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SEP 14 2001

CASE:GLS-143227-01
CC:GLS:PCTL:DAIngold

MEMORANDUM FOR PATRICIA KIRK, W&I:SPEC (AREA 4)

FROM: Donald M. Suica *Donald M. Suica*
Chief, Public Contracts and Technology Law Branch (GLS)

SUBJECT: Volunteer Income Tax Agreement (VITA) Agreements

This is in reply to your request for a legal opinion as to whether fiscal year 2001 funds can be obligated to pay for office supplies and the printing of promotional materials and training manuals, in addition to computer hardware and software, all to be provided to two Chicago area non-profit organizations, described as "the largest volunteer tax return preparation services in the nation."¹

¹These non-profits are (1) The Center for Law and Human Services and (2) The Tax Assistance Program. On the basis of electronic copies of "proposals," forwarded to us by e-mail, we understand the following:


- The Center has a mission of increasing economic opportunities for low-income persons, advocating on their behalf, and directly serving them in outreach and training programs. A program of the Center is the Tax Counseling Project. During the spring, 2001, tax-filing season, Center staff recruited and trained 500 tax assistance volunteers who assisted over 11,000 individuals, preparing 20,000 federal and state tax returns. In its proposal, the Center notes 65% of the tax returns that it prepared resulted in the receipt of an Earned Income Tax Credit (EITC).
- The registered trademark name of The Tax Assistance Program is "The Tax Assistance Program It - It Adds Up." In operation since 1994, the Program has helped more than 14,000 families, with average family earnings of \$14,000, receive over \$18 million in tax refunds. Forty-five percent of its clients received an EITC. The Program's proposal includes a list of the types of assistance it seeks from the IRS, classified in 3 categories:
 1. Office supplies (from pencils to calculators);
 2. Equipment (computers, printers, and copiers); and
 3. Printing (client flyers, volunteer training manuals, annual reports, client & volunteer reminder postcards, sign-in sheets, and IRS envelopes).

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Conclusions:

For reasons that follow, we conclude:

1. Relying on the precedent of past opinions of GLS, *see, e.g.*, CC:GLS-3-0413-92 (12/31/1991); CC:GLS-2034-92 (06/03/1991), you can obligate funds to acquire computer hardware and software to lend to VITA sites. [We recommend that ] DP
2. As alluded to in memorandum opinion CC:GLS-3-0413-92 (12/31/1991), *see* p.2 ("the Service develops and distributes taxpayer publications as part of its taxpayer education function without violating the restrictions in question"), you can supply VITA sites with copies of Service forms and publications.
3. With respect to the provision of additional goods and services, such as requested by the "The Tax Assistance Program It – It Adds Up," we do not believe there is authority to obligate funds to acquire them and give them to VITA sites. We note below a bill has been introduced in the Senate that would authorize an appropriation of "no year" funds to cover operating expenses of VITA sites.

Background:

You contacted us originally for assistance in the formulating and drafting of a "model agreement" with these two entities.  DP

 in addition to "asset categories" of computer hardware and software, the model agreement needed to cover other forms of "in kind" assistance, including office supplies and equipment, printing services, and the leasing of telephone and cellular communication lines. You said there is a desire to obligate fiscal year 2001 funds for these purposes and referred to interest in the obligation of specifically EITC funds.

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Discussion:

- Statutory authority a prerequisite for outright gifts. Precedent in past opinions for the loan of Government-owned computers to VITA sites.

A. Overview of three volunteer assistance programs in the Service:

Within the Service there are two statutorily authorized volunteer assistance programs: the Tax Counseling for the Elderly (TCE) program, authorized by Public Law 95-600, § 163(b), and the Low-Income Taxpayer Clinics (LITC) program, authorized by I.R.C. § 7526.

The VITA program is not statutorily authorized. Created by the Service in 1969, the VITA program is referred to by name in proposed legislation, that if enacted would:

- mandate the Secretary of the Treasury to undertake a study on the expansion of the VITA program to service more low income taxpayers;
- require the preparation and submission of a report on this study not later than 120 days after enactment; and
- authorize an appropriation for the VITA clinics of \$6 million "to remain available until expended," i.e. without fiscal year limitation, for the purposes of "the operating expenses of ... [the VITA] clinics, expenses for providing electronic filing expenditures through such clinics, and related expenses.

