

REPRESENTATIVE FOR PETITIONER: Timothy Currens, Attorney.

REPRESENTATIVE FOR RESPONDENT: Brenda Brittain, Morgan County Assessor.

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

In the matter of:

BENEVOLENT & PROTECTIVE)	
ORDER OF ELKS, # 1349,)	Petition No.: 55-021-02-2-8-00001
)	
Petitioner,)	County: Morgan
)	
v.)	Township: Washington
)	
MORGAN COUNTY PROPERTY)	Assessment Year: 2002
TAX ASSESSMENT BOARD)	
OF APPEALS,)	
)	
Respondent.)	

Appeal from the Final Determination of
Morgan County Property Tax Assessment Board of Appeals

January 8, 2004

FINAL DETERMINATION

The Board having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Issues

1. The issues presented for consideration by the Board were:

ISSUE 1 – *Whether the subject qualifies for an exemption for charitable purposes. (Ind. Code § 6-1.1-10-16; Ind. Code § 6-1.1-10-36.3)*

ISSUE 2 – *Whether the subject qualifies for an exemption as a fraternal benefit society. (Ind. Code § 6-1.1-10-23)*

ISSUE 3 – *Whether the doctrine of legislative acquiescence should apply.*

Procedural History

2. Pursuant to Ind. Code § 6-1.1-11-7 Mark Peden filed a Form 132, Petition for Review of Exemption, on behalf of Benevolent & Protective Order of Elks, # 1349 (“Petitioner” or “Elks”) petitioning the Board to conduct an administrative review of the above petition. The Form 132 was filed on July 11, 2003. The determination of the Morgan County Property Tax Assessment Board of Appeals (“PTABOA”) was issued on June 13, 2003.

Hearing Facts and Other Matters of Record

3. Pursuant to Ind. Code § 6-1.1-15-4 a hearing was held on October 15, 2003 at the Morgan County Annex building in Martinsville, Indiana, before Brian McKinney, the duly designated Administrative Law Judge (“ALJ”) authorized by the Board under Ind. Code § 6-1.5-5-2.
4. The following persons were present at the hearing:
 - For the Petitioner: Timothy C. Currens, Attorney at Law
Tommy L. McQueary, Trustee, Elks Lodge
 - For the Respondent: Brenda Brittain, Morgan County Assessor
Reva Brummett, Member, Morgan County PTABOA
5. The following persons were sworn in as witnesses and presented testimony:
 - For the Petitioner: None
 - For the Respondent: Brenda Brittain
Reva Brummett

6. The following exhibits were presented:

For the Petitioner: None

For the Respondent: Exhibit A – Property Record Card for subject

Exhibit B – Letter from Elks to PTABOA

Exhibit C – State Board Instructional Bulletin 92-43.

7. The following additional items are officially recognized as part of the record of proceedings:

A – Form 132 petition

B – Notice of Hearing on petition.

Jurisdictional Framework

8. The Board is authorized to issue this final determination pursuant to Ind. Code § 6-1.1-15-3.

State Review and Petitioner's Burden

9. The State does not undertake to make the case for the petitioner. The State decision is based upon the evidence presented and issues raised during the hearing. See *Whitley Products, Inc. v. State Bd. of Tax Comm'rs*, 704 N.E.2d 1113 (Ind. Tax 1998).

10. The petitioner must submit 'probative evidence' that adequately demonstrates the alleged error. Mere allegations, unsupported by factual evidence, will not be considered sufficient to establish an alleged error. See *Whitley Products, Inc. v. State Bd. of Tax Comm'rs*, 704 N.E.2d 1113 (Ind. Tax 1998), and *Herb v. State Bd. of Tax Comm'rs*, 656 N.E.2d 890 (Ind. Tax 1995). ['Probative evidence' is evidence that serves to prove or disprove a fact.]

11. The petitioner has a burden to present more than just ‘de minimis’ evidence in its effort to prove its position. See *Hoogenboom-Nofzinger v. State Bd. of Tax Comm’rs*, 715 N.E.2d 1018 (Ind. Tax 1999). [‘De minimis’ means only a minimal amount.]
12. The petitioner must sufficiently explain the connection between the evidence and petitioner’s assertions in order for it to be considered material to the facts. ‘Conclusory statements’ are of no value to the State in its evaluation of the evidence. See *Heart City Chrysler v. State Bd. of Tax Comm’rs*, 714 N.E.2d 329 (Ind. Tax 1999). [‘Conclusory statements’ are statements, allegations, or assertions that are unsupported by any detailed factual evidence.]
13. The State will not change the determination of the County Property Tax Assessment Board of Appeals unless the petitioner has established a ‘prima facie case.’ See *Clark v. State Bd. of Tax Comm’rs*, 694 N.E.2d 1230 (Ind. Tax 1998), and *North Park Cinemas, Inc. v. State Bd. of Tax Comm’rs*, 689 N.E.2d 765 (Ind. Tax 1997). [A ‘prima facie case’ is established when the petitioner has presented enough probative and material (i.e. relevant) evidence for the State (as the fact-finder) to conclude that the petitioner’s position is correct. The petitioner has proven his position by a ‘preponderance of the evidence’ when the petitioner’s evidence is sufficiently persuasive to convince the State that it outweighs all evidence, and matters officially noticed in the proceeding, that is contrary to the petitioner’s position.]

