

Unrelated Business Income Tax

Even though an Elks Lodge is recognized as a tax exempt 501(c)(8), it still may be liable for tax on its unrelated business income (UBI).

The following three conditions must be met before an activity may be classified as an unrelated trade or business regularly carried on.

1. The activity must be considered a trade or business;
2. The activity must be regularly carried on; and
3. The activity must not be substantially related to the organization's exempt purpose.
 - The fact that the activity generates income for the organization to spend on its charitable programs does not make the activity related to the organization's exempt purpose.

When to file-

- When gross UBI (gross receipts minus cost of goods sold) equals or exceeds \$1,000, an organization must file Form 990-T, Exempt Organization Business Income Tax Return.
- If an organization's total anticipated tax for the year equals or exceeds \$500, it must pay quarterly estimated tax, using Form 990-W, Estimated Tax on Unrelated Business Taxable Income for Tax-Exempt Organizations.

Failure to file the appropriate forms may subject the organization to penalties.

- If you find that you are unable to file Form 990-T by the original due date, you can request an extension of time by filing Form 8868, Application for Extension of Time To File an Exempt Organization Return, by that original due date.
- If you are a corporation, you may request an automatic 6-month extension. If you are a trust, you may request an automatic 3-month extension and, if necessary, an additional 3-month extension that will be granted at the IRS's discretion.

You must pay any unrelated business income tax due by the original due date for filing Form 990-T. No extension for paying the tax will be given. **Do not send the payment with Form 990-T. You must deposit the tax by EFTPS or tax coupon.**

Elks' statutes, Section 14.130, concerning the nature of Membership in the Order. Subject to state and local laws, the use of the Home or Club facilities shall be limited to Members in good standing in the Order, their spouses and guests of Members, and those receiving Identification Cards under Section 14.140, as provided in the House Rules, so as to preserve the privacy of the use of such facilities to the Members of the Order. Guests are individuals that have been signed in by a Lodge member. Subordinate Lodges shall take appropriate action to conform to the provisions of this Section.

Typical Forms of UBI

- Food and beverage paid for by nonmembers. We are members and guests only.
- Rentals of rooms
- RV Parks- if open to nonmembers
- Visiting Elks- if not signed in
- Revenue from advertising in bulletins
- Gaming

What about bingo (gaming)?

Section 501(c)(7), 501(c)(8) and 501(c)(10) – Social Clubs and Fraternal Organizations. The exempt function of organizations classified under these sections includes providing social and recreational activities for members and their bona fide guests. Thus, social clubs and fraternal organizations may engage in gaming involving only members without jeopardizing their exempt status. Gaming open to the general public does not further the exempt purposes of social clubs or fraternal organizations.

Certain bingo games are not included in the term “unrelated trade or business.” In order to qualify for this statutory bingo exclusion, a game must:

- Meet the definition of bingo under the Code and Regulations;
- Not violate state or local law where it is played; and
- Be played in a jurisdiction where bingo games are not regularly carried on by for-profit organizations.

Bingo is defined as a game of chance played with cards that are generally printed with five rows of five squares each. Participants place markers over randomly called numbers on the cards in an attempt to form a pre-selected pattern such as a horizontal, vertical, or diagonal line, or all four corners. The first participant to form the pre-selected pattern wins the game. *In addition, for a game to meet the legal definition of bingo, wagers must be placed, winners must be determined, and prizes or other property must be distributed in the presence of all persons placing wagers in that game.*

A wagering game that does not meet the definition of bingo under the Code and Regulations does not qualify for the exclusion regardless of its name.

- **Satellite and Internet bingo do not qualify** because these *games are conducted in many different places simultaneously, and those placing wagers are not all present when the wagers are placed, the winners are determined, and the prizes are distributed.*
- **“Instant Bingo,” “Mini Bingos,” and similar pull-tab or scratch-off games** do not qualify. In these games, a player places a wager by purchasing a card containing pre-printed numbers or a pattern covered by tabs or film. By uncovering the numbers or pattern, the player discovers whether the card is a winner.
- Unlike bingo meeting the exclusion, *the winners of these games are pre-determined.*

The bingo exclusion applies only if the game is legal under the laws of the jurisdiction where it is conducted.

