 (D.C. Cir. 1983), the court upheld the Service's denial of exemption to an organization that published a monthly newsletter and membership bulletin, organized lectures and meetings, issued occasional leaflets, and distributed books, all for the stated purpose of arousing in white Americans of European ancestry "an understanding of and a pride in their racial and cultural heritage and an awareness of the present dangers to that heritage." The newsletter's general theme was that "non-whites" are inferior to white Americans of European ancestry, and that Jews control the media and thus cause government policy to be harmful to the interests of white Americans of European ancestry. The lower court, following Big Mama, upheld the organization's exemption as educational, because of the invalidity of the regulation. 81-1 U.S.T.C. ¶ 9464, 48 A.F.T.R.2d ¶ 81-5029 (D.D.C. 1981). The government set forth in its briefs the four-prong "methodology" test (later published in Rev. Proc. 86-43) as its test to determine whether the organization's activities were educational. The court rejected the methodology test, finding its criteria as vague as the regulation, and even more susceptible of selective enforcement since they were not published.

The D.C. Circuit reversed, holding that the organization's materials could not qualify as educational within any reasonable interpretation of the term, and therefore did not decide the question whether the methodology criteria cured

the vagueness problem in the educational regulation. The court reasoned that although the organization cited certain purported facts in support of its views (e.g., crimes committed by blacks), there was no reasoned link between the facts cited and the conclusions asserted by the organization, and that the organization's views required more than mere assertion and repetition, since the truth of such views was not readily demonstrable. The court distinguished Big Mama on the ground that the vague test set forth in the regulations posed a real risk of arbitrary enforcement, in that the organization's activities in Big Mama could have been found educational within some reasonable interpretation of the term. Although the court avoided the question of constitutionality of the methodology test, it did state that the test tends "toward ensuring that the educational exemption be restricted to material which substantially helps a reader or listener in a learning process," and therefore reduces the vagueness found in Big Mama. The court also cited the government's argument that it need not, and cannot, devise an educational standard free from all subjectivity, and that judicial review protects against discriminatory enforcement.

F. Rev. Proc. 86-43

Rev. Proc. 86-43, 1986-2 C.B. 729, remains the Service's official administrative pronouncement on the subject of the methodology test. The Rev. Proc. indicates that it is the Service's policy to maintain a position of disinterested neutrality with respect to the beliefs advocated by an organization, and that it is the method used by the organization in advocating its position, rather than the position itself, which determines whether the organization has educational purposes. The Service stated that publication of the test represented no change either to existing procedures or to the substantive position of the Service. The method used by the organization to develop and present its views will not be considered educational if it fails to provide a factual foundation for the viewpoint being advocated, or if it fails to provide a development from the relevant facts that would materially aid a listener or reader in a learning process. The presence of any of the following factors in the presentations made by an organization is indicative that the method used by the organization to advocate its viewpoints is not educational:

1. The presentation of viewpoints unsupported by facts is a significant portion of the organization's communications.

2. The facts that purport to support the viewpoints are distorted.

3. The organization's presentations make substantial use of inflammatory and disparaging terms and express conclusions more on the basis of strong emotional feelings than of objective evaluations.

4. The approach used in the organization's presentations is not aimed at developing an understanding on the part of the intended audience or readership because it does not consider their background or training in the subject matter.

The Service indicated, however, that an organization's advocacy may be educational in exceptional circumstances even if one of more of the factors are present, and that all the facts and circumstances must be considered.

G. Nationalist Movement

In The Nationalist Movement v. Commissioner, 102 T.C. 558 (1994), affirmed per curiam, 37 F.3d 216 (5th Cir. 1994), cert. denied, 131 L.Ed.2d 136 (1995), the Tax Court upheld the Service's denial of 501(c)(3) exemption to an organization on the ground of failure to operate exclusively for charitable or educational purposes.

The organization, largely through the efforts of its founder, engaged in a variety of activities, including providing "social services" (phone counseling); litigating, mainly as a party plaintiff purportedly to advance First Amendment rights; appearing in radio and television talk shows (often before hostile audiences) and debates; holding conventions, speeches, rallies, and parades; conducting classes and training, including physical and weapons training of members; and publishing a monthly newsletter that reported on rallies, speeches, litigation, and other events, answered questions about the organization, and provided editorial commentary. The organization allocated its staff time as follows:

25% social service
20% legal (First Amendment)
20% TV, broadcasting
10% administration
10% publishing
5% forums, speeches
5% classes, training
5% miscellaneous

A disproportionately large share of the organization's expenditures was devoted to the newsletter and social service activities.

