

Memorandum

To: Honorable Jerome E. Horton, Chairman
Honorable Michelle Steel, Vice Chair
Honorable Betty T. Yee, First District
Senator George Runner, Second District
Honorable John Chiang, State Controller

Date: September 9, 2011

From: 
Randy Ferris, Acting Chief Counsel
Legal Department

Subject: **Board Meeting, September 20-21, 2011**
Chief Counsel Matters – Item L – Property Taxes
Welfare Exemption for Nonprofit Organizations

At the August 23, 2011, Board meeting, Board Member Yee requested that a Chief Counsel Matters item be placed on the Board meeting agenda for September 2011 to discuss the consistency with which the welfare exemption is administered with respect to nonprofit organizations that perform charitable activities in a global manner. This issue relates to the “community benefit test” which was discussed in 2007 and 2008 at several Board meetings.

The “community benefit test” requires that, to receive an Organizational Clearance Certificate (OCC), a charitable organization’s activities must benefit “the community as a whole or an unascertainable and indefinite portion thereof.”¹ (An OCC is required for an organization to receive a property tax exemption from a county in which it owns property.) Attached is a memorandum with accompanying exhibits, which was previously distributed to the Board Members, that provides a summary of recent Board discussions on the community benefit test and how staff has been implementing the direction provided by the Board. As explained in the attached materials, the Board, at the March 19, 2008, Board meeting voted 3-2 to affirm the longstanding Board interpretation of the term “community” as being co-extensive with the state’s territorial boundaries. Thus, nonprofit, charitable organizations that engage in activities solely outside of the State of California would not be eligible for exemption. Subsequently, a Letters to Assessors (LTA) 2008/34 was issued that reiterated staff’s historic position that “an organization’s claimed charitable activities must be found to primarily benefit persons within the geographical boundaries of the State of California.”

In 2010, as described in the attached memorandum and exhibits, the Legal Department wrote a memorandum which opined on the meaning of “primarily” for purposes of the community

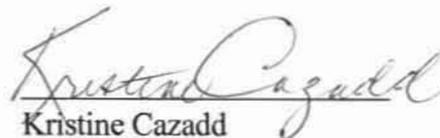
¹ *Stockton Civic Theatre v. Board of Supervisors* (1967) 66 Cal.2d 13, 22.

benefit test. It concluded that the term “primarily” requires a determination that the California community receives a “prime” or “meaningful” (i.e., “first-rank”) benefit and should not be interpreted to require that in all cases more than 50 percent of an objectively quantifiable benefit or use must be directly experienced by persons in California.

Because the granting or denial of an application for an OCC is heavily fact dependent, as factual situations arise that necessitate consideration of whether the community benefit test is met, the Legal Department works closely with the County-Assessed Properties Division to properly and consistently administer the issuance of OCCs within the context of existing statutes, regulations, judicial precedent, and Board guidance.

If you need more information or have any questions, please contact Christine Bisauta, Acting Assistant Chief Counsel, at (916) 322-0437 or Richard Moon, Tax Counsel IV, at (949) 440-3486.

Approved:


Kristine Cazadd
Interim Executive Director

RMF:EK:yg

J:/Chief Counsel/Finals/Board Memo - Welfare Exemption for Nonprofit Organizations – 09-09-2011.docx

J:/Prop/Finals/Monthly CC Agenda Items/2011/CC Memo Welfare Exemption.docx

Attachment

cc:	Ms. Kristine Cazadd	MIC: 83
	Mr. Dean Kinnee	MIC: 64
	Mr. Mike Harris	MIC: 64
	Ms. Christine Bisauta	MIC: 82
	Mr. Richard Moon	MIC: 82

Memorandum

To: Honorable Jerome E. Horton, Chairman
Honorable Michelle Steel, Vice Chair
Honorable Betty T. Yee, First District
Senator George Runner, Second District
Honorable John Chiang, State Controller

Date: September 8, 2011

From: Randy Ferris, Acting Chief Counsel
Legal Department



David Gau, Deputy Director
Property and Special Taxes Department



Subject: ***Background on the Community Benefit Test for the Welfare Exemption***

An article appeared in the August 14, 2011, edition of the New York Times discussing the “community benefit test,” a requirement that must be met by charitable, nonprofit organizations to qualify for the California property tax welfare exemption.¹ This memorandum provides a brief summary of the “community benefit test” issue, which was addressed by the Board at several hearings during 2007 and 2008.² We note that this issue will be placed on the agenda as a Chief Counsel matter at the September Board meeting and a separate Chief Counsel memorandum, to which this memorandum and accompanying exhibits will be attached, will be prepared for that item.

Revenue and Taxation Code³ section 214, subdivision (a), the welfare exemption, which implements California Constitution article XIII, section 4, subdivision (b), provides that “[p]roperty used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations, limited liability companies, or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation” if certain requirements are met.⁴ Where charitable purposes are involved, one such requirement is that the charitable activities must benefit “the community as a whole or an

¹<http://www.nytimes.com/2011/08/15/business/california-scrutinizes-property-tax-exemption-of-nonprofits.html>. It appears that the genesis of the New York Times article is a California-based attorney who states that he has a client who was denied an Organizational Clearance Certificate (OCC) based on the community benefit test. Based on the information in the article, it appears that this organization is an organization that first applied for an OCC in 2010. County-Assessed Properties Division has not denied the organization an OCC. Instead, the application is currently under review by the Legal Department. Additionally, the following provides information on some of the organizations specifically named in the article: World Vision International (OCC issued 12/11/2003), Direct Relief International (OCC issued 12/11/2003), William and Flora Hewlett Foundation (OCC issued 12/11/2003), International Community Foundation (OCC issued in 2008).

² A timeline and summary of the meetings are provided in the following pages of this memorandum.

³ All statutory references are to the Revenue and Taxation Code unless otherwise specified.

⁴ The Board issues an OCC to qualifying organizations; the county assessor is responsible for granting or denying exemption of property based on ownership and operation of the property (i.e., property must be owned by an organization with a valid OCC and must be operated for exempt purposes).

unascertainable and indefinite portion thereof.”⁵ Due to this reference to the “community,” this requirement has become commonly known as the “community benefit test.”⁶ Historically, the Board staff’s longstanding administrative interpretation of “community benefit” has defined “community” as being co-extensive with the state’s territorial boundaries and has limited the application of the exemption accordingly.⁷

In 2007 and 2008, however, certain nonprofit organizations that engage in charitable activities outside of the State of California requested an expanded definition of the “community benefit test” that would contain no such geographical limitation. At a March 19, 2008, Board meeting, the Board voted 3-2 to require that an organization’s charitable activities benefit persons within the geographic boundaries of the State. This vote was followed by Letters to Assessors (LTA) 2008/034 which reiterated staff’s position that “an organization’s claimed charitable activities must be found to primarily benefit persons within the geographical boundaries of the State of California.”

Subsequently, an issue arose as to the meaning of the word “primarily,” and the Legal Department wrote a memorandum in 2010 (see **Exhibit E** for an electronically redacted copy of the memorandum), which included a discussion on the meaning of that word for purposes of the community benefit test. It concluded that, with certain charitable activities, it is difficult to determine what exact benefits should be measured in determining whether the California community is primarily served, because certain activities, such as scientific research, are not limited to a particular location, nor is the benefit that accrues limited to a particular place or group of people. Thus, the term “primarily” requires a determination that the California community receives a “prime” or “meaningful” (i.e., “first-rank”) benefit. In other words, “primarily” should not be interpreted to require that in all cases more than 50 percent of an objectively quantifiable benefit or use must be directly experienced by persons in California because often such objective quantification is not possible, or does not capture all of the benefits afforded by a particular activity. (This definition of “primarily” was also quoted in the New York Times article.)

The following provides a timeline of events, including a brief synopsis of each event, addressing the “community benefit test” issue. (Please note that all documents regarding this issue are posted to the Board’s website at http://www.boe.ca.gov/proptaxes/welfarebenefit_test.htm.)

⁵ *Stockton Civic Theatre v. Board of Supervisors* (1967) 66 Cal.2d 13, 22.

⁶ See Assessors’ Handbook section 267, *Welfare, Church, and Religious Exemptions* (Oct. 2004) (AH 267), pp. 2-7 for a general discussion and history of the test.

⁷ See Letters to Assessors 2008/034 (Exhibit D) and Chief Counsel Memorandum dated January 11, 2008 (Exhibit B).

July 6, 2007, Consideration of Policy Change – Welfare Exemption

On July 6, 2007, the Chief Counsel sent a memorandum to the Board Members seeking the Board's direction (at the July 17, 2007, Board meeting) with respect to the interpretation of section 214. In brief, the memorandum explains the Legal Department's historic interpretation of the community benefit test and requests the Board Members' direction. Taxpayers argued for a broader definition of "community," one that would include charitable activities carried on outside of the State of California. Proponents of the broad definition of "community" also argued that the current interpretation discriminates against out-of-state commerce by giving a tax benefit only to in-state activities, which, they claimed, violates the Commerce Clause of the United States Constitution.

In the memorandum, Legal staff advised that a broader interpretation of "community" is not prohibited by law, and is appropriate in light of modern nonprofit organization purposes, and functionally avoids possible violation of the Commerce Clause. (See **Exhibit A** for a copy of the July 6, 2007, memorandum.)

July 17, 2007, Board Meeting

At the July 17, 2007, Board meeting, the Board Members heard discussions regarding the feasibility of expanding the community benefit test to include nonprofit organizations who own property in California but whose charitable activities include activities outside of California. The Board Members voted to defer the issue to a later date and referred the matter to the interested parties process.

