IN THE SUPREME COURT OF OHIO

NORTEAST OHIO PSYCHIATRIC INSTITUE, Appellant, v. RICHARD A. LEVIN, TAX COMMISSIONER OF OHIO, Appellee.	)))))))))))	CASE NUMBER 2008-0033 (Appeal from the Ohio Board of Tax Appeals Case No. 2005-Z-1683)

BRIEF OF *AMICUS CURIAE*, OHIO SCHOOL BOARDS ASSOCIATION, OHIO ASSOCIATION OF SCHOOL BUSINESS OFFICALS AND BUCKEYE ASSOCIATION OF SCHOOL ADMINISTRATORS ON BEHALF OF TAX COMMISSIONER

Mary C. Henkel (0039563) (Counsel of Record)
Vorys, Sater, Seymour and Pease LLP
221 East Fourth Street, Suite 2100
P.O. Box 0236
Cincinnati, OH 45201-0236
Tel. No.: (513) 723-4484
Fax No.: (513) 852-7856
mchenkel@vorys.com

Counsel for Appellant,
Northeast Ohio Psychiatric Institute

Nancy Hardin Rogers (0002375)
Attorney General of Ohio
Damion M. Clifford (0077777)
Assistant Attorney General.
16th Floor - Rhodes Tower,
Columbus, Ohio 43215
Tel. No.: (614) 995-9032
Fax No.: (614) 466-6090
dclifford@ag.state.oh.us
Counsel for Appellee,
Richard A. Levin,
Tax Commissioner of Ohio

David H. Seed (0066033) (Counsel of Record)
Daniel McIntyre (0051220)
Brindza, McIntyre & Seed LLP
1111 Superior Avenue, Suite 1025
Cleveland, Ohio 44114
Tel. No.: (216) 621-5900
Fax No.: (216) 621-5901
dseed@bms-law.com
dmcintyre@bms-law.com

Counsel for *Amicus Curiae*,
Ohio School Boards Association,
Ohio Association of School Business Officials,
Buckeye Association of School Administrators

John J. Kulewicz (0008376) (Counsel of Record)
Michael J. Hendershot (0081842)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
Tel. No.: (614) 464-5634
Fax No.: (614) 719-4812
jjkulewicz@vorys.com
Counsel for *Amicus Curiae*,
Ohio Council of Behavioral
Healthcare Providers

FILED
JUN 11 2008
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Table of Authorities iv

Statement of Interest of *Amicus Curiae* 1

Statement of Facts 2

Law and Argument 5

Proposition of Law No. 1 5

Northeast is not entitled to exemption from real property taxation under R.C. 5709.121 because the property at issue does not belong to a charitable institution.

A. Introduction

B. Applicable Standard of Review

C. Northeast's primary use of the property is leasing, not providing mental health services.

D. Northeast is not a charitable institution under R.C. 5709.121.

E. There can be no vicarious exemption based on the activities of others.

F. An Institution may be Non Profit and Yet Not a Charitable Institution

G. The property at issue cannot be considered as "belonging to" a charitable institution under 5709.121(A)(1)(a).

H. The Property at issue is not under the direction or control of a charitable institution under R.C. 5709.121(A)(2).

Proposition of Law Number 2 15

Northeast is not entitled to exemption from real property taxation under R.C. 5709.12.

Proposition of Law No. 3 17

Absent a change of the law by the Ohio General Assembly, there is no presumption that an entity exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code is a charitable institution for purposes of R.C. 5709.12 and 5709.121.

A. There is no assignment of error in Notice of Appeal for the Court to address whether an entity which has obtained status as a Section 501(c)(3) entity under federal law is a charitable institution for purposes of R.C. 5709.121.

B. Charitable Institution for Purposes of R.C. 5709.121 is Defined by the General Assembly and Interpreted by Appellate Court and Administrative Decisions.

C. Any inconsistency in the outcome of decisions as to whether an entity with 501(c)(3) status is a charitable institution is a result of the interpretation and application of Ohio law to each matter.

D. The activities of the applicant itself must be considered when reviewing a claimed charitable exemption.

E. The General Assembly has enacted the limited use of 501(c)(3) status as a factor for certain exemption matters and has not indicated that 501(c)(3) status should create a conclusive presumption of charitable status under Ohio law.

Conclusion 26

Certificate of Service 27

APPENDIX

Final Determination of Tax Commissioner C-1

Constitutional Provision:

Article XII, Section 2 ..... C-6

Cases:

88/96 LP v. Wilkins (July 20, 2007), BTA Case Number 2005-A-55, unreported.... C-8

City of Lewiston v. Marcotte Congregate Housing, Inc., 673 A.2d 209 (Me. 1996) C-18

Columbus Board of Education v. Limbach, et al. (June 26, 1992), BTA Number 86-H-566, unreported C-25

Dayton Art Inst. v. Limbach (June 19, 1992), BTA Case Number 1986-A-521, unreported C-62

Hilty Memorial Home v. Limbach (March 19, 1993), BTA Case Number 90-A-504, unreported C-67

Humane Society Foundation of Hancock County v. Tracy (Oct. 15, 1999), BTA Case Number 1998-J-884, unreported C-74

Jewish Community Ctr. of Cleveland v. Limbach (June 30, 1992), BTA Case Number 1988-A-124, unreported C-79

Madisonville Community Urban Redevelopment Corp. v. Tracy (March 2, 2001), BTA Case Number 1998-L-858, unreported C-87

Miami Valley Research Foundation v. Tracy (June 17, 1994), BTA Case Number 91-J-161, unreported C-93

New Covenant Believers Church v. Zaino (May 21, 2004), BTA Case Number 2002-B-926, unreported C-98

Presbyterian Manors, Inc. v. Douglas County (Kan. 2000) 998 P.2d 88 ..... C-109

Rehab Project v. Tracy (May 23, 1997), BTA Case Number 95-R-418, unreported C-120

Seven Hills Schools v. Tracy (June 11, 1999), BTA Case Number 1997-M-1572, unreported C-131

Thomaston Woods Limited Partnership v. Lawrence (June 15, 2001), BTA Case Number 1999-L-551, unreported C-135

Under the Rainbow Child Care Center, Inc. v. County of Goodhue, 741 N.W. 2d 880, 2007 Minn. LEXIS 775 at *20 (Minn. 2007) C-142

University of Cincinnati Medical Associates, Inc. v. Zaino (October 4, 2002), BTA Case Number 99-A-1411, unreported C-168

Victory Church v. Illinois Department of Revenue, 264 Ill.App.3d 919, 637 N.E.2d 463 (Ill. App. 1994) C-176

Youngstown Area Jewish Fedn. v. Limbach (June 30, 1992), BTA Case Number 1988-G-117, unreported C-181

Youngstown Revitalization Foundation v. Limbach (Jan. 11, 1991), BTA Case Number 87-D-1127, unreported C-186

Statute

R.C. 5715.27 ..... C-189

TABLE OF AUTHORITIES

Cases:

88/96 LP v. Wilkins (July 20, 2007), BTA Case Number 2005-A-55, unreported....25

Akron Golf Charities, Inc. v. Limbach (1987), 34 Ohio St. 3d 11, 516 N.E.2d 222 ....21, 23

Am. Commt. of Rabbinical College of Telshe, Inc. v. Bd. of Tax Appeals (1951), 156 Ohio St. 376....18

Am. Humanist Assn., Inc. v. Bd. of Tax Appeals (1963), 174 Ohio St. 545, 190 N.E.2d 685 21

Am. Natl. Can Co. v. Tracy (1995), 72 Ohio St.3d 150, 648 N.E.2d 48....7

American Society for Metals v. Limbach (1991), 59 Ohio St.3d 38, 569 N.E.2d 1065 16

Ameritech Publishing, Inc. v. Wilkins (2006), 111 Ohio St.3d 114, 855 N.E.2d 440 7

Assn. of Columbus, Inc. v. Tax Commr. (1966), 5 Ohio St.2d 177....4

Battelle Memorial Institute v. Dunn (1947), 148 Ohio St. 53, 73 N.E. 2d 88 15

Bethesda Healthcare, Inc. v. Wilkins (2004), 101 Ohio St.3d 420, 806 N.E.2d 142 ....5, 20

Bexley Village, Ltd. v. Limbach (1990), 68 Ohio App.3d 306, 588 N.E.2d 246 13

Carmelite Sisters, St. Rita's Home v. Bd. of Review (1969), 18 Ohio St.2d 41, 247 N.E.2d 477 22

Case Western Res. Univ. v. Tracy (1999), 84 Ohio St.3d 316, 703 N.E.2d 1240 21

Cincinnati Nature Center v. Board of Tax Appeals (1948), 48 Ohio St.2d 122, 357 N.E. 2d 381 14

City of Lewiston v. Marcotte Congregate Housing, Inc., 673 A.2d 209 (Me. 1996)....9

Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision (1994), 68 Ohio St.3d 336, 626 N.E.2d 933 18

Columbus Bd. of Edn. v. J.C. Penney Properties, Inc. (1984), 11 Ohio St.3d 203, 465 N.E.2d 48 18

Columbus Board of Education v. Limbach, et al. (June 26, 1992), BTA Number 86-H-566, unreported 22, 24

Columbus City School Dist. Bd. of Edn. v. Zaino (2001), 90 Ohio St.3d 496, 739 N.E.2d 783 6

Community Health Professionals, Inc. v. Levin (2007), 113 Ohio St.3d 432, 866 N.E. 2d 478 ..... 5, 20

Dayton Art Inst. v. Limbach (June 19, 1992), BTA Case Number 1986-A-521, unreported 16

Dayton-Montgomery Cty. Port Audi. v. Montgomery Cry. Bd. of Revision (2007), 113 Ohio St.3d 281, 865 N.E.2d 22 18

East Cleveland Post v. Board of Tax Appeals (1942), 139 Ohio St. 554, 41 N.E.2d 242 15

Episcopal Parish of Christ Church, Glendale v. Kinney (1979), 58 Ohio St.2d 199, 389 N.E.2d 847 5

Episcopal School of Cincinnati v. Levin (2008), 117 Ohio St. 3d 412, 884 N.E.2d 561 20

Evans Investment Company v. Limbach (1988), 51 Ohio App. 3d 104, 554 N.E.2d 941 ..... 13, 25

Gahanna-Jefferson Local School Dist. Bd. of Edn. v. Zaino (2001), 93 Ohio St.3d 231, 754 N.E.2d 789 6

Gerke v. Purcell (1874), 25 Ohio St. 229 19

Herb Soc. Of Am., Inc. v. Tracy (1994), 71 Ohio St.3d 374, 643 N.E.2d 1132 21

Hilty Memorial Home v. Limbach (March 19, 1993), BTA Case Number 90-A-504, unreported 17

Howard v. Cuyahoga Cty.Bd. of Revision (1988), 37 Ohio St.3d 195, 524 N.E.2d 887 6

Hubbard Press v. Tracy (1993), 67 Ohio St.3d 564, 621 N.E.2d 396 15

Humane Society Foundation of Hancock County v. Tracy (Oct. 15, 1999), BTA Case Number 1998-J-884, unreported 16

In re Application of American Legion (1969), 20 Ohio St.2d 121, 254 N.E.2d 21 ... 22

Incorporated Trustees of Gospel Worker Society v. Evatt (1942), 140 Ohio St. 185, 42 N.E.2d 900 15

Jewish Community Ctr. of Cleveland v. Limbach (June 30, 1992), BTA Case Number 1988-A-124, unreported 16

Joint Hospital Services v. *Lindley* (1977), 52 Ohio St. 2d 153, 370 N.E.2d 474 ..... 11, 23

Lutheran Book Shop v. Bowers (1955), 164 Ohio St. 359, 131 N.E.2d 219 15

Madisonville Community Urban Redevelopment Corp. v. Tracy (March 2, 2001), BTA Case Number 1998-L-858, unreported 12

Maumee Valley Broadcasting Assn. v. Porterfield (1972), 29 Ohio St.2d 95, 279 N.E.2d 863 23

Miami Valley Research Foundation v. Tracy (June 17, 1994), BTA Case Number 91-J-161, unreported 12

National Church Residences v. Lindley (1985), 18 Ohio St.3d 53 8

New Covenant Believers Church v. Zaino (May 21, 2004), BTA Case Number 2002-B-926, unreported 9

OCLC Online Computer Library Center, Inc. v. Kinney (1984), 11 Ohio St. 3d 198, 464 N.E.2d 572 11

Ohio Masonic Home v. Bd. of Tax Appeals (1977), 52 Ohio St.2d 127, 370 N.E.2d 465 ..... 7, 15

Olmsted Falls Bd. of Edn. v. Tracy (1997), 77 Ohio St.3d 393, 674 N.E.2d 690 ..... 6, 21

Planned Parenthood Assn. of Columbus, Inc. v. Tax Commr. (1966), 5 Ohio St.2d 177 ..... 4, 7, 11, 19, 20, 22

Polaris Amphitheater Concerts, Inc. v. Delaware Cty. Bd. of Revision, Slip Opinion No. 2008-Ohio-2454 18

Presbyterian Manors, Inc. v. Douglas County (Kan. 2000) 998 P.2d 88 22

Rehab Project v. Tracy (May 23, 1997), BTA Case Number 95-R-418, unreported 24

Seven Hills Sch. V. Kinney (1986), 28 Ohio St.3d 186 5

Seven Hills Schools v. Tracy (June 11, 1999), BTA Case Number 1997-M-1572, unreported 16

Thomaston Woods Limited Partnership v. Lawrence (June 15, 2001), BTA No. 1999-L-551, unreported 9, 16, 25

True Christianity Evangelism v. Tracy (1999), 87 Ohio St.3d 48, 716 N.E.2d 1154 ..... 8, 11

True Christianity Evangelism v. Zaino (2001), 91 Ohio St.3d 117 19

Under the Rainbow Child Care Center, Inc. v. County of Goodhue, 741 N.W. 2d 880, 2007 Minn. LEXIS 775 at *20 (Minn. 2007) 19

University of Cincinnati Medical Associates, Inc. v. Zaino (October 4, 2002), BTA Case Number 99-A-1411, unreported 8

Victory Church v. Illinois Department of Revenue, 264 Ill.App.3d 919, 637 N.E.2d 463 (Ill. App. 1994) 9

White Cross Hosp. Assn. v. Bd. of Tax Appeals (1974), 38 Ohio St.2d 199, 311 N.E.2d 862 5

Youngstown Area Jewish Fedn. v. Limbach (June 30, 1992), BTA Case Number 1988-G-117, unreported 16

Youngstown Revitalization Foundation v. Limbach (Jan. 11, 1991), BTA Case Number 87-D-1127, unreported 13

Statutes and Constitutional Provision:

R.C. 5709.12 ..... 5, 6, 9, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25 , 26

R.C. 5709.121 ..... 1, 5, 6, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 25, 26

R.C. 5715.27 1

R.C. 5717.04 ..... 6, 17

Article XII, Section 2 ..... 18, 19

I. STATEMENT OF INTEREST OF *AMICUS CURIAE*

Ohio School Boards Association, Ohio Association of School Business Officials, and Buckeye Association of School Administrators ("Ohio School Boards Organizations") represent Ohio public school boards, school administrators, and the diverse public schools that they represent.

Boards of Education in Ohio have financial and legal interests in the outcome of the instant matter. Inasmuch as school boards derive significant funding from real property taxation, Ohio law provides school boards with the ability to participate as a party in real property exemption proceedings under R.C. 5715.27(B) and to file complaints to challenge the continued exemption of a real property under R.C. 5715.27(E).

The Ohio School Boards Organizations believe the Ohio Board of Tax Appeals' ("BTA") December 14, 2007, Decision and Order is correct that an owner who leases its real property may not claim exemption in vicarious reliance on the activities of its lessee. Further, the Ohio School Boards Organizations believe that the act of leasing real property is not the conduct of a charitable institution especially when considered with the owner's other commercial activities, as determined by the BTA in its December 14, 2007, decision. Both Appellant, Northeast Ohio Psychiatric Institute ("Northeast"), and *Amicus Curiae* Ohio Council of Behavioral Healthcare Providers ("Ohio Council") seek to overturn the Decision and Order of the BTA of December 14, 2007. Northeast and Ohio Council are seeking nothing short of a reversal of long-standing Ohio law. Finally, Northeast and Ohio Council, in the absence of an assignment of error in the Notice of Appeal, request the Court to proclaim that an institution is charitable for purposes of R.C. 5709.121 if it has 501(C)(3) status from the Internal Revenue Service. They make the request despite that it contravenes current Ohio law and in the absence of legislative authority for

such a presumption. For these reasons, the Ohio School Boards Organizations respectfully request the Court to affirm the BTA's Decision of December 14, 2007.

II. STATEMENT OF FACTS

Northeast filed a real property tax exemption application on July 30, 2003, regarding its 5,666 square foot clinic/medical office building in Cuyahoga Falls. (S.T. 2-3). Northeast is an Ohio non-profit corporation that was formed by Portage Path Behavioral Health ("Portage Path"). (Northeast's Br., Appendix A-10). In lieu of Portage Path owning the property and a paying mortgage expense which could not be reimbursed, Portage Path created Northeast as a separate legal entity to pay the mortgage expense and in turn lease a portion of the property at issue to Portage Path. (S.T.9). Portage Path is a professional health care company. (S.T. 128). Portage Path earned about $10 million in 2003 from its activities including charging fees ranging from $35 per day for crisis beds to $300 to $544 per hour for inpatient psychiatric services and crisis intervention mental health services. (S.T. 149). The five highest compensated employees of Portage Path, all physicians, earned in 2002 in excess of $142,995 plus contributions to an employee benefit and deferred compensation plan. (S.T. 195).

The mission of Northeast is to provide facilities for Portage Path and psychiatric staffing. (S.T. 153). Northeast was organized with its primary purpose for "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." (Northeast's Br., Appendix A-10).

Northeast owns the subject property in Cuyahoga Falls. (Appendix A-11). Northeast leased 57% of the property at issue to Portage Path with the balance of the property leased to a for-profit medical laboratory (Barberton Health System LLC, dba Lab Care) and a private

physician (David N. Baer). (S.T. 3). The Tax Commissioner found that Northeast earned $95,100 in annual rental income for itself while the lessees operated for-profit or revenue generating businesses from the property. (S.T. 4).

The majority of the activities of Northeast involved providing business support for mental health providers through fee-based psychiatric staffing to agencies in need of professionals to perform psychiatric evaluation. (S.T. 3, 119, Northeast's Br., Appendix A-12, A-16). Northeast operated employee assistance programs and an employment service through a subsidiary business, "Psychstaffing," for psychiatrists through which it deployed psychiatrists either to Portage or "other providers of psychiatric services." (S.T. 118, Northeast's Br., Appendix A-12, Supp. 102). Northeast through Psychstaffing provided fee-based independent contractor medical staffing to employers, billed monthly at an hourly rate. (S.T.3, 119-124). Further, "Northeast also offers fee based consulting services in the areas of clinic operations, quality assurance, accounting and finance, marketing and public relations, billing and executive management." (S.T. 125, 137). As indicated on the website for PsychStaffing, services of Northeast are also provided through Summit Employee Assistance, which "is a broad brush employee assistance program (EAP) servicing employers and employees in Northeast Ohio." (S.T. 125, 135). Further, Summit Employee Assistance offers "capitated and fee-for-service programs which help prevent personal problems from becoming personnel problems." (S.T. 125). Summit Employee Assistance also offers testing services and professional trainers who help educate employees on behavioral health topics. (S.T. 125).

Northeast operates a private mental health clinic in Green, Ohio, through a subsidiary, Lifescapes Personal Development Center. (S.T. 3, 125). Lifescapes offers individual and group counseling, testing, and other behavioral health services through psychiatrists, psychologists, and

licensed counselors. (S.T. 125). Northeast earned income from parking fees on another piece of property which was located near the Akron Arrows Baseball Stadium. (Northeast's Br., Appendix A-12-13). Northeast earned a combined total of approximately $1.24 million in 2003, including $932,446 from its off-site medical staffing program, $179,347 from its rental income, $130,185 from insurance and fee payments, and $5,799 from parking and miscellaneous fees. (S.T. 3, 110). Northeast is not in the nature of a section 501(c)(2) exempt property holding organization because it does not turn over its entire income to a related not-profit entity. (S.T. 3).

The Tax Commissioner issued a Final Determination on October 7, 2005, finding that Northeast is in the nature of a business consultant and employment agency that provides medical staffing to other entities to generate revenue of about $1 million per year. (S.T.5). Moreover, the Tax Commissioner pointed out that Northeast's business operation, involving providing medical staff for a fee, collecting insurance payments, and operating a multi-tenant office building and a parking lot, is found to be more like and in competition with area for-profit medical staffing agencies and rental companies than with the charitable entities described in *Planned Parenthood Assn. of Columbus, Inc. v. Tax Commr.* (1966), 5 Ohio St.2d 177, Syllabus 1. (S.T. 5).

Northeast appealed to the Tax Commissioner's decision to the Ohio BTA, where the BTA found that "Northeast 's activities are more akin to commercial, income-producing activities." (Northeast's Br., Appendix A-16). The BTA further pointed out that "providing psychiatric staffing services benefits the psychiatrists being placed and the institutions hiring the psychiatrist." (Appendix A-16). While the BTA noted that Northeast's purpose to support mental health services in Summit County is an admirable undertaking, it nonetheless concluded that the benefit to the community is attenuated at best. (Northeast's Appendix, A-16). The BTA found that Northeast was <u>not</u> a charitable institution. (Northeast's Br., Appendix A-15, A-17).

III. LAW AND ARGUMENT

Northeast requests the exemption of the subject property from taxation under R.C. 5709.12 and R.C. 5709.121. Revised Code 5709.121 provides real property tax exemption for property belonging to a charitable institution which is used for charitable purposes. Under R.C. 5709.12, the arbiter must determine that (1) the property belongs to an institution, and (2) the property is being used exclusively for charitable purposes. The difference between the two statutes is that the R.C. 5709.12 "exempts from taxation real property belonging to institutions that is used exclusively for charitable purposes" while R.C. 5709.121 provides exemption to charitable institutions using their property for charitable purposes. *Seven Hills Sch. V. Kinney* (1986), 28 Ohio St.3d 186.

Proposition of Law No. 1:

Northeast is not entitled to exemption from real property taxation under R.C. 5709.121 because the property at issue does not belong to a charitable institution.

A. Introduction.

Northeast argues that its property is entitled to exemption from real property taxation inasmuch as it is a charitable institution under R.C. 5709.121. (Northeast's Br. at 7-20.) Northeast argues that its property ought to be exempt under R.C. 5709.12 on the grounds that the property is used exclusively for charitable purposes. (Northeast's Br. at 7-20.)

However, Northeast's arguments seemingly fail to acknowledge the dichotomy between R.C. 5709.121 and R.C. 5709.12 that Ohio courts have long recognized. In *Episcopal Parish of Christ Church, Glendale v. Kinney* (1979), 58 Ohio St.2d 199, 200-201, 389 N.E.2d 847, 848 and recently in *Community Health Professionals, Inc. v. Levin* (2007), 113 Ohio St.3d 432, 435-436, 866 N.E. 2d 478, 481 *and Bethesda Healthcare, Inc. v. Wilkin* (2004), 101 Ohio St.3d 420, 424, 806 N.E.2d 142, 146-147, this court approved of Justice Stern's concurring opinion in *White*

Cross Hosp. Assn. v. Bd. of Tax Appeals (1974), 38 Ohio St.2d 199, 203, 311 N.E.2d 862, in which he explained the relationship between R.C. 5709.12 and 5709.121, and the legislative definition of exclusive charitable use:

> "[I]t is important to observe that, although R.C. 5709.121 purports to define the words used exclusively for 'charitable' or 'public' purposes, as those words are used in R.C. 5709.12, the definition is not all-encompassing. R.C. 5709.12 states: '* * * Real and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation.' Thus *any* institution, irrespective of its charitable or noncharitable character, may take advantage of a tax exemption if it is making exclusive charitable use of its property. * * * The legislative definition of exclusive charitable use found in R.C. 5709.121, however, applies only to property 'belonging to,' *i.e., owned by,* a charitable or educational institution, or the state or a political subdivision. The net effect of this is that R.C. 5709.121 has no application to noncharitable institutions seeking tax exemption under R.C. 5709.12. Hence, the first inquiry must be directed to the nature of the institution applying for an exemption."

As this Court stated in *Olmsted Falls Bd. of Edn. v. Tracy* (1997), 77 Ohio St.3d 393, 396, 674 N.E.2d 690, 692, 'in deciding whether property is exempt under the charitable use provisions of *R.C. 5709.12* and *5709.121*, tax authorities must first determine whether the institution seeking exemption is a charitable or noncharitable institution.

B. Applicable Standard of Review

This Court has repeatedly stated that in reviewing BTA decisions, this Court is not a trier of fact *de novo,* but that it is confined to its statutorily delineated duties (R.C. 5717.04) of determining whether the board's decision is 'reasonable and lawful'. *Columbus City School Dist. Bd. of Edn. v. Zaino* (2001), 90 Ohio St.3d 496, 497, 739 N.E.2d 783; *Howard v. Cuyahoga Cty.Bd. of Revision* (1988), 37 Ohio St.3d 195, 197, 524 N.E.2d 887. This court "will not hesitate to reverse a BTA decision that is based on an incorrect legal conclusion." *Gahanna-Jefferson Local School Dist. Bd. of Edn. v. Zaino* (2001), 93 Ohio St.3d 231, 232, 754 N.E.2d

789. But the BTA is responsible for determining factual issues and, if the record contains reliable and probative support for these BTA determinations, this Court will affirm them. *Ameritech Publishing, Inc. v. Wilkins* (2006), 111 Ohio St.3d 114, 855 N.E.2d 440; *Am. Natl. Can Co. v. Tracy* (1995), 72 Ohio St.3d 150, 152, 648 N.E.2d 483. Under this standard, the BTA's determination that Northeast is not a charitable institution was neither unreasonable nor unlawful.

C. Northeast's primary use of the property is leasing, not providing mental health services.

Northeast asserts that it offers Portage Path a lease arrangement that is "at or below cost" and that Northeast would never replace Portage Path with a better paying tenant. (Northeast's Br. at 6.). Admittedly, it is a "convenient arrangement" between Northeast and Portage Path and mutually beneficial in some respect, but Northeast's use of the property, *i.e.* to lease it to others and receive rental payments in return, is a commercial use not within the purview of R. C. 5709.121, as was the case in *Ohio Masonic Home v. Bd. of Tax Appeals* (1977), 52 Ohio St.2d 127, 130, 370 N.E.2d 465, 467 (finding that land used for farming that generated an income to be used for the institutional care of the elderly is not tax exempt). Despite Northeast's allegations to the contrary, Northeast's use of the property is not to "provide" mental health service. Portage Path may provide mental health services, but Northeast leases commercial office space to not-for-profit and for-profit entities, places psychiatric staffing in other agencies, operates a mental health clinic on another site, and earns parking fees on another parcel of property that it owns. (S.T. 94, 112-113, 115-116).

While Northeast's leasing arrangement with Portage Path may be "at or below cost," the same can no doubt be said about many other commercial leasing arrangements. "At or below cost" are relative terms that, by their nature, seem to suggest a commercial relationship, not a

"positive abnegation" of gain or profit within the meaning of *Planned Parenthood Ass'n.*, *supra*, and *True Christianity Evangelism v. Tracy* (1999), 87 Ohio St.3d 48, 716 N.E.2d 1154. Rather, such terms may demonstrate that Northeast is a responsible landlord, but not a charitable institution.

In *University of Cincinnati Medical Associates, Inc. v. Zaino* (October 4, 2002), BTA Case Number 99-A-1411, unreported, a non-profit exempt organization, under section 501(c)(3), sought property tax exemption for a medical office building leased to five tenants, three of which related to the University of Cincinnati. The entity was organized and operated exclusively for educational, charitable, or scientific purposes by conducting and supporting the activities of the University of Cincinnati. The BTA affirmed the denial of the exemption application by the Tax Commissioner and, in doing so, reinforced that the owner is a commercial lessor, regardless of whether the property is leased to a charity and even at or below market rent or at actual cost:

> "In the instant matter, the appellant is leasing the subject property to medical practice corporations affiliated with the University of Cincinnati; in other words, the appellant is a landlord. Regardless of its lessees' activities, which may or may not be "charitable" in nature, appellant may not claim a vicarious exemption through them for itself. See *OCLC*, supra; *National Church Residences v. Lindley* (1985), 18 Ohio St.3d 53. In *OCLC*, the appellant, a non-profit corporation, sought exemption for its facilities, from where it provided online computer information to libraries around North America. The court held that "(A)lthough OCLC's service may greatly enhance the ability of libraries to better serve the public, OCLC essentially offers a product to charitable institutions, for a fee exceeding its cost, and, as the board concluded, is not itself a charitable organization." Likewise, appellant merely provides the leaseable building space, at a reasonable cost, for certain medical groups, not unlike a commercial lessor of real property. While appellant arguably establishes its rents at a below-market level and uses the rents generated to only cover costs of operations and if any rent money is left after covering its costs, to reduce the rent charged to the practice corporations, appellant still charges rents to first, cover its own costs. Appellant is not giving away the space in its building rent-free and it is not, in turn, acting as a charity or for

> charitable purposes. See *Falls Masonic Temple Co. v. Limbach* (June 30, 1993), B.T.A. No. 90-A-1563, unreported. Further, appellant, itself, does not provide the medical care that is offered at the subject facility (Ex. 1, p. 1); it is merely the lessor of the building. While the lessee tenants/practice corporations and other health care providers may act as charitable organizations, it is not their use of the building, but UCMA's, which is relevant to the instant outcome."

In *Thomaston Woods Limited Partnership v. Lawrence* (June 15, 2001), BTA No. 1999-L-551, unreported, the BTA determined that the owner *Thomaston Woods'* primary use of the property was to lease it to third parties. The BTA held that in a lease situation where it is the lessee who is engaged in the charitable activity, then for purposes of R.C. 5709.12(B), the lessor's primary use of the property is leasing and not charitable.[1] In *New Covenant Believers Church v. Zaino* (May 21, 2004), BTA Case Number 2002-B-926, unreported, where property was leased by New Covenant Believers Church, a 501(C)(3) entity, to W.C. Handy School, a 501(c)(3) entity, the BTA held that no exemption is warranted under R.C. 5709.12 where "...the act of leasing is the predominate activity of the subject property..."

D. Northeast is not a charitable institution under R.C. 5709.121.

Northeast asserts that the property at issue is entitled to exemption from real property taxation under R.C. 5709.121(A)(1)(b), which makes available exemption for "property belonging to a charitable" institution. Northeast claims that it is a charitable institution within the meaning of R.C. 5709.121 primarily on the grounds that its mission is to provide mental health service without ability to pay. (Northeast's Br. at 7-14.)

