IN THE SUPREME COURT OF OHIO

Appeal From the Ohio Board of Tax Appeals

EPISCOPAL SCHOOL OF CINCINNATI,	:	
	:	
Appellee,	:	
	:	Case No. 07-0126
v.	:	
	:	Appeal From BTA
WILLIAM W. WILKINS [RICHARD A. LEVIN],TAX COMMISSIONER OF OHIO,	:	No. 2004-R-230
	:	
	:	
Appellant.	:	

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Introduction

The Board of Tax Appeals ("BTA") erred when it granted an exemption to The Episcopal School of Cincinnati ("ESC")'s property even with the knowledge that by the time ESC filed the application for exemption from real property taxation ("Application") it had effectively abandoned its intent to use the building for an exempt purpose. (Decision and Order at 10-12).

ESC never used its property, the former Natural History Museum building ("building"), as a school. Nor will ESC ever use the building as a school. Less than a year after filing the exemption, ESC sold the building to a for-profit television station and it was demolished.

To grant an exemption for prospective use when that use never materialized, the BTA altered the time frame that this Court designated as the applicable scope of review in *Holy Trinity Church v. Bowers* (1961), 172 Ohio St. 103, 107 (the facts leading up to and thru the filing date of the application.) Instead it narrowed that scope of review to a single day in the year -what has been called the "tax lien date." The *Holy Trinity* test was created to exempt the property of those institutions not quite ready to use property for an exempt purpose but intending to so use

the property within a reasonable time from the filing of an application for exemption. As such, the term "filing date" was meant to encompass not only the steps leading up to that date but also to insure that the property is either used for the exempt purpose on that date or will be so used within a reasonable time. All of the steps – both before and after the filing must be evaluated in order to determine whether an applicant is actually going to use property for an exempt purpose. *People's Faith Chapel v. Limbach* (1985), 18 Ohio St.3d. 236, 238.

In contrast, "tax lien date," the date that the General Assembly established in R.C. 323.11 for the valuation of property and for placing a lien on taxes, allows for a "snap shot" of the status of property and its use on one particular date. Having this knowledge is an essential part of setting the appropriate tax for the property for that year.

The BTA's misuse of tax lien date is dangerous. So, too, is the BTA's extremely broad interpretation of R.C. 5709.07 to allow for property to be exempt when the owner only intends to use it for a school but never achieves that intent. Property owners could use the BTA's holding in order to avoid tax on property until the owner can find a more profitable use for the property. Thus, the BTA's distortion of this Court's prospective use test actually rewards individuals who take some steps toward an alleged exempt purpose with no real intent to use the property for that purpose as well as undermines precedent of this Court. Further, whether or not ESC had intent to develop the project into an actual school is irrelevant if ESC never realized its intent.

Because the BTA's decision was unlawful and erroneous, the Tax Commissioner respectfully requests that decision be reversed and the legal, lawful findings of the Tax Commissioner be reinstated.

Law and Argument

Proposition of Law:

The Tax Commissioner cannot grant an exemption for property based upon the applicant's prospective intent to use the property for educational or charitable purposes when it is clear that the applicant has never used the property and will never use the property for an exempt use.

1. When the legal conclusion is incorrect, this Court doesn't hesitate to reverse the decision.

This Court previously said that it would "not hesitate to reverse a BTA decision based upon an incorrect legal conclusion." *Gahanna-Jefferson Local School Dist. Bd. of Edn. v. Zaino*, 93 Ohio St.3d 231, 232, 2001-Ohio-1335. As elaborated in the Tax Commissioner's brief and summed up in this reply brief, the BTA's decision to grant an exemption to property never actually used for an exempt purpose was based upon an incorrect legal conclusion, that a prospective use exemption could be granted to a non-public entity where it is evident at the time of the filing of the application for exemption that the applicant has abandoned steps toward achieving an exempt use on the property, never used the property for an exempt use and never will use the property for an exempt use. Using the wrong criteria to determine if the prospective use test applied to the facts in this case, the BTA made an unreasonable and unlawful decision that should be reversed.

2. To receive an exemption for property, an entity must not only prove it has taken concrete and actual steps toward that goal but also must realize the exempt use of the property within a reasonable time from the filing of the application for exemption. An abandonment of the intent to use property for exempt purposes before the use begins is a clear indication that the property is not deserving of the exemption.

This Court created an exemption for prospective use in *Carney v. Cleveland Public Library* (1959), 169 Ohio St. 65. In syllabus 1 of *Carney,* this Court stated the conditions under

which an exemption was available for the prospective use of property: "[w]here an entity, which under the law is entitled to have its property exempted from taxation, acquires real property with the intention of devoting it to a use exempting it from taxation, such property is entitled to be exempted from taxation, **as long as it is not devoted to nonexempt or commercial use**, even though actual physical use of the property for the exempt purpose has not yet begun." (Emphasis added.) Id. Therefore, unless an applicant for exemption abandons its intent to use its property for exempt purposes by using the property for nonexempt or noncommercial uses, the grantor of exemptions should remove the tax from the property. When an applicant has abandoned all intent to use the property for exempt purposes, the exemption should cease and the property should be returned to the tax list. If the applicant never used the property for exempt purposes and abandoned the intent to do so before applying for an exemption, there can be no exemption for the time period the entity held the property.

