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IN THE SUPREME COURT OF OHIO  
Appeal from the Board of Tax Appeals

EPISCOPAL SCHOOL OF CINCINNATI,

Appellee,

v.

WILLIAM W. WILKINS [RICHARD A.  
LEVIN], TAX COMMISSIONER OF OHIO,

Appellant.

Case No. **07-0126**

Appeal from BTA Case  
No. 2004-R-230

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NOTICE OF APPEAL OF TAX COMMISSIONER OF OHIO

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**IN THE SUPREME COURT OF OHIO**

**Appeal from the Board of Tax Appeals**

EPISCOPAL SCHOOL OF CINCINNATI, :  
: Appellee, :  
: Case No. \_\_\_\_\_ :  
v. :  
: Appeal from BTA Case :  
WILLIAM W. WILKINS [RICHARD A. : No. 2004-R-230 :  
LEVIN], TAX COMMISSIONER OF OHIO, :  
: Appellant. :

**NOTICE OF APPEAL OF TAX COMMISSIONER OF OHIO**

Richard A. Levin, Tax Commissioner of Ohio, successor to William W. Wilkins, hereby gives notice of his appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio, from a decision and order of the Board of Tax Appeals (“BTA”), journalized on December 22, 2006, in Case No. 2004-R-230. A true copy of the BTA decision and order being appealed is attached hereto and incorporated herein by reference.

The errors in the decision and order of the BTA of which the Tax Commissioner complains are as follows:

- (1) The BTA erred when it decided that the property owned by the Episcopal School of Cincinnati (“ESC”) should be exempted from taxation for year 2001 even though the ESC “never accomplished” its exempt purpose.
- (2) The BTA erred in finding that the “prospective use” test could be applied to property for which an exemption from taxation was sought under R.C. 5709.08, R.C. 5709.12 or R.C. 5709.121, if the owner of the property never used the property for the exempt purpose.

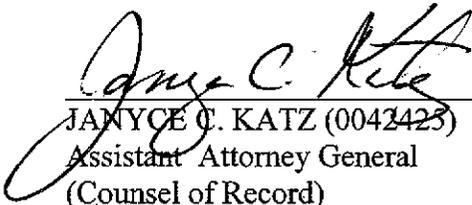
- (3) The BTA erred when it ignored the clear holding of the Supreme Court in *Holy Trinity Church v. Bowers* (1961), 172 Ohio St. 103, 107 that property belonging to a nongovernmental entity could be exempted before except use begins only when the ownership of the property is “coupled with the purpose, supported by tangible evidence, that the property will be devoted to an actual physical use for the public benefit. The intent to use such property for an exempt purpose must be one of substance and not a mere dream that sometime in the future, if funds can be obtained, the entity would so use such property.”
- (4) The BTA erred in not following the *Holy Trinity Church v. Bowers* (1961), 172 Ohio St. 103 syllabus in which the Supreme Court based the prospective exemption on a showing “that plans have been prepared and funds were available, or were to be available, to effectuate actual construction of such house of worship within a reasonable time from the filing of the exemption” when it ignored the fact that any possibility of using the property for an exempt purpose had been abandoned by the time the application for exemption was filed.
- (5) The BTA erred in finding that a prospective use exemption should be granted to property even though at the time the application for exemption was filed, it was clear that the owner had failed to raise adequate funding or to complete other essential tasks necessary to use the property for exempt purposes under R.C. 5709.07, R.C. 5709.12 or R.C. 5709.121.
- (6) The BTA erred when it granted an exemption to property owned by a school which was never to be used as a school when it was known at the time of the filing of the application

for exemption that the property would never be used as a school or for any other exempt purpose by the owner.

(7) The BTA erred in failing to follow the legal standards and controlling precedent of cases such as *Holy Trinity Church v. Bowers* (1961), 172 Ohio St. 103.