Constitutional and Statutory Basis for Exemption

14. The General Assembly may exempt from property taxation any property being used for municipal, educational, literary, scientific, religious, or charitable purposes. Article 10, § 1 of the Constitution of Indiana.
15. Article 10, §1 of the State Constitution is not self-enacting. The General Assembly must enact legislation granting the exemption.

16. In Indiana, use of property by a nonprofit entity does not establish any inherent right to exemptions. The grant of federal or state income tax exemption does not entitle a taxpayer to property tax exemption because income tax exemption does not depend so much on how property is used, but on how money is spent. *Raintree Friends Housing, Inc. v. Indiana Department of Revenue*, 667 N.E.2d 810 (Ind. Tax 1996) (501(c)(3) status does not entitle a taxpayer to tax exemption). For property tax exemption, the property must be predominantly used or occupied for the exempt purpose. Ind. Code § 6-1.1-10-36.3.

Basis of Exemption and Burden

17. In Indiana, the general rule is that all property in the State is subject to property taxation. Ind. Code § 6-1.1-2-1.
18. The courts of some states construe constitutional and statutory tax exemptions liberally, some strictly. Indiana courts have been committed to a strict construction from an early date. *Orr v. Baker* (1853) 4 Ind. 86; *Monarch Steel Co., Inc. v. State Board of Tax Commissioners*, 669 N.E.2d 199 (Ind. Tax 1996).
19. All property receives protection, security, and services from the government, e.g., fire and police protection and public schools. This security, protection, and other services always carry with them a corresponding obligation of pecuniary support – taxation. When property is exempted from taxation, the effect is to shift the amount of taxes it would have paid to other parcels that are not exempt. *National Association of Miniature Enthusiasts v. State Board of Tax Commissioners (NAME)*, 671 N.E.2d 218 (Ind. Tax 1996). Non-exempt property picks up a portion of taxes that the exempt property would otherwise have paid, and this should never be seen as an inconsequential shift.
20. This is why worthwhile activities or noble purpose is not enough for tax exemption. Exemption is justified and upheld on the basis of the accomplishment of a public purpose. *NAME*, 671 N.E.2d at 220 (citing *Foursquare Tabernacle Church of God in Christ v. State Board of Tax Commissioners*, 550 N.E.2d 850, 854 (Ind. Tax 1990)).

21. The taxpayer seeking exemption bears the burden of proving that the property is entitled to the exemption by showing that the property falls specifically within the statute under which the exemption is being claimed. *Monarch Steel*, 611 N.E.2d at 714; *Indiana Association of Seventh Day Adventists v. State Board of Tax Commissioners*, 512 N.E.2d 936, 938 (Ind. Tax 1987).
22. As a condition precedent to being granted an exemption under the statute (Ind. Code § 6-1.1-10-16), the taxpayer must demonstrate that it provides “a present benefit to the general public...sufficient to justify the loss of tax revenue.” *NAME*, 671 N.E.2d at 221 (quoting *St. Mary’s Medical Center of Evansville, Inc. v. State Board of Tax Commissioners*, 534 N.E.2d 277, 279 (Ind. Tax 1989), *aff’d* 571 N.E.2d (Ind. Tax 1991)).

Discussion of Issues

ISSUE 1: *Whether the subject qualifies for an exemption under Ind. Code § 6-1.1-10-16 and Ind. Code § 6-1.1-10-36.3*

23. The Elks contends the subject property qualifies for an exemption for charitable use because certain exempt activities conducted on the subject property are necessary to carry out the charitable purpose of the Elks.
24. The Respondent contends the subject property is not exclusively used for charitable purposes and therefore does not qualify for a 100% exemption under Ind. Code § 6-1.1-10-16(charitable). The Respondent further contends that the subject property is not used for a charitable purpose more than 50% of the time and does not qualify for an exemption under Ind. Code § 6-1.1-10-36.3.
25. The applicable statutes governing Issue 1 are:
Ind. Code § 6-1.1-10-16. Land and buildings used for educational, literary, scientific, religious or charitable
(a) All or part of a building is exempt from property taxation if it is owned, occupied, and

used by a person for educational, literary, scientific, religious, or charitable purposes.