Clearly, this Court did not intend the prospective use test to reward merely the wish to use property for an exempt purpose[1]. *Holy Trinity* 172 Ohio St. 103. The Court-created remedy of "prospective use" demands a two-part test centered on "filing date." Part one is to determine if the applicant has taken sufficient steps prior to the filing of an Application. That sufficient steps have been taken would be confirmed by part two – after filing date, within a "reasonable" period of time, the applicant would have started using the property for the exempt purpose. Thus, the test this Court developed to determine whether the prospective use exemption should be granted asks for information about steps taken during a broad sweep of time both before and

[1] In fact, R.C. 5713.08 and R.C. 5713.081 currently offer an applicant the opportunity to file for an exemption for one year and have up to three years of tax remitted on the property. Since the General Assembly passed the above-mentioned statutes, the need for a prospective use exemption is, therefore, much less.

after the filing of an application for exemption. *Ohio Operating Engrs. Apprenticeship Fund v. Kinney* (1980), 61 Ohio St.2d 359, 362-363.

By means of these steps, the applicant must demonstrate that the property "will be devoted to an actual physical use" within a reasonable time of filing an Application. *Holy Trinity Church v. Bowers*, 172 Ohio St. at 107. Id. If the applicant showed proof of intent to use the property in an exempt manner within a reasonable time from the filing of the exemption and provided tangible evidence that the property would be so used, the exemption for the property could be granted prior to the applicant starting the exempt use. *Ohio Operating Engrs. Apprenticeship Fund v. Kinney*, 61 Ohio St.2d at 362-363.

That this is the test for exemption was affirmed in *People's Faith Chapel v. Limbach* (1985), 18 Ohio St.3d. 236, 238, in which this Court concluded an exemption was warranted because "appellee [sic] contemplated a tax-exempt use for the property in question at the time of its application and has since put the property to a tax-exempt use." The wording of *People's Faith Chapel* is a further indication that this Court did not hold in *Holy Trinity* that concrete and actual plans were sufficient in and of themselves, if no exempt purposes would ever result from the plan.

This Court specifically developed the prospective use exemption centered on activities before and after the filing of the Application. By deciding to use "tax lien date" as the critical date for the prospective use test, the BTA ignored this Court's two part test and ignored ESC's activities after January 1, 2001. In particular, the BTA conveniently overlooked ESC's abandonment of any attempt to use the property for an exempt purpose prior to applying for the exemption.

The BTA omitted the requirement that an applicant start actual use of the property for the exempt purpose within a reasonable time from the filing of the exemption. After acknowledging that ESC never used the property for an exempt purpose and never would, the BTA granted an exemption under R.C. 5709.07 because ESC had been trying to start a school as of January 1, 2001. In essence, and in total contrast to the requirements this Court set forth in *Holy Trinity* and in other cases, the BTA rewarded the failure of the ESC's dream of a school in the former Natural History Museum building by granting an exemption to ESC for the year 2001.

To exempt the property, the BTA had to also expand the interpretation of R.C. 5709.07 as well as alter the *Holy Trinity* prospective use test. The BTA determined that R.C. 5709.07 allowed for an exemption not only for property used as a school house, but also property intended to be used as such.

R.C. 5709.07(A) exempts public schoolhouses from taxation. There is no wording in the statute granting an exemption for an attempt to use a building as a public schoolhouse. Yet, the BTA wrote that to receive an exemption under R.C. 5709.07, "there must be an actual or prospective use of the property as a public school house during the period in question." The BTA thereby indicated that if an applicant merely took some steps toward its dream of an exempt use of its property, the applicant would have qualified its property for an exemption. By interpreting the statute in such a broad manner, the BTA omitted the critical condition of the prospective use test that the applicant either use the property for the exempt purpose or effectuate that use within a reasonable time of filing the Application.

An exemption from taxation is the exception to the rule that all property is taxable. *Seven Hills Schools v. Kinney* (1986), 28 Ohio St. 3d 186. The General Assembly encourages certain activities through the grant of tax-exempt status. However, the granting of a tax exemption to

one entity necessarily shifts a heavier tax burden upon the nonexempt. See also *Faith Fellowship Ministries, Inc. v. Limbach* (1987), 32 Ohio St. 3d 432, 434. For that reason, granting an exemption for the prospective use of property when an applicant has totally abandoned any intent to use property is wrong.

If this decision is not overturned, the Tax Commissioner and courts will have to struggle to determine how many steps must be in place by tax lien date to grant an exemption for a year or a series of years until the tax lien date after the applicant effectively abandons any intent to use the property for exempt purposes. Besides being chaotic, such a decision opens a wide loop-hole for those looking to avoid tax until able to use property for more profitable activities.

3. The BTA erred in using January 1 as a snapshot to evaluate the exempt status of the property instead of the totality of the facts surrounding the date the Application was filed.

The BTA's error, when deviating from the Holy Trinity test, was focusing on ESC's steps toward an exempt use of the property as of January 1, 2001. Instead, if the BTA had focused on the Holy Trinity concept of "filing date" and then focused on ESC's abandonment of any attempt to use the building for exempt purposes prior to the day ESC filed the Application as the critical date for determining an exemption, the BTA's decision would have been different.

