2001

Youth Tennis Foundations of Utah v. Tax Commission of Utah : Brief of Appellee

Utah Supreme Court

UTAH SUPREME COURT

BRIEF

OF THE STATE OF UTAH

YOUTH TENNIS FOUNDATION OF UTAH, Sales Tax Audit Deficiency, 1973,

Plaintiff - Appellant,

V.

TAX COMMISSION OF THE STATE OF UTAH, and Vernon L. Holman, G. Douglas Taylor, Paul L. Fordham, K. Milton Yorgason and Eleanor L. Brennan as Commissioners of the Tax Commission of the State of Utah.

Defendants - Respondent.

BRIEF OF ~~APPELLANT~~ PLAINTIFF

Appeal from a written decision of the Tax Commission of Utah finding a 1973 sales audit tax deficiency against the Youth Tennis Foundation of Utah

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Case No. 14350

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NATURE OF THE CASE

A sales tax deficiency of $1,364.84, plus interest, was levied against the Youth Tennis Foundation of Utah based upon its sales of ticket admissions to a 1973 Professional tennis tournament.

DISPOSITION IN LOWER TRIBUNAL

The Foundation formally appealed from the deficiency audit determination. A formal hearing was held December 16, 1974 followed by decision #292 dated November 11, 1975 wherein the Utah Tax Commission upheld said assessment.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the decision of the Utah Tax Commission reversed and a determination made that the Foundation, as a charitable organization, is exempt from sales taxes upon admissions sold to tennis events sponsored and conducted by it.

STATEMENT OF FACTS

Decision #292 of the Tax Commission, November 11, 1975, concludes that the Youth Tennis Foundation of Utah is not a charitable organization and therefore is liable for sales tax in the sum of $1,364.84 plus interest at 6% per annum from September 9, 1973 until paid.

Findings of fact and conclusions of law were issued by the Commission as the basis for its decision. At the outset it should be noted that such Findings and Conclusions are erroneous in fact. Paragraph #3 of the Findings states that the Foundation has conducted amateur and professional tennis tournaments as one of its regular functions and activities since 1940 on an annual basis and that such tournaments have produced thousands of dollars of income to the Foundation. This is correct. (Emphasis added)

Paragraph #8 of the Conclusions admits that the 1973 professional tennis tournament was similar to other tournaments conducted by the Foundation but asserts that, significantly, the 1973 tournament charged admissions, which none of the others had done and hence it was not a "regular" activity of the Foundation. This is incorrect. (emphasis added)

The record shows that since 1946 the Foundation has conducted at least 23 tennis tournaments, both professional and amateur, to which spectator admission tickets were sold. In this regard the Foundation staged 1946,

1955, 1958, 1959, and 1963 professional events in Salt Lake City involving touring professionals, including Jack Kramer and Pancho Gonzales. The Foundation also conducted the 1947 U.S. Clay Court Championships; the 1953 and 1954 U.S. Men's Hardcourt Championships; Six Utah Open Championships; the 1957 and 1968 NCAA Championships; three National Men's Amateur Indoor Championships and four Freed Invitational Men's Indoor Championships. From 1967 through 1974 alone net income from tournaments amounted to $12,335.48 with by far the greater part coming from ticket sales for admissions. (Exhibit #6) (L 21, P 25 to L 12, P 26 and L 20, P 43 TR)

In his testimony, Mr. Freed stated:

> "A..... The Foundation started promoting and conducting tournaments in the 1940's and has continued to do so on an annual basis, almost without exception, since that time.
> Q. Is the conduct of tennis tournaments wherein the Foundation receives the net proceeds from entry fees and/or ticket admissions a regular function and activity of the Foundation?
> A. Yes.
> Q. Why?
> A. It has been reasonably necessary for the foundation to sponsor and promote tennis tournaments in order to increase the funds coming into the Foundation. These activities over the years have produced thousands of dollars for the Foundation and such funds have greatly benefitted the junior tennis programs of the Foundation." (P 20 L 19 to P 21 L 9, TR)

With respect to the 1973 tournament, the Foundation was the sole promoter and beneficiary. It was held at the University of Utah Special Events Center and featured 22 world class players, including Jimmy Connors. The Foundation was entirely responsible for the event, obligating itself to pay all expenses incurred and receiving all net income therefrom.

Findings of Fact, para. #11, states that the Foundation buys and maintains life insurance as to David L. Freed, the proceeds of which will be used to pay off loans by the Foundation to the Salt Lake Tennis Club.

The facts are that the insurance was jointly obtained and paid for by the Foundation and the Club and its purpose was to insure that the loan would be paid off in full if Mr. Freed died. The lone beneficiary as to the loan was the Foundation and no person, including Mr. Freed or any associate or member of his family, could have any interest in the proceeds. (L 21, P 101 to L 22, P 102 and L 6-13, P 27 TR) When the value of the Tennis Club property reached a point far in excess of the loan balance due said insurance was cancelled as of 1973. (L 6-13 P 27 TR)

Findings #9 asserts that loans have been made by the Foundation to the Freed Investment Company, with David L. Freed being the principal owner of the company as well as a director of the Foundation. The loans to said Company were made to obtain secure, safe and favorable interest income and were not in any sense entered into for the benefit of the Company. In fact, the loans were fixed at higher interest rates than the Company would have had to pay at the bank and are in that sense donations to the Foundation. (L 17-19, P 75 TR) Freed Investment Company is worth millions of dollars and it would have no difficulty at all borrowing money from banks rather than the Foundation. The loans were in each case secured by pledges of stock having a market value several times higher than the loan amounts. Interest on these loans are fixed so that they rise with the market. (L 21, P 74 to L 19, P 75; L 19-23, P 94 and L 7, P 124 TR).

