TAXATION: Real estate not exempt from taxation, although income used for purely charitable purposes.

10-30

October 28, 1935

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Mr. Walter A. Craven
Secretary
Masonic Bodies
Excelsior Springs, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of October 15 in which you request an opinion of this Department on the question therein submitted, which letter is as follows:

> "Our Lodge through the will of one of its members came into possession of various properties, among them a business building in this city.
>
> In his will he specified that all property be placed in endowment fund and only the income from such endowment was to be used for maintenance or upkeep of the Cemetery, the land for which he had purchased and gave to the Lodge.
>
> Following his will, all rents from this property goes into the maintenance fund of the Masonic Cemetery and no part of it reaches the Lodge for use in any other manner.
>
> The County Court of this, Clay County, claim because the property is income property, not used for Masonic Lodge, it is subject to taxes, and we have been paying these taxes, which amount to approximately $170.00 per year. We do not, however, agree with this position

> because the funds are used for benevolent, charitable and cemetery purposes (cemetery such as described herein)
>
> I wish you would write us just the situation as to the application of the laws governing such interests, and if your conclusions are favorable, inform the County Court that this property may be removed from taxable real estate.
>
> With all good wishes, I am."

We also have before us the Will mentioned in your letter, namely, the will of William E. Steck, dated July 12, 1928, and a certain contract entered into October 18, 1926, by and between the aforesaid William E. Steck and Clay Lodge No. 207, A. F. & A. M., Excelsior Springs, Missouri.

From the above instruments and your letter we assume that the above Lodge, or its trustees, has the title to various properties and a business building in Excelsior Springs, Missouri; that the income derived from said properties are, under the terms of the last will and testament, to be used for the maintenance and upkeep of the Masonic Cemetery created by the aforesaid Steck, and which we may assume for the purposes of this opinion to be "for purposes purely charitable."

The question then is whether or not real estate, owned by the lodge or its trustees mentioned above, which is rented out and the income of which is used for the maintenance and upkeep of the cemetery aforesaid, is exempt from taxation. In arriving at a correct solution of this matter we must look to the Constitution of Missouri and the statutes relating to tax exemptions and the construction of same as given by our courts. Section 6, Article X of the Missouri Constitution provides as follows:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the

> limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law.".

And the pertinent parts of Section 9743, R. S. Mo. 1929, which follows almost the precise language of Section 6, Article X, provides as follows:

> "The following subjects are exempt from taxation:
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> * * * * * * * * * * * * * * * * * * *
>
> sixth, lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, when the same are used exclusively for religious worship, for schools or for purposes purely charitable, shall be exempted from taxation for state, county or local purposes."

In the construction of laws exempting property from taxation there is one cardinal principle that stands out, and that is that such provisions of the constitution and statutes must be strictly construed.

In the case of State ex rel. St. Louis Y. M. C. A. v. Gehner 11 S. W. (2d) 30, l. c. 34, the Missouri Supreme Court, in a leading case on this subject, said the following:

> "Taxation is a sovereign right of the state, and the abandonment of the right to

exercise it can never be presumed; but the intention to abandon it must appear in the most clear and unequivocal terms,as was twice said by this court in early decisions and reiterated in later decisions.Lexington v.Aull,30 Mo.loc.cit.487; Pacific Railroad v. Cass County,53 Mo.loc.cit.27. 'An exemption from taxation must be clear and unambiguous and should not be created by implication.' Scotland County v.Railroad Co.65 Mo.134; State ex rel. v. Arnold, 136 Mo. loc. cit. 450, 38 S. W. 79.

'In the construction of laws exempting property from taxation it is a cardinal principle that they must be strictly construed. As a rule all property is liable to taxation, exemption, the exception,and it devolves upon the person claiming that any specific property is exempt to show it beyond a reasonable doubt. It is in no case to be assumed that the law intends to release any particular property from this obligation; and no such exemption can be allowed, except upon clear and unequivocal proof that such release is required by the terms of the statute. If any doubt arises as to the exemption claimed, it must operate most strongly against the party claiming the exemption.' Fitterer v. Crawford,157 Mo. loc. cit. 58, 57 S. W. 533, 50 L. R. A. 191.

'As the burden of taxation ordinarily should fall upon all persons alike, when one claims an exemption therefrom he must be able to point to the law granting such immunity and it must be clear and unambiguous.' Kansas Exposition Driving Park v. Kansas City, 174 Mo. loc. cit. 433, 74 S. W. 981.

'Such statute and constitutional provisions are construed with strictness and most strongly against those claiming the exemption.' Beach on Public Corp.par.1443; Dillon on Munic. Corp.(3rd Ed.) par.776, and cases cited; 1 Burroughs on Taxation,sec. 70; 1 Desty on Taxation,p.108; Cooley on Taxation, pp.204, 205.

And very recently this court, by Walker,J.,

> said:'The policy of our law,constitutional and statutory,is that no property than that enumerated shall be exempt from taxation.' State ex rel.Globe-Democrat Pub.Co. v.Gehner,316 Mo.696,294 S.W.loc.cit.1018.
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> 'A grant of exemption from taxation is never presumed;on the contrary,in all cases of doubt as to the legislative intention,or as to the inclusion of particular property within the terms of the statute,the presumption is in favor of the taxing power,and the burden is on the claimant to establish clearly his right to exemption.' 37 Cye.of Law,p.891;Galloway v. Memphis,116 Tenn.loc.cit.736,94 S.W.75;Willard v.Pike,59 Vt.218,9 A.907.
>
> We might multiply these citations, by quoting from the decisions of other courts of last resort and other text-books, but all would be to the same effect."

The doctrine announced in this case was reaffirmed in the case of St.Louis Y.M.C.A. v. Gehner 47 S.W.(2d) 776, 81 A.L.R.1449.

