No. SC88630

IN THE MISSOURI SUPREME COURT

MISSOURI STATE USBC ASSOCIATION,

Appellant,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI

Respondent.

BRIEF OF RESPONDENT DIRECTOR OF REVNUE

JEREMIAH W. (JAY) NIXON
Attorney General

GARY L. GARDNER
Assistant Attorney General

P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321
(573) 751-9456 (facsimile)
gary.gardner@ago.mo.gov

ATTORNEYS FOR RESPONDENT
DIRECTOR OF REVENUE

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STATEMENT OF FACTS

The Director of Revenue adds the following facts:

No one is turned away from membership in the United States Bowling Congress and its affiliated state and local organizations so long as they pay. (Exhibit B, Responses to Interrogatories, No. 12; Exhibit C, Tournament Entry Form) For example, to bowl in the state organization's (the taxpayer's) state tournament, a bowler must pay $20.00 in dues, which is allocated among the national, state, and local organizations. (Exhibit B, Responses to Interrogatories, No. 12; Exhibit C, Tournament Entry Form and reverse ¶ 1) In addition, a bowler must pay an entry fee of $20.00 per event. (Exhibit C, Tournament Entry Form and reverse ¶ 2) In addition to $20.00 in dues and a $20.00 entry fee, a bowler may elect to pay $5.00 to participate in the all events handicap, $5.00 to participate in the all events scratch, $10.00 to participate in the scratch singles, $20.00 to participate in the scratch doubles, and $50.00 to participate in the scratch team competitions. (Exhibit C, Tournament Entry Form and reverse ¶¶ 2, 6A) To become eligible to participate in any of the latter competitions, however, a bowler must pay the $5.00 fee for the all events handicap. (Exhibit C, Tournament Entry Form and reverse ¶ 5) It is unclear whether a bowler must pay an additional $20.00 entry fee to any of these competitions, but at least to participate in the team event, the singles event, or the doubles event, a bowler must also pay an additional

$20.00 entry fee. (Exhibit C, Tournament Entry Form) Therefore, depending on the number and type of events entered, a bowler could pay well over one hundred dollars in dues and fees.

The current state tournament will award to the all events scratch champion entry to the ABC Masters Tournament (presumably, that means payment of the tournament entry fee) and $400.00 in expense money; last year's state tournament awarded over $110,000 in prize money. (Exhibit C, Tournament Entry Form) The $20.00 per event entry fee is split $8.00 to a "prize fund," $8.25 to "bowling," and $3.75 to "expenses." (Exhibit C, Tournament Entry Form) Fees for scratch events are devoted entirely to prize money. (Exhibit C, Tournament Entry Form reverse ¶ 6A)

ARGUMENT

The state bowling association is not entitled to a sales and use tax exemption because it exists primarily to serve its own private interest in promoting bowling tournaments for its dues and fee paying members and is not a charitable, civic, or service organization.

Exemptions from taxation must be based upon the public, not a private, interest. "To warrant the taxing of one object or person and the exemption of another object or person within the same natural class, the exemption must be founded upon a reason public in nature which to a reasonable degree, at least, would justify restricting the natural class." *State ex rel. Transport Mfg. & Equipment Co. v. Bates*, 224 S.W.2d 996, 1000 (Mo. banc 1949). In short, tax exemptions must serve "a public, as distinguished from a private, interest." *Id*. Each claim for exemption must be evaluated upon the particular facts of the case. S*ee Young Men's Christian Ass'n of St. Louis & St. Louis County v. Sestric*, 242 S.W. 2d 497, 505 (Mo. banc 1951). In this case, the state bowling association's private interest in the promotion of statewide bowling tournaments does not justify exempting it from paying tax on lineage fees for the use of lanes in bowling alleys where its tournaments are held.

No charitable organization exemption

The bowling association, the Missouri arm of the United States Bowling Congress, claims that it is entitled to a sales and use tax exemption under § 144.030.2(19), RSMo, as a charitable organization. But the association primarily serves its own private interest in promoting the game of bowling and bowling tournaments for its members. The association does not give, or voluntarily transfer, anything to the public or even to bowlers. All of its activities are directed solely to its dues and fee paying membership. Because of that, its activities are directed to that part of the public which pays for it, not a part of the public that is involuntarily selected. Members' dues and fees are returned to themselves primarily in the form of tournament prize money. The association's activities do not relieve the government of any burden that it is obliged to carry for the people. And its giving and educational activities are incidental to its promotion of bowling and bowling tournaments for its members. A charitable exemption is not warranted.

