Think Before Speaking: Do Your Foundation's Communications Give Rise to Taxable Expenditures?

Introduction

In **Loren E. Parks v. Comm'r**,[1] the Tax Court found a private foundation liable for excise taxes on expenditures made to air politically oriented radio ads. Representatives of the IRS have described the case as "an important victory," with "important follow-on attributes."[2] Although only two of the foundation's ads referred to a piece of legislation by name, and although the foundation argued that the ads were "educational," the court found that all but one ad gave rise to taxable expenditures.

The **Loren E. Parks** opinion is worth a closer look, because it includes a rare in-depth examination of the text of various communications and the multilevel analysis that the court used to reach its holding.

The Facts in *Parks*

The Parks Foundation ("Foundation") was incorporated for three purposes: (1) enhancing and promoting sport fishing and sport hunting; (2) promoting education by researching and presenting to the public issues of general interest or concern and by supporting alternative educational programs and institutions; and (3) supporting charitable organizations and activities, the goals of which Foundation wishes to encourage and promote. As of the years at issue, Loren E. Parks was the sole contributor to Foundation, and he and his adult sons were its three directors.

In its taxable years 1997–2000, Foundation spent $65,000, $200,000, $33,011, $341,062, respectively, to produce 30- and 60-second radio messages aired on commercial radio stations in Oregon. Nine of the 10 radio messages were broadcast in the weeks or months leading up to a statewide election in which Oregonians voted on measures proposed by initiative or referral.

Background on Oregon Ballot Measures. Under the Oregon Constitution, citizens of Oregon have the power of "initiative," entitling them to propose statutes or constitutional amendments (referred to as "measures") by petition, and to enact or reject them in elections, independent of the Oregon Legislative Assembly. Amendments to the state constitution also can be proposed by the Legislative Assembly and referred to Oregon citizens for their approval or rejection at the next election. Thus, measures can come before Oregon citizens for approval or rejection by "initiatives," generated by citizen petitions, or by "referrals," generated by the Legislative Assembly.

Required Explanatory Statements. During the years at issue, the Oregon secretary of state was required to prepare a voters' pamphlet for every general and statewide special election. With respect to each measure on the ballot, the voters' pamphlet was required to contain relevant information, including an explanatory statement for the measure.

An explanatory statement was required to be 500 words or less, and "impartial, simple, and understandable."[3] Explanatory statements for measures were prepared by a committee of five citizens. A measure's proponents were entitled to appoint the first two members to the committee. The Oregon secretary of state appointed the next two members from among the measure's opponents. The four appointed committee members were to agree on the fifth member, with the secretary of state authorized to appoint the fifth member in the absence of agreement.

The statutory charge, the make-up of the committee, and various other procedural rules were designed to ensure that all explanatory statements would be objective and impartial. The court's analysis in **Parks** relied in part on the language of the relevant explanatory statements, so the statements themselves are instructive. Exhibit 1, on pages 4 and 5, contains the text of the explanatory statements and the scripts for the related radio ads that Foundation ran.

Additional Radio Ads. In addition to the 10 Foundation ads on the Oregon measures listed in Exhibit 1, Foundation also ran other ads. One (referred to in the opinion as "Communication #8") addressed Measure 11, which had been passed in 1994 and enacted a statute setting mandatory minimum sentences for certain violent crimes. In 1999, several bills seeking to amend the Measure 11 statute were introduced in the legislature. Exhibit 2, on page 6, presents the text of Communication #8.

Yet another Foundation ad was sparked by a lawsuit. In 2000, the Oregon Department of Justice, Charitable Activities Section, sued Foundation, alleging that Foundation had made expenditures from 1993 through 2000 that constituted taxable expenditures under IRC §4945, which violated Oregon law. Foundation ran an ad suggesting that this suit was filed in retribution for Foundation's earlier ad regarding Measure 8. Exhibit 3, also on page 6, presents the "lawsuit ad" script.

