

REPRESENTATIVES FOR PETITIONER: T. Joe Miller, Secretary of the Lodge

REPRESENTATIVES FOR RESPONDENT: Christine Philips, Osolo Township Assessor

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

In the matter of:

BENEVOLENT AND PROTECTIVE	)	Petition No.: 20-013-91-2-8-00020
ORDER OF ELKS, LODGE #425,)	
	)	County: Elkhart
Petitioner	)	Township: Osolo
	)	Assessment Year: 1991
v.)	
	)	Parcel Nos.: 27-02-32-177-001
ELKHART COUNTY BOARD OF	)	13-02-32-127-002
REVIEW,	)	13-02-29-376-004
	)	13-02-29-377-001
Respondent.	)	13-02-32-103-001
	)	13-02-32-126-004
	)	13-02-29-352-016

Appeal from the Final Determination of
Elkhart County Board of Review

NOVEMBER 21, 2002

FINAL DETERMINATION

The Indiana Board of Tax Review assumed jurisdiction of this matter as the successor entity to the State Board of Tax Commissioners, and the Appeals Division of the State Board of Tax Commissioners. For convenience of reference, each entity is without distinction hereafter referred to as the "Board".

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

Issue

1. The issue presented for consideration by the Board was:
Whether the real and personal property owned by the Benevolent and Protective Order of Elks, Lodge #425 (the "Lodge") is exempt from property taxation pursuant to Ind. Code § 6-1.1-10-16 and § 6-1.1-10-36.3.

Procedural History

2. Pursuant to Ind. Code § 6-1.1-11-7 the Lodge filed a Form 132, Petition for Review of Exemption petitioning the Board to conduct an administrative review of the above petition. The Form 132 was filed on July 12, 1991. The determination of the Elkhart County Board of Review (the "County Board") was issued on June 13, 1991.

Hearing Facts and Other Matters of Record

3. Pursuant to Ind. Code § 6-1.1-15-4 a hearing was held on April 28, 1992 before Hearing Officer Mike Denniston.
4. The following persons were present at the hearing:
For the Petitioner: T. Joe Miller, Secretary of the Lodge

For the Respondent: Christine Philips, Osolo Township Assessor
5. The following persons were sworn in as witnesses and presented testimony:
For the Petitioner: T. Joe Miller

For the Respondent: Christine Philips

6. The following exhibits were presented:

For the Petitioner:

Petitioner's Exhibit 1 – A copy of the Lodge's Annual Report (Page Two) for the year ending March 31, 1991;

Petitioner's Exhibit 2 – A packet of documents cataloguing the many causes promoted by the Lodge;

Petitioner's Exhibit 3 – Financial Statements for March 31, 1991 and March 21, 1990; and

Petitioner's Exhibit 4 – A copy of the information overview provided by the Lodge to the County Board in support of the exemption request.

For the Respondent:

The Respondent did not present any documentary evidence at the hearing.

7. The Hearing Officer viewed the subject property on April 28, 1992. T. Joe Miller and Christine Philips were present at the property viewing.

8. The property subject to this appeal consists of land, improvements, and personal property owned by the Lodge and situated on seven (7) individual parcels of property. The subject property is also known as the Christiana Creek Country Club. Specifically these properties are described as follows:

Parcel 27-02-32-177-001 – 9.07 acres of land upon which the lodge, swimming pool, golf shops, parking lots, and a dwelling sits. Located at 116 – 246 West Bristol Street. (Parcel A).

Parcel 13-02-32-127-002 – 108.558 acres of land upon which the golf course sits. Located at 116 West Bristol Street. (Parcel B).

Parcel 13-02-29-352-016 – 13.44 acres of vacant land located on West Bristol Street. (Parcel C).

Parcel 13-02-29-376-004 – 1.34 acres of vacant land located on West Bristol Street. (Parcel D).

Parcel 13-02-29-377-001 – 0.23 acres of vacant land located on West Bristol Street. (Parcel E).

Parcel 13-02-32-103-001 – an undisclosed amount of land upon which a portion of the golf course sits. Located on Silver Street. (Parcel F).

Parcel 13-02-32-126-004 – 4.06 acres of land upon which a portion of the golf course sits. Located on Silver Street. (Parcel G).

9. The following additional items are officially recognized as part of the record of proceedings:
 - Board Item A – Form 132 Petition
 - Board Item B – Notice of Hearing.

Jurisdictional Framework

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

State Review and Petitioner's Burden

11. 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).
12. 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 1230 (Ind. Tax 1998). ['Probative evidence' is evidence that serves to prove or disprove a fact.]

13. 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.]
14. 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.]
15. 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

16. 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.
17. Article 10, §1 of the State Constitution is not self-enacting. The General Assembly must enact legislation granting the exemption.

18. 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

19. In Indiana, the general rule is that all property in the State is subject to property taxation. Ind. Code § 6-1.1-2-1.
20. 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).
21. 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.
22. 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)).

