NONPROFITS: INTERNAL REVENUE SERVICE

Can Hate Groups Have 501(c)(3) Educational Status?

02.03.17 | Linda J. Rosenthal, JD

Richard Spencer has never shied away from grabbing headlines for his favorite cause: white nationalism. He heads up a nonprofit, National Policy Institute, through which he promotes these ideas and carries out programs and events.

During the 2016 presidential election campaign, Spencer became an exuberant supporter of Donald Trump – hailing his favorite candidate during Trump rallies with Nazi-style salutes and greetings. Late in the year, the white-supremacy provocateur gained notoriety for a proposed armed march in his family hometown of Whitefish, Montana, against the Jewish residents and businesses.

According to a December 22, 2016 article in The Chronicle of Philanthropy, some 60 organizations that have been labeled by watchdog organizations as "hate groups" currently enjoy 501(c)(3), tax-exempt, status as "educational organizations."

Spencer's National Policy Institute features prominently on that list, and tax-deductible contributions to it have spiked dramatically in recent months.

Outrage and Questions

Not surprisingly, this expose caused a flurry of criticism. How is it that so many so-called extremist organizations have the highly prized 501(c)(3) status? Is this a mistake or evidence of lax oversight at the IRS? Is it a matter of these groups having hidden their true intentions and activities during the application process? Can – or should – these tax exemptions be revoked?

These organizations claim to be "educational" within the meaning of section 501(c)(3), the same category that applies to schools, historical societies, museums, and arts organizations. How can that

be?

To borrow the title of a 2009 movie: "It's Complicated."

> *The issue is a thorny one for the Internal Revenue Service, which must balance First Amendment rights against concerns that it is essentially granting government subsidies to groups holding views that millions of Americans may find abhorrent.*

What is an "Educational" Organization?

This complex story begins with the deceptively simple language of section 501(c)(3) of the Internal Revenue Code, the definitional statute of eligibility for the most highly coveted category of federal tax exemption:

> *Corporations, and any community chest, fund, or foundation, **organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes**, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, ….*

"The term 'educational' is not defined in the Internal Revenue Code itself. Instead, it is explained in Treasury Regulation section 1.501(c)(3)-1(d)(3)(i).

It encompasses both –

(1) individual instruction "for the purpose of improving or developing his capabilities," and

(2) "[t]he instruction of the public on subjects useful to the individual and beneficial to the community."

The controversy arises in connection with the ***scope*** of the term "educational."

> *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.*

This Treasury Regulation is supplemented by a "methodology test" adopted by the Internal revenue Service, the agency charged with the duty of enforcing and interpreting this regulation. A "method is not 'educational' if it fails to provide a 'factual foundation' for the position or viewpoint or 'a development from the relevant facts that would materially aid a listener or reader in a learning process.'"

Espousing a Viewpoint as "Educational"

Many groups applying for tax exemption as "educational" organizations fit neatly within these parameters; the approvals are easily granted.
In other cases, though, the answer is less clear:

> *Can a group espousing a viewpoint (i.e., only one side of an issue) be characterized as educational? If so, does the group have to provide factual information to support its statements? Is there some standard for truthfulness and accuracy?*

And – most significantly – there are First Amendment considerations that come into play in connection with the definition of "educational" under section 501(c)(3):

> *While there is no constitutional requirement that the term 'educational' encompass every communication protected by the First Amendment, courts will examine the IRS's denial of a tax exemption or other benefit when it is based on the content of the taxpayer's speech in order to ensure the denial was not done for an impermissible reason.*
> *Groups that promote controversial positions may be particularly vulnerable to an interpretation of 'educational' that permits a subjective determination by the IRS as to whether a group's methods of presenting its views are educational.*

This Treasury Regulation and the IRS methodology test have been challenged and struck down as unconstitutionally vague in one federal appellate court, but "subsequent court cases have suggested that the test passes constitutional muster."

The Outer Fringes of "Educational"

The most difficult cases arise where the organization not only espouses a viewpoint, but the ideas are viewed by the mainstream of opinion as hateful, discriminatory, or otherwise repugnant and against established public policy.

So called "hate groups" fall into this tricky category. "The Southern Poverty Law Center defines hate groups as those which 'have beliefs or practices that attack or malign an entire class of people, typically for their immutable characteristics.'"

For its part, Spencer's National Policy Institute sees itself as "primarily dealing with research and education around race, immigration, and other issues affecting European-Americans."

Conclusion

"Hate groups" are nothing new, but, in the current political climate, they have emerged from the shadows and become emboldened. For this reason, the question whether they should enjoy the benefits of 501(c)(3) status has become a topic of keen public and expert interest and debate. Take a peek, here, here, and here, for opening salvos and responses from the tight-knit, nonprofit-law-professor circuit.