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Op. 59-122

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

September 11, 1959

Honorable Earl W. Fase
Tax Commissioner
State of Hawaii
Honolulu, Hawaii

Attention: Mr. John A. Bell
Deputy Tax Commissioner

Dear Sir:

This is in response to your request for advice concerning the application for exception from general excise tax made by the Territorial Hospital Auxiliary under the following circumstances:

The auxiliary is a corporation organized under secs. 172-16 and 172-17, R.L.H. 1955, for the purpose of promoting and improving the care, comfort and welfare of patients and former patients of the Territorial Hospital. Approximately three-fourths of the total hours volunteered by the members of the auxiliary are devoted to such work as operating the hospital library, serving at the reception desk at the convalescent center and at the visitors' desk at the hospital, processing and distributing clothing to the various wards, guiding visitors through the hospital, conducting art therapy classes, and assisting in the occupational, recreation and physio-therapy departments of the hospital. The remainder of the volunteer hours is spent in operating at the hospital two canteens which sell sundry items to patients.

For several years the canteens have been operated by the hospital itself. In February of last year the auxiliary, then an unincorporated association, took over the operations and purchased the inventory of the canteens with the view of relieving the hospital staff from what was considered a necessary but non-medical service. It was felt, furthermore, that staffing the canteens with volunteers from the outside would have a therapeutic effect on the patients.

The application is for the activity of selling sundries to the patients at the canteens.

Section 117-20, R.L.H. 1955, states that the provisions of chapter 117, the general excise tax law, shall not apply, among others, to:

"(g) Corporations, associations or societies organized and operated exclusively for religious, charitable, scientific or educational purposes;"

That the auxiliary is a corporation organized and operated exclusively for charitable purpose there is no question. But not all of the activities of such persons are exempt for sec. 117-20 goes on further to provide that the exemption shall apply only:

"(3) to the * * * religious, charitable, scientific, educational * * * activities of such persons * * * and not to any activity the primary purpose of which is to produce income even though such income is to be used for or in furtherance of the exemption activities of such persons."

A charity is defined in the leading and much cited case of Jackson vs. Phillips, 96 Mass. (14 Allen) 539, at page 556, in the following languages:

"A charity, in the legal sense, may be more fully defined as a gift to be applied to consistently with existing laws for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of religion, by relieving their bodies of 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."

And the lessening of any burden which the government would be under an obligation to assume is frequently put forward as the fundamental reason for exempting charities from taxation. Boston Chamber of Commerce vs. Assessors of Boston, 315 Mass. 712, 54 N.E.2d 199.

Whether an activity carried on by a charitable organization is a charitable one depends upon the dominant purpose of the activity concerned. If its primary purpose is to obtain revenue or profit, it is not charitable even though the revenue or profit

derived therefrom is used for the charitable purposes of the organization. But the realization of revenue or profit from an activity does not make the activity any less charitable if such realization is incidental and secondary. Congretional Sunday School & Publishing Soc. vs. Board of Review, 290 Ill. 108, 124 N.E. 7; Commonwealth vs. Lynchburg Y.M.C.A., 115 Va. 745, 80 S.E. 589; Union Pac. Ry. Co. vs. Artist, 60 Fed. 365. See also con-tributors to Pa. Hospital vs. Delaware County 169 Pa. St. 305 32 Atl. 456. Compare Allison vs. Mennonite Publication Board, 123 Fed. Supp. 23. This rule has been expressly adopted in paragraph (3) of sec. 117-20, set out above.

The fundamental purpose of the auxiliary in taking over the canteens being that of relieving the Hospital of the burden of providing an essential service to its patients, which resulted in making available the full time of at least one member of the Hospital staff for other work, and considering the limited nature of the patronage of the canteens, we are of the opinion the application should be allowed.

As our conclusion herein is based on the data presented with the application for exemption, its applicability to other claims would depend upon the specific facts of such claims. Moreover, in the future should it appear that the facts of this claim might have changed, it should be reexamined in the light of the new facts, and in this connection, it might be noted that section 117-20 requires persons claiming exemption hereunder to register annually.

Very truly yours,



NOBUKI KAMIDA
Deputy Attorney General

APPROVED:



JACK H. MIZUHA
Attorney General