The Tax Controversy

Lobbying Expenditures Are Taxable Expenditures. Like all IRC §501(c)(3) organizations, private foundations are absolutely prohibited from participating in or intervening in (including by distributing statements) any political campaign on behalf of (or in opposition to) any candidate for public office.[4] IRC §501(c)(3) organizations that are further classified as public charities are permitted to engage in an "insubstantial" amount of lobbying, which is defined as "the carrying on of propaganda or otherwise attempting to influence legislation before any publicly elected body."[5] For private foundations, however, amounts spent on lobbying constitute taxable expenditures under IRC §4945.[6]

A taxable expenditure gives rise to an initial tax on the private foundation equal to 20% of the amount of the expenditure plus an initial tax on any foundation manager who knowingly agreed to the expenditure equal to 5% of the amount of the expenditure (up to $10,000).[7] If the taxable expenditure is not timely corrected, the pri-

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Exhibit 1: Text of Explanatory Statements and Foundation's Radio-Ad Scripts

Measure 49 (Prison Work Programs)

Explanatory Statement. *In 1994, voters approved an amendment to the Oregon Constitution establishing requirements for work programs for state prison inmates. These provisions in the Oregon Constitution require state corrections officials to establish and operate work and on-the-job training programs so that all eligible inmates are engaged in these programs 40 hours per week. Due to a conflict between Oregon constitutional provisions and federal law, the Department of Corrections has shut down some of its most successful and productive prison industries programs.*

Script for Foundation's Radio Ad. *I'll bet you thought Oregon prisoners would be working 40 hours a week by now. Back in 1994, that's what voters overwhelmingly told the politicians to do. But the governor and attorney general have said, "NO, we're not gonna do it." Attorney General Hardy Myers says the federal government doesn't like the way Oregon pays it's [sic] prisoners. And so, he and the Governor have decided to shut down the program entirely. Some people just don't think criminals should spend much time in jail. They think they can be rehabilitated.*

If they really wanted prisoners to work, they'd just change the way we to [sic] pay them. When Hardy Myers was Speaker of the House, he took credit for changing Oregon's criminal statutes. Those changes resulted in the average convicted murderer spending less than 7 years in jail.

That's why Oregon voters had to step in and take control.

We said it loudly and clearly, "Put criminals in jail. Make 'em do their time, and work 'em while they're there."

What Oregon voters didn't say was, "Make a bunch of whiney excuses why you can't do what we want done."

Measure 61 (Minimum Sentences for Major Crimes)

Text of Explanatory Statement. *This measure creates a statute that sets minimum sentences for "major crimes," as defined in this measure. In addition, the measure requires the imposition of an additional sentence of one to three years of imprisonment for any offender who is convicted of a "major crime" and who was convicted of one or more "major crimes" within the previous 10 years. The measure requires that a presumed sentence of at least 14 months imprisonment be imposed for "major crimes" committed on or after January 1, 1999.*

The mandatory additional sentence is one year if the offender has one previous conviction for one of the specified crimes within that period, two years if the offender has two previous convictions for the specified crimes within that period, and three years if the offender has three or more previous convictions for the specified crimes within that period.

The mandatory additional sentence for previous convictions may not be reduced for any reason.

Script for Foundation's First Radio Ad. *Back when John Kitzhaber was Senate President, Legislation was passed that resulted in a convicted murderer, given a life sentence, actually serving less than 7 years in jail . . . . They said they didn't have enough jail space. But then came Measure 11.*

It required mandatory sentences for violent criminals with no possibility of early release . . . and . . . it required the state to build enough jail space.

They said it would cost billions of dollars. But it didn't.

And since Measure 11, violent crime in Oregon has gone down. And now Measure 61's on the ballot. It requires mandatory sentences for criminals convicted of property crimes. You live in Portland. You get your car stolen or your house burglarized there won't be jail . . . just probation. If Measure 61 passes, that criminal goes to jail. And they'll have to build enough jail space to keep 'em. There'll be no early release. It's Measure 61. Paid for in the public interest by the Parks Foundation.

Script for Foundation's Second Radio Ad. *The citizens, not the politicians, passed Measure 11 putting violent criminals in jail. Up 'till then, a convicted murderer with a life sentence served less than 7 years. They said it would cost billions. But, it didn't. And the crime rate went down. And now . . . Measure 61. You live in Portland, you get your car stolen . . . your house burglarized . . . there won't be jail . . . just probation. With Measure 61, that criminal absolutely goes to jail . . . and no early release. (Measure 61.) Pd [sic] for by the Parks Foundation.*

Measure 65 (Legislative Review of Administrative Rules)

Explanatory Statement. *This measure would amend the Oregon Constitution to create a review and approval process of state agency administrative rules by the Legislative Assembly. Currently, no such process exists. This process is triggered when a petition signed by a specified number of qualified voters is filed with the Secretary of State.*

Administrative rules are rules and regulations adopted by state agencies, board and commissions that generally have the full force and effect of law.