S. 802, 107th Cong., 1st Sess. (for your convenience a copy of S. 802 is attached, as well as the statement of Senator Bingaman when he introduced this proposal.)

- B. The prerequisite of statutory authority to create products for, or supply services to, non-federal entities. The provision of services or products as in the course of conduct of the Service's mission.

In memorandum opinion GLS-2034-91, issued June 3, 1991, on the subject of "Computer Equipment and Software for VITA and TCE Sites Offering Electronic Filing," a copy of which is attached, General Legal Services said:

... agencies may not use appropriated funds to create products or materials for, or otherwise supply services to, non-federal entities in the absence of specific statutory authorization. Such an activity is beyond the scope of the agency's discretion to incur necessary expenses. 62 Comp.

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Gen. 323 (1983) [T]his line of GAO [General Accounting Office] decisions is inapplicable in the context of a service or product that is provided in the course of conduct of the agency's authorized mission. Thus, for example, the Service develops and distributes taxpayer publications as part of its taxpayer education function without violating the restrictions in question.

Noting that electronic filing is a component of the Congressionally directed modernization of the Service, the 1991 opinion approved of the lending of computer hardware and software to VITA sites.

The 1991 opinion also noted that a source of specific statutory authority for the use of Government-owned computers by TCE sponsors is the TCE program-enabling legislation. It expressly authorizes the Secretary of the Treasury, through the Service, to provide for the use of governmental facilities, services, and personnel with, or without, reimbursement. Pub. L. 95-600, § 163(b)(4). (There remains in existence a prohibition imposed by the terms of the TCE Application Package on TCE awardees' use of funds or reimbursements to buy computers, although funds can be used to buy "software for the e-filing of returns" and "upgrading equipment," although the latter is to be, "if possible, minimized." See Pub. 1101. The prohibition on the transfer of Government-owned computers to TCE sites that existed formerly in the TCE regulations and application package – and is mentioned in the 1991 opinion as not being a requirement of the TCE authorizing statute – has been deleted. We note the TCE application package retains a prohibition on the use of federal funds for the leasing of communication lines. These prohibitions are not required by the TCE enabling statute. We note them, however, as there may be an interest in coordinating within W&I:SPEC a harmonizing of policies and a review of the practicality and efficiency of these restrictions. Should S. 802 be enacted into law, it would be authority, as noted above, for covering VITA clinics' "operating expenses ..., electronic filing expenditures, and related expenses.")

C. The Fiscal Year 2001 "Earmarking" of funds for TCE and EITC purposes:

The Treasury appropriation for fiscal year 2001, the "Consolidated Appropriations Act, 2001," Public Law 106-554, incorporates by reference H.R. 5658, 106th Cong. 2nd Sess., that earmarks funds for both TCE and EITC purposes.

With respect to TCE, we can be brief as we understand the non-profits that are currently seeking assistance are VITA sponsors. The explanation above of the distinction of TCE's status as a statutory program, with express authority to give away federal funds as reimbursements, suffices as background to an understanding of the

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fiscal year 2001 earmarking of "\$3,950,000 ... for the Tax Counseling for the Elderly Program."


With respect to EITC, under the heading of "Earned Income Tax Credit Compliance Initiative," funds are earmarked for:

funding essential earned income tax credit compliance and error reduction initiatives pursuant to section 5702 of the Balanced Budget Act of 1997 (Public Law 105-33), \$145,000,000, of which not to exceed \$10,000,000 may be used to reimburse the Social Security Administration for the costs of implementing section 1090 of the Taxpayer Relief Act of 1997.

The first of the two laws mentioned, section 5702 of the Balanced Budget Act of 1997, is the authorization of appropriations, in addition to any other funds available therefor, for enforcement initiatives related to the earned income tax credit for fiscal years 1998 through 2002. In addition to the section heading of being an authorization for "enforcement initiatives," the Balanced Budget Act of 1997 described the purpose of the funds authorized to be appropriated as "for improved application of the earned income credit under section 32 of the Internal Revenue Code of 1986." 111 Stat. 648.