"Tax lien date," January 1 of each year, is the date the General Assembly mandated for tax to become a lien upon property each year. R.C. 323.11. *City of Cleveland v. Limbach* (1988), 40 Ohio St.3d 295. January 1 is also the date used for purposes of determining whether an entity is using the property for an exempt purpose in order to grant the exemption for that year. In essence, "tax lien date" is a snap shot of valuation as of a one-day time-period. Because the BTA did not understand the purpose of R.C. 323.11, the BTA incorrectly determined that the "tax lien date" should be used as the basis for determining a prospective use of private property exemption.

In contrast, as discussed earlier, the concept of the date upon which the applicant files the Application encompasses a larger period of time. The steps taken prior to the filing, in essence, are as significant as are the steps taken after that lead to the use of the property for the exempt purpose within a reasonable time from the filing. The term "filing date" encompasses all the steps in an attempt to guarantee that an applicant who will never realize an exempt purpose on property is not granted an exemption for its use or for its prospective use. In this instance, the use of filing date would have shown that ESC had abandoned the intent to use the building as a school prior to applying for the exemption and had sold the building to a for-profit shortly thereafter.

Therefore, ESC is incorrect when stating that Tax Commissioner's decision to deny the exemption was the Tax Commissioner using hindsight. (Appellee brief at 4). In reality, the Tax Commissioner sensibly applied the two-part test developed by this Court. See, e.g. *Ohio Operating Engineers v. Kinney*, 61 Ohio St.2d at 359.

Some confusion arises because there are certain instances when an applicant can never receive a prospective use exemption even if almost all steps toward the exemption have been taken. See, e.g. *Christian Benevolent Ass'n v. Limbach* (1994), 69 Ohio St.3d 296. If an entity must meet a condition before qualifying for an exemption, for example, receiving a certain type of license, that entity cannot receive an exemption for steps taken prior to receiving the qualifying license. Id.

ESC's situation is different. It could receive an exemption for prospective use, but ESC had to take the steps both before and after the filing date to ensure that the exempt use would be in place within a reasonable time. However, as the BTA pointed out, the ESC board had "effectively abandoned" the prospect of using the Natural History Museum building for a school

by the time ESC filed the application for exemption of the building in December of 2001. After filing date, ESC sold the building to a for-profit, which proceeded to demolish the building.

Had the BTA used the correct test based upon the correct date, it would have found the fact that ESC had abandoned all efforts to use the building as a school prior to filing the application to be critical. There should be no exemption for property given in anticipation of the completion of all steps to that exempt use when it was clear that there never would be an exempt use. Tax dollars should not be used to reward failure of dreams, no matter how wonderful an impossible dream may be.

ESC argues that using the filing date rather than tax lien date is unfair to the institution that spends a long time developing a project but abandons it by the time it files for the exemption. ESC suggests that it might have gotten the exemption had it filed the application in February of 2001 and had the Tax Commissioner looked at the exemption in March of 2001.

First of all, in contrast to "tax lien date," which is a "snapshot" of valuation on a particular day, this Court in Holy Trinity and other cases envisioned filing date to encompass a broader spectrum of time. Then, an applicant abandoning the intent to use the property for exempt purposes and filing an Application after that abandonment takes place, should not be rewarded. In addition, the scenario in which an application is filed in one month and the property exempted the next could never happen because R.C. 5715.27 requires the Tax Commissioner to notify the affected BOE that the application was filed. The application could not be considered for at least six months after the filing. In this case, six months after ESC filed the application, ESC was looking to ride itself of the building.

Clearly, if the applicant has abandoned any attempt to attain the goal of using the property for exempt purposes, the applicant couldn't get an exemption for the use of the property

– as there never was an exempt use. For that same reason, an applicant who has abandoned the attempt to use the property for exempt purposes prior to filing an application for exemption shouldn't receive an exemption for any time during which the applicant held the property with the intent of using the property for exempt purposes.

4. The test for granting the prospective use exemption should be more stringent for a nonprofit than for a governmental entity and in either case, there should be no exemption when the use has been abandoned before the applicant files an Application.

ESC, in its first proposition of law, argues that there is no distinction between a private entity such as itself and a governmental entity supported by tax dollars. The BTA came to the same conclusion when it incorrectly applied a test this Court developed for property owned by a governmental entity when that entity had not yet abandoned its exempt use. (Decision and Order at 9).

Both the BTA and ESC incorrectly read this Court's decision in *Bd. of Cty. Commrs. of Lake Cty. v. Supanik* (1972), 32 Ohio St.2d 45. Looking at property owned by a governmental entity designated for use as a hospital if and when the community passed a bond issue, this Court wrote "[t]here is nothing in the record to indicate that the subject property is intended, or is being used, for other than public purposes, and the legislative purpose of R.C. 5709.08 would be equally well served by permitting the exemption at times during which the property is being held and prepared for uses cognizable under R. C. 5709.08." *Bd. of Cty. Commrs. of Lake Cty. v. Supanik*, 32 Ohio St.2d at 45. However, the Court did not address the issue in this case – that the applicant had fully abandoned any intent of using the property for an exempt purpose prior to applying for an exemption.

Ignoring both the nature of the applicant in *Supanik* and the fact that the county continued to hold the property with the hope of finding resources to use it for exempt purposes at the time it

filed the Application, the BTA applied the holding of *Supanik* to the facts present in ESC's case. This should have never happened. In the first place, the facts in *Supanik* differ radically from those in the case currently before this Court. Lake County still hoped to use the property for an exempt purpose at the time it filed an Application. ESC had abandoned the use and any intent to use the property before ever using the property and before applying for an exemption. This fact alone should be sufficient to reverse the BTA's decision.

