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AGENDA ITEM

For Meeting of: 10-11-01

MEMORANDUM

SUBMITTED LATE

DATE: October 11, 2001

TO: Commissioners

FROM: Commissioner Darryl R. Wold *DW*

RE: AOR 2001-12 (Democratic Party of Wisconsin)

The undecided issue in our consideration of this AO request appears to be whether 2 U.S.C. § 431(8)(B)(viii) would permit the Democratic Party of Wisconsin to use its building fund "for the purchase of office machinery, equipment, furniture and fixtures and similar property." OGC has provided a revised draft of the advisory opinion that would permit only the payment of "fixtures" from the building fund, and exclude the other categories of expenses in the foregoing list.

In two recent AOs, we have drawn a parallel between proposed uses of the building fund and the description and treatment of capital expenditures found in Internal Revenue Code (under 26 U.S.C. § 263) and the related IRS regulations (26 CFR 1.263(a)-1 and 1.263(a)-2), to determine whether the building fund may be used for certain categories of expenses. Among the examples of capital expenditures given in § 1.263(a)-2 are

"(a) The cost of acquisition, construction, or erection of buildings, machinery and equipment, furniture and fixtures, and similar property having a useful life substantially beyond the taxable year."

In AO 1998-7 we expressly drew the parallel to that IRS regulation, noting that under the regulation, "a capital expenditure includes the cost of the acquisition, construction, or erection of buildings, machinery and equipment, furniture and fixtures and similar property." (It appears that the present AO request has been drawn from that language.) We concluded that "items that would fall under the category of capital expenditures would also be considered the type of expenditures that are legitimately part

of the construction of a Party office facility.” We therefore permitted the building fund to pay for repair work that “reaches a level to constitute wholesale restoration or renovation of a structure” and which therefore could be treated as a capital expenditure.

In AO 2001-01 we again drew the parallel to the IRC, and concluded that architects’ services could be paid from the building fund because they “are explicitly listed in IRS regulations as an example of a capital expenditure,” citing 26 CFR 1.263(a)-2(d). (We also approved payment of construction management expenses, and fundraising expenses to raise funds for the construction of party headquarters, without reference to the IRS regulations, on the theory that those expenses were “directly related” to the construction of the party headquarters.)

Consistent with that parallel to the IRS’ capital expenditure distinction, we have not permitted the building fund to be used for “operating or administrative costs.” (See, e.g., AOs 1988-12, 1983-8.)

I do not see any persuasive reason to reject this precedent and abandon our reliance on the useful parallel to capital expenditures under the IRC. We explicitly and clearly relied on that parallel beginning three years ago, in 1998, and party committees have been entitled to rely on it since that time. While the proposed AO draft rejecting this precedent would grandfather the parties that have relied on it, that doesn’t cure the possible unfairness of having permitted some parties to rely on this analysis, but now precluding parties who have not yet acted from doing so.

The reliance on the capital expenditure distinction under the IRC is consistent with a literal and natural reading of the statutory provision. The question under the statutory provision is what is included in “office facility.” *The American Heritage College Dictionary* (3d ed.) defines “facility” as including “4. Something created to serve a particular function: *health care facilities*.” The term “health care facilities” certainly implies more than the building and fixtures -- it implies also the usual and necessary accoutrements, such as beds, x-ray equipment, and other furniture and equipment necessary to serve the function of providing health care. Similarly, “office facility” implies more than the four walls of a building -- it implies the usual and necessary items that enable an office to function, including desks, chairs, computers, telephone equipment, and similar furnishings and equipment.

Indirect support for this reading of “facility” can be found in 2 U.S.C. § 431(9)(B)(i), which provides that “expenditure” under the Act does not include a news story or other communication “distributed through the facilities of any broadcasting station, newspaper” etc. The term “facilities” in that context means whatever building and equipment is necessary to disseminate the communication -- it is less the building and fixtures than it is equipment like printing presses, broadcast equipment, etc.

The “building fund” provision found in 2 U.S.C. § 431(8)(B)(viii) was included in amendments to the FECA adopted in 1976. Unfortunately, the legislative debates

concerning those amendments do not appear to shed any light on Congress' understanding of what was meant by "office facility" -- indeed, it appears that the building fund provision was not even mentioned in the recorded debates.

Rules of statutory construction do not appear to be helpful in resolving this matter. It has been suggested that the building fund provision is an "exception" to the general definition of "contribution" and therefore should be construed narrowly. It is not clear, initially, that the provision is an "exception," since the fund "may not be acquired for the purpose of influencing the election of any candidate in any particular election." Even if it is construed as an exception, however, that does not resolve the matter under contemporary rules of statutory construction:

"The older rule strictly interpreted both exceptions and provisos. Today exceptions and provisos are interpreted according to the usual criteria of decision applicable to other kinds of provisions without using the presumption that qualifying language should be strictly construed."
[Singer, *Statutes & Statutory Construction* (6th ed., 2000) pp. 245-246.]

There are certainly other plausible interpretations of "office facility" that the Commission could adopt. The suggestion in the revised draft of the AO would permit "fixtures" but not other furnishings and equipment. It would probably be just as plausible to limit the interpretation to features actually "constructed" -- that is, that would fall under the "bricks and mortar" rubric. But none of those distinctions is more plausible on their face than the capital expense distinction that the Commission has drawn to date.

No distinction expressed in general terms (e.g., bricks and mortar, fixtures, capital expenditures) is going to avoid debate about inclusion or exclusion of particular items. In the context of real estate transactions, lawyers can argue interminably about whether an item is a "fixture" or not. Sometimes telephone systems are purchased from a distinct vendor and are "installed" in a permanent manner, but nevertheless can be removed and any damage from the removal repaired. It is uncertain, then, whether that is a "fixture" or not. The same could be said about a local area network (LAN) for a computer system, or about any number of other items that are installed in an office building in a semi-permanent fashion. Similarly, the distinction in tax law between a capital expenditure and an operating expense is often not clear. The advantage in drawing the line for our purposes between a capital expense and an operating expense is that the dollar value of items in question will usually be fairly small, compared to the dollar value of items in question in the distinction between fixtures and non-fixed items. That means that there will be relatively little at stake in the distinction, and consequently less opportunity for abuse, and less need for the Commission to be considering individual cases.

In summary, it appears to me that the parallel we have relied on in the IRS distinction between capital and operating expenses is a very useful one; that it provides an interpretation of "office facility" that is at least as plausible as any other distinction; and that there is no persuasive reason to abandon the Commission's previous reliance on that

distinction to determine what expenses will be considered for an "office facility" and therefore may be paid out of the Party's building fund.