

IN THE SUPREME COURT OF OHIO

08-0033

Northeast Ohio Psychiatric Institute

Appellant,

Vs.

William W. Wilkins, Tax
Commissioner of Ohio,

Appellee.

Appeal from the Ohio
Board of Tax Appeals

Board of Tax Appeals
No. 2005-Z-1683

NOTICE OF APPEAL OF APPELLANT
NORTHEAST OHIO PSYCHIATRIC INSTITUTE

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JAN 10 2008
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL

Appellant Northeast Ohio Psychiatric Institute ("the Institute") gives notice of its 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 ("Board"), journalized in Case No. 2005-M-1683 on December 14, 2007 (the "Decision"). A true copy of the Decision is attached.

Introduction

The Decision is unreasonable and unlawful in several respects. For the sake of clarity and organization, the Institute will group its assignments of error under specific headings. Each assignment of error is independent and may be considered apart from the other assignments of error.

Assignments of Error

General

- (1) The Board erred by failing to find that the property located at 792 Graham Road in the City of Cuyahoga Falls, Ohio and designated by the Summit County Auditor as permanent parcel nos. 0217808, 0215708, 0206041, 0206040 and 0206039, *exclusive of* those areas leased to private parties ("Disputed Property") is exempt from *ad valorem* taxation pursuant to R.C. §§ 5709.12 and 5709.121.
- (2) The Board erred by failing to hold that the Disputed Property (which *does not include* the space leased to private parties that is excluded from the application for exemption) is owned by an institution and used exclusively for charitable purposes pursuant to R.C. §5709.12(B).

- (3) The Board erred by failing to hold that the Disputed Property (which *does not include* the space leased to private parties that is excluded from the application for exemption) is owned by a charitable institution and used by a charitable institution under a lease for charitable purposes pursuant to R.C. §5709.121.

Errors of law regarding the Institute's charitable character

- (4) The Board erred by failing to hold that the Institute is a charitable institution.
- (5) The Board erroneously held that the Institute is not a charity, despite the undisputed evidence that it was created and is controlled by a charitable public mental health provider, Portage Path Behavioral Health ("Portage Path"), to promote public mental health.
- (6) The Board erred by looking to the activity of leasing itself as an activity that disqualifies the lessor from being a charity, despite the fact that leasing by a charity is an activity specifically contemplated by R.C. 5709.121(A)(1).
- (7) The Board erred by failing to correctly apply R.C. 5709.121(A)(1)(b) to the Disputed Property, which "is used by a [charitable] institution, *** under a lease, sublease, or other contractual arrangement *** [f]or other charitable *** or public purposes."
- (8) The Board erred by failing to apply R.C. 5709.121(A)(2) correctly to the Disputed Property, which "is made available under the direction or control of [Portage Path, a charitable] institution,*** for use in furtherance of or incidental to its charitable *** purposes and not with the view to profit" because the Institute is wholly under the direction and control of Portage Path, which uses the Institute and the Disputed Property for charitable public mental health activities.

- (9) The Board erred by failing to recognize the Institute's mission to promote mental health as a charitable purpose.
- (10) The Board erred by ruling that the Institute is not a charity, contrary to this Court's ruling in *Akron Golf Charities* (1987), 34 Ohio St.3d 11, 14-15; 516 N.E.2d 222, 225-26, when the record demonstrates that the Institute was created and is run to contribute to the charitable public mental health work of Portage Path.
- (11) The Board erred by holding that the Institute is not a charity, despite the lack of any evidence that it is operated with a view to profit.
- (12) The Board erred by failing to hold that the Institute is a charity, despite overwhelming evidence in the record that it exists to attempt in good faith spiritually, physically, intellectually and socially to advance and benefit the mentally ill in particular, without regard to ability to pay and with positive abnegation of gain or profit, fulfilling the requirements of *Planned Parenthood Ass'n v. Tax Comm'r* (1966), 5 Ohio St. 2d 117, 214 N.E.2d 222, syllabus ¶ 1.
- (13) The Board erred by holding that the Institute is not a charity, despite overwhelming evidence in the record that it exists to attempt in good faith spiritually, physically, intellectually and socially to advance and benefit society in general, insofar as society is endangered by mentally ill and chemically dependent persons who do not receive care; and that it operates without regard to ability to pay and with positive abnegation of gain or profit, fulfilling the requirements of *Planned Parenthood Ass'n v. Tax Comm'r* (1966), 5 Ohio St. 2d 117, 214 N.E.2d 222, syllabus ¶ 1.

