St. John's Law Review

Volume 35
Number 1 *Volume 35, December 1960, Number 1*

Article 4

May 2013

Federal Income and New York Real Property Charitable Tax Exemptions: Applications of the "Exclusive" Test

St. John's Law Review

The law in New York seems to place individual workers entirely at the mercy of union management, denying them remedy under the collective agreement however flagrant such abuses of discretion might be. As has been indicated, the aggrieved party is relegated to an action at law against the union for damages.

The individual is thus forced to bear the expense of litigation and the burden of proving fraud or breach of fiduciary duty in dealings admittedly of a discretionary nature, and in which, in the usual instance, he has taken little active part. Further, should he overcome these obstacles, he is entitled only to money damages—a remedy not wholly satisfactory in instances of, for example, wrongful discharge.

The door of abuse would seem therefore to be cast ajar in an area that has already had occasion to feel the sting of power misused.[59]

The need seems clear then for precise regulation of enforcement procedures under collective agreements that would preserve the basic rights of individuals to remedy injustices done them and at the same time retain the overall advantages of the collective bargaining system. Such regulation, properly, is the task of the legislature.

An amendment to the Civil Practice Act permitting the individual to compel and otherwise affect arbitration proceedings between the parties, upon a showing that there is reasonable cause to believe that the employee's rights have been violated by the union's mismanagement of his grievance, would seem to be the most likely solution. Such an amendment (if possible in the now-existing statutory scheme) would tend to limit direct participation in arbitration proceedings to those individuals whose rights are clearly endangered. Neither a flood of litigation nor the consequent collapse of the arbitration system, so feared by the courts, seems likely under such a provision.

FEDERAL INCOME AND NEW YORK REAL PROPERTY CHARITABLE TAX EXEMPTIONS: APPLICATION OF THE "EXCLUSIVE" TEST

The problem herein discussed is one of comparative statutory construction, centering around the meaning of "exclusive," as used in Section 501(c)(3) of the Internal Revenue Code, and Section 420

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[59] See, *e.g.*, Gregory, *Fiduciary Standards and the Bargaining and Grievance Process*, 8 LAB. L.J. 843 (1947); Kennedy, *Union Refusal to Bargain*, 73 HARV. L. REV. 502 (1958); Tureen, *Judicial Intervention in Intra-Union Affairs to Protect the Rights of Members*, 1954 WASH. L.Q. 440 (1954).

of the New York Real Property Tax Law (formerly New York Tax Law, section 4(6)). These two provisions authorize, under certain circumstances, a tax exemption in their respective areas to organizations which are exclusively charitable in their nature. Such entities have received special income tax treatment in every revenue act. The present Code, as well as the state property tax law, refers to organizations which are exclusively "charitable," "scientific," "religious," or "educational." Since the definitions of the terms are subject to reasonable dispute, a problem of interpretation is thereby created. This problem has taken on an even greater significance as the importance of taxation has increased, especially with the relatively recent appearance of the charitable foundation and the corporate donation. This article will examine the general definition of "exclusively charitable," and more specifically, how courts have construed "exclusive" within the context of income or profit-making activities of a charity, when applying the exemption provisions of the New York Real Property Tax Law as compared to the Internal Revenue Code.

The Meaning of Charity

It is difficult to define specifically what is meant by the term "charity." This is so, at least partially, because any definition, by its very existence, is also a limitation. As a result usage of the term has become very broad and comprehensive.[1] The foremost American legal definition[2] is that of Judge Gray in *Jackson v. Phillips:*[3]

> A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.[4]

Even this definition, however, in attempting to encompass all the purposes worthy of inclusion, is, as a result, couched in very broad and comprehensive language, and hence indefinite. Such a general definition complicates the precise application of laws which give special treatment to charitable institutions.

The Internal Revenue Code exempts from taxation organizations which were formed exclusively for certain named purposes. In addition to the charitable purpose, the Code enumerates, among others,

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[1] Reiling, *Federal Taxation: What is a Charitable Organization?*, 44 A.B.A.J. 525, 527 (1958).
[2] *Ibid.*
[3] 96 Mass. (14 Allen) 539 (1867).
[4] *Id.* at 556.

educational, scientific, religious and literary purposes as being similarly exempted.[5] It would seem, however, that each of these purposes could be included in the broad definition of Judge Gray. This being so, there is at least some indication that "charity" itself, as used in the Code, is a "catchall." The practitioner must therefore look to the common law for a determination of the tax status of any given organization. The treasury regulations offer little additional aid to the construction of "charity," the language there being very similar to that of Judge Gray.[6]

A similar situation exists in the New York Real Property Tax Law. There also, specifically enumerated purposes, which could be included within "charitable purpose," are enumerated as worthy of property exemption.[7] It would seem that under both the Internal Revenue Code and the New York Real Property Tax Law, the reason for the seeming redundance was not to limit the all-inclusiveness of "charitable purpose," but, because of the very vagueness of the term, to insure that these purposes would be considered charitable.

