

Note from the Attorney General's Office:

1951 Op. Att'y Gen. No. 51-1019 was overruled by 1983
Op. Att'y Gen. No. 83-086.

1019

RED CROSS, AMERICAN NATIONAL—REINCORPORATED BY ACT OF CONGRESS, MAY 8, 1947, 61 STAT., 82—IS NOT SUCH AGENCY OF FEDERAL GOVERNMENT AS WOULD MAKE IT ELIGIBLE FOR TAX EXEMPTION—MOTOR VEHICLE FUEL—SECTION 5527 G. C.

SYLLABUS:

The American National Red Cross, as reincorporated by the Act of Congress of May 8, 1947 (61 Stat., 82) is not such an agency of the federal government as would make it eligible for tax exemption under the provisions of Section 5527, General Code.

Columbus, Ohio, December 21, 1951

Hon. John W. Peck, Tax Commissioner
Department of Taxation, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Under date of October 8, 1937, the Honorable Herbert S. Duffy, then attorney general of Ohio, issued Opinion No. 1283, the syllabus of which reads as follows:

“1. The American National Red Cross is not such an agency of the United States as would entitle it to claim exemption or claim refund for excise taxes paid on purchases of motor vehicle fuel and liquid fuel made by the Society, in this state.

“2. There is no authority for the Tax Commission of Ohio to make refund to the American National Red Cross, of motor

vehicle fuel tax or liquid fuel tax paid by such society on purchases of these items made in this state, because such purchases of motor vehicle fuel or liquid fuel by the American National Red Cross in this state are not purchased by the "United States Government or any of its agencies," as that term is used in Sections 5527, 5541 and 5542-2 of the General Code of Ohio.'

"Subsequent to this opinion the American National Red Cross, by a special act of Congress, was reincorporated on May 8, 1947.

"The question has been presented to this office as to whether the status of the American National Red Cross has been changed to the extent that it might be considered an agency of the United States Government and thereby entitled to claim exemption from the motor vehicle fuel tax as imposed by the laws of this state."

The tax exemption to which reference is made in your inquiry is provided for in subparagraph (d) of Section 5527, General Code, in the following language:

"* * * provided, however, that no tax is hereby imposed upon or with respect to the following transactions:

"* * * (d) The sale of motor vehicle fuel to the United States government or any of its agencies, except such tax as may be permitted by it * * *"

By reference in Section 5541, General Code, the same exemption provision is applicable to the tax thereby imposed.

The question here presented is, therefore, whether the American National Red Cross is such an agency of the United States as the General Assembly intended to exempt from the tax under consideration.

We may properly observe at the outset that taxation is the rule and exemption from a tax is the exception; and that there is a presumption against a surrender by the state of its taxing power. 51 American Jurisprudence, 529, Sec. 526. It is settled, of course, that Congress has the power, under Article IV, Section 3, United States Constitution, to exempt federal agencies and instrumentalities from state taxation. *Cleveland v. United States*, 323 U. S., 329, 86 L. Ed. 274. However, in the case of the American National Red Cross, there is no federal statutory provision prohibiting taxation by the State; and it has been held, in the absence of such a statutory provision of immunity, that "no implied constitutional immunity can rest on the merely hypothetical interferences

with governmental functions.” *Oklahoma Tax Commission v. Texas Company*, 336 U. S., 342, 365, 93 L. Ed. 721, 739. In this situation it is logical to conclude, in my opinion, that the General Assembly, in the enactment of the exemption provision relative to governmental agencies in Section 5527, *supra*, had no intention of exempting *all* government agencies from the exaction in question, but rather, in recognition of the constitutional limitations involved, intended to exempt only (a) those agencies as to which Congress had provided an express exemption, and (b) those agencies of such nature that a state tax imposed upon them would actually, and in practical effect, amount to an interference with federal governmental functions, as opposed to a mere hypothetical interference. In this connection it may well be supposed that if the nature of a federal agency is such that a state tax imposed upon it would effect only a hypothetical interference with a governmental function, and if there is no federal statutory provision exempting it from state taxation, then the agency must fall into the category of those as to which “such tax * * * may be permitted” within the meaning of the proviso in which this language is used in Section 5527, *supra*.