September 19, 2007, Interested Parties Meeting

Staff held an interested parties meeting in Sacramento on September 19, 2007, to discuss the pros and cons of expanding the community benefit test for the welfare exemption.

January 11, 2008, Request for Guidance – Welfare Exemption

On January 11, 2008, the Chief Counsel sent a memorandum to the Board Members seeking the Board's guidance (at the February 1, 2008, Board meeting) regarding its position with regard to the definition of "community" in the interpretation of the community benefit test. In brief, the memorandum sets forth a discussion of the issues that both incorporates and addresses the arguments and comments of the interested parties. The memorandum concludes that the current interpretation of the community benefit test, which limits the welfare exemption to organizations performing charitable activities within the state, is both rational and defensible. Nevertheless, such a limited, geographical interpretation of "community" is neither mandated nor required by the constitutional, statutory, or judicial authorities cited in the memorandum and is not legally prescribed. (See **Exhibit B** for a copy of the January 11, 2008, memorandum.)

February 1, 2008, Board Meeting

At the February 1, 2008, Board meeting, after hearing testimony, the Board requested additional information of staff and that the matter be returned to the Board at a later date. Specifically, the Board directed staff to complete a new revenue estimate with the assistance of the county assessors in obtaining any appropriate data.

February 28, 2008, Request for Guidance – Welfare Exemption

On February 28, 2008, the Chief Counsel sent a memorandum to the Board Members seeking the Board's guidance (at the March 19, 2008, Board meeting) regarding its intent for the proper definition of "community" in the interpretation of the community benefit test. A revenue estimate was attached to the memorandum. (See **Exhibit C** for a copy of the February 28, 2008, memorandum.)

March 19, 2008, Board Meeting

At the March 19, 2008, Board meeting, the Board voted 3-2 to retain the current interpretation of the term "community."

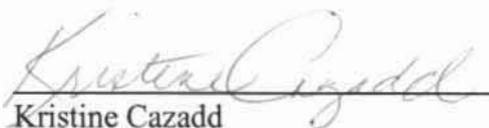
May 2, 2008, LTA No. 2008/034, Community Benefit Test for the Welfare Exemption

On May 2, 2008, LTA No. 2008/034 was issued providing a brief overview of the "community benefit test" issue. It also reiterated staff's position that the community benefit test for the welfare exemption will continue to require that an organization's claimed charitable activities must be found to benefit persons primarily within the geographical boundaries of the State of California. (See **Exhibit D** for a copy of the LTA.)

January 27, 2010, Memorandum to CAPD from Legal

Legal opinion that includes a discussion on the meaning of the term "primarily" for purposes of the community benefit test. (See **Exhibit E** for a redacted copy of the memorandum.)

Approved:



Kristine Cazadd
Interim Executive Director

DG:lf
Exhibits A-E

cc:	Ms. Kristine Cazadd	MIC: 73
	Mr. Dean Kinnee	MIC: 64
	Mr. Mike Harris	MIC: 64
	Ms. Christine Bisauta	MIC: 82
	Mr. Richard Moon	MIC: 82

State of California

Board of Equalization
Legal Department-MIC: 82**M e m o r a n d u m*****PRELIMINARY DRAFT – FOR DISCUSSION PURPOSES ONLY***

To: Honorable Betty T. Yee, Chairwoman
 Honorable Judy Chu, Vice-Chair
 Honorable Bill Leonard, Second District
 Honorable Michelle Steel, Third District
 Honorable John Chiang, Controller

Date: July 6, 2007

From: Kristine Cazadd 
 Chief Counsel

Subject: **Consideration of Policy Change – Welfare Exemption**
“Community Benefit Test” Under Revenue and Taxation Code section 214
July 17, 2007 Board Meeting – Chief Counsel Matters – Item L

Staff seeks the Board’s direction with respect to the interpretation of Revenue and Taxation Code¹ section 214, the welfare exemption. Section 214, subdivision (a), which implements California Constitution, article XIII, section 4, subdivision (b), provides that “[p]roperty used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations, limited liability companies, or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation” if certain requirements are met. One such requirement is that the charitable activity benefit the community as a whole or an unascertainable portion thereof.”² This requirement is known as the “community benefit test.”³

The Legal Department’s historic interpretation of the “community benefit test” has been to define the relevant community that must be benefited as the State of California. While the question has never been specifically tested in court, it was the Legal Department’s opinion in the past that California courts “would designate the State of California, or a portion thereof, as the relevant ‘community’ in any welfare exemption action which they might be called upon to consider,” and thus a qualified organization’s activities must benefit some Californians to satisfy the community benefit test, and an organization could not qualify for the welfare exemption if “substantially all” its activities benefit persons outside of California.⁴ This opinion was based on several court cases which defined “community” as the California community for other purposes

¹ All statutory references are to the Revenue and Taxation Code unless otherwise specified.

² *Stockton Civic Theatre v. Board of Supervisors* (1967) 66 Cal. 2d 13, 22.

³ See Assessors Handbook Section 267, *Welfare, Church, and Religious Exemptions* (Oct. 2004) (AH 267), pp. 2-7 for a general discussion and history of the test.

⁴ We are aware of 6 legal opinions written between 1976 and 1984 opining that the “community” that must be benefited was the California community.

for which a definition of the word “community” was necessary.⁵ It was also based on the logic that since a property tax exemption shifts the tax burden to properties that remain taxable, the term “community” must be defined so as to restrict the exemption to organizations whose activities benefit some Californians in order to be “fair, equitable and in the public interest for the balance of taxpayers to subsidize the exempt property.”⁶ Finally, a narrow definition of “community” was thought to be consistent with the 1944 Proposition 8 ballot measure language which added the welfare exemption to the California Constitution.

Taxpayers, recently, however, reasonably argue for a broader definition of “community,” one which would include charitable activities carried on outside of the State of California, and even throughout the world. They point out that neither California Constitution, article XIII, section 4, subdivision (b), nor section 214 limits the term “community” to California, and that neither contains an express requirement that charitable organizations benefit Californians. They additionally argue that a broad definition of “community” is consistent with the California Supreme Court’s opinion that the term “charitable” both as used in the constitutional language and in section 214 should be broadly construed;⁷ and, further, that such a reading is more consistent with principles of statutory construction. They argue that the words “charitable” and “community” are not static and should not – in the modern world where technology, media, and transportation are continually shrinking the globe – be constrained by early to mid-20th century notions of “community.” It has also been pointed out by nonprofits with an international impact that that even the California Supreme Court, in 1950, recognized that the Legislature intended for the meaning of the words “religious, hospital, and charitable,” as used in section 214, to change with the times.⁸

Finally, proponents of a broad interpretation of “community” argue that, as currently interpreted, by the Legal Department, the welfare exemption discriminates against out-of-state commerce by giving a tax benefit only to in-state activities in violation of the Commerce Clause of the United States Constitution.⁹

Request for Approval of Tax Policy Change and Staff Recommendation

Staff seeks the Board’s consideration of the two competing legal interpretations outlined above. After extensive research and review, the Legal Staff recommends that a broader interpretation of the “community” is not prohibited by law, and is appropriate in light of modern nonprofit organizational purposes, and functionally avoids possible violation of the Commerce Clause. In

⁵ See, for example, *Keech v. Joplin* (1909) 157 Cal. 1 (defining “community” as “people who reside in a given locality in more or less proximity” for purposes of a 1907 law authorizing “communities” to organize special protection districts within counties); *Gist v. French* (1955) 136 Cal.App.2d 247 (defining “community” as “an area as is governed by the same laws, and the people are unified by the same sovereignty and customs” for medical malpractice purposes); and *In re Giannini* (1968) 69 Cal.2d 563 (defining “community” as the State of California for purposes of determining whether certain live performances affronted contemporary community standards of decency.)

⁶ May 25, 1977 Letter from Legal Department.

⁷ See *Lundberg v. Alameda County* (1956) 46 Cal.2d 644; See also *Stockton Civic Theatre, supra* (1967) 66 Cal. 2d 13.

⁸ *Cedars of Lebanon Hospital v. County of Los Angeles* (1950) 35 Cal.2d 729.

⁹ U.S. Const., art. I, sec. 8, cl. 3.

Honorable Board Members

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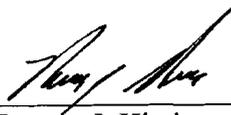
July 6, 2007

doing so, staff has prepared a detailed and extensive legal opinion, which, if approved by the Board, would be annotated and used to supersede all previous opinions with contrary analysis and advice.

If approved by the Board, the publication of such opinion would have some impact on county assessors, since the assessors co-administer the welfare exemption. Effective January 1, 2004, all tax exempt nonprofit organizations claiming the welfare exemption for the first time are required to file a claim for an *Organizational Clearance Certificate* with the Board. While it is thus true that the organization must hold a valid Board-issued *Organizational Clearance Certificate* before a county assessor can grant a welfare exemption, it is also true that the assessor may deny an exemption claim, based on non-qualifying use of the property, notwithstanding the claimant's organizational clearance certificate granted by the Board. Consequently, the Board determines whether an organization is organized and operated for exempt purposes and the assessor determines whether the organization's property is used for exempt purposes.¹⁰ Although the "community benefit test" is a matter addressed by the Board in determining whether an organization is organized and operated for exempt purposes, the broader interpretation being suggested would have implications with regard to the assessor's determination as to the "use" of the property.

Because the issue involved is important, and due to the fact that the county assessors have been following Staff's historic interpretation of the "community benefit test" since at least 1976, we recommend that if the Board approves the issuance of the legal opinion, then the Board staff should meet with assessors, staff, and interested members of the nonprofit community to discuss the issues and ramifications of a changed interpretation of the "community benefit test" that includes the global community and assist in developing questions to be addressed and information to be included in a future Letter to Assessors on this matter. Whether or not a rulemaking process ultimately is initiated or the Assessors' Handbook should be amended, convening such a meeting would likely ensure that all interested parties have an opportunity to share their views with the Board on this important matter.