A charity is "a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public building or works or otherwise lessening the burdens of

government." *Salvation Army v. Hoehn*, 188 S.W.2d 826, 830 (Mo. 1945). The bowling association attempts to read the word "gift" out of this definition, however, by pointing out that the word charity was first defined by this court in the context of a bequest or donation. But that is using a specific instance of a definition to exclude other instances of the definition.

The word "gift" is defined as "something that is voluntarily transferred by one person to another without compensation." *Webster's Third New Int'l Dictionary*, 956 (1993). The definition is broader than a bequest or donation. And the facts of this case do not fit within the definition. Here, the association does not voluntarily transfer anything to bowlers. Without first paying membership dues and bowling tournament fees, no bowler can bowl in a bowling league in Missouri (Appellant's App. A3, ¶ 7), become a member of the national, state, or local bowling associations (Appellant's App. A3, ¶ 7), bowl in the association's state tournaments (Appellant's App. A4–A5, ¶¶ 11–12), participate in the activities at the association's annual showcase and meetings (Appellant's App. A5, ¶¶ 15–16), become eligible for receipt of an award or scholarship (Appellant's App. A5, ¶ 15; A6, ¶ 17), or participate in the bowling educational ventures the association is planning (Appellant's App. A6–A7, ¶ 20). All of these activities are directed solely to the association's dues and fee paying membership.

Because the bowling association's activities are directed solely to its dues and fee paying membership, this case is similar to the Homebuilders Association of Greater St. Louis case. There, like here, "each and every one" of the taxpayer's activities was "predominantly for the benefit of appellant's members with only incidental benefits to the public." *Home Builders Ass'n of Greater St. Louis v. St. Louis County Bd. of Equalization*, 803 S.W.2d 636, 640 (Mo. App. E.D. 1991). In other words, providing only some element of giving or education to persons who are not members of an association is not sufficient to obtain an exemption. Other jurisdictions recognize this principle, too. *See Women's Club of Topeka v. Shawnee County*, 853 P.2d 1157, 1163–64 (Kan. 1993) (literary, education, benevolent, and charitable uses of property incidental to its use for social purposes of members); *State Bd. of Tax Comm'rs v. Fort Wayne Sport Club, Inc.*, 258 N.E.2d 874, 881–82 (Ind. App. 1970) (educational benefits from soccer club "merely incidental"); *National Ass'n of Miniature Enthusiasts v. State Bd. of Tax Comm'rs*, 671 N.E.2d 218, 222 (Ind. Tax Ct. 1996) (educational training in miniatures incidental to recreational and hobby activities); *Maxwell Memorial Football Club v. Pennsylvania*, 336 A.2d 460, 471 (Pa. Commw. Ct. 1975) (injury clinic and contribution to paralyzed boy "too isolated and too small" part of overall program).

Here, the association's giving and planned bowling educational ventures are incidental to its primary purpose of promoting the game of bowling and bowling tournaments. The association's scholarships are based in part on bowling ability and recommendations by coaches and are available only to members attending the annual meeting. (Appellant's App. A5, ¶ 15) Though over the past four years it contributed to the Special Olympics, a veterans group, and a breast cancer foundation, the association contributed $13,447 to the International Bowling Museum and Hall of Fame, around $5,000 more than it contributed to any of the other groups. (Appellant's App. A6, ¶ 18) The association's budget for 2006–07 includes only $1,000 for donations and does not indicate that the moneys will be donated for purposes other than to promote bowling. (Appellant's App. A6, ¶ 19) All of the association's educational ventures but for one, the "in–school carpet kits" for elementary school physical education classes, are available only to its members. (Appellant's App. A6–A7, ¶ 20)

A gift need not be given to every member of the public so long as that part of the public to which it is given is involuntarily selected. "A charity may restrict its admission to a class of humanity, and still be public … as long as the classification is determined by some distinction which involuntarily affects or may affect any of the whole people, although only a small number may be directly benefited, it is public." *Salvation Army*, 188 S.W.2d at 830. But because its

activities are directed solely to its dues and fee paying membership, the bowling association's purported gift is not given to a part of the public that is involuntarily selected. Only those members of the public who choose to pay the association's dues and fees receive its services.

