2001

Benevolent and Protective Order of Elks v. Salt Lake County Board of Equalization and Earl M. Baker, Salt Lake County Assessor, Tax Commission of the State of Utah : Petition for Writ of Certiorari

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

BENEVOLENT AND PROTECTIVE ORDER OF ELKS, NO. 85,
Petitioner,

vs.

SALT LAKE COUNTY BOARD OF EQUALIZATION and EARL M. BAKER, SALT LAKE COUNTY ASSESSOR,

and

TAX COMMISSION OF THE STATE OF UTAH,
Respondents.

Case No. 13826

BRIEF OF RESPONDENTS, SALT LAKE COUNTY BOARD OF EQUALIZATION AND SALT LAKE COUNTY ASSESSOR

Action in Certiorari to Review the Proceedings and Order of Tax Commission of the State of Utah

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STATEMENT OF THE NATURE OF THE CASE

Petitioner, in his brief, incorrectly states the nature of the case to be a review of the proceedings, decisions and orders of the Salt Lake County Board of Equalization. This is an original action in certiorari to review the proceedings, decisions and order of the State Tax Com-

mission of Utah wherein the Tax Commission, pursuant to a formal hearing, sustained the decision of the Salt Lake County Board of Equalization determining that certain properties located in Salt Lake County and owned by the Benevolent and Protective Order of Elks, Lodge No. 85, were not entitled to an exemption from ad valorem property taxes for the year 1973.

RELIEF SOUGHT ON APPEAL

Respondent, Salt Lake County, seeks affirmation of the decision of the State Tax Commission of Utah upholding the decision of the County Board of Equalization wherein said County Board found that the improved real property owned by the petitioner was not being used exclusively for charitable purposes as the term is defined by Article XIII, Section 2, of the Constitution of the State of Utah, and Utah Code Annotated, Sections 59-2-1, 59-2-30 and 59-2-31, and that the property of petitioner was subject to property taxes for the calendar year 1973.

STATEMENT OF FACTS

Petitioner, B. P. O. E. No. 85, is a fraternal organization and a corporation existing under and by virtue of the laws of the State of Utah.

The Salt Lake County Board of Equalization is a board of Salt Lake County Commissioners existing by virtue of the laws of the State of Utah.

Petitioner, B. P. O. E. No. 85, is the owner of certain improved property located at 139 East South Temple, Salt Lake City, Utah, more commonly known as the Elks' Lodge. During the year 1973, petitioner filed an application for exemption with the Salt Lake County Board of Equalization (T-4 through T-38). On the 2nd day of July, 1973, the Salt Lake County Board of Equalization issued its written decision specifically finding and concluding as follows:

> 1. The appellant, Salt Lake Lodge No. 85, Benevolent and Protective Order of Elks of the United States, is a Utah non-profit corporation incorporated in 1950. It is also a subordinate lodge of the National Order of Elks.
>
> 2. The purposes and objects for which the corporation was formed are fraternal, charitable, patriotic, historical and educational.
>
> 3. To further these purposes, the corporation is authorized to: purchase, acquire, hold or convey all such real and personal property as may be necessary to carry on or promote the purposes of the organization.
>
> 4. Applicant's property consists of two buildings — a lodge building and an office building. The office building is not used for lodge purposes, but is leased for $700 per month. The lodge building is used primarily by and for the membership and their families and contains a lounge and dining room facilities for the benefit of the members.
>
> 5. The nature and extent of the activities on the property claimed to be exempt is also in-

dicated by the supporting financial data of the lodge which was filed with the application. The activities indicated therein clearly demonstrate that the overall primary use of applicant's property is to produce rental and other income and for the fraternal and social benefit of the lodge, its members and their families, and any charitable use is merely incidental to the primary use by the lodge, its members and their families.

CONCLUSION:

1. The real property and improvements owned by the applicant [is] not used exclusively for charitable purposes within the meaning of Article XIII, Section 2, of the Constitution of the State of Utah, and Sections 59-2-1, 59-2-30 and 59-2-31, Utah Code Annotated, as amended.