The number of qualified voters who must sign the petition is equal to two percent of the total number of votes case for all candidates for Governor at the last gubernatorial election. The petition must specify the administrative rule or rules that the Legislative Assembly is required to review.

Upon being notified by the Secretary of State that a petition meeting the requirements of the measure has been filed, the President of the Senate must prepare a bill that would approve the administrative rule or rules specified in the petition. The President of the Senate must then introduce that bill at the next following regular session of the Legislative Assembly. If the petition is filed with the Secretary of State during a regular session, the bill must be introduced at the next following regular session.

After the introduction of the bill, the Legislative Assembly may amend the bill to approve only part of a specified rule. If the petition specifies more than one rule, the bill may be amended to approve fewer than all of the specified rules. Any rule or part of a rule that is not approved by the passage of a bill has no further force or effect after the session is adjourned.

Script for Foundation's First Radio Ad. *Right now, without even knowing it, you're being forced to live under laws created not by elected officials but by non-elected government bureaucrats. They're called administrative rules.*

Here's what happens:

The legislature passes a law to keep a watchful eye on growth and tells its hired workforce to carry out that law. So Jack and Bev Stewart turn 90 acres of Polk County brush piles into a horse farm. Because horses are expensive and easily stolen, they want to build a farmhouse so they can be there. But the government bureaucrats say no, we're not gonna let you until you earn $80,00 [sic] off the property. The Stewarts say, We can't do that until we get more horses . . . the bureaucrats say tough, that's your prob-

Continued on the next page

Exhibit 1: Continued

lem, not ours. When a legislator's asked how government can get away with this, he says we never intended for this to happen.

So the Stewarts are stuck . . . all they did was turn 90 acres of noxious weeds into income producing, taxpaying farm acreage.

It's called administrative rules, and you're gonna hear a lot more about 'em in the weeks to come.

Script for Foundation's Second Radio Ad. *Right now, without even knowing it, you're being forced to live under laws created not by elected officials but by non-elected government bureaucrats. They're called administrative rules. Here's what happens:*

The Good Sheppard [sic] Church of Clackamas County purchased the only available piece of land in the area to build a new church. It's zoned for farm use. But even though the elected legislature passed a state law allowing churches to build on farmland, the nonelected bureaucrats made up an administrative rule saying, we're not going to let you do it. And it doesn't matter whether the land is any good or not.

So in the mean time [sic], the Good Shepherd Church has been denied a building permit on their own land even though state law says it's OK. It's called administrative rules . . . and you're gonna hear a lot more about 'em in the weeks to come.

Measures 69–75 (Rights of Crime Victims)

Description of Measures.[a] In a 1996 general election, Oregon voters approved Measure 40, which granted victims of crime various constitutional rights with respect to the prosecution of criminal defendants. The Oregon Supreme Court found Measure 40 void in its entirety because it violated the procedural requirement that each distinct constitutional amendment must be approved by a separate vote. Measures 69–74 were the constituent parts of Measure 40, broken into separate measures.

Measure 69 granted victims constitutional rights in criminal prosecutions and juvenile court delinquency proceedings. Measure 70 gave the public, through the prosecutor, the right to demand a jury trial in criminal cases. Measure 71 limited pretrial release of accused persons to protect victims and the public. Measure 72 allowed murder convictions by 11-to-1 jury votes. Measure 73 limited immunity from criminal prosecutions for persons ordered to testify about their conduct. Measure 74 required that the terms of imprisonment announced in court be fully served, with certain exceptions. Measure 75 banned persons convicted of certain crimes from serving on grand juries and criminal trial juries.

Script for Foundation's Radio Ads. *District State Representative Jim Hill*[b] *is one of the very few Republicans in the state house fighting against the victims of crime. [Two] years ago, a wide majority of Oregonians voted to get tough on criminals by passing Measure 40.*

But the liberal state Supreme Court threw it out saying it contained too many subjects. The state house has just voted to split Measure 40 into 8 separate amendments to be reapproved by the voters. Who would be against this?