If you need more information or have any questions, please feel free to contact Acting Assistant Chief Counsel Robert Lambert at (916) 324-6593.

Approved: 
 Ramon J. Hirsig
 Executive Director

KEC:RM:pb
 Prop/Rules/ Welfare Exemption
 Chief Counsel/Final/Welfare Exemption

cc: Mr. Ramon Hirsig MIC: 73 Mr. Dean Kinnee MIC:64
 Mr. David Gau MIC: 63 Mr. Todd Gilman MIC:70
 Mr. Robert Lambert MIC: 82

¹⁰ As of January 1, 2004. (See AH 267, Part I, p. 87.) Prior to January 1, 2004, both Board staff and the county assessors reviewed each welfare exemption claim for organization and operation and use.

State of California

Board of Equalization
Legal Department-MIC: 82**M e m o r a n d u m**

To: Honorable Betty T. Yee, Chairwoman
Honorable Judy Chu, Ph.D., Vice-Chair
Honorable Bill Leonard, Second District
Honorable Michelle Steel, Third District
Honorable John Chiang, Controller

Date: January 11, 2008

From: Kristine Cazadd
Chief Counsel 

Subject: **Request for Guidance – Welfare Exemption**
“Community Benefit Test” Under Revenue and Taxation Code section 214
February 1, 2008 Board Meeting – Chief Counsel Matters

Staff seeks the Board’s guidance regarding its intent for the proper definition of “community” in the interpretation of the “community benefit test,” a test which must be met in order to qualify for property tax exemption under the charitable purposes aspect of the welfare exemption.¹ Revenue and Taxation Code² section 214, subdivision (a), which implements California Constitution article XIII, section 4, subdivision (b), provides that “[p]roperty used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations, limited liability companies, or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation” if certain requirements are met. Where charitable purposes are involved, one such requirement is that the charitable activities must benefit “the community as a whole or an unascertainable portion thereof.”³

Due to this reference to the “community,” this requirement has commonly become known as the “community benefit test.”⁴ Historically, it has been interpreted as requiring that an organization’s claimed charitable activities must be found to primarily benefit persons within the geographical boundaries of the State of California. In other words, the Board staff’s long-standing administrative interpretation of “community benefit” has defined “community” as being co-extensive with the state’s territorial boundaries and limited application of the exemption accordingly. Recently, however, certain nonprofit organizations that engage in charitable activities have requested an expanded definition of the “community benefit test” that would contain no such geographical limitation.

The issue, therefore, is whether or not the definition of community properly may or should be expanded as requested for purposes of application of the “community benefit test.” This issue initially was raised at the July 17, 2007 Board Meeting, at which time the Board directed staff to

¹ Rev. & Tax. Code, § 214.

² All statutory references are to the Revenue and Taxation Code unless otherwise specified.

³ *Stockton Civic Theatre v. Board of Supervisors* (1967) 66 Cal.2d 13, 22.

⁴ See Assessors’ Handbook Section 267, *Welfare, Church, and Religious Exemptions* (Oct. 2004) (AH 267), pp. 2-7 for a general discussion and history of the test.

meet with interested parties to discuss the issues and ramifications of such an expanded interpretation of the "community benefit test." Such a meeting was conducted on September 19, 2007, after which additional comments also were submitted and considered.

Set forth below is a discussion of the issues that both incorporates and addresses the arguments and comments of the interested parties.

I. Historical Background

A. Development of the Community Benefit Test

California Constitution article XIII, section 1, subdivision (c) was added in 1944 by Proposition 4. This constitutional amendment authorized the Legislature to exempt from property taxation "all or any portion of property used exclusively for religious, hospital or charitable purposes. . . ."⁵ The argument in support of Proposition 4 stated that the proposition was necessary because:

California is the only State which taxes the property of welfare agencies serving youth, old age, the sick and handicapped. Proposition Four authorizes the Legislature to exempt these organizations from property taxes and thus place California in line with the sound and wise practice of the other 47 States.

Section 214 was enacted in 1945 to implement Proposition 4. However, neither the California Constitution nor section 214 defines the word "charitable."

After the enactment of section 214 in 1945, a line of judicial decisions defined the word "charitable" for purposes of the welfare exemption. These cases reflect the courts' determination that qualification for exemption under section 214 should be based upon a "strict, but reasonable construction of the exempting language,"⁶ and the courts' expansion of the notion of "charity" from relief of the poor to activities that benefit the community as a whole by serving humanitarian goals.⁷ Thus, in *Fredericka Home for the Aged*, the California Supreme Court considered whether an organization providing a home for elderly people qualified as a charitable organization for purposes of section 214, ultimately finding that: the determination should be based upon a "strict, but reasonable construction of the exempting language"; an organization must "actually dispense charity" to qualify as a charitable organization; and that a home for the elderly was "charitable" because it had been recognized as such since the reign of Queen Elizabeth, I.⁸

Some years later, in *Lundberg v. County of Alameda*,⁹ the California Supreme Court considered whether organizations providing schools for students of less than collegiate grade qualified as

⁵ This constitutional provision was readopted by the electorate on November 5, 1974 as article XIII, section 4, subdivision (b) as part of the 1974 revision of the California Constitution. According to the argument in support of the measure, "Though the proposal shortens the Article by 8,200 words, it makes only technical changes in the Constitution and clarifies the meaning of existing sections."

⁶ *Fredericka Home for the Aged v. County of San Diego* (1950) 35 Cal.2d 789, 792.

⁷ See *Peninsula Covenant Church v. County of San Mateo* (1979) 94 Cal.App.3d 382.

⁸ *Fredericka Home for the Aged*, *supra*. 35 Cal.2d at pp. 794-795.

⁹ (1956) 46 Cal.2d 644.

charitable organizations within the meaning of California Constitution article XIII, section 1, subdivision (c). Prior to this decision, it was thought that educational activities were not properly includable within those activities considered to be “charitable.” The court, however, stated that section 214 was to be construed broadly and that “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 in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government.¹⁰

Later, in *Stockton Civic Theatre v. Board of Supervisors of San Joaquin County*,¹¹ the California Supreme Court considered whether an amateur community theatre organization qualified as charitable within the meaning of California Constitution article XIII, section 1, subdivision (c), and section 214. The Supreme Court began by looking to its earlier pronouncements in *Lundberg*, confirming its opinion that the word “charitable” should be broadly construed, “unless exceptional reasons appear for limiting the grant of power.”¹² Then, turning to the Restatement Second of Trusts, which states that a “charitable activity must benefit the community as a whole or an unascertainable portion thereof,”¹³ the Supreme Court fashioned what is now known as the “community benefit test.” The Supreme Court did not, however, define the term “community.”

B. The Board’s Historic Interpretation of the “Community Benefit Test”

Historically, staff’s interpretation of the “community benefit test” has been to define the relevant community that must be benefited as co-extensive with the geographical boundaries of the State of California. While the question has never been tested in court, it has been the Legal Department’s opinion that California courts “would designate the State of California, or a portion thereof, as the relevant ‘community’ in any welfare exemption action which they might be called upon to consider,” and that, thus, a qualified organization’s charitable activities must be found to be of benefit to some persons within the state’s boundaries in order for such allegedly charitable activities to be found to satisfy the community benefit test. Accordingly, pursuant to staff’s historical definition of “community,” an organization could not qualify for the welfare exemption if its allegedly charitable activities were not found to benefit persons within the state’s boundaries.¹⁴

The Legal Department’s opinion was based on several appellate decisions that defined “community” as the California community for other purposes in other contexts.¹⁵ It was also

¹⁰ *Id.* at p. 649.

¹¹ (1967) 66 Cal.2d 13.

¹² *Id.* at pp. 18-19.

¹³ *Stockton Civic Theatre, supra*, 66 Cal.2d 13 at p. 22.

¹⁴ We are aware of six legal opinions written between 1976 and 1984 opining that the “community” that must be benefited is the California community.

¹⁵ See, for example, *Keech v. Joplin* (1909) 157 Cal. 1 (defining “community” as “people who reside in a given locality in more or less proximity” for purposes of a 1907 law authorizing “communities” to organize special protection districts within counties); *Gist v. French* (1955) 136 Cal.App.2d 247 (defining “community” as “an area

based on the following principle: since a property tax exemption shifts the tax burden to in-state properties that remain taxable, the term "community" must be defined so as to restrict the exemption to those organizations whose charitable activities benefit some group of persons within the state's boundaries – otherwise, the exemption will not be "fair, equitable and in the public interest for the balance of taxpayers to subsidize the exempt property."¹⁶ Finally, a relatively strict construction of "community" was thought to be consistent with the 1944 Proposition 4 ballot language which added the welfare exemption to the California Constitution. The argument in favor of Proposition 4 stated:

These nonprofit organizations assist the people by providing important health, citizenship, and welfare services. They are financed in whole or in part by your contributions either directly or through a Community Chest. It is good public policy to encourage such private agencies by exemption rather than to continue to penalize and discourage them by heavy taxation.

The ability of these agencies to serve you is reduced when a share of your contribution given to aid their work is absorbed by the property tax. The tax has also discouraged and in many cases prevented charitable agencies from securing greatly needed additional facilities to meet growing population needs. Both the present services and the equipment of these agencies are far below normal in California. The tax has thus proved a bad tax in its effect on these important services.

Of California's total tax levy of \$316,001,918.00, approximately 303 charities owning real property pay \$759,916.21. Exemption of these charities from taxation would mean a loss to counties of only 2/10th of 1%. To the taxpayer this would mean a possible 1¢ increase per hundred dollars of assessed valuation. *Additional health and welfare services resulting from the exemption, in fact, would save taxpayers the entire exemption cost.*¹⁷ (Emphasis added.)

Based on this language, the Legal Department believed that the intent of Proposition 4, and consequently, of section 214, was to provide benefits in the form of additional charitable services in exchange for a property tax exemption. And since the property tax is limited to the state's boundaries, the charitable benefits and services should likewise be limited to those same boundaries.

as is governed by the same laws, and the people are unified by the same sovereignty and customs" for medical malpractice purposes); and *In re Giannini* (1968) 69 Cal.2d 563 (defining "community" as the State of California for purposes of determining whether certain live performances affronted contemporary community standards of decency.)

¹⁶ May 25, 1977 Letter from Legal Department.

¹⁷ <http://traynor.uchastings.edu/cgi-bin/starfinder/3975/calprop.txt>.

II. Analysis and Discussion

In the opinion of the Legal Department, while a continued interpretation of the “community benefit test” requiring that charitable activities be performed primarily within the state’s boundaries is reasonable, as explained below, a review of relevant constitutional, statutory, and judicial authorities does not compel a construction of the “community benefit test” that so limits the definition of qualifying charitable activities.

A. Courts’ Construction of Charitable Purposes Aspect of the Welfare Exemption

Neither California Constitution article XIII, section 4, subdivision (b), nor section 214 define either the term “community” or “charitable purposes.” Thus, there is no express constitutional or statutory requirement that the activities of charitable organizations seeking the welfare exemption benefit persons within the state’s boundaries. Given this lack of clear definition in the governing language, a court must interpret the constitutional and statutory language pursuant to the following rules of construction:

[The court’s] function is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. [citation] To ascertain such intent, courts turn first to the words of the statute itself, and seek to give the words employed by the Legislature their usual and ordinary meaning. [citation] *When interpreting statutory language, we may neither insert language which has been omitted nor ignore language which has been inserted.* [citation] The language must be construed in the context of the statutory framework as a whole, keeping in mind the policies and purposes of the statute, and where possible the language should be read so as to conform to the spirit of the enactment [citation].¹⁸ (Emphasis added.)

In the view of the Legal Department, a review of the judicial decisions that have interpreted the “charitable purposes” aspect of the welfare exemption can reasonably be read to use the word “community” not as a maximum geographic boundary within which charitable services must be rendered, but rather as a limitation on the minimum class or number of potential beneficiaries that are eligible to benefit from a particular charitable activity. In other words, such decisions can be read to use the term “community benefit” as a benefit to a sufficiently large group of potential beneficiaries so as to be “unascertainable,” as opposed to a benefit only to an insufficiently small group of potential beneficiaries. Thus, only those charitable activities aimed at benefiting a sufficiently large category of people will be found to qualify as charitable, while those intending to benefit only a small class of people – such as an organization’s founders or members – will not. In reaching this opinion, the Legal Department notes that: (1) courts have held that the term “charitable” should be broadly construed; and (2) courts have cited the law of charitable trusts in determining the meaning of “community” and charitable trust law does not restrict “community” to any particular geographic boundary.

¹⁸ *Scripps Clinic and Research Foundation v. County of San Diego* (1997) 53 Cal.App.4th 402, 409-410.

1. *“Charitable purposes” may be broadly construed.*

Cases discussing the “charitable purposes” aspect of the welfare exemption, and concluding that an organization’s charitable activities must benefit “the community as a whole or an unascertainable portion thereof,” have held that the term “charitable” as it appears in the Constitution is to be construed broadly.¹⁹ For example, in *YMCA v. County of Los Angeles*, the Supreme Court stated that:

. . . the rule of strict construction generally applicable to tax exemption laws must prevail here, but adherence to such legal principle does not require that the narrowest possible meaning be given to the exempting language if it would establish too severe a standard and defeat the apparent object of the law. Rather the construction of the law, though strict, must also be reasonable.²⁰

And in *Lundberg*, the Court stated that the “wide and varied nature of the exemption . . . clearly indicates a purpose and intention to give the words here in question a broad rather than a strict meaning” and does not require that they be narrowly construed against the exemption.²¹

Arguably, then, a broad construction of “charitable purposes” would not be consistent with a narrow definition of “community,” especially when, as explained below, courts defining “charitable purposes” have repeatedly turned to the law of charitable trusts to define what is “charitable.” And the term “community,” for charitable trust purposes, is not a geographic limitation on where otherwise charitable activities can be conducted, but rather pertains to the size of the class of people to which charitable benefits are available. In other words, in order to qualify as a charitable activity, the activity must serve an unascertainable “community” as opposed to a limited number of people such as a group’s founders or members.

2. *The law of charitable trusts does not restrict “community” to a geographic boundary.*

As stated above, judicial decisions have turned to the law of charitable trusts in considering the definition of “charitable” for welfare exemption purposes. For example, several cases, including *Lundberg* and *Stockton Civic Theatre*, citing charitable trust cases, state that:

A bequest is charitable if: (1) It is made for a charitable purpose; its aims and accomplishments are of religious, educational, political or general social interest to mankind. [citations omitted.] (2) *The ultimate recipients constitute either the community as a whole or an unascertainable and indefinite portion thereof.* [citations omitted.] The charitable nature of an institution is determined on the same basis.²² (Emphasis added.)

¹⁹ See *Lundberg v. County of Alameda*, *supra*, 46 Cal.2d 644, 650; *Stockton Civic Theatre*, *supra*, 66 Cal.2d 13, 18; *YMCA v. County of Los Angeles* (1950) 32 Cal.2d 760.

²⁰ *YMCA v. County of Los Angeles*, *supra*, 32 Cal.2d at p. 767.

²¹ *Lundberg v. County of Alameda*, *supra*, 46 Cal.2d at p. 651.

²² *Lundberg v. County of Alameda*, *supra*, 46 Cal.2d at pp. 650-651; *Stockton Civic Theatre*, *supra*, 66 Cal.2d at pp. 19-20.

Further, the *Stockton Civic Theatre* Court, in developing the “community benefit test,” cited the Restatement Second of Trusts, section 368, comment (a), which states that the “common element of all charitable purposes is that they are designed to accomplish objects which are *beneficial to the community*.”²³ (Emphasis added.) The Restatement Second of Trusts, section 368 lists a number of purposes that are considered “charitable,” including “other purposes the accomplishment of which is *beneficial to the community*.”²⁴ (Emphasis added.) Notably, the Restatement Second of Trusts, section 374, comment (i), which defines the phrase, “promotion of other purposes beneficial to the community,” states the following:

The mere fact that a trust is created for the benefit of members of a community outside the State or the United States does not prevent the trust from being charitable. Thus, a trust for the benefit of the poor of another State, or a trust to establish a hospital in a foreign country, is charitable.

Thus, considering these factors, the line of cases culminating in the “community benefit test” can reasonably be read to conclude that the California Supreme Court intended to fashion a flexible test for the “wide and varied nature” of charitable activities that would identify organizations whose activities are truly charitable because they benefit a large class of unidentifiable and unascertainable recipients, while separating out organizations providing similar types of services but that are not truly charitable in character because their services only benefit a small class of people such as their founders or members. Therefore, when the California Supreme Court stated that “charitable activity must benefit the community or an unascertainable and indefinite portion thereof” in *Stockton Civic Theatre*, the Board could reasonably conclude that the use of the word “community” was not intended to set a geographic boundary or require that the class always include persons within state boundaries.

This reading of the case law is consistent with the Internal Revenue Service’s (IRS) rules for determining whether a charitable activity benefits a “charitable class,” an IRS requirement similar to California’s “community benefit test.” For example, specifically for the charitable activity of providing relief to victims of a disaster, the IRS states that to accomplish its charitable purpose, an organization must benefit a “charitable class.”²⁵ A “charitable class” is then defined as follows:

The group of individuals that may properly receive assistance from a charitable organization is called a *charitable class*. *A charitable class must be sufficiently large or indefinite that the community as a whole rather than a pre-selected group of people is benefited.* For example, a charitable class could consist of all individuals located in a city, county, or state. This charitable class is large and benefits to it benefit the entire geographic community.²⁶ (Second emphasis added.)

²³ *Stockton Civic Theatre*, *supra*, 66 Cal.2d at p. 20.

²⁴ Rest.2d Trusts, § 368, subd. (f).

²⁵ IRS Publication 3833, p. 4.

²⁶ *Id.* at p. 5.

Thus, the example of a charitable class consisting of individuals located in a city, county, or state, is given to suggest that the class of beneficiaries (i.e., the community) must be large, not that charitable activities must be restricted to a particular geographic boundary. This is further confirmed by Revenue Ruling 71-460,²⁷ which held that activities which are truly charitable when conducted within the United States are still charitable within the meaning of Internal Revenue Code (IRC) section 501(c)(3) when conducted partially or solely in a foreign country.

B. Property Tax Burden Shift to Non-Exempt Taxpayers

Arguably, expanding the community benefit test to allow organizations that do not primarily provide charitable services in the state to qualify for the welfare exemption unfairly shifts the tax burden to all the other taxpayers in the state. Opponents to an expanded definition of the “community benefit test” argue that this is improper because taxpayers who are shouldering more of the tax burden are receiving no corresponding benefit, and because the argument in favor of Proposition 4 shows an intent that, in exchange for property tax relief, Californians should receive greater charitable services.

Proponents of an expanded interpretation of the “community benefit test” argue, however, that communities are benefited not only by the direct receipt of charitable services, but are also recipients of indirect benefits such as, through their donations, participating in charitable work around the globe with the assurance that their donations are made to a reputable charitable organization.

While it is not clear that section 214 and the cases interpreting “charitable purpose” intended such a broad meaning of the word “benefit” – to include both direct and indirect benefits – at least two court cases suggest that “benefit” should not be so strictly construed so as to be limited to only the direct benefits of the services performed by the nonprofit organization. For example, in *Clubs of California for Fair Competition v. Kroger*, the court stated that, if an institution serves an interest historically regarded as being closely tied to the public welfare, an *indirect* public benefit, such as potential tax savings, may be enough to warrant granting of the welfare exemption.²⁸ And in *Stockton Civic Theatre*, the Court stated that the beneficiaries of a community theatre are not only the audiences but also include those who take part in the theatrical productions.²⁹

Proponents of a changed interpretation of the “community benefit test” to include the global community also argue that mid-20th century notions of community should not be applied to test the wide and varied types of activities now being performed by nonprofit organizations both within and without the state, and fail to take into account that the concept of the community is no longer limited by geographical boundaries. For example, one nonprofit organization stated that it is engaged in: environmental cleanup in Mexico that benefits California beaches; habitat restoration in the Colorado River which is a resource used by Californians; protection of wetlands in Mexico that are the breeding grounds of Grey Whales that migrate along the California shoreline; social services in Mexico that may lessen the burden on California social

²⁷ 1971-2 C.B. 231.

²⁸ *Clubs of California for Fair Competition v. Kroger* (1992) 7 Cal.App.4th 709, 717.

²⁹ *Stockton Civic Theatre*, *supra*, 66 Cal.2d at p. 20.

services; and, infectious disease treatment and control among at-risk populations in Mexico that may reduce the likelihood that migrant workers and other border crossers with infectious diseases enter the United States. They argue that all of these activities, while performed outside state borders, may have a significant impact within state borders.

However, opponents of an expanded definition of the “community benefit test” contend that, while it is true that Californians donate large sums of money and volunteer time to help charities that perform most of their activities outside the state which may have significant impact within the state’s boundaries, this does not necessarily affect the legal definition of “community” under the “community benefit test.” They contend that the Proposition 4 ballot initiative argument in favor of the proposal clearly indicates that at least one intent of the initiative was to increase charitable services to in-state persons by reducing the property taxes of charitable organizations.

Nevertheless, while the ballot initiative argument is instructive in discovering the intent of the proposition, it is not conclusive. In fact, the *Lundberg* Court, in upholding the constitutionality of article XIII, section 1, subdivision (c) stated that:

The history of section [1, subdivision (c)] is inconclusive as to what was intended, and it certainly would not justify a construction of the term charitable contrary to that established by the decisions discussed above [deciding that the word ‘charitable’ should be broadly construed], adopted by the Legislature in the 1945 and 1951 sessions, and approved by the people on referendum in 1952.³⁰

In addition, we note that the ballot argument with respect to eligible activities lists only “welfare agencies serving youth, old age, the sick and handicapped”³¹ as organizations whose property taxes should be exempted by Proposition 4. No one argues, however, that Proposition 4 limits qualifying activities to only those groups, especially given that, as explained above and stated in *Peninsula Covenant Church*, court cases have demonstrated an increasing expansion of the notion of what is “charitable.”

Because this definition of charity as benefiting the community as a whole by serving humanitarian goals clearly contemplates something more than ‘the relief of the poor and destitute,’ a number of organizations have been found to be exempt despite the presence of facts which under the older, more restrictive view would preclude their characterization as charitable.³²

Likewise, while the increase of in-state charitable services may have been one motivation for passing Proposition 4, the charitable activities to which Proposition 4 should apply need not necessarily be bound by that single motivation.

Opponents of an expanded definition of the “community benefit test” also argue that a broadened definition of “community” is not warranted since a fundamental justification for the welfare exemption is that the activities of an organization qualifying for exemption lessen the burdens of

³⁰ *Lundberg v. County of Alameda*, *supra*, 46 Cal.2d at p. 653.

³¹ <http://traynor.uchastings.edu/cgi-bin/starfinder/3975/calprop.txt>.

³² *Peninsula Covenant Church*, *supra*, 94 Cal.App.3d at p. 398.

government. However, while lessening the burden of government is often cited as justification for the welfare exemption, it is not the only justification. For example, in *Lundberg v. County of Alameda*, the court listed activities considered to be charitable, one of which was “lessening the burdens of government.”³³ Additionally, if it was necessary for activities to lessen the burdens of government in order to be considered charitable, the Court in *Stockton Civic Theatre* may not have permitted the exemption for a community theatre organization since it is not necessarily the government’s burden to subsidize community theatre activities.³⁴

C. Constitutional Considerations

Proponents of an expanded definition of “community” argue that the Commerce Clause in the United States Constitution prohibits an interpretation of “community” that would restrict charitable activities from being performed outside the state. The Commerce Clause empowers the United States Congress to “regulate Commerce with foreign Nations, and among the several states.”³⁵ The “dormant” Commerce Clause refers to a United States Supreme Court doctrine prohibiting states from implementing regulatory measures which discriminate against interstate commerce even where Congress has not exercised its Commerce Clause powers to expressly prohibit such regulation.³⁶ The dormant Commerce Clause prohibits states from practicing certain forms of economic protectionism by prohibiting states from taxing interstate commerce more heavily than intrastate commerce.³⁷

In *Camps Newfound/Owatonna v. Town of Harrison, Maine*,³⁸ a Maine nonprofit corporation operating a summer camp, whose attendees were approximately 95 percent out-of-state residents, challenged a Maine property tax exemption statute that allowed a full property tax exemption only to charitable organizations whose property was used to primarily benefit Maine residents. The United States Supreme Court struck down the Maine statute as violating the dormant Commerce Clause of the United States Constitution, holding that an otherwise generally applicable state property tax violates the Commerce Clause if its exemption for property owned by charitable institutions excludes organizations operated principally for the benefit of nonresidents. The Court rejected arguments that the Commerce Clause did not apply because the camp was not engaged in commerce, the activity was purely intrastate, or a real property tax was at issue.³⁹ The Court viewed charitable organizations as major market participants for interstate goods and services and stated that, “We see no reason why the nonprofit character of an enterprise should exclude it from the coverage of either the affirmative or the negative [dormant] aspect of the Commerce Clause.”⁴⁰

³³ See page 4 *supra*.

³⁴ See also *Greek theatre Association v. County of Los Angeles* (1978) 76 Cal.App.3d 768. (The welfare exemption applied to an organization’s facilities used by a nonprofit corporation for theatrical and musical presentations by professional performers.)

³⁵ U.S. Const., art. I, § 8, cl. 3.

³⁶ See *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine* (1997) 520 U.S. 564.

³⁷ *Id.* at pp. 574-575

³⁸ (1997) 520 U.S. 564.

³⁹ *Id.* at p. 574.

⁴⁰ *Id.* at p. 584.

In light of this case, proponents of an expanded definition of “community” argue that the current interpretation of the “community benefit test” limiting the welfare exemption to organizations that provide benefits primarily within the State of California violates the Commerce Clause because it favors charitable organizations that use their property to benefit Californians over similar charitable organizations that use their property to benefit persons outside California. This, however, is not a necessary conclusion since *Camps Newfound* dealt with a statute that was per se or facially invalid as discriminatory against interstate commerce.⁴¹ Section 214, on the other hand, would warrant further analysis since it is not facially invalid because there is no language in the text of the statute that expressly restricts the exemption to charitable activities performed within the state. Further, the Maine statute at issue barred a full property tax exemption for in-state activity that primarily served non-residents. As the “community benefit test” is currently interpreted in California, however, an organization engaged in a similar activity carried on within California would not be disqualified for the welfare exemption simply because it primarily served non-residents. Thus, the instant situation is distinguishable from *Camps Newfound*.

D. Administrative Issues

In comments provided during and after the interested parties meeting, county assessors raised concerns about their ability to verify an organization’s stated activities. The county assessors argue that this inability to verify out-of-state charitable activities by field inspections constitutes an additional reason to maintain the current administrative interpretation of the community benefit test. They state that it would be impossible to verify by desk audit that property was being used outside the state so as to qualify for the welfare exemption if the definition of “community” is expanded. They also state that performing only desk audits of organizations engaged in activities outside the state while performing field inspections of organizations engaged in activities within the state would, in effect, hold the latter organizations to a higher verification standard.

In response, nonprofit organizations have offered that their out-of-state activities could be verified by the production of various documents, including results of audit by federal agencies such as the IRS and USAID, bills of lading, copies of airplane tickets, expense books, customs documents, pictures, and letters of verification that a project has been completed. We note, however, that the ability to merely inspect documents on an after-the-fact basis does not necessarily provide the same type of verification that can be obtained with field inspections.

E. Revenue Impact

Currently, there are seven pending exemption claims that would be affected by a change in the application of the “community benefit test,” amounting to approximately \$3.14 million in assessed value. Staff cannot estimate how many additional claims might be filed in the future if the test were to be expanded as discussed herein.

⁴¹ Me. Rev. Stat. Ann., tit. 36, § 652, subd. (1)(A) (Supp. 1996) provided in relevant part, “Any such [benevolent and charitable] institution that *is in fact conducted or operated principally for the benefit of persons who are not residents of Maine* is entitled to an exemption not to exceed \$50,000 of current just value. . . .” (Emphasis added.)

Honorable Board Members

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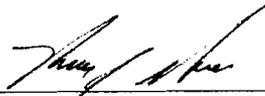
January 11, 2008

Conclusion

In the opinion of the Legal Department, the current interpretation of the “community benefit test” limiting the welfare exemption to organizations performing charitable activities within the state is both rational and defensible. Nevertheless, such a limited, geographical interpretation of “community” is neither mandated nor required by the constitutional, statutory, or judicial authorities cited herein and is not legally prescribed. Therefore, we recommend that the Board provide guidance with regard to its intent for the definition of “community” in this context – in consistency with the Constitution, statutes, and appellate decisions – for purposes of applying the “community benefit test.”

If you need more information or have any questions, please contact Acting Assistant Chief Counsel Robert Lambert at (916) 324-6593.

Approved: _____


Ramon J. Hirsig
Executive Director

KEC:pb

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cc: Mr. Ramon Hirsig, MIC: 73
Mr. David Gau, MIC: 63
Mr. Robert Lambert, MIC: 82
Mr. Dean Kinnee, MIC: 64
Mr. Todd Gilman, MIC: 70

State of California

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 Legal Department-MIC: 82
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Memorandum

To: Honorable Judy Chu, Ph.D., Chair
 Honorable Betty T. Yee, Vice-Chairwoman
 Honorable Bill Leonard
 Honorable Michelle Steel
 Honorable John Chiang

Date: February 28, 2008

From: Kristine Cazadd
 Chief Counsel 

Subject: **Request for Guidance – Welfare Exemption**
“Community Benefit Test” Under Revenue and Taxation Code section 214
March 19, 2008 Board Meeting – Chief Counsel Matters

This matter was raised initially at the July 17, 2007 Board Meeting, at which the Board directed staff to meet with interested parties to discuss the issues and ramifications of an expanded interpretation of the “community benefit test” for the welfare exemption from property taxation provided by Revenue and Taxation Code¹ section 214.

Section 214, subdivision (a), which implements California Constitution article XIII, section 4, subdivision (b), provides that “[p]roperty used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations, limited liability companies, or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation” if certain requirements are met. Where charitable purposes are involved, one such requirement is that the charitable activities must benefit “the community as a whole or an unascertainable portion thereof.”² Due to this reference to the “community,” this requirement has commonly become known as the “community benefit test.”³

Historically, the “community benefit test” has been interpreted as requiring that an organization’s claimed charitable activities must be found to primarily benefit persons within the geographical boundaries of the State of California. In other words, the Board staff’s long-standing administrative interpretation of “community benefit” has defined “community” as being co-extensive with the state’s territorial boundaries and limited the application of the exemption accordingly. Recently, however, certain nonprofit organizations that engage in charitable activities have requested an expanded definition of the “community” that would contain no such limitation based on geographical boundaries.

¹ All statutory references are to the Revenue and Taxation Code unless otherwise specified.

² *Stockton Civic Theatre v. Board of Supervisors* (1967) 66 Cal.2d 13, 22.

³ See Assessors’ Handbook Section 267, *Welfare, Church, and Religious Exemptions* (Oct. 2004) (AH 267), pp. 2-7 for a general discussion and history of the test.

Honorable Board Members

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February 28, 2008

On September 19, 2007, staff held an interested parties meeting to discuss the issues related to expanding the definition of the "community" beyond the state's territorial boundaries. Thereafter, at the February 1, 2008, Board meeting, staff requested the Board's guidance as to whether or not staff should expand the definition of the "community." In response, at that Board meeting, the Board directed staff to complete a new revenue estimate with the assistance of the county assessors in obtaining any appropriate data.

The requested revenue estimate is attached as Exhibit 1, and concludes that the estimated annual revenue loss would be less than \$500,000. To complete the revenue estimate, staff gathered data from county assessors, Franchise Tax Board, Internal Revenue Service, and the Secretary of State. Further, as the Board requested, staff contacted states believed to have changed their state law to exempt nonprofit organizations that did not provide an in-state benefit. However, staff was not successful in obtaining revenue loss estimates as a result of such contacts.

If you need more information or have any questions, please contact Acting Assistant Chief Counsel Robert Lambert at (916) 324-6593.

Approved: _____


Ramon J. Hirsig
Executive Director

KEC:RM:pb

Chief Counsel/Finals/Community Benefit .Memo.doc

Attachment

cc: Mr. Ramon Hirsig MIC: 73
Mr. David Gau MIC: 63
Mr. Robert Lambert MIC: 82
Mr. Dean Kinnee MIC: 64
Mr. Todd Gilman MIC: 70
Mr. Richard Moon MIC: 82

EXHIBIT 1

REVENUE ESTIMATE
(REV. 4/98)

STATE OF CALIFORNIA
BOARD OF EQUALIZATION



BOARD OF EQUALIZATION
REVENUE ESTIMATE

WELFARE EXEMPTION: "COMMUNITY BENEFIT TEST"

Issue

Can a nonprofit organization whose charitable activities primarily benefit people located outside of California satisfy the "community benefit test" and qualify as a "charitable" organization for purposes of the welfare exemption provided by Revenue and Taxation Code section 214?

Background, Methodology, and Assumptions

The Board's historic interpretation of the "community benefit test" has been to define the relevant community that must be benefited as one that is located within the boundaries of the State of California. As a result of inquiries from nonprofit organizations, Board staff initiated a review of the interpretation of the "community" as it pertains to the welfare exemption. The review included analysis of the statutory intent of Revenue and Taxation Code section 214, investigation of other state's practices, and evaluation of documents provided by nonprofit organizations that conduct charitable activities outside of California and other government agencies.

Currently, there are seven welfare exemption claimants that do not satisfy the historical "community benefit test" that have filed for the welfare exemption. The assessed value for these claimants total \$3.14 million. Under the broader definition of "community" that would include nonprofit organizations that primarily benefit persons outside of California, the revenue impact for these claimants at the basic one percent property tax rate is \$3.14 million x 1 percent, or \$31,400.

There may be other organizations that historically have not claimed the welfare exemption but would qualify under a broader definition of "community." We have been unable to find any data on the number of nonprofit organizations that operate in California and whose charitable activities primarily benefit people living outside of California. Neither have we been able to find data on what property these organizations might own in California.

We were able to find some information on nonprofit organizations in Los Angeles and Orange counties from an Internet site – TaxExemptWorld.com. For the organizations listed on this site we found 112 organizations that we believe could be eligible for a property tax exemption under the broader definition of "community." We asked Los Angeles County or Orange County to check to see if any of these organizations owned property in their counties. We found that only 12 of these organizations owned property and the assessed value for that property amounted to only \$435,000. At the basic one percent property tax rate the revenue on these properties amounts to \$4,350.

We recognize that the list we found was an exceedingly small sample. However, it may point out that while there may be many organizations like this, only a small portion of them might own property in California, and the assessed values of that property may not be very large.

Based on these assumptions, we believe that the revenue impact from a broader definition of "community" will not result in a large revenue loss. We believe that the revenue loss would be less than \$500,000 annually.

Revenue Summary

If the welfare exemption were extended to nonprofit organizations whose charitable activities primarily benefit people located outside of California, the annual revenue impact at the basic one percent property tax rate would be less than \$500,000.

Preparation This revenue estimate was prepared by Mr. David E. Hayes, Manager, Research and Statistics Section.

Current as of February 28, 2008



STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
 PROPERTY AND SPECIAL TAXES DEPARTMENT
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JUDY CHU, Ph.D.
 Fourth District, Los Angeles

JOHN CHIANG
 State Controller

RAMON J. HIRSIG
 Executive Director

May 2, 2008

No. 2008/034

TO COUNTY ASSESSORS:

COMMUNITY BENEFIT TEST FOR THE WELFARE EXEMPTION

Section 214, subdivision (a), which implements California Constitution article XIII, section 4, subdivision (b), provides that "[p]roperty used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations, limited liability companies, or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation" if certain requirements are met. Where charitable purposes are involved, one such requirement is that the charitable activities must benefit "the community as a whole or an unascertainable portion thereof."¹ This requirement is commonly known as the *community benefit test*, and meeting this test is one of the considerations for qualifying for the Welfare Exemption in California.

Community Benefit Test

Historically, the *community benefit test* has been interpreted as requiring that an organization's claimed charitable activities must be found to primarily benefit persons within the geographical boundaries of the State of California. In other words, the Board's long-standing administrative interpretation of "community benefit" has been that the term "community" is defined as being co-extensive with the state's territorial boundaries and limited the application of the exemption accordingly. Pursuant to staff's historical definition of the term "community," an organization could not qualify for the Welfare Exemption if its charitable activities were not found to benefit persons within the state's boundaries.

Staff's opinion is based on several appellate decisions that define the term "community" (for other purposes in other contexts) as being the California community.² Staff's opinion is also based on the following general principle:

Since a property tax exemption shifts the tax burden to in-state properties that remain taxable, the term "community" must be defined to restrict the exemption to those organizations whose charitable activities benefit some group of persons within the state's boundaries. Otherwise the exemption will not be fair, equitable, and in the public interest for the balance of taxpayers to subsidize the exempt property.

¹ *Stockton Civic Theatre v. Board of Supervisors* (1967) 66 Cal.2d 13, 22.

² See, e.g., *Keech v. Joplin* (1909) 157 Cal. 1, 12 [defining "community" as "people who reside in a given locality in more or less proximity" for purposes of a 1907 law authorizing "communities" to organize special protection districts within counties]; *Gist v. French* (1955) 136 Cal.App.2d 247, 271 [defining "community" to mean "such an area as is governed by the same laws, and the people are unified by the same sovereignty and customs" for medical malpractice purposes]; and *In re Giannini* (1968) 69 Cal.2d 563, 576 [defining "community" as the State of California for purposes of determining whether certain live performances affronted contemporary community standards of decency.]

