



August 24, 2021

The Honorable Janet Yellen
Secretary of the Treasury
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Dear Secretary Yellen,

We write in response to a recent letter dated July 22, 2021 by several Democratic lawmakers in the House of Representatives asking your office to review the tax-exempt status of American charities that provide support to Jewish people living in the State of Israel, including in the disputed territories of Judea and Samaria. That letter was egregiously wrong on all of the relevant law, policies, and facts, and this response will serve as an attempt to officially correct the record.

First, as a matter of law, Section 501(c)(3) of the Internal Revenue Code (“IRC”) exempts from taxation entities organized and operated exclusively for the purposes specified therein, which include charitable and educational purposes. The Treasury Regulations soften the operational test by requiring that an organization must engage “primarily” in activities which accomplish one or more of its exempt purposes and that an organization will fail the test “if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.” Treas. Reg. § 1.501(c)(3)-1(c)(1). The term charitable is interpreted by the Treasury Regulations in its “generally accepted legal sense” and includes “[r]elief of the poor and distressed or of the underprivileged; advancement of religion and promotion of social welfare ...” Treas. Reg. § 1.501(c)(3)-1(d)(2). The term “educational” is defined to include “the instruction or training of the individual for the purpose of improving or developing his or her capabilities or the instruction of the public on subjects useful to the individual and beneficial to the community.” Treas. Reg. § 1.501(c)(3)-1(d)(3).

In three Revenue Rulings, the IRS set forth additional requirements stating that activities of a Section 501(c)(3) organization must not be “illegal, contrary to a clearly defined and established public policy, or in conflict with express statutory restrictions.” *See*, Rev. Rul. 97-21, 1997-1 C.B. 121 *citing* Rev. Rul. 80-278, 1980-2 C.B. 175, and Rev. Rul. 80-279, 1980-2 C.B. 176. These additional requirements are broader than but along the same lines as a requirement recognized by the U.S. Supreme Court that a charitable organization may not violate a “national public policy” and will lose its tax-exempt status if “there is no doubt that the organization’s activities violate fundamental public policy.” *Bob Jones University v. U.S.*, 461 U.S. 574, 584 (1983). Clearly, this is not the case that serves as the subject matter of the allegations raised in the letter dated July 22, 2021.

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Charitable organizations that provide support to Jewish people living in the State of Israel, including in the disputed territories, clearly meet all of the requirements for tax-exempt status. They are engaged exclusively in charitable or educational activities which do not violate any U.S. laws or clearly defined and established national public policies. Moreover, even if there existed a clearly defined and established national public policy against Israeli settlement construction on the basis that it violates international law, that policy would have nothing to do with U.S. citizens supporting educational opportunities, humanitarian assistance, nutritional support, and medical assistance to people in those communities, which are the activities being conducted by the charities identified in the letter. The alleged “violation of international law” invoked by the lawmakers would be a violation on the part of the Israeli government, not the settlers themselves, and certainly not people providing aid to people in settlements.

In no case has the IRS been forced to examine and/or revoke the tax-exempt status of an organization based upon alleged violations of “international law,” but this is not the first time that someone has tried this tactic in these very circumstances. Had the authors only done the barest minimum of research they might have found the two cases in which plaintiffs sought such relief based upon allegations that a charitable organization’s support for Israeli settlements violated U.S. and international laws. Both were dismissed by the courts in favor of the IRS and the charitable organization.

In *Khalaf, et al v. Regan, et al*, 55 AFTR 2d 85-647 (DDC 1985) *aff’d* No. 85-5274, 1986 LEXIS 33734 (D.C. Cir. Sept. 19, 1986) (unpublished table decision), sixteen individual plaintiffs attempted to compel the IRS to revoke the tax-exempt status of six charitable organizations because the organizations supported Israeli settlements in the West Bank. The Court dismissed the case after determining that the alleged harms could “neither be rationally attributed to benefits conferred by U.S. tax laws, nor is it any more likely to be redressed by their elimination.” *Id.* Citing a quote *Allen v. Wright*, 468 U.S. 737 (1984) in which the Supreme Court stated that it is “entirely speculative ... whether withdrawal of a tax exemption from any particular school would lead the school to change its policies”, the Court in *Khalaf* went on to state “[i]t would be, if anything, more fanciful still to assume here that the government of Israel is so responsive to changes in U.S. tax laws that the withdrawal of benefits from U.S. contributors will work any alteration whatsoever...” 55 AFTR 2d 85-647,649.