R.C. 5709.121 provides, in pertinent part:

---

[1] *See*, A congregate care facility lost its property tax exemption when it rented some space to physicians at market rates. *City of Lewiston v. Marcotte Congregate Housing, Inc.*, 673 A.2d 209 (Me. 1996). Illinois Court of Appeals ruled against exemption for property leased by a church for religious and educational purposes. *Victory Church v. Illionis Department of Revenue*, 264 Ill.App.3d 919, 637 N.E.2d 463 (Ill. App. 1994).

(A) Real 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:

(1) It is used by such institution, *** or by one or more other such institutions, *** under a lease, sublease, or other contractual arrangement:

***

(b) For other charitable, educational, or public purposes.

Northeast operates a private mental health clinic on another site in Green, Ohio through a subsidiary, Lifescapes Personal Development Center. (S.T. 3, 125). Lifescapes offers individual and group counseling, testing, and other behavioral health services through psychiatrists, psychologists, and licensed counselors. (S.T.125). Northeast earned income from parking fees on another piece of property which was located near the Akron Arrows Baseball Stadium. (Northeast's Br., Appendix A-12-13). Northeast earned a combined total of approximately $1.24 million in 2003, including $932,446 from its off-site medical staffing program, $179,347 from its rental income, $130,185 from insurance and fee payments, and $5,799 from parking and miscellaneous fees. (S.T.3, 110). Northeast's mission may be to provide mental health service without ability to pay; however, its actual conduct includes leasing real estate to both not-for-profit and for-profit entities, placing psychiatric staffing to other agencies that generated more than $1.5 million during 2002 and 2003 from its off-site staffing program alone, operating a mental health clinic on another site, and earning parking fees on another parcel of property that it owns. (S.T. 94, 112-113, 115-116).

Northeast also asserts that the 2002 and 2003 revenues received in connection with its placement of psychiatric staffing is incidental to its operations. Northeast claims as much despite that these staff revenues far exceed the rental income received from Portage Path by a factor of more than 10. Such revenues are neither incidental nor consistent with an entity

operating to "advance and benefit mankind in general, or those in need of advancement and benefit in particular" without hope or expectation of gain or profit under the standard enunciated in *Planned Parenthood Ass'n.*, *supra*, and *True Christianity Evangelism*, *supra*. The BTA acknowledged the Tax Commissioner's characterization of Northeast's activities, as follows:

> "[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."
> (Northeast's Br., Appx. A-15, Decision at 7.)

For the foregoing reasons, Northeast cannot be said to be a charitable institution within the meaning of R.C. 5709.121.

E. There can be no vicarious exemption based on the activities of others.

Northeast argues that its relationship is seemingly interchangeable with Portage Path and further that Portage Path's status as a charitable institution vicariously inures to the benefit of Northeast. (Northeast's Br. at 7-20.) In *OCLC Online Computer Library Center, Inc. v. Kinney* (1984), 11 Ohio St. 3d 198, 464 N.E.2d 572, OCLC contended that it had demonstrated its entitlement to an exemption based upon the charitable status of the institutions which it contractually serves. OCLC claimed as much because it serves libraries, which in turn benefit the general public through the dissemination of knowledge for the edification and improvement of mankind, it qualifies as an institution furthering human knowledge and, therefore, is a charitable institution. This Court rejected this argument. This Court held the argument, however, simply constitutes an attempt by OCLC to obtain a vicarious charitable exemption by virtue of the activities of its customers. *OCLC*, 11 Ohio St. 3d at 200.

In *Joint Hospital Services* v. *Lindley* (1977), 52 Ohio St. 2d 153, 370 N.E.2d 474, the Court rejected a similar vicarious charitable exemption theory which a group of hospitals pooled

their resources and established a laundry and linen service for their members, as well as for several other non-profit organizations. Like OCLC, Northeast is attempting to obtain vicarious charitable exemption by virtue of Portage Path's activities. This is contrary to clearly established law providing that there can be no vicarious exemption based on the activities of others.

F. An Institution may be Non Profit and Yet Not a Charitable Institution

It is possible for an institution to be non profit and yet not charitable. In *Madisonville Community Urban Redevelopment Corp. v. Tracy* (March 2, 2001) BTA Case Number 1998-L-858, unreported, the first question is whether Madisonville is a charitable or educational institution. Although Madisonville is a non-profit corporation organized pursuant to R.C. Chapter 1702 to redevelop a blighted area in Cincinnati, it is not a charitable or educational institution. Its purpose is to improve private economic development and spur job growth in the community. While this is an important undertaking, the BTA concluded it does not satisfy the statutory requirements that the property be owned by a charitable or educational institution or the state or political subdivision.. Therefore, the BTA concluded that Madisonville did not qualify for property exemption as a charity under R.C. 5709.121.

In *Miami Valley Research Foundation v. Tracy* (June 17, 1994), BTA Case Number 91-J-161, unreported, Miami Valley Research Foundation which had been granted exemption from Federal income tax under section 501(c)(3) of the Internal Revenue Code applied for exemption. The entity was created "to foster and promote research, technological, scientific and educational activities and facilities in the Greater Dayton, Ohio Area and to create or preserve jobs and employment opportunities and improve the economic welfare of the Greater Dayton, Ohio Area." Upon consideration of the evidence adduced, the BTA concluded that the taxpayer is not a charitable institution and its acquisition and improvement of the subject property is not a

charitable use. Similarly, in *Youngstown Revitalization Foundation v. Limbach* (Jan. 11, 1991), BTA Case Number 87-D-1127, unreported, the BTA held that real property of a nonprofit foundation acquired for use as part of an overall economic development for a central business district was not exempt as charitable property under R.C. 5709.121. The BTA pointed out that even though the taxpayer is a not-for-profit foundation, its primary purpose is the economic development of the central business district of the City of Youngstown, and it is not a charity. Further, the BTA pointed out the "though this may be a commendable purpose, it is not charitable as the Supreme Court has defined 'charity'..."

G. The property at issue cannot be considered as "belonging to" a charitable institution under 5709.121(A)(1)(a).

Northeast argues in favor of exemption on the grounds that the property as issue is used by Portage Path, a charitable institution. (Northeast's Br. at 13-15.) However, real property is not property "belonging to" a charitable institution within the meaning of R.C. 5709.121 where the institution is a lessee of such property. *Evans Investment Company v. Limbach (1988),* 51 Ohio App. 3d 104, 554 N.E.2d 941. As a Court observed, *Evans* held that there must be a unity of ownership and use in the party claiming the exemption. *Bexley Village, Ltd. v. Limbach (1990)*, 68 Ohio App.3d 306, 309, 588 N.E.2d 246, 248.

Northeast leased 57% of the property at issue to Portage Path with the balance of the property leased to two for-profit lessees. (S.T. 3). The Tax Commissioner found that Northeast earned $95,100 in annual rental income. (S.T. 4). Portage Path's use of the property is inadequate to establish exemption under R.C. 5709.121 (A)(1)(a). The property at issue "belongs" to Northeast for the purposes of R.C. 5709.121.

H. The Property at issue is not under the direction or control of a charitable institution under R.C. 5709.121(A)(2).

Northeast argues that the property at issue qualifies for exemption inasmuch as it is under the "direction or control" of Portage Path. (Northeast's Br. at 17-18). However, Northeast's argument fails because R.C. 5709.121(A)(2) applies only to "[r]eal property *** belonging to a charitable" institution. While it may be true that Portage Path is a charitable institution under R.C. 5709.121, it is equally true that the property at issue does not belong to Portage Path. This is a necessary perquisite.

R.C. 5709.121 provides, in pertinent part:

> (A) 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:
>
> (2) 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. (Emphasis added).

In other words, real property belonging to a charitable institution is tax-exempt if such institution makes it available for use in furtherance of or incidental to its charitable purpose. As more fully discussed in the preceding section, real property is not property "belonging to" a charitable institution within the meaning of R.C. 5709.121 where the institution is a lessee of such property. Portage Path's use of the property at issue is inadequate to establish exemption under R.C. 5709.121 (A)(2).

Northeast's reliance on *Cincinnati Nature Center v. Board of Tax Appeals* (1948), 48 Ohio St.2d 122, 357 N.E. 2d 381, is relevant only to the extent that the property at issue belongs to a charitable institution which is seeking tax-exempt status for the property. In *Cincinnati Nature Center*, the property belonged to a charitable institution which was seeking exemption for

its property. This is not the case here. The property does not belong to a charitable institution.

For the proceeding reasons, Ohio School Boards Organizations request the Court to affirm the Decision of the BTA that Northeast is not a charitable institution under R.C. 5709.121.

Proposition of Law Number 2:

Northeast is not entitled to exemption from real property taxation under R.C. 5709.12.

R.C. 5709.12 provides, in pertinent part, that real property belonging to institutions "that is used exclusively for charitable purposes" shall be exempt from taxation. Where the property is not used exclusively for charitable purposes, exemption under R.C. 5709.12 is not available. For example, property owned by a veterans' organization not used exclusively for charitable purposes cannot be exempted from taxation. *East Cleveland Post v. Board of Tax Appeals* (1942), 139 Ohio St. 554, 41 N.E.2d 242.

According to the Ohio Supreme Court, one recognized test for ascertaining whether an applicant for exemption is charitable or otherwise is whether it is maintained and conducted for gain, profit or advantage. *Battelle Memorial Institute v. Dunn* (1947), 148 Ohio St. 53, 73 N.E. 2d 88 (property owner was found to be much more like that of a private commercial enterprise, i.e, obtaining patents in its own name, generating fees well in excess of its costs and furnishing research results to only a few commercial enterprises for their own financial gain); *Lutheran Book Shop v. Bowers* (1955), 164 Ohio St. 359, 131 N.E.2d 219 (sale of materials is in direct competition with other retail outlets, and precludes exemption); *Incorporated Trustees of Gospel Worker Society v. Evatt* (1942), 140 Ohio St. 185, 42 N.E.2d 900 (holding that under the Ohio Constitution and the applicable statute, property used to produce income to be used exclusively for charitable purposes is not exempt from taxation); *Ohio Masonic Home*, 52 Ohio St.2d at 130; *Hubbard Press v. Tracy* (1993), 67 Ohio St.3d 564, 621 N.E.2d 396 (holding that the subject

property used for the printing of envelopes to be used by churches and congregations is not tax exempt). Thus, to qualify for exemption real property must not be used in competition with commercial enterprises.

In *Thomaston Woods Limited Partnership v. Lawrence* (June 15, 2001), BTA No. 1999-L-551, unreported, the BTA found that leasing real estate was not the exclusive charitable use of the property. Such is the case here. Northeast's use of the property is leasing, not the provision of mental health service that it claims. Northeast is therefore not entitled to exemption under R.C. 5709.12(B).

Not-for-profit entities regularly fail to use their property in the manner of a charitable institution. *Seven Hills Schools v. Tracy* (June 11, 1999), BTA Case Number 1997-M-1572, unreported; *Youngstown Area Jewish Fedn. v. Limbach* (June 30, 1992), BTA Case Number 1988-G-117, unreported (finding that a gift shop that produced a profit and was operated by a charitable institution is not tax exempt); *Humane Society Foundation of Hancock County v. Tracy* (Oct. 15, 1999), BTA Case Number 1998-J-884, unreported (holding that the use of a multi-purpose building by a charitable institution to conduct bingo sessions for profit defeats property tax exemption); *Jewish Community Ctr. of Cleveland v. Limbach* (June 30, 1992), BTA Case Number 1988-A-124, unreported; and *Dayton Art Inst. v. Limbach* (June 19, 1992), BTA Case Number 1986-A-521, unreported. Such is the case here.

As to revenue or profit generated by activities undertaken by Northeast, the current use of the property rather than the ultimate use of the proceeds from the property is considered in determining whether the subject's use is for an exempt purpose. *Lutheran Book Shop*, 164 Ohio St. at 361. When that profit is dedicated to a charitable cause, the property is precluded from the exemption found in R.C. 5709.12. *American Society for Metals v. Limbach* (1991), 59 Ohio

St.3d 38, 569 N.E.2d 1065. Even where an applicant's goal for its facility is to merely "break even" on its expenses, the BTA has held that "operating at a loss, in and of itself, does not necessarily equate to operating as a non-profit or charitable organization." *Missionary Church, Ohio District, Inc./ d.b.a., Hilty Memorial Home v. Limbach* (March 19, 1993), BTA Case Number 90-A-504.

For the proceeding reasons, Ohio School Boards Organizations request the Court to affirm the Decision and Order of the BTA that Northeast does not use the property exclusively for charitable purposes pursuant to R.C. 5709.12.

Proposition of Law No. 3

Absent a change of the law by the Ohio General Assembly, there is no presumption that an entity exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code is a charitable institution for purposes of R.C. 5709.12 and 5709.121.

Northeast's third proposition of law is that a nonprofit entity that is restricted by its articles of incorporation to serve purposes defined by Ohio law as charitable or public purposes, and determined by the Internal Revenue Service to qualify for federal tax exemption under Section 501(c)(3), Title 26, U.S. Code is presumably a charitable institution for purposes of R.C. 5709.121. Similarly, Ohio Council filed an *Amicus Curiae* brief requesting the Court to adopt a proposition of law for which an entity granted Section 501(C)(3) status by the Internal Revenue Service shall be presumed charitable for purposes of R.C. 5709.121.

A. There is no assignment of error in Notice of Appeal for the Court to address whether an entity which has obtained status as a Section 501(c)(3) entity under federal law is a charitable institution for purposes of R.C. 5709.121.

Last this month this Court reiterated that its jurisdiction over Decisions of the BTA is governed by R.C. 5717.04, which requires that a notice of appeal "set forth * * * the errors therein complained of" in the BTA's decision. *Polaris Amphitheater Concerts, Inc. v. Delaware*

Cty. Bd. of Revision, Slip Opinion No. 2008-Ohio-2454. The Court has repeatedly held that the assignments of error set forth in the notice of appeal provide the scope of jurisdiction to grant relief to an appellant and the failure to so specify deprives the court of jurisdiction to grant a party relief on that ground. *Dayton-Montgomery Cty. Port Audi. v. Montgomery Cry. Bd. of Revision* (2007),113 Ohio St.3d 281, 865 N.E.2d 22. See, *Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1994), 68 Ohio St.3d 336, 337, 626 N.E.2d 933, citing *Columbus Bd. of Edn. v. J.C. Penney Properties, Inc.* (1984), 11 Ohio St.3d 203, 204-205, 465 N.E.2d 48. There is no assignment of error in the Notice of Appeal which directly or remotely addresses a request for this Court to conclusively presume an entity which has obtained status as a Section 501(c)(3) under federal law is a charitable institution for purposes of R.C. 5709.121.

B. Charitable Institution for Purposes of R.C. 5709.121 is Defined by the General Assembly and Interpreted by Appellate Court and Administrative Decisions.

The development of state charitable tax exemption law predates the adoption of the federal Internal Revenue Code. The principles of federalism dictate that federal and state taxing systems are separate.

State property tax exemptions usually begin with authorizing provisions in state constitutions. Most states have a specific constitutional provision (in Ohio, Article XII, § 2) regarding property tax exemptions; in most of these cases, the constitutional provision specifically references some kind of "charitable" exemption. These constitutional provisions typically then are made effective through specific enabling legislation passed by the state legislature, which in the State of Ohio includes Revised Code Sections 5709.12 and 5709.121.

This Court over 50 years ago discussed the exclusive use for charitable purposes set forth by our General Assembly in R.C. 5709.12 prior to the enactment of R.C. 5709.121 through the Ohio Constitution in paragraph one of the syllabus in *Am. Commt. of Rabbinical College of*

Telshe, Inc. v. Bd. of Tax Appeals (1951), 156 Ohio St. 376, providing "if operated without any view to profit, an institution used exclusively for the lawful advancement of education and of religion is an institution used exclusively for charitable purposes, within the meaning of Section 2 of Article XII of the Constitution and of Section 5353, General Code [now R.C. 5709.12]."

As to whether an entity is a charity in Ohio law, an early general definition of a charity in Ohio comes from the 1874 case of *Gerke v. Purcell* (1874), 25 Ohio St. 229, 243. Commonly cited, this Court in *True Christianity Evangelism v. Zaino* (2001), 91 Ohio St.3d 117, stated that "in past cases we have held that '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 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." *Planned Parenthood Assn. of Columbus, Inc. v. Tax Commr.* (1966), 5 Ohio St.2d 117, * * * paragraph one of the syllabus. It is against this definition that appellant's activities must be measured to determine if they constitute a charitable purpose."

C. Any inconsistency in the outcome of decisions as to whether an entity with 501(c)(3) status is a charitable institution is a result of the interpretation and application of Ohio law to each matter.

Both Northeast and Ohio Council improperly request this Court as opposed to the General Assembly to establish a presumption that a 501(c)(3) entity is a charity for purposes of R.C. 5709.121.[2] Ohio Council claims that Section 501(c)(3) is worthy of reliance on account of

[2] In a recent property tax exemption case, the Minnesota Supreme Court last year declared: "If the legislature had intended all organizations exempt from payment of federal income taxes under I.R.C. § 501(c)(3) also to be exempt from payment of real property taxes, it could have so provided, as it did with regard to state income taxation. . . . That it has not done so indicates that, in the legislature's view, there is a difference between an entity that qualifies for exemption from

the filing of an application for 501(c)(3) status and receipt of a Form 1023 determination letter from the IRS. Moreover, Ohio Council claims, without citing any legal authority in the State of Ohio, that an entity securing 501(c)(3) status should "serve as a proxy for Section 5709.121 charitable status" unless this Court, in place of the General Assembly, has directly held that a 501(c)(3) category fails the test set forth in *Planned Parenthood.* Both Northeast and Ohio Council argue that the enactment by this Court (in place of the General Assembly) of a 501(c)(3) presumption would eliminate the need for litigation as to whether an entity is a charity.

Northeast through Section A of Proposition of Law No. 3 claims there is confusion about the eligibility of Section 501(c)(3) organizations for Ohio tax exemption on account of the divergent outcome of decisions of this Court and the BTA. Northeast through Section B of Proposition of Law No. 3 claims that Courts have generally found entities compliant with federal tax exemption criteria to be charities under Ohio law. Both Northeast through Section D of Proposition of Law Number 3 and Ohio Council through Section A of Proposition of Law claim that the Court decisions about the state law charitable exemption of 501(c)(3) entities are consistent.

No Ohio Court or the BTA has made the determination that an entity is a charitable institution for purposes of R.C. 5709.12 and 5709.121 on account of Section 501(c)(3) status.

Both Ohio Council and Northeast cite decisions of this Court in which the charitable status of the entity was not questioned. *Episcopal School of Cincinnati v. Levin* (2008), 117 Ohio St. 3d 412, 884 N.E.2d 561; *Community Health Professionals, supra*; *Bethesda Healthcare,*

---

payment of federal income taxes because it does good works and from which its owners do not personally benefit, and an entity that qualifies for exemption from payment of property taxes as an institution of purely public charity." *Under the Rainbow Child Care Center, Inc. v. County of Goodhue*, 741 N.W. 2d 880 2007 Minn. LEXIS 775 at *20 (Minn. 2007).

supra. In *Herb Soc. Of Am., Inc. v. Tracy* (1994), 71 Ohio St.3d 374, 643 N.E.2d 1132, the Court reversed the BTA and determined the entity was a charity after considering R.C. 5709.12, 5709.121, *Planned Parenthood Assn, supra, Am. Humanist Assn., Inc. v. Bd. of Tax Appeals* (1963), 174 Ohio St. 545, 190 N.E.2d 685. In *Case Western Res. Univ. v. Tracy* (1999), 84 Ohio St.3d 316, 703 N.E.2d 1240, the Court determined certain entities were charitable after also considering the same authority. In *Olmsted Falls Bd. of Educ. v. Tracy* (1997), 77 Ohio St.3d 393, 674 N.E.2d 690, the Court reversed the finding of the BTA that the applicant was a charitable institution to qualify for exemption under the same precedent. Even in *Akron Golf Charities, Inc. v. Limbach* (1987), 34 Ohio St. 3d 11, 516 N.E.2d 222, the Supreme Court mentioned that the appellant had a federal tax exemption at the beginning of its opinion and did not discuss the issue again.

Both Northeast and Ohio Council claim that decisions of the BTA in determining whether an entity is a charity are irreconcilable due to the outcome of the BTA's decisions. Ohio Council cited 17 cases involving a 501(c)(3) entity for which the BTA found the entity to be charity in 9 of the case but did not do so in 8 of the cases. Ohio Council argues that the zigzag landscape of Board decisions calls out for guidance from this Court" through the establishment of by this Court of a presumption that a 501(c)(3) entity is a charity for purposes of R.C. 5709.121. Ohio Council pleads for the Court to provide a per se charitable status to any 501(c)(3) in place of the BTA following long-standing statutory provisions of the Ohio General Assembly and case law to provide greater predictability of BTA cases.

The claimed zigzag landscape of Board decisions is on account of the success and failure of entities to meet the legal requirements established in Ohio law. In fact, there is consistency of the decisions of this Court, the BTA, and the Tax Commissioner in the reliance in making the

determination of the charitable status of an applicant based on R.C. 5709.12 and 5709.121 and well-established case law.

Although Section C of the Proposition of Law proffered by Ohio Council claims that Courts in other states use section 501(c)(3) as the hallmark of state tax law immunity, the only decision cited by Ohio Council is a Kansas Supreme Court decision acknowledged by Ohio Council to not be controlling and which provides for the 501(c)(3) status to be given great weight for a property tax exemption application. *Presbyterian Manors, Inc. v. Douglas County* (Kan. 2000), 998 P.2d 88.[3]

D. The activities of the applicant itself must be considered when reviewing a claimed charitable exemption.

Another erroneous argument of Northeast in Section C of Proposition of Law No. 3 is that it is entitled to be a charity on account of the stated purposes in the Articles of Incorporation to promote mental health.

The presence or absence of a statement of exclusive charitable purpose in the Articles of Incorporation is neither determinative nor necessary in deciding tax status. *Carmelite Sisters, St. Rita's Home v. Bd. of Review* (1969), 18 Ohio St.2d 41, 247 N.E.2d 477; *Planned Parenthood Assn, supra*; Herbert, J., concurring opinion, in *In re Application of American Legion* (1969), 20

[3] The BTA in *Columbus Board of Education v. Limbach*, et al, (June 26, 1992), BTA Case Number 86-H-566, unreported, points out the following:
"And all the cases in other states which the Board has discovered have held that charitable exemption from real property tax under state law is in no way determined by exemption under IRC. 501(C)(3). *American Water Works Ass'n v. Bd. of Assessment Appeals*, (Ct. App., Colo., 1976) 563 P. 2d 359, 362, 38 Colo. App. 341; *People ex rel County Collector v. Hopedate Med. Foundation*, (S. Ct. Ill., 1970) 264 N.E. 2d 4, 11, 46 Ill. 2d 450; *Decatur Sports Foundation v. Dept. of Revenue*, (Ill. App., 4 Dist., 1988) 532 N.E. 2d 576, 582, 126 Ill. Dec. 891, 177 Ill App. 696; *Comptroller of the Treasury v. Md. State Bar Assoc.*, (Ct. App. Md., 1989) 552 A 2d 1268, 1273, 314 Md. 655. *Scripture Union v. Deitsch*, (Cmwlth Ct. Pa., 1987) 531 A 2d 64, 67 109 Pa. Cmwlth 272; *Experiment in International. Living, Inc., v. Town of Brattleboro*, (S.Ct. Vt. 1968) 238 A 2d 782, 786 127 Vt. 41; Fletcher Farm, Inc. v. Town of Cavendish, (S. Ct. Vt. 1979) 409 A 2d 569, 570, 137 Vt. 582."

Ohio St.2d 121, 123, 254 N.E.2d 21. The character of any nonprofit corporation must be found in its motives, its charter, its purposes, its methods, and its operation. *Joint Hospital Services v. Lindley* (1977), 52 Ohio St.2d 153; 370 N.E.2d 474; *Maumee Valley Broadcasting Assn. v. Porterfield* (1972), 29 Ohio St.2d 95, 97-98, 279 N.E.2d 863; *Akron Golf Charities, supra.*

Northeast focuses on *Akron Golf Charities, supra*, a case involving the sales and use tax exemption in R.C. 5739.02(B)(12) for nonprofit corporations operated exclusively for charitable purposes. The case involved a nonprofit corporation which sponsored profit-making golf tournaments and then distributed the net proceeds to various charitable organizations. The Court of Appeals for Summit County affirmed a finding of the BTA that Akron Golf was not in and of itself a charitable organization, but rather, a profit-making enterprise which in turn made donations to charities. Thus, the sales tax exemption had been denied.

In reversing the two lower decisions, the Supreme Court looked to the operation of Akron Golf Charities, Inc. and disagreed with the conclusion of the BTA that the operation of a golf tournament merely to raise revenue to local charities is a profit-making endeavor merely because the World Series of Golf is a major sporting event and that the applicant retains a reserve for future contingencies." According to Northeast, "since the Institute's purpose and its operations on the Disputed Property serve the charitable purpose of mental health care for those unable to pay, properly focused analysis shows that exemption is warranted." (Northeast brief p. 28). However, the inquiry as to whether an entity is a charity is not limited to leasing space to Portage Path. While Akron Golf Charities limited its operations to running a golf tournament to raise money for local charities and was found to be a charitable institution, the operations of Northeast extend far beyond leasing space at the subject property to Portage Path (for Portage Path to make lease payments in place of a mortgage payment) as Northeast engages in commercial activities

such as leasing property to for-profit entities, operating placement services, and operating a medical clinic, all of which are in competition with for-profit entities. While Northeast attempts to minimize the commercial activities by arguing it collects negligible rents or other revenues from activities not conducted on premises for which exemption is sought, nearly all of the revenue generated from Northeast are from these activities.

E. The General Assembly has enacted the limited use of 501(c)(3) status as a factor for certain exemption matters and has not indicated that 501(c)(3) status should create a conclusive presumption of charitable status under Ohio law.

Northeast in Section D of Proposition of No. 3 and Ohio Council in the Proposition of Law conclude that the General Assembly's reference in two limited circumstances to an entity's 501(c)(3) status opens the door for this Court to find that the General Assembly intended in every case that an entity's 501(c)(3) status creates a conclusive presumption of the charitable status of the entity. Both Northeast and Ohio Council acknowledge the enactment of R.C. 5709.12(D)(1) and R.C. 5709.12(E) was in response to decisions of the BTA in *Columbus Board of Education v. Limbach, et al.,* (June 26, 1992) BTA Number 86-H-566, unreported, and *Rehab Project v. Tracy* (May 23, 1997), BTA Case Number 95-R-418, unreported, respectively. After arguing that these statutes establish charitable status for certain entities denied tax exemption in two cases, Ohio Council proceeds to erroneously conclude that the "the only plausible inference from the legislative invocation of section 501(c)(3) status in repudiating those BTA decisions is that the General Assembly views 501(c)(3) status as a legitimate indicator that an entity should also enjoy state tax immunity from real property taxes." Further, Ohio Council implores "the Court to take this legislative cue and eliminate the confusion that confronts litigants before the BTA and other tribunals in property tax exemption cases." It is far-fetched for Northeast and Ohio Council to conclude that the reference to section 501(c)(3) status in

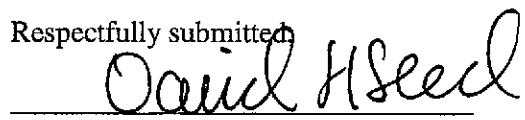
limited circumstances is a compelling endorsement by the General Assembly for the use of section 501(c)(3) status as a threshold test for state charitable tax exemption decisions. If the General Assembly intends for there to be a presumption that a 501(c)(3) non-profit is a charity for all tax exemption applications under R.C. 5709.121, it can do so through legislation. By not outright amending R.C. 5709.12(B), the General Assembly is expressing a legislative intent for the reliance on 501(c)(3) status in two limited cases and the continued ability of the BTA and this Court to follow well-established Ohio law to make the determination as to whether an entity is a charity.

Finally, Northeast's reliance on *88/96 LP v. Wilkins* (July 20, 2007), BTA Case Number 2005-A-55, unreported, is misplaced. Here, the BTA did not address whether entity was a charitable institution under R.C. 5709.121 as the exemption application was filed under R.C. 5709.12. As to whether the property was being used exclusively for charitable purposes, the Tax Commissioner's position was that the identity of ownership and use must exist in order to establish an exemption. See *Thomaston Woods Ltd. Partnership*, *supra*; *Evans Investment Company*, *supra*. The BTA disagreed and held that "... the facts in the aforementioned case law are distinguishable from those in the instant matter." Further, "herein, the owner, a limited partnership, does not lease the subject premises to another for use, as occurred in the foregoing cases." Here, the subject property is owned by a separate legal entity which carries on multiple businesses in operating a professional placement service and medical clinics in competition with for-profit businesses. Further, the instant matter does not involve a limited liability company renting back to its sole member and thus a provision in Am. Sub. H.B. 160 is not applicable.

IV. CONCLUSION

Ohio School Boards Organizations respectfully request the Court to affirm the Decision of the BTA that Northeast is not a charitable institution and does not use the property exclusively for charitable purposes. R.C. 5709.12, 5709.121. Further, the Ohio School Boards Organizations request this Court to reject the Propositions of Law advanced by Northeast and Ohio Council.