Petitioner, B. P. O. E., No. 85, filed a notice of appeal with the Tax Commission of Utah, thereby appealing the decision of the Salt Lake County Board of Equalization to tax the property owned by B. P. O. E., No. 85 (T-1-2).

Thereafter, a formal hearing was held before the Tax Commission of Utah on the 2nd day of July, 1974 (T-49).

On the 26th day of August, 1974, the Tax Commission issued its written Findings of Fact and Conclusions of Law (T-51-53). The pertinent portions of the Findings and Conclusions of the Tax Commission are as follows:

"4. The Elks' Lodge building in question is made up of five floors, plus a basement constituting six floors — the use of which includes a large variety of social functions, including dinner, dancing, liquor consumption, organization meetings, as well as some charitable functions, which take place in the Elks' Lodge building each year.

5. The third floor of the Elks' Lodge building, known as the Goodwill Room, is operated exclusively for charitable purposes and the distribution of clothing to the needy.

6. Proceeds from food sales, liquor and cigar consumption on the premises, after expenses, go into a general fund, to be in part used for the benefit of different charitable programs of appellants.

7. In fiscal 1973, approximately $300,000.00 gross revenue was received by appellant, $39,000.00 of which was received specifically for charitable purposes and $29,000.00 of which was actually expended for charitable purposes.

8. Appellant performs patriotic, charitable and civic functions, which include an annual Christmas party for the crippled and handicapped; Elks' Boys and Girls Club, scouts, youth scholarship programs, foreign exchange students programs, veterans remembrance programs — all of which renders a great service to the community.

9. The majority of charitable functions fulfilled by appellant are through cash donations of members, plus a multitude of man-hours contributed outside of the premises in question.

10. Other than the Goodwill Room on the third floor of the building and other than some organization functions, most other charitable functions are held at locations and buildings other than the buildings here in question.

11. The appellant participates in many other civic, patriotic and worthwhile activities, but such participation does not constitute the exclusive charitable use of the property.

12. Appellant makes no contention that its property is used for religious purposes, but maintains that its charitable functions within and without the premises render appellant's premises tax exempt."

From the foregoing factual determination made by the Tax Commission of Utah pursuant to its formal hearing, the following Conclusions of Law were issued:

"1. Article XIII, Section 2, of the Utah State Constitution, providing that lots with buildings thereon used exclusively for either religious worship or charitable purposes shall be exempt from taxation, (See, also, Utah Code Annotated, Section 58-21-1 (1953)) is applicable to the case at hand.

2. Appellant's case of *Elks* v. *Groesbeck*, 40 Utah 8, is not applicable to the present situation, since a substantial portion of appellant's area is used for membership, social and recreational or is unused for any purpose, and the above cited case held that members' activities were incidental to its charitable use and is, therefore, differentiated from the present situation.

3. Exemption from ad valorem property taxes in the State of Utah is based upon actual use of the property in question and not on the use of income derived from the operations thereon, or on participation in civic and patriotic functions.

4. Appellant's property in question during the calendar year 1973 was not used exclusively for charitable or religious purposes. The decision of the Salt Lake County Board of Equalization should be, therefore, affirmed."

Based upon its Findings and Conclusions, the Tax Commission issued its decision affirming the decision of the Salt Lake County Board of Equalization on the 26th day of August, 1974 (T-55).

Petitioner, in its brief, does not dispute or challenge the factual determinations made by the Tax Commission of Utah, but in effect, asserts that the legal conclusions of the Commission with respect to said facts are incorrect. Respondent, therefore, asserts that the only operative facts pertinent to the disposition of this appeal and before this Honorable Court are those findings of fact made by the Commission.

ARGUMENT

POINT I.

THE ELKS' LODGE WAS NOT BEING USED EXCLUSIVELY FOR CHARITABLE PURPOSES TO QUALIFY IT FOR EXEMPTION FROM TAXATION UNDER AND BY VIR-

TUE OF ARTICLE XIII OF THE CONSTITUTION OF UTAH, AND SECTION 58-2-1, UTAH CODE ANNOTATED, 1953, AS AMENDED.