Applicable Constitutional and Statutory provisions in this matter are as follows:

1. "Article XIII, Section 2, Utah Constitution. 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...Lots with the buildings thereon used exclusively for either religious worship or charitable purposes...shall be exempt from taxation."

2. "Section 59-15-6, Utah Code Annotated, 1953. Exempt Sales...All sales made to or by religious or charitable institutions in the

conduct of the regular religious or charitable functions and activities;...and all sales which the State of Utah is prohibited from taxing under the Constitution or laws of the United States or the State of Utah shall be exempt from taxation under this act."

3. "Section 59-2-30, Property Used for Religious Worship or Charitable Purposes--Requirements for Exemption....This section is intended to clarify the scope of exemptions for property used exclusively for either religious worship or charitable purposes provided for in Section 2 of Article XIII of the Constitution of the State of Utah. This section is not intended to expand or limit the scope of such exemptions. Any property whose use is dedicated to religious worship or charitable purposes including property which is incidental to and reasonably necessary for the accomplishment of such religious worship or charitable purposes, intended to benefit an indefinite number of persons, is exempt from taxation if all of the following requirements are met:

   (1) The user is not organized to produce a profit from the use the property.

   (2) No part of any net earnings, from the use of the property, inures to the benefit of any private shareholder or individual, but any net earnings shall be used directly or indirectly, for the charitable or religious purposes of the organization.

   (3) The property is not used or operated by the organization or other person so as to benefit any officer, trustee, director, shareholder, lessor, member, employee, contributor, or any other person through the distribution of profits, payment of excessive charges or compensations."

4. "Section 59-2-31. Applicability of Constitutional Provisions for Exemption of Property used for Charitable Purposes....

   (1) Property used exclusively for religious, hospital, educational, employee representation, or welfare purposes which use complies with the requirements of Section 59-2-30, shall be deemed to be used for charitable purposes within the exemption provided for in Section 2 of Article XIII of the Constitution of the State of Utah and Section 59-2-30.

   (2) This section shall not defeat exemptions for property not specifically enumerated which may be found to be withing the exemption provided in Section 2 of Article XIII of the Constitution of the State of Utah."

The Foundation is a non-profit corporation of Utah. (L 12-15, P 12 TR and Exhibit #1) It has prepared and filed with IRS approval federal tax returns using Form 990 "Return of Organization exempt from Income Tax" as

an entity entitled in all respects to such status. (L 10-11, P 60 TR and Exhibit #7) Persons contributing to it are entitled to personal deductions for same. (L 2-4, P 62 TR) The Foundation has no membership as such and it's affairs are administered by a four-man governing board. (L 23, P 64 and L 19, P 65 TR)

The Foundation was incorporated in 1946 as the "Tennis Patrons Association of Utah". Its originally stated purpose was found to be too broad in that it covered many things the organization never intended to, and never did, do. (L 22, P 66 to L 21, P 67 TR) This included such things as the building and constructing of tennis facilities. (L 19 P 52 TR) An amendment to delete such extraneous items was adopted October 9, 1951. (L 13-15, P 13 and exhibit #2)

As amended the Association stated it intended to promote the mental and physical welfare of all who might be benefitted by its activities. Its purposes were to promote amateur tennis; stimulate tennis in schools, playgrounds and parks; give encouragement, coaching and instruction to junior players; organize and manage tournaments, and, in general, to foster sportsmanship, recreation and health in the community. (L 7-15, P 13 TR) (Emphasis added)

From its inception in 1946, net funds of the Association were exclusively used to promote and develop junior tennis players, programs and activities. This obtained although the original purpose was not so limited. (L 2-6, P 16 and L 8-12, P 67 TR) In order to confirm this actual practice the name was changed to the Youth Tennis Foundation of Utah in 1961. (L 1-4, P 14 TR and Exhibit #3)

A ruling of the Internal Revenue Service of March 10, 1949 held that the Association was entitled to tax exemption under Section 101 (8) now 26 USCA 501 (c) (3) of the Code. This was affirmed August 12, 1949. By letter of

April 20, 1953, the IRS ruled that it was entitled to exemption under Section 101 (6), now 26 USCA 501 (C) (4). This ensued because the Foundation was deemed to be organized and operated exclusively for educational purposes. (Exhibit #5 para. #4)

The differences between 101 (6) and 101 (8), are enlightening. Both enable organizations qualifying thereunder to be tax exempt but the former, which is the current categorization of the Foundation, is reserved to entities having a higher value to society so that contributors thereto are granted personal deductions for same from their taxes. This Section creates exempt status for organizations operated exclusively for religious, charitable or educational purposes wherein no part of net earnings inures to the benefit of any private shareholder or person.(emphasis added) On the other hand Sec. 101 (8) pertains to civic leagues, clubs and organizations which are operated exclusively for social welfare purposes.

