

New York State Ethics Commission

Advisory Opinion No. 96-2: Restrictions on the New York State Division of Tax Appeals - Tax Appeals Tribunal's acceptance of a donation from a publishing company that publishes Tribunal decisions and determinations.

INTRODUCTION

The following advisory opinion is issued in response to an inquiry from [an official of] the Tax Appeals Tribunal ("Tribunal"), concerning an offer of a donation of computer equipment made by a publishing company that publishes Tribunal decisions and determinations.

Pursuant to the authority vested in the New York State Ethics Commission ("Commission") by Executive Law §94(15), the Commission hereby renders its opinion that the Tribunal and/or the Division of Tax Appeals, which it operates, may accept the donation as long as the publishing company does not have a matter pending before the Tribunal or the Division, is not in litigation with either, and does not condition the use of the computer in any manner. The Tribunal should make available to all publishing companies the documents generated by the donated computer.

BACKGROUND

The Tribunal was established by Chapter 282 of the Laws of 1986. It consists of three commissioners, appointed by the Governor with the advice and consent of the Senate, who serve for terms of nine years. The Governor designates one of the commissioners to serve as President.

The Tribunal operates and administers the Division of Tax Appeals ("Division"), which is a "separate and independent" division within the Department of Taxation and Finance ("Department").⁽¹⁾ The Division's purpose is to provide the public with a "just system of resolving controversies with [the Department] and to ensure that the elements of due process are present with regard to such resolution of controversies."⁽²⁾ The Division is responsible for processing and reviewing petitions filed in protest of notices issued by the Department, e.g., tax due, tax deficiency, denial of refund, cancellation, revocation or suspension of a license, permit or registration; providing hearings; and rendering determinations and decisions in such matters.

One of the important responsibilities of the Tribunal is to publish and make available to the public all determinations rendered by administrative law judges and all decisions rendered by the Tribunal. In requesting this opinion, [the requesting individual] states that these determinations and decisions are currently carried on the Westlaw and Lexis on-line computer information services and are commercially published in whole or in part by 17 publishing companies. The Division provides printed copies of the determinations and decisions to the publishers free of charge, and provides them in the form of ASCII computer files to the Department and one of the major publishing companies.⁽³⁾

In order to format computer files, all determinations and decisions must first be entered and processed on the Division's [] computer. This mid range computer utilizes a language which cannot be read by a personal computer or a word processing program unless the personal computer is connected directly to it. Currently, a Division employee must strip the computer files of the [computer] coding to create the ASCII files. The ASCII files are then sent to the publishing company, which must reformat them into an appropriate personal computer format.

The publishing company that receives the ASCII files has asked whether the Division would be interested in receiving a donated computer that could be used to translate the determinations and decisions from the [computer] format to a personal computer format. Use of such a computer would streamline the current process by eliminating the need for the publisher to reformat the ASCII files. The Division also suggests that the availability of determinations and decisions in personal computer format may result in other publishing companies choosing to receive the material.

The publishing company offering the computer does not presently have, nor has it ever had, a case pending before the Division. It is conceivable, however, that a Department audit of the company could result in an administrative proceeding and, ultimately, a matter before the Division.

There are no contracts for goods or services between the Division and the publishing company.

[The requesting individual] has posed several questions:

1. Whether the Tribunal has the authority to accept equipment donations from business organizations, individuals or not-for-profit organizations for Tribunal purposes?
2. Whether the Tribunal can accept equipment subject to a condition that it be used for a specific purpose?
3. Whether the Tribunal is free to determine the utilization of donated equipment as it deems appropriate?

APPLICABLE STATUTES

Tax Law §2006(14) and (15) authorize the Tribunal to:

...make, adopt and amend such rules and regulations appropriate for the exercise of its powers and the performance of its duties, including rules of practice and procedure.

...have all other powers and perform such other duties as are necessary and proper to operate and administer the division of tax appeals consistent with the purpose of such division described in this article.

Public Officers Law §73(5) provides as follows:

No statewide elected official, state officer or employee, member of the legislature or legislative employee shall, directly or indirectly, solicit, accept or receive any gift having a value of

seventy-five dollars or more whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part. No person shall, directly or indirectly, offer or make any such gift to a statewide elected official, or any state officer or employee, member of the legislature or legislative employee under such circumstances.

This section prohibits an individual State officer or employee from directly or indirectly soliciting, accepting or receiving any gift worth \$75 or more under circumstances in which it could be inferred that the gift was intended to influence him or her, or could reasonably be expected to influence him or her, in the performance of official duties, or was intended to reward official action. It also prohibits any person from directly or indirectly offering or making such a gift to a State officer or employee. Thus, it is applicable both to a donor and a donee.

Portions of the State's Code of Ethics, contained in Public Officers Law §74, are applicable to gifts in certain circumstances. The provision that sets forth the rule with respect to conflicts of interest is found in subdivision (2), which reads as follows:

No officer or employee of a state agency . . . should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest.