- The fact that a jurisdiction’s law prohibiting bingo is rarely enforced or is widely disregarded does not make the conduct of bingo legal for this purpose.
- The bingo exclusion applies only if for-profit organizations cannot regularly carry on bingo games in any part of the same jurisdiction.
- Jurisdiction is normally the entire state; however, in certain situations, local jurisdiction will control (<http://www.irs.gov/pub/irs-pdf/p3079.pdf>)

Section 501(c)(7), 501(c)(8) and 501(c)(10) organizations whose primary activity is public gaming jeopardize their exempt status and the gaming income may also be subject to the tax on unrelated business income. (<http://www.irs.gov/pub/irs-pdf/p3079.pdf>)

Rents:

- Rents from real property and incidental rents of personal property (normally tables and chairs) leased with real property are generally excluded from UBI, except if the property is debt-financed and rented to a non member.
- Section 512(b)(3)(B) also includes rent in UBI if more than 50% of the rent is attributable to personal property or if the amount of rent depends in whole or in part on the income or profits derived by any person from the property leased.
- Where rent and services (catering food and beverages) are to be provided, it is best to have two separate agreements, one for occupancy (rental) of the facility and another for catering and other services.

Volunteer Workforce: Any trade or business activity in which substantially all the work (85% or more) is performed for the organization without compensation is not an unrelated trade or business.

- The volunteer workers exception applies to activities that would otherwise be considered Unrelated Business Income (UBI).
- Providing a volunteer with a meal is acceptable but providing a drink and other “compensation” is not permitted.
- Accepting tips by volunteers will be considered employee compensation, will jeopardize a person’s volunteer status, and subject the Lodge to the minimum wage law.
- Applying the volunteer exception will require accurate and complete documentation, especially if applied to a trade or business activity that would normally be considered UBI.

Dividends, interest, annuities and other investment income: All dividends, interest, annuities, payments with respect to securities loans, and other income from an exempt organization’s ordinary and routine investments that the IRS determines are substantially similar to these types of income are excluded in computing unrelated business taxable income. Note, this exclusion does not apply to unrelated debt-financed property. ([Publication 598](#))

Questions & Answers from a presentation by PGER John Amen

1. Can a lodge rent out their facility, charge for adult beverages or food without being in violation of Grand Lodge Statutes or IRS regulations? If so, how do we document this correctly? If not, how can the lodges modify their record keeping so they can be in compliance?
 - First, you must comply with 14.130 GLS, third paragraph. 14.130: Subject to state and local laws, the use of the Home or Club facilities shall be limited to Members in good standing in the Order, their spouses and guests of Members, and those receiving Identification Cards under Section 14.140, as provided in the House Rules, so as to preserve the privacy of the use of such facilities to the Members of the Order. Subordinate Lodges shall take appropriate action to conform to the provisions of this Section.
 - If you can comply with 14.130, then you look at IRS requirements. Is this part of a regular “trade or business” carried on by the Lodge? If so, then it is all Unrelated Business Income (UBI).
 - **Advertising** makes it all UBI and may make you a “place of public accommodation.

- **Sale of food or beverages to non-members** results in the whole transaction (event) being UBI.

IRS audit procedures:

- **Rule of eights:** where a group of eight or fewer individuals, at least one of whom is a member, uses club facilities, it is assumed for audit purposes that the nonmembers are guests of the member, *if* payment for the use is received by the Lodge directly from the member.
- Where 75% or more of a group using the club facilities at an occasion are members, it is also assumed for audit purposes that the nonmembers in the group are guests of members, *if* payment for the use is received by the club director from one or more of the members.
- In all other situations a host-guest relationship is not assumed but must be proven.
- Where payment is made to the club directly by a member, the club is under no duty to investigate possible reimbursement.

Records: The club must maintain adequate records to substantiate the amount of people in the group and the percentage that are members and that payment was received by the club directly from members.

Your records must contain:

- The date
- Total number in party
- Number of nonmembers in the party
- The total charges
- The charges attributable to nonmembers
- The charges paid by nonmembers. Where a member pays all or part of the charges a statement signed by the member indicating whether he has been or will be reimbursed for the nonmember use and, if so, the amount of the reimbursement.