Respectfully submitted,

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**OHIO BOARD OF TAX APPEALS**

Episcopal School of Cincinnati,	)	
	)	CASE NO. 2004-R-230
Appellant,	)	
	)	(REAL PROPERTY TAX
vs.	)	EXEMPTION)
	)	
William W. Wilkins,	)	DECISION AND ORDER
Tax Commissioner of Ohio,	)	
	)	
Appellee.	)	

APPEARANCES:

For the Appellant	- Frost & Jacobs Samuel M. Scoggins 2500 Central Trust Tower 201 East Fifth Street Cincinnati, OH 45202
For the Appellee	- Jim Petro Attorney General of Ohio Janyce C. Katz Assistant Attorney General, Taxation Section State Office Tower, 16th Floor 30 East Broad Street Columbus, OH 43215

Entered **DEC 22 2006**

Ms. Margulies, Mr. Eberhart, and Mr. Dunlap concur.

The Board of Tax Appeals considers this matter pursuant to an appeal filed by the appellant, Episcopal School of Cincinnati ("ESC"). ESC appeals a final determination issued by the Tax Commissioner, in which the commissioner denied appellant's application for exemption of real property from taxation for tax year 2001.

ESC was established in 2000 as a nonprofit corporation. S.T. at 156-158.

ESC acquired the subject property on November 29, 2000. The property consists of 3.075 acres of land, improved with a building that for many years had housed the Cincinnati Natural History Museum. It is located in the Cincinnati City School District, Hamilton County, Ohio. It is identified in the auditor's records as permanent parcel number 071-0001-0115-00. ESC acquired the subject property with the intention to open an inner-city, multiracial, religiously affiliated elementary and middle school. H.R. at 22-23. No part of its earnings were to inure to the benefit of any private individual. S.T. at 47-49.

In December 2001, ESC applied for exemption of the subject real property from taxation, pursuant to R.C. 5709.07, 5709.12, and 5709.121, for the year 2001. At that time, the exempt use had not yet begun. ESC contends that since it had a plan for an exempt use of the property and was taking steps to accomplish that plan as of January 1, 2001, the subject property was entitled to exemption.

The Tax Commissioner, however, argues that although steps were taken, the plan was never properly funded and the exempt use was never realized. Therefore, the property does not qualify for exemption.

The matter is submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript ("S.T.") certified to this board by the Tax Commissioner, the record of the merit hearing ("H.R.") before this board, including exhibits, and briefs of counsel. Both the appellant and the appellee appeared and were represented by counsel. ESC called two witnesses to testify on its behalf, Rev. James A. Hanisian, Archdeacon of the Episcopal Diocese of Southern Ohio, and Ms. Patricia B. Hassel, CPA

and financial officer of the Episcopal Diocese of Southern Ohio.

Initially, it is important to note the presumption that the findings of the Tax Commissioner are valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. It is therefore incumbent upon a taxpayer challenging a finding of the commissioner to rebut that presumption and establish a right to the relief requested. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

Turning to ESC's claim for exemption, we first note the general rule that "[a]ll real property in this state is subject to taxation, except only such as is expressly exempted therefrom." R.C. 5709.01(A). It is as a result of this rule that "[i]n any consideration concerning the exemption from taxation of any property, the burden of proof shall be placed on the property owner to show that the property is entitled to exemption." R.C. 5715.271; see, also, *OCLC Online Computer Library Ctr. v. Kinney* (1984), 11 Ohio St.3d 198. The Supreme Court of Ohio explained the rationale for this principle in *Akron Home Medical Services, Inc. v. Lindley* (1986), 25 Ohio St.3d 107:

"Exceptions to a particular tax are governed by the oft-stated rules to be found in *Youngstown Metropolitan Housing Authority v. Exdtt* (1944), 143 Ohio St. 268, 273 [28 O.O. 163]:

"By the decisions it is established in Ohio that exemption statutes are to be strictly construed, it being the settled policy of this state that all property should bear its proportional share of the cost and expense of government; that our law does not

favor exemption of property from taxation; and hence that before particular property can be held exempt, it must fall clearly within the class of property specified \*\*\* to be exempt.