Respectfully submitted,



Daniel McIntyre (0051220)
David H. Seed (0066033) (Counsel of Record)
Brindza McIntyre & Seed LLP
1111 Superior Avenue, Suite 1025
Cleveland, OH 44114
Telephone No.: (216) 621-5900
Facsimile No.: (216) 621-5901
dseed@bms-law.com
dmcintyre@bms-law.com

Attorneys for *Amicus Curiae*,
Ohio School Boards Association, Ohio Association of School Business Officials, and Buckeye Association of School Administrators

APPENDIX

Final Determination of Tax Commissioner C-1

Constitutional Provision:

Article XII, Section 2 ..... C-6

Cases:

88/96 LP v. Wilkins (July 20, 2007), BTA Case Number 2005-A-55, unreported... C-8

City of Lewiston v. Marcotte Congregate Housing, Inc., 673 A.2d 209 (Me. 1996) C-18

Columbus Board of Education v. Limbach, et al. (June 26, 1992), BTA Number 86-H-566, unreported C-25

Dayton Art Inst. v. Limbach (June 19, 1992), BTA Case Number 1986-A-521, Unreported C-62

Hilty Memorial Home v. Limbach (March 19, 1993), BTA Case Number 90-A-504, unreported C-67

Humane Society Foundation of Hancock County v. Tracy (Oct. 15, 1999), BTA Case Number 1998-J-884, unreported C-74

Jewish Community Ctr. of Cleveland v. Limbach (June 30, 1992), BTA Case Number 1988-A-124, unreported C-79

Madisonville Community Urban Redevelopment Corp. v. Tracy (March 2, 2001), BTA Case Number 1998-L-858, unreported C-87

Miami Valley Research Foundation v. Tracy (June 17, 1994), BTA Case Number 91-J-161, unreported C-93

New Covenant Believers Church v. Zaino (May 21, 2004), BTA Case Number 2002-B-926 ..... C-98

Presbyterian Manors, Inc. v. Douglas County (Kan. 2000) 998 P.2d 88 ..... C-109

Rehab Project v. Tracy (May 23, 1997), BTA Case Number 95-R-418, Unreported C-120

Seven Hills Schools v. Tracy (June 11, 1999), BTA Case Number 1997-M-1572, unreported C-131

Thomaston Woods Limited Partnership v. Lawrence (June 15, 2001),
BTA Case Number 1999-L-551, unreported C-135

Under the Rainbow Child Care Center, Inc. v. County of Goodhue,
741 N.W. 2d 880, 2007 Minn. LEXIS 775 at *20 (Minn. 2007) C-142

University of Cincinnati Medical Associates, Inc. v. Zaino (October 4, 2002),
BTA Case Number 99-A-1411 ..... C-168

Victory Church v. Illinois Department of Revenue, 264 Ill.App.3d 919,
637 N.E.2d 463 (Ill. App. 1994) C-176

Youngstown Area Jewish Fedn. v. Limbach (June 30, 1992),
BTA Case Number 1988-G-117, unreported C-181

Youngstown Revitalization Foundation v. Limbach (Jan. 11, 1991),
BTA Case Number 87-D-1127, unreported C-186

Statute
R.C. 5715.27 ..... C-189

0000000258

FINAL DETERMINATION

Date: OCT 07 2005

Northeast Ohio Psychiatric Institute
c/o Jay P. Porter Esq.
Vorys, Sater, Seymour and Pease LLP
First National Tower
106 South Main Street
Akron, OH 44308

Re:	DTE No.:	JE 2538
	Auditor's No.:	9010
	County:	Summit
	School District:	Cuyahoga Falls SD
	Parcel Numbers:	0217808
		0215708
		0206041
		0206040
		0206039

This is the final determination of the Tax Commissioner on an application for exemption of real property from taxation filed on July 30, 2003, seeking exemption for the 2003 tax year.

In response to the recommendation of the attorney examiner, dated August 1, 2005, the applicant submitted written objections, which have been considered by this Department. On review of the applicant's objections, the Tax Commissioner finds that neither the factual objections nor the objections to the legal interpretation of applicable statutes is sufficient to overcome the recommendation of the attorney examiner.

Namely, the applicant submits that, while the property leased to private for-profit entities is not entitled to exemption, the property leased to Portage Path Behavioral Health ("Portage Path") meets the requirements for exemption because Portage Path is a charitable institution that uses the property to provide mental health services to the public. The applicant further submits that said leased property is entitled to exemption whether or not the property owner, Northeast Ohio Psychiatric Institute ("Northeast") is a charitable entity or not. Even if Portage Path were to be considered a charitable entity, the 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. As such the property does not meet the requirements for exemption pursuant to either R.C. 5709.12 or R.C. 5709.121 as requested by the applicant, because the applicant uses the property for commercial leasing

purposes. See, *New Covenant Believers Church v Zaino* (May 21, 2004), BTA No. 2002-B-926, wherein the Board of Tax Appeals held that even where the property is owned by a non-profit entity and used by a lessee for charitable purposes, the primary use of the property by the owner is leasing and there is no exempt use no matter how small the rent or revenue generated therefrom.

The property is comprised of a 5,666 sq. ft. office building with grounds. The applicant Northeast Ohio Psychiatric Institute, an entity that supports or promotes mental health care through leasing facilities and providing outsourced medical staffing to businesses, earned a combined total of approximately $1.24 million dollars in 2003, including $932,446.00 from its medical staffing program, $179,347.00 from its rental income, $130,185.00 from insurance and fee payments, and $5,799.00 from parking and miscellaneous fees.

It is noted that even though the applicant acquires property to lease to others, it is not in the nature of an Internal Revenue Service ("IRS") section 501(c)(2) exempt property holding organization because it does not turn over its entire income to another related non-profit entity. The applicant instead provides business support for mental health by providing fee based staff and acquiring and leasing property to for-profit and not-for-profit mental health providers. Although organized as an IRS 501(c)(3) corporation there is no evidence in the record that shows that the applicant is a charitable entity. It is a non-profit corporation formed to acquire, hold and lease property and provide outsourced medical staffing to others. Northeast also offers fee based consulting services in the areas of clinic operations, quality assurance, accounting and finance, marketing and public relations, billing, and executive management. Northeast's subsidiary businesses include PsychStaffing, which provides fee based "independent contractor" medical staffing to employers, billed at an hourly rate; Summit Employee Assistance, which offers capitated and fee-for-service programs; Lifescapes Personal Development Center, a private clinic; and Portage Path Behavioral Health. Northeast leases the property to three tenants: Its non-profit subsidiary Portage; an individual named David N. Baer; and for-profit Barberton Health System LLC ("Barberton"). The record reflects that 3,562 sq. ft. of the building is leased to Portage at a rent of $5,500.00 per month; 1,425 sq. ft. is leased to David Baer at a rent of $1,525.00 per month; and 713 sq. ft. is leased to Barberton at a rent of $900.00 per month. As well, the approximately 5,000 sq. ft. parking area is open to all tenants on a first come first served basis, thereby permitting the for-profit tenants access to occupy the entire parking area.

The applicant does not seek exemption for the property leased to or used by the for-profit entities David Baer and Barberton. The applicant seeks exemption only for the property leased to its health care company subsidiary Portage, which entity earns yearly revenue of about $10 million from its mental health related programs and activities. The fees charged by Portage range from $35.00 per day for a crisis bed to $300.00 to $544.00 per hour for inpatient psychiatric services and crisis intervention mental health services. There is no evidence in the record that the applicant provides its care at no charge or at a sliding scale for persons who cannot afford the costs of treatment.

The applicant states that it owns other property that is exempt from taxation as used for charitable purposes. It is noted that R.C. 5713.271 provides "in 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. The fact that property has previously

been granted an exemption is not evidence that it is entitled to continued exemption". Further, while certain property owned by the applicant has been granted exemption, other property owned by it has been denied exemption as not being owned by a charity and not used for a charitable purpose. See Final Determination dated November 28, 1989 (DTE No. UE 1368) granting exemption, and Final Determination dated April 30, 1991 (DTE No. UE 1805) denying the request for exemption as being leased property.

In *Episcopal Parish v. Kinney* (1979), 58 Ohio St. 2d 199, the Supreme Court defined the charitable use provisions of R.C. 5709.12 as follows:

> R.C. 5709.12 states "*** real and tangible personal property belonging to an institution that is used exclusively for charitable purposes shall be exempt from taxation." *** The legislative definition of exclusive charitable use found in R.C. 5709.121, however, applies only to property "belonging to, 'i.e. owned by' a charitable or educational institution, or the state or a political subdivision."

R.C. 5709.12(B), then, applies to property owned by an institution and used exclusively for a charitable purpose. Therefore, in order to be entitled to exemption under R.C. 5709.12(B), two requirements must be met: (1) the property must belong to an institution, and (2) the property must be used exclusively for charitable purposes. *Highland Park Owners, Inc. v. Tracy* (1994), 71 Ohio St.3d 405. The Supreme Court has defined "charity" as "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 for 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." *Planned Parenthood Association v. Tax Commissioner* (1966), 5 Ohio St. 2d 117.

The Court held that a "private, profit-making venture does not use property exclusively for charitable purposes". *Highland Park* at 406-407. As well, property used for the non-exempt purpose of generating revenue or making a profit is not exempt from taxation, even though the profit may be employed for purposes that are charitable. *Zindorf v. The Otterbein Press* (1941), 138 Ohio St. 287; *National Headquarters, D.A.V. v. Bowers* (1960), 171 Ohio St. 312; *Columbus Youth League v. Board of Revision* (1961), 172 Ohio St. 156. Here, the leased subject property is used by Northeast to earn $95,100.00 in annual rental income for itself, while the lessee companies and individuals operate for-profit or revenue generating businesses from the property. See, also, *Reuben Anaya v. Lawrence* (Jun. 30, 2000), BTA No. 99-S-1308, wherein the Board of Tax Appeals ("Board") held that property owned or used by an individual does not meet the requirements of an institution for exemption purposes.

In *Thomaston Woods Limited Partnership v. Lawrence* (Jun. 15, 2001), BTA No. 99-L-551, the Board held that commercially leased property does not meet the requirements for exemption under either R.C. 5709.12 or R.C. 5709.121. The Board found that both the lessor and lessee of property must be either a charitable, educational or public entity, and the property cannot be commercially leased. See, *Bethesda Healthcare, Inc. v. Wilkins* (2004), 101 Ohio St.3d 420. Here, portions of the property, including the entire parking areas, are commercially leased to or

used by individuals or for-profit entities and the requirements for exemption are therefore not met. See, also, *New Covenant,* supra, wherein the Board held that no exemption is warranted under R.C. 5709.12 where the primary use by the owner is leasing.

Additionally, R.C. 5709.121 provides that exemption is warranted where: (1) the property owner is a charitable, public, or educational institution, and (2) the property is used by or made available to a charitable, public, or educational institution for an educational, charitable or public purpose or the property is used by a charitable owner in furtherance of or incidental to that owner's charitable purpose. As stated above, there is no evidence that the applicant is a charitable entity, nor is the property leased to a charitable, educational or public institution. The applicant is more in the nature of a business consultant and employment agency, providing medical staffing to other entities at a revenue generating charge of about one million dollars per year. In *White Cross Hospital Ass'n v. Board of Tax Appeals* (1974), 38 Ohio St. 2d 199, Justice Stern found that providing for-profit medical staffing or space for the private practice of staff physicians is not "in furtherance of or incidental to" any charitable purpose. The applicant's business operation, involving providing medical staff for a fee, collecting insurance payments and fees, and operating a revenue generating leased office building and parking areas, is found to be more like and in competition with area for-profit medical staffing agencies and rental companies than with the charitable entities described in *Planned Parenthood*, supra. See, *Bethesda Healthcare,* supra; *The Lutheran Book Shop v. Bowers* (1955), 164 Ohio St. 359, wherein the Court affirmed denial of a business owned by a corporation that operated "in competition with commercial concerns in the same line *** even though such corporation be one formed not for profit". See, also, *Youngstown Revitalization Foundation v. Limbach,* (Jan. 11, 1991), BTA No. 87-D-1127; *Case Western Reserve Univ. v. Tracy* (1999), 84 Ohio St.3d 316, wherein it was found that the aid or promotion of business development was not a charitable activity.

Finally, in *Cleveland Osteopathic Hospital v. Zangerle* (1950), 153 Ohio St. 222, the Court restated the tenet that where a health care organization "extends its facilities and services very largely to those who are able to and do pay the established rates for their accommodation *** it places itself in the classification of a business enterprise amenable to taxation, notwithstanding that some unfortunate persons without means are cared for free of charge". *Id.* at 227; *Vick v. Cleveland Memorial Medical Foundation* (1965), 2 Ohio St.2d 30. Even where an applicant's goal for its facility is to merely "break even" on its expenses, the Board held that "operating at a loss, in and of itself, does not necessarily equate to operating as a non-profit or charitable organization". *Missionary Church, Ohio District, Inc./ d.b.a., Hilty Memorial Home v. Limbach* (Mar. 19, 1993), BTA No. 90-A-504. Here, there is no evidence that the applicant provides any services without regard to ability to pay for such services. Therefore, its services cannot be said to be charitable, but more in the nature of a business.

Applying the statutes and case law cited above, the leased property, used for the purpose of leasing by the non-charitable owner and used by the various entities for business purposes, is not used exclusively for a charitable purpose and does not meet the requirements for exemption under R.C. 5709.12 or R.C. 5709.121.

The Tax Commissioner finds that the property described in the application is not entitled to be exempt from taxation and the application is therefore denied for reasons set forth above.

The Tax Commissioner further orders that all penalties charged for the 2003 and 2004 tax years be remitted.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. NOTICE WILL BE SENT PURSUANT TO R.C. 5715.27 TO THE COUNTY AUDITOR. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED, AND THE FILE APPROPRIATELY CLOSED.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE COPY OF THE FINAL DETERMINATION RECORDED IN THE TAX COMMISSIONER'S JOURNAL

William W. Wilkins
WILLIAM W. WILKINS
TAX COMMISSIONER

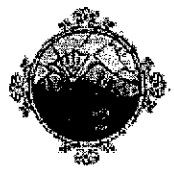
/s/ William W. Wilkins

William W. Wilkins
Tax Commissioner

cc:

Carol Mahaffey
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
PO Box 1008
Columbus, OH 43216-1008

127th OHIO GENERAL ASSEMBLY



2007-2008

The Ohio Constitution

[The 1851 Constitution with Amendments to 2006]

View the entire Ohio Constitution in pdf format

OR

Search the Constitution by Keyword:

Search Reset

§ 12.02 Limitation on tax rate; exemption

[View Article Table of Contents]

No property, taxed according to value, shall be so taxed in excess of one per cent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation. Land and improvements thereon shall be taxed by uniform rule according to value, except that laws may be passed to reduce taxes by providing for a reduction in value of the homestead of permanently and totally disabled residents, residents sixty-five years of age and older, and residents sixty years of age or older who are surviving spouses of deceased residents who were sixty-five years of age or older or permanently and totally disabled and receiving a reduction in the value of their homestead at the time of death, provided the surviving spouse continues to reside in a qualifying homestead, and providing for income and other qualifications to obtain such reduction. Without limiting the general power, subject to the provisions of Article I of this constitution, to determine the

C-6

subjects and methods of taxation or exemptions therefrom, general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose, but all such laws shall be subject to alteration or repeal; and the value of all property so exempted shall, from time to time, be ascertained and published as may be directed by law.

(Adopted November 6, 1990).

(Amended, effective July 1, 1975; HJR No.59.)

[Back to Main Table of Contents]-[Back to Top of Page]

This site is not the official publication of Ohio's Constitution. For the official publication, please contact the Secretary of State's office. This version is published with approval from
the Secretary of State's office. To report any problems with this site, or errors to the content,
please write to the webmaster.

Please send questions and comments to the Webmaster.
© 2008 Legislative Information Systems | Disclaimer
Index of Legislative Web Sites

C-7

*2007 Ohio Tax LEXIS 1018, **

88/96 LP and Community Housing Network, its General Partner, Appellant, vs. William W. Wilkins, Tax Commissioner of Ohio, Appellee.

CASE NO. **2005-A-55** (REAL PROPERTY TAX EXEMPTION)

STATE OF OHIO -- BOARD OF TAX APPEALS

2007 Ohio Tax LEXIS 1018

July 20, 2007

[*1]

APPEARANCES

For the Appellant - Vorys, Sater, Seymour and Pease LLP, Blake A. Snider, 52 East Gay Street, P.O. Box 1008, Columbus, Ohio 43216-1008

For the Appellee - Marc Dann, Attorney General of Ohio, Janyce C. Katz, Assistant Attorney General, Taxation Section, State Office Tower - 25<th> Floor, 30 East Broad Street, Columbus, Ohio 43215

OPINION:
DECISION AND ORDER

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

This matter is before the Board of Tax Appeals upon a notice of appeal filed by appellant 88/96 LP and Community Housing Network, its General Partner ("88/96"). 88/96 appeals from a final determination of the Tax Commissioner, in which the commissioner denied its application for exemption of real property from taxation for tax year 2002, but granted remission of all penalties charged for tax year 2002. This matter is submitted to the board based upon the appellant's notice of appeal, the statutory transcript ("S.T."), the record of the hearing before this board ("H.R."), including exhibits, and the briefs of counsel.

In his final determination, the Tax Commissioner summarized the facts of the instant matter, as follows:

> "The applicant, a for-profit limited partnership, **[*2]** seeks exemption for property used as a mental health or drug and alcohol addiction services facility. The facility provides housing and on-site programs and services to its program participants, including on-site case management and outreach. The for-profit 88/96 Limited Partnership that owns the property is comprised of two partners. Community Housing Network *** is a non-profit entity that became a 0.1% general partner of 88/96 LP in 2001, while Ohio Equity Fund for Housing Limited Partnership IX *** is a 99.9% for-profit limited partner of the partnership. The property is then leased to or used by Community Housing Network under a management agreement to provide the programs and services described above. The record shows that the property has been used in the CHN programs since January of 2002. The property was vacant or unused prior to that. The record also shows that the Equity Fund also invests in other property and provides equity capital financing to the members of the Equity Fund's parent group, Ohio Capital Corporation for Housing.

C-8

"According to the 88/96 Limited Partnership agreement, the purpose of the partnership is to acquire property for use as low-income housing, **[*3]** and to eventually sell the property, and the partnership shall exist until dissolved or terminated, with assets distributed according to percentage of ownership and contributions made to the venture. CHN made a contribution to the partnership of $ 1.00, while the for-profit Equity Fund made an aggregate contribution of approximately $ 250,000.00. CHN assigned to the partnership all of its interests in the property and the Equity Fund is entitled to receive a cash return for its investment.

"The Equity Fund is also entitled to 99.9% of any profits made by the partnership, as well as an equal percentage of depreciation and tax credits, with all cash flow allocations first distributed to the Equity Fund. Upon dissolution and winding up of the partnership, the assets are distributed to the for-profit and general partners in accordance with their contributions or debts, including a 99.9% distribution of capital to the Equity Fund." S.T. at 2-3.

Based upon the Tax Commissioner's foregoing findings of fact, he concluded that "since the property is owned by a for-profit entity, it does not meet the requirements for exemption," and therefore, the taxpayer's application for exemption **[*4]** was denied. S.T. at 5.

In response to the foregoing determination by the Tax Commissioner, the appellant filed a notice of appeal with this board, specifying the following errors:

"(1) The Tax Commissioner erred in failing to find that the property located at 88-96 North 22nd Avenue in the City of Columbus, Ohio *** is exempt from ad valorem taxation pursuant to §§ 5709.12 and 5709.121 of the Ohio Revised Code ***.

"(2) The Tax Commissioner erred in failing to find that the Disputed Property is owned by an institution and used exclusively for charitable purposes pursuant to R.C. 5709.12(B).

"(3) The Tax Commissioner erred in finding as a matter of fact that the Disputed Property is used 'merely as subsidized housing' when the facts show that the Disputed Property is used as housing with supervision and support services provided for individuals who suffer from chronic mental illness and/or substance abuse and but for such housing would be homeless or wards of the State of Ohio.

"(4) The Tax Commissioner erred in finding that 88/96 can sell the Disputed Property and keep the revenue from the operation and sale of the Disputed Property.

"(5) The Tax Commissioner misconstrued **[*5]** the holding of the Ohio Supreme Court in *Highland Park Owners, Inc. v. Tracy* (1994), 71 Ohio St.3d 406***.

"(6) The Tax Commissioner erred in his reliance on the Board's decision in *Thomaston Woods Limited Partnership v. Lawrence* (June 15, 2001), BTA No. 99-L-551***.

"(7) The Tax Commissioner erred in failing to find that the Disputed Property 'belongs to' CHN for purposes of R.C. 5709.121 ***.

"(8) The Tax Commissioner erred in failing to find that the Disputed Property is

C - 9

'real property *** belonging to a charitable *** institution' which 'is used by [a charitable] institution, *** under a lease, sublease, or other contractual arrangement' *** '[f]or other charitable *** purposes' pursuant to R.C. 5709.121 (A)(2).

"(9) The Tax Commissioner erred in failing to find that the Disputed Property 'is made available under the direction or control of [CHN, a charitable] institution, *** for use in furtherance of or incidental to its charitable *** purposes and not with the view to profit' as defined in R.C. 5709.121(B).

"(10) The Tax Commissioner erred in failing to find that the ownership structure of the Disputed Property is merely a means to **[*6]** finance CHN's acquisition of the Disputed Property similar to that of a mortgage and should not prevent the exemption for a charitable use.

"(11) The Tax Commissioner's denial of real property tax exemption to the Disputed Property pursuant to R.C. 5709.12 and R.C. 5709.121 elevates form over substance causing like properties to be taxed differently thereby violating the 'Uniform Rule' under § 2, Article XII of the Ohio Constitution and denying equal protection under § 2, Article I of the Ohio Constitution and the Fourteenth Amendment of the United States Constitution."

At the hearing before this board, appellant presented the testimony of Mr. John F. Kukura III, chief of acquisitions for the Ohio Capital Corporation for Housing, Ms. Susan E. Weaver, executive director and CEO of the Community Housing Network, and Mr. Michael A. Tynan, Director of Housing Services for the Community Housing Network. The appellee Tax Commissioner did not present any witnesses.

We begin our review by observing that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121, 123. Consequently, it is incumbent **[*7]** upon a taxpayer challenging a determination of the Tax Commissioner to rebut that presumption. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135, 143; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138, 142. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213, 215. When no competent and/or probative evidence is developed and properly presented to the board to establish that the commissioner's determination is "clearly unreasonable or unlawful," the determination is presumed to be correct. *Alcan Aluminum,* at 123.

The rule in Ohio is that all real property is subject to taxation. R.C. 5709.01. Exemption from taxation is the exception to the rule. *Seven Hills Schools v. Kinney* (1986), 28 Ohio St.3d 186. The burden of establishing that real property should be exempt is on the taxpayer. Exemption statutes must be strictly construed. *American Society for Metals v. Limbach* (1991), 59 Ohio St.3d 38; **[*8]** *Faith Fellowship Ministries, Inc. v. Limbach* (1987), 32 Ohio St.3d 432; *White Cross Hospital Assn. v. Bd. of Tax Appeals* (1974), 38 Ohio St.2d 199; *Goldman v. Robert E. Bentley Post* (1952), 158 Ohio St. 205; *Natl. Tube Co. v. Glander* (1952), 157 Ohio St. 407; and *Willys-Overland Motors, Inc. v. Evatt* (1943), 141 Ohio St. 402.

The subject property qualifies as low income housing subject to HUD section 8 rent subsidies and is described as follows:

"The property is in a residential neighborhood. It is somewhat transitional, but there are very strong efforts in the neighborhood to bring about a stronger and

C-10

healthier neighborhood so there will be more stability. It is part of the Near East Area Commission, which is devoted to trying to bring that neighborhood back up to higher standards.

"There are two apartment buildings that face each other across a parking lot. Each of the buildings has two entrances to the apartments. And there are eight apartments - that are accessed by each of these entrances, four on the ground floor and **[*9]** four on the second floor. So there are a total of 16 apartments in each building and all totaled, 32 apartments in the complex.

"***

"Each of the apartments basically follows a plan of a one-bedroom apartment. There is a living area, a bedroom and a kitchenette off of the living area, and a bathroom with a tub and shower." H.R. at 227, 229.

In addition, a basement in one of the buildings is available for use by tenants and case managers or other social organizations for meeting purposes. H.R. at 198-199.

To live in the subject complex, residents must meet certain admission criteria:

"[O]ne of the admission criteria is that the tenants be chronically homeless. I like to use the term long-term homeless as opposed to chronically homeless. And long term is defined by the Community Shelter Board as at least 120 days of living in a shelter and/or on the streets or four different shelter stays -- three different shelter stays within the past two years, which indicates a certain level of instability as far as housing goes.

"They also need to have some sort of a disability, whether it's mental health and/or chemical dependency, what we sometimes call dual diagnosis. The individuals **[*10]** must be able to live independently so they can take care of an apartment with suggestion from case managers or assistance from a resident manager.

"But they're able to cook for themselves. They're able to provide food either from shelters, that is pantries that the resident managers might help them locate in the neighborhood or from -that they are able to procure from their other income." H.R. at 234.

There are no vacancies at the subject property, as there is always a waiting list of prospective tenants. Approximately 85% of the tenants stay for 12 months or longer. H.R. at 261. Tenants pay rent based upon their ability to pay, with the average tenant paying approximately $ 170 per month, with the minimum being $ 50 per month and maximum being market rate (approximately $ 430-$ 450 per month). H.R. at 262.

Through its notice of appeal, appellant seeks exemption for the subject property pursuant to both R.C. 5709.12 and R.C. 5709.121. However, on its application for real property tax exemption and remission, appellant only sought exemption pursuant to R. C. 5709.12. n1 S.T. at 110. Therefore, we may only consider appellant's ability to qualify for exemption under such section. **[*11]** See *City of Grove City v. Zaino* (Sept. 24, 2004), BTA No. 2003-K-722, unreported.

C-11

n1 We note that the Tax Commissioner's hearing examiner's recommendation discusses the exemption application in light of the provisions of R.C. 5709.121, S.T. at 12-14; however the commissioner's final determination substantively addresses only the applicability of R.C. 5709.12. S.T. 2-5.

Since we are limited to making a determination as to whether 88/96 qualifies for exemption pursuant to R.C. 5709.12, we first note that R.C. 5709.12(B) specifically provides that "[r]eal *** property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation." In *Highland Park Owners, Inc. v. Tracy* (1994), 71 Ohio St.3d 405, the court succinctly set forth the requirements imposed by R.C. 5709.12 for obtaining exemption:

> "[T]o grant exemption under R.C. 5709.12, the arbiter must determine that (1) the property belongs to an institution, n2 and (2) the property is being used exclusively for charitable purposes. We have held that a private profit-making venture does not use property exclusively for charitable purposes. *Cullitan v. Cunningham Sanitarium* (1938), 134 Ohio St. 99 **[*12]** ***; *Cleveland Osteopathic Hosp. v. Zangerle* (1950), 153 Ohio St. 222 ***; *Lincoln Mem. Hosp., Inc. v. Warren* (1968), 13 Ohio St.2d 109 ***. Nevertheless, '"any institution, irrespective of its charitable or non-charitable character, may take advantage of a tax exemption if it is making exclusive charitable use of its property."' *Episcopal Parish v. Kinney,* supra, 58 Ohio St.2d at 201 ***. As the BTA concluded, the applicant for exemption under R.C. 5709.12 need not be a charitable institution, but simply an institution." Id. at 406-407. (Parallel citations omitted and emphasis sic.)

n2 In *Highland Park Owners,* supra, at 407, the term "institution" was defined as '"An establishment, especially one of eleemosynary or public character or one affecting a community. An established or organized society or corporation. It may be private in its character, designed for profit to those composing the organization, or public and charitable in its purposes, or educational (e.g. college or university).*** '"

In addition, to qualify for exemption under the above **[*13]** statute, real property must not be used with a view to profit. See *Girl Scouts-Great Trail Council v. Levin,* 113 Ohio St.3d 24, 2007-Ohio-972; *Am. Soc. for Metals,* supra; *Lutheran Book Shop v. Bowers* (1955), 164 Ohio St. 359. See, also, *Seven Hills Schools,* supra; *Seven Hills Schools v. Tracy* (June 11, 1999), BTA No. 1997-M-1572, unreported; *Youngstown Area Jewish Fedn. v. Limbach* (June 30, 1992), BTA No. 1988-G-117, unreported; *Jewish Community Ctr. of Cleveland v. Limbach* (June 30, 1992), BTA No. 1988-A-124, unreported; and *Dayton Art Inst. v. Limbach* (June 19, 1992), BTA No. 1986-A-521, unreported.

In the present matter, we find that 88/96, a limited partnership, is necessarily an "institution" for the purposes of the first prong of the test found in *Highland Park Owners, Inc.,* supra. In *Thomaston Woods Ltd. Partnership v. Lawrence* (June 15, 2001), BTA No. 1999-L-551, unreported, we considered the very same issue. Therein, we held:

> "In the instant case, the Appellant is a limited partnership organized to develop low-income housing. **[*14]** The Tax Commissioner has concluded that Appellant is not an 'institution' for purposes of R.C. 5709.12(B). The Tax Commissioner distinguishes the meaning of 'institution' as announced in *Highland Park Owners, Inc., supra,* from the business structure of the Appellant which is organized as a limited partnership.
>
> "In *True Christianity Evangelism v. Tracy* (1999), 87 Ohio St.3d 48, at 50, the

C - 12

Supreme Court noted that the first point of inquiry for exemption under R.C. 5709.12(B) was whether the property belongs to an 'institution.' Citing *Highland Park Owners, Inc., supra,* the Supreme Court concluded as follows:

'"While the nature of an institution seeking exemption for property under R.C. 5709.121 is relevant, *the nature of the institution seeking exemption under* R.C. 5709.12(B) *is not relevant*' Id. at 50-51. (Emphasis added in original.)

"Based upon the Supreme Court's decisions in *Highland Park Owners, Inc., supra,* and *True Christianity Evangelism, supra,* we disagree with the Tax Commissioner's distinction and hold that a limited partnership may be deemed an 'institution' for purposes of R.C. 5709.12(B). There is no specific **[*15]** requirement for corporate status to exist, rather than a limited partnership, to qualify as an 'institution' under R.C. 5709.12(B). This Board concludes that a property owner organized and operating as a limited partnership, whether for charitable or non-charitable purposes, may qualify as an 'institution' under the definition approved in *Highland Park Owners, Inc., supra.* See also *Episcopal Parish, supra.* Although Appellant is not an institution with a charitable purpose, we conclude that the Appellant qualifies as an institution for purposes of R.C. 5709.12(B)." Id. at 6-7.

As to the second prong of the test, we find that the General Assembly has not defined what constitutes "charity." However, the Supreme Court of Ohio held in *Planned Parenthood Assn. of Columbus, Inc. v. Tax Commr.* (1966), 5 Ohio St.2d 117, paragraph one of the syllabus, that:

"[I]n 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, **[*16]** 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."

Furthermore, the phrase "used exclusively" has been interpreted by the court to mean primary use. *True Christian Evangelism v. Zaino* (2001), 91 Ohio St.3d 117, 118. "Whether an institution renders sufficient services to persons who are unable to afford them to be considered as making charitable use of property must be determined on the totality of the circumstances ***." *Bethesda Healthcare, Inc. v. Wilkins,* 101 Ohio St.3d 420, 426, 2004-Ohio-1749.

In the context of whether the subject property was being used exclusively for charitable purposes, it is the Tax Commissioner's position that identity of ownership and use must exist in order to establish an exemption. In *Lincoln Memorial Hospital v. Warren* (1968), 13 Ohio St.2d 109, the court held:

"The evidence herein discloses a situation during the entire time involved where a corporation organized for profit held title to the **[*17]** hospital building and land and for all practical purposes rented the same to a separate nonprofit corporation for enough remuneration to discharge the financial obligations of appellant. Consequently, the 'use' which appellant made of the property was in the nature of a rental arrangement to another and not a 'use' *by it* exclusively for charitable purposes. Id. at 110. (Emphasis sic.)

