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B-210922.1, Jun 27, 1983

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THE HONORABLE MARK ANDREWS

UNITED STATES SENATE:

THIS RESPONDS TO YOUR LETTER OF MAY 4, 1983, CONCERNING THE REQUEST OF THE INTERNAL REVENUE SERVICE (IRS) FOR OUR INTERPRETATION OF SECTION 117 OF THE JOINT RESOLUTION OF DECEMBER 21, 1983, PUB.L. NO. 97-377, 96 STAT. 1830, 1912. SINCE IRS HAS REQUESTED OUR VIEWS ON SEVERAL OTHER MATTERS, AND YOU HAVE INDICATED THAT AN EARLY RESPONSE ON THE ISSUE OF SECTION 117 IS ESSENTIAL, WE ARE ANSWERING THAT QUESTION FIRST. WE SHALL ISSUE A SEPARATE DECISION TO IRS WHEN WE HAVE DECIDED THE OTHER QUESTIONS POSED.

AS WE SHALL EXPLAIN BELOW, WE DO NOT GENERALLY OFFER OPINIONS ON THE CONSTITUTIONALITY OF ENACTED LEGISLATION. HOWEVER, FROM OUR ANALYSIS OF SECTION 117, WE FIND THAT UNDER SECTION 117, IRS MAY ASSESS THE TAX ON CERTAIN INCOME OF EXEMPT ORGANIZATIONS IN NORTH DAKOTA ALTHOUGH IT MAY NOT ENFORCE THE TAX WITH FUNDS APPROPRIATED BY THE CURRENT CONTINUING RESOLUTION.

SECTION 117 OF THE RESOLUTION STATES AS FOLLOWS:

"NONE OF THE FUNDS CONTAINED IN THIS RESOLUTION SHALL BE AVAILABLE FOR THE IMPLEMENTATION AND ENFORCEMENT OF ANY INTERNAL REVENUE RULING RELATING TO THE APPLICATION OF SECTIONS 511, 512, AND 513 OF THE INTERNAL REVENUE CODE TO REVENUES GENERATED AS A RESULT OF NORTH DAKOTA CENTURY CODE CHAPTER 53-06."

SECTIONS 511 THROUGH 513 OF THE INTERNAL REVENUE CODE, REFERRED TO IN SECTION 117, IMPOSE A TAX ON THE UNRELATED TRADE OR BUSINESS INCOME OF CERTAIN CHARITABLE ORGANIZATIONS OR CORPORATIONS NOT ROUTINELY SUBJECT TO TAX. THE TERM UNRELATED TRADE OR BUSINESS, AS DEFINED IN SECTION 513, MEANS ANY TRADE OR BUSINESS WHICH IS NOT SUBSTANTIALLY RELATED TO THE EXERCISE OF THE ORGANIZATIONS' CHARITABLE FUNCTION. PRESUMABLY, IN THE ABSENCE OF SECTION 117, IRS WOULD ENFORCE THESE SECTIONS AGAINST NORTH DAKOTA ORGANIZATIONS WHICH RECENTLY BEGAN ADMINISTERING "GAMES OF CHANCE" UNDER CHAPTER 53-06 OF THE NORTH DAKOTA CENTURY CODE. FN1

CONSTITUTIONALITY OF THE PROVISION

IRS QUESTIONS THE CONSTITUTIONALITY OF SECTION 117 ON SEVERAL GROUNDS. IT RECOGNIZES, HOWEVER, THAT THE RESOLUTION OF THAT ISSUE MUST BE LEFT TO THE COURTS. WE AGREE. THE GENERAL ACCOUNTING OFFICE, AS AN AGENT OF THE CONGRESS, MUST ACCORD FULL EFFECT TO THE LAWS ENACTED BY THE CONGRESS SO LONG AS THEY

REMAIN UNCHANGED BY LEGISLATIVE ACTION AND UNIMPAIRED BY JUDICIAL DETERMINATION. OUR OFFICE THUS DOES NOT QUESTION THE CONSTITUTIONALITY OF STATUTES ENACTED BY THE CONGRESS. B-124906, OCTOBER 14, 1955; B-124271, SEPTEMBER 23, 1955. HOWEVER, WE WISH TO POINT OUT THAT THERE MIGHT BE CONSTITUTIONAL PROBLEMS IF SECTION 117 WERE INTERPRETED AS EXEMPTING ONLY ONE STATE FROM ENFORCEMENT OF SECTIONS 511 THROUGH 513 OF THE INTERNAL REVENUE CODE.

