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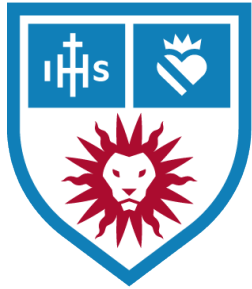
Tax Notes Federal, 172

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Publication Date

2021-07-12



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Legal Studies Paper No. 2021-22
(July 12, 2021)

*Americans for Prosperity and the
Future of Schedule B*

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Americans for Prosperity and The Future of Schedule B

To the Editor:

Before the July 1 decision of the Supreme Court in *Americans for Prosperity*,¹ the California Attorney General had for a number of years required all section 501(c)(3) organizations operating in the state to file with it a full copy of its federal Form 990, the annual information return for exempt organizations. The required filing included an unredacted Schedule B, listing the donations, with names and addresses, of substantial contributors. The Supreme Court held California's requirement to be facially unconstitutional. The Court determined that the California requirement failed an exacting scrutiny standard of review under which, to avoid violating the First Amendment, any compelled disclosure to government must be "narrowly tailored" to an asserted and substantial government interest. The Court concluded that California's asserted need for an unredacted Schedule B in order to investigate fraud did not meet this standard.

Currently, the information included on Schedule B as filed with the IRS by section 501(c)(3) organizations follows from a statutory requirement under section 6033(b): "Every organization described in section 501(c)(3) . . . shall furnish annually information, at such time and in such manner as the Secretary may by forms or regulations prescribe, setting forth . . . the total of the contributions and gifts received by it during the year, and the names and addresses of all substantial contributors."

In the Court's opinion in *Americans for Prosperity*, Chief Justice John G. Roberts Jr. writes that "revenue collection efforts and conferral of tax-exempt status *may* raise issues not presented by California's disclosure requirement, which can

prevent charities from operating in the state altogether." (Emphasis added.) But I fear that the section 6033(b) requirement would not withstand a challenge under the criteria announced in the case. That is, I see little hope for optimism because of Roberts's use of "*may*" in the sentence quoted.

The distinction implied in the quoted sentence eludes me. Failure by a tax-exempt organization to file the appropriate Form 990 for three years or other violations application to section 501(c)(3) organizations can lead to loss of exemption.² Such loss of exemption seems to me as severe a burden as the inability to operate as a charity in a particular state.

At the end of his opinion, Roberts writes that in the case of the California Attorney General, "Schedule Bs are not used to initiate investigations. That is true in every case. California has not considered alternatives to indiscriminate upfront disclosure. That is true in every case. And the State's interest in amassing sensitive information for its own convenience is very weak."

IRS need for Form 990 information, including that on Schedule B, parallels that of the California Attorney General. Both federal tax authorities and state attorneys general work to identify self-dealing transactions, improperly valued donations, and other transactions that violate both nonprofit and tax-exempt status. But according to a February report from the Treasury Inspector General for Tax Administration, the IRS examined only 0.13 percent of Forms 990 in fiscal 2019, compared with 0.64 percent of corporate returns and 0.44 percent of individual returns.³ The TIGTA report did not discuss what percentage of the 0.13 percent examined involved examining Schedule B and how many examinations of Schedule B triggered an audit. Is an examination of 0.13 percent of all Forms 990 enough use to satisfy the Supreme Court? I fear not.

¹ *Americans for Prosperity Foundation v. Bonta*, No. 19-251 (July 1, 2021). I note that I was one of the parties on the "Brief Amicus Curiae Scholars of the Law of Non-Profit Organizations in Support of Respondent," Supreme Court (2021).

² See section 6033(j).

³ TIGTA, "Obstacles Exist in Detecting Noncompliance of Tax-Exempt Organizations" (Feb. 17, 2021).

Recent action by federal tax authorities themselves underscores the vulnerability of the section 6033(b) requirement. In May 2020, after losing a case challenging use of a revenue procedure to change Schedule B filing requirements,⁴ Treasury and the IRS published final regulations eliminating a long-standing regulatory requirement that noncharitable section 501(c) organizations list the names and addresses of major donors on their Schedules B.⁵ (The final regulations did retain the regulatory requirement for section 527 organizations, which are political organizations.) Unlike revenue procedures, Treasury decisions adopting final regulations explain in considerable detail the basis for their content, including responses to comments on proposed regulations. The reasoning in the preamble to these regulations threatens the current Schedule B statutory requirement for section 501(c)(3) organizations.

The preamble to the February regulations explained that, in making this regulatory change, Treasury and the IRS “sought to balance the IRS’s need for the information for tax information purposes against the cost and risks associated with reporting of the information.”⁶ It determined that “for the specific purpose of evaluating possible private benefit or inurement or other potential issues relating to qualification for exemption, the IRS can obtain sufficient information from other elements of the Form 990 or Form 990-EZ and can obtain the names and addresses of substantial contributors along with other information, upon examination as needed.”⁷ Eliminating the requirement of listing names and addresses reduced the risk of “inadvertent disclosure” and thus protected against “possible reprisals (such as harassment, threats of violence, or economic retribution),” according to the preamble.⁸ The preamble reported that commenters on the proposed regulations “discussed the concern that fear of exposure and

fear of reprisal may have a ‘chilling effect,’” implicating constitutional rights.⁹ All this language sounds remarkably like that in the *Americans for Prosperity* opinion.