The sole question to be resolved in this case is whether the building and premises known as Elks' Lodge No. 85 have been used exclusively for charitable purposes, as shown by the facts adduced in this case, under and by virtue of Article XIII, Section 2, of the Constitution of Utah and Section 59-2-1, Utah Code Annotated, 1953, as amended.

Respondent, Salt Lake County, emphatically contends that Elks' Lodge No. 85 has not met the burden required of it to show that its property is exempt from taxation. And the decision of the Tax Commission of Utah should, therefore, be affirmed.

Article XIII, Section 2, of the Utah Constitution provides, in part, as follows:

> "All tangible property in the state, not exempt under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The property of the state, counties, cities, towns, school districts, municipal corporations and public libraries, lots with the buildings thereon used exclusively for either religious worship or charitable purposes, * * * shall be exempt from taxation. * * *"

Section 59-2-1, Utah Code Annotated 1953, provides as follows:

> "The property of the United States, of this state, counties, cities, towns, school districts, municipal corporations and public libraries, lots with the buildings thereon used exclusively for either religious worship or charitable purposes, * * * shall be exempt from taxation."

The general rule of construction regarding property tax exemptions is that all property of whatever kind soever and by whomsoever owned is subject to taxation. An exemption must not be aided by judicial interpretation. The rule of strict construction applies. All doubts must be resolved against the exemption. See *Praker* v. *Quinn*, 64 P. 961, 23 Utah 332 (1901).

This Court has generally recognized that the exemptions from taxation granted to properties used exclusively for charitable purposes are dependent upon the actual use of the premises. As was stated by this Court in *Friendship Manor Corporation* v. *Tax Commission*, 26 Utah 2d 227, 487 P. 2d 1272 (1972).

> "It is *the use to which it puts its real property, which is the determination of whether or not such property is exempt.* If the charitable organization does not use its real property and building thereon exclusively for charitable purposes, such property is not exempt, notwithstanding the fact that the owner thereof is a charitable organization." (at page 234) (Emphasis supplied.)

The Salt Lake County Board of Equalization found that the activities conducted upon petitioner's premises "clearly demonstrate that the overall primary use of applicant's property is to produce rental and other income and for the fraternal and social benefit of the lodge, its members and their families, *and any charitable use is merely incidental to the primary use by the lodge, its members and their families.*" Our Constitution, Article XIII, Section 2, requires that the property be used *exclusively for charitable purposes* to be exempt. Incidental use for charitable purposes is not sufficient. See Article XIII, Section 2, Constitution of Utah. The Tax Commission in affirming the decision of the County Board of Equalization found that the majority of the charitable functions of the organization are held at locations and buildings other than the building here in question. And the use of the property includes a large variety of social functions, including dinner, dancing, liquor consumption, and organization meetings. And that the proceeds from food sales, liquor and cigar consumption on the premises, after expenses, go into a general fund, to be in part used for the benefit of different charitable programs of appellant. However, the general fund is used by the lodge to pay all operating expenses of the lodge and it is only after all expenses are met that any such funds might be available for charity (See T-p. 109, 112 and 113). In short, any monies that might result from the fraternal and social activities and use of the lodge by the members and their guests would be available for charity only after the expenses of operations are met. Charity then is a secondary

consideration of the overall activities conducted upon the premises in question. This Court's attention is directed to the universal truth written by the Supreme Court of the State of Missouri in denying an exemption to the Benevolent and Protective Order of Elks 61 years ago:

> Charity is not a promiscuous mixer. Here she modestly stands outside or goes away and waits; waits until the plaintiff has finished using the spacious and comfortable rooms for the pleasures of its members; waits until the curtain has fallen upon the last scene of the vaudeville performance on the stage; until the dancers are tired and have gone home; until the billiard rooms have been deserted to the markers; until the plaintiff has paid the cost of its own entertainment and goes out and finds her and hands her whatever it may have left in its own pocket. She gets not the use of the premises but what remains of income to the owners after they have used it in carrying out the injunction of their organic law, by promoting their own welfare, enhancing their own happiness, and cultivating their own good fellowship among themselves.