The purpose of the Court-created prospective use test is to provide relief to entities that need extra time to prepare to use property for exempt purposes and actually do use the property for those purposes within a reasonable time period. The test was not designed to exempt property when the applicant has abandoned any intent to use the property for an exempt purpose prior to filing an application for exemption. Even a governmental entity that has fully abandoned any hope of using property for an exempt purpose at the time of Application should not be rewarded with an exemption for the prospective use of the property for those years in which it held the property on tax lien date.

Should this Court determine that *Supanik* in actuality stands for the granting of an exemption when the applicant never has used property used for an exempt purpose and has effectively abandoned any attempt to so use the property, there is another factor this Court should consider. As pointed out in the Tax Commissioner's previous brief, this Court judicially created the prospective use test to assist those non-governmental institutions definitely preparing for the charitable, educational or public use of their property. *Carney v. Cleveland Public Library*, 169 Ohio St. at 65; *Holy Trinity Church v. Bowers*, 172 Ohio St. at 103. In so doing, this Court distinguished a governmental public entity from a house of public worship, a private school or a charity and carved out a different test for a governmental public entity.

The rationale for the distinction is the fact that "the sole legitimate purpose of taxation is to benefit the public;" therefore, the taxation of governmental property already devoted to public use is merely "diverting funds from one public benefit to another." *Carney v. Cleveland Public Library*, 169 Ohio St. at 67. Such property, when owned by a governmental entity, would remain exempt "until such time as, among other things, the exempted purpose was abandoned or ceased to exist. *Bd. of Cty. Commrs. Of Lake Cty. v. Supanick*, 32 Ohio St.2d at 45.

In contrast, when a private entity owns property it eventually intends to use for a charitable or educational purpose, it USES ITS OWN MONEY to move the project forward. The tax exemption allows the private entity to use more of its own money for its exempt purpose. However, before the exemption is granted, the grantor must have sufficient proof that the general public will receive a benefit from the exempt use of the property sufficient to justify the loss of tax revenue. *Philada Home Fund v. Board of Tax Appeals* (1966), 5 Ohio St. 2d 135. Surely, when the intent to use the property for an exempt purpose has been clearly abandoned prior to filing the Application, the general public will have no benefit from the use of its tax dollars for the project.

As ESC's exempt use of the building never materialized and it had abandoned its intent to use the building for a school, the BTA erred by granting an exemption under R.C. 5709.07 for an intent to use the school for exempt purposes. For that reason, the Tax Commissioner respectfully requests that the BTA's unlawful, erroneous decision be reversed.

5. ESC took some steps towards using the property for an exempt purpose but for financial and other reasons, ESC's dream never came close to realization.

As the ESC Board tried to move toward realizing its dream, it found out that the price tag to get the school started including purchasing the property, renovating two buildings and a startup cost, kept growing. In part, the cost grew because ESC discovered new problems with the building, such as asbestos and extremely thick, computer-wiring-resistant walls. Changing the former Natural History Museum building into a modern facility was a very expensive proposition, more than the ESC Board anticipated. Further, ESC's Board had emphasized the purchase of the building, its renovation and innovative furniture to use inside it. The school's other potential costs were also high, anticipated to be $20 million dollars.

ESC had taken steps toward getting bonds and other financing in place. Yet, by January 1, 2001, ESC did not have enough financing in place to open the school it wanted to open in the former Natural History Museum building. That this is so is proved by ESC's failure to open a school in the building.

Here, again, the BTA misinterpreted this Court's previous rulings in order to give ESC an exemption for the period of time during which it tried to find the financing. The BTA cited *Cleveland Memorial Medical Foundation v. Perk* (1967), 10 Ohio St.2d 72, for the proposition that having only half the financing in place with no exempt use in sight indicated an applicant had taken sufficient steps to receive an exemption for the prospective use of its property.

But, unlike ESC, the applicant in *Cleveland Memorial* had not totally abandoned its intent to use the property for the exempt purpose when it applied for the exemption. Further, this Court decided that only one out of the two parcels should be exempted. This Court found the other to be vacant, with no steps taken toward its exempt use.

Again, considering that ESC had abandoned any intent to use the property for exempt purposes before filing the Application, the question of sufficient financing should be moot. Further, had the BTA used the proper test as developed in *Holy Trinity* and other cases, the circumstances before and after ESC filed the Application should have indicated that ESC did not have sufficient financing to open a school in that particular building. Again, how can there be an exemption for prospective use if there never has been and never will be an exemption for use?

ESC had a dream it could not realize. The taxpayers of Ohio should not have to subsidize the failure of ESC to achieve a public use for its property.

CONCLUSION

For all the above reasons, the Court should overturn the Decision and Order of the Board of Tax Appeals and reinstate the Tax Commissioner's Final Determination.

Respectfully submitted,
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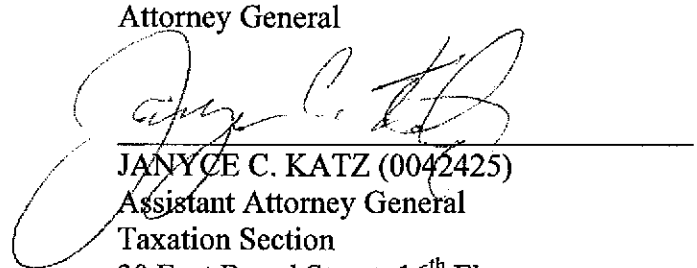

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323.11 State's lien for taxes attaches and continues until paid.