We are thus confronted with the problem of ascertaining whether the American National Red Cross is a federal agency of such nature that the imposition of a state tax upon it would actually and practically amount to an interference with a federal governmental function.

As you have indicated, this question was considered by one of my predecessors in office in Opinion No. 1283, Opinions of Attorney General for 1937, p. 2200, the syllabus in which is quoted in your letter of inquiry. From an examination of the discussion in that opinion, it appears that the writer was led to the conclusions therein reached by two principal considerations. First, it was noted that the American National Red Cross operates wholly with funds raised by voluntary contributions and enjoys no allowance of public funds raised by taxation. Second, except for the auditing of its accounts as disclosed in its annual fiscal report filed with the War Department, the government exercises no immediate control over the functions of the American National Red Cross and the organization enjoys wide discretion in the choice of activities, within the scope of its powers, to which its efforts and funds will be devoted.

As noted in your inquiry, the American National Red Cross was reincorporated by special act of Congress since the rendition of the 1937

opinion, *supra*. It is proper, therefore, to observe the changes thereby made and their legal effect, if any, on the essential nature of the organization.

The purposes of the organization, as set forth in Section 3 of the Act of January 5, 1905 (Title 36, Sec. 3, USC), were:

“The purposes of the corporation are and shall be—

“First. To furnish volunteer aid to the sick and wounded of armies in time of war, in accordance with the spirit and conditions of the conference of Geneva of October, 1863, and also of the treaty of the Red Cross, or the treaty of Geneva, of August 22, 1864, to which the United States of America gave its adhesion on March 1, 1882.

“Second. And for said purposes to perform all the duties devolved upon a national society by each nation which has acceded to said treaty.

“Third. To succeed to all the rights and property which have been hitherto held and to all the duties which have heretofore been performed by the American National Red Cross as a corporation duly incorporated by Act of Congress June 6, 1900, which Act is hereby repealed and the organization created thereby is hereby dissolved.

“Fourth. To act in matters of voluntary relief and in accord with the military and naval authorities as a medium of communication between the people of the United States of America and their Army and Navy, and to act in such matters between similar national societies of other governments through the ‘Comite International de Socours,’ and the Government and the people and the Army and Navy of the United States of America.

“Fifth. And to continue and carry on a system of national and international relief in time of peace and apply the same in mitigating the sufferings caused by pestilence, famine, fire, floods, and other great national calamities, and to devise and carry on measures for preventing the same. (Jan. 5, 1905, c.23, Sec. 3, 33 Stat. 600.)”

In the Act of May 8, 1947, the first two paragraphs of this section were amended to read:

“The purposes of the corporation are and shall be—

“First. To furnish volunteer aid to the sick and wounded of armies in time of war, in accordance with the spirit and conditions of the conference of Geneva of October, eighteen hundred and sixty-three, and also of the treaties of the Red Cross, or the

treaties of Geneva, of August twenty-second, eighteen hundred and sixty-four, and July twenty-seventh, nineteen hundred and twenty-nine, to which the United States of America has given its adhesion, and also of any other treaty or convention similar in purpose to which the United States of America may hereafter give its adhesion.

“Second. And for said purposes, to perform all the duties devolved upon a national society by each nation which has acceded to any of said treaties or conventions.”

Section 4 of the Act of January 5, 1905, relating to fraudulent use of the American National Red Cross insignia, was repealed in the 1947 amendment, presumably because the subject was then covered in the federal criminal code.

Newly enacted in the Act of May 8, 1947, was Section 4a, which reads:

“Membership in the American National Red Cross shall be open to all the people of the United States, its Territories, and dependencies, upon payment of the sums specified from time to time in the bylaws.