- (14) The Board erroneously characterized the Institute as a commercial lessor, although the record demonstrates that it is a charity, which exists to promote public mental health and provide space to and otherwise support a charitable public mental health provider, Portage Path.
- (15) The Board erroneously characterized the Institute as a commercial lessor, although the record demonstrates that it subsidizes charitable mental health care, and leases to Portage Path rather than to profitable lessees, in a manner inconsistent with commercial leasing operations.
- (16) The Board erroneously held that the Institute is not a charity, overlooking the primary purpose and activity of the Institute to support public mental health care for those unable to pay.
- (17) The Board erroneously held that the Institute is not a charity on the basis of its incidental charitable fundraising activities, not conducted on the Disputed Property, by which it generates revenues to support its charitable purpose.
- (18) The Board erred by misapplying the holdings of *Hubbard Press v. Tracy* (1993), 67 Ohio St.3d 564, 621 N.E.2d 396 and related cases to disqualify the Institute as a charity because of incidental fundraising conducted on other property, rather than restricting consideration of the effect of incidental fundraising activities to the eligibility for exemption of property used for such activities.

Errors of law regarding charitable use of the Disputed Property

- (19) The Board erroneously held that the Disputed Property (consisting *only* of that space for which exemption is sought, the space used for or incidental to operation

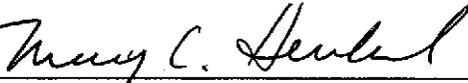
of Portage Path's public mental health clinic) is not used exclusively for charitable purposes pursuant to R.C. 5709.12(B).

- (20) The Board erred by failing to restrict consideration of the use of the Disputed Property to the Disputed Property alone, looking instead to the use of property for which exemption is not sought.
- (21) The Board erred by failing to hold that the Disputed Property is used exclusively for the charitable purposes of Portage Path, which is itself a charity, and which wholly controls the Institute.
- (22) The Board erred by failing to follow the law as established by R.C. 5709.121(A)(1)(b) and explicated by this Court in *Community Health Professionals v. Levin* (2007), 113 Ohio St.3d 432, 2007-Ohio-2336, providing that collection of rent to cover costs of charitable activities does not undermine the conclusion that property is used in furtherance of a charitable purpose.
- (23) The Board erred by failing to apply R.C. 5709.121(B)(2) to exempt the property at issue because it is made available under the direction or control of a charitable institution, the state, or political subdivision for use in furtherance of or incidental to its charitable or public purposes and not with the view to profit.
- (24) The Board erroneously held that the Institute leases property with a view to profit, where the uncontradicted record demonstrates that the Institute leases to Portage Path on a non-commercial basis, at or below cost, uses proceeds from all other activities solely to support Portage Path, uses proceeds from the lease of space that Portage Path does not need to offset Portage Path's lease, and deliberately leases to Portage Path rather than to profitable lessees.

Conclusion

Based on each and every assignment of error set forth above, the Board's Decision is unreasonable and unlawful. Accordingly, the Court should reverse and vacate the Decision or modify the Decision and enter final judgment in accordance with such modification. If the Court reverses and vacates the Decision and remands the Decision to the Board, the Court should exercise its authority to direct the Board to convene a rehearing on the merits, applying the appropriate legal and evidentiary standards. *See Gennaro Pavers, Inc. v. Kosydar* (1974), 38 Ohio St.2d 174, 311 N.E.2d 516. Alternatively, the Court should direct the Board to reconsider the record in light of the findings of this Court, applying the appropriate legal and evidentiary standards.

Respectfully submitted,

By: 

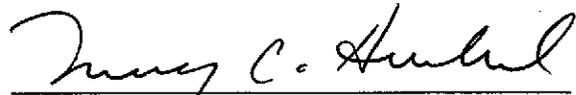
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PROOF OF SERVICE

I certify that a copy of this NOTICE OF APPEAL was served via hand delivery,
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OHIO BOARD OF TAX APPEALS

Northeast Ohio Psychiatric Institute,)
)
Appellant,) (CASE NO. 2005-M-1683
) (REAL PROPERTY EXEMPTION)
)
vs.) DECISION AND ORDER
)
William W. Wilkins,)
Tax Commissioner of Ohio,)
)
Appellee.)