Meaning of "Exclusive" in the New York Real Property Tax Law

The difficulty of application is increased by the additional condition that the purpose in question be *exclusively* charitable. To qualify for special property tax exemption in New York, the owner must be *"exclusively* organized for" a charitable purpose,[8] as distinguished from "organized and operated *exclusively*" for a charitable purpose which is required for federal income tax exemption.[9]

The New York exemption, quite distinct from that of the federal income tax, distinctly severs the "organizational test" from the "operational test." In the federal income tax area, "organized" and "operated" are two interrelated tests, the operation to a large degree reflecting the organization.[10] The charter of an organization is not conclusive as to the purposes for which it was formed.[11] In New

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[5] INT. REV. CODE OF 1954, § 501(c)(3).

[6] Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959).

[7] N.Y. REAL PROP. TAX LAW § 420(1): "Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, library, patriotic, historical or cemetery purposes, for the enforcement of laws relating to children or animals, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes . . . shall be exempt from taxation as provided in this section."

[8] N.Y. REAL PROP. TAX LAW § 420(1).

[9] INT. REV. CODE OF 1954, § 501(c)(3).

[10] 6 MERTENS, LAW OF FEDERAL INCOME TAXATION § 34.07 (rev. ed. 1957).

[11] See Better Business Bureau v. United States, 326 U.S. 279 (1945), cited in Lichter Foundation, Inc. v. Welch, 247 F.2d 431, 434 (6th Cir. 1957), and

York State, under the property tax exemption provision, however, even where an organization uses all its property for and is operated exclusively for a charitable purpose, it will lose its exemption if its charter is open to a possible construction that is not exclusively charitable.[12] The articles of incorporation are conclusive, and the use of the property does not reflect on the organization.[13] Although there is no express operational test in the property exemption provision, the law does provide for loss of exemption in cases where, although exclusively organized for charitable purposes, the organization is deemed a guise for profit-making activities.[14] It would seem that this provision injects considerations in addition to the "organizational test," which is determined solely by the charter. If an organization, though on its face organized for charitable purposes, in fact operates in a business-like manner, the presumption of its charitable design may be rebutted.[15] Thus it appears that this is similar to the exclusively operated test used in the federal income tax area.

Conceding that an organization is organized and operated for charitable purposes, a further qualification is whether the use of specific property or a specific item of receipt will subject the property [16] or income [17] to a tax.

The New York Real Property Tax Law exempts property owned by such a charitable organization, which is *used exclusively* for

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United States v. Community Servs., Inc., 189 F.2d 421, 424-25 (4th Cir. 1951), as indicative of the law with respect to charitable exemption of income tax. The problem there was whether the Better Business Bureau of Washington, D.C., was exclusively charitable so as to be exempt from social security taxes. In denying the exemption, the Court pointed out that "in order to fall within the claimed exemption, an organization must be devoted to educational purposes exclusively. This plainly means that the presence of a single non-educational purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly educational purposes." Better Business Bureau v. United States, *supra* at 283. Thus it would seem that the "organizational test" is predicated on a devotion to exclusively charitable purposes (meaning enumerated tax exempt purposes), which, it would appear, may be determined from both the charter and the functions of the organization.

[12] Great Neck Section, Nat'l Council of Jewish Women, Inc. v. Board of Assessors, 21 Misc. 2d 142, 189 N.Y.S.2d 623 (Supp. Ct. 1959).

[13] "[I]t is settled beyond dispute that the right of a corporation to exemption [under the organizational test] must be determined not from its activities but *solely* from its articles of incorporation." *Id.* at 143, 189 N.Y.S.2d at 624.

[14] N.Y. REAL PROP. TAX LAW § 420(1) states, in part: "Such real property [of an exempt organization, though used for an exempt purpose] shall not be exempt . . . if the organization thereof for any such avowed purposes be a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association or for any of its members or employees; or if it be not in good faith organized or conducted exclusively for one or more of such purposes."

[15] N.Y. REAL PROP. TAX LAW § 420(1).

