

REPRESENTATIVES FOR PETITIONER: Steven Hedges, Attorney

REPRESENTATIVES FOR RESPONDENT: Marilyn Meighen, MEIGHEN & ASSOCIATES, PC.

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

In the matter of:

FRATERNAL ORDER OF)	
EAGLES, ROSE CITY AERIE)	Petition No.: 33-016-02-2-8-00035
#933,)	
)	County: Henry
Petitioner)	
)	Township: Henry
v.)	
)	Parcel No.: 0300700600
HENRY COUNTY PROPERTY)	
TAX ASSESSMENT BOARD)	Assessment Year: 2002
OF APPEALS,)	
)	
Respondent)	
)	

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

June 19, 2003

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

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 Steven Hedges filed a Form 132, Petition for Review of Exemption, on behalf of Rose City Aerie #933 of the Fraternal Order of Eagles (Petitioner)(Eagles) petitioning the Board to conduct an administrative review of the above petition. The Form 132 was filed on August 27, 2002. The determination of the Henry County Property Tax Assessment Board of Appeals (PTABOA) was issued on August 22, 2002.

Hearing Facts and Other Matters of Record

3. Pursuant to Ind. Code § 6-1.1-15-4 a hearing was held on January 28, 2003 at the Henry County Annex in New Castle, Indiana, before Tim Rider, 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: Steven G. Hedges, Attorney at Law
Mike Rogers, Mike Rogers Accounting
Mike Bratton, Treasurer of Eagles
 - For the Respondent: Marilyn Meighen, MEIGHEN & ASSOCIATES, PC
Jodie Brown, Henry County Assessor

5. The following persons were sworn in as witnesses and presented testimony:
 - For the Petitioner: Mike Rogers
 - Mike Bratton
 - For the Respondent: Jodie Brown

6. The following exhibits were presented:
 - For the Petitioner: Exhibit A – Flow Chart
 - Exhibit B – Copy of Articles of Association
 - Exhibit C – 35 newsletters from Eagles
 - Exhibit D – By-Laws of Eagles
 - Exhibit E – Usage Study of Eagles
 - For the Respondent: Exhibit 1 – Binder containing tabs A – D
 - Exhibit 2 – Use Analysis of Facility

7. At the hearing, the ALJ gave the parties 30 days to submit post-hearing briefs. Both parties submitted briefs in a timely manner and they are made part of the record.

8. 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

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

State Review and Petitioner's Burden

10. 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).

11. 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.]
12. 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.]
13. 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.]
14. 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

15. 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.
16. Article 10, §1 of the State Constitution is not self-enacting. The General Assembly must enact legislation granting the exemption.
17. 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

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

21. 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)).
22. 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).
23. 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(charitable).*

24. The Petitioner contends the subject property qualifies for a 100% exemption for charitable use because all activities conducted on the subject property are necessary to carry out the charitable purpose of the Petitioner.

25. 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).
26. The applicable statutes governing this Issue 1 are:

§ 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.

§ 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 activities of the members are not what qualify the property for an exemption. The issue 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 Petitioner argues that the social activities are necessary to attract and keep members to further the charity 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 is 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. According to the Usage Study (Petitioner’s Exhibit E), the lodge was generally open 6 days a week from 11am until midnight. The Usage Study concludes, “no activity at this Eagles facility is non-exempt activity, therefore, the facility is exempt from all property tax...”
32. Without explanation the determination made in the Usage Study that no non-exempt activity occurs on the property is purely conclusory.
33. Petitioner’s argument is base entirely on the contention that the charitable status of the property should be determined by reviewing the nature of the entity that owns the property rather than the actual use.

34. The Respondent attempted a breakdown of hours the subject was used for exempt purposes. (See Respondent's Exhibit 2). The Respondent concluded that at most the subject was used for exempt purposes for 293.5 hours. The Respondent then divided that by the total usage according to Petitioner's Exhibit E (1374.5 hours). The Respondent concluded that at most, the subject is used for exempt purposes 21% of the time.
35. Although the Respondent's determination might also be considered conclusory, the Petitioner did not dispute the figures used by Respondent. Nor did Petitioner present any detailed breakdown of their own indicating how much time the property was used for exempt purposes.
36. For all these reasons, the Petitioner failed to present probative evidence establishing the subject was used for exempt purposes more than 50% of the time. Therefore, the subject is not entitled to a partial exemption under Ind. Code § 6-1.1-10-36.3 or Ind. Code § 6-1.1-10-16.

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

37. The Petitioner contends that the subject qualifies for a 100% exemption as a fraternal benefit society.
38. The Respondent contends that the subject does not qualify for 100% exemption as a fraternal benefit society.
39. The applicable statute governing this issue is:
§ 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

40. 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).
41. 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.”
42. 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).
43. According to the By-Laws of the subject, “This Aerie Does Not Pay Benefits.” See Petitioner’s Exhibit D, page 3. Furthermore, in Section 7.1 of the By-Laws, “This Aerie does not pay benefits for any sickness or disability.” Finally, the only funeral benefit that is provided is listed in Section 8.2 of the By-Laws. “On the death of a member, his wife, or any of his children, the Aerie shall provide a suitable floral or other form of tribute, cost not to exceed thirty-five (\$35.00) dollars, to be paid from the General Fund.”

44. The subject property is not providing benefits required to meet the definition of fraternal benefit associations. The Petitioner presented testimony that certain benefits are given members, including cost of education for children. However, there was no evidence in the articles of association (Petitioner's Exhibit B) or in the By-Laws (Petitioner's Exhibit D) to support this claim.

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

45. The Petitioner contends that because of the doctrine of legislative acquiescence, the subject property should be 100% exempt.
46. The Respondent contends the subject property does not warrant an exemption from property taxes.
47. 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) (*Eagles No. 255*).

Analysis of ISSUE 3

48. The Petitioner argues that longstanding decisions by the courts and the Attorney General require the decision that the subject property is a charity and fraternal benefit association under the doctrine of Legislative Acquiescence.
49. 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.
50. The Tax Court granted the exemption on the basis of legislative acquiescence. However, the Tax Court noted that the evidence presented by the Eagles at the hearing did not support the claim for exemption. The Indiana Supreme Court reversed the Tax Court

and noted “there can be little doubt that appellee does not qualify for a tax exemption under the provisions of Ind. Code § 6-1.1-10-23.” *Eagles No. 255*, 521 N.E. 2d at 679.

51. 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.
52. 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(charitable)), the Board determines that the doctrine of legislative acquiescence is not applicable in the case at bar. For this reason, there is no change in the amount of exemption for the subject property.

Summary of Final Determination

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

53. The Petitioner did not present probative evidence indicating the subject property qualifies for an exemption for charitable use. The Petitioner did not present any probative evidence indicating the subject property qualifies for an exemption under the predominant use test.

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

54. The Petitioner 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.*

55. The doctrine of Legislative Acquiescence does not apply in this case. Therefore, there is no change in the amount of exemption to the subject property.

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.