The organization's membership application stated as follows:

> ***I apply for membership in The Nationalist Movement vowing freedom as the highest virtue, America as the superlative nation, Christianity as the consummate religion, social justice as the noblest pursuit, English as the premier language, the White race as the supreme civilizer, work as the foremost standard and communism as the paramount foe.***

The organization was generally critical of blacks, Jews, homosexuals, Communists, and other minorities of various kinds, advocated a "pro-majority" philosophy to counteract minority "tyranny" in the form of special privileges for minority groups such as affirmative action, and advocated voluntary emigration or repatriation of foreigners and minorities, who were considered "unassimilable" and "incompatible". For instance, a fundraising letter described incidents of perceived injustice carried out by minorities against whites (including the beating of a high school student, demands for the ouster of white school officials and other white workers, and the tearing down of the American flag) and included a petition directed to "public officials" to "keep gangs of minorities from replacing government by the people." One newsletter included a list of "common sense" standards for Supreme Court Justices, including "No odd or foreign name," "No beard," "Christian and Protestant," and "Anti-ERA and anti-busing." Another contained a list of people who should be excluded from U.S. citizenship, including "Non-Americans: Boat people, wetbacks and aliens who are incompatible with American nationality and character, such as Nicaraguan refugees and Refusnik immigrants." Another newsletter queried,

> ***What is 'Black History' Month anyhow? No such thing. Nary a wheel, building or useful tool ever emanated from non-white Africa. Africanization aims to set up a tyranny of minorities over Americans.***

The organization encouraged its supporters to help the poor, sick, and elderly, and included Christian observances in its public activities.

With respect to educational purposes, the court held that Rev. Proc. 86-43 was not unconstitutionally vague or overbroad, on its face or as applied. The court stated that Rev. Proc. 86-43 does not by its terms require organizations to present and rebut opposing views, and that it is doubtful whether such a requirement would be appropriate even apart from Constitutional considerations; thus, the Service need not evaluate how accurately or completely an organization presents opposing views.

The court found that the newsletter activity was substantial, reasoning that it was an important source of support and means of communicating with members and was available to the general public. In applying the Rev. Proc.

86-43 criteria and finding the newsletter non-educational, the court found that a significant portion of it was devoted to presenting viewpoints unsupported by facts, such as the standards for Supreme Court Justices, the groups of people who should be excluded from U.S. citizenship, and the statement regarding Black History Month.

The court could not determine whether the newsletter failed the distortion standard since the government had not pointed to specific distorted or erroneous facts in its brief. However, the court did find one obvious distortion of fact: an article stated that the Anti-Defamation League "recently called for Nationalists to be prosecuted and even killed for pamphleteering and exercising free speech," but later indicated that the "killed" reference was an extrapolation from the quoted phrases "must be stopped" and "pay the price." The court noted that such a patent distortion is less serious than one not apparent on its face.

The court found prevalent use of inflammatory terms, such as references to "queers" and "perverts," and in use of the terms "invasion" and "invaders" to describe a protest march in Forsyth County, Georgia by "black-power" participants, with those opposing the march characterized as "patriots" and "martyrs."

The court also found that the organization did not consider its audience's youthful background. The average age of members was in the low twenties, newsletter articles discussed activities of students and skinheads, and the organization sought to recruit youth. The newsletter included many references to events and public leaders in the 1960s, of which the audience may have had limited knowledge.

The Tax Court also held that the organization failed to provide sufficient detail of the social service work (phone counseling) and litigation (mostly involving the organization as party plaintiff) to establish that such activities accomplished exempt purposes. On appeal, the Fifth Circuit did not reach the issue whether the methodology test is constitutional, since it determined that the organization's non-advocacy activities (phone counseling and litigation) were substantial non-exempt activities.

