

Private foundation self-dealing; use of private road by disqualified person. The use of a private foundation museum's private road for access to the adjacent headquarters and manufacturing plant of a corporation (a disqualified person) during the same hours the road is used by the general public as a thoroughfare connecting two public streets is not an act of self-dealing.

Advice has been requested whether, under the circumstances described below, the use of a private foundation's private road by a disqualified person constitutes an act of self-dealing within the meaning of section 4941(d)(1)(C) of the Internal Revenue Code of 1954.

The private foundation is exempt from Federal income tax under section 501(c)(3) of the Code, and is a private foundation within the meaning of section 509(a). Its primary activity is the operation of a museum open to the general public.

Adjacent to the private foundation's museum property is the headquarters and manufacturing plant of a corporation that is a disqualified person, within the meaning of section 4946(a) of the Code, with respect to the foundation. Separating the foundation's property and the property of the disqualified person is a private road owned by the foundation. This road serves as the entrance to the foundation's museum, and is open at all times that the museum is open. Access to the road is permitted only through gates at either end controlled exclusively by the foundation. During the period of time that the road is open, the general public is permitted to use the road for access to the museum, or as a thoroughfare connecting two public streets that intersect it at either end.

In addition to providing access to the museum, and connecting the two public streets, the road is intersected by an entrance drive to the property of the disqualified person. The corporation's employees and members of the public doing business with the corporation may use the road whenever the gates are open.

During the hours that the road is open to the public, it is in fact in regular and continuous use as if it were an integral part of the municipal street system. Residents and visitors to the community use the road as a thoroughfare between the two public streets that intersect the road at either end. There is presently no convenient substitute for traveling between the two public streets.

In order to induce the foundation to continue its practice of allowing use of the road by the corporation and the general public, the corporation has entered into an agreement with the foundation to keep the road in good repair at the expense of the corporation. This agreement provides that the use of the road by

the corporation shall be subject to the same restrictions or conditions that the foundation imposes on such use by the general public.

Section 4941(a) of the Code imposes a tax on any act of 'self-dealing' between a disqualified person and a private foundation.

Section 4941(d)(1)(C) of the Code defines the term 'self-dealing' to include the furnishing of goods, services, or facilities between a private foundation and a disqualified person.

Section 4941(d)(2)(D) of the Code provides that the furnishing of goods, services, or facilities by a private foundation to a disqualified person shall not be an act of self-dealing if such furnishing is made on a basis no more favorable than that on which such goods, services, or facilities are made available to the general public. Section 53.4941(d)-3(b)(2) of the Foundation Excise Tax Regulations provides that this exception does not apply, however, unless there are a substantial number of persons other than disqualified persons who actually use the goods, services, or facilities.

Section 53.4941(d)-3(b)(1) of the regulations provides that, after May 16, 1973, the exception set forth in section 4941(d)(2)(D) of the Code shall only apply if the goods, services, or facilities are functionally related, within the meaning of section 4942(j)(5), to the exercise or performance by a private foundation of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501(c)(3).

Rev. Rul. 76-10, 1976-1 C.B. 355, holds that the use of a private foundation's meeting room by a disqualified person is not an act of self-dealing within the meaning of section 4941(d)(1)(C) of the Code. The room is made available to the disqualified person on the same basis that it is made available to the general public, and is functionally related within the meaning of section 4942(j)(5) to the performance of an exempt purpose of the foundation.

Generally, by permitting a disqualified person to use its private road, a private foundation would be engaging in an act of self-dealing. However, in this situation, the road is made available to the disqualified person on a basis that is no more favorable than the basis on which it is made available to the general public. In addition, a substantial number of persons other than disqualified persons actually use the road. The fact that the disqualified person has agreed to maintain the road does not entitle it to any special privileges with respect to the use of the road not otherwise available to the general public. Further, the use of the road as an entrance to the foundation's museum is functionally related within the meaning of section 4942(j)(5) of the Code to the foundation's exempt purpose of

operating a museum for the benefit of the general public.

Accordingly, the use of the private foundation's private road by the disqualified person does not constitute an act of self-dealing within the meaning of section 4941(d)(1)(C) of the Code.