The nature and extent of the Foundation's income and outgo was testified to in detail. (Exhibit #6) Evidence discloses that its revenue for the past several years (1967 to 1974) has consisted of interest from loans ($26,971.52); proceeds from tournaments ($12,335.48 net); gain from the sale of equipment ($2,257.25 net) and voluntary contributions ($31,183.07) for a total of $69,151.74. (L 2-25, P 18; L 15, P 19 TR and Exhibit #6)

In each instance such fund raising activities are regular in that they are of long and consistent duration and are reasonably necessary for and incidental to continuation and expansion of the Foundation's functions. It should be noted that, in addition to direct interest income, the loan to the Sale Lake Swimming and Tennis Club has accrued substantial ancillary benefit. Through it the Foundation has gained the use of the Club's outstanding indoor and outdoor facilities for conducting tournaments, lessons,

clinics and Junior and Little League Team competitions. (L 19, P 22 to L 14, P 24 and L 17-23, P 127 TR) This Club is non-profit also. (L 14-20, P 115 TR)

Net income of the Foundation has been and is used exclusively in the promotion and development of junior tennis players and programs throughout Utah. (L 2-25, P 18 and L 15, P 19 TR) This is clearly reflected in testimony concerning the outgo of the Foundation. (Exhibit #6, page 3) In this context equipment has been donated to the University of Utah, Little League and Junior League teams, and Salt Lake City and County Recreation Department programs in the sum of $22,000.00. (L 6, P 125 TR) This included, for instance, several thousand tennis balls at a cost that is now $9.50 per dozen. (L 2, P 127 TR)

It sould be noted that the aforesaid team programs involve approximately 2000 youngsters. Nobody is excluded from participation by reason of race, creed, color, religion or lack of finances. Those needing equipment are provided same without cost by the Foundation. (L 1-7, P 28 and L 18-19, P 116 TR) None of the Foundation's trustees or their relatives receive assistance. (L 3, P 96 TR)

The Foundation has contributed $8,628.91 over the past seven years to provide advanced instruction to young boys and girls. In this way some 400 of them from 10 to 18 years of age received weekly group lessons at the Salt Lake Swimming and Tennis Club. (L 25, P 28 to L 13, P 29 TR) No players recommended for this program have been excluded. (L 24, P 117 to L 1, P 118 TR) Furthermore, the Foundation provided $3,029.90 in travel funds so that players could compete in tournaments outside of Utah. (L 15-24, P 29 TR) In almost all instances the juniors concerned were not aware that the Foundation had assisted them and no promotional or advertising motives existed. (L 4-13, P 117 TR)

Direct monetary donations over the past seven years were made to the University of Utah tennis program in the sum of $5,326.00. (L 11-13, P 30 TR) This directly benefitted juniors at the school. It also assisted those throughout the community in that University players provided good deportment and playing models; they practiced with other juniors and helped in the conducting of tournaments. (L 9-20, P 87 TR) Over the period in question the Foundation contributed $1,509.91 for trophies to be awarded to participants in Little League, Junior League and Salt Lake City and County Recreation Department team competitions. (L 21, P 30 to L 5, P 31 TR)

In summary, from 1967 through 1974, the Foundation had total income of $69,151.74 while it contributed $55,869.24 to the development of junior tennis players and activities. Annually it has used an average of 80% or more of its income in its charitable purposes. The remainder is retained by the Foundation as a reserve. (L 19-24, P 31 TR) This has given Utah one of the outstanding junior programs in the United States. (L 1-15, P 88 TR)

The Foundation has almost no expenses and limits reimbursements to those that are reasonable and necessary. (L 23, P 69 and L 24, P 43 TR) Secretarial, accounting, legal and other services are donated. (L 17-21, P 18 and L 16-17, P 27 TR) No person or entity has any right to net funds (L 3, P 44 TR) and no Foundation officer or director receives any benefits. (L 15, P 46; L 19, P 46; L 23, P 46; L 3, P 47; L 18, P 47 and L 25, P 47 TR)

In conducting its 1973 professional tournament the Foundation reasonably secured the services of a manager who could devote his whole time to the promotion of ticket and program sales. (L 23, P 69 TR) Except for this all work was performed by more than 100 volunteers who contributed their time to the project without compensation. The primary purpose behind this event was the hope that substantial additional income could be generated that would

not otherwise be available. No desire existed as such to entertain spectators or to provide a venue for professional players. No participants were wined or dined and no receptions were held. (L 22-25, P 68 TR)

Upon dissolution all Foundation assets will go to the University of Utah Development Fund. (Exhibit #4) If this is not in existence delivery will be made to the National Tennis Educational Foundation. (L 20, P 14 to L 4, P 15 TR) Now named the National Tennis Foundation, Inc., 51 E. 42nd St., New York, New York, such organization is a non profit corporation of charitable and educational purposes. (L 5-7, P 70 TR) It was established under the aegis of the United States Lawn Tennis Association to promote a nation-wide educational program for the encouragement and development of tennis as a sport of lifetime recreational and physical advantages. In particular it was intended to support an expanded junior program. Its purposes are set forth in its Articles of Incorporation filed with the New York Secretary of State and summarized in the 1974 Official USLTA Yearbook. Amendment of the Foundation articles to provide for the aforesaid distribution of assets was suggested but was not made mandatory by an IRS auditor. (L 24-25, P 65 and L 8-15, P 66 TR)

The tournaments conducted by the Foundation have been reasonable and necessary in providing income for expansion of its activities. The relatively poor return from the 1973 meet, which would be a loss if the tax herein is required, was certainly not anticipated. (L 6-18, P 25 TR) It did however provide substantial ancillary benefits to junior tennis in Utah. It displayed world class players to hundreds of Utah youngsters, (L 22, P 110 TR) which is an important element in fostering tennis skills. For this reason the Foundation provided free admission to juniors (25, P 110 TR) with approximately 2000 tickets being distributed without charge to Salt Lake junior and senior high schools daily. (L 3-6, P 111 TR)