See *St. Louis Lodge* v. *Koeln*, 262 Mo. 444, 171 S. W. 329 (1914). To extend the language of the Utah Constitution to a point whereby petitioner's property is granted exemption would be contrary to the plain meaning of the language creating religious and charitable exemptions.

In order to be entitled to an exemption, the prop-

erty exempted must be used in such a manner that the state is relieved of a burden that it must otherwise assume. As this Court stated in *Friendship Manor*, supra, at page 1277:

> "The power to tax rests upon necessity and is essential to the existence of the state, and in order to be exempt, the state must be benefited in some regard so as to relieve the state of some burden."

Is the State of Utah required to provide a facility whereby members of a fraternal order may meet and have dinner? It the State of Utah required to provide a facility whereby members of a fraternal order may hold a dance? Is the State of Utah required to provide a facility whereby members of a fraternal order or their families may consume liquor or hold meetings? The answer is no. As this Court stated again in *Friendship Manor*:

> "The state does not have the obligation to provide living accommodations to persons well, able and willing to pay for their needs."

Certainly, in the instant case, there is no obligation upon the state to make such a facility available. To be entitled to exemption, the physical property under consideration must be used for charity and such exemption does not extend to the institution per se. See *Odd Fellows' Building Ass'n* v. *Naylor*, 177 P. 214, 53 Utah 111 (1918). This principal was perhaps most clearly discussed by the Arizona Supreme Court in 1932:

> "Applying these principles of law to the facts, it is obvious to us that, even assuming Arizona Lodge No. 2 is a 'charitable institution' within the constitutional provision, the Masonic Temple is not a 'charitable institution' within the terms of Section 3067, supra. It consists of three lodge rooms, an auditorium, banquet rooms, offices for officials, lounge rooms, kitchen, and various storage rooms, appropriately furnished and prepared for use for which their names designate. None of the rooms is used in any manner for the relief of the indigent or the afflicted. The only connection which the temple has with such relief is that the organization which owns it has that as one of its objects, and uses part of its funds derived from many sources, among which is the rental of certain portions of the temple, for that purpose."
>
> *Conrad* v. *Maricopa County*, 40 Arizona 390, 12 P. 2d 613 (1932) at page 615.

A distinction must, therefore, be made between those charitable lands used directly for the purpose of charity as opposed to those which provide income which is later put to eleemosynary purposes. The uses of petitioner's property in the instant case are as a parking area, for lodge activities, liquor and cigar sales and consumption, and other meetings and social and fraternal activities of the members. The third floor from the basement is used 75% for storage and processing of clothing for indigents and 25% for storage of petitioner's property (T-88 & 89). The direct use of the property, therefore, is for the activities of its members. To consider the property of

petitioner as being used exclusively for charitable purposes as that term was intended by the framers of the Utah Constitution:

> ". . . would amount to an absolute perversion of the plain meaning and intent of the framers of the constitution and the citizens of the state who afterwards voted for its adoption."
>
> *Odd Fellows' Building Ass'n* v. *Naylor*, 53 Utah 111, 177 P. 214, (1918) at page 217.

Petitioner places great reliance upon the case of *Salt Lake Lodge No. 85, B. P. O. E.* v. *Groesbeck*, 40 Utah 1, 120 P. 192 (1911), as controlling its claim for exemption, urging further that the *Groesbeck* case creates an exception to the general rule of strict construction. However, as was most succinctly stated by Justice Thurman 7 years after *Groesbeck*:

> "Much has been said in argument upon the question as to whether or not a strict or liberal construction should be adopted in seeking to ascertain the meaning of the constitutional provision involved. In our judgment, as contended by respondent, 'there is no room for construction.' The language is plain, unequivocal, and unambiguous."