[16] *Ibid.*

[17] INT. REV. CODE OF 1954, § 511(a).

charitable purposes.[18] It is sometimes difficult to determine whether a court is denying exemption because the organization is a mere guise for profit-making activity, or because the organization, a true charity, is not using the property for exclusively charitable purposes.[19] Where an organization's activities are confined to one property, the use to which it puts that property will determine whether it is a mere guise, and in such a situation the "use" and the "guise" test, being based on the same activity, may overlap.

People ex rel. *D.K.E. Soc'y v. Lawler*[20] is often cited as an accurate interpretation of "exclusive use" in the property exemption area. In that case, the petitioner, a society organized for "literary purposes," was, in fact, operated primarily as a college social fraternity. Accepting the fact that it was organized exclusively for acceptable purposes, the court denied exemption on the ground that the land was not also used exclusively for such purposes. Suggesting that the use of the property should be scrutinized with the literal meaning of "exclusive" in mind, the court went on to say: "[A]lthough we ought not, perhaps, to give to the word 'exclusively' an interpretation so literal as to prevent an occasional use of the relator's property for some purpose other than one or more of those specified, yet the policy of the law is to construe statutes exempting property from taxation somewhat rigidly . . . ."[21]

As suggested by the *D.K.E. Soc'y* case, the word "exclusive" may not prevent an occasional use of the property for other than strictly charitable purposes. However, in such a case the use must be incidental to the charitable purpose. The problem as to when an activity is more than incidental, like the problem of determining when an organization is a charity, is susceptible of no precise determination. In *Silver Bay Ass'n v. Braisted*,[22] the court held that the property of a summer camp with recreational and farming facilities which realized a small income from the sale of surplus foods produced on the property was tax exempt. The evidence showed that the primary activity, in good faith, was the carrying on of conferences for the schooling and training of religious workers. In a subsequent case, a membership corporation, ostensibly organized for the teaching of metaphysics, maintained, in actuality, a retreat which reflected the aspects of an ordinary country club. The court held that the social functions were emphasized to such a degree that the petitioner could not in good

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[18] N.Y. REAL PROP. TAX LAW § 420(1).

[19] See, *e.g.*, Peace Haven, Inc. v. Geiger, 175 Misc. 753, 25 N.Y.S.2d 974 (Sup. Ct. 1951).

[20] 74 App. Div. 553, 77 N.Y. Supp. 840 (4th Dep't 1902), *aff'd mem.*, 179 N.Y. 535, 71 N.E. 1136 (1904).

[21] *Id.* at 557, 77 N.Y. Supp. at 842.

[22] 80 N.Y.S.2d 548 (Sup. Ct. 1920).

faith contend that the property was exclusively used for any of the exempt purposes, as designated in the property exemption statute.[23]

It is not to be presumed that any use which produces an income or profit will destroy the exemption. Quite the contrary: income derived, even from property itself, may be incidental to, and not reflect on, the charitable use. For example, in *Seventh Day Adventists v. Schenck*,[24] profit realized from the sale of milk produced on the property was considered incidental, and not enough to destroy the property exemption, where the petitioner was a dairy farming school, the surplus being produced in the course of instruction. A similar result was obtained in the *Silver Bay* case, where the sale of surplus food products was considered incidental, the bulk being consumed by the religious trainees. In another farm surplus case, however, *People* ex rel. *Watchtower Bible & Tract Soc'y, Inc. v. Mastin*,[25] an opposite decision was reached. At issue in that case was the exempt status of farm land owned and used by the Jehovah's Witnesses. Food produced thereon was used in three ways: (1) for students attending the Bible School of Gilead on the premises; (2) for the Bethel family in Brooklyn; (3) as surplus sold to the public generally. As to the first use, the land was assumed properly charitable, but, because the volume so used was insignificant, it had no effect on the principal issue. As to the second use, it was held that the "Bethel family" was for all practical purposes a group of lay employees working for the petitioner, and not "ministers of religion"; hence, food grown for their benefit was merely conventional compensation, and the land on which it was grown did not qualify for any religious exemption. Finally, in the alternative, the sales to the public were not in any way sporadic, irregular, or accidental, but rather they represented a regular and planned income, substantial in nature, and not incidental to the other two purposes. Thus the land was at least partially used for commercial purposes, and could not pass the "exclusive use" test. This part of the decision seemed to be predicated on a finding that the petitioner was marketing its products in a business-like manner, and was selling products annually valued at almost $60,000, or approximately thirty-five percent of the total value of production. (These figures were based on two farms owned by the petitioner; only one was involved in this litigation.) This percentage, said the court, negates any argument that the sales were insignificant and incidental.

The same question re-appeared in *People* ex rel. *Watchtower Bible & Tract Soc'y, Inc. v. Harding*,[26] concerning the tax years 1954, 1955 and 1956. The referee found the property not to be

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[23] Peace Haven, Inc. v. Geiger, *supra* note 19.
[24] 304 N.Y. 706, 107 N.E.2d 654 (1952) (memorandum decision).
[25] 191 Misc. 899, 80 N.Y.S.2d 323 (Sup. Ct. 1948).
[26] 10 App. Div.2d 167, 198 N.Y.S.2d 135 (3d Dep't 1960).

exempt, apparently relying on the arguments of the earlier *Watchtower* case. The Appellate Division, however, while recognizing the referee's arguments, decided against the petitioner on other grounds; namely, that the land in question was separate from the charity itself and was used only to support it, and thus was not used exclusively for carrying out *thereupon* one of the exempt purposes, as provided in the exemption provision.

That determination was recently reversed by the Court of Appeals,[27] which held that such reliance on the word "thereupon" was unfounded. Contrary to the 1948 *Watchtower* case, the court, criticizing the referee's contrary opinion, apparently felt that the employees of the organization were "ministers of religion." Having recognized petitioner's status as a charity, the test applied was whether the land was reasonably incident to the major purpose of its owner. Quite significantly, the court held that the surplus sales, amounting to no more than ten percent of the farm produce, should play no part in the decision. Obviously the Court of Appeals felt that such sales of less than ten percent were incidental and thus did not effect the "exclusive use" test. Thus as a practical result, the Jehovah's Witnesses, by cutting down the percentage of surplus sales from approximately thirty-five percent to less than ten percent have left the realm of a business and have become exclusively charitable within the meaning of the property exemption provision.

Two lunchroom cases, *YWCA v. City of New York* [28] and *Pace College v. Boyland,*[29] further illustrate these distinctions. In the former, the property tax exemption was denied where the institution's lunchroom facilities were open to the public and constituted a regular source of income. In the latter, however, because the facilities were open only to those connected with the school, the use of the property was deemed not commercial, even though a commercial organization operated the lunchroom for the school.

If the use of the land is not incidental to the charitable purpose of the organization, the fact that the income derived from the commercial use of the property is directed to charitable purposes will not save the exemption. In *People* ex rel. *The Frick Collection v. Chambers,*[30] the petitioner was a tax-exempt art institute that had

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[27] People *ex rel.* Watchtower Bible & Tract Soc'y v. Harding, — N.Y.2d —, — N.E.2d —, — N.Y.S.2d — (November 18, 1960), cited in 144 N.Y.L.J., November 21, 1960, p. 13, col. 3.

[28] 217 App. Div. 406, 216 N.Y. Supp. 248 (1st Dep't 1926), *aff'd mem.*, 245 N.Y. 562, 157 N.E. 858 (1927). Compare YWCA v. City of New York, 144 Misc. 120, 259 N.Y. Supp. 62 (Sup. Ct. 1932), where the same petitioner was granted an exemption on properties used as tennis courts that were not operated as a business or for profit.

[29] 4 N.Y.2d 528, 151 N.E.2d 900, 176 N.Y.S.2d 356 (1958); see generally Sellin, *State and Local Taxation,* 34 N.Y.U.L. REV. 1411, 1416-17 (1959).

[30] 196 Misc. 1026, 91 N.Y.S.2d 525 (Sup. Ct. 1949), *aff'd mem.*, 276 App. Div. 891, 94 N.Y.S.2d 819 (1st Dep't 1950).

acquired property on which it planned to expand its facilities. Due to the high costs of construction at the time, however, it rented the land temporarily, applying the rental income to its charitable purpose. In denying an exemption on the property the court refused to consider the designated use of the revenue, holding that to lease property is an investment and in no way an exclusively charitable use.[31] Where only part of the property is leased, however, that part will be isolated for tax purposes and the remainder will retain its exemption.[32] Further, by statute, charities are now allowed to lease their lands to other charities, provided that the revenue received represents only carrying, maintenance, and depreciation costs.[33] In addition, a few types of charities are permitted to receive a rental profit where the profit is used in the furtherance of the charity.[34]

It would seem that if the use is incidental to, and designed primarily for, the furtherance of the charitable design, then the use takes on the form of the charity itself, despite its commercial nature, and the property retains its charitable exemption. Such, for example, was the situation in the *Silver Bay, Seventh Day Adventists,* and *Pace College* cases.[35] If, on the other hand, the primary purpose of the activity carried on by the charity is to make money, then it will not be an exclusively charitable use, even though the revenue derived is used to promote the charity. Such was the situation in the *Watchtower Bible, YWCA* and *Frick Collection* cases.[36]

Federal Income Tax

At the present time, an otherwise exempt charity will often be taxed on its so-called unrelated business income.[37] Historically,

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[31] *Ibid. Accord,* People *ex rel.* Unity Congregational Soc'y v. Mills, 189 Misc. 774, 71 N.Y.S.2d 873 (Sup. Ct. 1947). See also People *ex rel.* Adelphi College v. Wells, 97 App. Div. 312, 89 N.Y. Supp. 957 (2d Dep't 1904), *aff'd mem.*, 180 N.Y. 534, 72 N.E. 1147 (1905).

[32] N.Y. REAL PROP. TAX LAW § 420(2): "If any portion of such real property is not so used exclusively to carry out thereupon one or more of such purposes but is leased or otherwise used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be exempt . . . ." See, *e.g.,* In the Matter of Syracuse YMCA, 126 Misc. 431, 213 N.Y. Supp. 35 (Sup. Ct. 1925). (That part of a building leased for profit was held taxable, the remainder retaining its exemption as charitable property.)

[33] N.Y. REAL PROP. TAX LAW § 420(2).

[34] N.Y. REAL PROP. TAX LAW § 420(5), (6) (referring to rental income received and used by free public hospitals and libraries respectively). For cases illustrating the power of the legislature to grant special property tax exemptions, see In the Matter of Will of Vassar, 127 N.Y. 1, 16, 27 N.E. 394, 398 (1891); People *ex rel.* New York Univ. v. Wells, 94 App. Div. 271, 87 N.Y. Supp. 1107 (1st Dep't 1904).

[35] See notes 22, 24 and 29 *supra* and accompanying text.

[36] See notes 27, 28 and 30 *supra* and accompanying text.

[37] INT. REV. CODE OF 1954, §§ 511-13.

however, the scope of the federal income exemption provision has been confusing. The source of the confusion stemmed from the Supreme Court's decision in *Trinidad v. Sagrada Orden de Predicadores.*[38] In that case the problem was whether a religious organization was subject to an income tax on revenues derived from its holdings in real estate and stocks, interests in loans, and from profits from wines, chocolates, and other small articles sold in its churches and parsonages. It would seem that the Court granted an exemption on the grounds that, as to the sales, they were either themselves in furtherance of the religious purpose, or incidental thereto; and as to the property interests, such were commonly accepted as proper income-producing activities of a charity.[39] In other parts of the decision, however, the Court in more general terms stated that it is inherent in the nature of a charitable income exemption provision that organizations may be exclusively charitable and have an income, and that the test of such an exemption is the destination, not the source of the revenue. These two aspects of the decision gave rise to the difference of opinion which developed in the federal courts.

The interpretation of the *Sagrada* decision most widely accepted thereafter was that the destination of the income should control its taxable status, regardless of its commercial or non-commercial source. Thus, in *Unity School of Christianity,*[40] the contention that *Sagrada* should be applicable only to non-competitive activities was completely rejected, and the "destination doctrine" was adopted. In another now famous case, *Roche's Beach, Inc. v. Commissioner,*[41] the Second Circuit adopted the "destination doctrine" as the ultimate test of exemption even in cases where the activity was otherwise wholly unrelated to the charitable purpose. In that case, however, the dissent by Judge Learned Hand pointed up a strong argument for the restrictive approach, *i.e.,* that neither Congress nor the *Sagrada* decision intended to give exemptions wholly on the basis of the destination of income. Had the Court in *Sagrada* intended to whole-heartedly endorse the destination doctrine it would not have had to determine whether the sales involved were incidental or in the furtherance of the charity directly. Further, Judge Hand argued that at the time of that case, the then existing revenue law gave a specific exemption to "feeder-type organizations" dealing in realty rentals and directing their income to charitable functions.[42] Had Congress intended that the exemption be based on destination of income, such specific exemption would have been unnecessary.

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[38] 263 U.S. 578 (1924).
[39] *Id.* at 581-82.
[40] 4 B.T.A. 61 (1926). *Accord,* Sand Springs Home, 6 B.T.A. 198 (1927).
[41] 96 F.2d 776 (2d Cir. 1938).
[42] *Id.* at 779 (dissenting opinion).

Subsequently, this emphasis on the destination of income received support in the Third, Fifth, Sixth, and Eighth Circuits, in addition to the Second.[43] The more restrictive view, that exemption be based on the source, denying it to unrelated business income, found support in the Fourth and Ninth Circuits, as well as in the Tax Court.[44] Such a situation in any area of tax law, is always a source of great frustration for the Tax Court. Though the Court followed the restrictive approach, it did so subjecting itself to reversal, depending upon the locale of the litigants.

It is apparent that a liberal construction of the *Sagrada* case opens the field to flagrant abuse and differs with the New York policy as to property tax exemption, which does not accept the destination doctrine. Such an inconsistency is more than academic. For instance, in the *YWCA* case, and the *Frick* case,[45] a property exemption was denied because the property was used for income producing activities; yet under the destination doctrine, the income, though defeating the property exemption, would not be subject to federal tax.

While there are strong arguments for a liberal construction so as to encourage public charity,[46] a congressional study revealed that the destination standard adopted had resulted in several undesirable practices:

(a) exempt organizations had made investments in real property through the incurring of substantial indebtedness and lease-back transactions not requiring the use of any funds of the exempt organization;

(b) exempt organizations were using or distributing little or none of their income for current charitable purposes, but were amassing vast amounts of money without any apparent limitation;

(c) creators of charitable foundations retained a control which enabled them to use and manipulate the foundation funds to their own personal financial advantage; and

(d) certain charitable trusts were established for the principal purpose of operating family controlled businesses to effectively avoid various taxes otherwise due.[47]

And finally, as illustrated by the *Roche's Beach* case,[48] and *C. F.*

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[43] Lichter Foundation, Inc. v. Welch, 247 F.2d 431, 437 (6th Cir. 1957).

[44] *Ibid.* See, *e.g.*, Ralph H. Eaton Foundation v. Commissioner, 219 F.2d 527 (9th Cir. 1955); United States v. Community Servs., Inc., 189 F.2d 421 (4th Cir. 1951); Joseph P. Eastman Corp., 16 T.C. 1502, 1508-09 (1951).

[45] See text accompanying notes 28 and 30 *supra*.

[46] See Helvering v. Bliss, 293 U.S. 144, 150-51 (1934); C. F. Mueller Co. v. Commissioner, 190 F.2d 120, 121-22 (3d Cir. 1951).

[47] Samuel Friedland Foundation v. United States, 144 F. Supp. 74, 87 (D.N.J. 1956), citing S. REP. No. 2375, 81st Cong., 2d Sess. —, U.S. Code Cong. Serv. (1950) 3078-3092.

[48] 96 F.2d 776 (2d Cir. 1938). (A profitable bathing beach business whose income was used wholly to finance a charitable foundation was held tax exempt.)

Mueller Co. v. Commissioner,[49] commercial businesses that channeled their profits into a charitable organization were given an exemption.

The broad construction turned charities into "big business," placing them at a considerable competitive advantage, in a position to destroy tax-paying competition. Further, charities in the liberal circuits had a considerable advantage over similar charities in restrictive circuits.

The Revenue Act of 1950, embraced in the 1954 Code and reflecting the present state of the law, contained a multitude of modifications designed to eliminate these inequities.[50] Now, charities with the exception of churches, associations of churches, and certain trusts, are subject to income tax on the income from operations of a business enterprise unrelated to its charitable purposes.[51] As a result, some of the key cases in this area, *i.e., Unity School* case, *Roche's Beach* case, and *C. F. Mueller Co.* case, no longer represent the law as it exists today.[52]

Federal cases and rulings seem to reflect the same standards in construing "unrelated business" as have been used by New York courts in construing the term "exclusive." Thus it has been held that the income from a school laundry, operated by the school primarily for student use, is tax exempt.[53] But the income from a cinder block plant and radio station, operated commercially by the same school, is not exempt, even though there was some student training at the radio station.[54] These rulings would seem to be in line with the property tax decisions in the *YWCA* case and the *Pace College*

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[49] 190 F.2d 120 (3d Cir. 1951). (A macaroni business that directed all its profits to New York University for the support of the law school was held tax exempt.)

[50] INT. REV. CODE OF 1954, §§ 502-04, 511-14 [formerly Int. Rev. Code of 1939, §§ 101, 3813, 3814, 421-23, as amended, 64 Stat. 948, 950, 952, 957, 958 (1950)].