2. Can a lodge serve non-members at a non-rental event? That is, can a non-member (or many non-members such as musician groupies) enter an Elks establishment without a member as their escort and dance and/or consume beverages within that establishment
 - Again, the key problem is violation of Section 14.130, third paragraph. See above. We are an organization that is fraternal and for the benefit of members and their bona fide guests.
3. Can an Elks lodge lease out part (or most) of their facility (e.g., a restaurant) to some other person or organization that serves both members and non-members alike? If so, what is the minimum space the lodge must have for the lodge to remain in compliance with the IRS (providing approval is granted from Grand Lodge).
 - The part leased out must not be part of the facility that is under the control, management and supervision of the club governing body that is formed pursuant to Section 16.040 because that area is for the exclusive use of members and guests pursuant to Section 14.130.
 - A Lodge may, with appropriate approval of its membership, designate a portion of its facility that is closed off from the club as an area designated for rental purposes. It may not provide services other than utilities and common area janitorial.
 - Non members may not come into the Lodge unless they are under contract to provide services to the Lodge or are bona fide guests of a member.

- If a lease (including options to renew) is for a term of more than five years then a Board of Grand Trustees (BOGT) permit under 16.050(g) must be obtained.
4. Can an Elks-owned golf course allow non-members to play on the course without being a member or as a guest? That is, a walk on public. If so, how often can they play before they must be required to become members? Further, how do we itemize this for the IRS?
- If a Lodge wants to operate an extraordinary facility as “open to the public” it should create a separate “for profit” subsidiary, pay any regular corporate taxes due on the income, and dedicate all net profits to the Lodge for charitable purposes. Note: The Lodge bar may not be open to the public as the “19th hole.” In this situation the golf facility is a “public accommodation.”
5. One comment I have been hearing lately is, “Let’s just be open to the public and just pay the IRS taxes.” So, can a lodge be totally open to the public and pay IRS and other taxes and still remain part of the Elks organization. If so, what is the process for doing so with the IRS and with the Elks?
- An Elks Lodge is a private, closed to the public entity, operated for the fraternal benefit of its members and their bona fide guests. If the Lodge Trustees want to be the operators of a “beer joint”, they should lease a space down the street with their own money, get a liquor license, and operate the business for their own profit, but not as an Elks Lodge.
 - A Lodge that operates in disregard to the Laws of the Order is not operating as a fraternal entity under the Lodge system and is subject to revocation of charter under Section 9.130 and 9.160.
6. Another comment/question I have been hearing is, “Can a lodge have a for-profit side of the lodge and a not-for-profit side?” That is, have a part of the organization and facility totally open to the public while having one part only for members. This could be similar to question three except the for-profit side would pay IRS taxes etc. and potentially could even donate funds to the not-for profit side, ENF, Idaho Elks Rehabilitation hospital etc.
- A Lodge could have a for-profit taxpaying subsidiary. However, if a substantial part of the Lodge activity is conducting “a trade or business”, then it is subject to revocation of its tax exemption. Note that a tax exempt entity can have substantial revenue from certain outside sources if they are subject to one of the exceptions to UBI; i.e. Dividends and investment income; real estate rental income so long as there is no provision of services; royalty income, etc.
7. Can we advertise that we are open for events (room rental) in the local newspaper, chamber of commerce, etc? If so, how can we do that appropriately?
- Advertising to the public is strong evidence that you are conducting a taxable “trade or business”.
8. What must we be doing to prepare for an IRS audit now, what should we examine from the past, what should we be doing in the future?
- Keep accurate and complete records. If an agent takes a certain position against the Lodge then you must be able to rebut that position with records.

This document contains general information only and is not a substitute for such professional advice or services about your specific situation. Before making any decision or taking any action that may affect your Lodge and your taxes, you should consult with your tax advisor.

UNRELATED BUSINESS INCOME TAX FORMS AND INSTRUCTIONS

www.irs.gov/pub/irs-pdf/f990t.pdf

IRS 990-T Exempt Organization Business Income Tax Return (form and instructions)

https://www.ftb.ca.gov/forms/2013/13_109bk.pdf

CA Tax Return Form 109 (form and instructions)

files.hawaii.gov/tax/forms/2013/n70npins.pdf

HA form N70NP tax form instructions

files.hawaii.gov/tax/forms/2013/n70np_f.pdf

HA N70NP tax form

Forms and instructions are lengthy and impractical to include as part of this document.

To view associated forms and/or instructions, copy the link and paste in your browser. You will be able to download and/or print the form(s).

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