“The foundation upon which that policy rests is that statutes granting exemption of property from taxation are in derogation of the rule of uniformity and equality in matters of taxation. (See 38 Ohio Jurisprudence, 853, section 114.)” See, also, *Id.* at paragraph two of the syllabus; *Cleveland-Cliffs Iron Co. v. Glander* (1945), 145 Ohio St. 423, 430 [31 O.O. 39]; *Natl. Tube Co. v. Glander* (1952), 157 Ohio St. 417 [47 O.O. 313], paragraph two of the syllabus; *First Natl. Bank of Wilmington v. Kosydar* (1976), 45 Ohio St.2d 101 [74 O.O.2d 206]; *Southwestern Portland Cement Co. v. Lindley* (1981), 67 Ohio St.2d 417, 425 [21 O.O.3d 261]; *Natl. Church Residences v. Lindley* (1985), 18 Ohio St.3d 53, 55.” *Id.* at 108.

See, also, *White Cross Hosp. Assn. v. Bd. of Tax Appeals* (1974), 38 Ohio St.2d 199, 201.

“Exemption is the exception to the rule and statutes granting exemptions are strictly construed.” *Am. Soc. for Metals v. Limbach* (1991), 59 Ohio St.3d 38; *Seven Hills Schools v. Kinney* (1986), 28 Ohio St.3d 186.

In its application, ESC claimed exemption under R.C. 5709.12, 5709.121, and 5709.07. As to R.C. 5709.12, the Tax Commissioner did not find that ESC’s request for exemption should be considered because the Supreme Court of Ohio held that for property to be exempt, it must qualify under the statute that specifically applies rather than the provisions of a more general statute. See *Rickenbacker Port Auth. v. Limbach* (1992), 64 Ohio St.3d 628, and *Toledo Business & Professional Women’s Retirement Living, Inc. v. Bd. of Tax Appeals* (1971), 27 Ohio St.2d 255. See, also, *Athens Cty.*

*Auditor v. Zaino* (Mar. 19, 2004, BTA No. 2002-A-1152, unreported (affirmed in *Athens Cty. Auditor v. Wilkins*, 106 Ohio St.3d 293, 2005-Ohio-4986). As to R.C. 5709.121 and 5709.07, the commissioner found that there was no actual or prospective use of the subject property that was consistent with an exempt purpose.

R.C. 5709.12 reads as follows:

“Exemption of property used for charitable or public purposes.

“(B) \*\*\* Real and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation.”

R.C. 5709.121 states the following:

“Exclusive charitable or public use, defined.

“Real property and tangible personal property belonging to a charitable or educational institution or to the state or a political subdivision, shall be considered as used exclusively for charitable or public purposes by such institution, the state, or political subdivision, if it meets one of the following requirements:

“(A) It is used by such institution, the state, or political subdivision, or by one or more other such institutions, the state, or political subdivisions under a lease, sublease, or other contractual arrangement:

“\*\*\*

“(2) For other charitable, educational, or public purposes;

“(B) It is made available under the direction or control of such institution, the state, or political subdivision for use in furtherance of or incidental to its charitable, educational, or public purposes and not with the view to profit.”

R.C. 5709.07 provides an exemption from real property taxation for property that is used exclusively as a public schoolhouse. That section reads, in pertinent part:

“(A) The following property shall be exempt from taxation:

“(1) Public schoolhouses, the books and furniture in them, and the ground attached to them necessary for the proper occupancy, use, and enjoyment of the schoolhouses, and not leased or otherwise used with a view to profit; \*\*\*.”

Accordingly, in order to determine whether the subject property qualifies for exemption under R.C. 5709.07, there must be an actual or prospective use of the property as a public schoolhouse during the period in question.

The prospective use test is based upon the understanding that the actual exempt use cannot always begin immediately. Therefore an exemption may be granted while the real property is being prepared for that exempt use. However, the property owner must be actively working toward the exempt use. It must show that it had definite plans. “The intent to use such property for an exempt purpose must be one of substance and not a mere dream that sometime in the future, if funds are obtained, the entity would so use the property.” *Holy Trinity Protestant Episcopal Church v. Bowers* (1961), 172 Ohio St. 103, at 107.