The liberals and criminal defense lawyers. Some Democrats joined with most of the Republicans to support victims' rights . . . very few Republicans didn't.

Your district 5 State Representative Jim Hill is one of them.

Many victims of crime urged the passage of Measure 40 because they wanted the victims to be treated at least as well as the criminals.

But Jim Hill fought us all the way.

The Parks Foundation paid for this message because we want you to know what your elected officials really do once they get to Salem.

Measure 8 (Government Spending)

Explanatory Statement. *Ballot Measure 8 would amend the Oregon Constitution by linking the rate of growth of state government spending to the rate of growth of personal income in the state. The measure would limit all state spending, regardless of the source of the funds, to no more than 15 percent of total personal income of Oregonians earned in the two calendar years immediately preceding the budget period (biennium).*

If the state collects revenues in excess of the limit, the measure would require that those excess revenues be distributed to Oregon taxpayers in proportion to the income taxes they paid in the biennium. Excluded from this distribution are earnings from dedicated investment funds, such as retirement funds or the Common School Fund.

The Legislature could vote to increase spending beyond the limit, but only if the Governor specifically declares an emergency, and three-fourths of the elected members of both the House and the Senate vote for the increased level of spending.

The limit covers state spending from all sources of funds, such as taxes, fees, federal funds, and investment earnings. The measure would exclude from the limit proceeds from state-issued bonds, although it does include the funds appropriated to repay those bonds.

For comparison, the state has recently experienced a spending level of about 18 percent of personal income. The estimated impact of the measure on the 2001–2003 state budget would be to limit expenditures to an amount $5.7 billion less than the projected spending of $32.4 billion.

The measure limits state spending. The measure does not cut state taxes, nor does it direct the Legislature or Governor how state funds are spent within the new limit.

Script for Foundation's Radio Ad. *Is Oregon State government really growing nearly 3 times faster than the personal income of those who pay its bills?*

Oregonians will soon be asked if they want to slow down the growth of their State government.

Here are the facts. From 1989 to [1991] State government grew by 21%, citizen income grew less than 9%. In [1993] State income up 20%, citizens' income just 11%. In [1995] State income up another 23%, private pay up less than 11%. And in [1997] the State income was up 14% and private pay just 8%.

So what all this means is that over the last 10 years the State increased its income by more than 130%, while private pay increased less than 50%.

Our Tax dollars to State government have increased nearly 3 times faster than the personal income of its own citizens. And those are the State's own figures. Paid for by the Parks Foundation.

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a. The court did not refer to the specific text of the explanatory statements in its findings of fact or analysis and instead provided a recitation of relevant facts.

b. The second script was identical to the first except that it substituted District 34 State Representative Lane Shetterly's name for Representative Hill's.

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vate foundation is subject to an additional tax equal to 100% of the expenditure amount, and any foundation manager who refuses to agree to the correction is subject to an additional tax equal to 50% of the amount of the expenditure (up to $20,000).[8] The term "taxable expenditure" also includes an expenditure "for any purpose other than one specified in section 170(c)(2)(B)."[9]

Definition of "Lobbying" and the Exception for Nonpartisan Analysis, Study, or Research. In simple terms, "direct" lobbying occurs when an organization attempts to influence a legislative body.[10] "Grassroots" lobbying occurs when an organization asks members of the public to attempt to influence a legislative body.[11] For purposes of IRC §4945, amounts paid for either type of lobbying constitute taxable expenditures.[12] The regulations treat communications with the general public regarding ballot measures that (1) refer to specific legislation and (2) reflect a view on such legislation as "direct lobbying communications."[13]

Limited exceptions apply. In particular, the act of making available the results of nonpartisan analysis, study, or research does not give rise to a taxable expenditure.[14] The term "nonpartisan analysis, study, or research" refers to independent and objective exposition of a particular subject matter.[15] It includes any activity that is "educational" for purposes of IRC §501(c)(3). Nonpartisan analysis, study, or research may advocate a particular position or viewpoint as long as it provides a sufficiently full and fair exposition of the relevant facts to enable the public or an individual to form an independent opinion or conclusion. However, the presentation of an unsupported opinion does not qualify. Thus, a communication that reflects a view on specific legislation will not fall within this exception if it directly encourages the recipient to take action with respect to the legislation.[16] Also, analysis, study, or research that initially came within this exception but subsequently is used for lobbying may fall outside its protection (and give rise to a taxable expenditure).[17]

The Opposing Viewpoints, and the Court's Analysis. The issues in **Parks** turned on whether the radio ads were lobbying communications or "nonpartisan analysis, study, or research." Foundation argued that except for the two ads that specifically referred to Measure 61 (Minimum Sentences for Major Crimes) by name, the ads were not direct lobbying communications because they did not "refer to" ballot measures by name. The IRS argued—and the court agreed—that a communication can "refer to" a ballot measure without identifying it by name.

