

Opinion No. 43-4248

March 4, 1943

BY: EDWARD P. CHASE, Attorney General

TO: Employment Security Commission of New Mexico, Box 1301, Albuquerque, New Mexico. Attention Mr. A. M. Frazier

We are in receipt of your letter and the Memoranda Brief of recent date concerning the question of whether or not the Santa Fe Lodge No. 460, B.P.O.E., as an employer, is subject to the provisions of the Unemployment Compensation Act.

The contention made by this lodge is that it is organized and operated exclusively for charitable purposes, under Section 19 (7) F. of the Unemployment Compensation Act, so as to be exempt from the tax imposed by this act and from compliance therewith.

This section, which is compiled as Sub-section (7) (F) of Section 57-822 of the 1941 Compilation is as follows:

"(7) The term 'employment' shall not include:

(F) Service performed in the employ of a corporation, community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual;"

I will not attempt to set out in full all the facts incorporated in your Memoranda Brief, but do believe that you fairly establish the following facts:

First: That the lodge was not organized solely for charitable purposes, since the preamble to the constitution of the order is as follows:

"To inculcate the principles of Charity, Justice, Brotherly Love and Fidelity; **to promote the welfare and enhance the happiness of its members; to quicken the spirit of American patriotism; to cultivate good fellowship;** to perpetuate itself as a fraternal organization, and to provide for its government, the Benevolent and Protective Order of Elks of the United States of America, ordains this Constitution."

Further, on Page 4 of your brief you state, after reciting the various charitable and educational purposes, that

"A thorough examination of the Constitution and statutes does not reveal any provision whereby the activities and operations of either the Grand Lodge or any Subordinate Lodge are limited or restricted to charitable or educational purposes.

On the contrary, at several places, fraternal, social, civic and community activities are provided for."

Second: That while the bulk of the net income of the lodge goes for charity, a portion of it goes for other purposes, since you state on page 6 that a portion goes for social activities, financing and upkeep of lodge property, purchase and upkeep of regalia and ceremonial equipment.

A mere statement of the facts would appear to be conclusive of this question since it is impossible to state the facts without stating that the lodge is not organized and operated exclusively for charity. I say this because Webster's dictionary defines "exclusive" as being "single, sole or undivided," and since it would be impossible to say, under this definition, that this lodge was operated singly or solely for charity, when reference is made to the fact that the sum of \$ 169.20 was used in 1941 for social purposes. The same is true as to the purpose for which the lodge is organized, since the purpose, as shown by the preamble hereinabove quoted, is shown to be, among other things, to enhance the happiness of its members and to cultivate good fellowship, which, under no stretch of the imagination, could be deemed charitable. Thus, we resolve ourselves to the question of whether, as a matter of law or legal construction, the words "organized and operated exclusively for charitable purposes" will be given their common and ordinary meanings.

First, your attention is directed to the fact while by Article 8, Section 3 of the Constitution, under which most of the cases in New Mexico have been decided, the test is the use to which the property is put, under the section of the Unemployment Compensation Act above cited the test is the purpose for which the employer is **organized** as well as **operated**.

The only case in which the exemptions to the tax imposed by the Unemployment Compensation Act has been construed is that of Peisker v. Unemployment Compensation Commission, found in 45 N.M. 307, where the Court, in holding that an exemption is to be strictly construed in favor of the taxing authorities and against the one claiming the exemption, said, quoting Samosa v. Lopez, Treasurer, 19 N.M. 312:

"It is a well-established rule of construction that a statute of exemption from taxation must receive a strict construction, and, no claim of exemption should be sustained, unless within the express letter or the necessary scope of the exemption clause."

The writer sees no reason why this rule of strict construction should not be applied. While the Court in Temple Lodge v. Tierney, 37 N.M. 178, established an exception to the general rule of strict construction, it did so on a "quid pro quo" basis, the theory being that if private, charitable and educational institutions did not provide such services, that the state would have to do so, and therefore its loss in tax is made up from the other benefits derived. However, this theory could not be present in the present instance, since here the tax is not one for general revenue, but to protect persons from

the hardships of unemployment, and who the state would be obliged to care for if the employer, through the Unemployment Compensation plan, did not contribute.

Further, the Court, in the later case of Church of the Holy Faith v. State Tax Commission, 39 N.M. 405, does not revert to this exception, and therefore apparently overrules this doctrine sub silentio.

In Temple Lodge v. Tierney, 37 N.M. 178, and in Albuquerque Lodge B. P. O. E. v. Tierney, 39 N.M. 135, the Supreme Court granted the Albuquerque Masons and the Albuquerque Elks, respectively, exemption from the general tax laws. However, these cases are not controlling in the present instance, since both of them were decided under Article 8, Section 3 of the Constitution, wherein the word "exclusively" or words of like import are not found.

While little can be gained from examining the cases from other jurisdictions, since there is such a decided split of opinion, your attention is directed to the cases collected in 22 A. L. R. 907 and 83 A. L. R. 773, dealing with the exemption from taxation of property from fraternal or relief associations.

It is noted that with the exception of Salt Lake Lodge v. Groesbeck, 40 Utah 1, 120 P. 192, that in all the cases cited therein, the Courts refused to grant tax exemptions to Elks Lodges under provisions similar to those found in our Unemployment Compensation Act.

Thus, since under the facts stated, the Santa Fe Elks Lodge is both organized and operated for purposes other than charitable, and since the rule of strict construction must be applied, the exemption will not be granted, as this lodge cannot bring itself within the express letter or the necessary scope of the exemption statute.

In view of the foregoing, I concur in your opinion that the Elks Lodge of Santa Fe is subject to the tax imposed by our Unemployment Compensation Act.

Trusting that the foregoing sufficiently answers your inquiry, I am

By ROBERT W. WARD,

Asst. Atty. General