Evidence of these steps toward exempt use must exist as of the tax lien date for the year the property owner is requesting exemption. *City of Cleveland v. Carney* (1959), 169 Ohio St. 259; *Carney v. Cleveland City School Dist. Pub. Library* (1959),

169 Ohio St. 65. See, also, *Cleveland Mem. Med. Found. v. Peck* (1967), 10 Ohio St.2d 72.

Once a property is determined to be exempt under the prospective use test, the exemption continues until the exempt purpose has been abandoned or the efforts to realize that purpose have ceased, so long as the property has not been used for non-exempt or commercial purposes. *Bd. of Cty. Commrs. of Lake Cty. v. Supanick* (1972), 32 Ohio St.2d 45 (note, however, that this was public property rather than private). See, also, *Community Temple v. Voinovich* (Apr. 8, 1976), Cuyahoga App. No. 35395, unreported.

In the present case, meetings regarding starting a school began as early as 1997. H.R. at 21, 55. Prior to purchasing the subject property, a feasibility study was undertaken at a cost of \$75,000. H.R. at 55-56. Prior to the tax lien date, ESC took the following steps:

1. Formed a nonprofit, 501(c)(3) corporation (S.T. at 47-49, 156-158; H.R. at 21-22, 57);
2. Recruited a volunteer board of trustees and adopted a code of regulations (S.T. at 126-155, 175-177; H.R. at 23);
3. In 1999, hired a coordinator, Dr. Hansel, to complete the steps necessary to open the school (S.T. at 173-174; H.R. at 23, 56, 91);
4. Set up committees for curriculum, personnel, and property site (H.R. at 49-52);

5. Contributed \$4,500,000 to the Cincinnati Museum Center to acquire the subject property, subject to a covenant that legally restricted the property's use to educational or museum purposes (S.T. at 79; H.R. at 24-25; Appellant's Ex. 4);
6. Purchased an additional parcel of land for approximately \$1,800,000 and transferred it to the Cincinnati Museum Center (H.R. at 24-26; Appellant's Ex. 4);
7. In January 2000, engaged an architectural firm to prepare a feasibility study, floor plans, and furniture plans; cost was approximately \$462,000 (S.T. at 262-301; H.R. at 24-26, 89-90; Appellant's Ex. 4);
8. Engaged a construction company that prepared a construction budget (S.T. at 364-401, 481);
9. In June of 2000, prepared and filed school certification documents with the Ohio Department of Education, which included descriptions of academic programs, resources, administration, staff and faculty, admission, enrollment projections, school year calendar, daily schedule, technology, marketing, governance, facilities, funding, and capital requirements (S.T. at 303-361);
10. Hired and paid Head of School, Chief Financial Officer, and Development Director (S.T. at 402-404; H.R. at 31, 91);
11. Held press conference on September 11, 2000 to announce school with opening date a year later (S.T. at 201; H.R. at 31);

12. Created brochure regarding school that was widely distributed (Appellant's Ex. 8);
13. Obtained a \$500,000 grant from the William Cooper Procter Fund of the Episcopal Diocese of Southern Ohio (H.R. at 92);
14. Negotiated a committed line of credit from PNC Bank for \$6,500,000 to finance the acquisition of the subject property, which the Episcopal Diocese guaranteed (S.T. at 409-478; H.R. at 91);
15. Also obtained a \$10,500,000 letter of credit for school construction (S.T. 424-478); and
16. In January 2001, executed a construction contract with Frank Messer & Sons Construction Co. to complete the renovations (H.R. at 34).

By April 2001, ESC was experiencing financial difficulties. H.R. at 36. It was then that ESC realized the September 2001 opening date was in jeopardy, and it failed to complete the conversion of the property. H.R. at 35-36, 42, 75-78. Dr. Hansel left Cincinnati. H.R. at 36. ESC attempted to get scaled-down plans from the architects. S.T. at 218; H.R. at 43. The principal and staff left in June of 2001. H.R. at 64.

By September 2001, ESC was making payment only for legal fees associated with the bond levy, utilities, and severance pay. H.R. at 97. By November 2001, only utilities and maintenance payments were being made to prevent the deterioration of the building. H.R. at 99-100. By the time the application for exemption was filed in December 2001, ESC had already begun considering the possibility of starting a school in another building. *Id.* The subject property was sold to Scripps

Howard, a for-profit corporation, in November 2002 after the city of Cincinnati was persuaded to release the use restrictions on the property. H.R. at 44, 72-73; Appellant's Ex. 5.