3. Relationship of Methodology Test to Other Exemption Issues

A. Lobbying

Rev. Proc. 86-43 implies that the fact that advocacy is educational does not mean that it is not lobbying. IRC 501(c)(3) prohibits as a substantial activity

the attempting to influence legislation, by carrying on propaganda **or otherwise**. However, the relationship between education and lobbying under IRC 501(c)(3) is complicated, partly by IRC 501(h) and 4911. An important question is under what circumstances an organization's advocacy may satisfy the methodology test and still constitute lobbying.

(1) Advocacy of Objective vs. Nonpartisan Analysis

The 1959 regulations include a definition of an action organization that incorporates both an "ends" test and a "means" test:

An organization is an "action" organization if it has the following two characteristics:

> ***(a) Its main or primary objective or objectives (as distinguished from its incidental or secondary objectives) may be attained only by legislation or a defeat of proposed legislation; and***
>
> ***(b) it advocates, or campaigns for, the attainment of such main or primary objective or objectives as distinguished from engaging in nonpartisan analysis, study, or research and making the results thereof available to the public.***

Reg. 1.501(c)(3)-1(c)(3)(iv).

Rev. Rul. 62-71, 1962-1 C.B. 85, provided an example of such an action organization. The organization's purpose was to support an educational program for the stimulation of interest in the study of economics, particularly with reference to the single tax theory of taxation. The organization conducted research (primarily concerned with securing information for determining the effect of the various methods of real estate taxation on the rise and fall of land values); moderated discussion groups; disseminated publications at nominal prices; and maintained a lecture service for schools and other organizations that studied social and economic problems. The organization's announced policy was to promote its philosophy by educational methods as well as by the encouragement of political action. Most of the publications and a substantial part of the other activities dealt with the theory advocated, which could be put into effect only by legislative action.

Rev. Rul. 64-195, 1964-2 C.B. 138, involved an organization held to engage in nonpartisan analysis (rather than advocacy), in connection with court reform which was the subject of an upcoming state referendum. The organization was a 501(c)(3) educational organization that promoted the study of law. The analyses explained contemplated changes in (1) the number of such courts,

territory of each; (2) judges: number, pay, removal, duties; (3) clerks: number, pay, removal, duties; (4) jurisdiction of courts, court clerks and magistrates; and (5) rules of practice and procedure for courts and magistrates. The organization did not participate in any way in the presentation of suggested bills to the state legislature and did not campaign to persuade the people to vote for the constitutional amendment. Its activity in connection with court reform was limited to the study, research, and assembly of materials and the presentation of an objective analysis to those interested in court reform including those who opposed it as well as those who favored it, and to the general public.

Other Code and regulatory provisions distinguish between advocacy and nonpartisan analysis. With respect to activities of private foundations, IRC 4945(e), enacted in 1969, defines as a taxable expenditure an amount paid for any attempt to influence legislation through an attempt to affect the opinion of any segment of the general public, other than through making available the results of "nonpartisan analysis, study, or research."

Reg. 53.4945-2(d)(1)(ii), promulgated in 1972, provides as follows:

> ***For purposes of IRC 4945(e), "nonpartisan analysis, study, or research" means an independent and objective exposition of a particular subject matter, including any activity that is "educational" within the meaning of Reg. 1.501(c)(3)-1(d)(3). Thus, "nonpartisan analysis, study, or research" may advocate a particular position or viewpoint so long as there is a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent opinion or conclusion. On the other hand, the mere presentation of unsupported opinion does not qualify as "nonpartisan analysis, study, or research."***

Reg. 53.4945-2(d)(1)(vii) contains a dozen examples regarding "nonpartisan analysis." Although the examples are too voluminous to discuss in detail here, they illustrate that analyses that present information merely on one side of a controversy rather than discussing the pros and cons do not constitute nonpartisan analysis, because they do not allow the audience to form an independent opinion or conclusion.

It should be noted that the nonpartisan analysis exception applies only where the organization makes the results available to the public in a proper manner, and the communication does not "directly" encourage the recipient to take action, within the meaning of Reg. 56.4911-2(b)(2)(iii)(A) through (C).

A question arises as to the relationship of the educational regulation (Reg. 1.501(c)(3)-1(d)(3)(i)) to the action organization regulation (Reg. 1.501(c)(3)-1(c)(3)(iv)), and to others that deal with the distinction between advocacy and nonpartisan analysis. As discussed above, the regulations under IRC 4945 equate nonpartisan analysis with satisfaction of the methodology test under IRC 501(c)(3). However, those regulations also indicate that nonpartisan analysis must discuss the pros and cons of both sides of an issue, whereas the D.C. District Court in Big Mama and the Tax Court in Nationalist Movement (unlike Alternative Schools) indicated that such discussion is not required under the methodology test.