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Entered **DEC 14 2007**

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

This cause and matter comes to be considered by the Board of Tax Appeals upon a notice of appeal filed herein on December 6, 2005. This appeal is taken from a determination of the Tax Commissioner, appellee herein, wherein said official considered an application for exemption from real property taxation for tax year 2003 filed by the appellant. Through his journal entry, the commissioner

concluded that property owned by the appellant be denied exemption. The appellant has challenged the commissioner's denial.

The matter is considered by the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified to this board by the Tax Commissioner, the evidence adduced at the merit hearing held before this board, and the legal argument provided by the appellant and appellee Tax Commissioner.

The appellant, Northeast Ohio Psychiatric Institute ("Northeast"), is a non-profit corporation originally formed by Portage Path Behavioral Health ("Portage Path"). Portage Path is a non-profit public mental health provider. According to its articles of incorporation, Northeast was organized with its primary purpose "the promotion of mental health care" and was to be operated exclusively for "charitable, education or scientific purposes within the meaning of Section 501(c)(3) of the [Internal Revenue] Code." Appellant's Ex. 2.

At the hearing before this board, Mr. Jerry Kraker, president of both Portage Path and Northeast, described the relationship between Portage Path and Northeast. In 2003 Portage Path contracted with the Summit County Alcohol Drug Addiction and Mental Health Services Board ("ADAMH") to provide mental health services in the Summit County area. As a result of that contract, Portage Path was required to provide an "Assurance Statement." Appellant's Ex. 8. That statement assured ADAMH that clients will be provided services regardless of ability to pay, and that moneys provided to Portage Path will be used to provide available,

accessible, quality mental health services which preserve human dignity. According to Mr. Kraker, Northeast exists to support Portage Path's mission and to fulfill the conditions of Portage Path's contract with ADAMH. H.R. at 48.

Northeast is the titleholder to certain property located on Graham Road in Cuyahoga Falls, the exemption of which is the subject of this appeal. The property is improved with a 5,000±-square-foot office building, originally constructed in 1959. The property was purchased by Northeast in 1993. A lease executed in 1998 by Portage Path as lessee and Northeast as lessor was presented to the Tax Commissioner. A lease executed in 2003 between the same parties was presented to this board and marked Appellant's Exhibit 16. Both leases provide that Portage Path controls 57 percent of the building¹ for a rental rate of \$5,500 per month. The leases further obligate the lessor to pay all utilities except telephone, and require Portage Path to pay a proportionate share of any increase in taxes, assessment, insurance, and utilities after the base year ending on January 31, 1994.

Despite the fact that the lease documents presented to the Tax Commissioner and this board indicated that Portage Path leased 57 percent of the premises, Mr. Kraker testified that Portage Path actually occupied 68 percent of the premises. The remainder of the subject that was not leased to Portage Path in 2003 was leased to two other entities, a medical laboratory and a private doctor's office.

¹ At hearing, Mr. Kraker indicated that Portage Path currently occupies a greater percentage of the building, as one of the for-profit entities has vacated the building. However, at the time of the exemption request, two for-profit entities were situated in the subject property.

Appellant's Ex. 17. Mr. Kraker explained that Portage Path's entire rental payment was used to offset the operating costs of the building. However, if Northeast's expenses for operating the building were less than Portage Path's rent, a portion of the rent was returned. Appellant's Exhibit 17 consists of rent schedules for years ending December 2000, 2001 and 2002. Each schedule identified rental payments made by the three entities sharing the subject property. The medical laboratory was allocated 12 percent of the operating expenses, the private doctor's office, 20 percent, and Portage Path, 68 percent of the expenses. Mr. Kraker testified that after operating expenses were allocated, Portage Path received a refund for years ending December 31, 2001 and 2002, as in those years, 68 percent of operating expenses did not reach \$66,500. However, in the year ending December 31, 2000, Portage Path was not required to pay in excess of \$66,500, even though its share of operating expenses exceeded that amount. H.R. at 74-76.

Mr. Kraker also described the other activities Northeast participated in during the year for which exemption was sought. Northeast was also created to provide psychiatric staffing to other agencies in need of professionals to perform psychiatric evaluation. H.R. at 112, 113. Northeast operated employee assistance programs and operated an employment service for psychiatrists through which it deployed psychiatrists either to Portage or "other providers of psychiatric services." H.R. at 94. Northeast also operated a mental health clinic on another site and earned

income from parking fees on another piece of property which was located near the Akron Arrows Baseball Stadium. H.R. at 115, 116.