C - 13

This position has been espoused by this board on several occasions as well. See *Thomaston Woods Ltd. Partnership,* supra; *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 fact, in the instant matter, the commissioner, in his final determination, stated that "[w]hile Community Housing Network has previously sought and been granted exemptions for similar property where services were provided, that property was owned by the not for profit Community Housing Network." S.T. at 4. Thus, it appears that the commissioner has based his denial of exemption not on the uses to which the property is put, but the ownership structure of the subject property. **[*18]** We find, however, that the facts in the aforementioned case law are distinguishable from those in the instant matter. Herein, the owner, a limited partnership, does not lease the subject premises to another for use, as occurred in the foregoing cases. Here, the limited partnership owner, which includes both a limited/for-profit and a general/non-profit partner, in its partnership agreement, clearly states that the purpose of the business of the partnership is to "acquire *** and operate" the subject property as low income housing. Ex. F at § 1.2. In creating such partnership, the limited partner and the general partner created an arrangement whereby the general partner manages the partnership's operation of the subject and furthers the use of the subject for charitable purposes, regardless of each partner's percentage of ownership. n3 Ex. F at § 5.1; Ex. F at Article 7.

n3 We recognize that financial statements show primarily losses or minimal profits for the limited partnership and we acknowledge that the tax credits and related federal income tax benefits, including depreciation on the property, constitute the return the for-profit investors (i.e., the limited partner) receive on their investments. Ex. M; H.R. at 150. It is understood that the for-profit investors really have no expectation of receiving cash "profits." H.R. at 50. **[*19]**

Specifically, at this board's hearing, one of the property owner's witnesses, Ms. Weaver, indicated that the subject serves as "permanent affordable housing linked to a safety net." H.R. at 204. She went on to elaborate that "[t]here is a gap between what other organizations can provide, since they're not located on the site and the needs of the people. And so our safety net under the umbrella of property management is extensive in order to provide the support that people need in order to live in the community. People are very disabled." H.R. at 204-205.

The subject property is managed by the general partner, Community Housing Network, Inc., "CHN," a non-profit entity. A brochure specifically listing the services it offers provides the following:

> "CHN performs all customary property management functions, including both administrative and maintenance/repair. In addition CHN staff facilitate and coordinate interaction among the tenant[s], the supportive service provider, Columbus Metropolitan Housing Authority, the neighborhood, and community. CHN's property management service is a safety net providing extra oversight that serves as an early warning system to alert the primary service **[*20]** provider, avoid a crisis and assist tenants to remain stable and successful in keeping their housing." Ex. N.

An employee of CHN testified that the subject property was created to not only provide housing for the homeless, but also "to provide what we call 'wrap-around services.' We partner with other agencies through various types of agreements in order to provide case management services, mental health treatment, drug and alcohol treatment, health services,

C - 14

and those types of services that will help the individuals develop life skills so that they can continue to live in the apartment. It's not a matter of just getting the individuals to move into the apartment, but it's also important to provide those support services that will help them retain their apartments." H.R. at 224.

In *Philada Home Fund v. Bd. of Tax Appeals* (1966), 5 Ohio St.2d 135, the court agreed with this board's denial of an exemption for apartments owned by a nonprofit corporation for "aged and needy persons." The court held that "[t]he only use of this property is for private residential housing. A long line of Ohio cases hold that property partly or incidentally used for private **[*21]** residence is nonexempt as not used exclusively for charitable purposes. Among the cases so holding are *Incorporated Trustees of Gospel Worker Society v. Evatt, Tax Commr.,* 140 Ohio St. 185; Mussio v. Glander, Tax Commr., 149 Ohio St. 423; *Cleveland Branch of Guild of St. Barnabas for Nurses v. Board of Tax Appeals,* 150 Ohio St. 484; *Western Reserve Academy v. Board of Tax Appeals,* 153 Ohio St. 133 (although reversed in part as to exemption of public academies by our judgment in *Denison University v. Board of Tax Appeals,* 2 Ohio St. 2d 17, is still authority for the proposition that 'residence in a dwelling with a family is a private use of the premises and not a use exclusively for charitable purposes,' as we held in *Doctors Hospital v. Board of Tax Appeals,* 173 Ohio St. 283). Later, in *National Church Residences v. Lindley* (1985), 18 Ohio St.3d 53, which approved *Philada,* at 55, the court held "the furnishing of low-cost housing at or below market prices, where residents **[*22]** pay a part or all of their rental costs, is not, in and of itself, an exclusive use of the property for charitable purposes." See, also, *Cogswell Hall v. Kinney* (1987),30 Ohio St.3d 43.

Based upon the foregoing case law, the subject would not be eligible for exemption if 88/96 solely provided housing to the homeless/disabled based upon a sliding rent scale. It would simply be considered subsidized housing. However, 88/96 clearly provides much more than housing for its tenants. It provides services to its tenants, "extra oversight," not normally provided in a traditional subsidized housing setting. Ex. N. A review of the admission criteria and building rules indicates that "[p]rospective tenants must be currently homeless" and "have some disability, either physical or mental, substance abuse or chronic unemployment" and with some disabilities, must be actively participating in certified treatment programs, working on a structured recovery program, and/or provide documentation regarding sobriety from a case manager. Ex. R. The introduction to the subject's building rules, which must be signed by all tenants and a CHN representative, provides further insight **[*23]** into the program offered by 88/96 to its tenants and provides in pertinent part, as follows:

> "The North 22<nd> Street project has been developed to assist formerly homeless persons in making positive changes in their lives according to their own needs and goals. The partners believe that stable housing is a good starting point to begin dealing with issues relating to recovery, employment, health and relationships.
>
> "We hope you will be happy here. We hope you will contribute to a positive atmosphere that will promote your own well-being and that of your neighbors. We encourage you to take the initiative in developing your own goals, while at the same time you make use of all of the resources that the project makes available to you, especially the CHN Housing Coordinator and Resident Managers and the VA and Columbus Area Case Managers.
>
> "The following are common sense rules for this particular supportive housing program. *** Violations of the rules will be documented and could lead to an eviction process, depending on the seriousness or frequency of the violation. We are in the business of housing people, so we will work with you and your case managers to correct problems before **[*24]** they get out of hand." Ex. T.

C-15

In addition, some of the building rules clearly demonstrate that 88/96 serves a much greater role than just that of landlord:

> "5. Telephones may be installed in tenants' apartments. Tenant is responsible for bills. Since the phone company tries to sell extra services, *tenants may want to seek advice about the costs and practicality of some of those services.*
>
> "***
>
> "8. The apartment if for the use of one person. The person named on the lease is the only legal occupant. Tenants are expected to have visitors no more than four nights in a row and no more than ten days per month. *If a tenant wants to assist someone who needs housing, referrals can be made to management. We will do our best to assist the person.*
>
> "9. *This is a recovery-based program* and consumption of alcohol is not permitted.
>
> "***
>
> "15. *While there is no rule about borrowing and lending, the management encourages tenants to avoid these practices, since they often lead to misunderstandings and arguments. Rule of thumb: If you loan something to someone, do so with the intent that you will not get it back. Staff members will not act as arbitrators in cases of disputes over* **[*25]** *borrowing and lending.* (Emphasis added.) Ex. T.

88/96 actively participates in its tenants' lives, providing on-the-spot guidance and direction as well as references to other resources for better living. Exs. K, L. "Tenants receive services offered by the VA, Columbus Area and other service providers that include on-going assessment, case management, psychiatric services, medication monitoring, individual counseling, substance abuse treatment, assistance with activities of daily living, skills training, and referrals to community services. CHN's Employment Center provides employment services, including job skills training, desk staff and cleaning employment training, resume assistance, education and job training referrals, job development, and volunteer opportunities." Ex. P.

The staff at the subject not only provides the traditional administrative and maintenance/repair services that any apartment complex would offer, but it also coordinates services between the tenants and social service providers that support the tenants in their goal to live independently. Exs. K, L. The staff also acts as a liaison between the tenants and the neighborhood and community to foster positive **[*26]** relationships. Ex. Q. "CHN employs two resident managers and one Housing Coordinator, based at CHN's main office, to select new tenants, facilitate community orientation, coordinate community meetings, address repair and maintenance issues, maintain communication between service providers and oversee the property." Ex. P; H.R. at 257-258.

Thus, based upon the foregoing, we find that the subject property is being used by the appellant limited partnership exclusively for charitable purposes. See *St. Vincent Hotel, Inc. v. Tracy* (Apr. 25, 1997), BTA No. 1996-K-419, unreported. Therefore, it is the decision and order of the Board of Tax Appeals that the subject property shall be exempt for tax year 2002 pursuant to the provisions of R.C. 5709.12 (B). Accordingly, the Tax Commissioner's final determination must be, and hereby is, reversed.

C-16

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax Law > State & Local Taxes > Administration & Proceedings > Judicial Review
Tax Law > State & Local Taxes > Income Tax > Partnerships
Tax Law > State & Local Taxes > Real Property Tax > General Overview

Source: My Sources > Ohio > Find Statutes, Regulations, Administrative Materials & Court Rules > By Administrative Materials > **OH Board of Tax Appeals Decisions**
Terms: **2005-A-55** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Monday, June 2, 2008 - 11:02 AM EDT

LexisNexis® About LexisNexis | Terms & Conditions | Contact Us
Copyright © 2008 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

C-17

*673 A.2d 209, *; 1996 Me. LEXIS 60, **

CITY OF LEWISTON v. MARCOTTE CONGREGATE HOUSING, INC.

Decision No. 7568, Law Docket No. AND-95-372

SUPREME JUDICIAL COURT OF MAINE

673 A.2d 209; 1996 Me. LEXIS 60

January 2, 1996, Argued
March 5, 1996, Decided

DISPOSITION: [1]** Judgment affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff non-profit corporation appealed a judgment from the Androscoggin County Superior Court (Maine) in favor of defendant City of Lewiston, Maine. The superior court vacated the decision of the State Board of Property Tax Review and determined that, pursuant to Me. Rev. Stat. Ann. titl 36, § 652(1)(A) & (J) (1990 & Supp. 1995), a portion of one of the non-profit's properties and the entirety of another were exempt from taxation.

OVERVIEW: The City imposed real estate taxes on the non-profit's building and tunnel that connected the building to a hospital. Following the City's denial of its applications for abatement, the non-profit petitioned for assessment review with the Board. The Board determined that the non-profit qualified, for purposes of Me. Rev. Stat. Ann. tit. 36, § 652 (1), as an institution organized and conducted exclusively for benevolent and charitable purposes. The Board found that the portion of the building used for low-income and disabled elderly housing was tax exempt, the tunnel was tax exempt as incidental to the building, and that the remaining portion was taxable. On petition for review, the superior court concluded that the building and tunnel were not exempt. On appeal, the court held that the non-profit was a benevolent and charitable organization, and that neither its religious purposes nor its corporate affiliation with religious organizations removed it from the tax exemption statute. However, the award of a partial exemption was a misapplication of the statute. The building and the tunnel were not exempt because they were not used "solely" for the non-profit's charitable purposes.

OUTCOME: The court affirmed the judgment in favor of the City that vacated the decision of the State Board of Property Tax Review, which found a portion of the non-profit's building and all of its tunnel were exempt from taxation.

CORE TERMS: benevolent, exemption, exempt, taxation, congregate, religious, tunnel, leased, charitable purposes, housing, space, used solely, qualify, charity, housing units, property owned, tax exemption, own purposes, conducted exclusively, nonsubsidized, qualifying, occupied, charitable institutions, rental rates, charitable, tax exempt, exemption statute, charitable organizations, nursing homes, inter alia

LEXISNEXIS(R) HEADNOTES
Business & Corporate Law > Nonprofit Corporations & Organizations > Formation
Tax Law > State & Local Taxes > Personal Property Tax > General Overview

C-18

Tax Law > State & Local Taxes > Real Property Tax > General Overview

HN1 Me. Rev. Stat. Ann. tit. 36, § 652(1) (Supp. 1995) exempts from taxation certain property of qualifying organizations. Specifically, Me. Rev. Stat. Ann. tit. 36, § 652 (1)(A) (Supp. 1995) exempts from taxation the real estate and personal property owned and occupied or used solely for their own purposes by benevolent and charitable institutions incorporated by Maine. Me. Rev. Stat. Ann. tit. 36, § 652(1) (J) (Supp. 1995) exempts from taxation the real and personal property owned by benevolent and charitable organizations and occupied or used solely for their own purposes by one or more other organizations qualifying for exemption pursuant to Me. Rev. Stat. Ann. tit. 36, § 652(1)(A)-(C) (E)-(H). Me. Rev. Stat. Ann. tit. 36, § 652(1)(J) (1990).

Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > General Overview

HN2 Me. Rev. Stat. Ann. tit. 36, § 652(1)(C)(1) (Supp. 1995) provides that any corporation claiming exemption under Me. Rev. Stat. Ann. tit. 36, § 652(1)(A) (Supp. 1995) must be organized and conducted exclusively for benevolent and charitable purposes.

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion
Administrative Law > Judicial Review > Standards of Review > De Novo Review
Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN3 When the superior court acts in the capacity of an appellate tribunal, an appellate court reviews directly the decision of the State Board of Property Tax Review for abuse of its discretion, error of law, or findings unsupported by substantial evidence in the record.

Administrative Law > Judicial Review > Standards of Review > General Overview
Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > Limitations

HN4 A strict construction of the tax exemption statute is appropriate because of the basic principle that taxation is the rule and tax exemption is the exception.

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview
Governments > Public Improvements > General Overview
Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > General Overview

HN5 In determining whether an organization is organized and conducted exclusively for benevolent and charitable purposes, we recently described a charity to be for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.

COUNSEL: Attorney for the Plaintiff: Bryan M. Dench, Esq. (orally), Ronald P. Lebel, Esq., SKELTON, TAINTOR & ABBOTT, Auburn, Maine.

Attorneys for the Defendant: John Geismar, Esq., Susan E. Oram, Esq. (orally), ISAACSON & RAYMOND, Lewiston, Maine.

JUDGES: Before WATHEN, C.J., and ROBERTS, GLASSMAN, RUDMAN, DANA, and LIPEZ, JJ. All concurring.

OPINION BY: GLASSMAN

C-19

OPINION

[*210] GLASSMAN, J.

Marcotte Congregate Housing, Inc. (MCH) appeals from the judgment entered in the Superior Court (Androscoggin County, *Marden, J.)* vacating the decision of the State Board of Property Tax Review determining that, pursuant to 36 M.R.S.A. § 652(1)(A) & (J) (1990 & Supp. 1995), [1] a portion of one of MCH's properties and the entirety of another of its properties are exempt from taxation. MCH contends that because the Board properly applied the statute by granting the exemptions, the trial court erred in vacating the Board's decision. We affirm the judgment.

FOOTNOTES

1 *HN1*Section 652(1) exempts from taxation certain property of qualifying organizations. Specifically, section 652(1)(A) exempts from taxation "the real estate and personal property owned and occupied or used solely for their own purposes by benevolent and charitable institutions incorporated by this State . . . ." 36 M.R.S.A. § 652(1)(A) (Supp. 1995). Section 652(1)(J) exempts from taxation "the real and personal property owned by [benevolent and charitable] organizations and occupied or used solely for their own purposes by one or more other... organizations" qualifying for exemption pursuant to section 652(1)(A)-(C) (E)-(H). 36 M.R.S.A. § 652(1)(J) (1990).

[2]** The record reveals the following pertinent facts: MCH is a non-profit corporation organized under the law of Maine. It owns two parcels of real estate that are the subject of the instant appeal: (1) a five-story multiple use building that houses a congregate care facility, a kitchen and cafeteria, a chapel, and various office and storage spaces (the building), and (2) a tunnel that connects the building to St. Mary's Regional Medical Center.

In 1992, the City of Lewiston (City) issued tax bills imposing real estate taxes on the building and the tunnel. [2] In response, MCH submitted to the City two applications for abatement of the assessed taxes, claiming the properties were exempt pursuant to 36 M.R.S.A. § 652(1)(A) and (J). Following the City's denial of the applications, MCH filed two petitions for assessment review with the Board.

FOOTNOTES

2 The building and tunnel were acquired by MCH by separate deeds. Accordingly, the City treated them as separate properties by issuing separate tax bills.

After hearings **[**3]** on the petitions, [3] the Board determined that MCH qualifies, for purposes of 36 M.R.S.A. § 652(1), as an institution organized and conducted exclusively for benevolent and charitable purposes. [4] The Board found that the building contains 110 residential units that are leased pursuant to a United States Housing and Urban Development Housing Assistance Payments Contract administered by the Lewiston Housing Authority and an additional 18 residential units that are leased to low-income and disabled elderly tenants at market rental rates without federal subsidies. The Board further found that in addition to containing these congregate housing units, the building also contains (1) storage space that is leased at market rental rates to the Sisters of Charity Health System, Inc., Campus Cuisine, Inc., St. Mary's Regional Medical Center, and Marcotte Nursing Home; [5] (2) a kitchen

C-20

and cafeteria space that is leased at market rental rates to Campus Cuisine; and (3) office space that is leased at market rental rates to Sisters of Charity, Campus Cuisine, and private physicians. [6] Based on these findings of fact, the Board concluded that the dominant use of the building is to provide federally **[**4]** subsidized housing for low-income and disabled elderly tenants. Accordingly, the **[*211]** Board determined that 82 percent of the building is tax exempt pursuant to 36 M.R.S.A. § 652(1)(A) and (J), and that the remaining 18 percent, representing the physicians' offices and the nonsubsidized congregate housing units, is taxable.

FOOTNOTES

3 The two petitions were consolidated into a single action.

4 As provided by HN2 36 M.R.S.A. § 652(1)(C)(1) (Supp. 1995), "any corporation claiming exemption under [section 652(1)(A)] must be organized and conducted exclusively for benevolent and charitable purposes."

5 Sisters of Charity is the parent corporation to MCH, Campus Cuisine, St. Mary's Regional Medical Center, and Marcotte Nursing Home. The Board found that Sisters of Charity and each of its above-named subsidiaries is a Maine non-profit corporation and that each one is organized and conducted exclusively for benevolent and charitable purposes within the meaning of 36 M.R.S.A. § 652(1).

6 Physicians leasing office space in the building provide medical services both to the general public and to some of the congregate housing residents. Many of them specialize in areas other than gerontology, including pediatrics, child and adult psychology, obstetrics and gynecology, and pediatric dentistry.

[5]** With respect to the tunnel, the Board found that it is used to transport meals and patients from the building to St. Mary's Regional Medical Center. It determined that this use is incidental to the use of the building and that therefore the entire tunnel property is tax exempt.

From the Board's decision concluding that a portion of the building and all of the tunnel are exempt from taxation, the City sought review by the Superior Court pursuant to 5 M.R.S.A. § 11002 and M.R. Civ. P. 80C. MCH filed a cross-petition for review in which it asserted the Board erred in finding 18 percent of the building to be taxable. After a hearing, the trial court concluded that MCH qualifies as a benevolent and charitable organization for tax exemption purposes but that the building and tunnel are used in such a manner as to not be exempt. From the judgment entered accordingly, MCH appeals.

I

HN3 When, as here, the Superior Court acts in the capacity of an appellate tribunal, "we review directly the decision of the Board for abuse of its discretion, error of law or findings unsupported by substantial evidence in the record." *IBM Credit Corp. v. City of Bath, 665* A.2d 663, 664 (Me. 1995) (citing **[**6]** *Town of Vienna v. Kokernak,* 612 A.2d 870, 872 (Me. 1992)). It is well settled that "HN4 a strict construction of the exemption statute is appropriate . . . because of the basic principle, upon which we have repeatedly relied, that 'taxation is the rule and tax exemption is the exception." *Connecticut Bank & Trust Co., N.A. v. City of Westbrook,* 477 A.2d 269, 271 (Me. 1984) (quoting *Silverman v. Town of Alton, 451* A.2d 103, 105 (Me. 1982)). Accordingly, for MCH to prevail on its appeal. It must bring its claim "unmistakably within the spirit and intent of the act creating the exemption." *Episcopal Camp Found. Inc., v. Town of Hope,* 666 A.2d 108, 110 (Me. 1995) (quoting

C-21

Holbrook Island Sanctuary v. Town of Brooksville, 161 Me. 476, 483, 214 A.2d 660, 664 (1965) (citations omitted)).

II

To qualify for an exemption pursuant to sections 652(1)(A) and (J), MCH must establish that it is "organized and conducted exclusively for benevolent and charitable purposes." 36 M.R.S.A. § 652(1)(C)(1) (Supp. 1995). The Board determined that MCH satisfies this requirement, and the City contends such determination constitutes error.

As stated in its articles of incorporation, MCH "is **[**7]** organized exclusively for charitable, religious, educational and scientific purposes." Such purposes include, *inter alia, (1)* "functioning as an integral part of . . . a Roman Catholic religious congregation . . . engaged in providing for the health, social and spiritual needs of people through apostolic and charitable services"; (2) owning and operating hospitals, nursing homes, congregate housing and other such facilities "for the care, treatment and healing of human ailments and prevention of disease"; and (3) "coordinating activities of affiliate and subsidiary organizations . . . as those organizations pursue their charitable, religious, educational, scientific and other purposes. . . ." MCH is controlled by the Sisters of Charity, its sole corporate member, which in turn is controlled by the Covenant Health Systems, Inc., a Massachusetts nonprofit corporation. No part of MCH's net earnings inure to the benefit of any private individual, and, except for reasonable compensation for services rendered, none of its income is distributed to its members, directors, or officers.

*HN5*In determining whether an organization is organized and conducted exclusively for benevolent and charitable **[**8]** purposes, we recently described a charity to be

> for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or **[*212]** works or otherwise lessening the burdens of government.

Episcopal Camp Found., 666 A.2d at 110 (quoting *Johnson v. South Blue Hill Cemetery Ass'n,* 221 A.2d 280, 287 (Me. 1966)). We conclude that MCH falls within the above description. We also conclude that, contrary to the City's contention, neither MCH's religious purposes nor its corporate affiliation with religious organizations removes it from the purview of the tax exemption statute. *See Episcopal Camp Found.,* 666 A.2d at 108 (Episcopal Camp Foundation qualified for exemption despite stated purpose "to maintain camps . . . which will carry on moral, cultural, religious and recreational training and education. . . ."); *Green Acre Baha'i Inst. v. Town of Eliot,* 150 Me. 350, 352, 110 A.2d 581 (1954) (organization qualified for exemption despite stated **[**9]** purpose to, *inter alia,* "conduct educational facilities . . . for the exposition of spiritual truths, principles and religious precepts based upon the extent and available sacred literature of all revealed faiths, with particular reference to the Baha'i teachings on progressive revelation, religion, unity, and the oneness of mankind . . . ."); *Town of Poland v. Poland Spring Health Inst., Inc.,* 649 A.2d 1098 (Me. 1994) (organization qualified for tax exemption despite operating properties consistent with religious tenets, and despite religious affiliation when such affiliation did not compromise charitable purpose). Accordingly, the Board did not err in determining that MCH qualifies as a benevolent and charitable organization.

III

MCH must next establish that its uses of the building and tunnel qualify the properties for tax exemption pursuant to section 652(1)(A) or section 652(1)(J). The Board determined that

C-22

portions of the building leased to private physicians and nonsubsidized congregate housing tenants, constituting 18-percent of the building's value, do not qualify for exemption pursuant to these sections. Nevertheless, the Board exempted the remaining 82 percent **[**10]** of the building's value. [7] The City contends this award of a partial exemption constitutes a misapplication of the statute. We agree.

FOOTNOTES

[7] The Board exempted the entire value of the entire based on its finding that it is incidental to the uses of the building.

Section 652(1)(A) exempts from taxation real property that is "owned and occupied or used *solely* for their own purposes by benevolent and charitable institutions . . . ." 36 M.R.S.A. § 652(1)(A) (emphasis added). Contrary to MCH's contentions, the plain language of section 652(1)(A) precludes exempting the building from taxation because 18 percent of the building is not used in furtherance of MCH's charitable purposes, i.e., the building is not used "solely" for MCH's charitable purposes. [8] Similarly, section 652(1)(J) exempts from taxation, *inter alia,* real property owned by charitable and benevolent organizations that is "occupied or used *solely* for their own purposes by one or more other [qualifying] organizations." 36 M.R.S.A. § 652(1)(J) **[**11]** (emphasis added). Because the private physicians and residents paying full market rental value for their quarters are not qualifying organizations pursuant to section 652(1)(J), the building is not within the purview of this exemption.

FOOTNOTES

[8] Although a prior provision of Maine's tax exemption statute permitted the exemption of portions of real property owned by benevolent and charitable institutions, R.S. 1944, ch. 81, § 6, sub § III, the Legislature repealed and replaced such provision by enacting language that, like the current statutory scheme, exempts "real and personal property owned and occupied or used solely for their own purposes by benevolent and charitable institutions incorporated by the state." P.L. 1953, ch. 37 (emphasis added).

Because we conclude that MCH's building is not used in a manner qualifying it for tax exemption pursuant to either section 652(1)(A) or section 652(1)(J), we conclude that the tunnel, which is incidental to the building's use, also is not tax exempt.

IV

Finally, we need **[**12]** not consider MCH's contention that the Board erred by determining that the nonsubsidized congregate housing units are taxable. [9] Regardless of whether **[*213]** these units are exempt, the portion of the building leased to private physicians renders the entire property subject to taxation.

FOOTNOTES

[9] MCH alleged on its cross-appeal to the Superior Court that the Board erred in determining that the nonsubsidized congregate housing units and the space leased to private physicians are taxable. On its appeal to this Court, however, MCH alleges that the Board erred in determining that the nonsubsidized housing units are taxable. MCH does not challenge the Board's determination regarding space leased to private physicians.

C-23

The entry is:

Judgment affirmed.

All concurring.

Service: **Get by LEXSEE®**
Citation: **673 a.2d 209**
View: Full
Date/Time: Monday, June 9, 2008 - 4:40 PM EDT

* Signal Legend:
- Warning: Negative treatment is indicated
- Questioned: Validity questioned by citing refs
- Caution: Possible negative treatment
- Positive treatment is indicated
- Citing Refs. With Analysis Available
- Citation information available

* Click on any *Shepard's* signal to *Shepardize®* that case.

LexisNexis® About LexisNexis | Terms & Conditions | Contact Us
Copyright © 2008 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

C-24

*1992 Ohio Tax LEXIS 721, **

Columbus Board of Education, Appellant, vs. Joanne Limbach, Tax Commissioner of Ohio, and American Chemical Society, Appellees.

CASE NO. **86-H-566** (EXEMPTIONS)

STATE OF OHIO -- BOARD OF TAX APPEALS

1992 Ohio Tax LEXIS 721

June 26, 1992

[*1]

APPEARANCES

For the Appellant - Jeffrey A. Rich, Mark A. Leiendecker, Teaford, Rich, Belskis, Coffman & Wheeler, Attorneys at Law, 20 East Broad Street, Columbus, Ohio 43215-3682

For the Appellee Tax Commissioner - Lee I. Fisher, Attorney General of Ohio, By: James C. Sauer, Assistant Attorney General, State Office Tower, 16th Floor, 30 East Broad Street, Columbus, Ohio 43215

For the Appellee American Chemical Society - Charles F. Glander, Edgar C. Lindley, J. Ormes Allen, Mark A. Engel, Bricker & Eckler, Attorneys at Law, 100 South Third Street, Columbus, Ohio 43215

OPINION:
DECISION AND ORDER

This cause and matter comes on to be considered upon the notice of appeal of the Columbus Board of Education [hereinafter often referred to as CBE], filed June 6, 1986, with the Board of Tax Appeals, from a final order of the Tax Commissioner of May 12, 1986, wherein that official denied said Appellant's two complaints against exemption from real property tax for tax year 1980. The realty in question consists of five vacant parcels and one parcel occupied by an office building at the corner of Dodridge Road and Olentangy River Road in Columbus, Ohio, all owned by Appellee American Chemical Society **[*2]** [hereinafter often referred to as "ACS"]. American Chemical Society owns approximately 55 acres at this location, of which 27 acres are involved in this appeal. The real estate is occupied by Chemical Abstracts Services ["CAS"], a division of the American Chemical Society.

In this proceeding it is the contention of Appellee American Chemical Society that the six parcels were exempt under R.C. 5709.12 and 5709.121, exemption of real estate used exclusively for charitable purposes, while it is the contention of the Appellant Columbus Board of Education that they were not so exempt. Although Appellee Tax Commissioner in her final order denied the complaints against exemption she has taken the position in this proceeding before the Board of Tax Appeals that exemption should be denied. See Brief of Appellee Tax Commissioner.

Before presenting the facts and legal analysis of this Decision and Order there are several preliminary matters to be discussed.

At the evidentiary hearing before this Board the Board's Attorney-Examiner neglected to state that the exhibits offered by Appellee American Chemical Society which were not objected to by Appellant or Appellee Tax Commissioner were **[*3]** admitted into evidence.

C-25

These exhibits are hereby so admitted. In fact, the Board of Tax Appeals admitted and admits into evidence all exhibits offered by Appellee American Chemical Society at the evidentiary hearing.

Approximately five months after filing its brief in this case Appellant Columbus Board of Education filed a "Motion To Supplement Appellant's Brief" with a brochure entitled "Your Guide To The American Bar Association." Appellee American Chemical Society subsequently objected to this proposed supplementation. This submission is part of Appellant's larger effort at the evidentiary hearing to submit evidence of analogous activities of organizations Appellant feels comparable with the American Chemical Society.

The above motion causes us to reconsider our order at the evidentiary hearing refusing to admit into evidence Appellant's exhibits O to TT. As evidencing activities of allegedly analogous organizations these should have been admitted into evidence for whatever weight they bear, and we hereby reverse our ruling on this subject at the evidentiary hearing. Regarding the instant motion, we determine to grant it. At the evidentiary hearing the Board's **[*4]** Attorney-Examiner stated that he took judicial notice of the fact that professional organizations generally offer educational opportunities, and we welcome this opportunity to bring to our attention the allegedly analogous activities of the American Bar Association.

The burden of proof in this proceeding is upon Appellee American Chemical Society rather than Appellant, contrary to the usual situation. This reversal of the usual roles was created by R.C. 5715.271, which provides as follows:

"In 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. The fact that property has previously been granted an exemption is not evidence that it is entitled to continued exemption."

Appellee American Chemical Society presented its case first at the evidentiary hearing.

The statutes under which exemption is sought are R.C. 5709.12 and 5709.121. R.C. 5709.12 read in pertinent part as follows in 1980:

"Real and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation."

