

THE TAX LAW OF CHARITIES AND OTHER EXEMPT ORGANIZATIONS

Cases, Materials, Questions and Activities

Second Edition

Darryll K. Jones
Steven J. Willis
David A. Brennen
Beverly I. Moran

American Casebook Series®

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**CASES, MATERIALS,
QUESTIONS AND ACTIVITIES**
Second Edition

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*To David Brennen, Darryll Jones and Steve Willis
for being wonderful co-authors.
And to the Lawyers of Boardman, Suhr, Curry & Field
for their continued support*

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To My Wife and Friend, Vickey

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Preface to the Second Edition

We continue to adhere to the overall philosophy expressed in the preface to the first edition. That is, we seek both depth and breadth in the study of the tax law of charities and other nonprofit organizations commensurate with the important role those organizations play in today's society. We are less idealistic, though, and so our second edition expresses our sudden realization that law students actually take time to study topics other than the tax law of exempt organizations! The second edition includes materials related to all the legislative and judicial changes wrought since the first edition, including those contained in the Pension Protection Act of 2006 and the American Jobs Protection Act of 2004. Nevertheless we have tried to streamline our text to give those wayward students opportunities to cover exempt organizations thoroughly and yet still study other topics. To that end, we have re-edited many cases and rulings; we have redacted nearly 200 pages of text even as we have included references to new rules regarding credit counseling services, charitable contributions, donor advised funds, controlled subsidiaries and supporting organizations. We have reorganized certain chapters to emphasize emerging issues, such as the issue of valuation as it relates to private inurement and excess benefit transactions covered in Chapter 9. After much discussion and debate, though, we agreed to adhere to an approach that makes the text useful for 2, 3, or 4 credit courses as well as seminars. We thank all those who have adopted the text—and even those who have not—for sharing our passion and interest in the remarkable world of charitable organizations.

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Preface to the First Edition

When we began our study of tax jurisprudence, there were no casebooks dealing with the tax law of charities and other similar exempt organizations (there were, of course, books dealing with the tax law of exempt pensions plans, but none on charities and the like). Professor Willis, the elder statesman of our group, taught his course on tax exempt organizations first from mimeograph materials and later from an electronic text. The rest of us followed suit when we joined the academy, though in more recent years we have had the benefit of at least one book on the subject (more on that below).

Perhaps the dearth of casebooks resulted from the subject being historically viewed as an afterthought, a luxury at best, in most tax curricula. The sexier tax subjects were and probably always will be Corporate Tax, Partnership Tax and Estate and Gift Tax. We have no quarrel with that. We do assert, as have others, that the tax treatment of nonprofit organizations evokes important questions of tax and social policy. After all, it might be argued that when we exempt one group of economic actors—nonprofits are indeed economic actors—from taxation we effectively increase the tax burden imposed on another group. A common response to that, one that hopefully will be borne out in the pages to come, is that society grants exemption only when just the opposite is true. Tax exemption is most appropriate because the group actually lessens the tax burden imposed on the rest of us, in one way or another.

The number and influence of charities and other exempt organizations are increasing exponentially, not just in American society but in the world at large. And their influence extends far beyond the imperative to lessen the purely economic burdens of life. Many broad societal issues—social justice, war and peace, international affairs, the allocation of economic wealth, and even political power (despite the prohibitions against charities engaging in political activity)—are greatly debated, influenced and conspired about by people organizing themselves under the penumbra of nonprofit organizations comprising an “independent sector.”

Given this pervasive societal influence, we think it appropriate that we bring a variety of perspectives to the table as we explore this burgeoning area of law. Thus, Professor Willis, who has been teaching taxation of nonprofits at University of Florida’s LL.M. Tax Program for over two decades, brings a well-developed depth of technical knowledge. Professor Moran, who has written extensively on social issues in tax law generally, brings some much-needed vision to this project. Professor Brennen, who is an adviser to the American Law Institute’s new project on nonprofit law and who has written extensively in the area, brings a

cutting edge sense of the social complexities of nonprofit tax law. Finally, Professor Jones (the newest member of legal academy), who served in the general counsel's office of two educational nonprofits and who has written many law review articles in recent years concerning the area, brings a real world knowledge of tax exempt law and its impact on society.

Just as the number and influence of charities have increased in recent years, casebooks on the subject have also multiplied, though not as quickly as the rate at which nonprofit organizations themselves have multiplied. Professors James Fishman and Stephen Schwarz with their book, "Nonprofit Organizations," (Foundation Press, 1995) were the pioneers in this regard. But perhaps because the area of nonprofits was similarly neglected from a corporate governance and regulation standpoint (very few Business Organizations casebooks focus or even acknowledge nonprofit corporations), their fine text is not exactly what we intend ours to be. While the Fishman and Schwarz text is oriented, from a tax standpoint, more towards introduction and broad survey—due to the desire to cover nonprofit corporate governance and regulation as well as tax law—ours seeks to provide the same sort of in-depth and sometimes maddening study heretofore reserved for those more traditional tax courses mentioned above. We think the growing importance of the independent sector requires the treatment we adopt, though we do not intend to disparage any other approach. We are also happy to note that as this book goes to print there are at least two other tax focused nonprofits casebooks that will be available at the same time as this one. Professors Nicholas Cafardi and Jaclyn Cherry have also gathered their materials into a new casebook, "Tax Exempt Organizations: Cases and Materials" (Mathew Bender, 2002) that will first become available at the same time as ours. Professors Fishman and Schwarz have gone back to the future, developing a tax-only casebook—"Taxation of Nonprofit Organizations"—from their original text.