The Foundation's charitable activities benefit an indefinite number of Utahns. Donations made by the Foundation to such activities over the past seven years totaled $55,860.24 in cash or equipment. In 1974 alone some 2000 boys and girls were assisted in team play. (L 3, P 31 TR) Further some 400 received weekly instruction while still others were assisted through travel funds. (L 9-22, P 28; L 8-18, P 29; L 21, P 30 to L 10, P 31 and L 22, P 36 to L 9, P 37 TR) Participation figures are increasing each year and ever greater numbers will be aided in the future as and when funds increase. (L 10-15, P 35; L 18-23, P 35; L 25, P 35 to L 8, P 36 TR)

The aforementioned programs confer direct monetary and material assistance to Salt Lake City and County Governments and their taxpayers. (L 1-4, P 28 TR) If such was not given the children and their parents involved would look to the City and County Recreation Departments to fill the void. (L 12-20, P 36 TR) Mr. Harrison former Salt Lake City Mayor, testified that the Foundation's activities saved tax money. (L 9-25, P 77 and L 7, P 78 TR)

The State of Utah in the form of the University of Utah is directly aided by the Foundation. The University's outstanding tennis programs would not continue on the same high level now obtaining were such support to cease. (L 10-11, P 38 and L 2-6 and L 17-19, P 86 TR) This allows the school to devote part of its appropriated monies or tuition funds to other needs. On an annual basis the Foundation's contributions to the University are substantial amounting to $2,600.00 in 1973 while over the past years it has reached several thousands of dollars. (L 2-6 and L 14, P 86 and L 6-7, P 92 TR)

These activities are not rendered any less charitable because the State, County and/or the City has no legal duty to provide tennis programs for junior players. Mr. Harrison pointed out that the tennis sponsored by the Recreation Departments was necessary in providing well rounded recreational opportunities for the citizens of the community which they could and would insist upon. (L 14-15, P 78 TR) He also made it clear that said Governments could not afford to assume the support now furnished by the Foundation. (L 8-13, P 79 TR) It is enlightened policy to foster tennis programs in the public interest. (L 9-22, P 83 TR)

The largest single portion of the Foundation's income derives from contributions. (L 2-14, P 18 and L 13-14, P 20 TR and Exhibit #6) For 1967 through 1974 this income reached $31,183.07 from 448 separate donors. (L 10-17, P 22 TR) In 1973 this totaled $1,722.00 (1 19, P 70 TR) with over half coming from those not associated with the Foundation. (L 16, P 71 TR) The ratio of income to donations by the Foundation is strikingly favorable when viewed in the context of other charities. Virtually no income is consumed by overhead or expense costs and the Foundation annually donates from 50% to more than 100% of its yearly net income. (L 1-4, P 32 TR and Exhibit #6)

ARGUMENT

I. THE YOUTH TENNIS FOUNDATION OF UTAH IS A CHARITABLE ORGANIZATION AND IS ENTITLED TO TAX EXEMPT STATUS.

A. THE FOUNDATION'S ACTIVITIES IN DEVELOPING AND PROMOTING JUNIOR TENNIS PLAYERS AND PROGRAMS IN UTAH ARE CHARITABLE.

The threshold issue is whether or not the Foundation's activities in developing, promoting and fostering junior tennis players and programs are charitable. If so it is clearly entitled on its own merits to exemption from the sales taxes levied in general.

Evidence in the record is uncontroverted that the Foundation's activities are beneficial in several substantial ways to the youth of this state. They are given equipment and tennis materials. They are furnished with tennis instruction, training and competition. They are assisted in traveling to and participating in tournaments. Such activities are clearly a material physical, mental, moral and social benefit to thousands of young boys and girls.

Tennis is currently an "in" sport of great popularity because people, in general, have finally come to understand what the Foundation has espoused for thirty years, i.e. tennis is an ideal life-time sport that provides participants with healthful mental and physical stimulation. It gives enjoyment but more importantly it builds healthy bodies, teaches self-discipline and fosters honesty, neatness and courtesy. It is perhaps the only major sport where competitors in official tournament play are honor bound to fairly call their opponent's shots against their own self interest. They are obliged, at least in tournaments, to wear neat and clean attire and to treat competitors with respect.

84 CJS on Taxation, Section 282, states that an organization is charitable if it performs a service of public good having general welfare or societal value in some mental, physical or moral way. Such classification is not limited to assistance given to the poor or the sick. William Budge Memorial Hospital v. Maughan, 3 P 2d 258, Utah, (1931)

The fact that the Foundation fosters and develops athletic skills and physical well being enhances, not denigrates from its "charitable" nature. Charity covers a broad spectrum of activity and its legal definition goes far beyond the popular view of caring for the ill or indigent. This concept was expressed in Green v. Connally, 330 F. Supp 1150, (1971) where

it was held that the word "charitable" is to be viewed in its generally accepted legal, rather than popular, sense, which supposes it to apply to aid to the poor and sick only.

Noteworthy in this area is Elks v. Tax Commission of Utah, 536 P 2 d 1214, Utah, (1975). This involved a property tax but its findings with respect to what is "Charitable" in Utah are controlling in favor of the Foundation in the case at hand. The Court cited with approval the opinion in Stockton Civic Theater v. Board of Supervisors, 423 P 2 d 810, Calif, (1967). There tax exempt status was afforded to the Theater the purpose of which was to promote the arts. The Court said:

> "charity is not confined solely to the relief of the needy and destitute, but comprehends as well activities which are humanitarian in nature and rendered for the general improvement and betterment of mankind...The word Charitable encompasses a wide range of activities beneficial to the community..."