Ind. Code § 6-1.1-10-36.3. Property used or occupied for one or more stated purposes

(a) For purposes of this section, property is predominantly used or occupied for one (1) or more stated purposes if it is used or occupied for one (1) or more of those purposes during more than fifty percent (50%) of the time that it is used or occupied in the year that ends on the assessment date of the property.

(b) If a section of this chapter states one (1) or more purposes for which property must be used or occupied in order to qualify for an exemption, then the exemption applies as follows:

(1) Property that is exclusively used or occupied for one (1) or more of the stated purposes is totally exempt under that section.

(2) Property that is predominantly used or occupied for one (1) or more of the stated purposes by a church, religious society, or not-for-profit school is totally exempt under that section.

(3) Property that is predominantly used or occupied for one (1) or more of the stated purposes by a person other than a church, religious society, or not-for-profit school is exempt under that section from property tax on the part of the assessment of the property that bears the same proportion to the total assessment of the property as the amount of time that the property was used or occupied for one (1) or more of the stated purposes during the year that ends on the assessment date of the property bears to the amount of time that the property was used or occupied for any purpose during that year.

(4) Property that is predominantly used or occupied for a purpose other than one (1) of the stated purposes is not exempt from any part of the property tax.

(c) Property is not used or occupied for one (1) or more of the stated purposes during the time that a predominant part of the property is used or occupied in connection with a trade or business that is not substantially related to the exercise or performance of one or more of the stated purposes.

Analysis of ISSUE 1

27. The subject property will qualify for an exemption for charitable purposes if it is owned, occupied, and used for charitable purposes. The issue to be considered is whether the building qualifies for an exemption, not whether the members are charitable. “Although charitable giving might serve as evidence to support claimed charitable use of the facility, the statutory test since 1983 has been predominant use of the facility, not distribution of income for charitable purposes.” *State Board of Tax Commissioners v. New Castle Lodge #147, Loyal Order of Moose, Inc.*, 765 N.E.2d 1257, 1263 (Ind. 2002)

28. In the present case, the building in question has a bar, a kitchen, and other rooms. The building is used for social purposes at times. Because the sole use of the building is not charitable, the building does not qualify for a 100% exemption.
29. The Elks argues that the social activities are necessary to attract and keep members to further the charitable purpose of the organization. However, it is the actual use of the building that is the critical factor in determining whether the subject property qualifies for an exemption, not the charity of the individual members.
30. The subject property would qualify for a partial exemption under Ind. Code § 6-1.1-10-36.3 if it were used more than 50% of the time for charitable purposes. If it is used for more than 50% of the time, the subject will qualify for an exemption in that amount. If the subject is used for charitable purposes 50% of the time or less, then there can be no exemption applied.
31. Respondent's Exhibit B is a letter from the Elks to the PTABOA. In this letter, the use of the building's individual rooms was broken down on an hourly use basis. According to this study, done by the Elks, the building is used for an exempt purpose 19% of the time.
32. The Respondents stated that they considered the usage, but the Elks did not present any explanation of what they considered charitable usage and therefore, the study was given little weight. The Board agrees with the Respondent. There needs to be a more detailed breakdown of usage. For example, the Elks claim that the Lodge & Multipurpose room was used for an exempt purpose 100% of the time. A list of the types of activities that occurred there is necessary for a meaningful review of the exemption claimed.
33. The Elks did not present any evidence indicating the subject was used for an exempt purpose more than 50% of the time. In fact, according to the Elks' evidence the subject is used only 19% of the time for charitable purposes. Accordingly, there can be no exemption granted. The decision of the PTABOA determining the subject property to be 100% taxable is upheld.

ISSUE 2: Whether the subject qualifies for an exemption under Ind. Code § 6-1.1-10-23

34. The Elks contends that the subject qualifies for exemption as a fraternal benefit society.
35. The Respondent contends that the subject does not qualify for an exemption as a fraternal benefit society.
36. The applicable statute governing this issue is:
- Ind. Code § 6-1.1-10-23. Fraternal beneficiary associations**
- (a) Subject to the limitations contained in subsection (b) of this section, tangible property is exempt from property taxation if it is owned by a fraternal beneficiary association which is incorporated, organized, or licensed under the laws of this state.
- (b) The exemption does not apply to real property unless it is actually occupied and exclusively used by the association in carrying out the purpose for which it was incorporated, organized, or licensed.