Referring to a Ballot Measure. The regulations do not define the term "refers to" but illustrate its meaning through examples. Relying on examples in the regulations that conclude that use of language "widely used" in connection with specific legislation can constitute a reference to that legislation, the Tax Court found that the language of the radio ads (see Exhibits 1, 2, and 3 for ad text) referred to specific legislation:

- *Prison Work Programs Ad:* The court determined that in referring to prisoners working and the shutdown of prisoner work programs, the ad employed terms "widely used in connection with" Measure 49. In particular, the use of various iterations of the term "prison inmate work program" in the explanatory statement demonstrates that those and similar terms had been widely used with Measure 49 at the time the radio message was broadcast. Further, comparing the text of the radio ad and the explanatory statement, the court determined that the ad described the general content of Measure 49. Consequently, the court found that the relevant ad "referred to" Measure 49.
- *Legislative Review of Administrative Rules Ads:* Similarly, the court noted that the ads that were run in connection with Measure 65 cited examples of seeming-

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Exhibit 2: Communication #8 Text

Portland Police have just arrested 32-year-old Todd Reed for the gruesome serial murders of 3 women.

But what about Todd Reed's criminal history? In '81 he was convicted of burglary. In '82, burglary. In '87 convicted of 3 more burglaries. In '92 he was arrested for 3 counts of rape, 2 counts of sodomy, 5 counts of kidnaping, I [sic] count each sex abused [sic] and menacing.

After plea-bargaining he got a 17-year sentence. But this was Oregon before Measure 11. He spent 2 years in jail. But if he was under Measure 11, there'd be no early release; he'd still be in jail.

The State Senate just voted to allow some violent Measure 11 convicts a 15% reduction in prison time.

Now, who would do that?

From the Portland area, Senators Kate Brown, Ginny Burdick and Frank Shields.

And the one most responsible, Neil Bryant of Bend.

The Parks Foundation paid for this because we want you to know what the politicians really do once they get to Salem.

Exhibit 3: The Lawsuit Ad

A few weeks ago, the Parks Foundation revealed that, over the last 10 years, Oregon government income has grown by 130%, nearly 3 times faster than the personal income of citizen's [sic] who pay for it.

The state government didn't like what we said. They filed a lawsuit against us.

But, like it or not, the general fund budget has gone from $4 to $10 billion.

And where's that money gone?

A big part of it goes to the Oregon Health plan that just paid a quarter million dollars for a convicted child molester from Mexico to receive a bone marrow transplant. . . .

And 2 brain surgeries for an out of state man . . . .

Gall bladder surgery for an out of state woman . . . . And 2 knee replacements for a skier who lives off a trust fund but said he had no income.

The state government is using taxpayers' money to intimidate us from revealing this kind of information.

Isn't that what Richard Nixon did when he used the IRS to go after his political enemies?

Paid for by the Parks Foundation.

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ly arbitrary and nonsensical government requirements imposed by "non-elected government bureaucrats" and equated those requirements with "administrative rules." The ads (which were run just weeks before the relevant election) went on to state, "you're gonna hear a lot more about . . . in the weeks to come." The explanatory statement for Measure 65 referred extensively to "administrative rules" as the focus of the measure. The court concluded that the term "administrative rules" had been widely used in connection with Measure 65 at the time Foundation's ads were broadcast and that the relevant ads referred to Measure 65 within the meaning of the regulations.

- *Rights of Crime Victims Radio Ads:* The court noted that the ads described Measure 40's passage, its invalidation by the Oregon Supreme Court, and the legislature's subsequent splitting of Measure 40 into separate ballot measures. The court determined that this description of the content and effect of Measures 69–75 was a reference to those measures.
- *Government Spending Ad:* The court noted the ad's references to (1) the rate of growth of state government revenues as compared to the rate of growth of personal income and (2) the fact that Oregonians would "soon be asked" whether they wanted to slow down the growth of their state government. The court found that because the ad both employed terms widely used in connection with Measure 8 and described its effect, the ad thus "referred to" Measure 8.