The lien of the state for taxes levied for all purposes on the real and public utility tax list and duplicate for each year shall attach to all real property subject to such taxes on the first day of January, annually, or as provided in section 5727.06 of the Revised Code, and continue until such taxes, including any penalties, interest, or other charges accruing thereon, are paid.

Taxes may be apportioned in case of transfer of a part of any tract or lot of real estate, in which case the lien of such taxes shall extend to the transferred part and the remaining parts only to the extent of the amounts allocated to such respective parts.

Effective Date: 07-02-1984

R.C. § 5709.01 Taxable property entered on general tax list and duplicate.

(A) All real property in this state is subject to taxation, except only such as is expressly exempted therefrom.

(B) Except as provided by division (C) of this section or otherwise expressly exempted from taxation:

(1) All personal property located and used in business in this state, and all domestic animals kept in this state and not used in agriculture are subject to taxation, regardless of the residence of the owners thereof.

(2) All ships, vessels, and boats, and all shares and interests therein, defined in section 5701.03 of the Revised Code as personal property and belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, other than aircraft licensed in accordance with sections 4561.17 to 4561.21 of the Revised Code, are subject to taxation.

(C) The following property of the kinds mentioned in division (B) of this section shall be exempt from taxation:

(1) Unmanufactured tobacco to the extent of the value, or amounts, of any unpaid nonrecourse loans thereon granted by the United States government or any agency thereof.

(2) Spirituous liquor, as defined in division (B)(5) of section 4301.01 of the Revised Code, that is stored in warehouses in this state pursuant to an agreement with the division of liquor control.

(3) Except as otherwise provided in section 5711.27 of the Revised Code, all other such property if the aggregate taxable value thereof required to be listed by the taxpayer under Chapter 5711. of the Revised Code does not exceed ten thousand dollars.

(a) If the taxable value of such property exceeds ten thousand dollars only such property having an aggregate taxable value of ten thousand dollars shall be exempt.

(b) If such property is located in more than one taxing district as defined in section 5711.01 of the Revised Code, the exemption of ten thousand dollars shall be applied as follows:

(i) The taxable value of such property in the district having the greatest amount of such value shall be reduced until the exemption has been fully utilized or the value has been reduced to zero, whichever occurs first;

(ii) If the exemption has not been fully utilized under division (C)(3)(b)(i) of this section, the value in the district having the second greatest value shall be reduced until the exemption has been fully utilized or the value has been reduced to zero, whichever occurs first;

(iii) If the exemption has not been fully utilized under division (C)(3)(b)(ii) of this section, further reductions shall be made, in repeated steps which include property in districts having declining values, until the exemption has been fully utilized.

(D) All property mentioned as taxable in this section shall be entered on the general tax list and duplicate of taxable property.

R.C. § 5709.07 Exemption of schools, churches, and colleges

(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;

(2) Houses used exclusively for public worship, the books and furniture in them, and the ground attached to them that is not leased or otherwise used with a view to profit and that is necessary for their proper occupancy, use, and enjoyment;

(3) Real property owned and operated by a church that is used primarily for church retreats or church camping, and that is not used as a permanent residence. Real property exempted under division (A)(3) of this section may be made available by the church on a limited basis to charitable and educational institutions if the property is not leased or otherwise made available with a view to profit.[;]

(4) Public colleges and academies and all buildings connected with them, and all lands connected with public institutions of learning, not used with a view to profit.

(B) This section shall not extend to leasehold estates or real property held under the authority of a college or university of learning in this state; but leaseholds, or other estates or property, real or personal, the rents, issues, profits, and income of which is given to a municipal corporation, school district, or subdistrict in this state exclusively for the use, endowment, or support of schools for the free education of youth without charge shall be exempt from taxation as long as such property, or the rents, issues, profits, or income of the property is used and exclusively applied for the support of free education by such municipal corporation, district, or subdistrict.

(C) As used in this section, "church" means a fellowship of believers, congregation, society, corporation, convention, or association that is formed primarily or exclusively for religious purposes and that is not formed for the private profit of any person.

R.C. § 5709.08 Exemption of government and pubic property

Real or personal property belonging to the state or United States used exclusively for a public purpose, and public property used exclusively for a public purpose, shall be exempt from taxation. Real and personal property, when devoted to public use and not held for pecuniary profit, owned by an adjoining state or any political subdivision or agency of such adjoining state, which would be exempt from taxation if owned by the state of Ohio or a political subdivision or agency thereof, shall be exempt from taxation providing that such adjoining state exempts from taxation real and personal property devoted to public use and not held for pecuniary profit, owned by the state of Ohio or any political subdivision or agency thereof, which would be exempt from taxation if owned by the adjoining state or political subdivision or agency thereof.

R.C. § 5709.12 Exemption of property used for charitable or public purposes.

(A) As used in this section, "independent living facilities" means any residential housing facilities and related property that are not a nursing home, residential care facility, or adult care facility as defined in division (A) of section 5701.13 of the Revised Code.

(B) Lands, houses, and other buildings belonging to a county, township, or municipal corporation and used exclusively for the accommodation or support of the poor, or leased to the state or any political subdivision for public purposes shall be exempt from taxation. Real and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation, including real property belonging to an institution that is a nonprofit corporation that receives a grant under the Thomas Alva Edison program authorized by division (C) of section 122.33 of the Revised Code at any time during the tax year and being held for leasing or resale to others. If, at any time during a tax year for which such property is exempted from taxation, the corporation ceases to quality for such a grant, the director of development shall notify the tax commissioner, and the tax commissioner shall cause the property to be restored to the tax list beginning with the following tax year. All property owned and used by a nonprofit organization exclusively for a home for the aged, as defined in section 5701.13 of the Revised Code, also shall be exempt from taxation.

(C) If a home for the aged is operated in conjunction with or at the same site as independent living facilities, the exemption granted in division (B) of this section shall include kitchen, dining room, clinic, entry ways, maintenance and storage areas, and land necessary for access commonly used by both residents of the home for the aged and residents of the independent living facilities. Other facilities commonly used by both residents of the home for the aged and residents of independent living units shall be exempt from taxation only if the other facilities are used primarily by the residents of the home for the aged. Vacant land currently unused by the home, and independent living facilities and the lands connected with them are not exempt from taxation. Except as provided in division (A) of section 5709.121 [5709.12.1] of the Revised Code, property of a home leased for nonresidential purposes is not exempt from taxation.

(D)(1) A private corporation established under federal law, †defined in 36 U.S.C. 1101, Pub. L. No. 102-199, 105 Stat. 1629, as amended, the objects of which include encouraging the advancement of science generally, or of a particular branch of science, the promotion of scientific research, the improvement of the qualifications and usefulness of scientists, or the increase and diffusion of scientific knowledge is conclusively presumed to be a charitable or educational institution. A private corporation established as a nonprofit corporation under the laws of a state, that is exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code of 1986, 100 Stat. 2085, 26 U.S.C.A. 1, as amended, and has as its principal purpose one or more of the foregoing objects, also is conclusively presumed to be a charitable or educational institution.

The fact that an organization described in this division operates in a manner that results in an excess of revenues over expenses shall not be used to deny the exemption granted by this section, provided such excess is used, or is held for use, for exempt purposes or to establish a reserve against future contingencies; and, provided further, that such excess may not be distributed to individual persons or to entities that would not be entitled to the tax exemptions provided by this chapter. Nor shall the fact that any scientific information diffused by the organization is of particular interest or benefit to any of its individual members be used to deny the exemption granted by this section, provided that such scientific information is available to the public for purchase or otherwise.

(2) Division (D)(2) of this section does not apply to real property exempted from taxation under this section and division (C) of section 5709.121 [5709.12.1] of the Revised Code and belonging to a nonprofit corporation described in division (D)(1) of this section that has received a grant under the Thomas Alva Edison grant program authorized by division (C) of section 122.33 of the Revised Code during any of the tax years the property was exempted from taxation.

When a private corporation described in division (D)(1) of this section sells all or any portion of a tract, lot, or parcel of real estate that has been exempt from taxation under this section and section 5709.121 [5709.12.1] of the Revised Code, the portion sold shall be restored to the tax list for the year following the year of the sale and a charge shall be levied against the sold property in an amount equal to the tax savings on such property during the four tax years preceding the year the property is placed on the tax list. The tax savings equals the amount of the additional taxes that would have been levied if such property had not been exempt from taxation.

The charge constitutes a lien of the state upon such property as of the first day of January of the tax year in which the charge is levied and continues until discharged as provided by law. The charge may also be remitted for all or any portion of such property that the tax commissioner determines is entitled to exemption from real property taxation for the year such property is restored to the tax list under any provision of the Revised Code, other than sections 725.02, 1728.10, 3735.67, 5709.40, 5709.41, 5709.62, 5709.63, 5709.71, 5709.73, 5709.78, and 5709.84, upon an application for exemption covering the year such property is restored to the tax list filed under section 5715.27 of the Revised Code.

(E) Real property held by an organization organized and operated exclusively for charitable purposes as described under section 501(c)(3) of the Internal Revenue Code and exempt from federal taxation under section 501(a) of the Internal Revenue Code, 26 U.S.C.A. 501(a) and (c)(3), as amended, for the purpose of constructing or rehabilitating residences for eventual transfer to qualified low-income families through sale, lease, or land installment contract, shall be exempt from taxation.

R.C. § 5709.121 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:

(1) As a community or area center in which presentations in music, dramatics, the arts, and related fields are made in order to foster public interest and education therein;

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

(B) It is made available under the direction or control

the minerals, is in another person, the county auditor shall ascertain the aggregate value of such lot or parcel of land and the minerals or rights thereto, and shall equitably divide and apportion such aggregate valuation between the owner of the fee of the soil and the owner of such minerals and rights thereto, according to the relative value of the interests held by such owners of the fee of the soil and such minerals or rights thereto.

R.C. § 5709.12 Exemption of property used for charitable or public purposes. (Continued)

The exemption shall commence on the day title to the property is transferred to the organization and shall continue to the end of the tax year in which the organization transfers title to the property to a qualified low-income family. In no case shall the exemption extend beyond the second succeeding tax year following the year in which the title was transferred to the organization. If the title is transferred to the organization and from the organization to a qualified low-income family in the same tax year, the exemption shall continue to the end of that tax year. The proportionate amount of taxes that are a lien but not yet determined, assessed, and levied for the tax year in which title is transferred to the organization shall be remitted by the county auditor for each day of the year that title is held by the organization.

Upon transferring the title to another person, the organization shall file with the county auditor an affidavit affirming that the title was transferred to a qualified low-income family or that the title was not transferred to a qualified low-income family, as the case may be; if the title was transferred to a qualified low-income family, the affidavit shall identify the transferee by name. If the organization transfers title to the property to anyone other than a qualified low-income family, the exemption, if it has not previously expired, shall terminate, and the property shall be restored to the tax list for the year following the year of the transfer and a charge shall be levied against the property in an amount equal to the amount of additional taxes that would have been levied if such property had not been exempt from taxation. The charge constitutes a lien of the state upon such property as of the first day of January of the tax year in which the charge is levied and continues until discharged as provided by law.

The application for exemption shall be filed as otherwise required under section 5715.27 of the Revised Code, except that the organization holding the property shall file with its application documentation substantiating its status as an organization organized and operated exclusively for charitable purposes under section 501(c)(3) of the Internal Revenue Code and its qualification for exemption from federal taxation under section 501(a) of the Internal Revenue Code, and affirming its intention to construct or rehabilitate the property for the eventual transfer to qualified low-income families.

As used in this division, "qualified low-income family" means a family whose income does not exceed two hundred per cent of the official federal poverty guidelines as revised annually in accordance with section 673(2) of the "Omnibus Budget Reconciliation Act of 1981," 95 Stat. 511, 42 U.S.C.A. 9902, as amended, for a family size equal to the size of the family whose income is being determined.

R.C. § 5713.08 List of exempted property; annual abstract; duties of tax commissioner.

(A) The county auditor shall make a list of all real and personal property in the auditor's county, including money, credits, and investments in bonds, stocks, or otherwise, which is exempted from taxation. Such list shall show the name of the owner, the value of the property exempted, and a statement in brief form of the ground on which such exemption has been granted. It shall be corrected annually by adding thereto the items of property which have been exempted during the year, and by striking therefrom the items which in the opinion of the auditor have lost their right of exemption and which have been reentered on the taxable list. No additions shall be made to such exempt lists and no additional items of property shall be exempted from taxation without the consent of the tax commissioner as is provided for in section 5715.27 of the Revised Code, but when any personal property or endowment fund of an institution has once been held by the commissioner to be properly exempt from taxation, it is not necessary to obtain the commissioner's consent to the exemption of additional property or investments of the same kind belonging to the same institution, but such property shall appear on the abstract filed annually with the commissioner. The commissioner may revise at any time the list in every county so that no property is improperly or illegally exempted from taxation. The auditor shall follow the orders of the commissioner given under this section. An abstract of such list shall be filed annually with the commissioner, on a form approved by the commissioner, and a copy thereof shall be kept on file in the office of each auditor for public inspection.

The commissioner shall not consider an application for exemption of property unless the application has attached thereto a certificate executed by the county treasurer certifying one of the following:

(1) That all taxes, assessments, interest, and penalties levied and assessed against the property sought to be exempted have been paid in full to the date upon which the application for exemption is filed, except for such taxes, interest, and penalties that may be remitted under division (B) of this section;

(2) That the applicant has entered into a valid delinquent tax contract with the county treasurer pursuant to division (A) of section 323.31 of the Revised Code to pay all of the delinquent taxes, assessments, interest, and penalties charged against the property, except for such taxes, interest, and penalties that may be remitted under division (B) of this section. If the auditor receives notice under section 323.31 of the Revised Code that such a written delinquent tax contract has become void, the auditor shall strike such property from the list of exempted property and reenter such property on the taxable list. If property is removed from the exempt list because a written delinquent tax contract has become void, current taxes shall first be extended against that property on the general tax list and duplicate of real and public utility property for the tax year in which the auditor receives the notice required by division (A) of section 323.31 of the Revised Code that the delinquent tax contract has become void or, if that notice is not timely made, for the tax year in which falls the latest date by which the treasurer is required by such section to give such notice. A county auditor shall not remove from any tax list and duplicate the amount of any unpaid delinquent taxes, assessments, interest, or penalties owed on property that is placed on the exempt list pursuant to this division.

(3) That a tax certificate has been issued under section 5721.32 or 5721.33 of the Revised Code with respect to the property that is the subject of the application, and the tax certificate is outstanding.

(B) Any taxes, interest, and penalties which have become a lien after the property was first used for the exempt purpose, but in no case prior to the date of acquisition of the title to the property by the applicant, may be remitted by the commissioner, except as is provided in section 5713.081 [5713.08.1] of the Revised Code.

(C) Real property acquired by the state in fee simple is exempt from taxation from the date of acquisition of title or date of possession, whichever is the earlier date, provided that all taxes, interest, and penalties as provided in the apportionment provisions of section 319.20 of the Revised Code have been paid to the date of acquisition of title or date of possession by the state, whichever is earlier. The proportionate amount of taxes that are a lien but not yet determined, assessed, and levied for the year in which the property is acquired, shall be remitted by the county auditor for the balance of the year from date of acquisition of title or date of possession, whichever is earlier. This section shall not be construed to authorize the exemption of such property from taxation or the remission of taxes, interest, and penalties thereon until all private use has terminated.