Analysis of ISSUE 2

37. In the Indiana Code, Title 27, article 11 governs fraternal benefit societies. According to Ind. Code § 27-11-1-1: “This article applies to any incorporated society, order, or supreme lodge without capital stock, whether incorporated or not, conducted solely for the benefit of its members and their beneficiaries and not-for-profit, operated on a lodge system with ritualistic form of work, having a representative form of government, **and that provides benefits in accordance with this article.**” (Emphasis added).
38. Ind. Code § 27-11-2-3 states that: “A society shall operate for the benefit of members and their beneficiaries by: (1) Providing benefits as specified in IC 27-11-6-1; and (2) Operating for one (1) or more social, intellectual, educational, charitable, benevolent, moral, fraternal, patriotic, or religious purposes for the benefit of its members that may also be extended to others. These purposes may be carried out directly by the society, or indirectly through subsidiary corporations or affiliated organizations.”
39. Ind. Code § 27-11-6-1 lists benefits that can be provided as: death benefits; endowment benefits; annuity benefits; temporary or permanent disability benefits; hospital; medical or nursing benefits; monument or tombstone benefits to the memory of deceased

members; and such other benefits as authorized for life insurers and that are not inconsistent with this chapter. Title 27 Article 11 seems to apply to organizations that provided contractual benefits similar to insurers. (Title 27 contains the statutes governing insurance).

40. The Elks did not present any evidence indicating the subject property is providing benefits required to meet the definition of fraternal benefit association. Accordingly, the decision of the PTABOA to deny the exemption stands.

ISSUE 3: *Whether the doctrine of legislative acquiescence should apply.*

41. The Elks contends that because of the doctrine of legislative acquiescence, the subject property should be 100% exempt.
42. The Respondent contends the subject property does not warrant an exemption from property taxes.
43. The applicable case governing this issue is *State Board Of Tax Commissioners v. Fraternal Order of Eagles, Lodge No. 255*, 521 N.E.2d 678 (Ind. 1988).

Analysis of ISSUE 3

44. The Elks argue that the subject has been granted exemptions in the past, and that the doctrine of legislative acquiescence requires the subject continue to be exempt.
45. The decision of the Indiana Supreme Court in *Eagles No. 255* is the controlling case in determining whether the doctrine of legislative acquiescence applies. In that case, a lodge of Fraternal Order of Eagles sought a property tax exemption for charitable purposes or as a fraternal benefit association.
46. In *Eagles No. 255* the Indiana Supreme Court held: “invoking the doctrine of legislative acquiescence upon the facts in the case at bar overbroadens its scope. We share Judge

Sullivan's trepidation that to so broaden the doctrine would be to trap administrative agencies in their own mistakes and in the absence of legislative change would force them to continue their errors *ad infinitum*." *Eagles No. 255*, 521 N.E.2d at 681. (Referring to *Indiana Dep't of State Revenue v. General Foods Corp.*, 427 N.E.2d 665, 671 (Ind. Ct. App. 1981).

47. Because the decision in the *Eagles No. 255* case is based on the same code provisions (Ind. Code § 6-1.1-10-23 and Ind. Code § 6-1.1-10-16), the Board determines that the doctrine of legislative acquiescence is not applicable in the case at bar. For this reason, the determination of the Morgan County PTABOA is upheld.

Summary of Final Determination

Determination of ISSUE 1: *Whether the subject qualifies for an exemption for charitable purposes. (Ind. Code § 6-1.1-10-16; Ind. Code § 6-1.1-10-36.3)*

48. The Elks did not present any probative evidence indicating the subject property qualifies for an exemption under the predominant use test. There is no change as a result.

Determination of ISSUE 2: *Whether the subject qualifies for an exemption as a fraternal benefit society. (Ind. Code § 6-1.1-10-23)*

26. The Elks did not present probative evidence indicating the subject property qualifies for an exemption as a fraternal benefit association under Ind. Code § 6-1.1-10-23 or Ind. Code § 27-11.

Determination of ISSUE 3: *Whether the doctrine of legislative acquiescence should apply.*

48. The doctrine of legislative acquiescence does not apply in this case. Therefore, there is no change as a result of this issue.

This Final Determination of the above captioned matter is issued this by the Indiana Board of Tax Review on the date first written above.

Commissioner, Indiana Board of Tax Review

IMPORTANT NOTICE

- APPEAL RIGHTS -

You may petition for judicial review of this final determination pursuant to the provisions of Indiana Code § 6-1.1-15-5. The action shall be taken to the Indiana Tax Court under Indiana Code § 4-21.5-5. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice.