IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

THE GOVERNORS OF THE KNIGHTS OF AK-SAR-BEN, Plaintiff,	)	DOCKET 352 PAGE 148
vs.	)	ORDER
DEPARTMENT OF REVENUE OF NEBRASKA and FRED A. HARRINGTON, TAX COMMISSIONER OF NEBRASKA, Defendants.	)	

Dept. of Justice
DEC 28 1984
State of Nebraska

* * *

The matter before the Court is an appeal pursuant to the provisions of Neb. Rev. Stat. §77-27,127 (Supp. 1984), and the Administrative Procedures Act, Neb. Rev. Stat. §§84-917 to 84-919 (Reissue 1981 and Supp. 1984), from the Findings and Order of the State Tax Commissioner dated December 27, 1982.

The issue presented is whether the gross receipts from the sale of Ak-Sar-Ben memberships are subject to Nebraska sales tax as constituting taxable retail sales of admissions.

Neb. Rev. Stat. §77-2703(1)(Supp. 1984) provides that

> There is hereby imposed a tax. . . upon . . . the gross receipts from the sale of admissions in this state . . .

The sale of admissions is defined as:

> [T]he right or privilege to have access to or use a place or location . . .

Neb. Rev. Stat. §77-2702(10)(d)(Supp. 1984). The Legislature specifically found that admissions charged by elementary and secondary schools or by school districts, school organizations, or PTAs did not constitute "admissions" within the meaning of the statute. Id.

An Ak-Sar-Ben membership gives the purchaser the right to attend several entertainment events during the year at no additional charge. The fair market value of the right to attend these events exceeds the price of a membership. As several Ak-Sar-Ben ads have stated, a member would receive "a $100.00 entertainment value for only $20.00."

The Nebraska Department of Revenue, in construing §77-2702(10)(d), has promulgated Reg-1-44 of the Nebraska Sales and Use Tax regulations, which provides:

> (1) The term "admission" as used herein means the right or privilege to have access to or use a place or location where amusement, entertainment or recreation is provided. The gross receipts from the sale of admissions are subject to sales tax. This includes season or subscription tickets as well as single admissions.
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> (2) However, the term "admission" does not include regular membership dues paid which entitle one to usual or similar organizational privileges, even though one of the privileges is the right to participate in amusement, entertainment, or recreation. But, where the chief or sole privilege of a so-called membership is a right of admission to certain particular performances, or to some place on a definite number of occasions, then the amount paid for such membership is taxable; e.g., community concert memberships.

. . . .

> (6) Places of amusement, entertainment or recreation include, but are not limited to, theatres, motion picture shows, auditoriums where lectures and concerts are given, amusement parks, fair grounds, race tracks . . .

The provisions of Reg-1-44 have existed without substantial change since their adoption in 1967. "Although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction, particularly when the Legislature has failed to take any action to change such an interpretation." McCaul v. American Savings Company, 213 Neb. 841,846, 331 N.W.2d 795,798 (1983).

On its face, at least, an Ak-Sar-Ben membership is, for example, indistinguishable from a season ticket subscription to a local symphony orchestra. In both cases, the purchaser receives the right to attend a series of concerts for a price well below the full fair market value of the regular admission price. In both cases, the concerts are supported by a charitable organization whose aim in giving them is to enhance the cultural atmosphere of the community.

Ak-Sar-Ben argues that the two are distinguishable in that the season symphony ticket holders expect to receive nothing more than entertainment, whereas an Ak-Sar-Ben member has expectations which go beyond entertainment, since Ak-Sar-Ben also has agricultural, charitable and educational objectives. Accordingly, so the argu-

ment goes, the shows are merely incidental to the organization's other objectives and thus the memberships should not be taxed as admissions.

In support of this argument, Ak-Sar-Ben cites Sveithold Singing Club v. McKibben, 381 Ill. 194, 44 N.E.2d 904 (1942), where a nonprofit social club was held not to be subject to the state retailer's occupation tax where the club furnished food and drink to its members in pursuance of its primary goal of promoting social intercourse among the members of the club. The court held that what distinguished the club from a commercial vendor was that the food and drinks were furnished only incidentally to the primary object of the club, whereas a commercial vendor would be primarily interested in their sale, the promotion of social intercourse being a strictly incidental object.

> [A] tax is not due and payable where sales, though at retail and for use and consumption and not for resale, are merely incidental to a business which the vendor was licensed or authorized to transact.

Id at ____, 44 N.E.2d at 908.