23. 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).
24. 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 Issue

ISSUE: *Whether the real and personal property owned by the Benevolent and Protective Order of Elks, Lodge #425 (the “Lodge”) is exempt from property taxation pursuant to Ind. Code § 6-1.1-10-16 and § 6-1.1-10-36.3.*

25. The Petitioner contends the subject property is entitled to an exemption.
26. The Respondent contends the subject property is not exempt because less than 3% of the Lodge’s gross income was donated to charity.
27. The applicable statutes governing the Issue are:
- Ind. Code § 6-1.1-10-16(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.
- (c): A tract of land, including the campus and athletic grounds of an educational institution, is exempt from property taxation if:
- (1) a building which is exempt under subsection (a) is situated on it; and
 - (2) the tract does not exceed:
 - (A) one hundred fifty (150) acres in the case of:
 - (i) an educational institution;

- (ii) a tract that was exempt under this subsection on March 1, 1987; or
 - (B) two hundred (200) acres in the case of a local association formed for the purpose of promoting 4-H programs; or
 - (C) fifteen (15) acres in all other cases.
- (e): Personal property is exempt from property taxation if it is owned and used in such manner that it would be exempt under subsection (a) if it were a building.

- Ind. Code § 6-1.1-10-36.3:** (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 by 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 state purposes during the year that ends on the assessment date of the property bears to the amount of time 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.

28. Evidence and testimony considered particularly relevant to this determination include the following:
- a. The Lodge owns and operates a dining facility, bar, swimming pool, and an 18-hole golf course. The main building on Parcel A contains the dining facilities, two separate bars, locker rooms with showers, meeting rooms, and offices. Parcels B through G make up the Lodge's golf course.

- b. The dining facility is open to the general public only during the noon hour. The remaining areas, including the golf course, are for the exclusive use of the Lodge's membership.
- c. The Lodge's gross income for the year ending March 31, 1991 was \$1,242,091. (Pet. Ex. 3). The amount of income attributed to charitable contributions for the year ending 1991 is shown as \$3,093. (Pet. Ex. 3). \$34,073 in cash and \$50,543 in man-hours (members and spouses) were donated in 1991. (Pet. Ex. 1). According to Petitioner's Exhibit 4, charitable contributions of \$61,234 (including \$16,000 in scholarship monies and over \$21,000 in man hours and forfeiture of fees for use of the Lodge) were made by the Lodge.
- d. The Lodge sponsors and coordinates programs for needy families, for special aid funds, for the community, for health and research, for veterans, and for the Miss Indiana Pageant. The Lodge has contributed to scholarship funds, to Boy Scouts, and to youth soccer, basketball, and baseball teams. In 1990, the Lodge provided the use of its facilities, at no charge, to other non-profit organizations 268 times. Also in 1990, the Lodge's membership contributed more than 4,000 hours to charitable ventures.

Analysis of ISSUE

- 29. The determination of this matter is significantly influenced by the holding in *New Castle Lodge, # 147, Loyal Order of Moose, Inc. v. State Board of Tax Commissioners*, 733 N.E. 2d 36 (Ind. Tax 2000)(*Moose I*) affirmed by the Indiana Supreme Court, *State Board of Tax Commissioners v. New Castle Lodge, #147, Loyal Order of Moose, Inc.*, 765 N.E. 2d 1257 (Ind. 2002) (*Moose II*).
- 30. As was reflected by the statements of the Supreme Court in *Moose II*, the predominant use test was codified in Ind. Code § 6-1.1-10-36.3 is the appropriate test for determining whether the Lodge should be exempt. However, the Supreme Court also made note of the fact that at the time of the state hearing the Petitioner was led to "focus on the wrong

test”¹ due to prior declarations of the State Board of Tax Commissioners. The facts of this matter are substantially similar to the situation addressed in the *Moose* decisions.

31. In *Moose*, the Supreme Court decision ultimately recognized the inequity in applying a new and different standard (even though it is the correct one) after the fact. The decision provided a pragmatic remedy in order to avoid prejudice that might result from attempting to hold a hearing ten years later, asking the Petitioner to bring in evidence that will support an argument that focused on the correct standard. The decision remanded the matter to the State and directed a final determination to be based on the “hearing officer’s recommendation” which had been arrived at using the evidence presented at the original hearing of the matter.
32. This Board now finds it appropriate to apply the same logic to this matter. The Hearing Officer’s recommendation in this matter was calculated in the same manner that was used to arrive at the recommendation expressly referenced in the *Moose* case. The Hearing Officer found that the Petitioner’s charitable or exempt usage of Parcel A equaled 14.75% (\$27,440 in assessed value). No other portion of the subject property was determined to be used for charitable purposes.
33. For these reasons, and in accord with the direction provided by *Moose*, the Board now finds that the predominant use of the subject property is not charitable. Only 14.75% of Parcel A is used in a charitable manner. According to Ind. Code § 6-1.1-10-36.3 states that a property must be used for more than 50% of the time for charitable purposes to meet the predominant use test. Accordingly, the Board finds that the subject property is not entitled to an exemption.
34. This determination should not be construed as making a determination that has application beyond the specific and unique factual and historical circumstances affecting this matter for the subject assessment year.

¹ Prior determinations and actions had made the percentage of charitable contributions of primary consideration, instead of the amount of time the property was used for charitable purposes.

Summary of Final Determination

Determination of ISSUE: *Whether the real and personal property owned by the Benevolent and Protective Order of Elks, Lodge #425 (the "Lodge") is exempt from property taxation pursuant to Ind. Code § 6-1.1-10-16 and § 6-1.1-10-36.3.*

35. The subject property is 100% taxable.

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

Chairman, 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.