Based upon the use of the property, Northeast argues that the Tax Commissioner erred when he concluded that the property was subject to real property tax. We begin by acknowledging the duties imposed upon the Board of Tax Appeals when reviewing a decision of the Tax Commissioner. The Tax Commissioner's findings are entitled to a presumption of correctness and it is incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the presumption and establish a right to the relief requested. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121; *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.

As to the law relating to exceptions from taxation, exemption from tax is an exception to the rule that all property is subject to taxation and therefore a statute granting such an exemption must be strictly construed. *Natl. Tube Co. v. Glander* (1952), 157 Ohio St. 407; *White Cross Hospital Assn. v. Bd. of Tax Appeals* (1974), 38 Ohio St.2d 199.

Any institution, whether charitable or noncharitable, may receive exemption for its property if that institution uses the property exclusively for

charitable purposes. However, charitable and noncharitable institutions are held to different standards when seeking exemption. When a noncharitable institution seeks exemption, the institution must use the real property “exclusively for charitable purposes.” *Highland Park Owners, Inc. v. Tracy* (1994), 71 Ohio St.3d 405.

In *True Christianity Evangelism v. Zaino* (2001), 91 Ohio St. 3d 117, the Ohio Supreme Court interpreted the terms “exclusively for charitable purposes” as found in R.C. 5709.12. Therein the court held:

“The General Assembly has used the phrase ‘used exclusively’ as a limitation in both R.C. 5709.07 (houses used exclusively for public worship) and R.C. 5709.12 (property used exclusively for charitable purposes). In *Moraine His. Baptist Church v. Kinney* (1984), 12 Ohio St. 3d 134, 135, *** this court held that for purposes of R.C. 5709.07, the phrase ‘used exclusively for public worship’ was equivalent to ‘primary use.’ There is no indication that the phrase ‘used exclusively’ as used in R.C. 5709.12 is to be interpreted differently than it is in R.C. 5709.07.” *Id.* at 120, parallel citations omitted.

Thus, the Tax Commissioner (and, in turn, this board) must first determine whether the owner is a charitable or noncharitable institution. If the owner is a noncharitable institution, then, the Tax Commissioner (and, in turn, this board) must determine whether the property is used primarily for a charitable purpose. This determination is made without consideration of the permitted uses accorded to charitable institutions in R.C. 5709.121. *Community Health Professionals, Inc. v. Levin*, 113 Ohio St.3d 432, 2007-Ohio-2336; *Olmsted Falls Bd. of Edn. v. Tracy* (1997), 77 Ohio St. 3d 393.

In the present matter, the Tax Commissioner found that Northeast was not a charitable entity:

“[T]he record shows that the applicant Northeast is a non-charitable entity more in the nature of a business entity, providing employee staffing services to the community, and operates the property as a commercial lessor.” S.T. at 2.

Northeast has provided this board with evidence that it is a non-profit entity. However, for purposes of real estate tax exemption, a corporation must be more than non profit; it must meet one of the definitions found in R.C. Chapter 5709. In the present appeal, Northeast claims it is a charitable entity. In paragraph one of the syllabus in *Planned Parenthood Assn. v. Tax Commr.* (1966), 5 Ohio St.2d 177, the Supreme Court defines “charity” in the following manner:

“In the absence of a legislative definition, ‘charity,’ in the legal sense, is the attempt in good faith, spiritually, physically, intellectually, socially and economically to advance and benefit mankind in general or those in need of advancement and benefit in particular, without regard to their ability to supply that need from other sources, and without hope or expectation, if not with positive abnegation, of gain or profit by the donor or by the instrumentality of the charity.”

The record reveals that Northeast was founded by Portage Path and that Portage Path is a charitable entity. However, Portage Path’s status does not vicariously inure to the benefit of Northeast. See *OCLC Online Computer Library Ctr. v. Kinney* (1984), 11 Ohio St. 3d 198.

The Tax Commissioner concluded that Northeast was much more than an entity structured to assist Portage Path in its charitable goals. The Tax

Commissioner found that Northeast leased property to both non-profit and for-profit organizations; Northeast provided outsourced medical staffing to others and offered fee-based consulting services. S.T., at 3. At the hearing before the board, Northeast presented its financial statements for tax years 2002 and 2003. Both years revealed revenues for psychiatric staffing (\$932,446 for 2003, \$616,096 for 2002), patient fees (\$9,774 for 2003, \$26,924 for 2002), and parking revenues (\$3,470 for 2003, \$2,887 for 2002). Appellant's Ex. 18, at 3. While Northeast tries to limit the discussion to only those activities taking place on the subject property, for purposes of determining the standard by which Northeast's activities are considered, this board must consider the corporation as a whole, and not merely its relationship to the subject property.