[51] INT. REV. CODE OF 1954, §§ 511-13.

[52] See text accompanying notes 40, 41 and 49 *supra*. Two questions arise with respect to the 1950 Revenue Act. First, does this law represent an interpretation and codification of the congressional intent behind the earlier law in the area? This argument was rejected in Lichter Foundation, Inc. v. Welch, 247 F.2d 431 (6th Cir. 1957), the court there holding that all income accrued before January 1, 1951 is subject to the old laws. Secondly, where there are exceptions to the new law taxing unrelated business income, are the parties free to act accordingly, assuming no tax to be applicable, or will the exemption depend, as before, upon the liberality of a particular circuit? It would seem that the only logical conclusion would be that charitable activities, not subject to unrelated business income treatment, retain the charitable exemption regardless of the commercial nature of the activities from which the income is derived unless the commercial activities are so extensive that the organization is no longer a charity. See Randall Foundation, Inc. v. Riddell, 244 F.2d 803, 808 (9th Cir. 1957), where, under a prior statute, the court held that the commercial activities were so extensive as to negate a charitable status.

[53] Rev. Rul. 55-676, 1955-2 CUM. BULL. 266.

[54] *Ibid.*

case.[55] The Treasury approach appears to be that if the activity is commercial in nature, it will normally be construed to be unrelated, depending on the continuity of the activity and its relative size and nature as compared to the charitable activity.[56] If the income is derived from activities in *direct* furtherance of the charitable purpose, it will be exempt regardless of the relative size of the income.[57] However, if the activities are merely associated in some way to the charitable purpose, then the proportion of their income to the total income will become decisive. For example, substantial commercial sales of fertilizer by an organization designed to further agriculture through instruction could not be justified.[58] Likewise, an exempt medical research organization was required to pay tax on the sale of medical photographs to hospitals and patients at commercial rates, the income representing seventy-five percent of that organization's total receipts.[59] But an organization formed for the exhibition of arts, sciences, and athletic events, paid no tax on income realized from the famed Senior Bowl football game, though the proceeds represented its total income, since such exhibition was an integral part of the civic and educational program of the organization.[60]

Though there would now seem to be a close similarity in construction in both areas of the law, the effects of a substantial deviation from what is exclusively charitable might be considerably dif-

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[55] See text accompanying notes 28 and 29 *supra*.

[56] Treas. Reg. § 1.513-1(a)(4) (1958).

[57] See authorities cited note 60 *infra*.

[58] Rev. Rul. 57-466, 1957-2 CUM. BULL. 311.

[59] Rev. Rul. 57-313, 1957-2 CUM. BULL. 316. Two recent rulings indicate that the Treasury takes a strict approach on the size of the income derived by a charity from activities merely associated with the charitable purpose. An exempt organization of horse breeders was forced to pay a tax on the income from food and drinks served in the clubhouse, as unrelated business, Rev. Rul. 60-86, 1960 INT. REV. BULL. No. 10, at 15, as was a labor union that received income from a semi-weekly bingo game. Rev. Rul. 59-330, 1959-2 CUM. BULL. 153. This would seem to raise the question of whether such activities would defeat the property exemption on the building, especially in the latter case. Would the exemption be lost to the whole union hall, or only to the room in which bingo is played?

[60] Mobile Arts and Sports Ass'n v. United States, 148 F. Supp. 311 (S.D. Ala. 1957). See also, Rev. Rul. 58-502, 1958-2 CUM. BULL. 271, where a charitable organization for the promotion of a particular sport was allowed to receive tax exempt income from the promotion of a tournament and the sale of literature relating to the rules of the sport, both activities being in furtherance of its charitable purpose. Furthermore, income from radio and television rights was also tax exempt, such income not being disproportionate to the size and nature of the charitable activities and merely incidental to its purpose. Compare People *ex rel.* Adelphi College v. Wells, 97 App. Div. 312, 89 N.Y. Supp. 957 (2d Dep't 1904), *aff'd mem.*, 180 N.Y. 534, 72 N.E. 1147 (1905); Rutgers Univ. v. Piscataway Township, 134 N.J.L. 85; 46 A.2d 56 (Sup. Ct. 1946), where school athletic fields, producing income through outside leases and ticket sales respectively, were denied property tax exemption because of their income producing nature.