Cases under R.C. **[*5]** 5709.12 held that even an incidental non-charitable use disqualified a claimant under R.C. 5709.12 from exemption. See: Incorporated Trustees of the Gospel Workers Society v. Evatt (1942), 140 Ohio St. 185. Appellee American Chemical Society does not here claim exemption under R.C. 5709.12 alone. As we state later, if it did so seek, we would deny the claim for reasons hereinafter set forth.

R.C. 5709.121, defining exclusive charitable or public use, was enacted in 1969. This statute read at times pertinent to this appeal:

Section 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 is either:

"(A) 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

C-26

arrangement:

"(1) As a community or area center in which presentations in music, dramatics, the arts, and related **[*6]** fields are made in order to foster public interest and education therein;

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

"(B) Otherwise 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."

The American Chemical Society was founded in 1876 in New York, N.Y., by a group of chemists. In its present form it is organized under a congressional charter issued by the United States Congress in 1937. Section 2 of the charter states in part "That the objects of the incorporation shall be to encourage in the broadest and most liberal manner the advancement of Chemistry in all its branches." The ACS is and has been exempt from federal income tax under section 501(C)(3) of the Internal Revenue Code as a scientific and educational organization. It is governed by an Executive Director, a Board of Directors and the advisory opinions of a council of 480 members. The Executive Director is the principal administrative officer of the Society, and is responsible to the Board of Directors. The Board of Directors **[*7]** consists of the President, Past-President, President-Elect, six regional Directors, and six Directors at-large. The President-Elect and Regional Directors are elected by the membership-at-large and by region, respectively, while the at-large Directors are elected by the council.

There were approximately 120,000 members in 1980. n1 Only individuals can be members of the ACS. Corporations can attain "Associate" status. A member of the American Chemical Society is required to show the requisite education and employment. The alternative requisites are:

B.A. in chemistry or chemical engineering from an ACS approved institution; B.A. in chemistry from a non-approved institution and three years work experience in chemistry or chemical engineering; B.A. in a close related service - depending on course work and employment. Also available are Associate and National Memberships. Dues are $ 24.00/year for full membership.

n1 The relevant tax lien date for the 1980 tax year was January 1, 1980. In a previous order of the Board it was decided that information from 1977-1983 would be relevant and probative for determining the nature of the Society and the use of the realty on the tax lien date. **[*8]**

The ACS is a sizeable operation. Total revenues rose from $ 64,590,828 (1979) to $ 103,705,693 (1983). ACS Exhibits 56, 59.

In 1980 there were four Operating Divisions of the American Chemical Society: the Chemical Abstracts Service Division ("CAS"); the Public Affairs Division; the Books and Journals Division; and, the Membership Division. We will discuss the specific activities of these Operating Divisions in greater detail later.

The American Chemical Society also had Technical Divisions in 1980. There were not operating divisions, but basically official associations of members interested in certain sub-disciplines of chemistry. A chemist who had a professional interest in analytical chemistry might join the Analytical Chemistry Technical Division, for example. Among other activities, the Technical Divisions organized lectures, symposia and programs at the semi-annual

C-27

national meetings of the ACS in the area of their expertise. The chemical sub-specialties reflected in the Technical Divisions corresponded, as did the technical chemistry journals of the ACS Books and Journals Division, discussed later, with recognized sub-specialities of chemistry.

Beginning very early **[*9]** in its history the ACS also developed so-called "Local Sections" throughout the country. These are associations of members of ACS in a given local geographic area. They are recognized by the ACS, and are reflected in its council. Many of the educational and award programs of the ACS are directed through the Local Sections, and Local Sections have their own agenda of meetings, programs and activities to foster their own and others' interests and abilities in chemistry. ACS Exhibit 5 is a report of local section activity for 1980. It was published out of the membership division.

ACS' real estate in Columbus is occupied in part by two buildings. Building A, a five level office building, is on the southwestern portion of the tract, and is surrounded by a parking area. It houses CAS offices including part of the staff generating the CAS data base and services, staff providing support to CAS subscribers and users, and the CAS library. Building B, which was located in the south-central portion of the property, consists of a five level office building on top of a three level parking garage. This building contained offices of CAS as well as offices of the Books and Journals Division **[*10]** of ACS. This building is not involved in this appeal. The remainder of the rather extensive land area owned by ACS in Columbus is open space which has been landscaped and is used recreationally. Certain of this vacant land, including one vacant parcel at issue in the instant case, was at issue in American Chemical Society v. Kinney, Comm'r (1980), 62 Ohio St. 2d 258 ("ACS I") and American Chemical Society v. Kinney, Comm'r (1982), 69 Ohio St. 2d 167 ("ACS II"). The collateral estoppel effect of this case is our next subject of discussion.

There has been, as indicated above, prior litigation concerning the exemption for real estate tax purposes of some of ACS land. This litigation concerned the 1977 tax year and was resolved in two Ohio Supreme Court decisions. In the first opinion (American Chemical Society v. Kinney, Comm'r (1980), 62 Ohio St. 2d 258, "ACS I") the Supreme Court held that the realty was not exempt since ACS was not a public institution of learning as it had claimed. The Court remanded to the Board of Tax Appeals to consider the application of R.C. 5709.12 and 5709.121 and the use of the realty for charitable purposes. The second opinion **[*11]** ("ACS II") decided these charitable issues as indicated below. Our use of the terms ACS I and ACS II refer to those opinions and the proceedings leading up to both of them. Although ACS I and ACS II reflect different issues and Supreme Court decisions, they result from a single proceeding.

Appellee American Chemical Society now contends that the judgment in American Chemical Society v. Kinney, Commissioner (1982), 69 Ohio St. 2d 167 "ACS II" has collateral estoppel effect in the present action. In the modern view collateral estoppel is embraced by the wider doctrine of res judicata. Hicks v. De La Cruz (1977), 52 Ohio St. 2d 71

The doctrine of res judicata has been defined as follows by the Ohio Supreme Court:

"A final judgment or decree rendered upon the merits without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue as to the parties and their privies, and is a complete bar to any subsequent action upon the same cause of action between the parties or those in privity with them. The prior judgment is res judicata as between the parties or their privies. (Paragraph No. 1 of syllabus **[*12]** of Norwood v. McDonald, 142 Ohio St. 299, approved and followed.)"

Syllabus #1 of Whitehead v. General Telephone Co. (1969), 20 Ohio St. 2d 108 (1969)

And in the second syllabus of the same case the Court defined collateral estoppel:

C-28

"A final judgment or decree in an action does not bar a subsequent action where the causes of action are not the same, even though each action relates to the same subject matter. However, a point of law or a fact which was actually and directly in issue in the former action, and was there passed upon and determined by a court of competent jurisdiction, may not be drawn in question in a subsequent action between the same parties or their privies. The prior judgment estops a party, or a person in privity with him, from subsequently relitigating the identical issue raised in the prior action. (Paragraphs Nos. 2 and 3 of syllabus of Norwood v. McDonald, 142 Ohio St. 299, approved and followed.)"

ACS I and ACS II concerned ACS's exemption from real property tax for the 1977 tax year. The instant case deals with 1980. It has been held in Ohio that tax cases involving different tax years contain distinct and different causes of action. **[*13]** Beatrice Foods Co. v. Lindley, Tax Commissioner (1982), 70 Ohio St. 2d 29; Standard Oil Company v. Zangerle (1943), 141 Ohio St. 505. This is in accordance with the weight of authority nationally (50 C.J.S., Judgments, section 752; Anno: Judgment in tax cases in respect of one period as res judicata in respect of another period, 150 A.L.R. 5, Suppl. 162 A.L.R. 1204). A judgment as to tax due for one tax year will thus not be res judicata (as distinguished from collateral estoppel) in a second proceeding for tax due in a subsequent tax year.

Contrary to the rule in some states (50 C.J.S. Judgments, section 752; 150 A.L.R. 5) Ohio does permit the use of collateral estoppel in tax proceedings. Superior's Brand Meats, Inc. v. Lindley, Tax Commissioner (1980), 62 Ohio St. 2d 133, 135 An issue or fact determined in a tax proceeding for one tax year thus can, under the right circumstances, discussed below, be conclusively determined for a second tax proceeding for a different tax year. Hooven & Allison Co. v. Lindley, Tax Commissioner (1983), 4 Ohio St. 3d 169, 171; Beatrice Foods Co. v. Lindley, Tax Commissioner, supra, at 70 Ohio St. 2d 35; Standard **[*14]** Oil Co. v. Zangerle, supra; State ex rel Herbert v. Brotherhood of Railroad Trainsmen Insurance Department, (Fr. Ct. App., 1944) 74 Ohio App. 263.

It follows from the above that the judgment in ACS II cannot constitute res judicata as to the instant case; nor does ACS make such contention. ACS does contend that Appellant CBE is collaterally estopped from (re)litigating the charitable status of ACS under R.C. 5709.12 and R.C. 5709.121 because that issue was litigated and determined in ACS's favor in the earlier case.

We will first examine the factual underpinnings for the collateral estoppel argument. Before discussing this matter, however, it might be helpful to know that it is the position of the Board of Tax Appeals, after analyzing all the facts and law relating to the collateral estoppel issue, that for collateral estoppel to apply the fact or factual issue must have been actually litigated in the prior case. We thus examine ACS I and ACS II to see if that occurred. As we discuss infra, there are other legal objections to the application of collateral estoppel in this case. Certain of them -- the lack of privity and mutuality come to mind -- are **[*15]** just as serious objections to the application of collateral estoppel as the fact that the charitable nature of ACS was not actually litigated in ACS I and ACS II. We choose to discuss first the lack of actual litigation of its charitable status because it is so fundamental, and its absence so clear.

In ACS I the Board of Tax Appeals found ACS to be an institution of public learning and did not consider its charitable status. The Supreme Court found it was not entitled to exemption as a institution of public learning, and remanded to the Board to consider its charitable status under R.C. 5709.12 and 5709.121.

The Board, on remand, denied exemption under these statutes.

In ACS II the Ohio Supreme Court reversed the Board of Tax Appeals and exempted parcels

C-29

of ACS's land -- one of which is involved in the instant case -- pursuant to R.C. 5709.12 and 5709.121. The case arose pursuant to applications for exemption by ACS, whereas the instant case arose from complaints against such charitable exemption filed by the Appellant Columbus Board of Education.

Our first task in determining the collateral estoppel effect of ACS II, if any, is to determine to which issues **[*16]** in this case application is sought, and whether they are identical to issues determined in ACS II.

In its briefs ACS seeks collateral estoppel effect with respect to two issues: that as of 1977 the Society was a charitable institution, and, that the Society used at least one parcel of land at issue herein in furtherance of its charitable purposes. ACS' Brief, p. 67. Insofar as the "in furtherance" issue depends on our resolution of the "charitable institution" issue -- i.e. ACS II would have "collateral estoppel" effect as to this issue only if we earlier determined the charitable purposes to be the same, by collateral estoppel or otherwise -- we herein concentrate on the issue in ACS II as to whether as of January 1, 1977 ACS was a charitable institution. With regard to this issue the Ohio Supreme Court in ACS II stated the following:

"A review of Section 2 of ACS's national charter reveals that ACS is clearly a charitable or public institution for R.C. 5709.121 purposes. It is also unquestioned the land at issue is 'under the direction or control' of ACS. Thus, the first prong of the Cincinnati Nature Center inquiry has been satisfied."

The first syllabus **[*17]** of this case, moreover, read:

"1. When property is being used in furtherance of or incidental to an institution's charter provisions, i.e. charitable, educational or public purposes and not with a view to profit, it is exempt from taxation under R.C. 5709.121."

From the above language alone it would appear that the Ohio Supreme Court relied heavily on ACS' charter to determine that it was a charitable institution. The syllabus refers to uses in furtherance of the charter provisions, however, and the decision does contain a brief description of ACS' activities on the land.

In his dissent in ACS II Justice William B. Brown states:

"Undeniably, the first prong of the test is met, for American Chemical Society (ACS) is, for the purposes of R.C. 5709.121, a charitable or public institution and the land in question is under the direction or control of ACS."

Footnote 1 states:

"1 The American Chemical Society was chartered by the Congress of the United States and its status as a charitable organization is not in dispute in this appeal."

Justice Brown's statement, and especially his footnote, introduce us to Appellant's and Appellee Tax Commissioner's argument that ACS' status **[*18]** as a charitable institution was not litigated in ACS II.

Two years after its decision in ACS II the Ohio Supreme Court decided OCLC Online Computer Library Center, Inc. v. Kinney, Commissioner (1984), 11 Ohio St. 3d 198. In that case the Court reversed this Board's granting of exemption, stating that OCLC did not meet the first test of Cincinnati Nature Center, i.e. it was not a "charitable institution."

OCLC had cited ACS II in support of its application for exemption, but ACS II was discussed as follows in the Supreme Court's OCLC opinion:

C-30

"OCLC first challenges the board's determination that the property sought to be exempted is not under the control of a charitable institution. OCLC argues that it does function as a charitable institution, much like the Chemical Abstracts division of the American Chemical Society whose claim for an exemption was reviewed by this court in American Chemical Soc. v. Kinney (1982), 69 Ohio St. 2d 167 [23 0.0 3d 197]. In fact, OCLC argues in its brief that the decision in American Chemical Soc. controls the subject cause since its 'activities are closely akin, if not the same in nature, as those of American Chemical **[*19]** Society.'

"We conclude, however, that OCLC's reliance upon American Chemical Soc., as controlling the present cause, is misplaced. Therein, the status of certain land and improvements, as well as Chemical Abstracts' charitable purpose, was not before this court, having previously been determined to be tax exempt under R.C. 5709.12 and 5709.121. (See dissenting opinion of Justice William B. Brown, at 173, fn. 1.)" At 11 Ohio St. 3d 200. (emphasis added)

Thus, Justice Brown's footnote that ACS' "status as a charitable organization is not in dispute in this appeal" moved into the body of a subsequent decision.

It thus appears from the above discussion that we have an identity of issues -- i.e. whether ACS is a charitable organization -- between ACS II and this case, which is necessary for the application of collateral estoppel. We turn now to discuss the element of actual litigation of the issue sought to be collaterally estopped. The cases, which will be discussed subsequent to our interpretation of the proceedings in ACS II, we submit require that the estopped issue must have been "actually litigated."

The record in ACS I and ACS II has been destroyed **[*20]** pursuant to the state's records' retention policy. There is thus no way for the Board of Tax Appeals to now know precisely what occurred at the hearings before the Commissioner of Tax Equalization and the Board of Tax Appeals. The parties' briefs in the Supreme Court still exist, however, and these briefs and this Board's Decision and Order on remand conclusively show, we believe, that the Commissioner of Tax Equalization did not litigate (contest, present evidence on, receive a decision) the issue as to whether ACS was a charitable organization as of January 1, 1977. The briefs and decision show that the Commissioner or her counsel must have informed both hearing authorities that he was not contesting this issue. Thus, in American Chemical Society v. Kinney, Commissioner of Tax Equalization, B.T.A. Case Nos. 77-B-152, 77-B-153 (January 26, 1981), our decision on remand from ACS I, we stated:

"Further, the status of Chemical Abstracts as a charitable institution is not in question before the Board." (Record of the Commissioner of Tax Equalization, page 6, lines 19-25) (at p. 4).

The Brief of Appellee Commissioner of Tax Equalization in Supreme Court Case No. 81-321 (69 **[*21]** Ohio St. 2d 167 (1982)) contains as its one and only proposition of law the following:

"Proposition of Law No. I.

"The parcels of land which are owned by ACS and which are in issue in the case before the court are not used 'in furtherance of or incidental to' the expressed purpose of Chemical Abstracts. Accordingly, these parcels of land are not entitled to tax exemption by virtue of section 5709.12 and 5709.121 of the Revised Code." (at p. 7)

The Brief Amicus Curiae of the Board of Education of the Columbus City School District, also on file with the briefs in 81-321, contains the following in the statement of facts (the confusion is in the original):

"Let us assume for the sake of this argument that Appellant is a charitable institution. 1 (The

C-31

question of whether appellant is a charitable institution as required by Revised Code Section 5709.121 is not before this Court today. American Chemical Society v. Kinney, 77-B-152, 153 p. 4 (BTA 1-26-81). This Court should therefore assume, without deciding, that for the purposes of this case Appellant is a charitable institution under Revised Code Section 5709.121) that owns and uses 2 (Obviously a corporation is a fiction of **[*22]** the law and can only be said to use the property when its employees use the property), the real property under consideration and therefore to gain an exemption it must comply with (A) of Revised Code Section 5709.121." (at p. 4)

And finally, the brief of Appellant (in S. Ct # 81-321) American Chemical Society, the party who in the instant case wants us to declare the issue collaterally estopped, expressly states that the issue whether it was a charitable organization was not litigated in ACS II. Statement of Facts:

"The American Chemical Society was chartered by the Congress of the United States, and its status as a charitable organization is not in dispute in this appeal. (Ct. Tr. p. 49 lines 21-23; Ct. Tr. pp. 33 and 34" (at p. 5)

Body of the brief:

"The charitable status of ACS and its Chemical Abstracts division is not in dispute. (Ct. Tr. p. 265)"

From the above it is apparent that the issue as to whether ACS was a charitable institution was not litigated, but rather that the parties chose to concede or assume it was a charitable institution. The parties then litigated the issue of whether the use of the vacant land was in furtherance of the (assumed) charitable **[*23]** purpose. The limited focus of ACS II is further shown by the fact there were only two witnesses at the B.T.A. hearing which was the basis of the appeals in ACS I and ACS II, the Director of Business Operations for Chemical Abstracts, Emerson Heilman, and a Professor of Psychology at Ohio State University, Dr. Richard Klinoski. Dr. Klinoski's testimony related exclusively to the benefits vacant land had to the CAS employees. It appears that Mr. Heilman primarily testified concerning the acquisition, location and use of the vacant land. He apparently did describe the activities of CAS, but the focus of his testimony would also appear to have been on the vacant land. The differing focus of ACS I and II as compared to this case is because only vacant land was at issue in the previous cases.

The extremely limited evidence on the activities of CAS in ACS I and ACS II is to be contrasted with the numerous witnesses and extensive written evidence concerning the activities and work of American Chemical Society and its operating division Chemical Abstracts in the instant case. This is because its charitable nature of ACS was not litigated in ACS I and ACS II. **[*24]** Quite clearly ACS II should not be used to collaterally estop consideration and decision of this issue in the instant case, and the authorities would so hold, as we will see.

The cases nationally and in Ohio require that a fact or issue have been actually litigated in the prior case in order to have collateral estoppel effect in the second case. Restatement, Second, Judgments, section 27 reads as follows:

Section 27 Issue Preclusion - General Rule

"When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." (emphasis added)

C-32

Comment e, Issues not actually litigated, contains the following:

"A judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action."

[Res judicata can extend to matters necessarily but not expressly decided. For collateral estoppel, however, the fact or issue must have been actually litigated.]

Ohio cases state that the fact or issue to be precluded **[*25]** must have been "actually and directly in issue:" Norwood v. McDonald (1943), 142 Ohio St. 299, Syllabus, Paragraph 3; Whitehead v. General Telephone Co., supra., at Syllabus 2; Werlin Corp. v. Pub. Util. Comm. (1978), 53 Ohio St. 2d 76, 81; Trautwein v. Sorgenfrei (1979), 58 Ohio St. 2d 493, Syllabus; In Superior's Brand Meats v. Lindley, Tax Commissioner, supra., which ACS cites in its brief at p. 68 for the proposition that an "adequate opportunity" to litigate is sufficient, that language was dicta since the Supreme Court found the fact -- whether there was a construction contract -- to have been actually litigated. At 62 Ohio St. 2d 137.

For an issue or fact to have been actually litigated means that the parties actually contested it, evidence was submitted thereupon, and the Court ruled on the issue. Comment e to section 27 of the Restatement, Second, Judgments, goes on as follows:

"An issue is not actually litigated if the defendant might have interposed it as an affirmative defense but failed to do so; nor is it actually litigated if it is raised by a material allegation of a party's pleading but is admitted (explicitly or by virtue of a failure **[*26]** to deny) in a responsive pleading; nor is it actually litigated if it is raised in an allegation by one party and is admitted by the other before evidence on the issue is adduced at trial; nor is it actually litigated if it is the subject of a stipulation between the parties."

Thus in Ohio the dismissal of a case under Civ. R. 12(B)(6) cannot create collateral estoppel effect to an issue in the prior case. State ex rel Fenske v. McGovern (1984), 11 Ohio St. 3d 129. A failure to answer will not confer collateral estoppel effect to any of the issues thus not contested. Zaperach v. Beaver, (Ct. App. Fr. Co., 1982) 6 O. App. 3d 17, 451 NE 2d 1249; Murray v. Day, (S.D. Ohio, 1980), 4 Bankr. 750 app. dism'd 633 Fed. 2d 214. While a consent judgment or stipulated judgment may apparently constitute collateral estoppel as to an issue thereby decided (State ex rel. Bd. of Educ. v. State Bd. of Educ. (1979), 58 Ohio St. 2d 1189) ACS II was not a consent or stipulated judgment. Nor does it appear that in the proceedings before the Commissioner of Tax Equalization or the Board that the parties stipulated ACS was a charitable institution. There may have been some understanding **[*27]** or concession between the parties that the issue of charitable status need not be considered by the Board. What may have happened was that the Commissioner of Tax Equalization made a strategic litigation decision that he would not fight the exemption of the vacant land on the ground that ACS was not a charitable institution. This strategy was of course not opposed by ACS. The authorities clearly hold that under these circumstances the issue is not collaterally estopped. "Hence, the doctrine of res judicata [including collateral estoppel] does not preclude relitigation of an issue raised by the pleadings in the former action, but withdrawn or withheld from the consideration of the court or of the jury, either by stipulation of the parties or otherwise." 46 Am. Jr. 2d, Judgments, section 419. An issue that might have been litigated, but which was not raised or actually litigated in prior litigation between the parties does not have collateral estoppel effect. Werlin Corp. v. PUCO (1978), 53 Ohio St. 2d 76

The way in which the question whether a fact or issue was "actually or directly in issue" in a prior case must be addressed is shown from the following quote from **[*28]** Werlin Corp. v. Pub. Util. Comm., supra, where the question before the Ohio Supreme Court was whether the issue of "certificate splitting" had been "actually and directly in issue" in a prior case before the Common Pleas Court.

C-33

"The issue of illegal certificate splitting was not raised in the Court of Common Pleas. The central question in that litigation, as revealed by the pleadings, the parties' briefs and the conclusions of law which were incorporated into the permanent injunction order, was whether the consideration called for in the 1967 contract had been paid for by appellant and accepted by McKibben so that the contract was, therefore, enforceable. The question of whether the terms of the contract constituted, by virtue of the terms of payment or by virtue of appellant's retention of control over the truck drivers, an attempt to split a certificate in derogation of statutes governing the commission's control of such certificates was not raised before or addressed by the Court of Common Pleas. We therefore find that certificate splitting was not 'actually and directly in issue' before the Court of Common Pleas and that the doctrine of res judicata does not operate to **[*29]** estop the issue from being addressed by the commission in its proceedings."

At 53 Ohio St. 2d 82

Appellee ACS, which was of course a party to ACS II, has submitted no evidence to us from that case -- record before the Commissioner of Tax Equalization or Board of Tax Appeals -- which would indicate that the issue of "charitable institution" was actually litigated. This redounds to Appellee ACS's detriment, for the authorities hold that the burden of proving that a fact or issue was actually litigated falls upon the party proposing the application of collateral estoppel. Comment f. to section 27, Restatement of Judgments, Second, reads as follows:

"f. Extrinsic evidence to determine what issues were litigated. If it cannot be determined from the pleadings and other materials of record in the prior action what issues, if any, were litigated and determined by the verdict and judgment, extrinsic evidence is admissible to aid in such a determination. Extrinsic evidence may also be admitted to show that the record in any prior action does not accurately indicate what issues, if any, were litigated and determined.

"The party contending that an issue has been conclusively **[*30]** litigated and determined in a prior action has the burden of proving that contention."

(emphasis added).

In Ohio see McCrory v. Children's Hospital, (Ct. App Fr., 1986) 28 Ohio App. 3d 49

We detail now a number of other considerations arguing against the imposition of collateral estoppel in this case. These are the existence of a change of the legal climate regarding the issue sought to be collaterally estopped, and the lack of privity and mutuality. Finally, we note that the rationale behind collateral estoppel fails to apply under the facts of this case.

We have previously quoted from the Supreme Court's opinion in OCLC Online Computer Library Center, Inc. v. Kinney, supra. In that quotation the Supreme Court stated that the charitable purpose of ACS had not been in issue in ACS II. In addition to constituting authority for what was "at issue" in ACS II, however, OCLC is also authority which at the very least calls into question what ACS II stands for on the question of the charitable nature of ACS.

46 Am Jur 2d., Judgments section 443 reads in part: "However, where, after the rendition of a judgment, subsequent events occur, creating a new **[*31]** legal situation or altering the legal rights or relations of the litigants, the judgment may thereby be precluded from operating as an estoppel." A subsequent case questioning the legal proposition embodied in the issue sought to be precluded can be such a subsequent event.

C-34

In addition to OCLC another Ohio Supreme Court case altering the legal climate around the "charitable organization" issue is American Society for Metals v. Limbach, Tax Commissioner (1991), 59 Ohio St. 3d 38. Both OCLC and American Society for Metals will later be discussed in some detail. It is sufficient to state here that American Society for Metals, in which the Ohio Supreme Court denied the exemption for real estate tax for a professional organization at least superficially like Appellee ACS, casts further doubt on whether (assuming the issue was decided) the ACS II proposition that ACS is a "charitable organization" is still viable.

In basing our decision to not apply collateral estoppel primarily on the reason that the issue of "charitable organization" was never "actually litigated" in ACS II we are not ignoring other problems with applying the doctrine in this case. Foremost **[*32]** among the other elements required for collateral estoppel is the question of privity or mutuality. It is and always has been black letter law that collateral estoppel can only be applied against a person or institution who was a party to the previous judicial proceeding or was in privity to such a person or organization. Quality Ready Mix, Inc. v. Mamone (1988), 35 Ohio St. 3d 224; Jones v. VIP Dev. Co. (1984), 15 Ohio St. 3d 90, 99, 100; 63 O. Jur. 3d, Judgments, sections 401, 416. Appellant Columbus Board of Education was not a party to ACS I or ACS II. It did file a brief Amicus Curiae in the Supreme Court, but that action does not confer or impose the legal rights and responsibilities arising from party status.

It is important to note as well that at the relevant time, namely surrounding January 1, 1977, there was no statutory procedure whereby Appellant Columbus Board of Education could become a party in the procedure whereby applications for exemption were determined that constituted ACS I and ACS II. Since October 17, 1985, R.C. 5715.27 has provided a remedy for -- notice to, opposition by, and party status for -- the affected Board of Education **[*33]** in such exemption proceedings, which remedy did not exist in 1977. At that time school boards did not participate or become parties in proceedings for applications for exemption under R.C. 5713.08. School Boards were only given the right to file complaints against exemption under the prior version of R.C. 5715.27.

Although several cases have held that the State of Ohio is the real party when successive suits are brought against different state officials, State ex rel Wilson v. Preston (1962), 173 Ohio St. 203; State ex rel Hofstetler v. Kronk (1969), 20 Ohio St. 2d 117; Florian v. Highland Local School Dist. Bd. of Educ. (N.D. Oh., 1983), 570 F. Supp. 1358 we are here dealing with two very distinct and separate levels and entities of government. There is no authority in Ohio holding that a local school board was in privity with the State Commissioner of Tax Equalization with respect to a proceeding whereby the latter determines an application for exemption. Syllabus 4 of Whitehead v. General Telephone Co., supra, states: "Generally, a person is in privity with another if he succeeds to an estate or an interest formerly held by another --." These are not "successive **[*34]** governmental entities, authorized to regulate the use of the same parcel of land --" as were the county and municipal zoning bodies in Columbus v. Union Cemetery Assoc. (1976), 45 Ohio St. 2d 47. In at least one older case from another state municipal and state governments have been held to be separate parties and not in privity for purposes of res judicata. Carre v. City of New Orleans, 6 So. 893, 41 La. Ann. 996 (La. S. Ct., 1889).

Related to the absence of privity of Columbus Board of Education, which is here attempted to be collaterally estopped, is the absence of mutuality in this case. The first syllabus in Goodson v. McDonough Power Equip., Inc. (1983), 2 Ohio St. 3d 193 reads as follows:

"1. In Ohio, the general rule is that mutuality of parties is a requisite to collateral estoppel, or issue preclusion. As a general principle, collateral estoppel operates only where all of the parties to the present proceeding were bound by the prior judgment. A judgment, in order to preclude either party from relitigating an issue, must be preclusive upon both. A prior judgment estops a party, or a person in privity with him, from subsequently relitigating the identical **[*35]** issue raised in the prior action. (Paragraph two of the syllabus in Whitehead

C-35

v. Gen'l Tel. Co. of Ohio, 20 Ohio St. 2d 108 [49 0.0 2d 435] and the syllabus of Trautwein v. Sorgenfrei, 58 Ohio St. 2d 493 [12 0.0. 3d 403], approved and followed."

In Ferrell: Collateral Estoppel In Ohio, 18 Capital University Law Review 337 (1989), the author, on the first page states the "general policies" behind the application of res judicata and collateral estoppel as: "-- ensuring the finality of legal disputes, encouraging reliance on judicial decision, barring vexatious litigation, and conserving judicial resources." Appellee ACS has neither alleged nor proven that it previously "litigated" the charitable nature, if any, of its use of the property. To the knowledge of the Board of Tax Appeals the instant case, including the five days of hearing evidence regarding ACS' use of the subject property, constitutes the first real hearing of this issue. Appellee ACS has not been "vexed" by having to present this testimony and written evidence twice, to the Board's knowledge. The decisions in ACS I and ACS II, moreover, dealt with different property than the instant case, and **[*36]** Appellee's charitable status was not explored at length therein, so it cannot really be said that the bringing and decision of this case abuses the finality of legal dispute. And finally, for the above reasons judicial resources have not been dissipated in the controversy since this is the first time, to our knowledge, the actual use of this property has been truly litigated.

For all the above reasons the Board of Tax Appeals decides that Columbus Board of Education is not collaterally estopped from litigating the issue whether Chemical Abstracts Services and American Chemical Society are charitable institutions.

We have previously cited R.C. 5709.12 and 5709.121. ACS seeks charitable exemption of its real estate under both statutes together, as we have indicated above. The first question under these statutes is whether ACS is a "charitable institution." White Cross Hospital Assn. v. Board of Tax Appeals (1974), 38 Ohio St. 2d 199, 203; Cincinnati Nature Center Assn. v. Board of Tax Appeals (1976), 48 Ohio St. 2d 122. Indeed, our resolution of this question is decisive of this case, as we determine from a review of all its activities as well as its enabling documents **[*37]** that ACS is not a "charitable institution" as required by the statutes. The remainder of this Decision and Order is concerned with resolution of this issue.

