

Private Foundation Lobbying: Ninth Circuit Bunts

05.09.18 | Linda J. Rosenthal, JD



In December 2017, the Ninth Circuit Court of Appeals issued a decision in a much-anticipated case involving the conservative-leaning Parks Foundation of Oregon and its controlling director, Loren Parks.

At issue was whether the IRS had correctly imposed a hefty excise tax under Internal Revenue Code (IRC) section 4945 for alleged lobbying that is prohibited as a “taxable expenditure.” This penalty tax was imposed on the foundation as well as on Mr. Parks, individually. Under this statute, in appropriate circumstances, asserting a penalty against both the foundation and one or more individual directors is permitted and appropriate.

Specifically, there were nine radio communications that the government asserted constituted impermissible lobbying under IRC section 4945. These lobbying and political activities cases turn on discrete sets of facts and circumstances, so they are often challenging for the IRS and the judiciary to make determinations.

Lobbying: Taxable Expenditures

After the Internal Revenue Service made the first-level determination of a violation of the private foundation rules, the matter proceeded to the second level of review – the United States Tax Court. In a 69-page written opinion – full text [here](#) – the judge issued an exhaustive discussion and analysis of each and every one of these nine communications. The use of the adjective “exhaustive” in this instance is no understatement. The reader of this opinion will come away with a thorough understanding of the finest nuances of each one of the nine instances at issue.

For someone who wants to get a good idea of the particular *facts* of this case, but is disinclined to wade through the heavyweight discussion in the Tax Court ruling, there is a good review by BolderAdvocacy.org [here](#). The first paragraph, itself, is a good mini-summary of the types of

lobbying activities at issue in the case:

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In a long awaited decision in the case of Parks v. Commissioner of Internal Revenue, the United States Tax Court recently examined a series of radio messages created and funded by a private foundation and determined that the messages constituted taxable expenditures under the Internal Revenue Code (IRC). The messages, which contained information and commentary regarding a variety of issues relevant to upcoming state ballot measure elections, were each around 30-60 seconds long. Although several of the ads did not mention specific ballot measures by name, the Court decided that both the foundation and its manager were liable for excise taxes.

Opposition to Lobbying Decision

Well before it reached the appellate level, this case “had attracted significant attention.” It “has been of interest “because of its potential ramifications for how attempting to influence legislation (i.e., lobbying) is defined for federal tax purposes, particularly with respect to private foundations and charities more generally,....”

In a March 2017 post, at the time *Parks* was pending in the Ninth Circuit, Professor Lloyd Mayer, aka The Nonprofit Blogger, noted that it was one of “at least two pending cases that could redefine how federal tax law defines various types of political activity for charities and other tax-exempt organizations.” The “issue is how attempting to influence legislation (i.e., lobbying) is defined for purposes of the prohibition on private foundations engaged in such activity (and the related limit on lobbying by public charities).”

Professor Mayer noted that participation in this debate included the progressive powerhouse Alliance for Justice and the prestigious Council of Foundations who jointly filed an amicus brief – here – urging *reversal* of the Tax Court decision.

The Alliance for Justice’s position is set out in the Summary of Argument; AJC “believes that the Tax Court’s decision in this case will significantly restrict nonprofit lobbying in a manner that is inconsistent with Congressional intent and applicable regulations.” How the appeal is decided will, according to AJC, “have implications beyond this particular case,....”

The Council of Foundations also urged the appellate court to reverse the lower court’s ruling, citing the “critical” need for their members to have a “consistent definition and test for determining when activity constitutes lobbying as compared to education or advocacy.” COF urged reversal of the Tax Court’s decision which it argues “creates uncertainty in this area because of its overly broad interpretation of the ‘refer and reflect’ test for communications that may or may not be lobbying. The organization argued that “uncertainty often results in a decision to avoid otherwise legitimate and valuable work.”

In his March 2017 blog post, Professor Mayer concludes with the caution that *Ford* may not lead to any seismic changes to the relevant definitions of political activity, but [it bears] watching.”

Lobbying Rules Uncertainties Remain

The Ninth Circuit’s opinion in *Parks Foundation v. Commissioner of Internal* was, perhaps, the exact opposite of a seismic event. The text of the 6-page ruling is [here](#). It is “unpublished” under the Ninth Circuit’s rules; that is, of no precedential value. The court went out of its way to quickly and easily affirm the Tax Court’s opinion.

In a post in February 2018, Professor Mayer noted that the Court may have sought “[to avoid \[the\]issues](#)” he had raised earlier; namely, “the potential ramifications for how attempting to influence legislation (i.e., lobbying) is defined for federal tax purposes, particularly with respect to private foundations and charities more generally.”

The Ninth Circuit “instead limited its brief opinion to whether the communications at issue failed to qualify as educational because they did not satisfy the methodology test provided by Revenue Procedure 86-43.” The appeals court held that the Tax Court “did not err in concluding that the communications at issue did not satisfy that test.”

Conclusion

Even if the Ninth Circuit’s ruling had been published, it would have affected only the jurisdictions included at that judicial circuit; namely, Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. As it stands, the Tax Court’s decision is in full force and effect around the nation.

In [Bolder Advocacy’s summary](#) of the Tax Court ruling, that group has a useful piece of advice: “[C]ontext and wording are critical components to determining whether a private foundation’s communications delve into the realm of lobbying.”