In Elks v. Tax Commission, supra, the Court also cited an earlier decision (Elks v. Groesbeck, 40 Utah 1, 120 P 192 (1911)) where it was stated:

> "there is, however, an exception to this general rule, and statutes exempting property used for educational and charitable purposes or for public worship, under the great weight of authority, should receive a broad and more liberal construction than those exempting property used with a view to gain or profit only..."

Clearly in determining what conduct is "charitable", Utah has opted to follow the general rule under which the Foundation's activities in promoting and developing tennis among Utah's youngsters are clearly so categorized. Keeping young people mentally, socially and physically sound is surely a "charitable" activity of great value. This is manifest in Taylor v. Hoag, 116 A 826, Pa, (1922), where the Court said:

> "The word charitable in a legal sense, includes every gift for a general public use, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, and designed to benefit them from an educational, religious, moral, physical or social standpoint. In its broadest meaning it is understood to refer to something done or given for the benefit of our fellows or the public."

In Restatement of Trusts, 2d Edition, Sec. 368, the following are listed as charitable purposes: (a) relief of poverty (b) advancement of education (c) advancement of religion (d) promotion of health (e) governmental or municipal purposes (f) other purposes the accomplishment of which is beneficial to the community. This deals with trusts but no basis is perceived to conclude that what is "charitable" as a trust or as a real property tax matter would not be similarly construed in a sales tax context.

In determining what are charitable activities and thus entitled to tax exempt status, courts have approved a wide variety of conduct along with concommitant property, facilities or transactions incidental and reasonably necessary thereto. (Emphasis added) The Utah Supreme Court so concluded in Staines v. Burton, 53 P. 1015, Utah (1898), where charitable purposes were held to include devoting income to schools, public parks, watering cities, planting forests or anything else whereby members of a class may be benefitted. In like manner use of a tennis court on the grounds of a charitable hospital was deemed tax exempt in Cedars of Lebanon Hospital v. County of Los Angeles, 221 P 2d 331, (1950).

Viewed from another aspect it seems certain that donations to the young are charitable per se when they provide assistance in any socially valuable way. This was the position adopted by the court in St. Louis Council of Boy Scouts of America v. Burgess, 240 S W 2d 684 (1951) where the Court said that the development of worthy qualities among the young is clearly charitable. See People v. Cogswell, 45 P 270, Calif., (1896).

The general rule prevailing in this country is that activities establishing and promoting athletics and field sports are charitable. More Game Birds in America, Inc. v. Boettger, 14 A 2d 778, (1940). Donations for teaching marksmanship, which had sports as well as governmental value, were held charitable in In Re Stephens, 8 Times L 792, England, 1892. The promoting of the playing of chess and staging of tournaments was also held charitable in In Re Deupree's Trusts, Ch 16, 2 All England 443, 1945.

To like effect are the decisions of courts giving tax exempt charitable status to uses of property wherein youngsters were trained in swimming, boating, nature studies, camp crafts, hiking and overnight camping. Greater Lowell Girl Scout Council v. Town of Pelham, 117 A 2d 325, (1955) and YMCA v. Los Angeles County, 221 P 2 d 47, (1950). Attention is invited to Matanusky-Susitna Borough v. Kings Lake Camp, 439 P 2d 441, Alaska, 1968, where the Court said:

> "It is quite clear that what is done out of good will and a desire to add to the improvement of the moral, mental and physical welfare of the public generally comes within the meaning of the word charity ....Both in England and the United States it has frequently been held that the providing of recreational facilities, such as accommodations for campers is a charitable use of the property. In order to qualify as a charitable undertaking, it is not necessary that the beneficiaries of the charity be indigent or needy."

Encouraging young boys and girls of Utah to play tennis and to participate in team competitions and training programs in connection therewith provide them with socially valuable benefits in physical, mental and moral ways. Even if this were not so however the Foundation would still be entitled to tax exempt status because it also donates directly to the needy. No poor youngster is denied the opportunity to play in Little League and Junior League teams because of the lack of funds. In a larger sense the donations of balls and other tennis equipment to individuals and the Salt Lake City and County Recreation Department programs is direct assistance to the indigent. Viewed

either in the popular or the legal sense the Foundation's activities are clearly charitable.

Although few "charitable" sales tax cases exist it appears that an exemption in this area should be viewed at least as broadly as in the numerous property cases. This certainly seems to be the view of the Utah Attorney General as evidenced by his ruling of November 27, 1941. CCH State Tax Report-Utah, Para 60-104 there it was determined that the British War Relief Society was charitable in that its funds were used to support the British war effort hence it was exempt from paying taxes on rummage sales it conducted as fund raising projects. Another opinion, dated January 10, 1951, CCH State Tax Report-Utah, Para 60-204 held an exemption applied to sales of ticket admissions to a banquet sponsored by a political party. This opined that that the ticket price was in effect a donation and not a sale but this is a distinction without a difference in the context of what is or is not charitable. The rationale of these cases would clearly entitle the Foundation to an exemption for its efforts in promoting mental, physical and moral wellbeing among the youth of Utah.

B. THE FOUNDATION'S EDUCATIONAL AND WELFARE ACTIVITIES ARE CHARITABLE.

1. Section 59-2-31, Utah Code Annotated, 1953 provides that property used for educational or welfare purposes is deemed to be used for charity and thus tax exempt. Said section deals with property taxes but is equally applicable to sales taxes, at least for the purpose of determining what is "charitable" within the meaning of Section 59-15-6, UCA, 1953.