ferent due to the very nature of the taxes. Under the New York property tax law, a deviation from exclusive charitable use destroys the entire property exemption, unless that segment of the property so used can be geographically isolated;[61] under the federal income tax law the exemption is lost only on the unrelated income received.[62] For example, in the *Watchtower Bible & Tract Soc'y, Inc. v. Mastin* case,[63] the entire farm was held taxable because of the commercial sale of some of the products grown thereon. Under the federal income tax law, however, only income realized from the sale of the products to the public would be taxable, while income realized from other sources not unrelated to the charitable purpose would retain an exemption. Due to the list of statutory exceptions to taxable unrelated business income such as rentals, annuities, royalties, etc.,[64] other differences result when applying the income and property exemptions to the same situation. While the leasing of property owned by a charity would result in a loss of the New York property tax exemption, the charity would not lose its exemption on the rental income. This is so even though the lessor be a "feeder corporation" dealing wholly in realty.[65] Also, a church is given special exclusion from the unrelated business provisions,[66] but is not given such liberal treatment under the property exemption law.

Conclusion

While most of the specific exclusions from the federal unrelated business income section have no counterpart in the New York property tax law, the courts in both jurisdictions have apparently taken the same approach in construing the exemption provisions within the context of income or profit-making activities. Cases from both jurisdictions presently reflect a substantial harmony with respect to the application of charitable tax exemption treatment, namely, that an activity is qualified for exemption if it is directly in furtherance of the charity, other than through financial support. In both areas, an organizational test is the first prerequisite for an exemption, though in the property field more emphasis is placed on the charter in determining the organizational purposes. Similarly, the protection against a property exemption for a charitable "guise" is to some de-

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[61] N.Y. REAL PROP. TAX LAW § 420(2).
[62] INT. REV. CODE OF 1954, § 511(a).
[63] See text accompanying note 25 *supra*.
[64] INT. REV. CODE OF 1954, § 512(b). Included among the items expressly excluded from the unrelated business income section of the Code (§ 511(a)) are dividends, interest, annuities, royalties, rents (on real property), gains through certain sales or exchanges of property, income through certain types of research, and the first one thousand dollars in every case.
[65] INT. REV. CODE OF 1954, §§ 501(a), 501(c)(2), 502.
[66] INT. REV. CODE OF 1954, § 511(a)(2).

gree comparable to the federal income "operational" test since it is the operation which determines whether the charity is in fact a "guise." Finally, the federal income "unrelated business" test is at least a partial counterpart to the property "use" test. Only that part of a charity which is deemed "unrelated business" is subject to income tax, the remainder retaining its exemption. Likewise, only that segment of the property not used for the charitable purpose will be taxed, the remainder again retaining its exemption.

THE DOCTRINE OF MERGER IN FELONY-MURDER AND MISDEMEANOR-MANSLAUGHTER

Early common law grouped homicide cases as (1) justifiable, (2) excusable, and (3) felonious.[1] In other words, all homicide which was not justifiable nor excusable was felonious.[2] Every felonious killing, without further refinement into murder or manslaughter, was punishable by death;[3] while on the other hand, benefit of clergy attached even if it was a killing of the most atrocious nature.[4]

However, during the period from 1496 to 1547, a series of statutes excluded from benefit of clergy certain of the more serious forms of felonious homicide, referring to them as murder committed with malice aforethought.[5] Felonious homicide was then divided into two main categories: that which was committed with malice aforethought, and that which was not. The former was called murder and punishable by death, the latter became manslaughter and was punishable by branding and imprisonment not to exceed one year.[6] Express malice was defined by Blackstone as "malice . . . when one, with a sedate deliberate mind and formed design, doth kill another: which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm."[7] Malice afore-

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[1] 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 483-84 (1895).
[2] 3 HOLDSWORTH, A HISTORY OF ENGLISH LAW 314 (3d ed. 1927).
[3] 2 POLLOCK & MAITLAND, *op. cit. supra* note 1, at 450-60.
[4] 3 STEPHEN, HISTORY OF CRIMINAL LAW OF ENGLAND 44 (1883).
[5] See Perkins, *A Re-Examination of Malice Aforethought*, 43 YALE L.J. 537, 543 (1934). This work is an excellent and extensive study of malice aforethought. According to the author, aforethought (prepense) was used in the sense of a design meditated upon for a substantial period of time in advance.
[6] *Id.* at 544.
[7] 4 BLACKSTONE, COMMENTARIES *199. The words "express" or "implied" do not add to the meaning of malice; they are not two separate kinds of malice, but merely signify the manner in which the only kind known to the law may be shown to exist.