It is possible for an institution to be non profit and yet not charitable. In *Madisonville Community Urban Redevelopment Corp. v. Tracy* (Mar. 2, 2001) BTA No. 1998-L-858, unreported, the board found that the property owner, a non-profit entity organized pursuant to R.C. Chapter 1702 to redevelop a blighted area in Cincinnati, was not a charitable or educational institution for purposes of R.C. 5709.121:

"Its purpose is to improve private economic development and spur job growth in the community. While this is an important undertaking, it does not satisfy the statutory requirements that the property be owned by a charitable or educational institution or the state or political subdivision. *Episcopal Parish v. Kenney* (1979), 58 Ohio St. 2d 199; *Highland Park Owner's Inc. v. Tracy* (1994), 71 Ohio St. 3d 405." Id. 10.

The board similarly finds Northeast's purpose to support mental health services in the Summit County area to be an admirable undertaking. In practice, however, Northeast's activities are more akin to commercial, income-producing activities. Providing psychiatric staffing services benefits the psychiatrists being placed and the institutions hiring the psychiatrists. The benefit to the community as a whole is attenuated at best.

Thus, we find that, for purposes of R.C. 5709.121, Northeast is not a charitable institution.² Therefore, pursuant to R.C. 5709.12, to have its property exempted from real property taxation, Northeast must use the property exclusively (primarily) for charitable purposes. In the present matter, Northeast leases its property to both non-profit and for-profit entities. In *Thomaston Woods Limited Partnership v. Lawrence* (June 15, 2001), BTA No. 1999-L-551, unreported, this board held that leasing a property commercially violates the second prong of R.C. 5709.12(B) – that real property belonging to an institution must be used “exclusively for charitable purposes” – in order to be exempt from taxation. This board held:

“While educational organizations lease the property for laudable purposes and perhaps at below market rents, it does not change the fact that the property owner ‘uses’ the subject property to lease to third parties. When a lease situation exists where it is the lessee who is doing the charitable work, then for purposes of R.C. 5709.12(B), the lessor’s primary use of the property is the leasing. *Lincoln Memorial Hospital v. Warren* (1968), 13 Ohio St.2d 109.” Id at 9.

² This finding distinguishes this matter from *Community Health Professionals, Inc., v. Levin*, 113 Ohio St.3d 432, 2007-Ohio-2336. The Supreme Court in that case emphasized the fact that the Tax Commissioner found the property holder to be a “charitable organization.” In the present matter, the Tax Commissioner has specifically found that Northeast “is not a charitable entity.” S.T., at 2.

See, also, *Lincoln Mem. Hosp., Inc. v. Warren* (1968), 13 Ohio St.2d 109; *Evans Investment Company v. Licking Cty. Bd. of Revision* (Feb. 10, 1988), BTA No. 1985-C-1112, unreported, affirmed (1988), 51 Ohio App.3d 104.

In the present appeal, the owner, Northeast, uses its property by leasing it to both for-profit and non-profit entities. However, Northeast seeks exemption for only that portion of the property used for charitable purposes. The General Assembly, by virtue of R.C. 5709.121, allows charitable institutions greater latitude in the manner in which property owned by those institutions may be used. During the relevant period, R.C. 5709.121 provided:

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

“(A) It is used by such institution *** 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 of such institution, *** for use in furtherance of or incidental to its *** charitable *** purposes and not with a view to profit.”

R.C. 5709.121 permits a charity to allow another to use its property under a lease, as long as the use of the property is in furtherance of or incidental to a charitable purpose and the use is made without a view to profit. However, as the Tax Commissioner

found that Northeast was not a charitable institution, and we agree, Northeast cannot avail itself of the more liberal uses permitted by R.C. 5709.121.

Therefore, considering the record, statutes, and case law, this Board of Tax Appeals finds the Tax Commissioner was correct when he denied exemption for tax year 2003. Accordingly, the matter must be, and hereby is, affirmed.

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.


Sally F. Van Meter, Board Secretary