2. Counsel for the Tax Commission states in his memorandum to the Commission that Section 59-15-6 does not refer to educational activities. This is true but unimportant. In Elks v. Tax Commission, supra, this Court properly concludes that an activity that is educational or in furtherance

of the public welfare is charitable. Said opinion cites United Presbyterian Assn. v. Board of County Commissioners, 167 Colo 485, 448 P 2dd 964 (1968) where the decision pointed out:

> "A charity in the legal sense may be more fully defined as a gift, to be applied consistently with the existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by...otherwise lessening the burdens of government."

Since 1953 the Internal Revenue Service has ruled that the Foundation is educational and that it has so used its funds exclusively pursuant to 26 USCA 501 (c) (3). (Exhibit #5, para #4) It should be kept in mind that this Section and its exemption applies only to those organizations having the highest of community welfare values.

No claim is made that an IRS income tax exemption necessarily leads to the same result as to Utah sales taxes. It should be obvious however that, in determining what is charitable or educational and therefore charitable, the same basic predicate must be met in either situation, i.e. the entity must be educational or charitable in nature and must use its net funds exclusively therein.

Holdings of courts on this issue have been uniform. The use of real or personal property, or the creation of trusts or bequests, where the purpose is to educate the public in general and children in particular have been held tax exempt. The court in Stockton Civic Theatre, supra, said "it is settled that charitable purposes embrace educational purposes". It said furthermore that what is educational in this context is to be broadly construed. The court pointed out that instruction in the dramatic arts was a part of the curriculum of many schools, colleges and universities and perforce educational. It should be noted that whether in classes or in teams, tennis is taught today in almost every high school and university

in Utah. This is certainly the case at the University of Utah, which currently is faced with tennis classes that are so large the school's some 20 tennis courts are woefully inadequate for the demand.

The Court in In Re Robbins Estate, 371 P 2d 573, (1962) stated that a bequest to educate the young was definitely charitable and this was true whether or not those aided were rich or poor for its intrinsic social value was sufficient. As defined "education" is not limited to reading and writing but includes almost anything that teaches something of social and community value. See Flathead Lake Methodist Camp v. Webb, 399 P 2d 90, Mont, (1965). There the Court ruled that property was exempt because it was used to instruct children in archery, swimming, and nature crafts. In so doing the court concluded that educational uses were not, by the great weight of authority, limited to common scholastic instruction in grammar schools, high schools, universities or colleges but also embraced activities having social, intellectual, physical or religious value. See also Taylor v. Hoag, Supra.

Attention should be given to the opinion of the Utah Attorney General of August 14, 1957. CCH State Tax Reports, Utah, Para. 60-204 (Note 55). This held that a non profit corporation that is religious, charitable or educational in nature, may in the regular conduct of its functions and activities be exempt from sales taxes even though such corporation may include the selling of tickets to a profitable function among its activities. (Emphasis added) This view is proper and would find the Foundation tax exempt both as a "charitable" as well as an "educational" organization.

C. THE FOUNDATION MEETS ALL CRITERIA ESTABLISHED IN STATUTES OR DECISIONS FOR TAX EXEMPT STATUS.

Such criteria are as follows:

1. The property (or net income) of the organization must be used exclusively for exempt purposes. Article XIII, Section 2, Utah Constitution.

2. Sales are tax exempt if made in the course of the organization's regular activities. Sec. 59-15-6, Utah Code annotated, 1953.

3. The organization must be non-profit with no person entitled to any net income and excessive compensation is not paid. Section 59-2-30, Utah Code Annotated, 1953.

4. An indefinite number of persons are benefitted. Section 59-2-30, Utah Code Annotated, 1953.

5. The organizations activities lessen governmental burdens. Elks v. Tax Commission, Supra.

6. Substantial amounts of new income at least are used for charitable purposes. Elks v. Tax Commission, supra.

It is considered apparent that the Foundation meets all of the foregoing criteria as follows:

1. Net income of the Foundation is used exclusively in the promotion and development of junior tennis programs and activities in Utah. This was found by the Tax Commission to be a fact. (Findings #2 and #6) Nothing to the contrary was introduced into evidence and this should therefore be accepted as proven on the state of the Record.

a. Apart from the aforesaid findings the U.S. Internal Revenue Service has concluded that the Foundation uses its net income exclusively for charitable, i.e. educational purposes. (Exhibit 5, para. 4)

b. Courts have found tax exempt status to exist for organizations on facts substantially less favorable than obtain as to the Foundation.

Bedford v. Colorado Fuel and Iron Co., 81 P 2d 752, Colo., (1938). There the plaintiff, a profit making Corporation, was held exempt from taxes upon sales occurring in its operation of a hospital for employees and dependents. The hospital was deemed charitable in that the fee it charged patients did not cover in full the costs of the services it rendered.

c. The Foundation does not, except for payment of minimal reimbursement expenses, have any portion of its funds going to other than its charitable purposes. Its use in such way is genuinely exclusive. Even it it did not, however, it would be entitled to exempt status so long as such use was primary and inherent albeit not truly exclusive. In Elks v. Tax Commission, supra, the Court cited Elks v. Groesbeck, supra, and said:

> "So long as the incidental uses made of such buildings do not exclude or interfere with their use for....charitable purposes....then such incidental uses do not deprive the property of the benefit of the exemption. To hold otherwise would, in effect, annul the provision of the constitution and statute under consideration by defeating the very purposes for which it was adopted."

d. Sales of material by a charitable hospital to be used in constructing a garage was held exempt in Good Samaritan Hospital of Dayton v. Porterfield, 278 NE 2d 26, Ohio, (1972). The Court reached its decision, in part at least, on the rationale in property tax cases. It conceeded that real property tax decisions were not necessarily dispositive of sales tax cases but concluded that the basis is identical in both instances, i.e. charitable purposes and exclusive us. YMCA v. Phila, 11 A 2d 529, Pa., (1940) and Sailors' Snug Harbor v. McGoldrick, 20 NE 2d 7, (1939).