The bowling association argues that dues and fees are irrelevant to whether charitable status exists. But the dues and fees that the association collects show that the part of the public which participates in the association's activities selects itself for participation. Participation is not determined by some person or event outside of those who choose to pay. The bowlers who participate in tournaments are not persons who can participate for some involuntarily reason. And what the association does with the payments it collects shows that it exists to serve the interest of its self–selected members. The association plows its dues and fees primarily back into prize money for bowlers.

The bowling association argues that this court has already determined that the collection of dues and fees is irrelevant to whether charitable status exists. But an examination of the cases it cites shows otherwise. No fees are mentioned at all in one case. *See St. John's Medical Ctr. v. Spradling*, 510 S.W.2d 417 (Mo. banc 1974). And though fees were charged in the other two cases, this court did not examine their role in determining charitable status. *See Director of Revenue v. St. John's Regional Health Ctr.*, 779 S.W.2d 588, 590 (Mo. banc 1989) (flat monthly

fee for use of hospital's fitness center, whose purpose was educational); *Young Men's Christian Ass'n*, 242 S.W. 2d at 502, 505 (membership fees for YMCA with religious purpose to develop "Christian character and Christian fellowship and in order to foster good citizenship and Christian ideals"; some free memberships provided, athletic facilities provided free of charge to some groups).

The bowling association bases its claim to be a charitable organization on the "lessening the burdens of government" arm, as opposed to the educational, religious, medical, humanitarian, or public works arms, of the definition of charity. The association says it merely does on a state wide scale what a municipal parks and recreation department does. But promotion of bowling, organized games, or even beneficial physical recreation is not a burden of government. A burden is defined as "something that is borne as a duty, obligation, or responsibility often with labor and difficulty." *Webster's Third New Int'l Dictionary*, 298 (1993). Government is not obliged to organize and provide the people with opportunities for physical recreation, games competition, or bowling tournaments. The taxpayer's citation to the Engineers Club of St. Louis case is unavailing. In that case, the activities of the club were educational in nature. *See City of St. Louis v. State Tax Comm'n*, 524 S.W. 2d 839, 841–42, 845 (Mo. banc 1975) (education "explicitly and firmly established" as an "accepted category" within the definition of charity; weekly meetings on engineering and architectural subjects open to the

public; presentations of papers by young engineers; meetings with universities to discuss engineering and architectural education; nation wide work with secondary schools to explain the professions; public meetings on air pollution, mass transportation, airport planning, water quality, solid waste disposal; resolutions on public works bond proposals). *See also Fort Wayne Soccer Club*, 258 N.E.2d at 881–82 (though education not restricted to "academic curricula or to ivy covered halls," educational exemption available to equivalent of university and public school offerings that relieve government of a burden); *St. Louis Calligraphy Guild v. Director of Revenue*, 1987 WL 51173, * 2, * 4 (Mo. Admin. Hearing Comm.) (activities of calligraphy guild not governmental duty or activities).

Moreover, the association's citation to an Illinois case is unavailing. In that case, there was evidence that without a foundation's complex that was used by the city's baseball league, the park district would have to build more baseball fields, reschedule games to less desirable times, and reduce the number of games. *See Decatur Sports Foundation. v. Department of Revenue*, 532 N.E.2d 576, 583 (Ill. App. 1988). Here, assuming solely for the sake of argument that providing physical recreation opportunities, games competitions, and bowling tournaments to the people is a burden of government, which it is not, there is no similar evidence. The association cites a Minnesota case that found showing movies kept teenagers "off the street" and, therefore, lessened the burdens of government. *See Paradise*

Community Ctr. Ass'n,, Inc. v. County of Kanabec, 2004 WL 192978, * 9 (Minn. Tax Ct.). That case failed to focus on whether showing movies was a governmental duty or activity. Under the association's analysis, pool halls and video game arcades that keep teenagers "off the street" would qualify for an exemption.