DISCUSSION

Both Public Officers Law §§73 and 74 are specifically applicable to gifts made to individual State employees. They are not, however, enforceable with respect to gifts to agencies. In [Advisory Opinion No. 94-16](#), in which the Commission discussed in detail how these sections are to be interpreted and applied, it stated that the opinion was inapplicable to gifts to agencies. The Commission has, however, considered the question of whether and under what circumstances an agency may accept donations of money or equipment, which is the question presented here.

In [Advisory Opinion No. 92-1](#), the Commission considered gifts to an agency where the agency head was authorized by the statute governing the agency to accept gifts. There, the Commission held that the Commissioner of Agriculture and Markets could accept private contributions from regulated persons and entities, but not when such individuals and entities are involved in litigation with or under investigation by the agency. The Commission stressed the importance of maintaining the agency's impartiality in adversarial situations. It also urged that care be taken when accepting gifts from donors whose relationship to the agency might raise the appearance of impropriety, i.e., those doing business with the agency, lobbyists, and applicants for licenses and permits. In such cases, the Commissioner must carefully consider the source, timing and amount of the donation.

More recently, in [Advisory Opinion No. 95-38](#), the Commission considered several other issues raised by the receipt of gifts by a State agency. Following its previous opinion, the Commission held that the Department of Environmental Conservation ("DEC") -- which, like the Department of Agriculture and Markets, is authorized by its governing statute to accept gifts -- could accept a donation from an entity subject to its jurisdiction, provided the source, timing and value are not such as to cause the public to perceive the donation as an attempt to improperly influence the agency in the administration of its public duties. The Commission went on to hold that DEC may not accept donations where the equipment or money donated is conditioned upon its use in a particular geographic region, saying that "[t]he Commissioner must be free to determine the allocation of the agency's resources statewide based upon his or her best judgment". Further, it held that while donors may freely advertise their donations to DEC, the use of logos or other identifiable markings on the donated equipment, while not prohibited should be discreet.

Examining the Tribunal's request, the first question presented is whether it has the authority to accept donations. As noted above, both of the agencies to which the Commission has issued relevant decisions have such authority granted by statute. The Tribunal does not have a similar statute, but, arguably, Tax Law §2006(14) and (15) provide such authority. While, for purposes of this opinion, the Commission will assume the authority of the Tribunal to accept gifts consistent with the Public Officers Law, it may contact the Office of the Attorney General if it wishes a determination with regard to this issue.

We turn now to whether the Public Officers Law permits the Tribunal to accept the donation of a computer from a publishing company that publishes its decisions and determinations. While the company has not appeared before the Division, it may, as a taxpayer in New York State, have occasion to make such an appearance. This, in itself, does not preclude the Division's accepting the computer. The Commission's holdings in Advisory Opinion Nos. [92-1](#) and [95-38](#), permitting agencies to accept donations from entities subject to their jurisdiction, authorize the acceptance of the gift by the Division. However, due consideration must be given to the circumstances surrounding the donation, including whether it could be perceived as an attempt by the donor to curry favor with the agency. Clearly, the gift could not be accepted if it were offered at a time during which the publishing company had a matter pending before the Division or Tribunal, or was in litigation with either.

In weighing whether the donation is intended to influence, may actually influence or may appear to influence official action on the part of the Division, it is important that the publishing company has never had a matter before it. Although the company could possibly appear before the Division in the future, the uncertainty regarding when, and even if, such an appearance might occur makes it unlikely that the donated computer could be perceived as intended to influence future actions of the Division.

With regard to the remaining question posed -- whether the Tribunal is free to determine the utilization of the computer equipment -- the Commission holds that it may not be accepted subject to any conditions imposed by the publishing company. Rather, the agency must have complete discretion as to its use. (See [Advisory Opinion No. 95-38](#), discussed above.) Indeed, the Tribunal should disseminate its determinations and decisions generated in the personal computer format to all publishing companies requesting them. By doing so, the Tribunal would

not only be implementing its statutory mandate, but also assuring that no favoritism is being shown to the publishing company making the donation.

CONCLUSION

The Commission concludes that the Tribunal and/or the Division may accept the donation of computer equipment from a publishing company which publishes the Tribunal's decisions and determinations as long as the company (1) does not have a matter pending before the Tribunal or the Division, (2) is not in litigation with either, and (3) does not condition the use of the donated equipment in any manner. The Tribunal should make available the documents generated by the donated computer to all publishing companies.

This opinion, until and unless amended or revoked, is binding on the Commission in any subsequent proceeding concerning the person who requested it and who acted in good faith, unless material facts were omitted or misstated by the person in the request for opinion or related supporting documentation.

All concur: Joseph M. Bress, Chair
Angelo A. Costanza
Robert E. Eggenschiller
Donald A. Odell, Members

Dated: March 11, 1996

Endnotes

1. Tax Law §§2002 and 2004. The Commission held in [Advisory Opinion No.91-13](#) that the Division is a State agency, separate and independent from the Department of Taxation and Finance for purposes of the post-employment restrictions of Public Officers Law §73(8).
2. Tax Law §2000.
3. An ASCII file is a document which has been stripped of all formatting.