

505.0335

M e m o r a n d u m

To: Ms. Carol Holman
FH - District Supervising Tax Auditor

Date: May 28, 1993

From: John L. Waid
Tax Counsel

Subject: S---
[No Permit Number]

I am responding to your memorandum to the Legal Division dated March 24, 1993. You ask if the S--- C--- O--- R--- E--- ("S---") is a federal instrumentality exempt from sales and/or use tax. You attached to your memorandum a letter from Mr. J--- G---, S--- Chief Financial Officer, to FH District, requesting confirmation of S---'s exempt status. You also attached a memorandum dated March 24, 1992, from Associate Tax Auditor Wayne Grupe to you in which he concluded that S--- was an exempt federal instrumentality. You indicated that related documentation from S--- was attached, and Mr. Grupe refers to some attachments, but the only item enclosed with your memorandum was Mr. G---'s letter.

OPINION

Mr. Grupe based his analysis on our previous opinion, as expressed in my memorandum to FH District Principal Auditor Phil Klepin dated September 4, 1990, regarding the status of the Veterans Administration Volunteer Service Advisory Committee. (See, Annot. 505.0810.) In that memorandum, I described the standard to be applied to determine if tax applies to an entity connected to the federal government:

“Sales to the United States or its unincorporated agencies and instrumentalities are exempt from the sale and use tax by statute. (§ 6381(a); Reg. 1614.) The United States Supreme Court has concluded that an entity is a federal instrumentality exempt from state sales and use taxes only when that entity is considered to be an arm of the federal government 'deemed by it essential for the performance of governmental functions.' Standard Oil of California v. Johnson (1941) 316 U.S. 481, 485 [62 S.Ct. 1168, 86 L./Ed. 1611].) Standard Oil indicates some of the factors that the court considers important in determining whether or not a given organization has such a close connection with the federal government as to render it immune from

state taxation: (1) the entity is established and operates under the authority of federal statutes and regulation; (2) the object of the entity is to carry out federal policy; and (3) profits, if any, do not go to individuals.”

The Court also discussed additional factors which it considered persuasive: (4) Congress constructs, equips and maintains the entity's buildings; (5) the entity is operated by Federal employees. (Ibid. at 486-486.)

As Mr. Grupe notes in his memorandum, S--- was founded in 1962 and organized in 1975 under the provisions of the Non-Profit Corporation Act of the District of Columbia. In October 1964, the Small Business Administration (SBA) took measures to organize local chapters and to administer the program through provisions of the Small Business Act of 1958.

In 1973, S--- was formalized and attached to both the A--- Agency and the SBA pursuant to the Domestic Volunteer Service Act of 1973. SBA would provide program guidance and direction and S--- would continue to participate in SBA's ongoing work of assisting small business. (4 USCAAN (1978) 3895.) Its purpose was set forth as follows:

“This title provides for programs in which persons with business experience volunteer to assist persons, especially those who are economically disadvantaged, engaged in, or who seek to engage in, small business enterprises, and to make available their expertise as volunteers in programs authorized by, or of a character eligible for assistance under, the Act, the Economic Opportunity Act of 1964, as amended (42 U.S.C. chap. 34) (particularly title VII thereof), or the Small Business Act (15 U.S.C. Chap. 14A). The purpose of this title is to utilize the skills and expertise of persons with business experience to assist person in, of seeking to enter, business enterprises, or to carry out management and financial counselling activities in furtherance of the purposes of this Act.”

(P.L. 93-113, § 301, 87 Stat. 404 [1 USCAAN (1973) 465-466.]

On July 5, 1975, the President transferred back to SBA all functions, powers and duties vested in the A--- Agency or its Director which related to S---. The SBA assumed all powers and duties which related to S--- but the law did not reflect the change. Public Law 95-510 inserted the provisions of the Domestic Volunteer Service Act of 1973 relating to S--- (42 U.S.C. §§ 5031 & 5032) into the Small Business Act and gave S--- volunteers certain federal benefits. (P.L. 95-510, § 101, 92 Stat. 1780; See, 4 USCAAN (1978) 3894-3898.)

15 U.S.C. Section 637(b)(1) now restates and codifies in the Small Business Act the authority for the S--- programs and includes language to clarify that SBA's authority extends to publicizing the availability of these volunteer programs and the maintenance of a team of volunteers at its headquarters to facilitate their administration; declares that such volunteers,

while working on SBA programs or projects, shall be considered Federal employees for purposes of coverage regarding Federal tort claims and workmen's compensation and recodifies provisions authorizing the Administrator to reimburse S--- volunteers for out-of-pocket expenses incident to their service including the cost of temporary secretarial services not available from SBA and attendance at official workshops and meetings and for malpractice insurance; puts existing provisions exempting payments for supporting services or reimbursement for out-of-pocket expenses from certain taxes; permits SBA to assume the legal defense of full-or-part-time volunteers serving in the program; and authorizes SBA to accept contributions of property, money, services and facilities from S--- volunteers and other interested parties to further the agency's service to small business through its volunteer assistance programs. Mr. Grupe also noted that funding for S--- is a yearly budget item for the SBA and also comes from donations. He also states that the S--- by-laws provide that no part of the funds and assets of S--- shall inure to the personal benefit of S--- members.

We are of the opinion that S--- satisfies the criteria set forth in the Standard Oil case. It is established under Federal law to facilitate the purposes of the SBA. The SBA provides S--- with office space and administrative personnel. S--- volunteers are considered to be Federal employees for certain purposes while working on SBA projects or programs. The SBA funds its operations. Finally, any profits S--- makes do not inure to the benefit of any person and donations for the benefit of S--- are made to the SBA. We thus conclude that S--- is an unincorporated Federal instrumentality exempt from sales and use tax under Regulation 1614.

JLW:es