The remaining cases from other jurisdictions and the Administrative Hearing Commission (AHC) that the bowling association cites are also distinguishable. The administrative decision is different because preserving stories about older adults, Native American and Scottish ancestors, and Lewis and Clark history, and telling them in the speech patterns of the times at libraries, nursing homes, day care centers, parks, and storytelling festivals, serves a broad educational purpose. *See Missouri Storytelling, Inc. v. Director of Revenue*, 2005 WL 1172533, * 1–2, * 7 (Mo. Admin. Hearing Comm'n). Here, assuming solely for the sake of argument that the bowling association bases its claim for a charitable exemption upon an educational purpose, which it does not, its planned bowling educational ventures are incidental, as its giving is incidental, to its primary purpose of promoting bowling and bowling tournaments. All of its bowling educational ventures but for one are available only to its dues and fee paying members.

The remaining foreign state decisions are all distinguishable for a variety of reasons. In one case, a charitable exemption was allowed because a baseball club

did not charge registration fees to its ball players, and the state's definition of charitable included a physical benefit. *See Department of Revenue & Taxation of Wyoming v. Casper Legion Baseball Club, Inc.*, 767 P.2d 608, 609, 610 (Wyo. 1989). In another, an exemption was allowed because a garden club's horticultural services, such as landscaping and arranging flowers at cemeteries, schools, museums, parks, other public areas, and charity fund raising dinners, fell under the state's definition of charitable that included scientific work. *See Eugene Garden Club v. Lane County Dep't of Assessment & Taxation*, 2001 WL 1012729, * 1, * 2 (Or. Tax Ct.). In another, an exemption was allowed to a theatre on the ground that drama provided educational benefits. *See Stockton Civic Theatre v. Board of Supervisors of San Joaquin County*, 423 P.2d 810, 815 (Cal. 1967).

In a final case, an exemption was allowed to the owner of an amateur baseball team because it provided its team members as coaches and instructors for and permitted the American Legion, little league, and youth baseball camp to use its field free of charge, and because the definition of charity included "any benevolent or philanthropic objective not prohibited by law or public policy which tends to advance the well–doing and well–being of man." *See Hutchinson Baseball Enterprises, Inc. v. Commissioner of Internal Revenue*, 696 F.2d 757, 758 (10th Cir. 1982). If this court were to adopt that extremely broad, federal definition of charity, it would abandon its practice of determining exemptions on a case by

case basis. All activities would qualify other than those that are strictly commercial or unlawful. Moreover, this court does not consider controlling that the association may qualify for a federal tax exemption under that federal definition or that the association has a federal exemption under the fostering amateur sports competitions provision of § 501(c)(3) of the Internal Revenue Code. *See* (Appellant's App. A2, ¶ 2); *Indian Lake Property Owners Assoc. v. Director of Revenue*, 813 S.W2d 305, 308 (Mo. banc 1991). Neither should this court consider controlling the exemptions the director previously extended to the association's predecessors. The association suggests that evidence is needed to demonstrate that the previous exemptions were improvidently given. But the association is a new organization that requested a new exemption. All of the evidence needed for reviewing the director's denial of an exemption for a new organization is before this court.

Under that evidence, a sales and use tax exemption as a charitable organization is not warranted. Neither is an exemption as a civic or service organization warranted.

No civic or service organization exemption

The bowling association also claims that it is entitled to a sales and use tax exemption under § 144.030.2(20) as a civic and a fraternal organization. This court has defined a civic organization as "forming a component of or connected with the functioning, integration, and development of a civilized community (as a town or city) involving the common public activities and interests of the body of citizens … concerned with or contributory to general welfare and the betterment of life for the citizenry of a community or enhancement of its facilities; *esp*: devoted to improving health, education, safety, recreation, and moral of the general public through nonpolitical means." *Indian Lake Property Owners Ass'n, Inc. v. Director of Revenue,* 813 S.W.2d 305, 308 (Mo. banc 1991).