It is clear from the record that ESC was organized as a nonprofit corporation for the purpose of starting a school, which purpose would be exempt under R.C. 5709.07. It is also equally as clear that ESC had a plan for constructing and operating this school and took steps toward implementation of that plan. Two questions remain, however, in resolving the issue of exempt status in this matter: as of what date are we to determine exempt status, the tax lien date or the date of application for exemption, and was adequate funding in place to make this plan more than a "mere dream." A final consideration is the effect, if any, of the fact that the exempt use was never realized and the school never opened.

The Tax Commissioner submits that the date that is to be used for determining whether an exemption is granted should be the date of the filing of the application based upon language in *Holy Trinity*, supra. In the present case, as of the filing date in December 2001, plans for using the subject property as a school had effectively been abandoned and other sites were being considered.

However, a review of case law establishes that the crucial date for determining whether a property is exempt from taxation is the tax lien date. See *Freshwater v. Belmont Cty. Bd. of Revision* (1997), 80 Ohio St.3d 26; *Christian Benevolent Assn. of Greater Cincinnati, Inc. v. Limbach* (1994), 69 Ohio St.3d 296; *City of Grove City, Ohio v. Zaino* (Sept. 24, 2004), BTA No. 2003-K-722, unreported.

Therefore, the board finds that the exemption status of property is to be determined as of the applicable tax lien date.

The Tax Commissioner maintains that the minutes of the board of trustees' meetings as early as December 2000 reflect that the project was not viable due to a lack of funding. However, although funding was discussed and considered in these board of trustees' meetings, it appears that the intent to continue with the project remained. Also, ESC continued to take affirmative steps toward the exempt purpose, i.e., by signing a construction contract in January 2001. Therefore, the board finds that as of the tax lien date, January 1, 2001, ESC was actively proceeding toward constructing and operating a school.

The Tax Commissioner submits that adequate funding for the project needs to be in place before the prospective use test can be utilized. See *Cleveland Mem. Med. Found.*, supra. See, also, *Holy Trinity*, supra, (holding that funds need to be available within a reasonable time). In *Cleveland Mem. Med. Found.*, supra, the Supreme Court of Ohio reversed the Tax Commissioner's denial of exemption, noting that over one-half of the funds necessary to complete the exempt purpose had been raised. In *Grove City*, supra, availability of funds was also stressed.

As the Tax Commissioner points out, this project became increasingly more expensive and less feasible. It appears that costs were initially somewhat underestimated and then grew substantially. ESC, however, had significant funding in place by the tax lien date. On November 21, 2000, PNC bank had approved the bridge loan in the amount of \$6,500,000, and ESC had procured a letter of credit totaling \$10,500,000. Further, as

of the end of 2000, progress was being made on a bond levy, which bond levy was later abandoned by the underwriters subsequent to the tax lien date. When it became clear to ESC that funding was inadequate, instead of abandoning the project, ESC attempted to scale it down. Therefore, the board does not find that funding was inadequate, or that inadequate funding should be a basis for denying ESC an exemption from taxation for the subject property, as of January 1, 2001.

The board does not find the fact that the exempt purpose was never accomplished sufficient to deny the subject property exemption for 2001. Once exempt status is established, then that property is entitled to exemption until either the purpose is abandoned or efforts to realize the exempt purpose have ceased. *Bd. of Cty. Commrs. of Lake Cty.*, supra. See, also, *Community Temple*, supra.

Based upon the foregoing, this board finds that ESC presented sufficient competent, probative, and reliable evidence to demonstrate that the Tax Commissioner erred in his final determination, thereby rebutting the presumption in favor of the Tax Commissioner's findings and decision.

Accordingly, it is the decision and order of the Board of Tax Appeals that the decision of the Tax Commissioner must be, and hereby is, reversed.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.

  
\_\_\_\_\_  
Julia M. Snow, Board Secretary

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the Notice of Appeal was sent by certified U.S. mail to Samuel M. Scoggins and Joseph J. Dehner, Frost Brown Todd, LLC, 201 East Fifth Street, Suite 2200, Cincinnati, Ohio 45202, counsel for appellee, on this 22<sup>nd</sup> day of January, 2007.

  
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Assistant Attorney General