Reflecting a View on the Relevant Legislation. The Tax Court noted the following specific examples that supported its finding that Foundation's lobbying constituted taxable expenditures:

- *Prison Work Programs Ad:* The explanatory statement made clear that Measure 49 was designed to make reinstatement of prisoner work programs possible. The court found that, by emphatically endorsing prisoner work programs, the radio ad reflected a view on Measure 49.
- *Minimum Sentences for Major Crimes Ads:* Each ad posited that mandatory prison sentences for the crimes covered by Measure 61 would result in a reduction in crime. Accordingly, the court found that each message reflected a view on Measure 61.
- *Legislative Review of Administrative Rules Ads:* The court noted that each ad alleged an instance in which an administrative rule was both unwarranted and contrary to legislative intent and strongly suggested the desirability of greater legislative oversight. Accordingly, each ad reflected a view on Measure 65.
- *Rights of Crime Victims Ads:* The court determined that the rhetorical question, "Who would be against this?" and the suggestion that only "the liberals and criminal defense lawyers" would be sufficient to reflect a view on Measures 69–75.
- *Government Spending Ad:* The ad stated that state revenues had been growing at nearly three times the rate of growth of personal income over the past decade, and the court found that any reasonable observer would likely think this growth rate unsustainable. Accordingly, the court found that the ad reflected a view on Measure 8.'

But, the Lawsuit Ad is Different. Like the Measure 8 ad, Foundation's lawsuit ad also referred to the state government's growth rate. But, it differed from the Measure 8 ad in three important respects. First, it asserted that the state government had filed a retaliatory lawsuit against Foundation. Second, it cited several examples of seemingly inappropriate expenditures of state funds, including "to intimidate us from revealing this kind of information." Third, it did not state that voters would "soon be asked" whether they wanted to slow down the growth of their state government. Accordingly, the court found that the lawsuit ad was a direct criticism of state government without suggesting a remedy and thus was not advocacy for Measure 8 but instead was an attack on state government as wasteful and retaliatory. Accordingly, the court found that the lawsuit ad was not a direct lobbying communication.

Does the Exception Apply? After determining that the majority of the ads referred to and reflected a view on legislation, the Tax Court considered whether any of the ads qualified for the exception for nonpartisan study or research.

For the exception to apply, there must have been nonpartisan analysis, study, or research that was made available to others. With the exception of the first ad related to Measure 8 the court concluded that none of the information in the ads was the result of any study or research that Foundation conducted or collected from others.

In order for the exception to apply, there must have been nonpartisan analysis, study, or research that was made available to others. With the exception of the first ad related to Measure 8 (which presented statistics related to government spending), the court concluded that none of the information in the ads was the result of any study or research that Foundation conducted or collected from others. Further, the radio messages were all produced at an ad agency that specializes in political advertisements, suggesting that Foundation was not nonpartisan.

Foundation argued that its ads were educational (and thus nonpartisan analysis, study or research), which requires a sufficiently full and fair exposition of the facts to enable the public or an individual to form an independent opinion or conclusion.

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As a basis for comparison, the court looked to the explanatory statements, which, by design, provide a benchmark of impartiality against which the ads could be judged. After establishing the explanatory statements as a benchmark, the court looked to the factors set out in Rev. Proc. 86-43[18] to make comparisons. The factors are:

- Whether the presentation of viewpoints or positions unsupported by facts is a significant part of the communication;
- Whether the facts that purport to support the viewpoints or positions are distorted;
- Whether the presentation makes substantial use of inflammatory and disparaging terms and express conclusion more on the basis of strong emotional feelings than of objective evaluations; and
- Whether the approach used in the presentations is aimed at developing an understanding on the part of the intended audience by considering their background and training in the subject matter.