Odd Fellows' v. *Naylor*, supra, at page 217. In addition, respondent would assert that the *Groesbeck* case has been limited by the decision of this Court in the *Friendship Manor* case, and further, if still viable, should be limited to the facts of that case. As was stated by the

Supreme Court of New Mexico in a case involving the exempt status of an Elks' Lodge:

> "Clearly, the sole question to be determined is whether the property is used for charitable purposes. *Mountain View Home, Inc.* v. *State Tax Commission*, N. M. 649, 427 P. 2d 13 (1967). This determination must necessarily depend on the uses being made of each property which is claimed comes within the exemption. *Except to the extent that the facts as to use are so nearly alike as to logically compel like results, no case can be said to constitute a cotnrolling precedent for a case in this area.*" (Emphasis ours.)

Benevolent and Protective Order of Elks' Lodge No. 461 v. *New Mexico Property Appraisal Department*, 83 N. M. 447, 493 P. 2d 411 (1972) at page 412. That Court also considered the question of how exemption provisions should be construed and indicated that they should be construed ". . . to the end that the probable intent of the provision is effectuated and the public interests to be subserved thereby are furthered." 493 P. 2d 411 at page 413. This Court should do no less. Respondent would submit that the framers of our constitution recognized the dangers inherent in a diminishing tax base. Diminution shifts a correspondingly increased burden upon those already paying their share of the costs of government. They should not be made to pay an indirect subsidy to and for the benefit of those fraternal organizations that maintain private facilities primarily for their exclusive fraternal and social benefit. A similar approach was

taken by the Supreme Court of Indiana in the case of *Indianapolis Elks Building Corporation* v. *State Board of Tax Commissioners*, 145 Ind. 522, 251 N. E. 2d 672 (1969), wherein the Court determined that the dominant use of the Elks' Lodge property was social and, therefore, not entitled to an exemption under a statute exempting property used exclusively for charitable purposes. In that case the Court pointed out that many of the objectives of the Elks' Lodge were also visible in the family home and other establishments that were not exempt from property tax. An extensive annotation regarding tax exemption of property used by fraternal associations is found in 39 A. L. R. 3d 624.

Finally, respondent would urge this Court to recognize the distinction between those persons actually performing acts of charity and those who promote charity. During the year herein in question, petitioner received approximately $39,000.00 in cash solely for charitable purposes. As indicated from the record, approximately $29,000 was expended for charitable purposes. Who then performed the act of charity, the hundreds of people who were solicited to purchase circus tickets, car raffle tickets or made donations or the organization that gathered and expended the funds? Respondent would assert that the charity in this case was made possible not by the petitioner but by the numerous persons who supported the programs sponsored by petitioner. They are the ones who are charitable, not the petitioner.

Under the facts in the present case, the conclusion

is inescapable that the property known as Elks' Lodge No. 85 was not used exclusively for charitable purposes as that term is defined in the Constitution of Utah and the decision of the Tax Commission should, therefore, be affirmed.

POINT II.

THE PARTIAL OR PERCENTAGE EXEMPTION URGED BY PETITIONER IS CONTRARY TO THE INTENT OF THE DRAFTERS OF THE UTAH CONSTITUTION, THE LEGISLATIVE INTENT OF THE 1973 LEGISLATURE, AND IS NOT SUPPORTED BY THE FACTS AS DETERMINED BY THE TAX COMMISSION OF UTAH.

Petitioner, in its brief, has claimed alternative relief by asserting a claim for partial exemption of its property for the third floor "Goodwill Room".

This Court has recognized a partial exemption in two previous cases. Those cases do contain significant factual differences that make them readily distinguishable from the instant case.

In *Parker* v. *Quinn*, 23 U. 332, 64 P. 961 (1901), the structure involved was a two-story building. The upper floor was used for meetings and the performance of the charitable work of the Relief Society. The main floor was rented to a third party and taxed. In general, approximately 50% of the building was used for what this

Court determined to be charitable purposes and a 50% exemption was allowed.