R.C. § 5713.081 Collection of delinquent taxes on publicly owned property

No application for real property tax exemption and tax remission shall be filed with, or considered by, the tax commissioner in which tax remission is requested for more than three tax years, and the commissioner shall not remit more than three years' delinquent taxes, penalties, and interest.

All taxes, penalties, and interest, that have been delinquent for more than three years, appearing on the general tax list and duplicate of real property which have been levied and assessed against parcels of real property owned by the state, any political subdivision, or any other entity whose ownership of real property would constitute public ownership, shall be collected by the county auditor of the county where the real property is located. Such official shall deduct from each distribution made by him, the amount necessary to pay the tax delinquency from any revenues or funds to the credit of the state, any political subdivision, or any other entity whose ownership of real property would constitute public ownership thereof, passing under his control, or which come into his possession, and such deductions shall be made on a continuing basis until all delinquent taxes, penalties, and interest noted in this section have been paid.

As used in this section, "political subdivision" includes townships, municipalities, counties, school districts, boards of education, all state and municipal universities, park boards, and any other entity whose ownership of real property would constitute public ownership.

R.C. § 5715.27 Application for Exemption; rights of board of education; complaint against exemption.

(A) The owner of any property may file an application with the tax commissioner, on forms prescribed by the commissioner, requesting that such property be exempted from taxation and that unpaid taxes and penalties be remitted as provided in division (B) of section 5713.08 of the Revised Code.

(B) The board of education of any school district may request the tax commissioner to provide it with notification of applications for exemption from taxation for property located within that district. If so requested, the commissioner shall send to the board for the quarters ending on the last day of March, June, September, and December of each year, reports that contain sufficient information to enable the board to identify each property that is the subject of an exemption application, including, but not limited to, the name of the property owner or applicant, the address of the property, and the auditor's parcel number. The commissioner shall mail the reports on or about the fifteenth day of the month following the end of the quarter.

(C) A board of education that has requested notification under division (B) of this section may, with respect to any application for exemption of property located in the district and included in the commissioner's most recent report provided under that division, file a statement with the commissioner and with the applicant indicating its intent to submit evidence and participate in any hearing on the application. The statements shall be filed prior to the first day of the third month following the end of the quarter in which that application was docketed by the commissioner. A statement filed in compliance with this division entitles the district to submit evidence and to participate in any hearing on the property and makes the district a party for purposes of sections 5717.02 to 5717.04 of the Revised Code in any appeal of the commissioner's decision to the board of tax appeals.

(D) The commissioner shall not hold a hearing on or grant or deny an application for exemption of property in a school district whose board of education has requested notification under division (B) of this section until the end of the period within which the board may submit a statement with respect to that application under division (C) of this section. The commissioner may act upon an application at any time prior to that date upon receipt of a written waiver from each such board of education, or, in the case of exemptions authorized by section 725.02, 1728.10, 3735.67, 5709.41, 5709.62, or 5709.63 of the Revised Code, upon the request of the property owner. Failure of a board of education to receive the report required in division (B) of this section shall not void an action of the commissioner with respect to any application. The commissioner may extend the time for filing a statement under division (C) of this section.

(E) A complaint may also be filed with the commissioner by any person, board, or officer authorized by section 5715.19 of the Revised Code to file complaints with the county board of revision against the continued exemption of any property.

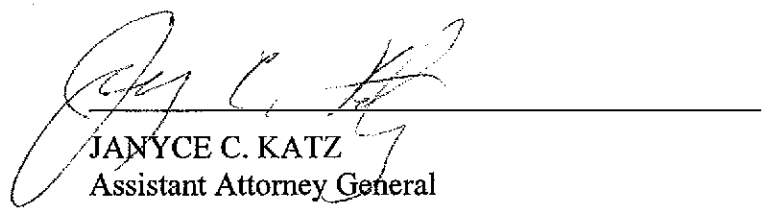
(F) An application for exemption and a complaint against exemption shall be filed prior to the thirty-first day of December of the tax year for which exemption is requested or for which the liability of any property to taxation in that year is requested. The commissioner shall consider such application or complaint in accordance with procedures established by the commissioner, determine whether the property is subject to taxation or exempt therefrom, and certify the commissioner's findings to the auditor, who shall correct the tax list and duplicate accordingly. If a tax certificate has been sold under section 5721.32 or 5721.33 of the Revised Code with respect to property for which an exemption has been requested, the tax commissioner shall also certify the findings to the county treasurer of the county in which the property is located.

(G) Applications and complaints, and documents of any kind related to applications and complaints, filed with the tax commissioner under this section, are public records within the meaning of section 149.43 of the Revised Code.

(H) If the commissioner determines that the use of property or other facts relevant to the taxability of property that is the subject of an application for exemption or a complaint under this section has changed while the application or complaint was pending, the commissioner may make the determination under division (F) of this section separately for each tax year beginning with the year in which the application or complaint was filed or the year for which remission of unpaid taxes under division (B) of section 5713.08 of the Revised Code was requested, and including each subsequent tax year during which the application or complaint is pending before the commissioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Appellant was sent by regular U.S. mail to Joseph J. Dehner and Samuel M. Scoggins, Frost, Brown, Todd, LLC, 201 East Fifth Street, Suite 2200, Cincinnati, Ohio 45202, counsel for appellee, on this 2nd day of July, 2007.



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