Although this decision is based on Ohio law and in accordance with Ohio law, since the American Chemical Society and the Chemical Abstracts Services Decision are in many ways sui generis, at least in Ohio, we are aided by the reasoning of other states' courts in cases involving analogous factual situations and legal principles. The Ohio Supreme Court has held that unanimity of authority in other states, although not binding on that Court, is "highly persuasive." Trolio v. McLendon (1967), 9 Ohio St. 2d 103, 107, 224 N.E. 2d 117, 38 Ohio Op. 2d 287.

At the evidentiary hearing ACS introduced into evidence its congressional charter, constitution, by-laws and regulations in force from 1977-1980. ACS Exhibits 3A-3D. ACS also provided extensive testimony as to its abstracts and the activities of CAS which we will discuss later in the course of the opinion. At the hearing, to some degree, and particularly in its briefs ACS goes to great pains quoting and emphasizing its enabling documents. It is evidently said Appellee's contention **[*38]** that this Board should determine ACS' charitable status based on their written statements of its aims, purposes and goals.

It is the position of the Board of Tax Appeals that the charitable status or non-status of an Ohio entity for real property tax exemption is determined primarily from a review of its activities, what it really does and accomplishes in the world. As we have said, at the evidentiary hearing before the Board ACS presented extensive evidence of its activities, including the activities of CAS. An examination of the ACS enabling documents is proper, of course, to determine that they are in accord with the activities, but the focus is and must be on what the organization actually does. A moment's thought reveals this to be the only proper course: to rely only on the stated goals would allow the lofty and principled language

C-36

of enabling documents to establish charitable status to an entity which does not in fact perform any charitable activities.

Ohio cases in the main support the position that the charitable status of an entity is to be determined by examining its activities. Prior to the enactment of R.C. 5709.121 in 1969, of course, the question was whether **[*39]** the land was "used exclusively for charitable purposes." So prior to the above date the focus of judicial concern was the activities taking place on the land. And since the enactment of R.C. 5709.121, when for the first time it became of concern whether a land-owner was a "charitable institution," the better reasoned cases have focused on what the organization actually does rather than sentiments expressed in charters, constitutions, articles of incorporation, or other documents.

In Cincinnati Nature Center Association v. Board of Tax Appeals, supra, at 48 Ohio St. 2d 124, the Court stated: "The board itself found that 'in the main' the use of the Nature Center's property is 'a charitable use.'" The Supreme Court in determining whether the Cincinnati Nature Center was a "charitable institution" clearly looked to activity rather than intentions.

In OCLC Online Computer Library Center, Inc. v. Kinney, Comm'r, supra, the Supreme Court found that the appellant was not a "charitable institution," thus failing the first step of the R.C. 5709.121 analysis, and in so determining the Court clearly relied on the activities of OCLC and not the professed sentiments of charter, **[*40]** constitution, etc:

"So, too, in the instant cause, the record demonstrates that OCLC's activities more clearly resemble those of a publisher of library materials or a data base firm specializing in information retrieval, such as Lexis or the New York Times Information Bank, rather than that of a library. Although OCLC's service may greatly enhance the ability of libraries to better serve the public, OCLC essentially offers a product to charitable institutions, for a price exceeding its cost, and, as the board concluded, is not itself a charitable organization." At 11 Ohio St. 3d 201 (Emphasis added)

No clearer exposition of the evidence needed under R.C. 5709.121 could be devised.

In Masonic Home v. Board of Tax Appeals (1977), 52 Ohio St. 2d 127 the Supreme Court considered the fact that the farm remained under the direction and control of the owner, a charitable home for the aged, in considering whether the land owner was a charitable institution.

In Akron Golf Charities, Inc. v. Limbach, Tax Commissioner (1987), 34 Ohio St. 3d 11, where the question was whether Akron Golf Charities was a "nonprofit organization[s]" operated exclusively for charitable purposes, **[*41]** the Supreme Court stated: "However, the focus of the exemption granted by the legislature is always unequivocally placed on the purpose and actual operation of the corporation that desires the exemption." At 34 Ohio St. 3d 13.

Lastly, in Comptroller of the Treasury v. Maryland State Bar Association, (Ct. App. 1989) 552 A. 2d 1668, 314 Md. 655, the Maryland Court of Appeals approved the Tax Court's review of the allegedly charitable activities. This case was recently furnished the Board by ACS in its "Statement of Additional Activity" of October 2, 1991.

Finally, two observations on this point.

The courts of other states appear to be in accord that an institution's status as "charitable" [the universal word in state real estate tax exception statutes] is not determined by the precatory words of a charter, constitution, or articles of incorporation, but by the actual activities on the land. State ex rel Burbridge v. St. John, (S.Ct. Fla, 1940) 197 So. 131, 134, 143 Fla. 544, Suppl. 197 So. 549, 143 Fla. 876; Mu Beta Chapter Chi Omega

C-37

House Corp. v. Davison, (S. Ct. Ga. 1941) 14 S.E. 2d 744, 745, 746, 192 Ga. 124; Readlyn Hospital v. Hoth, (S. Ct. Ia., 1937) 272 **[*42]** N.W. 90, 91, 223 Iowa 341; Missouri Goodwill Inds. v. Gruner, (S.Ct. Mo., 1948), 210 S.W. 2d 38, 39, 357 Mo. 647; Albuquerque Lodge No. 461, BPOE v. Tieiney, (S. Ct. N.M., 1935) 42 P. 2d 206, 210, 211, 39 N.M. 135; Willacy County Appraisal Dist. v. North Alamo Water Supply Corp., (Ct. App. Tx., 1984) 676 S.W. 2d [MISSING PAGE]
charitable status for purpose of exemption from Ohio real property tax.

Obviously the two exemptions are under different provisions, and have been interpreted by different authorities. No Ohio court has accepted the argument ACS here puts forth. The Supreme Court in Akron Golf Charities, Inc. v. Limbach, Tax Commissioner, supra, mentions that appellant had a federal tax exemption at the beginning of its opinion, then drops the subject, and never discusses it again. And all the cases in other states which the Board has discovered have held that charitable exemption from real property tax under state law is in no way determined by exemption under IRC. 501(C)(3). American Water Works Ass'n v. Bd. of Assessment Appeals, (Ct. App., Colo., 1976) 563 P. 2d 359, 362, 38 Colo. App. 341; People ex rel County Collector v. Hopedate Med. Foundation, **[*43]** (S. Ct. Ill., 1970) 264 N.E. 2d 4, 11, 46 Ill. 2d 450; Decatur Sports Foundation v. Dept. of Revenue, (Ill. App., 4 Dist., 1988) 532 N.E. 2d 576, 582, 126 Ill. Dec. 891, 177 Ill App. 696; Comptroller of the Treasury v. Md. State Bar Assoc., (Ct. App. Md., 1989) 552 A 2d 1268, 1273, 314 Md. 655. Scripture Union v. Deitsch, (Cmwlth Ct. Pa., 1987) 531 A 2d 64, 67 109 Pa. Cmwlth 272; Experiment in International. Living, Inc., v. Town of Brattleboro, (S.Ct. Vt. 1968) 238 A 2d 782, 786 127 Vt. 41; Fletcher Farm, Inc. v. Town of Cavendish, (S. Ct. Vt. 1979) 409 A 2d 569, 570, 137 Vt. 582.

It is thus necessary to describe in [Illegible Words] activities of ACS in the late 70s and early 80s [Illegible Words] reported to us at the evidentiary hearing. Since [Illegible Words] use of the realty in question was by CAS and [Illegible Words] primary activity of ACS (50-70% of its gross revenue [Illegible Words] from CAS operations '77-'83) we will pay particular [Illegible Words] to the activities of CAS.

CAS is an operating division of ACS, no [Illegible Words] independently existing subsidiary. No separate balance [Illegible Words] thus exist for CAS. CAS nevertheless **[*44]** has substantial revenues. We have no separate figures for CAS revenues, but at the evidentiary hearing it was variously estimated that CAS produced 50%-70% of ACS' revenue during the years in question. For 1983 that ACS revenue totaled $ 103,705,693. The great majority of the CAS revenue would be income from its printed publications and electronic products and services. At the evidentiary hearing it was stated that CAS was meant to be self-supporting and even make a modest contribution to ACS' budget. In fact, in 1980 CAS had revenue over expenses equal to 3.8% of its expense budget for the following year. The average CAS contribution to the ACS' reserves over the period 1977-1983 was 4%, and over that period CAS contributed over ten million dollars of "profit" to the ACS finances. R. Vol. II, 34.

CAS employed in excess of 1200 persons at its Columbus "campus" in 1980. Of these, 350 were scientists, 50% of whom had Ph. Ds in chemistry or a related field, and the remainder had masters or bachelors degrees in such a field. Some two-thirds of the scientists had a proficiency in at least one foreign language and many had a proficiency in more than one.

The total activity of **[*45]** the CAS division was directed toward the publication and distribution of its chemical abstracts, whether in printed or electronic form. CAS publications and materials published in 1980 are found on the first three pages of ACS' Exhibit 64. CAS provided 40 some different services in 1980. The preeminent publication of CAS during 1980 was, as it has been since the Division's foundation in 1907, the publication of Chemical Abstracts, the basic service. There is nothing comparable to Chemical Abstracts published in the world. Testimony of Dr. Paul Smith, R. Vol. II, 21. CA is used by all chemists, in whatever field. Testimony of Dr. Glenn A. Seaborg, R. Vol. I, 31. CA, as with all ACS publications, is

C-38

used by nonmembers as well as members. R. Vol. I, 44.

At the evidentiary hearing Dr. David Weisgerber, Editor and Director of Editorial Operations at CAS, described the procedure involved in creating a chemical abstract. The process is represented graphically on ACS' Exhibit 42. Approximately half a million abstracts are presently created each year.

The CAS receives and considers over 12,000 chemistry journals per year from sources in the United States and abroad. 40% of these **[*46]** journals are in one of 50 foreign languages - thus the need for the language skills before mentioned. The extensive number of chemistry journals monitored displays the attempt at thorough coverage -- in 1980, for example, 26.1% of the 12,728 journals monitored produced "zero" abstracts, while an additional 36% of the journals produced fewer than 10 abstracts each during the year. ACS Exh 43; R. Vol. II, 21.

The substantive work in creating an abstract begins when scientists with the appropriate chemical and language skills abstract and index the article. Abstracting is designed to present a summary of the important scientific aspect of the article. The indexing is done in two ways -- one by the terms used by the author, one by "controlled indexing" using a CAS manual containing a listing of approved terms. The latter helps chemists to make searches based on standardized terms. The articles abstracted are indexed in several ways -- by author, by subject, formula, ring system, patents. CAS generates over 2,000,000 chemical substance index entries per year. The information -- abstract and index -- are placed in CAS' computer system. The chemical substances mentioned in the **[*47]** abstract are checked against CAS' registry data base. This is a unique, numercially - identified listing of all chemical substances known to CAS -- there were 5,500,000 entries in 1980. The registry system was developed in the 1960s. We summarize later in this Decision and Order the testimony of Mr. Richard Simon, an employee of Dialog Information Services, Inc. an on-line licensee of certain CAS files. Mr. Simon testified for the appellant. What he said about the CAS Registry System is appropriate to be related here, however. He stated (R. Vol. IV, 96, 97): "There's a market for the Chemical Abstracts registry numbers because that system of registry is the most unique and foremost such system in the world. Therefore, chemists who require identification of chemical compounds will automatically seek the CA registry number concerning those compounds."

If a match is found - 2/3 are commonly matched of 2,000,000 chemical substances checked each year, -- the registry numbers are assigned to the file together with the index name and molecular form. If the chemical substance is not found in the registry data-base, a new entry in the registry data base is established. This new registry **[*48]** number uniquely identifies that substance. Since chemical substances are subject to graphic structure representation, the structure of the chemical substance will also be checked against all structures represented in the structure data base. In 1980 there were over 5,500,000 structures of chemical substances in the CAS structures data base. [The existence of the structure data base was a unique asset when CAS provided an on-line source in 1980. Now chemists can search the CAS data base for identical or similar structures, or chemical substances, they are interested in. This eliminates from the search substances with similar atoms but different structures.] As with the registry data base, a new structure will have to be drawn and entered into the structure data base for a new substance. The "Registry File" is available on-line, and structures can be checked there.

The abstract and indexing are checked for accuracy by a second scientist with the appropriate chemical and language skills.

The frequent identification of new substances creates a need for new names thereof. The author of the article may have named the substance, but structured searching of the literature creates **[*49]** a need for systematic and predictable names, so CAS has a group

C-39

of scientists who name new chemical substances based on CAS rules found in a nomenclature policy manual. Many chemistry reference books use CAS nomenclature for new substances.

The basic Chemical Abstracts product, consisting of chemical abstracts produced as aforesaid, comes out weekly. The July 7, 1980 volume, Vol. 96, No. 1, was introduced as ACS Exhibit 36B. One year subscription to the basic service of Chemical Abstracts cost $ 5000. There was a $ 500 possible discount for large educational organizations, and a separate "Small College Discount" of 80%. Total discounts in 1980 were $ 1,300,000. ACS Exhibit 63 discusses the "Small College Discount" program. Unlike many other publications of CAS there does not appear to have been a discount to members for the basic service. Due to its cost, bulk and inclusiveness members, who are individuals, would probably not subscribe to the basic service.

Included in the annual 1980 subscription fee of $ 5000 were the various index volumes (under various methods of indexing mentioned above and below) which, inter alia., are found in ACS Exhibit 36: 36A-Patent Index; 36C-Author **[*50]** Index; 36D-Formula Index; 36E-Chemical Substance Index; 36F-General Subject Index. (There may have been other indexes too.) ACS Exhibits 36A-F are only single volumes of sub-sets -- 36F, the General Subject Index, only covers A-J, for example.

Based on the basic Chemical Abstracts data base (the written, and, later, computerized record) of abstracts and indexes thereto CAS produced a number of ancillary products. ACS Exhibit 37, for example, is but one volume of the Tenth Collective Index. By this product chemists could search five years of indexes at once. ACS Exhibit 37 - Index of Ring Systems, is, for example, only one volume of the Tenth Collective Index's sub-index of ring systems (A-C6H4T2). There would be other multivolume sub-indexes within the Tenth Collective Index for Author, Subject, etc. The subscription fee for the Tenth Collective Index was $ 9,000, including postage and handling. We have no evidence there was a discount for members, and the same comments apply as to Chemical Abstracts itself.

Chemical Abstracts and its indexes including the collective indexes, are available on microfilm, for a comparable cost, and, since November, 1980, on-line, which is described **[*51]** below.

Another "spin-off" of its abstracts and indexes is the "CA Selects" and "CA Sections" series of compiled, selected abstracts which are provided to subscribers therefor who are interested in keeping up with the abstracts in their more or less limited field of interest. "CA Selects" was and is the more narrow-focused of the two, and presented timely abstracts in a specialized field. There was no example of CA Selects placed in evidence and we have no evidence of its cost, but we believe subscription prices were structured as in CA Sections (below), with a lesser price for ACS members.

ACS Exhibits 48 through 52 are examples of the 1989 publications identified at the hearing as "CA Sections." These publications presented a selection of chemical abstracts wider and less focused than "CA Selects", but narrower than the basic "Chemical Abstracts" service, which represented the whole field of chemistry. Thus, we have: ACS Exhibit 48, Applied Chemistry and Chemical Engineering Sections; ACS Exhibit 49, Macromolecular Sections; ACS Exhibit 50, Biochemistry Sections; ACS Exhibit 51, Organic Chemistry Sections; ACS Exhibit 52, Physical, Inorganic, and Analytical Chemistry Sections. **[*52]**

The subscription price for each of these CA Sections publications was: to CA subscribers, $ 1200; to ACS members, $ 270; and to colleges, universities and all others $ 1400.

As indicated on Exhibit 64, there were numerous other CAS publications in 1980. Chemical Titles (ACS Exhibit 53) was a partial listing of the journal articles abstracted by CAS in the primary publication. The annual subscription rate was $ 385, $ 155 for ACS members. Cassi

C-40

(Chemical Abstracts Service Source Index, Exhibit 47) gave locations where original journal articles subject of abstracts would be found. For the cumulative 1907-1984 and quarterly source indexes - $ 1550. No discount for members of ACS - again individual members would not ordinarily buy this. ACS Exhibit 45 is a cumulative supplement to the Ring System Handbook. The basic handbook and supplements: $ 475 for new subscribers; $ 235 for continuing subscribers. Again, no discount to members. And, finally, ACS Exhibit 46 is the 1980 Supplement to the Registry Handbook, the subject of which has been previously discussed. The basic handbook is priced at $ 100, no discount to members, and the two needed supplements are $ 100 and $ 500, **[*53]** likewise no discount to members of ACS.

In addition to the printed and microfilm productions from its abstracts, indexes, etc., in November, 1980 CAS began to produce an on-line service based on its data base. At first this consisted merely of portions of the chemical registry file, but now the basic service is available on-line. Anyone can be a subscriber; there is an account set up charge, and charges based on usage. These charges for on-line are computed, it was testified, to recoup the cost of the service. It was also testified at the hearing that the on-line fees were set with some consideration to what competitors were charging. The on-line service's expenses initially exceeded revenues. Its development cost was $ 1,800,000 in 1979 and 1980.

CAS also licenses certain of its files, made available via magnetic tapes, to third-party, for-profit and not-for profit, companies that in turn offer their customers access on-line to the CAS information. Dialog Corporation -- a for-profit corporation -- is one of their licensors, and an officer of this for-profit corporation testified at the evidentiary hearing.

Appellee ACS, at the evidentiary hearing, presented the testimony **[*54]** of Dr. Glenn T. Seaborg, Professor of Chemistry at the University of California at Berkely, recipient of the Nobel Prize for Chemistry, among other awards, and member and past-president of the ACS. It was this very-distinguished scientist's testimony that the existence and work of Chemical Abstracts enabled chemists worldwide, in government, education, industry and research institutions, to be "at the cutting edge" of chemistry because through examination of Appellees' indexes and abstracts they could know the work that had been done before them. Without Chemical Abstracts' work product chemists would be relegated to reading the original journals and documents, a very difficult and time-consuming job.

The Books and Journals Division of ACS in 1980 was headquartered at the Society's Washington, D.C. offices, but its editing, composing and publishing staff was located in Columbus, in Building B. [Building B is not at issue in this proceeding]. The primary duty of the Books and Journals Division was to publish the sixteen primary journals published by ACS. In 1980 these journals were: Accounts of Chemical Research; Analytical Chemistry; Biochemistry; Chemical Reviews; Industrial **[*55]** and Engineering Chemistry Fundamentals; Engineering Chemistry Product Designs and Development; Journal of Chemical Information and Computer Science; Inorganic Chemistry; Industrial Chemistry Process Journal; Journal of Agricultural and Food Chemistry; Journal of Physical Chemistry; Journal of Chemical and Engineering Data; Journal of Medicinal Chemistry; Journal of the American Chemical Society; Journal of Organic Chemistry; and Macromolecules,

These are detailed technical journals, as we shall see. The contents are selected on the basis of scientific merit by an Editor-in-Chief and Associate Editors who are independent, respected scientists in their field of chemistry and not employed by ACS. In the case of doubt about the scientific merit of a paper the Editor-in-Chief and Associate Editors can consult with a Board of Editors, who are likewise independent, respected scientists in the field of chemistry covered by the journal. The Editor-in-Chief is paid annually a stipend of approximately $ 5,000, while the Associate Editors receive a smaller amount. The Board of Editors donate their services.

Cover sheets and table of contents for thirteen of these journals were introduced **[*56]** into

C-41

evidence at the evidentiary hearing as Exhibits 65A - 65M. Microfilm copies of the complete journals were also provided, which the Board has examined. The papers published in these journals appear to be without exception the reports of serious scientific experiments and explorations in the field of chemistry covered. We are of course not competent to adjudge the novelty and importance of the topics covered, but we have no reason to doubt the testimony at the hearing that the Editors select these papers for their scientific timeliness and importance.

The following articles are representative of those contained in the particular Journal:

Accounts of Chemical Research, Vol. 13, No. 1, (Jan., 1980) (Exh. 65E)	-	Molecular Multiphoton Ionization Spectroscopy. Philip M. Johnson, p. 20.
Information Computer, Vol. 20, No. 1, (Feb., 1980) (Exh. 65C)	-	The Chemical Abstracts Service Chemical Registry System VII. Tautomerism and Alternating Bonds, J. Mockus and R. E. Stobaugh, p. 18
Journal of Agricultural and Food Chemistry, (Jan-Feb, 1980) (Exh. 65D)	-	Evaluation of Rapeseed Protein Concentrate Source of Protein in a Zinc Supplemented Diet for Young Rats, Bhaguan W. G. Shah, Alexandre Giroux Bartholemew Belonje and John D. Jones, p. 36
Journal of Medicinal Chemistry, Vol. 22, No. 1, (Jan. 1979) (Exh. 65-B)	-	A new Nonsteroidal Analgesic-Antiinflamatory Agent Synthesis and Activity of 4 - Ethoxy - 2 methyl - 5 - morpholino - 3 (2H) - pyridazinone and Related Compounds. M. Takaya, M. Sato, K. Terashimas, H. Tanizawa and Y. Maki, p. 53
Journal of Chemical and Engineering Data, Vol. 24, No. 1 (Jan., 1979) (Exh. 65-H)	-	Densities of ALCL3 - Rich Molten ALCL3-LICI Mixtures. Ronald A. Carpio, Lowell A. King, and Armand A. Fannin, Jr., p. 22
Journal of Organic Chemistry, Vol. 44, No. 1, (Jan. 1979) (Exh. 65-K)	-	Photochemistry of N-Alkylpyrrolidinones in the Gas Phase and in Solution. Paul H.

C-42

		Mazzocchi, James Thomas, and Flora Danisi, p. 50
Journal of the American Chemical Society, Vol. 102, No. 1 Jan. 2, 1980	-	Solution Characterization of "Intermediate-Spin" Iron (111) Porphyrins by NMR Spectroscopy. Harold Goff and Eric Shimomura, p. 31

[*57]

These journals are published on various schedules. The Journal of the American Chemical Society was published biweekly, for example, while the Ind. & Engineering Chemical publication came out every three months.

The journals must be subscribed to separately, although there is a very substantial price break for ACS members. Some subscription rates: Journal of Medicinal Chemistry (1980): Members $ 22, non-members $ 88; Journal of Agricultural and Food Chemistry (1980): Members $ 13, non-members $ 52; Analytical Chemistry (1980): Members $ 12, non-members $ 16; Journal of Organic Chemistry (1980): Members $ 34, non-members $ 136; Journal of the American Chemical Society (1980): Members $ 45, non-members $ 180.

The journals contain advertising by private and public organizations, and sometimes by ACS itself for one of its services. Examples of the advertising were submitted into evidence at the hearing. See CBE Exhibits H, I and J. ACS receives the advertising money through Centcom, a for-profit subsidiary, that pays its profits to ACS as its sole shareholder.

At the time in question there was a "page charge" to the authors of a paper published in ACS journals. It averaged around **[*58]** $ 30/page. Authors could refuse to pay it, and refusal or neglect on this score didn't affect the publication of the paper -- the editors didn't know whether it was paid or not. The "page charge" practice was common to scientific journals, and appears to have arisen because government grants, which constituted the great majority of research funding sources, would pay the publication costs. 50% of the research reported in the journals in 1980 was sponsored by the federal government. It would appear that the authors personally paid the "page charge" very rarely, if at all.

No information was submitted at the hearing regarding the activities of the Public Affairs Division. Such a function would be common to an organization of this size and character, and constitutes a non-charitable aspect thereof.

Much testimony and other evidence at the hearing concerned the activities of the Membership Division around 1980 and the ways -- primarily educational -- in which it furthered the cause of chemistry. We will briefly summarize these activities below. It should be kept in mind that the membership division at the same time it was performing the following acts, many of them admitted charitable **[*59]** even by the appellant, was undoubtedly performing all the other responsibilities of the membership office of a professional organization with 120,000 members.

During the period 1977-1983 the Membership Division was responsible for the semiannual National Meetings of the ACS and the several Regional Meetings held each year. Anyone, whether or not a member of ACS, could attend and take advantage of any of the activities of these meetings including the symposia, programs and paper presentations. Attendees were "mainly" members, however. Testimony of Dr. Justin Collat, R. Vol. I., 89. There was a higher attendance fee for non-members, $ 75 vs. $ 50. ACS Exhibits 6 and 7 are programs of

C-43

the 1980 meetings. The second one that year, in Las Vegas, was an International Meeting and was distinguished by the number of foreign visitors. There were over 10,000 registrants at the International Meeting in Las Vegas.

One of the prominent features of these National, International and Regional Meetings were the programs put on by the ACS Technical Divisions. These programs consisted of lectures, symposia and paper presentations on chemical subjects. As with the articles in the journals discussed **[*60]** above, a perusal of Exhibits 6 and 7 indicates that the programs at the meetings appear to focus on the results of genuinely innovative chemical research. (As to exhibits of that research, see infra). At the evidentiary hearing Dr. Justin Collat, Secretary of the ACS and former head of the Membership Division testified that in order for a presentation to be scheduled at one of the above National or International Meetings it had to be an overview of a chemical topic by a highly respected chemist in his field or a segment of "new science" in chemistry by a researcher.

The above National and International Meetings also involved the meetings of administrative committees of ACS, as is indicated in the programs. A primary activity also was the giving of addresses by the recipients of awards by the ACS. These addresses are seen in the programs. There was also a "exposition" area to the National and International Meetings, where for-profit and not-for-profit organizations displayed, advertised, or described their product or service to the chemical community. It appears these "expositions" were profitable to the ACS. The Membership Division, with CAS, were the Administrative Divisions **[*61]** expected to be self-sufficient, or make a "profit", by ACS. No "deals" were to be made or business to be engaged in at the expositions, but it was designed to and undoubtedly did create business for exhibitors in the future.

Many of the paper presentations and symposia at National and International Meetings were recorded and later published by the Membership Division when it thought it deserved preservation and a wider audience. Examples are Exhibit 8, "The Responsibility of the Chemist to Society", report of a symposium conducted March 26, 1980, Las Vegas, during 18th National Meeting, and "Teaching Chemistry to Physically Handicapped Students," a pamphlet resulting from an April, 1980 workshop.

As indicated above, an important activity of the Membership Division in 1977-1983 was the making of awards. There were many of these awards, as shown by Exhibit 10, the awards list for 1980. It was the position of the ACS that such awards encouraged achievement in all aspects of chemistry, whether in teaching or research, for example, and further disseminated the knowledge of the role of chemistry in the community. The Priestly Award was the Society's highest award, and Dr. Seaborg, **[*62]** a recipient himself, stated that after the Nobel Prize it was the highest chemical award a chemist could receive. As ACS Exhibit 10 describes, there were many lesser awards, including one for High School Chemistry Teacher, and several for Local Section activity. The Akron Local Section received an award at the Las Vegas International Meeting, including a $ 500 honorarium, for its activities in the past year, which included many meritorious acts including the safety inspection of school chemistry labs, a science fair for high school students, and the establishment of an explorer's post.

Some awards were sponsored by outside organizations, including private corporations, and their receipt meant a pecuniary award as well. The sponsor apparently had no voice as to who received the award.

The Membership Division oversees the Local Sections, of which there were 760 in 1980. Although the Local Sections were composed of members of ACS, some of their activities and programs were open to or even directed toward non-member chemists, students, and the public. As we will see later, the Local Sections were involved heavily in seeking to improve the quality of high school chemistry.

C-44

The **[*63]** Membership Division was also responsible for the Student-Affiliate Chapters of the ACS at colleges and universities throughout the nation. There were 746 chapters of student affiliates in 1980, involving 80,000 college students. Dues were $ 8.00/yr.

The ACS was in 1944 designated the administrator of a trust named the Petroleum Research Fund. The PRF was created by seven oil companies, its income to be used for advanced scientific issues and fundamental research in the petroleum field. Research can be in any area connected with petroleum, such as geology, chemistry, etc. The ACS selects research recipients -- always non-profit organizations such as colleges, universities and research institutes -- who are selected on the merit of their research proposals. Any patents resulting from this research are donated to the public. A proportion of grants is structured to encourage new researchers. In 1980 there were 305 recipients of grants, and just less than $ 6,000,000 was awarded. Results of research funded by the PRF are reported in scholarly journals, including those of the ACS.

In 1982 an Education Division was established in the ACS because of the degree of activity of the **[*64]** ACS in this area. Prior to that time educational programs and activities had been in the Department of Educational Services in the Membership Division. Ms. Sylvia Ware, Director of the Division of Education of ACS at the time of the evidentiary hearing, was Manager of High School Chemistry in the Department of Educational Activities in 1980, and was familiar with and testified concerning many educational programs and activities of the ACS during the period 1977-1983.

In 1980 the ACS Department of Educational Activities in the Membership Division conducted educational programs and activities for high school teachers and students, colleges and universities and their students, and for graduate students and professional chemists.

In 1979 the Office of High School Chemistry with the Department of Educational Activities conducted a survey of high school chemistry programs. As a result a number of programs developed aimed at improving the quality of high school chemistry. All of the following activities were directed at non-member high-school teachers as well as members of ACS who taught high school.

ACS Exhibit 21, "Guidelines and Recommendations for the Preparation of Continuing **[*65]** Education of Secondary School Teachers of Chemistry," the so called "bluebook", was published and distributed. It was prepared by ACS members, designed to reach the educators and certifiers of high school chemistry teachers, and recommended minimum standards for chemistry teacher training and continuing education.

As a result of the survey, "Chemunity," a newsletter, was developed, published, and distributed to high school chemistry teachers. It advised them of educational opportunities, awards, and resources for their teaching and laboratory demonstrations. Over 5000 issues were distributed in 1980.

ACS initiated the "Expert Demonstrator Trainer Activity" or EDTA workshops around the country. These were "multiplier" workshops conducted by the Local Sections that taught high school chemistry teachers how to do a number of chemical demonstrations. The workshops, which the trainees were to repeat, thus multiplying the exposure, were of course free and as with all their high school activities, were designed for non-members of ACS as well as members.

The ACS Department of Educational Activities had programs to teach Secondary School and University Teachers about safety in the **[*66]** chemistry classroom, laboratory, and stockrooms. ACS Exh. 30 is a booklet entitled "Health and Safety Guidelines for Chemistry Teachers" which was distributed in 1979, free, to members and non-members. ACS Exhibit 26 is the same type of brochure that was similarly distributed entitled "Safety in Academic

C-45

Chemistry." In addition, during this period of time the Local Sections conducted a program concerned with stockroom safety.