To be civic in nature, an organization's "purposes and functions must be concerned with and relate to the citizenry at large" and "benefit the community it serves on an unrestricted basis." *Id*. Regardless of whether bowling improves the health and recreation of bowlers, and though the association need not serve every member of the public, there is no evidence and there can be no argument that the general welfare of the citizenry, including non–bowlers, is somehow enhanced by bowling. The only evidence or argument for this that the association offers is the commercial activity that bowling tournaments bring to their host cities. But this commercial activity is itself an incidental benefit of bowling tournaments, which

benefits the host cities, not non–bowlers. And even if an exemption were granted, that incidental benefit would be lessened by the host cities' loss of sales tax revenue. These facts, and the fact that the association charges dues and fees for its services and plows them back into prize money for its members, show that the association primarily serves its own private interest in promoting bowling and bowling tournaments to its paying members.

The Eden Hill Farm case does not help the association. In that case, unlike here, "there never [was] a charge" for use of the farm by the women of a community for rest and recreation, and the federal § 501(c)(4) exemption focused on the "social welfare" of individuals, rather than the general welfare of the citizenry. *See Eden Hill Farm v. U.S.*, 389 F.Supp. 858, 859, 861 (W.D. Pa. 1975). The association does not have a § 501(c)(4) exemption.

Finally, though this court has not defined the term "service organization," the AHC has done so. Relying upon *Webster's Third New International Dictionary*, that tribunal has defined "service organization" as a "club of business and professional men or women concerned especially with community welfare and usually forming part of a national or international organization." *Anheuser–Busch Employees' Credit Union v. Director of Revenue*, 1992 WL 82601, * 6 (Mo. Admin. Hearing Comm'n). In other words, a service organization's activities must benefit someone other than its own membership. *See id*. Citing an AHC decision

for the proposition that a service organization is simply one that contributes to the welfare of others, the association argues that it contributes to others by promoting recreational activity, providing resources to local bowling organizations for their promotion of bowling, and raising funds for charitable causes. The administrative decision is distinguishable because the welfare of others was served there by a scientific and educational function. *See The Missouri Branch of the American Society for Microbiology v. Director of Revenue*, 1988 WL 152884, * 1 (Mo. Admin. Hearing Comm'n) (presentation of papers and interchange of ideas in microbiology, presentation by students of their studies in microbiology). As shown above, any recreational activity and resources provided to local organizations go only to the association's members; the association's giving to others is incidental.

The state bowling association is not entitled to an exemption from sales and use taxation as either a charitable, civic, or service organization because it primarily serves its own private interest in promoting bowling and bowling tournaments to its dues and fee paying members.

No charitable or civic function or activity

Even if the bowling association were entitled to either a charitable or a civic or service exemption, the use to which the association would put that exemption would not be proper. The association would use an exemption to avoid paying tax

on the lineage fees it pays for the use of lanes in bowling alleys where its tournaments are held. (Appellant's App. A5, ¶ 13) That use would not be in the association's "charitable or educational functions and activities" or in its "civic or charitable functions and activities." §§ 144.030.2(19), (20). A bowling tournament is not a charitable, educational, or civic function or activity.

CONCLUSION

For the reasons stated above, the decision of the Administrative Hearing Commission should be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

GARY L. GARDNER
Assistant Attorney General
Missouri Bar No. 24779

Post Office Box 899
Jefferson City, Missouri 65102
(573) 751-3321
(573) 751-9456 (facsimile)
gary.gardner@ago.mo.gov

ATTORNEYS FOR RESPONDENT
DIRECTOR OF REVENUE

CERTIFICATES OF SERVICE AND COMPLIANCE

I hereby certify that 1 copy and 1 computer diskette of the foregoing was served by first–class mail, postage prepaid, this ____ day of December, 2007, upon:

Carole L. Iles	James L. Spradlin
Edward F. Downey	Amy Bartolomuci
2221 Bolivar, Suite 101	P.O. Box 475
Jefferson City, MO 65101	Jefferson City, MO 65105-0475

I hereby certify that an electronic copy of the foregoing was e–mailed to Carole L. Iles at carole.iles@bryancave.com this _____ day of December, 2007.

I hereby certify that this brief contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 4,432 words and that the diskettes provided this court and counsel have been scanned for viruses and are virus–free.

_____
Assistant Attorney General