The second of the two laws mentioned in the fiscal year 2001 appropriation, section 1090 of the Taxpayer Relief Act of 1997, appears to have two purposes: (1) the expansion of "coordinated enforcement efforts" between the Service and the Health and Human Services' Office of Child Support Enforcement, and (2) the mandated sharing or matching of social security numbers between HHS and the Service.

As to exactly what "compliance" encompasses, there are no additional insights gained from the Conference Report that accompanies the "Consolidated Appropriations Act, 2001." It only restates *verbatim* the appropriation language. H.R. Rep. 106-1033, p. 340.

 We do note as possibly very significant on the subject of program, or agency mission, authority in this area and relevant to communication and public awareness issues is Public Law 101-508, title XI, § 11114, enacted November 5, 1990. Codified as a note under section 21 of title 26, U.S. Code Annotated, it provides:

Not later than the first calendar year following the date of the enactment of this subtitle [November 5, 1990], the Secretary of the Treasury, or the Secretary's delegate, shall establish a taxpayer awareness program to inform the taxpaying public of the availability of the credit for dependent

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care allowed under section 21 of the Internal Revenue Code ... and under section 32 of such Code. Such public awareness program shall be designed to assure that individuals who may be eligible are informed of the availability of such credit and filing procedures. **The Secretary shall use appropriate means of communication to carry out the provisions of this section.**

(Emphasis added.)

This mandate for a taxpayer awareness program and the express requirement to "use appropriate means of communication" to implement the program, depending on the plan that was, in fact, developed, might be interpreted as investing the Secretary, or the Secretary's delegate, with wide latitude in determining what is "appropriate means of communication." We conferred informally with the staff attorney who drafted the 1991 memorandum opinion that approved the loan of Government-owned computers to VITA and TCE sites. While she recalls suggestions of using EITC earmarked funds as the source of funding for inquiries about initiatives similar to the instant one, she does not recall there being any suggestion of this law, enacted in 1990, as possibly investing the Secretary with authority to communicate through volunteers.

The introduction by Senator Bingaman of S. 802, with its proposals for specific authority to require a study on the expansion of VITA clinics, a report to Congress on the same, and to authorize "no year" funding of \$6 million to cover operating expenses of VITA clinics, may suggest that, pending enactment or other action by the Congress or the President on this bill, reliance on pre-existing general authorities should be within the bounds of established precedent and practices that are well known to Congressional oversight and appropriating committees.

On the subject of what has been reported as known by the Senate Appropriations Committee about the VITA program, we attach a copy of an article from the Tax Analysts' Daily Tax publications *Highlights & Documents* and *News Highlights*, for September 4, 2001. Under "Top News" there appears the following:

Preliminary Report [for the upcoming, Fiscal Year 2002, appropriation] **Shows Senate Hiking Funding for Tax Clinics.** Preliminary report language passed by the Senate Appropriations Committee but not yet filed with the full Senate would increase funding for the Low Income Taxpayer Clinic program from \$6 million to \$8 million in fiscal 2002.

The fuller account in the *News Highlights* adds:

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It also notes that the existing Volunteer Income Tax Assistance program "provides an invaluable service by helping low-income taxpayers prepare and file their federal income tax returns. The committee understands that VITA volunteers receive only in-kind contributions of forms and equipment from the IRS."



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Summary:

We advise, pending possible clarification or express authorization of VITA program authority, it is prudent to stay within established legal precedents in lending assistance to VITA sites. In summary, we conclude:

- There is current authority to obligate funds to acquire computer hardware and software to lend to VITA sites;
- There is current authority to give VITA sites copies of Service forms and publications;
- Current authority does not exist, particularly in light of proposed legislation, to support the obligation of funds to provide VITA sites with additional goods and services.

Attachments (3): S. 802; introductory remarks by sponsor; & CC:GLS-2034-91