The Court of Appeals applied the same reasoning to dismiss similar claims in *Abulhawa, Susan, et al v. U.S. Dept of the Treas, et al*, (2017, DC Dist Col) 119 AFTR 2d 2017-1042, *reconsideration denied* (2017, DC Dist Col) 120 AFTR 2d 2017-5769, *aff’d* (2018, CA Dist Col) 121 AFTR 2d 2018-2201. The plaintiffs in that case claimed that the Treasury, through the IRS, improperly granted tax-exempt status to approximately 150 entities that “finance non-charitable activities, such as the seizure of Palestinian-owned property and acts of discrimination and physical violence against the Palestinian people.” *Id.* at 2018-2202. The Court of Appeals found Plaintiffs’ argument that investigations of the tax-exempt status of the entities would eliminate the flow of money to the settlements, and thereby materially reduce the risk of future injuries “not plausible because it depended on a long chain of improbable assumptions such as that (1) the Treasury would find all of the Section 501(c)(3) organizations sending funds to the specific groups that could be implicated

in the potential future theft of ... land or in inflicting future injuries ...; (2) the Treasury would choose to investigate those 501(c)(3) organizations; (3) the Treasury would revoke their tax-exempt status; (4) those entities' and their donors' willingness to send funds to Israeli settlers would evaporate in the absence of a tax benefit; and (5) no other sources of funds exist, or would appear, anywhere in the world to support the settlement activities.” *Id.* at 2018-2204. And when the IRS did once try to illegally impose heightened scrutiny to an application for tax-exempt status received from an organization connected to Israel because it dealt with “disputed territories,” the agency was forced to issue an official apology through the Department of Justice. In that instance Z Street, a non-profit corporation dedicated to educating the public about various issues related to Israel and the Middle East, alleged that the IRS applied heightened scrutiny to applications for tax-exempt status received from organizations connected in any way to Israel, and applied this policy to Z Street’s application, resulting in delay. The settlement agreement included an apology from the IRS to Z Street for the delayed processing of the group’s application for tax-exempt status.

As a matter of policy, the letter was also entirely wrong about the United States’ position on Israeli settlements. In fact, the U.S., officially, does *not* consider Israeli settlements to be inconsistent with international law. In addition, despite what the authors of the letter might wish, the United States does in fact recognize Jerusalem as the capital of the State of Israel. And even if there *was* a U.S. policy that considered settlements illegal, that policy would have nothing to do with U.S. *citizens* giving charity to the people in those communities, which is what these organizations do. The alleged “violation” of international law would be on the part of the Israeli government, not the settlers themselves, and certainly not the people providing humanitarian aid to those who live there.

Finally, as a matter of fact, the letter was either intentionally misleading or inexcusably ill-informed with regard to almost every single assertion it contained.

For example, while claiming that Israeli forces “occupied” the disputed territories in 1967, it completely *ignored* any of the actual historical and legal context of Israel’s presence in those areas.

Briefly: In 1922 the League of Nations Mandate for Palestine established an area (which included the West Bank) to be a national home for the Jewish people. Article 6 of the mandate explicitly encouraged “close settlement by Jews on the land.” This was not a “gift” to the Jews, nor was it established at anyone else’s expense. Jews have lived in these areas continuously for over 4000 years. As Winston Churchill, then secretary of state for the colonies, explained, “When it is asked what is meant by the development of the Jewish National Home in Palestine, it may be answered that it is not the imposition of a Jewish nationality upon the inhabitants of Palestine... but the further development of the existing Jewish community... [I]n order that this community should have the best prospect of free development... it is essential that it should know that it is in Palestine as of right and not on sufferance.”

When the United Nations was formed it re-affirmed the arrangement, and after Britain announced that it would leave the area, the U.N. proposed a partition plan that was not accepted by the Arab world, which left the extant Mandate lines intact. Under the international legal principle of *Uti possidetis juris*, emerging states presumptively inherit their pre-independence administrative