2. The conducting of the 1973 tournament by the Foundation was a part of its regular functions and activities.

a. As heretofore pointed out, Finding #3 is correct and Conclusions #7 and #8 are erroneous. The record shows that the Foundation has staged

at least 23 major tournaments since 1946 in Salt Lake City at which ticket admissions were sold. It also operates some events where tickets are not involved but by far the greater number fit the former category. The 1973 tournament was a regular activity of the Foundation and was identical in all basic ways, including sales of admissions, to 23 preceeding events. If the 24th in a series of identical tournaments is not a regular activity it is hard to envision what would so qualify.

b. The Attorney General's decision of August 14, 1957, supra, puts conclusions #7 and #8 in proper perspective. Ticket admissions to a profitable project of a charitable organization are exempt from taxes when such activity is a regular part of the organization's programs. Conclusion #7 states that the 1973 tournament was not a "charity". Certainly such event was not in and of itself a "charity" for by its very nature it was designed to return a profit. This is true also of any activity of any organization where admissions are sold and such activity does not make the organization any less "charitable" so long as the net income is used for "charitable" purposes. This is obviously what Section 59-15-6, UCA, 1953 envisions.

c. Just as clearly the Attorney General's opinion of August 14, 1957, supra, contemplates an activity can involve the sale of something for a profit and still be exempt. This is because the exemption does not flow from the type of the sale but from the charitable nature of the organization itself. As to this the Foundation has used over a 30 year period tennis tournaments with paid admissions as a major part of its fund raising activities. Its exclusive use of the net funds so obtained in promoting

developing and teaching tennis to junior players alone warrants the exemption.

d. In this regard note should be taken of Regulation S43 of the Utah Tax Commission, CCH State Tax Reports-Utah, para 60-208. This provides that sales by a charitable institution are exempt from tax if involving a regular activity. Most importantly perhaps this regulation enunciates a presumption that sales carred on by a charitable organization will be deemed to be part of its regular activities. (Emphasis added) On this basis alone the Foundation is entitled to a finding on the issue of "regularity" for no evidence appears in the record to show otherwise. All that obtains is the Tax Commission's conclusions that the tournament was not a "charity" and it was not "regular". The former is inconsequential and the latter is based upon an erroneous view of the record.

3. The Foundation is a non profit corporation of Utah. This was found to be a fact by the Commission. Finding #1. On the basis of uncentroverted evidence it is shown that no person has any right to any net income of the Foundation. In addition it is seen that the Foundation has no buildings, pays no rent or salaries and works entirely on donated labor both secretarial, administrative and professional.

a. In this area some consideration should be given to Commission Findings #9 and #10. They refer to loans made by the Foundation to the Freed Investment Company and to the Salt Lake Tennis Club. No conclusion is drawn from these finding but they nevertheless likely convey some negative inference.

b. The facts, in any event, show that such loans were not made to benefit the Company or Mr. Freed or the Club. They did however provide secure and safe income to the Foundation from 1967 through 1974 alone of $26,971.52. The interest rates were favorable and, as far as the Freed

Company was concerned, were higher than it would have had to pay at the bank. All loans were secured by property having a much higher value than the loan balances.

c. Loans to secure income are obviously proper for a charitable organization to engage in. In truth almost any kind of fund raising activity may be utilized without losing tax exempt status. This included sales of tickets to functions of all kinds. It also most certainly included loans to profit making entities.

d. A land mark decision in this regard was rendered by the U.S. Supreme Court in Trinidad v. Sagrada Orden De Predicadores, 263 U.S. 578, (1924). There the court was called upon to interpret the statute now identified as 26 USCA 501 (c) (3) under which the IRS has ruled the Foundation is exempt from federal income taxes as an organization of highest social value. The plaintiff was formed for charitable, religious and educational purposes. It acquired funds from extensive real estate holdings, stock held in private corporations and interest on money loaned to profit making companies. (Emphasis added) The court found the plaintiff was tax exempt despite its varied revenue sources and concluded that the use not the source was controlling. (Emphasis added) It concluded that religious, charitable and/or educational activities could not be operated without adequate funds and they could generate income by almost any means so long as they used their net gain exclusively in furtherance of the socially valuable aims of the organization. Income from interest on loans has been approved as a source of income for charitable organizations in IRS Treasury Regulation 1.513-1 (b).

e. A wide range of revenue producing activities have been found to be incidental to and reasonably necessary for charitable organizations by state courts also. This includes rent, interest earned on loans, income from performances, sales of material and similar functions. YMCA v. Los Angeles County, supra; Passaic United Hebrew Burial Assn. v U.S., 216 F. Supp 500, DC NJ, 1963; Flathead Lake Methodist Camp, supra; Stockton Civil Theatre, supra, and Matanuska-Susitna Borough, supra.