ACS Exhibit 31, "Programs for High Schools" was during this period of time sent to Local Sections to advise them of possible ways to reach out and assist high schools in the teaching of chemistry. It discussed possible chemical demonstrations, tests, and ways to educate and advise on career opportunities.

ACS in 1980 maintained numerous audio tapes and much literature on chemistry which Local Sections could borrow or obtain and use in their out-reach to High School Teachers.

There were regional and national meetings for high school teachers, members and non-members, and it was around this time that Project "Seed" was started. "SEED" is the acronym for Summer Educational Experience for the Disadvantaged. This was a program where disadvantaged, largely minority **[*67]** high school students with one year of chemistry were given the opportunity to spend ten weeks in an academic chemistry laboratory. The students were paid a stipend -- the program was considered a success in that a high proportion of the students having this experience went on to higher education.

Finally, in this area of High School chemistry, the ACS published "Chematters", a high school student magazine for chemistry students. It had news and articles about chemistry and chemists and was designed to educate and encourage high school students in their knowledge and study of chemistry.

ACS and its Department of Educational Activities also conducted a number of programs and activities designed to encourage and improve the teaching of chemistry in colleges and universities.

ACS in 1979 published "Chem-Tech," a textbook in chemistry for community college students studying for an Associate Degree in Chemical Technology. At around the same time ACS wrote, with the assistance of a $ 600,000 National Service Foundation Grant, "ChemCom: Chemistry in the Community," a college textbook for non-chemistry students. A copy is ACS Exhibit 35. The ACS put over $ 400,000 of its own money **[*68]** into developing the book, which was privately published, and over $ 1,000,000 into teacher training in connection with implementing use of the book.

Just as it did with respect to High Schools, ACS published a booklet describing minimum standards for an undergraduate college education in chemistry - entitled "Undergraduate Professional Education in Chemistry; Guidelines and Evaluation Procedures" it contained course and education requirements and was directed at college teachers and administration.

The above program was connected with ACS' long-established role approving or disapproving colleges and university programs in chemistry. The ACS' "Committee on Professional Training" certifies chemistry degree-granting courses based on guidelines for courses and training. Over 505 colleges and universities in the United States participate in this program, and in 1980, as today, over 90% of all Bachelor degrees in chemistry in the country come from ACS approved programs. The certification must be renewed on a five year basis.

We have already talked briefly about the student-affiliate ACS chapters in schools throughout the country. ACS had at the time in question a student-affiliate **[*69]** newsletter (ACS Exhibit 19), and furnished educational information to such chapters (ACS Exhibit 33 - understanding a chemical article) on chemical literature and careers. ACS also awarded grants to certain student affiliate chapters for innovative programs.

The ACS also, with regard to graduate students and professional chemists, had specifically directed material for purposes of continuing education. There were short courses, video

C-46

courses, computer courses, and audio courses in various chemical subjects. These were just as available to non-members as to members, as all high school, college, and graduate education programs were. In addition, the Technical Division on Chemical Education ran continuing education courses for members and non-members at the National and International Meetings.

The educational activities within the Membership Division were not self-supporting in the period 1977-1983 and were funded in part from other resources including member dues and excess revenues of CAS.

The above summarizes ACS' evidence supporting its contention that it was a charitable institution and that the realty was used in furtherance of and incidental to its charitable purposes. **[*70]** ACS also presented testimony regarding its finances and financial policies which will be discussed later. We have discussed ACS' evidence in detail because it is what ACS relies on to prove it is a charitable institution. As we state later, it presents only a partial picture of ACS, but these activities of ACS which may have a charitable aspect should be recognized as the meritorious acts they are.

We turn now to the evidence presented by Appellant CBE. It is much briefer. Appellant's evidence consisted of the depositions of John K. Crum, Executive Director of ACS, and Ronald L. Wigington, Director of ACS, and the testimony of Robert A. Simons, corporate attorney of Dialog Information Services, Inc., and of Ms. Lisa Scheidt, Account Representative and Group Leader for West Services, Inc. The information of Messrs. Crum and Wigington related to the activities of ACS and, where appropriate, has been and will be related with discussion thereof. Below we summarize the testimony and evidence presented by Mr. Simons and Ms. Scheidt.

Dialog Information Services, Inc. is and has been since the early 1970s an on-line vendor of a large number of information services. It offered over **[*71]** 100 information services in 1979-1980. It is a for-profit company. Its basic business is to license data bases from others, process it and index it by computer to permit access in a number of ways, and then offer it to third parties. The third parties pay a "connect" fee and a time on-line charge. Another large on-line company is Mead Data Central.

Dialog has licensed certain data bases from CAS since the late 1970s, for which it has paid CAS an annual fee for each license and royalties based on the usage of that file. The first CAS file it licensed was CA Search. Now it licenses around half a dozen. In 1979-1980 other on-line companies, for-profit and non-profit, licensed and offered on-line certain of CAS' chemical data bases. These organizations included Orbit Systems, Pergamnon Info-Line, U.S. Service BRS, and two European organizations, Data Star and the European Space Agency Service.

Mr. Simon testified that the CAS royalties have increased over 10% a year during the years Dialog has paid them, and that they are higher than what for-profit companies charge. He also testified that CAS has refused to license some files to Dialog or any other on-line companies. These **[*72]** files include the pre-1965 registry file.

Dialog and others were on-line with certain CAS files before the CAS on-line service started in late 1980. The initiation of the CAS on-line service increased competition for a limited period of time with regard to these files. Mr. Simon testified that the CAS on-line service advertises its service in industry publications and at trade shows. CAS on-line offers more access and information retrieval to CAS data bases than the other on-line services.

Mr. Simons described that ACS "is the world's foremost depository of information concerning chemical compounds and discoveries in the creation of the unique chemical registry system that it has." R. Vol. IV, 136.

C-47

It was Appellant CBE's contention at the hearing, as it is in their brief, that what ACS's CAS Division does is comparable to what West Publishing Company does in creating and publishing its Digest system. To amplify this analogy CBE called as a witness Ms. Lisa Scheidt, who, as an account representative and group leader for West Services, Inc., the on-line subsidiary of West Publishing Co., trains attorneys on West-Law and other West products.

West Publishing is a for-profit organization, **[*73]** which, in addition to the on-line service, publishes a wide line of law-related books. The on-line service has been in existence 10 years, and is used by law firms, law schools and universities.

Ms. Scheidt described how the West editors categorize case principles into topics and key numbers, and how they write the synopses that constitute entries in the Digest system. (The Digest System doesn't exist on-line) As all attorneys know, West's Digest system divides the field of law by topics and key numbers, and the principle or principles of a federal or state case are synopsized and recorded in yearly or multiyear books under these classifications. By focusing on the principles of law he is researching -- identifying it by topic and key number -- the attorney can find all cases on that point in a given state, all states, or in the federal judicial system.

On cross-examination Appellee ACS explored the differences between chemical abstracts and West's synopses of law cases that are contained in its digests. It pointed out that law cases are always in English and that digesting involves the creation of no new nomenclature. The synopses contained in the digests omits a number of **[*74]** features of the cases -- whether per curium, any concurrent or dissenting opinions -- and can sometimes be devised from the headnotes. Synopses of legal cases also make no referral to past cases, being confined to the facts at hand.

This completes our recitation of the evidence supporting and opposing exemption. Many of the activities we have detailed are unquestionably charitable. Even CBE would admit, for example, that several of the programs and activities assisting high school chemistry education are charitable.

If we appear in the remainder of this Decision and Order to ignore these activities it is not because we do not value them. We do. But it is our perception that the educational activities of the Membership Division, and even the Local Sections therein, are rather peripheral to the primary activities of the ACS. It is elsewhere, we conclude, that ACS devotes the majority of its personnel and finances. The "social purpose" of ACS and CAS, what they do day in and day out, is performed by CAS, the Books and Journals Division, the National and Regional Meetings, and the ordinary activities of its Local Sections. Primary among these "core" activities is CAS -- at the **[*75]** evidentiary hearing it was variously estimated that CAS provided 50%-70% of the gross revenues of ACS. Ultimately, then, in the following analysis we will focus on CAS.

Before we do that we will first discuss the legal authorities and arguments under which ACS, in all its activities, must be determined to be a "charitable institution." Then, after relating some financial facts about ACS and CAS, some of which have been stated supra, using these facts and the conclusions we draw therefrom we will consider the charitable nature of CAS, as described by its activities, under Ohio law.

There are many definitions of charity in the law of trusts and tax exemption, from Ohio and elsewhere. An early general definition in Ohio comes from the 1874 case of Gerke v. Purcell (1874), 25 Ohio St. 229, Syllabus 4:

"4. A charity, in a legal sense, includes not only gifts for the benefit of the poor, but

C-48

endowments for the advancement of learning, or institutions for the encouragement of science and art, without any particular reference to the poor."

Perhaps the most quoted definition in Ohio tax exemption cases comes from Planned Parenthood Assoc. v. Tax Commissioner (1966), 5 Ohio **[*76]** St. 2d 117, Syllabus 1, as follows:

"1. 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."

As we see, charity includes the "advancement of learning." In Waddell v. The Young Women's Christian Association (1938), 133 Ohio St. 601, 604, 605, a negligence action against a charitable institution, this aspect of charity was expanded upon as follows:

"Charity is not aid to the needy alone, but it embraces and includes all which aids man and seeks to improve his condition. Diffusion of useful knowledge, the acquirement of the knowledge of arts and sciences and the advancement of learning without any particular reference to the poor are considered charitable objects. See Gerke, Treas., v. Purcell, 25 Ohio St. 229; Cleveland Library Assn. v. Pelton, **[*77]** Treas., 26 Ohio St. 253." (Emphasis added).

We can say at this time that the basic reason ACS claims an exemption is because it, primarily, disseminates useful knowledge, and in particular scientific knowledge. As Waddell indicates, the diffusion of useful knowledge has been held in Ohio to be a charitable activity. The American Publishing Co. v. Evatt, Tax Commissioner (1940), 137 Ohio St. 264; The Hubbard Press v. Glander, Tax Commissioner (1951), 156 Ohio St. 170; The American Humanist Association, Inc. v. Board of Tax Appeals (1963), 174 Ohio St. 545.

We have no difficulty in accepting the definitions of charity ("diffusion of useful knowledge and advancement of education," "the promotion of research and the acquisition of knowledge and information in scientific fields") contained in ACS' brief at p. 75.

What is and what is not charitable has been said to be more a matter of description rather than definition. Perin v. Carey (1860), 65 U.S. 465, 494 16 L. Ed 701.

In Cleveland Osteopathic Hospital v. Zangerle (1950), 153 Ohio St. 222, Syllabus 2 states:

"Based on the theory that all property should bear its proportionate share of the costs of government **[*78]** and that it should be absolved from such obligation only for good cause, taxation is the rule and exemption the exception." (Emphasis added)

The same principle is stated in White Cross Hospital Assoc. v. Board of Tax Appeals (1974), 38 Ohio St. 2d 199, 210; Ohio Masonic Home v. Board of Tax Appeals (1977), 52 Ohio St. 2d 127, 129, and; Seven Hills Schools v. Kinney (1986), 28 Ohio St. 3d 186.

Statutes granting exemption are to be "strictly construed." The Incorporated Trustees of the Gospel Worker Society v. Evatt, Tax Comm'r (1942), 140 Ohio St. 185, 188; National Tube Corp. v. Glander, Tax Commissioner (1952), 157 Ohio St. 407, Syllabus 2; White Cross Hospital Assn. v. Bd. of Tax Appeals, supra, at 38 Ohio St. 2d 201; Seven Hills Schools v. Kinney, Comm'r, supra, at 28 Ohio St. 3d 186; American Society for Metals v. Limbach, Tax Commissioner (1991), 59 Ohio St. 3d 38, 40.

C-49

Still considering principles to guide us in our determination, we note that the Ohio Supreme Court has stated on several occasions that: "The reason for exemption is present benefit to the general public sufficient to justify the loss of tax revenue." The Philada Home **[*79]** Fund v. Board of Tax Appeals (1966), 5 Ohio St. 2d 135, 139; The White Cross Hospital Assoc. v. Board of Tax Appeals, supra, at 38 Ohio St. 2d 201; Ohio Masonic Home v. Board of Tax Appeals, supra, at 52 Ohio St. 2d 129.

And finally, a quotation from a case of another state in which we find some general wisdom that we believe is very appropriate to this case. It comes from Massachusetts Medical Society v. Assessor of Boston (1960), 164 N.E. 2 325, 340 Mass. 327, a case decided by the Supreme Judicial Court of Massachusetts, in which that court denied exemption from real property tax of the Medical Society's headquarters in Boston.

"As we have said many times, charity and charitable corporations are not limited to alms-giving but comprehend a wider field of activity for the improvement and happiness of man. * * * While new objects have been and must be added to comprehend the wide variety of gifts which may be classed as charitable 'the more remote the objects and methods become from the traditionally recognized objects and methods [-relief, religion, education and public works-] the more care must be taken to preserve sound principles and to avoid unwarranted exemptions **[*80]** from the burdens of government.' Boston Chamber of Commerce v. Assessors of Boston, 315 Mass. 712, 718, 54 N.E. 2 199.202." At 164 N.E. 2 328

The only real property tax exemption cases in Ohio holding professional or trade associations or societies to be or not to be "charitable institutions" under R.C. 5709.121 are allegedly ACS II, supra (debated herein); American Ceramic Society, supra; and this Board's decision in American Society For Metals v. Limbach, Tax Commissioner, B.T.A. Case No. 87-A-807 (March 23, 1990), affirmed by the Ohio Supreme Court on other grounds in American Society For Metals v. Limbach, Tax Commissioner, supra. The predecessor proceedings to American Ceramic Society and American Society For Metals referenced in ACS' briefs were administrative proceedings occurring prior to the enactment of 5709.121.

In ACS II, as we have previously stated, the issue of whether ACS was a "charitable institution" was never actually litigated. It is thus clear, and the opinion in ACS II bears this out, that whether a professional or trade association or society could be a "charitable institution" was not addressed in ACS II.

American **[*81]** Ceramic Society v. Kinney, Comm'r, (1984), Franklin Cty Ct. App. No. 83AP-134 did not on its face find the American Ceramic Society a "charitable institution" because it engaged in charitable activities. The Court of Appeals found American Ceramic Society charitable because the charter language was charitable and the Court improvidently relied on ACS II with the effect that whether or not an organization was a "charitable institution" under R.C. 5709.121 depended solely on the language of the charter. The Court's conclusion was contrary to the great weight of authority nationwide. The Franklin County Court of Appeals also apparently based its decision in American Ceramic Society v. Kinney, Comm'r, supra, on collateral estoppel -- the Board of Tax Appeals having apparently found its real property exclusively used for charitable purposes twenty-five years before. We note in connection with this decision that the question whether the American Ceramics Society was a "charitable institution" only became pertinent in 1969 with the enactment of R.C. 5709.121.

In our decision in American Society for Metals v. Limbach, Tax Commissioner, supra, we held that organization not **[*82]** to be a "charitable institution" under R.C. 5709.121, but the Ohio Supreme Court did not focus on this issue in affirming our Decision and Order. The predecessor administrative proceeding to ASM, referenced by ACS, was an administrative determination granting exemption, made (again) before the issue of "charitable institution" existed in the statutes. In our decision in 87-A-807 we stated:

C - 50

"Upon consideration of the facts in evidence before us, the Board of Tax Appeals finds that ASM fails to meet the three-part test of Cincinnati Nature Center, supra. Appellant has not shown that it is a charitable institution, or that it uses the property in furtherance of a charitable or public purpose and with no view to profit." At p. 10 (Emphasis added)

Appellee ACS presents no case, from any jurisdiction, other than discussed above, that indicates a professional association or society as normally constituted is a "charitable institution." This is also true of Comptroller of the Treasury v. Maryland State Bar Association, supra. We decide infra that such a determination is possible, but difficult and rare indeed.

The courts of other states have been, with very rare exception, **[*83]** uniform in holding that professional associations and societies are not charitable institutions or users of realty for purposes of charitable exemption from real estate tax. California College of Mortuary Services v. L.A. County, (Ct. App. Ca., 1972) 100 Cal Rptr 558, 23 CA 3d 702; American Institute of Industrial Engin. v. Chilivis (S. Ct. Ga., 1976) 225 SE 2d 308, 236 GA 793; International College of Surgeons v. Brenza (S. Ct. Ill., 1956) 133 N.E. 2d 269, 8 Ill. 2d 141; Milward v. Paschen (S. Ct. Ill., 1959) 157 N.E. 2d 1, 16 Ill. 2d 302; Bd. of Certified Safety Professionals of Am. Inc. v. Johnson (Ill. S. Ct., 1986) 494 N.E. 2d 485, 112 Ill. 2d 542, 98 Ill. Dec. 363; Am. College of Chest Physicians v. Ill. Dept. of Revenue (App. Ct. Ill., 1990) 559 N.E. 2d 774, 262 Ill. App. 3d 59, 147 111 Dec. 434; Kansas State Teachers Assoc. v. Cushman (S. Ct. Kan., 1960) 351 P. 2d 19, 186 Kan. 489; Mass. Medical Society v. Assessors of Boston (Sup. Jud. Ct. Mass., 1960) 164 N.E. 2d 325; Minnesota State Bar Association v. Comm'r of Taxation, (S. Ct. Minn., 1976), 240 N.W. 2 321, 307 Minn. 389; Am. Assoc. of Cereal Chemists v. County of Dakota (S. Ct. **[*84]** Minn, 1990) 454 N.W. 2d 912; Nebraska State Bar Foundation v. Lancaster Cnty. Bd. of Equalization (S. Ct. Neb., 1991), 465 N.W. 2d 111, 237 Neb 1; Assoc. of Bar of City of New York v. Lewisohn, (Ct. App. N.Y., 1974) 313 N.E. 2d 30, 34 N.Y. 2d 143; Penn. Bar Assoc. Endowment v. Robins, (Com. Pls. Ct., Pa. 1956) 10 Dist. & County Reps. 2d 637, 68 Dauph. 338, exceptions den'd. 69 Dauph. 181; South Dakota State Medical Assn. v. Jones (S. Ct. S.D., 1966) 146 N.W. 2d 725, 82 S.D. 374; South Dakota Education Assn. v. Dramey (S. Ct. S.D., 1971) 188 N.W. 2d 833, 85 S.D. 630; Engin. and Scientists of Milwaukee, Inc. v. City of Milwaukee (S. Ct. Wis. 1968) 157 N.W. 2d 572, 38 Wis. 2d 550.

On October 2, 1991, ACS filed a "Statement of Additional Authority" bringing to our attention Comptroller of the Treasury v. Maryland State Bar Association, Inc., (Ct. App. Md., 1989) 552 A. 2d 1268, 314 Md. 655, and, the decision of the Tax Commissioner on remand, Maryland State Bar Association v. Comptroller of the Treasury Sales and Use Tax Division, 1990 Md. Tax Lexis 9 (1990). We consider that these cases uphold the position we are here expressing against the charitable **[*85]** exemption of professional associations rather than the contrary. The Court of Appeals opinion at 552 A. 2d 1275 states that it upholds the Tax Commissioner's determination that the Maryland State Bar Association was not primarily a charitable organization:

"Thus, we think that the Tax Commissioner understood the meaning of the word 'charitable' in section 326(1) and properly applied it to the evidence in the case. Its factual determination that MSBA was not primarily a charitable organization was supported by substantial evidence, i.e., by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

The Tax Commissioner was directed on remand to consider whether education was MSBA's primary purpose, and, if not, whether its educational and charitable activities in combination mounted up to an organization engaged primarily in educational and charitable pursuits. [The two purposes could combine under Maryland law. There is no precedent they can under Ohio law, and, in any event, the Ohio Supreme Court has already determined ACS is not a "public institution of learning." American Chemical Society v. Kinney, Comm'r. (1980), 62

C-51

Ohio **[*86]** St. 2d 258 "ACS I"]. Thus, the Maryland Court of Appeals upheld the Tax Commissioner's determination that MSBA was not primarily a charitable organization.

The cases cited in the Court of Appeals decision support, as you might expect, this determination, and our finding in this case, that professional associations are not -- absent extraordinary circumstances (see infra) -- charitable. The bar association cases it cites to the contrary -- St. Louis Union Trust Company v. United States, (8 Cir, 1967) 374 F. 2d 427, Dulles v. Johnson, (2 Cir. 1959) 273 F. 2d 362 and Rhode Island Hospital Trust Co. v. United States (D.R.I., 1958), 159 F. Supp. 204 are footnoted by the Court of Appeals with the observation, from Minnesota State Bar Association v. Comm'r of Taxation, 307 Minn. 389, 240 N.W. 2 321 (1976) (a case above cited in support of our position), that these cases were decided under the principle of federal gift and estate tax law that public policy favors exemption of bequests to bar associations.

Of the cases cited in Md. State Bar Assoc. that support our position American Institute of Industrial Engineers v. Chilivis, supra, and South Dakota **[*87]** State Medical Association v. Jones, supra, in addition to Minnesota State Bar Association v. Comr. of Taxation, supra, were decided on real estate tax exemption grounds and have been cited above in support of our position that professional associations are rarely to be exempted under such provisions. The other cases cited by the Court of Appeals -- Gas Research Institute v. Dept. of Revenue, (App. Ct. Ill., 1987) 507 N.E. 2 141, 154 Ill. App. 3d 430, 107 Ill Dec. 477, App. Dism'd 515 N.E. 2 107, 113 Ill Dec. 298, (1987) and International Foundation, Etc. v. City of Brookfield, (Ct. App. Wis., 1980), 290 N.W. 2d 720, 95 Wis. 2d 444, aff'd 100 Wis. 2d 66, 301 N.W. 2, 175 (1981) support our view although decided under other tax provisions than real estate tax exemption statutes.

The predominant concept in the above out-of-state real estate tax exemption cases is that in professional organizations and societies the direct benefit is to the members, while the public receives only an indirect benefit. Thus, in a society of physicians, for example, the general public does benefit from the improved knowledge and proficiency of doctors resulting from the association's various **[*88]** programs, but the greatest, most direct, benefit accrues to the physicians themselves who maintain and improve their practices from the meetings, journals, continuing education and other activities of the association or society. The above cases say the indirect benefit according to the public from such typical activities is not sufficient to make them charitable.

ACS is structurally a professional society. Its leaders are elected directly or indirectly by the membership. Ignoring for the moment CAS, ACS' activities are in type comparable to those of the professional organizations described in the above out-of-state cases. Thus, professional organizations publish journals of varying scientific interest, conduct national and regional conventions and meetings, have organized sub-specialties and regional sections, conduct educational programs for students and the public, and provide continuing education for their members.

The above is not to say that professional organizations and societies can never be charitable organizations. It appears to be rare, but see American College of Surgeons v. Korzen (S. Ct. Ill., 1967), 224 N.E. 2 7, 36 Ill 2d 340. The distinction is stated **[*89]** in Massachusetts Medical Society v. Assessors of Boston, supra., at 164 NE2 328, 329;

"Whether an institution is in its character literary, benevolent, charitable or scientific will depend upon the declared purposes and the actual work performed. [citation omitted] An institution will be classed as charitable if the dominant purpose of its work is for the public good and the work done for its members is but the means adopted for this purpose. But if the dominant purpose of its work is to benefit its members or a limited class of persons it will not be so classified even though the public will derive an incidental benefit from such work. [citation omitted]." (Emphasis added)

C-52

The above quotation is favorably quoted in Maryland State Bar Association v. Comptroller of the Treasury, supra. MSBA was furnished to this Board by ACS in its "Statement of Additional Authority" of October 2, 1991.

In line with the authorities cited supra, it is the burden of the ACS to clearly prove that their organization's dominant purpose is the benefit of the public and not its members or some other limited class of persons. This is a heavy burden, because in the great majority **[*90]** of professional organizations -- and ACS is no exception -- the programs and activities that have some public benefit at the same time are essentially benefiting the member of some other limited class, such as an industry. Thus, even the apparent charitable act of ACS, the assistance given to high school chemistry students, also benefits the chemical industry by fostering talented and well-educated future employees. Other examples we can think of are even less charitably weighted.

We take seriously ACS' assertion that its "mission" is to encourage and promote "chemistry." The substitution of "chemistry" for ACS members as ACS' direct beneficiary merely substitutes, however, we find, one limited class of direct beneficiaries for another. Instead of its members, to the extent ACS promotes "chemistry" it more directly promotes the well-being of chemists and the chemical industry generally than it benefits the well-being of the public. Thus, we find even the most benevolent, scientific activities of ACS, such as the publication of its journals, to an impermissible degree serve directly the interests of a limited class of beneficiaries.

We have considered the purpose and activities **[*91]** -- excluding CAS -- of the ACS. We have considered the purpose and activities of the professional associations Appellant CBE has (validly) presented to us. We have considered the purpose and activities of the professional and trade associations contained in the above-captioned cases. We cannot state that after this examination we find that ACS has proven its "dominant purpose" or its "primary activity" is the good of the public.

The Public Affairs Division of ACS, about which we heard no testimony and received no evidence, assuredly engages in non-charitable activities. We don't know the number of employees in this Division or the amount of its budget. Excluding its educational activities, the activities of the Membership Division are non-charitable. We likewise know neither the number of employees or budget involved there. The journals published by the Books and Journals Division contain matters of genuine scientific interest and import. Other professional societies, however, also publish journals that contain matters of genuine scientific importance. And even the genuinely scientific journal articles benefit the members and chemical community more directly than it does **[*92]** the public.

We thus find that ACS has not proven that its "dominant purpose" in 1980 was the public good as opposed to the good of its members and the chemical industry. It is not established by a preponderance of the evidence that ACS was, not considering for the moment CAS, a "charitable institution" in 1980 within the purview of R.C. 5709.121.

Although the above conclusion might be determinative of the appeal, we turn now to a specific analysis of the charitable status of CAS. CAS is not a typical activity of a professional organization, and its charitable status must be ascertained under different principles. In considering CAS, however, we are still determining whether ACS is a "charitable institution," since CAS is a principal activity of ACS.

There follows financial and other facts about the activities of ACS and CAS. Our purpose in relating this is to furnish a foundation for the conclusion we come to regarding the charitable nature of CAS. Since ACS is one institution structurally and financially some of the facts about ACS have bearing on our conclusion about CAS. We also find that certain commercial

C-53

aspects of ACS' activities shed light on the scientific/commercial **[*93]** division in CAS' activities.

It should be stated at this point that more could have been done at the evidentiary hearing to develop the commercial aspect of what CAS does. We are primarily referring here to evidence of the scientific and commercial use CAS' subscribers made of its abstract service. With the possible exception of Mr. Simon of Dialog, Appellant CBE did not present evidence of the use made of CAS' abstracts. In its motion for directed verdict at the evidentiary hearing CBE referred to ACS as a "commercial enterprise" but it failed to present evidence to prove this point. R. Vol IV, 84. We believe, however, that the evidence extant in this case, including the following, amply supports our conclusion.

Approximately 40% of CAS subscribers in 1980 were industrial users. Deposition of Ronald L. Wigington, 18. Many of these industrial users were for-profit. Deposition of John K. Crum, 12. They use Chemical Abstracts "for business reasons." Deposition of Ronald L. Wigington, 16. These for-profit industrial users use CAS publications in their "research." Deposition of John K. Crum, 12. This would necessarily be for new and improved products and services upon which **[*94]** they would make a profit.

The following is drawn from the financial statements of ACS (ACS Exhs. 56-59) and testimony at the hearing. Revenues include revenues of restricted funds (PRF). "Surplus" is at end of year. % "Profit"/Expenses reflects next year's budgeted expenses. "Profit" includes capital gains.

Gross	Revenues	Gross Advertising Revenue	Revenue/ Expenses (so-called "profit")	"profit" as % of Revenues	Reserve/ Fund Bal (so-called "surplus")
1980	75,140,672	5,593,880	6,025,045	8%	20,924,914
1981	87,517,213	6,375,910	7,972,588	9%	23,327,552
1982	105,998,705	5,829,844	3,520,578	3.3%	21,890,832
1983	103,705,673	5,744,576	6,098,218	5.8%	22,529,199

Gross	% "surplus"/ next yr's Budgeted Expenses
1980	31%
1981	25%
1982	23.1%
1983	22.1%

The gross advertising revenues are commissions to Centcom, the profit subsidiary. The percentage "surplus" or reserve or fund balance was of the following year's budgeted expenses was pursuant to a 1978 policy of ACS that the "surplus" should be maintained at 25%-30% of following year's budgeted expenses. R. Vol. III, 151. The surplus was for "catastrophies, **[*95]** capital requirements, and R & D and marketing requirements." R. Vol. IV 147. At the evidentiary hearing ACS presented two CPAs who testified that such a reserve or "surplus" level was not "unreasonable."

ACS and CAS ran a deficit in revenue/expenses in 1979, but have not done so since. Other years CAS has contributed a "profit" averaging 4% of expenses to ACS finances. Over the

C-54

years 1978-1983 CAS contributed over $ 10,000,000 to the ACS "surplus." R. Vol. II, 34. Over the same years CAS incurred capital expenditures of $ 26,211,000. R. Vol. II, 34

None of the "surplus" comes from members' dues. All comes from CAS, Books and Journals, investment income. R. Vol. II, 88

The CAS data base of abstracts and indexes is a copyright. R. Vol II, 9.

CAS had a marketing department in 1980. Deposition of Ronald L. Wigington, 33. Employees of this department solicited new business at trade and market shows for CAS product and services, Id. In 1980 CAS had a R & D Department that employed approximately 100 people. They worked on the creation of new ways of providing services. Deposition of Ronald L. Wigington, 8.

The research reported at paper presentations and symposia at **[*96]** ACS' meetings comes from all sources, including private companies. Deposition of John K. Crum, 151.

In 1980 a full page advertisement in the Journal of Analytical Chemistry cost "over $ 2,000." The same advertisement in the Journal of Computer Science would have cost "substantially under $ 1,000." R. Vol IV, 55.

In 1980 CAS did some "sponsored research" in its data base subject to "certain strict demands." Deposition of John K. Crum, 13.

In establishing the fees for CAS on-line (Which included a start up charge as well as use charges and material retrieved charges. Deposition of Ronald L. Wigington, 23) CAS considered its cost but also considered the rate other on-line providers were charging. Deposition of Ronald L. Wigington, 14.

When considering whether to develop an on-line service, CAS debated purchasing a private on-line company. Deposition of Ronald L. Wigington, 50. CAS markets CAS on-line in a number of publications, including those of ACS. Deposition of Ronald L. Wigington, 52.

In the area of the licensing of CAS files on electronic tape, industrial companies and other on-line companies were and are among the licensees. Deposition of Ronald L. Wigington, 53. **[*97]**

The subscription fees for CAS publications are very substantial, as described above. Witnesses testified that the microfilm versions were comparably priced. We did not receive figures for on-line, which vary according to usage.