Ak-Sar-Ben argues that a similar situation is presented here. That is, in order to carry out its agricultural, civic and philanthropic goals:

> [I]t is necessary that Ak-Sar-Ben have a broad base of community and regional support both from business and individuals . . . In connection with its annual membership drive, Ak-Sar-Ben offers to its members high quality

> entertainment, which is either free or available at a discount; however, that entertainment is entirely secondary to the primary purposes and goals of Ak-Sar-Ben.

Affidavit of Walter Scott, Jr., the President of the Governors of the Knights of Ak-Sar-Ben (T:265). Since the entertainment is offered only to procure community support, and is thus a secondary concern of the organization, it argues, the Sveithold analysis should be applied, and the admissions tax should not be assessed.

Nevertheless, the Sveithold analysis does not quite fit here. In that case, the sale of food and drink was carried on because otherwise the organization would have been severely restricted in the pursuit of its primary goal. The sales directly complimented its other activities. Here, the offering of concerts does not directly compliment its other activities, but instead serves as a means of generating public good will towards the organization itself. Since it does not appear that the income produced from the sale of memberships covers the costs of the entertainment (T:118, 130), the shows apparently have no other benefit for the organization.

In Youth Tennis Foundation v. Tax Commission, 554 P.2d 220 (Utah, 1976), the state attempted to collect admissions taxes from the admissions to a professional tennis tournament sponsored by a youth tennis foundation which qualified as a nonprofit charitable corporation. In holding that the sales were exempt, the court stated:

> Sales which are made merely incidental to and consistent with charitable purposes do not change that character or deprive it of attendant protections.

Id at 223. Thus, it is permissible to exempt such sales because they directly compliment the organization's charitable ends, even though such an activity would normally be subject to the tax.

In Revenue Ruling 67-246, the Internal Revenue Service held that where consideration in the form of admissions is received in connection with payments by patrons of fund-raising events, the presumption is that the payments are not "gifts" within the meaning of IRC §170.

> In making such a determination, the full fair market value of the admission . . . must be taken into account. Where the affair is reasonably comparable to events for which there are established charges for admission, . . . the established charges should be treated as fixing the fair market value of the admission . . . Where the amount paid is the same as the standard admission charge there is, of course, no deductible contribution, regardless of the intention of the parties. . . .
>
> The fact that the full amount or a portion of the payment made by the taxpayer is used by the organization exclusively for charitable purposes has no bearing upon the determination to be made as to the value of the admission . . . and the amount qualifying as a contribution.
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> Also, the mere fact that tickets . . .are not utilized does not entitle the patron to any greater charitable contribution deduction than would otherwise be allowable. The test of deductibility is not whether the right to admission . . . is exercised, but whether the right was accepted or rejected by the taxpayer.

This Revenue Ruling illuminates several of the considerations involved in the present case:

1. If the value of the right of admission conferred on an Ak-Sar-Ben member by virtue of the membership is reasonably comparable to the fair market value of the right of admission, the member's motives are not deemed to be charitable.
2. Even if Ak-Sar-Ben uses the proceeds from the memberships exclusively to further its charitable goals, and the taxpayers buy the memberships to further those goals, there is no charitable intent for tax purposes.
3. Even if it is physically impossible for all Ak-Sar-Ben members to attend any one show, the purchase of the membership is not charitable unless the member explicitly refuses the right of admission.

Similarly, in Revenue Ruling 68-432, the IRS held:

> Whether payments in the form of membership fees or dues to an organization described in section 170(c) of the Code are in whole or in part contributions is a question of fact and will depend on such considerations as the objectives and activities of the organization and the nature and extent of the benefits or privileges conferred upon its members. If any reasonably commensurate return privileges or facilities are made available by reason of membership payment, such payment is not a charitable contribution within the meaning of section 170 of the Code.

This reaffirms the earlier ruling and clarifies the holding in Sveithold, supra. As this Ruling later states:

> If . . . the rights and privileges of membership are incidental to making the organization function according to its charitable purposes and the only return benefit thereby obtainable is the satisfaction of participating in furthering the charitable cause, the membership fee is considered a contribution toward the support of the organization . . . Such privileges as being associated with or being known as a benefactor of the organization are not significant return benefits that have a monetary value within the meaning of this Revenue Ruling.

In Young Women's Christian Ass'n v. City of Lincoln, 177 Neb. 136, 128 N.W.2d 600 (1964), the court held that certain property owned by the YWCA was exempt from taxation. In determining whether the building was being used for a charitable purpose, the test was whether it "is used primarily for accomplishing the charitable purpose of the organization or is, instead, simply an adjunct, related to the organization but not an integral part of it insofar as carrying out its charitable purpose." Id at ____, 128 N.W.2d at 607. Since in that case the building was used to "provide moral surroundings, with religious overtones, and proper supervision . . . for young girls. . . ", Id, it furthered the YWCA's charitable purpose and was entitled to exemption.