The court in Haswell v. United States, 500 F.2d 1133 (Ct. Cl. 1974), cert. denied, 419 U.S. 1107 (1975), discussed the meaning of "nonpartisan analysis" under action organization Reg. 1.501(c)(3)-1(c)(3)(iv). At issue was the National Association of Railroad Passengers, an organization formed by an individual concerned by the discontinuance of passenger trains. The organization advocated the preservation of passenger service. The court noted by analogy the definition under IRC 4945(e) and regulations thereunder which make clear that projects designed to present information on one side of a legislative controversy, or that fail to report available information that would tend to dispute conclusions that are advocated, are partisan, and stated that nonpartisan analysis, study, or research requires a fair exposition of both sides of an issue. The court also noted that the term "nonpartisan" relates to issues rather than organized political parties. The court concluded that the organization's materials were partisan and prepared in a manner that would present most forcefully its position rather than being full and fair objective expositions that would enable the audience to reach an independent conclusion.

Some observers have concluded that the Service might be justified in applying a stricter "full and fair" standard for purposes of nonpartisan analysis than for purposes of the educational methodology test.

(2) Advocacy of Legislation vs. Discussion of Broad Problems

The test of lobbying under Reg. 1.501(c)(3)-1(c)(3)(ii) is whether the organization advocates the adoption or rejection of legislation, or whether the organization contacts (or urges the public to contact) legislators for the purpose of proposing, supporting, or opposing legislation. IRC 4945 provides some interpretive guidance.

According to the Senate Report, IRC 4945(d)(1) and (e), which contain a definition of lobbying, were intended essentially to retain the 501(c)(3) definition of lobbying except for the "substantiality" test. S. Rep. No. 552, 91st Cong., 1st Sess. 48 (1969). Reg. 53.4945-2(d)(4) provides that examinations and discussions of broad social, economic, and similar problems are not lobbying, even if the problems are of the type with which government would be expected to deal ultimately. The regulation states that lobbying does not include public discussion, or communications with members of legislative bodies or governmental employees, the general subject of which is also the subject of legislation before a legislative body, but only where such discussion does not address itself to the merits of a specific legislative proposal, and only where such discussion does not directly encourage recipients to take action with respect to legislation.

As mentioned above, the 4945 regulations contain the "nonpartisan analysis" exception to lobbying under Reg. 53.4945-2(d)(1)(ii). The "nonpartisan analysis" exception goes further than the "discussion of broad problems" exception and allows a position to be taken on a specific pending legislative proposal. See Examples (5) and (8) under Reg. 53.4945-2(d)(1)(vii), which involve nonpartisan analysis in which a position is taken with respect to pending legislative proposals.

However, G.C.M. 36127 (Jan. 2, 1975) concluded that an expression of opinion or position by an organization for or against specific proposed or pending legislation, even if educational, would be an attempt to influence legislation under IRC 501(c)(3), notwithstanding the 4945 regulations. The G.C.M. drew a distinction between specific legislative proposals or programs, on the one hand, and general classes of legislative solutions to policy problems, which arise from nonpartisan analysis and are not timed to coincide with specific legislative proposals, on the other.

Under the reasoning of the G.C.M., advocacy favoring or opposing specific legislative proposals would be regarded as lobbying under Reg. 1.501(c)(3)-1(c)(3)(ii), even if presented in conjunction with nonpartisan analysis. Courts have held that time spent in formulating, discussing, and agreeing upon an organization's positions with respect to advocating or opposing legislative measures is properly considered a part of the organization's program for influencing legislation. See Kuper v. Commissioner, 332 F.2d 562 (3d Cir. 1964), cert. denied, 379 U.S. 920 (1964); League of Women Voters v. United States, 180 F.Supp. 379 (Ct.Cl. 1960). Thus, time spent on formulating advocacy positions would apparently also be considered as devoted to influencing legislation.

(3) IRC 501(h) and 4911

The above discussion applies to 501(c)(3) organizations that do not have a 501(h) election in effect; the analysis is somewhat different for organizations with a 501(h) election, which are subject to the lobbying rules under IRC 4911.