We think the emergence of these new books can only be applauded. The lack of formal, lasting casebooks on any subject is tantamount to the absence of written history. When there are no casebooks, the subject instead exists more as "lore." As casebooks evolve from their first to later editions, they provide just such a written history and, as with any area, there ought to be more than one perception of history. We also want to acknowledge the existence of several treatises in this area—all of which are useful to the study of tax exempt organizations. Professor Frances Hill and Attorney Barbara L. Kirschten's¹ original work, "Federal and State Taxation of Exempt Organizations," provides comprehensive treatment and annotations regarding our subject. And of course, Bruce Hop-

1. Professor Hill, along with Attorney Douglass Mancino, have authored a newer treatise on Tax Exempt Organizations.

kins' "The Law of Tax Exempt Organization" has been an oft-cited standard reference for years.

What makes our approach to the tax study of tax exempt organizations unique? First we keep in mind that it may be some time before our subject evolves from a two to a three or four credit course at most institutions. With this pedagogical reality in mind, we have tried to create several mini-casebooks in one. We have used a "modular" approach suggested to us by experienced teachers and scholars who came together from across the country one chilly weekend at the New York University Center for Philanthropy and the Law to provide constructive criticism. Needless to say, we are very grateful to Professor Harvey P. Dale and Professor Jill Manny for organizing what proved to be an extremely useful forum. Each module is intended to stand alone, meaning that a professor might pick and chose those subjects for which there is sufficient time to explore without worrying about the need to cover another subject. If time is a luxury, simply teaching the subjects in the order presented is one option. On the other hand, a professor might wish to focus on just a few of the infinite variety of "exempt purposes" and this casebook includes material conducive to an in-depth discussion of those most commonly encountered in the real world. After having done so, the professor might then choose her own route through the different limitations affecting charities—the commerciality doctrine, private inurement and excess benefit, private benefit, lobbying and campaign intervention.

We include a much more in-depth study of private foundations than all other casebooks not only because we are somewhat masochistic, but also because the phenomenal growth of the charitable sector increased the number of private foundations; the volume and density of laws regulating those organizations similarly increased. We doubt, though, that a two credit course will allow for sufficient time to explore the depths of private foundations, but at least a student who purchases the book will have a source from which to continue studying the area. In addition, we think the in-depth material is suitable for that rare seminar on private foundations. In any event, there is certainly a need for formal education with regard to private foundations. Unfortunately, we suspect that in the normal two-credit course, most professors will only be able to survey the materials relating to private foundations.

The casebook also includes several stand-alone chapters on less commonly discussed yet important organizations, such as social welfare organizations, labor organizations, social clubs and business leagues. Perhaps most importantly, we include a chapter on the tax treatment of states, state-related institutions, and Native American governing bodies. We think the taxation of subordinate governmental organizations is a vitally important yet sorely neglected area, particularly with regard to the taxation of Native American governing bodies. Once again, we acknowledge that time may not permit a full consideration of those topics. But

here, too, we hope that students retain the text after they have graduated and refer to it in their practices.

The unrelated business income tax is, of course, a primary source of complexity and sheer volume with regard to the tax regulation of non-profit organizations. We place the materials related to that vast subject after the materials regarding the different types of exempt organizations considered. We do so because the theory underlying the imposition of a tax on charities is rather generic to all types of exempt organizations, though the breadth of tax varies with regard to the different organizations. That is, taxation is appropriate when organizations stray from the purposes for which tax exemption is reserved, but only to the extent those organizations do in fact stray. The reasons taxation is necessary in such instances are not entirely convincing. Congress, when it first enacted the unrelated business income tax, thought that tax exemption was allowing nonprofits to “unfairly” compete with profit-making entities, thereby threatening the economic system thought to most efficiently deliver goods and services to society. The tax on unrelated debt-financed income, as well as the taxation of certain income from controlled subsidiaries, is focused more on preventing the use of tax exemption for tax avoidance purposes. Whatever the case, taxation of nonprofit organizations in those instances involves economic predictions and theories of taxation that continue to be debated.

The text puts two very important subjects—the mechanics of the charitable contribution deduction and the treatment of foreign charities and cross border giving—in the last two chapters. This should not be construed as an indication that we view the subjects as less important. But we do acknowledge that they may very well have been taught in other courses. The charitable contribution deduction, if it has not been mastered in the basic federal income tax course, will surely have been studied in an estate and gift tax course. The treatment of foreign charities and cross border giving might have been considered in an international tax course, though such a course is probably on the same level as exempt organizations in terms of its relative priority. Regardless, at the J.D. level, it may be a stretch to assume that the majority of students using this text will have also studied federal income tax, estate and gift tax and international tax. We therefore include the materials regarding charitable contributions, foreign charities and cross-border giving.

Finally, another word on pedagogy. We have tried to include both problems typical of tax casebooks—number crunching problems that evoke a discussion of underlying theory—as well as questions that stimulate greater student involvement, questions that simulate real life practice, and questions that require collaboration with other tax exempt practitioners. For example, one question requires students to use the internet to find completed Forms 1023 and 990 for use in completing their own such forms. Another requires students to prepare a mock CLE discussion on a provision relating to private foundations. This would involve students in learning a provision to an extent that they can con-

struct and teach from their own hypothetical examples, as they might be called upon to do once they gain admission to the bar. Of course, it is our overall hope that the text is adaptable to various pedagogical approaches and we welcome comments in that or any other regard relating to the book.

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