boundaries, and thus international law dictates that Israel, the only state to ever have emerged from that Mandate, inherited the boundaries of the Mandate of Palestine as they existed in May, 1948. Of course, when Israel declared independence, it was immediately attacked by five Arab nations. Two of the invading Arab armies, Jordan (West Bank) and Egypt (Gaza Strip) occupied territory that they had taken through aggressive action – the kind of aggressive action that is forbidden under international law. The famous “Green Line” was drawn for no other reason than to mark off on a map how far those two invading armies had gotten; the armistice agreements themselves state that these were never meant to be actual borders. To give meaning under international law to these ‘pre-67 lines,’ as the authors of this letter do, is, ironically, to retroactively ratify aggression against the mandate and support occupation. In 1967, Israel regained those territories in what was undisputedly a defensive war. While the UN charter forbids aggression, UN Charter Article 51 clearly recognizes “the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.” Under international law, occupation occurs when a country takes over the sovereign territory of another country. But the West Bank was never part of Jordan, which seized it in 1949 and ethnically cleansed its entire Jewish population. Moreover, a country cannot occupy territory to which it has sovereign title, and Israel has the strongest claim to the land. I To quote Former State Department Legal Advisor Professor Stephen Schwebel, who later headed the International Court of Justice in the Hague: “Where the prior holder of territory had seized that territory unlawfully, the state which subsequently takes that territory in the lawful exercise of self-defense has, against that prior holder, better title.” To summarize, Israel was given land under a Mandate that was never repealed, two other countries attacked Israel and squatted on the land for a while, and then, when they attacked Israel again and once again lost, Israel regained the land she had originally been given.

The letter claims that Israel has a “broad settlement enterprise to create and sustain illegal settlements, pursuant to a policy of settling its civilians” in these territories. Of course there is no citation because none of that is true, and Israel has no such policy. In fact, Israel has repeatedly, offered plans for peace that would resolve the conflict over the territories. Some of those plans were incredibly generous, and some, including the Clinton Parameters, were even supported by much of the Arab world- and the Democratic Party. Perhaps the authors of the letter should consider these facts: Israel (legitimately) gained a total of 26,178 square miles of territory in the 1967 Six Day War. To date, it has given back over 23,871 square miles, or 87 percent, of that territory. At various times in recent history (including deals offered in 2000, 2008, 2014, and 2020), Israel has offered up to 99.3 percent of the remaining disputed territory in exchange for peace. Each time, the Palestinians refused.

Of course, the letter ignores all of that, and just proceeds to recite (with zero support) false allegations about Israeli authorities seizing land and displacing Palestinians. In fact, Israel upholds the rule of law in its property disputes between Jews and Arabs equally in court, as the Israeli Supreme Court did once again this week in the Sheikh Jarrah matter, a case that the authors of this letter have repeatedly lied about in the past, and continue to lie about in this letter.

What these lawmakers *really* mean is that they want to revoke the tax-exempt status of these charities because they (the lawmakers) do not agree with their (the charities') views. Nothing could be more un-American.

In theory that should end the discussion. But the fact is that the letter does raise an interesting point. Maybe there *are* some organizations that should have their status looked at.

The above analysis would be quite different if we were talking about groups that have been found to be engaged in any "terrorist activities." If they were identified as such then under IRC Section 501(p) their tax exemptions would be automatically suspended without any action required to be taken by the IRS. Such a suspension would come into effect if an organization was "designated or otherwise individually identified" (1) under the Immigration and Nationality Act as a "terrorist organization or foreign terrorist organization", (2) in or pursuant to an Executive Order related to terrorism "for the purpose of imposing on such organization an economic or other sanction," or (3) in or pursuant to an Executive Order "as supporting or engaging in terrorist activity." No income, gift, or estate tax deduction would be allowed for a contribution to the organization during the suspension period. Neither an organization nor a donor to the organization would be permitted to challenge a suspension under these rules or a designation or identification leading to the suspension in any administrative or judicial proceeding relating to the Federal tax liability of such organization or other person. If an organization's tax exemption became suspended under the statute the IRS would be required to update the listings of tax-exempt organizations and publish an appropriate notice to taxpayers of the organization's suspension, and the fact that contributions to the organization are not deductible during its "suspension period."

In 2016, the House Foreign Affairs Committee Subcommittee on Terrorism, Nonproliferation, and Trade and the Subcommittee on the Middle East and North Africa heard testimony from Jonathan Schanzer, a former terrorism finance analyst for United States Department of the Treasury. Americans for Justice in Palestine Educational Foundation (AJP) a nonprofit umbrella group that fiscally sponsors US-based Boycott, Divestment, and Sanctions (BDS) organizations funnels money to terrorist groups that specialize in killing Jews and that call for Jewish genocide, including Hamas. This is against the law, and, of course, public policy. We assume that the concerned Members who signed this letter- all of who have publicly supported BDS- must not have known about this information, and will now happily agree that the exempt tax status of these organizations should definitely be investigated and revoked. To the extent that your office would like additional information about these matters we would be more than happy to provide it.

Sincerely,

A handwritten signature in black ink that reads "Jay Alan Sekulow". The signature is fluid and cursive, with the first name "Jay" being particularly prominent.

Jay Alan Sekulow
Chief Counsel