EFFECT OF THE PROVISION

IRS ASSERTS THAT UNDER A LITERAL READING OF SECTION 117 IT CANNOT IMPLEMENT OR ENFORCE ANY "INTERNAL REVENUE RULING" RELATING TO THE APPLICATION OF CODE SECTIONS 511, 512, AND 513 TO NORTH DAKOTA. THE PROVISION DOES NOT PREVENT IT, IRS ARGUES, FROM ENFORCING SECTIONS 511, 512, AND 513, EVEN IN NORTH DAKOTA, IN THE ABSENCE OF A REVENUE RULING.

WHILE THIS IS ESSENTIALLY CORRECT, IT IS NOT NECESSARY TO READ THE STATUTE IN AN OVERLY TECHNICAL MANNER. WE REACH THE SAME RESULT BY LOOKING AT THE PLAIN MEANING OF THE STATUTE. BY ITS TERMS, SECTION 117 DOES NOT EXEMPT NORTH DAKOTA ORGANIZATIONS FROM THE TAX LEVIED BY SECTIONS 511, 512 AND 513 OF THE INTERNAL REVENUE CODE; IT ONLY PROHIBITS ENFORCEMENT OF THE TAX WITH FUNDS APPROPRIATED BY THE CURRENT CONTINUING RESOLUTION. THESE ORGANIZATIONS SHOULD BE ADVISED THAT THEY WILL REMAIN LIABLE FOR THIS TAX EVEN THOUGH IRS MAY BE UNABLE TO COMPEL THEM TO PAY IT DURING THE PERIOD OF THE CONTINUING RESOLUTION. MOREOVER, IF THEY DO NOT PAY THE TAX VOLUNTARILY THIS YEAR, THEY COULD BE SUBJECT TO INTEREST AND PENALTY ASSESSMENTS IF THE ENFORCEMENT RESTRICTION IS NOT REENACTED IN SUBSEQUENT FISCAL YEARS.

AS A PRACTICAL MATTER, THEREFORE, SECTION 117 HAS NO REAL EFFECT OTHER THAN POSSIBLY DELAYING THE COLLECTION OF THE TAX. IF THE INTENT OF THE CONGRESS WAS TO AMEND THE INTERNAL REVENUE CODE BY EXEMPTING NORTH DAKOTA ORGANIZATIONS FROM PAYING A TAX ON REVENUE GAINED THROUGHAL GAMES OF CHANCE, THIS PROVISION DOES NOT ACHIEVE THAT AIM. FURTHER, WE THINK THAT AN INTERPRETATION OF THE PROVISION EXEMPTING ONLY THE STATE OF NORTH DAKOTA FROM THE APPLICATION OF THIS TAX WOULD RAISE SERIOUS CONSTITUTIONAL QUESTIONS.

WE RECOGNIZE THAT THE LITERAL INTERPRETATION OF THIS PROVISION MAY LEAD TO AN ANOMALOUS SITUATION IN WHICH THE IRS IS NOT CURRENTLY PERMITTED TO ENFORCE THIS TAX IN NORTH DAKOTA EVEN THOUGH THE NORTH DAKOTA ORGANIZATIONS REMAIN LIABLE FOR IT. USUALLY, WHERE A LITERAL INTERPRETATION OF A PROVISION WOULD LEAD TO AN AWKWARD OR ABSURD RESULT, WE WOULD SEEK TO DETERMINE THE TRUE INTENT OF CONGRESS. SEE, E.G., 53 COMP.GEN. 422 (1973). SEE GENERALLY SUTHERLAND STATUTORY CONSTRUCTION SEC. 46.07 (4TH ED. 1973). HOWEVER, IN THIS INSTANCE, DUE TO THE LACK OF LEGISLATIVE HISTORY, WE ARE UNABLE TO DERIVE AN ALTERNATE INTERPRETATION OF THIS PROVISION. THUS, DESPITE THE IMPRACTICALITY, WE FEEL COMPELLED TO GIVE SECTION 117 ITS PLAIN MEANING.

WE HOPE THAT WE HAVE BEEN OF ASSISTANCE TO YOU ON THIS MATTER.

FN1 CHAPTER 53-06 OF THE NORTH DAKOTA CENTURY CODE, ENTITLED "LICENSING GAMES AND AMUSEMENTS," REFERENCED IN SECTION 117, WAS REPEALED IN 1979. IN 1981 CHAPTER 53-06.1, ENTITLED "GAMES OF CHANCE," WAS ENACTED. IT IS CLEAR, HOWEVER, THAT CONGRESS INTENDED TO REFER TO THE (WORDS OMITTED) OF THE NORTH DAKOTA CODE. CF. 58 COMP.GEN. (NO. OMITTED), 359-61 (1979).