The court concluded that most of the ads failed these requirements. For example, the ad related to Measure 49 (Prison Work Programs) suggested that (1) the governor and attorney general could have prevented the programs from being shut down but did not, and (2) their decisions were based on their personal views, and not—as the explanatory statement indicated—because the program conflicted with federal law. Accordingly, the ad distorted the facts. Further, the ads related to Measure 65 (Legislative Review of Administrative Rules) used disparaging terms such as "non-elected bureaucrats," which one ad described as the legislature's "hired workforce" that had an attitude of "tough, that's your problem, not ours." The second ad went so far as to allege that administrators "made up" an administrative rule. The ads related to Measures 69–75 expressed conclusions based more on strong feelings than on objective evaluations by portraying legislators who opposed the measures as "fighting against the victims of crime."

Practice Point: The court implicitly deemed the tone and content of the explanatory statements as representative of the type of communication that might qualify as educational. A foundation seeking to make a communication about legislation should model the communication after the explanatory statements presented in **Parks** as well as on the factors in Rev. Proc. 86-43.[19]

But, the Measure 8 ad was different. The court did find that this ad referred to and expressed an opinion on Measure 8, but it also held that the ad qualified for the exception. *Reason:* This ad provided facts and statistics to support its viewpoint that mandatory limits should be imposed on state spending and it provided a factual foundation for the point of view it sought to advance. Because the ad qualifies as "educational," the expenses incurred in connection with it are not taxable expenditures.

Were the Expenses of Communication #8 and the Lawsuit Ad Made for a Nonexempt Purpose? The IRS did not allege that Communication #8 was an attempt to influence legislation, and the court found that the Lawsuit Ad was not a direct lobbying communication. Whether those ads gave rise to taxable expenditures came down to whether the ads were made for a nonexempt purpose.[20]

Communication #8 Is Not Educational. The court found that Communication #8 contained two factors from Rev. Proc. 86-43 indicating that it was not educational. First, it omitted critical facts about when sentence reductions could apply. Second, it suggested a conclusion (that four named senators acted reprehensibly) on the basis of emotion (sparked by the occurrence of "gruesome serial murders") rather than objective evaluation. Because it was not "educational," and did not serve any other exempt purpose, the court found that Communication #8 gave rise to a taxable expenditure.

Neither Is the Lawsuit Ad. The Lawsuit Ad alleged that the state of Oregon filed a retaliatory lawsuit against Foundation. It did not mention that Foundation had been under audit concerning its expenditures for radio ads for more than two years before the Measure 8 ad aired. The omission of this material fact, and the lack of any other evidence about retaliation, led the court to conclude that the claim of retaliation was a distortion. The court also found the reference to Richard Nixon's use of the IRS against his political enemies was inflammatory and disparaging. Because it wasn't "educational," and did not serve any other exempt purpose, the court found that the Lawsuit Ad gave rise to a taxable expenditure.

Conclusion

In relevant part, the **Parks** case demonstrates that family foundations do involve themselves in lobbying activity, including by spending significant sums on lobbying communications. In today's politically charged environment, the case serves as an important reminder that lobbying communications give rise to taxable expenditures. The careful and detailed analysis in the case also indicates that communications—even those that do not refer to legislation on their face—will be closely scrutinized

Endnotes

1. 145 T.C. No. 12 (11/17/2015).

2. David van den Berg, "IRS Examining Holding on Political Ad Expenditures Excise Tax," Tax Notes Today, Doc.2015-25748 (Nov. 23, 2015).

3. Id., referencing Or. Rev. Stat. Ann. Sec. 251.251(1) (West 2015).

4. IRC §501(c)(3).

5. Id.

6. For prior coverage of taxation of lobbying expenditures, see Katherine E. David, "Avoiding Election-Year Pitfalls for Private Foundations," 13(6) Family Found. Adv. 1 (Sept./Oct. 2014).

7. IRC §§4945(a), 4945(c)(2).

8. IRC §§4945(b), 4945(c)(2).

9. IRC §4945(d)(5).

10. Treas. Reg. §56.4911-2(b)(1).

11. Treas. Reg. §56.4911-2(b)(2).

12. IRC §4945(e); Treas. Reg. §53.4945-2(a).

13. Treas. Reg. §§56.4911-2(b)(1)(i), 56.4911-2(b)(1)(iii).

14. IRC §4945(e).

15. Treas. Reg. §53.4945-2(d)(1)(ii).

16. Treas. Reg. §53.4945-2(d)(i)(vi).

17. See Treas. Reg. §53.4945-2(d)(1)(v).

18. 1986-2 C.B. 730.

19. Id.

20. See IRC §4945(d)(5). ■