The lobbying definitions under IRC 4911 contain exceptions practically identical to those in IRC 4945 for nonpartisan analysis (IRC 4911(d)(2)(A) and Reg. 56.4911-2(c)(1)) and for discussion of broad problems (Reg. 56.4911-2(c)(2)). Furthermore, these exceptions expressly apply in determining whether an organization that has made the 501(h) election has engaged in lobbying for 501(c)(3) purposes, whereas they are not controlling for 501(c)(3) lobbying purposes with respect to organizations without a 501(h) election. Therefore, G.C.M. 36127 cannot be applied to an organization with a 501(h) election; the nonpartisan analysis exception is an absolute exception to lobbying.

The enactment of IRC 501(h) and 4911 was not intended to change the lobbying rules under IRC 501(c)(3) for non-electing organizations. See IRC 501(h)(7). Thus, the relationship of the methodology test to the lobbying rules depends on whether the organization has made a 501(h) election.

Some commentators have questioned the viability of action organization Reg. 1.501(c)(3)-1(c)(3)(iv) for organizations with a 501(h) election in effect, given the purpose of IRC 501(h) to provide a more precise definition of lobbying and of the permissible amounts of lobbying. However, the regulations under IRC 501(h) indicate that Reg. 1.501(c)(3)-1(c)(3)(iv) is not affected by a 501(h) election. See Regs. 1.501(c)(3)-1(c)(3)(ii) and 1.501(h)-1(a)(4).

B. Political Intervention

IRC 501(c)(3) contains an absolute bar to political intervention; Rev. Proc. 86-43 makes clear that nothing vitiates that bar. Under Rev. Proc. 86-43, the publication of statements on behalf of or in opposition to a candidate is prohibited, regardless whether educational. For a fuller discussion, see 1993 CPE at 411-415. However, the Service has condoned certain "voter education" activities (such as the truly impartial publication of the voting records of all legislators) under certain circumstances. See 1993 CPE at 419-427.

C. Other Exempt Purposes

The methodology test determines only whether advocacy is educational. If advocacy serves another exempt purpose, then the test is not controlling. See,

e.g., Rev. Rul. 68-306 (religious publication furthered religious purposes). The regulations expressly state that a charitable organization may advocate its views on controversial issues:

> ***The fact that an organization, in carrying out its primary purpose, advocates social or civic changes or presents opinion on controversial issues with the intention of molding public opinion or creating public sentiment to an acceptance of its views does not preclude such organization from qualifying under IRC 501(c)(3) so long as it is not an "action" organization.***

Reg. 1.501(c)(3)-1(d)(2). However, non-educational advocacy must be reasonably related to the accomplishment of the exempt purpose. See Rev. Rul. 80-278, 1980-2 C.B. 175. Further, if an organization is "charitable" only in that it advances education, then the methodology test is controlling on the issue of whether its advocacy of particular viewpoints furthers charitable purposes.

Cases involving organizations that claim a religious purpose are particularly sensitive matters. Such advocacy generally falls into two categories--(1) religious proselytizing (i.e., seeking converts to the religion), and (2) advocating a political, social, or other secular cause based on religious principles. Advocacy of the first type (and entailing none of the second) is clearly permissible. Advocacy of the second type could raise questions whether the advocacy is conducted exclusively for religious purposes, requiring a careful examination of the facts and circumstances, through taxpayers have won several cases in such situations. See Girard Trust Co. v. Commissioner, 122 F.2d 108 (3rd.Cir. 1941); Lord's Day Alliance of Pennsylvania v. United States, 65 F.Supp. 62 (E.D.Pa. 1946). Even if the advocacy is conducted exclusively for religious purposes, it may still run afoul of the action organization regulations under IRC 501(c)(3), which contain no exceptions for religious organizations. See, e.g., Christian Echoes National Ministry, Inc. v. United States, 470 F. 2d 849, 854 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973). However, particularly in the case of churches with many activities, the advocacy may prove to be insubstantial.

In cases where advocacy activities purportedly in furtherance of an exempt purpose other than education (e.g., promoting secular causes based on religious beliefs, defending human rights, preventing cruelty to animals) do not appear to satisfy the methodology test, coordination with the Exempt Organizations Division in Headquarters may be appropriate.