4. The Foundation's activities benefit an indefinite number of Utah's youngsters. It is note worthy that Section 59-2-30, UCA, 1953, indicates that a charitable institution needs only to intend to benefit an indefinite number of persons. (Emphasis added) The Foundation exhibits such an intent in both its stated purpose and actual programs. Furthermore, in fact, its activities do benefit an indefinite number of Utahns. Thousands of juniors are aided annually and the Foundation places no limits upon the number it will help and is restricted in this context only by lack of funds. Those thus assisted are increasing in number year by year without regard to wealth, race, creed, color, sex or national origin.

a. This seems conclusive in favor of the Foundation even though its largess is limited to those having an interest in tennis. It has been consistently held that limitations imposed by sex, geography or class does not denigrate from the charitable nature of an activity or render its recipients impermissibly definite. As used in the Utah statutes and interpreted in decisions "indefinite" really means that the beneficiaries are not numbered or identified so as to unduly restrict them. See Marriner W. Merrill Foundation v. Tax Commission of Utah, 282 P 2d 333, Utah (1953), which stated that an indeterminate number must be assisted

but that the charity may be limited to a specified class of persons. See also People v. Cogswell, supra, where the number was held to be indefinite because the recipients were not named.

b. It is not essential that charity be universal in application. An institution may limit the disposition of its blessings to one sex, or to the inhabitants of a particular city or district or to the membership of a particular religion or secular organization and in so doing it is not thereby rendered non charitable either in legal or popular apprehension. Indianapolis Elks Corp. v. State Board of Tax Commissioners, 251 NE 2d 673, Indiana, (1969) and Staines v. Burton, supra.

5. The Foundation's activities provide direct financial and material assistance to State, City and County Governments. This lessens the burdens upon such units and enables the University of Utah and the City and County Recreation Departments to operate expanded tennis programs that could not be so maintained without such support. Mr. Harrison, the former mayor of Salt Lake City, and Mr. James, the University of Utah Tennis Coach, made it clear that their tennis programs were necessary for well-rounded educational and recreational activities of substantial benefit to the school and the community. This was found to be a fact by the Commission. Finding #5. This diminution of burdens upon Government appears to be one indicia of a "charitable" entity highly favorable to the Foundation. Friendship Manor v. Tax Commission, 487 P 2d 1272, (1971).

6. No case is known that fixes a specific amount of annual income that must be used in charitable activity to merit exempt status. It seems reasonable however, in the absence of some compelling need, that a charitable organization should so use at least a substantial part of yearly income.

This is not to say that most or even all net income must be donated each year for prudent management and protection against unforeseen exigencies would indicate that some should be held for a reserve or invested so as to establish an endowment for future use.

a. In Elks v. Tax Commission, supra, the taxpayer expended $29,000.00 in charitable purposes in 1972 in the face of gross revenue of some $300,000.00. This is a ratio of income to contribution of approximately 10%. Likewise in Elks v. Groesbeck, supra, an average annual amount of $1,757.79 went to charitable purposes and this was a minute part of income. Nonetheless such decisions held that the property concerned was "exclusively" used for charity because the dominant purpose was charitable. The Indiana Supreme Court found that annual donations of 3% of income of $159,088.52 was not sufficient to qualify for charitable status. Indianapolis Elks Corp. v. Tax Commissioners, supra.

b. In any event the posture of the Foundation in this regard appears conclusively in its favor. From 1967 through 1974 the income to the Foundation was $69,151.74 while its charitable expenditures amounted to $55,860.24. Exhibit #6 shows that in no year from 1967-1974 did the Foundation contribute less than 50% of its annual income to charitable purposes, and its average was approximately 80%. In one year in fact its donations were approximately 130% of income.

CONCLUSION

The only case found that concerns tennis directly and the tax exempt status of funds from a tournament is West Side Tennis Club v. Commissioner, 111 F 2d 6, 2nd Cir., 1940. Said Club is a non profit corporation of New York that operates a private tennis club at Forest Hills. It is the site

each year of the U.S. Men's and Women's Open Tennis Championships conducted jointly by the United States Lawn Tennis Association and the Club.

The Club claimed that its income from the tournament was exempt from federal income taxes because it was a non profit entity of social value. The court denied this because it was shown that the income went into the Club treasury where it was used to lessen financial burdens upon club members through reduction of dues and costs. In this tournament therefore, part of the funds of the tournament go to the Club and are taxable. The major part of revenue goes to the USLTA and is not taxable as such entity is charitable and educational.

This decision is correct for the tournament had only indirect relationship to the recreational value of the Club but more importantly the proceeds therefrom benefitted club members directly and not society in general. On the other hand the event and its sponsorship by the USLTA is proper as an incidental activity for such organization which has exempt status. If the income of the Club had been put into a fund and used to teach tennis without cost to boys and girls in New York it would also have clearly been tax exempt.

The Youth Tennis Foundation of Utah is clearly entitled to tax exempt status. It is non profit. Its programs for youngsters are charitable conferring direct and substantial educational, mental, physical, moral and social benefits upon them. Its funds are used exclusively for such purposes. No person, entity or private shareholder has any right to any net income or assets. No officer, shareholder, member, trustee, lessor, contributor or other person benefits from the Foundation's activities or assets through distribution of profits or payment of excessive charges or compensations.

Its activities benefit an indefinite number of boys and girls of Utah. They confer direct and substantial material and monetary assistance upon state, county, and city governments. These lessen burdens upon the University of Utah and said governments and enable them to maintain excellent tennis programs that would be degraded otherwise. The conduct of the tournament in question by the Foundation was incidental to its charitable activities and was reasonably necessary in the fulfillment of its purposes.

It is respectfully prayed that the Youth Tennis Foundation of Utah be held exempt from the payment of taxes upon sales by it of tickets resulting from its promotion of the 1973 tournament in question.