I would be happy to be wrong and see the section 6033(b) requirement survive a constitutional challenge. Contributions to section 501(c)(3) organizations, unlike those to almost all other section 501(c) organizations, are deductible from income, estate, and gift taxes. Schedules B that include names and addresses thus assist the IRS in ensuring that the proper amounts of charitable contributions are deducted. Perhaps Schedule B’s utility in ensuring accurate revenue collection is sufficient to shield it from constitutional invalidity. But I doubt it under the reasoning of *Americans for Prosperity*.

The brief filed in the case by the United States made the tax subsidy argument. On the basis of *Regan*,¹⁰ it asserted that tax reporting differed from reporting to the California Attorney General because tax requirements represent a condition on the subsidies of tax exemption and deductibility. I question the acting solicitor general’s premise. Tax exemption does not appear on the tax expenditure budget;¹¹ it is treated as a structural element of the IRC. Charitable deductions do, but the Supreme Court has not consistently treated tax expenditures as a government subsidy for constitutional purposes.¹² (After all, if it did, contributions to houses of worship would be of questionable constitutionality under the Establishment Clause, at least under current Supreme Court jurisprudence.)

Even if we accept the subsidy argument, I don’t think that it survives the case’s articulation of exacting scrutiny. That standard of review is now applicable, it seems, to any government-required disclosure. As with noncharitable section 501(c)

⁴ *Bullock v. IRS*, 401 F. Supp. 3d 1144 (2019); see also Kristen A. Parillo, “Montana Federal Court Strikes Down EO Donor Rule Change,” *Tax Notes Federal*, Aug. 5, 2019, p. 933.

⁵ T.D. 9898.

⁶ *Id.* at 31962.

⁷ *Id.* at 31963.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983).

¹¹ Joint Committee on Taxation, “Estimates of Federal Tax Expenditures for Fiscal Years 2020-2024,” JCX-23-20 (Nov. 5, 2020).

¹² See Linda Sugin, “The Great and Mighty Tax Law: How the Roberts Court Has Reduced Constitutional Scrutiny of Taxes and Tax Expenditures,” 78 *Brook. L. Rev.* 777 (2013); and Edward A. Zelinsky, “Are Tax ‘Benefits’ Constitutionally Equivalent to Direct Expenditures?” 112 *Harv. L. Rev.* 379 (1998).

organizations, the IRS “can obtain names and addresses of substantial contributors . . . upon examination as needed.”¹³ That is, the IRS has already announced a readily available, more narrowly tailored alternative.

Thus, the Schedule B requirement for section 501(c)(3) organizations seems to me to be at risk of being held constitutionally invalid. And without the requirement that Schedule B filings by section 501(c)(3) organizations include names and addresses, IRS oversight of charitable organizations, in particular enforcement of wrongdoing, reduced already by *Americans for Prosperity* and the regulatory change to Schedule B for noncharitable section 501(c) organizations, will suffer further. Violations will increase, and public confidence in the charitable sector will diminish.

And, of course, the consequences of *Americans for Prosperity* for government reporting and disclosure will extend beyond Schedule B and tax law. As Justice Sonia Sotomayor warns in her dissent, “Today’s analysis marks reporting and disclosure requirements with a bull’s-eye.”¹⁴

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July 6, 2021

A Not-So-Jolly Catch-22

To the Editor:

Sound tax administration calls for the government to be consistent in its application of the law, which includes being consistent among the positions its lawyers take in court. Judge Ryan T. Holte of the United States Court of Federal Claims recently issued an order denying the United States' motion to dismiss pro se plaintiff Maketa Jolly's tax refund suit for lack of jurisdiction.¹ We applaud Judge Holte's order. However, we are troubled by the United States' argument supporting its motion and the argument's potentially deleterious effects on tax administration.

The IRS Office of Chief Counsel took one position in the Tax Court and prevailed. The Justice Department subsequently took the opposite position in the Court of Federal Claims and fell short. Specifically, before filing a refund suit in the Court of Federal Claims, Jolly had sought to resolve her dispute with the IRS commissioner in the Tax Court. The Tax Court dismissed her petition for lack of jurisdiction, agreeing with the commissioner that the IRS had never issued Jolly a notice of deficiency for 2017. After the Tax Court's dismissal, Jolly filed a refund suit in the Court of Federal Claims. The United States, represented by the Justice Department, moved to dismiss, arguing that Jolly had not satisfied the jurisdictional "full payment rule" set forth in *Flora*.² In support of its motion, the United States alleged that it was "unable to obtain the IRS administrative file for the 2017 tax year. Presumably, however, a . . . notice of deficiency was issued with respect to that year." Judge Holte rejected the United States' argument, holding that for the year in question, 2017, the United States had failed to show that the IRS had issued a notice of deficiency and that it had therefore properly assessed the deficiency. It followed that without a properly assessed deficiency, there was no liability that Jolly had to pay in full, and therefore *Flora's* full payment rule had been satisfied. The United States filed a motion to reconsider Judge Holte's order, and that motion is still pending.

¹³ See T.D. 9898.

¹⁴ *Americans for Prosperity*, slip op., Justice Sotomayor, with whom Justice Stephen Breyer and Justice Elena Kagan join, dissenting, *supra* note 1, at 2.

¹ *Jolly v. United States*, No. 1:20-cv-00412 (Ct. Cl. 2021).

²*Flora v. United States*, 357 U.S. 63, 75 (1958).