D. Activities Illegal or Contrary to Public Policy

If an organization advocates engaging in criminal or other activities contrary to public policy, then it may run afoul of the prohibition against such activity by 501(c)(3) organizations. See. e.g., Rev. Rul. 75-384, 1975-2 C.B. 204; 1994 CPE at 155.

Cases in which educational methodology problems arise may involve organizations whose membership criteria discriminate on the basis of race, religion, or similar criteria. Where such is the case, violation of clearly established public policy may be considered as an alternative ground for denial or revocation. The lower court in National Alliance rejected the government's argument that the organization, by advocating violence against blacks and Jews, violated the common law prohibition against charities engaging in activities that are illegal or contrary to public policy; the court considered this prohibition applicable only to racial discrimination by schools. The issue was not presented to the D.C. Circuit on appeal. However, the Service may raise the argument in appropriate cases.

E. Inurement and Private Benefit

Non-educational purposes and private benefit are not entirely distinct concepts; activities that do not further an exempt purpose may further the private interests of the founders. In some cases, an advocacy organization appears to be carrying on a personal vendetta of its founder against one or more individuals or organizations. The court in Save the Free Enterprise System, Inc. v. Commissioner, T.C.M. 1981-388, relied on inurement and private benefit to the founder as the ground for denial rather than the non-educational nature of the advocacy. See also Puritan Church-The Church of America v. Commissioner, T.C.M. 1951-151; G.C.M. 36323 (June 26, 1975). The Tax Court in Nationalist Movement, however, rejected the Service's argument that the organization privately benefitted its founder by providing him a forum to express his personal agenda and promote his career in politics, reasoning that the founder did not engage much in retaliatory personal attacks, financially benefit from the organization, or appear to have current ambitions for public office (although he had campaigned for office a decade earlier).

Where advocacy qualifies as educational, benefit to the founder arising from the advocacy itself may be incidental to achievement of the educational purpose in most cases, although all the facts and circumstances must be considered.

F. Commerciality

Even if the content of an organization's publications or programming is educational, the organization may still be denied exemption if conducted like a commercial business. See, e.g., Rev. Rul. 77-4, 1977-1 C.B. 141; 1988 CPE at 62.

G. Promotion of the Arts

The Service has long held that promotion of the arts is educational. See, e.g., Rev. Rul. 64-175, 1964-1(Pt. 1) C.B. 185. Although the proposition has never been tested in court, it might be concluded that the methodology test does not apply to an organization that promotes literature, film, or other arts, even if the art contains messages or "advocates" particular views, so long as the art is portrayed as fictional (rather than as documentary or nonfictional).

4. Value Neutrality and Constitutional Concerns

As discussed above, the D.C. Circuit in Big Mama found the educational regulation unconstitutionally vague, in violation of the First Amendment. However, the Tax Court's holding in Nationalist Movement and the D.C. Circuit's dicta in National Alliance indicate that the regulation, as amplified by the methodology test, is not unconstitutionally vague.

Aside from First Amendment concerns, where the Service denies exemption to an organization for failure to meet the methodology test, the organization may claim that it is being treated differently than similar organizations, in violation of its Constitutional rights to due process under the Fifth Amendment and equal protection. The Service is susceptible to this charge in any action that it takes with any taxpayer. However, the charges may arise more frequently in cases involving educational advocacy organizations (and religious organizations), because of the awareness of such organizations that they are engaged in activities protected by the First Amendment, which prohibits federal law from abridging the freedom of speech. Advocacy organizations have sometimes charged that the Service is discriminating against them due to dislike of their viewpoints or positions rather than due to their methodology of presentations.

Such arguments were raised in Nationalist Movement. The Tax Court indicated that although it takes a restrained and cautious approach to allegations of administrative inconsistency, it also does not take such allegations lightly. The court concluded that the organization had not proven unequal treatment as a factual matter.

Thus, cases involving application of the methodology test are particularly sensitive. It is important for the tax law specialist to try to be as objective as possible in applying the test. As the National Alliance court put it, "the government must shun being the arbiter of 'truth'" (although the government, unfortunately, cannot entirely avoid this role to the extent that it must determine whether communications are supported by undistorted facts). Each case should be well-developed and carefully considered before a denial or revocation is issued, and coordination with Headquarters may be appropriate.