

ISSUE

Is an organization which makes distributions to a university, under the circumstances described below, a supporting organization within the meaning of section 509(a)(3) of the Internal Revenue Code if it is controlled by a disqualified person and the employees of a disqualified person?

FACTS

The organization is exempt from federal income tax under section 501(c)(3) of the Code. Its purpose is to make distributions to a university described in section 509(a)(1) and section 170(b)(1)(A)(ii).

The organization is controlled by a four member board of directors. One of these directors is a substantial contributor to the organization. Two other directors are employees of a business corporation of which more than 35 percent of the voting power is owned by the substantial contributor. The remaining director is chosen by the university. None of the directors has a veto power over the organization's actions.

LAW AND ANALYSIS

Section 509(a)(3)(C) of the Code provides that in order to qualify as other than a private foundation under section 509(a)(3), an organization may not be controlled directly or indirectly by one or more disqualified persons (as defined in section 4946) other than foundation managers and other than one or more organizations described in section 509(a)(1) or (2).

Section 4946 provides that the term 'disqualified person' includes a substantial contributor to an organization, and a corporation of which a substantial contributor owns more than 35 percent of the total combined voting power.

Section 1.509(a)-4(j) of the Income Tax Regulations provides that a supporting organization will be considered to be controlled directly or indirectly by one or more disqualified persons if the voting power of such persons is 50 percent or more of the total voting power of the organization's governing body or if one or more of such persons has the right to exercise veto power over the actions of the organization. However, all pertinent facts and circumstances will be taken into consideration in determining whether a disqualified person does in fact indirectly control an organization.

Because only one of the organization's directors is a disqualified person and neither the disqualified person nor any other director has a veto power over the organization's actions, the organization is not directly controlled by a disqualified

person under section 1.509(a)-4(j) of the regulations. However, in determining whether an organization is indirectly controlled by one or more disqualified persons, one circumstance to be considered is whether a disqualified person is in a position to influence the decisions of members of the organization's governing body who are not themselves disqualified persons. Thus, employees of a disqualified person will be considered in determining whether one or more disqualified persons controls 50 percent or more of the voting power of an organization's governing body.

Two of the organization's four directors are also employees of a corporation that is itself a disqualified person because more than 35 percent of its voting power is owned by a disqualified person. Because a majority of its board of directors consists of a disqualified person and employees of a disqualified person, the organization is indirectly controlled by disqualified persons within the meaning of section 509(a)(3)(C) of the Code.

HOLDING

Since the organization is controlled by a disqualified person and the employees of a disqualified person, under the circumstances described above, it is not a supporting organization within the meaning of section 509(a)(3) of the Code.