In *Odd Fellows' Building Ass'n* v. *Naylor*, 53 Utah 111, 177 P. 214 (1918), the building in question contained three floors. The rooms on the first floor to a depth of 30 feet were rented to private concerns. The rear part of the first floor was rented to various tenants and was also used in connection with the lodge halls on the second and third floor which were exempt. Therefore, in excess of 66-2/3% of the building was used for exempt purposes. In the instant case, we are concerned with 75% of one floor of a six-story building or, assuming the same approximate floor space per floor, approximately 12-1/2% of the total structure as being used exclusively for charitable purposes. In terms of total space allocated to "charity", the instant case is, therefore, readily distinguishable from the *Quinn* case and the *Odd Fellows'* case.

Respondent, Salt Lake County, agrees with the assertion made by the Tax Commission in its brief. Partial or percentage exemptions create a great administrative burden and are almost impossible to administer. For example, how are the common areas such as hallways, parking lots, eating facilities and elevators to be allocated or apportioned. How do we treat multi-purpose rooms or facilities that may be used for charity one day and non-charitable activities the next day? At what percentage of charitable use do we say that the property is not used exclusively for charitable purposes, or for

that matter, at what percentage of charitable use do we say that the property is in fact used exclusively for charitable purposes? Do we allow a 5% use? Do we allow a 10% use? How should we treat individuals in their homes who perform charitable activities? The law does not require that they be organized as a charity because the exemption extends to the use of the property not the organization. See *Odd Fellows'* v. *Naylor,* supra. Should we then exempt the sewing room in the home of an individual who makes wearing apparel and perhaps quilts that are utilized for the needs of the indigent? Should we exempt the room that is used to store discarded articles that are periodically donated to various service organizations such as Veterans Thrift, the Junior League Flea Market or Deseret Industries? Where do we draw the line? Respondent would submit that the language of Article XIII, Section 2, of the Constitution of Utah does not allow such apportionment. That language speaks in terms of lots with buildings thereon used exclusively for charitable purposes. There is no language in the Constitution or the implementing statute found in Section 59-2-1, Utah Code Annotated, 1953, as amended, that would indicate that the exemption should apply to a portion of a lot with a building thereon of which a portion is used exclusively for charitable purposes. The constitutional provision is all inclusive as is the statute enacted thereunder.

Finally, in the *Friendship Manor* case, the trial judge had in fact granted a partial exemption to the manor

based upon the FHA requirements governing the admittance of the tenants. Although this Court did not direct itself specifically to that question, this Court did reject the ruling of the trial court that a partial exemption should be allowed and went on to tax the entire manor. The Court should do likewise in the case at bar because to allow partial or proportionate exemptions would lead to great abuse and would enable virtually every organization that conducts some form of nominal charitable activity to claim a proportionate exemption for an isolated area of its facilities that could be claimed to be used exclusively for its charitable purposes. Certainly, the framers of the constitution must have had this problem in mind when they drafted Article XIII, Section 2, which respondent respectfully submits precludes any partial or percentage exemptions such as the one requested by petitioner in this case. Respondent, Salt Lake County, would further support the contention of the Tax Commission in its brief that the allowance of a percentage or partial exemption of one building would be contrary to the legislative intent as more clearly indicated in the newly enacted Section 59-2-30, Utah Cade Annotated, 1953, as amended, 1973.

Finally, petitioner Elks' Lodge in its brief argues that the fact that the Elks' Lodge does not lease a portion of its property and that the building in the instant case is exclusively occupied by the petitioner the exemption should be granted. However, a reading of the constitutional and statutory provisions relating to exemptions would clearly indicate that the exemption is

not granted to charitable, or for that matter non-profit corporations, merely because they do not lease their premises. The requirement of the constitution is an affirmative one and the burden is upon the person claiming the benefit of the exemption provision to establish that his property is being used exclusively for charitable purposes. The mere failure to lease one's property clearly does not establish that claim.

CONCLUSION

Respondent, Salt Lake County, respectfully submits to this Honorable Court that the decision of the Tax Commission was correct in all respects, that there is substantial evidence in the record to support the findings and conclusions of the Tax Commission, that the conclusions of the Commission are supported by the constitutional and statutory provisions applicable to this case, and that the decision of the Tax Commission is in harmony with previous rulings of this Court and that the order and decision of the Tax Commission should, therefore, be affirmed.

Respectfully submitted,

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