Additionally, staff believes that a relatively strict construction of the term "community" is consistent with the 1944 Proposition 4 ballot language that added the Welfare Exemption to the California Constitution. The argument in favor of Proposition 4 states:

These nonprofit organizations assist the people by providing important health, citizenship, and welfare services. They are financed in whole or in part by your contributions either directly or through a Community Chest. It is good public policy to encourage such private agencies by exemption rather than to continue to penalize and discourage them by heavy taxation.

The ability of these agencies to serve you is reduced when a share of your contribution given to aid their work is absorbed by the property tax. The tax has also discouraged and in many cases prevented charitable agencies from securing greatly needed additional facilities to meet growing population needs. Both the present services and the equipment of these agencies are far below normal in California. The tax has thus proved a bad tax in its effect on these important services.

Of California's total tax levy of \$316,001,918.00, approximately 303 charities owning real property pay \$759,916.21. Exemption of these charities from taxation would mean a loss to counties of only 2/10ths of 1%. To the taxpayer this would mean a possible 1¢ increase per hundred dollars of assessed valuation. *Additional health and welfare services resulting from the exemption, in fact, would save taxpayers the entire exemption cost.*³ [Emphasis added.]

Based on this language, staff believes that the intent of Proposition 4, and consequently Revenue and Taxation Code section 214, is to provide benefits in the form of additional charitable services in exchange for a property tax exemption. And, since the property tax is limited to the state's boundaries, the charitable benefits and services should likewise be limited to those same boundaries.

Review of the Community Benefit Test Policy

The elected Members of the Board directed staff to review their policy regarding the *community benefit test* for the Welfare Exemption. At a July 17, 2007, meeting, the Members heard discussions regarding the feasibility of expanding the *community benefit test* to include nonprofit organizations who own property in California but whose charitable activities solely benefit persons outside of California. Staff held an interested parties meeting in Sacramento on September 19, 2007, to hear discussions regarding the pros and cons of expanding the *community benefit test* for the Welfare Exemption. At the February 1, 2008, Board meeting, staff requested the Board's guidance as to whether the definition of the term "community" should be expanded. After hearing testimony, the Board requested additional information of staff and to return the matter to the Board at a later date. At the March 19, 2008 meeting, the Board voted to retain the current definition of the term "community."

³ <http://traynor.uchastings.edu/cgi-bin/starfinder/1959/calprop.txt>.

TO COUNTY ASSESSORS

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May 2, 2008

In summary, as directed by the Board, staff will retain its historic interpretation of the *community benefit test* for the Welfare Exemption and will continue to require that an organization's claimed charitable activities must be found to primarily benefit persons within the geographical boundaries of the State of California.

All documents regarding this issue are posted to the Board's website at <http://www.boe.ca.gov/proptaxes/otherprojects08.htm>. If you have questions regarding this issue, you may contact Mrs. Ladeena Ford at 916-445-0208 or at Ladeena.Ford@boe.ca.gov.

Sincerely,

/s/ David J. Gau

David J. Gau
Deputy Director
Property and Special Taxes Department

DJG:lf

State of California

Board of Equalization
Legal Department - MIC:82
Telephone: (916) 445-3540

Memorandum

To: Mr. Mike Harris (MIC:64)
Principal Property Appraiser

Date: January 27, 2010

From: Denise L. Riley
Tax Counsel

Subject: *Claim for Organizational Clearance Certificate – Nonprofit Organization
Assignment No. 09-195*

This is in response to your August 27, 2009, memorandum to Assistant Chief Counsel Randy Ferris, requesting our review of the application filed by Nonprofit Organization (Organization) for an Organizational Clearance Certificate (OCC) under Revenue and Taxation Code¹ sections 214 and 254.6. You ask whether Organization qualifies for an OCC under the charitable purposes aspect of the welfare exemption. At issue is whether Organization is organized and operated for charitable purposes when some of its activities are targeted at individuals at the graduate or post-graduate level within California colleges or universities and whether it meets the community benefit test.

Based on the claim and documents submitted, and as explained in further detail below, we are of the opinion that Organization qualifies for an OCC.

Factual Background

On August 6, 2007, Organization filed an application for an OCC, beginning with the 2007-08 fiscal year. Supporting documentation establishes that: (1) Organization qualifies as an exempt organization under Internal Revenue Code section 501(c)(3); and (2) Organization's Articles of Incorporation includes an acceptable statement of irrevocable dedication and an acceptable dissolution clause.²

In response to question 10 of the claim form, requesting that the organization fully state all activities in which it is engaged, Organization states that the purpose of the organization is "scientific research, telescope observatory operation for educational and scientific purposes." Organization's Articles of Incorporation indicates that "the specific purpose of this corporation is to engage in scientific research and education related to astronomy and astrophysics." According

¹ All further statutory references are to the Revenue and Taxation Code unless otherwise specified.

² See Internal Revenue Service letter, dated February 6, 2007, and Articles of Incorporation, endorsed by the California Secretary of State on December 30, 1993, which was amended on July 25, 2006, to clarify "the name of the organization." The amended Articles of Incorporation was endorsed by the California Secretary of State.

to Organization's Web site, Organization is a privately funded, nonprofit organization that is "creating a cutting edge science program paired with a[n] innovative education program,"³ by "building a global network of telescopes for scientific research and research-based education."⁴

Documents submitted by staff (various Web pages from Organization's Web site) indicate that as early as 2007 and continuing to date, Organization is in the process of building two networks of completely robotic telescopes that will be linked via the Internet, which scientists, teachers and students will be able to access via the Web and where all data will be stored and freely available.

Organization's goal is to have in place in various areas around the globe approximately 24 to 40 0.4 meter telescopes, ten 0.9-1.0 meter telescopes, and three to four 2.0 meter telescopes, all of which will be linked together as two integrated networks (the northern and southern hemispheres). These telescopes are being designed and/or manufactured by a team of experts, who are employed at Organization's headquarters located in Santa Barbara, California, where the majority of Organization staff and equipment are located. Organization also employs staff members who reside near these telescope sites (currently Australia, Hawaii, and Texas) in order to maintain the telescopes already installed.

Organization's motto and mission is to "keep education in the dark."⁵ By placing telescopes all over the world, linked and controlled via the Internet, there "ill always be at least one telescope, if not more, in the dark, which will make viewing and studying objects in the sky easier; with observations passing off from one telescope to the next, the network has the capability of non-stop observing."⁶ This network will be the first of its kind. It has not been created to-date because "no one has had the funding until now."⁷ "This project will provide scientists with a wider, faster, and deeper view of the universe than current telescopes allow."⁸

Organization's Web site explains that this network of telescopes will allow the user to examine and mark the various changes within the galaxy. Because most objects in astronomy change and vary over time, they need to be observed over a course of several hours, to several days, weeks, months or even years. This network will allow this type of extensive observation. In addition, Organization hopes that this network will encourage more students to become interested in science. Organization plans to work with teachers to help improve science programs, with natural history museums to create more in-depth, hands-on science exhibits, and with other organizations around the world to achieve these common goals.⁹ The telescope network will be offered to teachers, students and scientists for scientific and educational research. "While the Telescope is intended primarily for science, it also offers some great opportunities for educational use."¹⁰ Teachers "will have the ability to get time on these telescopes. We will teach them how to use the equipment and to develop lesson plans."¹¹ "The educational network will be open and free of charge to schools."¹²

³ See page 1 of attached "Information" page from Organization's Web site, supplied by staff.

⁴ See Organization Web site.

⁵ See page 2 of attached Web pages, supplied by staff; see also The Coonabarabran Times, article.

⁶ See Organization Web site.

⁷ See The Coonabarabran Times, article.

⁸ See page 3 of attached Web pages, supplied by staff.

⁹ See Organization's Web site; see also The Coonabarabran Times, article.

¹⁰ See The Coonabarabran Times, article.

¹¹ Ibid.

¹² See The Coonabarabran Times, article.

At this time, four telescopes are installed but not yet inter-connected. They are, however, individually available online for access by students and scientists.¹³ The network is still in the planning and design stages and has not yet been completed. According to an article posted on Popular Science's Website,¹⁴ Organization hopes to have the network constructed within the next five years.

According to the documents provided, while most users are either located in the UK, Hawaii, or Australia, Organization stated in its July 29, 2009, response letter that "the telescope time is primarily allocated to Organization's engineers and astronomers, education institutions and universities located in the state of California." In a telephone call on January 12, 2010, the CFO for Organization, indicated that the actual time allocated to California users is 87.5 percent for all four telescopes currently running.

While Organization's Website indicated that the user must sign up to be a member before it can use the telescopes, and indicated that the user must pay a fee for a set, pre-scheduled time, according to the CFO, and the founding director, the organization does not charge fees for users to access the telescopes via the Internet, and that it does not plan to charge fees in the future. The terms and conditions that were placed on the Website that referenced the payment of a fee were incorrect, created from a legacy document dating back several years earlier when Organization was first formulating its education outreach programs. The Web page has been updated and any references to fees or payment for usage have been eliminated.¹⁵

Review of Organization's 2007 financial records indicates that the founding director incorporated Organization and is also listed as the founder of Foundation, a private, non-operating, non-profit public benefit corporation (a private grant-making foundation), which is the main contributor of funds for Organization. According to Organization's 2007 Tax Returns, the Foundation contributed \$15 million to Organization.

According to Organization's 2007 Depreciation and Amortization Report, Organization owns over \$5.8 million in equipment, which consists of computer equipment, cameras, scientific equipment, telescopes and telescope parts, tools, software, astronomical equipment, furniture and vehicles, most of which is located at Organization's headquarters in Santa Barbara, California.