“The chapters of the American National Red Cross shall be the local units of the corporation within the States and Territories of the United States. The regulations with respect to the granting of charters to the chapters and the revocation of the same, the territorial jurisdiction of the chapters, the relationship of the chapters to the corporation and compliance by the chapters with the policies and rules of the corporation, shall be as determined from time to time by the Board of Governors. Such regulations shall require that each chapter shall, in the election of the governing body of the chapter and in the selection of delegates to the national convention of the corporation, adhere to democratic principles of election as specified in the bylaws. (Jan. 5, 1905, c.23, sec. 4a, as added May 8, 1947, c.50, sec. 5, 61 Stat. 81.)”

The governing body of the organization was provided for in Section 5 of the Act of January 5, 1905, which read in part as follows:

“The governing body of the American National Red Cross shall consist, in the first instance, of a central committee numbering eighteen persons, to be appointed in the manner following, namely: Six by the incorporators herein named and twelve by the President of the United States, one of whom shall be designated by the President to act as chairman. It shall be the duty of the central committee to organize with as little delay as possible State and Territorial societies, including the District of

Columbia, under such rules as the said committee may prescribe. When six or more State or Territorial societies have been formed, thereafter the central committee shall be composed as follows: Six to be appointed by the incorporators, six by the representatives of the State and Territorial societies at the annual meeting of the incorporators and societies, and six by the President of the United States, one of whom shall be designated by him as chairman and one each to be named by him from the Departments of State, War, Navy, Treasury, and Justice.

“The first six members of the central committee elected by the incorporators at the first annual meeting, and the first six members of the central committee elected by the State and Territorial delegates, shall when elected select by lot from their number two members to serve one year, two members to serve two years, and two members to serve three years, and each subsequent election of members shall be for a period of three years or until their successors are duly elected and qualify. The six members of the central committee appointed by the President at the annual meeting shall serve for one year.”

This section, as amended in 1947, reads in part:

“The governing body of the corporation in which all powers of government, direction, and management of the corporation shall be lodged, shall consist of a Board of Governors numbering fifty persons, to be appointed or elected in the manner following, namely:

“(a) Eight Governors shall be appointed by the President of the United States. Of the Governors so appointed, one shall be designated by the President of the United States to act as the principal officer of the corporation with such title and such functions as may from time to time be prescribed in the bylaws; and the remainder shall be officials of departments and agencies of the Federal Government, whose positions and interests are such as to qualify them to contribute toward the accomplishment of Red Cross programs and objectives. Of these at least one and not more than three shall be selected from the armed forces.

“(b) Thirty Governors shall be elected by the chapters. The Governors so elected shall be elected at the national convention under procedures for nomination and election which shall be such as to insure equitable representation of all the chapters, having regard to geographical considerations, to the size of the chapters and to the size of the populations served by the chapters.

“(c) Twelve Governors shall be elected by the Board of Governors as members-at-large. The Governors so elected shall be individuals who are representative of the national interests

which it is the function of the Red Cross to serve, and with which it is desirable that the corporation shall have close association.”

I find nothing in these amendments which effect any change in the essential purposes of the organization or in the degree of its governmental control which could be deemed of any legal significance with respect to the question at hand.

Of some interest, however, is Section 10 of the Act of January 5, 1905, unchanged by the 1947 amendments. This section reads:

“Whenever in time of war, or when war is imminent, the President shall find the cooperation and use of the American National Red Cross with the land and naval forces to be necessary, he is authorized to accept the assistance tendered by the said Red Cross and to employ the same under the land and naval forces in conformity with such rules and regulations as he may prescribe.”

These statutory provisions are cogent evidence of the extent to which the American National Red Cross is independent of government control. It will be noted that the organization is under no legal compulsion to serve with the armed forces in time of war, but that the President may *accept* its assistance when *tendered*. It would appear from this that the American National Red Cross occupies a position to a large extent comparable to that of any person, natural or corporate, who volunteers to serve without compensation in time of war in a non-military capacity.

In view of the quite limited extent of governmental control of this organization, and the high degree of autonomy which it enjoys; I am impelled, despite the obvious value and importance of its activities as related to the national welfare, to the conclusion that it is a quasi-governmental agency only, and is not one for which the General Assembly intended, in the enactment of Section 5527, General Code, to provide an exemption.

Respectfully,

C. WILLIAM O'NEILL

Attorney General.