The fundamental principles relating to tax exemptions are well stated in the above cases, and with these fundamental principles in mind we approach your question.

In Cooley on Taxation, Vol.2,(4th Ed.) Section 686,page 1434, in discussing tax exemptions where the income of the property is used for some charitable purposes,is stated the following:

> "In case of charitable, religious, educational and other like institutions where the statute bases the exemption from taxation on the use of the property for the exempt purposes, it often happens that the association leases to others a part of the building or a separate building or a part of the land, or that it receives an income from money invested or from property otherwise used as a source of profit outside of and independent of its regular line of work. The question then

> arises as to what is the effect thereof on the existing exemption of property used for the purposes of the association. Of course, much importance is to be given to the precise wording of the exemption statute. Generally, the provision exempts only property 'used' or 'exclusively used' for the enumerated purposes; and in several states the governing provision expressly excepts property used for profit by including only property 'not leased or otherwise used with a view to profit.' If the exemption is based on ownership, by virtue of the wording of the governing provision, a different question arises. But if the statute makes the exemption depend upon the use of the property, then the general rule is that the exception does not apply to property rented out to others by the exempt association or to other property held or used by it merely as a source of revenue, except that a mere occasional renting out, not interfering with the primary use of the property by the lessor, does not affect the exemption, and that sometimes the statute is sufficiently broad in its terms to include revenue and income."

In this connection it is to be noted that Section 6, Article X, of our Constitution, says in part,

> "* * * * * * Lots in incorporated cities or towns, or within one mile of the limits of such city or town, to an extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; "

In the case of Y. M. C. A. v. Douglas County 52 L. R. A. 123, 63 N. W. 924, it is held that,

> "To hold that property rented for business purposes is exempt when the rentals or main income therefrom are used exclusively for religious, charitable or educational purposes, is extending the operation of the law further than is warranted by the language used. There is a clear and well defined distinction between the use of property and the use of the income derived therefrom."

And in the case of United Brethren v. Forsythe 120 S. E. 626, in a note, 50 L. R. A. (n.s.) 1211, it is said:

> "And a house and lot owned by a religious corporation, but rented out as a restaurant are not exempt from taxation as property used exclusively for religious, charitable or educational purposes; although the corporation applies the rent received for such purposes."

The rule is stated in 61 C. J., page 461, Section 518, as follows:

> "Under constitutional and statutory provisions which in varying terms make charitable use of property essential to its exemption, it is ordinarily held that where property owned by charitable institutions is rented to third persons or otherwise employed as a source of profit, it is not exempt despite application of the income to charitable purposes, * * * * "

In a note under the case of People of the State of Illinois, ex rel. v. Wither's Home, 143 N. E. 414, 34 A. L. R. 628, l. c. 659, it is stated:

> "By the great weight of authority a charitable institution is not entitled to an exemption from taxation on property which it leases out or holds for revenue, although the funds derived in this manner are devoted to charitable purposes." (And cases are therein cited from a great many states of the Union.)

And in the case of State of West Virginia v. McDowell Lodge A. F. & A. M. 123 S. E. 561, 38 A. L. R. 31, l. c. 34, it is said:

> "While it must be borne in mind that the decisions of other jurisdictions are largely influenced by their constitutional and statutory provisions, it is quite generally held that where property belonging to a charitable institution is rented out or otherwise employed as a source of profit to the institution, it is not sufficient to save that property from taxation because the rent or income is devoted exclusively to charitable purposes; the exemption is generally held to apply to the property which is actually used and occupied for the charitable purposes for which the institution is organized." (Cases cited thereunder.)

Coming now to the construction given Article X, Section 6, by our courts, the Supreme Court of Missouri said in the case of Fitterer v. Crawford, 157 Mo. 51, page 63:

> "It is upon the condition that the property is 'used exclusively for purely charitable purposes,' that

it is exempted from taxation. It must be remembered that it is not exempted from taxation simply because it belongs to the Masonic lodge, but because of its exclusive use by the lodge for charitable purposes. Now as to the third story there can be no question as to its use for such purposes, but as to the other stories, and the ground, they are not so used. And being parts of the same building, and belonging to the same party, it could not be parceled out, and thus assessed and taxed, so as to bring that part of it, 'used exclusively for charitable purposes' within that provision of the statute which exempts such property from taxation. Nor do we think that merely applying the rents received from the first and second stories to the extinguishment of the debt incurred in the construction of the Masonic lodge building, is 'using the building exclusively for purely charitable purposes,' within the meaning of the statute. There is a very material difference between the 'use of a building exclusively for purely charitable purposes,' and renting it out, and then applying the proceeds arising therefrom to such purposes. To rent out a building is not to use it within the meaning of the statute, but in order to use it, it must be occupied or made use of. Moreover, by leasing the property the lodge becomes the competitor of all persons having property to rent for similar purposes, and the plain and obvious meaning of the statute is that such property shall not be exempt from taxation."

The above case was followed and approved in the case of State ex rel. v. Y. M. C. A. 259 Mo. 233, wherein a Y. M. C. A. building was held to be not exempt from taxation where a portion of the building was rented out for

commercial purposes, notwithstanding the income derived therefrom was used by the organization for charitable purposes.

From the above and foregoing and the construction given our constitution and the statutes enacted in conformity therewith, by the Supreme Court of Missouri, and the great weight of the authority from other states construing similar constitutional provisions and statutes, it is our opinion that the real estate and buildings owned by the lodge mentioned in your letter, or the trustees under the will mentioned, are not exempt from taxation although the income therefrom is used for purely charitable purposes, namely, the maintenance and upkeep of the Masonic Cemetery.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

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