Organization also reports that it has paid out grants towards its charitable purposes. Grants reported in 2007 include \$252,000 to Cal Tech for "Canada-France Hawaii Telescope;" \$77,000 to Charles Stuart University (located in Australia) for educational purposes; and \$12,000 to the University of Hawaii for network hardware.

¹³ These four telescopes and their locations are: Faulkes Telescope South, located at Siding Spring Observatory, NSW, Australia; SNST II, located at McDonald Observatory, Texas; Faulkes Telescope North, located at Haleakala, Maui, Hawaii; and Cerro Tololo, located at Chile.

¹⁴ See posting at <http://www.popsci.com/>.

¹⁵ See attached signed statement, dated January 13, 2010, from founding director, confirming that Organization does not charge fees for usage of its telescopes and does not have any plans for charging such fees in the future and attached email from CFO confirming that at no time in the past has Organization charged fees for access to its telescopes.

In response to staff's incomplete and Not Been Met Finding Sheets that requested further information regarding Organization's charitable activities, specifically current activities directed at and benefiting the California community, Organization reports that it has designed and constructed telescopes for various colleges, including UCSB and California State University at Monterey (CSUM). In this regard, since 1998, Organization has conducted a program to support the Observatory Project of CSUM, where volunteer staff provides: (1) maintenance of the Project's telescopes, and (2) designs software related to the operation of the telescopes, including technical upgrades to such software. The Monterey Institute of Astronomy, which manages the program, is dedicated to public education and outreach in astronomy. It includes a High School Student Summer Internship Program, which is designed to give high school students in the Monterey Bay area experience in astronomy research and using the scientific method. This program also offers a yearly, free lecture for general audiences from a visiting scientist who focuses on current events in the field of astronomy. Finally, this program offers a program called "Exploring the Universe from the Central Coast," which is an interactive version of an exhibit located at the Pacific Grove Museum of Natural History, detailing local research in astronomy.

Organization also recently designed, built and installed a .8m telescope on the Sedgwick Reserve owned by UCSB to be used for research and educational purposes. Organization supplies infrastructure and staff to reach out to the central coast community for astronomy and educational purposes as well as to pursue scientific astronomical observations. The goal of the Sedgwick Reserve is to provide children and adults in the community access to the telescope for astronomy education. Organization has made a commitment to be a part of this ongoing mission.

Organization has also entered into a joint project with UCSB where volunteer staff will design, program and construct another telescope to be used for research purposes by UCSB and educational outreach to the Santa Barbara community by the Santa Barbara Museum of Natural History. The Museum's Astronomy Education program provides everyone in the community, especially 9000 school children, the opportunity to learn about and enjoy astronomy. Organization provides volunteer staff to manage this project.

Organization also reports that, for the past two years, it has hosted internships for students from local Santa Barbara area high schools and universities to encourage their pursuit of science and engineering careers. For example, Organization provided funds and internships to the Dos Pueblos High School Engineering Academy Foundation, which provides students who are interested in science or engineering with the opportunity to supplement their high school education with a carefully designed, hands-on, college-preparatory science curriculum.¹⁶

Organization also stated in its July 29, 2009, letter that it supports postdoctoral programs both financially and through providing project guidance and support and that it funds astronomical research by an astrophysicist through the University of California at Berkeley (UCB). His work provides astronomy education to a wide audience beyond the traditional scientific community. However, Organization provided as attachments to its March 12, 2009 letter, several letters that acknowledge that funds were provided by Organization's sister organization, the Foundation, not by Organization. During our January 12, 2010 conversation, the CFO clarified that while some of the receivers of the funds may have confused Foundation with Organization, it was Organization that was the provider of funds for these educational programs, with the exception of

¹⁶ See recent press release from Goleta Valley Junior High School, a local California junior high school.

one. In this one case, Foundation provided the first disbursement of grant money, however, Organization has since been providing the remainder of the grants. The CFO provided further documentation and bank receipts (attached) that show that Organization is the provider of grants to a number of California-based educational programs.

Finally, Organization provided that, since 2007, it has joined UCSB's Kauli Institute of Theoretical Physics for an annual one-day conference, where over a hundred science teachers from secondary schools from around the country meet to talk to several world experts on different areas of the latest physics research. A second day of training was offered, which is planned to be an annual event, where Organization will instruct teachers on its training model. Organization also participates, since 2006, in lecture series with UCSB and the Santa Barbara Museum of Natural History.

Legal Analysis

Article XIII, section 4, subdivision (b) of the California Constitution provides that the Legislature has the authority to exempt certain property used exclusively for religious, hospital, or charitable purposes if owned, operated or held in trust by a nonprofit organization operating the property for those purposes. The constitutional authority for the welfare exemption is implemented by section 214, which provides in relevant part that: "property used exclusively for . . . charitable purposes owned and operated by . . . corporations organized and operated for . . . charitable purposes is exempt from taxation" if all other requirements set forth in section 214 are met. This exemption is commonly referred to as the welfare exemption. In this case, Organization seeks an OCC under the charitable purposes aspect of the welfare exemption.

Section 254.6 requires that any organization intending to claim the welfare exemption under section 214 must file a claim for an OCC with the Board. Section 254.6 requires the Board to review each claim to ascertain whether the organization meets the requirements of section 214.

The Legislature has not defined what is "charitable;" however, the California courts have defined the term "charitable" in a number of cases. Most notably, in *Stockton Civic Theatre v. Board of Supervisors* (1967) 66 Cal.2d 13, the court held that the term "charitable" was to be broadly construed in line with previous decisions and based upon the wide and varied nature of the exemption, such that an activity was charitable if it provides a general community benefit whose "ultimate recipients are either the community as a whole or an unascertainable and indefinite portion thereof." (*Id.* at p. 20.)

According to section 267 of the Assessors' Handbook, *Welfare, Church, and Religious Exemptions*:

This means that the class benefited must be sufficiently large that a gift to it may be considered to benefit an indefinite portion of the community. An organization may still be considered charitable even if its benefits are confined to the members of a certain segment of the public, such as a particular race or creed, provided no special advantage is given to members of the organization or to particular individuals.

As well, Letters to Assessors (LTA) No. 2008/034 states:

Historically the community benefit test has been interpreted as requiring that an organization's claimed charitable activities must be found to primarily benefit persons within the geographical boundaries of the State of California. In other words, the Board's long-standing administrative interpretation of "community benefit" has been that the term "community" is defined as being co-extensive with the state's territorial boundaries and limited the application of the exemption accordingly. Pursuant to staff's historical definition of the term "community," an organization could not qualify for the Welfare Exemption if its charitable activities were not found to benefit persons within the state's boundaries.

We first note that providing scientific research for scientific and educational purposes or funding scientific research for educational purposes may be considered qualifying charitable activities. (See *Scripps Clinic and Research Foundation v. County of San Diego* (1997) 53 Cal.App.4th 402, 415; see also § 214, subd. (j).) In our opinion, Organization's purpose of engaging in scientific research and education related to astronomy and astrophysics and providing telescope observatory operation for educational and scientific purposes are qualifying purposes.

In addition, with respect to the funds granted to college professors, the documentation provided shows that these funds are provided specifically for scientific research in line with Organization's stated charitable purpose of "scientific research and education related to astronomy and astrophysics" and not for any individual purposes. Therefore, we do not believe that these grants are disqualifying activities.

While all of these activities, of course, should be verified by the assessor to ensure that they are ongoing, continuous activities provided by the organization in California, we do not believe that any of these activities are disqualifying activities.

You have also indicated some concern that Organization does not satisfy the community benefit test because its activities do not primarily benefit the California community. We note, however, that Organization has reported that 87.5 percent of telescope time is allotted to, and is used by, California users. Thus, we believe that the community benefit test is met even on a purely numerical analysis of use inside and outside of California since the percentage of telescope time used inside California is greater than 50 percent.

However, we also note that with certain activities, it is difficult to determine what exact benefits should be measured in determining whether the California community is primarily served. This is because certain activities are not limited to a particular location, nor is the benefit that accrues limited to a particular place or group of people. In those instances, we believe that the term "primarily" requires a determination that the California community receives a "prime" or "meaningful" (i.e., "first-rank") benefit. In other words, "primarily" should not be interpreted to require that in all cases that more than 50 percent of an objectively quantifiable benefit or use must occur to persons in California because often such objective quantification is not possible, or does not capture all of the benefits afforded by a particular activity. For example, in this case, although the majority of telescope time is used by California users, we do not believe that all the benefits of such activity can be captured simply by allocating the percentage of time used by persons inside and outside of California.

In this particular case, the “benefit” attributable to the activity - scientific research and education - is not fully attributable to a particular location, and cannot be fully quantified. In fact, because the activity is in the nature of scientific research and education, and because there are telescopes located around the world, there is arguably no group of people or location that benefits “primarily.” Indeed, one of the foundations of the scientific method is that results should be published to the global scientific community so that findings and theories can be verified and further research can be pursued for the refinement and enhancement of scientific knowledge, resulting in a non-localized benefit to all of humankind.

In sum, in this case, because: (1) currently approximately 87.5 percent of time spent on the telescopes is spent by persons in California; (2) at least two of the telescopes in question have been or will be installed in California; (3) California research institutions receive direct funding; and (4) significant other educational, outreach and research activities are occurring in this state, we believe that California is receiving a primary (or first-rank) benefit under these particular facts. For this reason, we are also of the opinion that even if the percentage of time spent on the telescopes by persons in California drops below 50 percent, we do not believe that that fact alone would disqualify Organization for an OCC.

DLR:yg

J:/Prop/Prec/OCC/2010/09-195.doc

Attachments

cc:	Mr. David Gau	MIC:63
	Mr. Dean Kinnee	MIC:64
	Mr. Todd Gilman	MIC:70