It would be possible in the present case to construct a test similar to the one in YWCA, supra. Nebr. Rev. Reg-1-44, supra, holds that memberships are taxable as admissions if the "chief or sole privilege . . . is a right of admission to certain particular performances." The Sveithold and Youth Tennis cases seem to

imply that if the sales are incidental to and consistent with the organization's charitable purposes, they should be exempt from taxation. Revenue Rulings 67-246 and 68-432 indicate that if the return privileges of membership are roughly equivalent to or greater than the fair market value of the price paid for the membership, there is no charitable intent implied in its purchase.

Keeping in mind that:

> Taxation is the rule and exemption therefrom the exception; and the claimant of such an exemption must show his right thereto by evidence which leaves the question free from doubt. The claimant for an exemption must show that his demand is within the letter as well as the spirit of the law.

Jones v. Iowa State Tax Comm'n, 247 Iowa 530, 74 N.W.2d 563 (1956), the above holdings indicate that the Ak-Sar-Ben memberships are properly taxable as admissions unless either:

1. The value of the privileges conferred is minimal compared to the price paid for the membership; or
2. The shows to which members are entitled to attend directly further the avowed charitable purpose of the organization.

However, in the present case:

1. The value of the privileges conferred by an Ak-Sar-Ben membership is not minimal compared to the price paid. Ak-Sar-Ben's advertisements contained the language "Treat your family to a $100.000 entertainment value for only $20.00." (T:262,263). Thus, by its own admission,

Ak-Sar-Ben memberships confer privileges worth more than the price of the memberships. It is, of course, irrelevant that it is physically impossible for all members to attend all shows, since only the "right or privilege to have access" is taxed.

2. Ak-Sar-Ben appears to have at least three distinct purposes. The primary goal of the organization is to promote agriculture, which it accomplishes by supporting various farm-related organizations and by staging several livestock shows throughout the year.

Ak-Sar-Ben also sponsors, in a more general manner, educational and other charitable organizations via direct contributions of money and labor.

Finally, in order to "further a program of civil betterment," Ak-Sar-Ben undertakes "to stage and conduct cultural entertainment." (T:63). This does not appear to be a valid charitable purpose in itself, since otherwise nearly all entertainment activities would be tax-exempt, which clearly goes against the intent of NRS §§77-2703(1) and 77-2702(10)(d). Therefore, under YWCA, supra, the shows must be "used primarily for accomplishing the charitable purpose of the organization." Id. Because the cost of putting the shows on exceeds the revenue of the memberships, and because the shows appear to be unrelated to the organization's other charitable purposes, the shows instead are "related to the organization

but not an integral part of it insofar as carrying out its charitable purpose." Id.

Therefore, the memberships should be treated in the same manner as season tickets to other types of community entertainment, which are clearly taxable under the statute.

Findings of Fact and Conclusions of Law

1. The provisions of Reg-1-44 of the Nebraska Sales and Use Tax Regulations, relating to the taxability of sales of admissions, are entitled to considerable weight and deference in the interpretation of §§77-2703(1) and 77-2702(10)(d), such regulation having been duly adopted by the agency charged with the enforcement of the State's revenue laws.

2. The provisions of Reg-1-44, which includes under the taxable sale of admissions the sale of memberships "where the chief or sole privilege of a so-called membership is a right of admission to certain performances or to some place on a definite number of occasions," are consistent with the provisions of §77-2702(10)(d), which defines the sale of admissions as "the right or privilege to have access to or use a place or location."

3. The manner in which plaintiff advertises the sale of Ak-Sar-Ben memberships, together with the rights and privileges granted members by such purchase to attend certain specified entertainment events for free or at reduced prices by virtue of their

purchase of Ak-Sar-Ben memberships, constitutes the taxable sale of admissions under §77-2702(10)(d) and Reg-1-44, and therefore such memberships are subject to Nebraska sales tax under §77-2703(1).

4. The plain language of §77-2702(10)(d), which defines the sale of admissions as "the right or privilege to have access to or use a place or location," indicates no legislative intent to require that a right or privilege of access purchased need actually be exercised to render the transaction subject to Nebraska sales tax.

5. The interpretation of the State Tax Commissioner contained in his Findings and Order dated December 27, 1982, determining the sale of Ak-Sar-Ben memberships to be subject to Nebraska sales tax, is within his statutory authority and jurisdiction, is supported by competent, material, and substantial evidence, and is not arbitrary or capricious.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Findings and Order entered herein by the State Tax Commissioner on December 27, 1982, is affirmed, that the Petition on Appeal is dismissed, and that costs are taxed to Appellants.

Dated: December 27, 1984.

BY THE COURT:

Donald E. Endorott
District Judge