An examination of the national and international meeting programs (ACS Exhs. 6, 7) reveal that some of the Technical Divisions' names accord to industries. Examples are Division of Agricultural and Food Chemistry; Cellulose, Paper and Textile Division; Division of Environmental Chemistry; Division of Fuel Chemistry; Division of Medical Chemistry; Division of Nuclear Chemistry and Technology; Division of Organic Coatings and Plastics Chemistry; Division of Petroleum Chemistry, Inc.; Division of Polymer Chemistry, Inc.; Rubber Division, Inc.; Division of Fertilizer and Soil Chemistry; Division of Fuel Chemistry; Division of Pesticide Chemistry. There even is a Technical Division called Division of Chemical Marketing and Economics. The Board realizes the denomination of the Technical Divisions accord to the denomination of the sub-specialties in the science, but that in itself shows the deep connection between science and commerce in this area. On this **[*98]** same subject we would note that one of the technical journals is denominated Industrial and Engineering Chemistry Product Design and Development.

An examination of the topics of the papers, symposia and programs at the meetings even to

C-55

the non-scientist shows that much of the research there discussed would be of commercial as well as scientific interest. We will not cite examples, but invite a detailed examination of Exhibits 6 and 7, particularly the programs of the Technical Divisions.

CAS does not do scientific research. It has made some truly genuine innovations in the way "past chemistry" is researched, such as its Registry File and Structure Searching, but it does not routinely search for and make scientific discoveries. CAS' case for exemption therefor does not come under the exemptions given for scientific research -- as Battelle Memorial Institute would, for example -- but rather under an exemption for the "dissemination of [scientific] knowledge." This distinction is recognized in ACS briefs.

Nor did ACS in 1980 generally disseminate scientific information to the public. It disseminated scientific information primarily to subscribers in the field of chemistry. This **[*99]** distinction is likewise important when considering the cases, because dissemination of useful knowledge to the public is inherently a charitable act (The American Humanist Association, Inc. v. Board of Tax Appeals (1963), 174 Ohio St. 545; The Hubbard Press (1951), 156 Ohio St. 170; The American Issue Publishing Co. v. Evatt, Tax Commissioner (1940), 137 Ohio St. 264) while dissemination of useful knowledge to a limited class or group of persons or institutions has been held not necessarily charitable.

In OCLC Online Computer Library Center, Inc. v. Kinney, Comr., supra., the Ohio Supreme Court affirmed the denial of an application for charitable exemption of OCLC. OCLC was and is an Ohio not-for-profit organization which provided computerized bibliographic services to libraries across the United States. The Court cited OCLC's contract research for private enterprise, and stated that OCLC could not vicariously rely on the charitable exemptions of its library clients, but the Supreme Court also addressed the charitable nature of an institution that provided such services [dissemination of useful knowledge] only to institutions -- though charitable ones -- for a fee. **[*100]**

"So, too, in the instant cause, the record demonstrates that OCLC's activities more closely resemble those of a publisher of library materials or a data base firm specializing in information retrieval, such as Lexis or the New York Times Information Bank, rather than that of a library. Although OCLC's service may greatly enhance the ability of libraries to better serve the public, OCLC essentially offers a product to charitable institutions, for a fee exceeding its cost, and, as the board concluded, is not itself a charitable organization." At 11 Ohio St. 3d 201

Like OCLC, CAS is a disseminator of information to institutions, not the public, for a fee greater than cost. OCLC provides strong support for CBE in this case.

ACS might argue that the dissemination of scientific knowledge is charitable when disseminated to only institutions, not the public, and might point out that it would be pointless to distribute chemical knowledge to persons who don't understand it. This is a valid point but it does not affect the Ohio law of charities, which appears to hold that the limited dissemination of knowledge may not be charitable in all instances. That the doing of scientific **[*101]** research and the dissemination of scientific knowledge are not sacrosanct can be seen from an examination of Battelle Memorial Institute v. Dunn, Aud. (1947), 148 Ohio St. 53.

Battelle Memorial Institute did "contract research" -- scientific research on the various problems of private and public institutions that paid a fee therefor. The fee was basically cost. Any patentable result went to the sponsors of the research. A large proportion of the contract-sponsors were private enterprises. The Supreme Court held, applying the then R.C. 5709.12, that:

"When the use of property is wholly for the promotion and advancement of learning, science

C-56

and the useful arts generally, that use is deemed charitable; but when the use is essentially for the private and pecuniary advantage of a class, such as industrial organizations, the contrary is true." At 148 Ohio St. 61.

There is a common thread running through the OCLC and Battelle cases. Although both OCLC and Battelle were not-for-profit corporations, we submit that the Supreme Court found the transactions of both organizations impermissibly commercial. The transactions were economically self-interested on both sides **[*102]** rather than charitable. The institutions seeking exemption received substantial fees (cost plus) while the "customers" received something from which they would derive a pecuniary benefit, even in the case of the libraries. There may have been a charitable attitude involved, on the part of OCLC and the part of Battelle, but the transactions in both cases, when analyzed, were impermissibly commercial rather than charitable.

The evidence in this case indicates that the "social purpose" served by CAS' activities in publishing abstracts is essentially commercial rather than scientific. The fees from advertising in ACS publications, the substantial fees charged for CAS publications, the substantial percentages of private subscribers to CAS services, the nature of the information transmitted as exemplified by topics at meetings and in journals indicate there is a significant commercial value for CAS abstracts. This conclusion is further substantiated by the "profitability" of CAS.

If the abstracts had no commercial value there would be no issue; and the "social purpose" served would be purely scientific. In such case, if CAS disappeared for some reason the publishing of abstracts **[*103]** would not continue without the efforts of a charitable institution. But in this case, as in Battelle and OCLC, the conclusion is inescapable that -- the Battelle contract research would be done, -- the OCLC bibliographic material would be furnished, -- the CAS abstracts would be published -- whether or not the service or product provider was a charity. The evidence in this case leads one inescapably to the conclusion that CAS' abstracts are valuable commercially as well as scientifically.

To deny charitable exemption to institutions like Battelle and OCLC and ACS is not miserly or ungrateful. These institutions provide great benefit to the public, perhaps the more so because they have a commercial importance as well as a scientific benefit. The public benefits from their commercial endeavor as well as their charitable acts. We are required by the law of charity, however, to determine exactly what "social purpose" is being served by these institutions and when it is substantially commercial we must deny charitable exemption, for the several reasons we discuss later.

As in the cases cited above denying exemption to other states' professional societies, the indirect **[*104]** benefit to the public of CAS' abstracts is not sufficient to warrant exemption. The public benefit in Battelle's scientific research and OCLC's increased access to books was not found sufficient to warrant exemption in those cases, and supports our position on this point.

Even if the Supreme Court in OCLC had not disparaged "vicarious" charitable exemptions CAS would not be entitled therefor, for a substantial number of its subscribers are private corporations and obviously not charitable.

Our argument is not with the fees charged by CAS, substantial as they are. Even when something is patently a charity a reasonable fee may be charged. Planned Parenthood Assn. v. Tax Commissioner (1966), 5 Ohio St. 2d 117. The exaction of a fee in that case from women seeking medical information did not detract from the charitable nature of the transactions or the institution. The same would be true of a fee for public education or for the dissemination of information to the public. But where there is doubt whether certain transactions constitute charity instead of commerce -- such as Battelle and OCLC -- a substantial fee lends credence to the argument that something **[*105]** more than charity is

C-57

taking place.

Our finding that the activities of CAS are essentially commercial rather than scientific has four consequences in the law of charity:

First, the CAS activities are not relieving the burdens of government. This is one of the bases of charity, and applicable under the instant circumstances. If CAS stopped business tomorrow the evidence indicates another party, perhaps for-profit, would step into the business. The government would not, we suggest, be forced to publish chemical abstracts. As said before, this is not ingratitude but a requirement of charity. It doesn't do what private incentive will do for itself. CAS role is not entirely unique: Later in this Decision and Order we cite cases of a not-for-profit corporation in Pennsylvania that publishes biological abstracts. On this point also compare American Society for Testing and Materials v. Board of Revision of Taxes, Philadelphia County (S. Ct. Pa., 1967), 225 A. 2d 557, 423 Pa. 530, wherein a professional society was held exempt from municipal taxation as a "public charity" because it performed a quasi-governmental function in designing standards for, and tests of, construction materials. **[*106]**

Secondly, the recipients of CAS' alleged charity, the subscribers to its abstracts, are not legitimate objects of charity. A large percentage of CAS subscribers are private companies, and the library subscribers may cater largely to private demand. None of the subscribers are needy, and CAS doesn't donate its service to anyone. Certainly none of the subscribers are any more charitable than the libraries in OCLC.

Third, a substantial number of the CAS subscribers use CAS services to design and improve products for private gain. One can't peruse one of the programs for the 1980 national and international meetings without being struck by the commercial potential in what ACS and CAS do.

Fourth, there is a limited class of direct beneficiaries of CAS' alleged charitable activities. There is undoubtedly a public benefit from what CAS does, but the primary, direct benefit is to the chemists, chemical companies and government agencies that improve their careers and profits by designing, developing and improving commercial products. This is the "limited class of persons" spoken of in Massachusetts Medical Society v. Assessors of Boston, supra., at 164 N.E. 2d 328, as being **[*107]** one of the distinctive signs of a non-charity.

Biological Information Service ("Biosis") is a Washington, D.C., not-for-profit corporation that is in the business of obtaining, abstracting, indexing and publishing the abstracts of biological literature just as CAS does for chemical literature. In fact, today Biosis and CAS have a combined abstract publication. The similarities between the two institutions are many indeed. In 1986 (Biosciences Information Service v. Commonwealth of Pennsylvania (Cmwlth. Ct., Pa., 1986), 516 A 2d 434, 101 Pa. Cmwlth. 384) and again in 1988 (Biosciences Information Service v. Commonwealth of Pennsylvania (1988), 551 A 2d 672 122 Pa. Cmwlth. 294) the Commonwealth Court of Pennsylvania considered this corporation's exemption from use tax under the claim that it was a charitable organization. Biosis sold the abstracts it produced to "government agencies, hospitals, scientists, and universities." At 551 A 2d 675. In both decisions the Pennsylvania Commonwealth Court denied the exemption, finding that Biosis was not a "charitable organization." The Court held that Biosis did not advance a charitable purpose, did not donate a substantial portion **[*108]** of its services, did not relieve the government of a burden, and did not operate free from the profit motive. There were required elements of a purely public charity as defined by the Pennsylvania Courts.

Of particular interest to us due to our position in this case is the following quotation from the Commonwealth Court in 551 A2 672, at 675, discussing Biosis alleged status as a "charitable organization." It supports our view regarding the non-charitable nature of the "limited class" served by CAS.

C-58

"BIOSIS first argues that it does, in fact, advance a charitable purpose by collecting, preserving, and making available its library to the public. Without its library, BIOSIS argues, the public would be unable to access the accumulated literature in the biological sciences field.

"The definition of 'charitable purpose' was set forth in Hill School Tax Exemption Case, 370 Pa. 21, 87 A.2d 259 (1952) where the Pennsylvania Supreme Court stated:

'The word "charitable" in a legal sense includes every gift for a general public use, to be applied, consistent with existing laws, for the benefit of an indefinite number of persons, and designed to benefit them from an educational, religious, **[*109]** moral, physical, or social standpoint. In its broadest meaning it is understood "to refer to something done or given for the benefit of our fellows or the public. . . ." Id. at 25, 87 A.2d at 262 (quoting Taylor v. Hoag, 273 Pa. 194, 196, 116 A. 826 (1922)).

"In the instant matter, the service which BIOSIS provides does not benefit the public at large but, rather, benefits scientists, universities, hospitals, and government agencies, all of which pay for BIOSIS' services: Although the public may benefit secondarily from BIOSIS' services, we conclude that BIOSIS' purpose is not charitable in nature."

(Emphasis added)

The Commonwealth Court's decisions in Biosciences were affirmed by the Pennsylvania Supreme Court in 1990 in a Per Currium opinion. 569 A2d 927 (2-6-90)

Finally, we state certain other considerations which confirm our conclusion that CAS is essentially a commercial institution, and chemists and the chemical industry are the direct, primary beneficiaries of its activities.

There appears to be very little charitable giving to CAS, or to ACS, for that matter. The subject of donations to the Appellee ACS or CAS never came up at the hearing, and there **[*110]** is no line item for donations or contributions in the ACS financial statements. The presence or absence of charitable donations to an alleged charity has often been held an indicator of charitable purpose or its absence.

As we indicated above, ACS derives a great deal of money from advertising in its publications, and has even established a for-profit subsidiary to handle it. The for-profit subsidiary receives a commission for its efforts. The presence of so much advertising indicates a commercial interest in what ACS and CAS do.

CAS limits the dissemination of its publications by its fees and other practices. At the evidentiary hearing Mr. Simon stated that ACS had been asked to provide free access to certain files for educational uses and had refused. Certain files ACS has refused to license at all. And on the files on which ACS did grant a license, Mr. Simon testified the fees and royalties were greater than for-profit companies.

Like OCLC and Battelle, CAS does some "contract research," in the case of its chemical archives, for a fee. The witness at the evidentiary hearing implied that CAS didn't do as much of this as it could! He left the impression that CAS could **[*111]** charge more, take more "business," and make even more money if it desired. This is the sign of a reluctant for-profit company, not a charitable institution seeking to benefit others.

As earlier indicated, CAS was designed to and did make substantial profits during the period we are concerned with. From 1977-1983 it contributed over $ 10,000,000 in "profit" to ACS. In Goodwill Industries of Southern Ohio, Inc. v. Limbach, Tax Commissioner, BTA Case No.

C-59

84-B-129 (Feb. 6, 1987) we stated: "The words 'charity' and 'profit' are not compatible." At p. 558. CAS was designed not just to break even, but to show a "modest" profit. We are not saying that income exceeding expense is automatically fatal under step 3 of the Cincinnati Nature Center case test, but as we have said its presence suggests the presence of commerce.

Resulting partly from the "profits" of CAS ACS had a very substantial surplus during the years in question of around $ 20,000,000. The same comments made above about "profits" apply to this fund maintained by ACS.

CAS during the period in question was in competition with for-profit and not-for-profit companies in its on-line service. This has been described **[*112]** above. We might speculate that CAS has foreclosed competition in the printed media -- there would appear, based on the competition on-line, to be a commercial market for such a printed source.

"When a substantial portion of the gross income of a corporation is received for work done in competition with commercial concerns in the same line, the property of such corporation may not be exempted from taxation under Section 5353, General Code, even though such corporation be one found not-for-profit and owned by a religious institution, for whose use, benefit and behalf the property of the corporation is held. (American Issue Publishing Co. v. Evatt, Tax Commissioner, 137 Ohio St., 264, distinguished." Zindorf v. The Otterbein Press (1941), 138 Ohio St. 287, Syllabus #2

See also The Lutheran Book Shop v. Bowen, Tax Commissioner (1955), 164 Ohio St. 359. Testimony at the evidentiary hearing established that CAS advertised its services during the period in question in trade publications and made appearances at conventions and trade shows.

We have the greatest respect and admiration for the men and women who founded, built and carry on the work at ACS and CAS. That it **[*113]** is not primarily charitable does not detract from its benevolent nature and public essentiality. There should be no opprobrium attached to commercial usefulness, as the most needed and worthy services are supplied mainly by non-charitable entities. If ACS and CAS were charities they would be satisfying less of a public need than they do satisfy. Serving a benevolent purpose, however (Camp v. Fulton County Medical Society (S. Ct. Ga., 1964), 135 S.E. 2d 277, 219 Ga. 602) and usefulness (Appeal of Doctor's Hospital, (Cmwlth Ct. Pa., 1980) 414 A. 2d 134, 51 Pa. Cmwlth. 31) are not sufficient to make an institution a charity.

Upon consideration of all the evidence, the Board of Tax Appeals hereby finds and determines that for the reasons stated herein the final order of the Tax Commissioner denying Appellant's complaints against real property tax exemption was erroneous. IT IS ORDERED that the final determination of the Tax Commissioner, rendered by Journal Entry dated May 12, 1986, be and hereby is reversed and the same is remanded to that official to take such action in connection herewith **[*114]** as is required to give effect to this Decision and Order.

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax Law > Federal Tax Administration & Procedure > Collateral Estoppel & Res Judicata > Collateral Estoppel
Tax Law > Federal Tax Administration & Procedure > Collateral Estoppel & Res Judicata > Res Judicata
Tax Law > State & Local Taxes > Administration & Proceedings > Judicial Review

C-60

Source: My Sources > Ohio > Find Statutes, Regulations, Administrative Materials & Court Rules > By Administrative Materials > **OH Board of Tax Appeals Decisions**
Terms: **86-H-566** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Monday, June 9, 2008 - 4:02 PM EDT

LexisNexis® About LexisNexis | Terms & Conditions | Contact Us
Copyright © 2008 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

C-61

*1992 Ohio Tax LEXIS 673, **

Dayton Art Institute, Appellant, vs. Joanne Limbach, Tax Commissioner of Ohio, Appellee.

CASE NO. **86-A-521** (REAL PROPERTY EXEMPTION)

STATE OF OHIO -- BOARD OF TAX APPEALS

1992 Ohio Tax LEXIS 673

June 19, 1992

[*1]

APPEARANCES:

For the Appellant - Robert T. Duffy, Attorney at Law, c/o Ms. Marie Ferguson, Administrator, Dayton Art Institute, Forest & Riverview Avenues, P. O. Box 941, Dayton, Ohio 45401

For the Appellee - Lee I. Fisher, Attorney General of Ohio, By: Floyd J. Miller, Assistant Attorney General, State Office Tower, 16th Floor, 30 East Broad Street, Columbus, Ohio 43215

OPINION:
DECISION AND ORDER

This matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed by Dayton Art Institute. The appeal is taken from a final order of the Tax Commissioner wherein that official denied an application for the exemption of real property from taxation.

Dayton Art Institute ("Dayton Art") is a nonprofit corporation organized for purposes of fostering the appreciation of the fine and applied arts, and for acquiring and exhibiting collections and objects of art. To this end, Dayton Art maintains three buildings in a campus-like setting; a two-story museum, a three-story pavilion, and a one-story propylaeum. The property is used to house permanent and temporary art exhibits, provide adult and youth studio classes, host special events, and to offer workshops, films, lectures **[*2]** and concerts. Dayton Art's operations are primarily funded by endowment and investment income, membership fees, grants, and special events fees.

The Appellant's property has enjoyed a tax exemption since 1937, when the forerunner to the Tax Commissioner found the property used for charitable purposes under General Code section 5353. However, in 1982 the Tax Commissioner withdrew the exemption, and returned to the tax list and duplicate, that portion of the property which consisted of a museum store and a framing service area. Dayton Art then filed an application to restore the exemption for this portion of its property. Following a hearing on the matter, the Commissioner found that the museum store and framing service were income producing ventures, and that the square footage which housed these ventures was used to sell goods and services. Due to the lack of a charitable use, the application for tax exemption was denied.

From the final action of the Tax Commissioner a timely notice of appeal was filed with the Board of Tax Appeals. The matter is before us today upon the notice of appeal, the statutory transcript furnished by the Tax Commissioner, the testimony and exhibits **[*3]** presented at the evidentiary hearing before the Board, and the legal briefs of counsel.

The real property at issue here is the Appellant's museum store and framing service area.

C-62

The museum store occupies 1,449 square feet of space in the basement of the propylaeum structure. It is managed by a salaried employee and staffed by volunteers. The store sells art reproductions and replicas, posters, post cards, art books, educational toys, and other related items which have artistic value.

The framing service area occupies 1,008 square feet of space on the second floor of the Rike Pavilion. Framing service is the responsibility of a salaried employee who prepares, mats, and frames works of art for display at the museum. Framing service is also available to anyone in the general community who wishes to preserve museum-quality art with conservation framing.

The sole question presented in this matter is whether the museum store and framing area qualify for an exemption from real property taxes under the authority of R.C. 5709.121. The statute provides as follows:

"Real property and tangible personal property belonging to a charitable or educational institution . . . shall be considered **[*4]** as used exclusively for charitable or public purposes by such institution . . . if it is either:

"(A) Used by such institution . . .

"(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) Otherwise 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."

This legislative definition of exclusive charitable use applies only to property belonging to a charitable institution. The first inquiry must therefore be directed to the nature of the institution, and finding it to be a charitable institution then the applicability of R.C. 5709.121 must be examined. White Cross Hospital Assn. v. Board of Tax Appeals (1974), 38 Ohio St. 2d 199. The concurring opinion of Judge Stern (pp 203, 204) is particularly instructive, with his conclusion that ownership and use need not coincide for such property to be exempt. Thus if the charitable **[*5]** institution owns and uses the property for a charitable purpose as specified in R.C. 5709.121(A)(1) or (A)(2), it is exempt property; or if such institution contractually allows another charitable institution to use the property as specified in R.C. 5709.121(A)(1) or (A)(2), it is similarly exempt. Followed in Episcopal Parish v. Kinney (1979), 48 Ohio St. 2d 199, 201. Further, if such institution otherwise makes the property available to anyone for a use in furtherance of, or incidental to such institution's charitable purposes and without a view to profit, the property is exempt. See Galvin v. Masonic Toledo Trust (1973), 34 Ohio St. 2d 157.

Then in Cincinnati Nature Center v. Bd. of Tax Appeals (1976), 48 Ohio St. 2d 122, at 125, the Supreme Court in considering the status of houses owned by a charitable institution and used by its employees, framed a three prong test in the application of the exemption granted under R.C. 5709.121:

"To fall within the terms of R.C. 5709.121, property must (1) be under the direction or control of a charitable institution or state or political subdivision, (2) be otherwise made available 'for use in furtherance of or incidental to' **[*6]** the institution's 'charitable * * * or public purposes,' and (3) not be made available with a view to profit."

In applying these principals to the instant appeal, the first inquiry is satisfied without any

C-63

genuine dispute. Dayton Art is a nonprofit corporation, exempted from taxation for federal purposes, which is for all purposes a community or area center existing to foster public interest and education in the arts. Dayton Art's real property currently enjoys a tax exemption by reason of its charitable use as a community or area center in the arts, within the purview of R.C. 5709.121(A), except that the Tax Commissioner has withdrawn exemption for the museum store and framing area, which are an integral part of the subject property.

Directing attention to the museum store and framing area, the evidence reveals that the inventory of the museum store is unique and contains items generally not available commercially, and are individually selected for their quality and artistic value. The framing service is also unique and substantially differs from that available at commercial frame stores in that the labor and materials primarily focus on the long-time preservation and conservation **[*7]** of the art. An item purchased from the museum store continues to encourage an interest and contribute to an art education after the individual leaves the premises; and museum-quality framing promotes the preservation of art for long-time enjoyment. Dayton Art has presented more than enough evidence to establish that the two areas of property are part of the subject property and used in performance of its charitable activities. The subject property including the museum shop and framing area are entitled to the exemption conferred by R.C. 5709.121(A)(1). Our consideration of this appeal should be properly concluded; and the order of the Tax Commissioner reversed.

At this point we must state that since the areas in question are not made available to any other person or institution, the provisions of R.C. 5709.121(B) are not applicable. Assuming arguendo, that we are required to give consideration to applicability of Division (B), it is clear from what goes before, that both activities, the museum shop and framing area are incidental to, and in furtherance of Dayton Art's charitable purposes; and it does not intend to make a profit from the operation of its ventures to promote the **[*8]** arts, as the evidence will indicate.

The question of what constitutes the making of a profit was the focus of attention in Seven Hills Schools v. Kinney (1986), 28 Ohio St. 3d 186, at 188, a case which involved a facility where donated clothing and household items were sold so as to obtain money used to support a school. The Court adopted a broad definition of "profit" and construed it to mean the "excess of income over expenditure . . . during a given period of time." Specifically, profit is the income which remains after the deductions of the cost of the goods sold and the cost of operations. See also, American Society for Metals v. Limbach (1991), 59 Ohio St. 3d 38.

Dayton Art derives a majority of its funds from the public-at-large (gifts, endowments, donations, bequests) and government grants. Because of the public and government support, Dayton Art is accountable to show how the donated funds are being used. As a result of this accountability, Dayton Art makes an annual report which contains a balance sheet, a statement of activity, and statements of the status and activities of funds.

As a not-for-profit corporation, Dayton Art's accounting standards are that **[*9]** of a nonprofit organization. Dayton Art does not separately account for the cost of operations according to function, and does not make profit and loss statements. Since its accounting method does not readily correspond with the information necessary for charitable exemption purposes, Dayton Art engaged a certified public accountant, Mr. John MacIlwaine, to fashion profit and loss statements from the financial books and records.

Mr. MacIlwaine composed a profit and loss statement for the museum store which indicated net operating losses of $ 7,298 and $ 4,136 for the 1982 and 1983 fiscal years. The statement reflects several figures which were known to be specific to the store, including the income from sales, the cost of the goods sold, salary and fringe benefits for the store manager, supplies, freight and telephone service. The various other costs of operations were

C-64

determined by allocating to the store a certain percentage of the museum's overall expenditures. For example, since the store comprises 1.24 percent of the museum's total square footage, the museum's total utilities expenses were multiplied by 1.24 percent to determine the store's share of the cost. This allocation **[*10]** method was used for several operational expenditures, such as departmental payroll (i.e., administration, secretarial, maintenance, custodial), supplies and insurance.

In the same manner, a profit and loss statement was also created for the museum framing service. The income from sales and cost of sales (including salaries) were known to be specific to the framing service. The other cost of operations, including utilities, insurance, departmental payroll and supplies, were allocated to the framing service based on the percentage of its share of the museum's overall expenditure. The profit and loss statement indicated a net operating loss of $ 7,702 for the three months it operated in 1982, and a net operating loss of $ 18,665 for fiscal year 1983.

The Board of Tax Appeals is mindful that Dayton Art keeps its books and records in accordance with the accounting standards for not-for-profit organizations, and as a result, does not account for operational expenses by functional categories. The Board finds that the profit and loss statements fashioned by Mr. MacIlwaine are reliable and credible delineations of the income and expenses generated by the museum store and framing service **[*11]** area. Consequently, we find that the store and framing service do, indeed, operate at a loss.

At the evidentiary hearing before the Board, testimony was presented by Ms. Marie Ferguson, the Administrator of Dayton Art, Mrs. Virginia Cramer, the Manager of the museum store, and Ms. Susan Lugabihl, the Preparator of the framing service. Their testimony is convincing that the museum store and framing service are not operated for the objective of profit, but rather, for the purpose of stimulating an interest in and preserving fine art. Dayton Art is willing to absorb the loss from the store and framing service since the ventures function in unity with the organization's goal of community art appreciation.

Upon consideration of the evidence before us, and the applicable law, the Board of Tax Appeals finds and determines that the museum store and framing service area are a part of property owned and used by Dayton Art as a community or area center for the arts and to foster public interest and education therein, and are entitled to the exemption from taxation provided by R.C. 5709.121.

Therefore, for the foregoing reasons, it is the decision of the Board of Tax Appeals that the final **[*12]** order of the Tax Commissioner must be, and hereby is, reversed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax Law > State & Local Taxes > Administration & Proceedings > Judicial Review
Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > General Overview
Tax Law > State & Local Taxes > Real Property Tax > General Overview

Source: My Sources > Ohio > Find Statutes, Regulations, Administrative Materials & Court Rules > By Administrative Materials > **OH Board of Tax Appeals Decisions**
Terms: **86-A-521** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Monday, June 9, 2008 - 4:06 PM EDT

About LexisNexis | Terms & Conditions | Contact Us

C-65

LexisNexis® Copyright © 2008 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

C-66

*1993 Ohio Tax LEXIS 422, **

Missionary Church, Ohio District, Inc./ d.b.a., Hilty Memorial Home, Appellant, vs. Joanne Limbach, Tax Commissioner of Ohio, Appellee.

CASE NO. **90-A-504** (EXEMPTION)

STATE OF OHIO -- BOARD OF TAX APPEALS

1993 Ohio Tax LEXIS 422

March 19, 1993

[*1]

APPEARANCES

For the Appellant - Martha J. Sweterlitsch, Douglas A. Baker, Attorneys at Law, 50 West Broad Street, Suite 1326, Columbus, Ohio 43215

For the Appellee Tax Commissioner - Lee I. Fisher, Attorney General of Ohio, By: James C. Sauer, Assistant Attorney General, State Office Tower, 30 East Broad Street, 16th Floor, Columbus, Ohio 43215

OPINION:
Decision and Order

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein on May 15, 1990, by the above-named appellant from a decision of the Tax Commissioner dated April 18, 1990. Therein, the Tax Commissioner granted in part and denied in part appellant's application for exemption from real property taxation relating to the tax year 1988.

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified to the Board by the Tax Commissioner, the evidence presented at a hearing before this Board on June 25, 1991, and the briefs filed by counsel to both parties.

At the outset, it must be noted that the Board reserved ruling on the admissibility of exhibits 19-21 (nursing home residents' affidavits) and exhibit 30 (a newspaper) at **[*2]** the hearing on this matter. The Board will accept said exhibits into evidence for what they are worth, and as such, will accord them little weight since opposing counsel and this Board had no opportunity to cross examine the authors of said documents.

Appellant Hilty Memorial Home (hereinafter "Hilty"), a nursing home, is owned and operated by the The Missionary Church. Situated on six acres of land in Pandora, Putnam County, Ohio, the home is licensed by the Ohio Department of Health and has a 61 bed capacity.

Hilty built a day care center adjoining the nursing home premises which opened in October 1988 for the care of children ages six weeks through five years of age. The center, which is licensed by the state of Ohio, has its own director and teaching staff. It is open to the public and charges its customers a competitive rate based upon a survey it did of the day care competition in the area; it gives a ten per cent discount to children of employees of the home.

The Tax Commissioner, when considering Hilty's application for exemption from real property

C-67

taxation, splitlisted Hilty's property. An exemption was granted for the nursing home but denied for the day care center, **[*3]** the land on which it is built, and the driveway area and carport used in conjunction with the day care operation.

In its notice of appeal, appellant claims the right to exemption for the day care operation pursuant to R.C. 5701.13, claiming that the day care is part of the nursing home which provides intergenerational therapeutic activities to its residents by involving the children from the day care. In addition, appellant contends that the subject should be exempt as a charitable entity, pursuant to R.C. 5709.12 or exempt as being used in furtherance of the nursing home's and/or center's charitable purpose, pursuant to R.C. 5709.121.

The majority of the nursing home premises herein was exempted by the Tax Commissioner as a home for the aged, pursuant to the provisions of R.C. 5709.12. That section provides an exemption for "(a)ll property owned and used by a nonprofit organization exclusively for a home for the aged, as defined in section R.C. 5701.13 of the Revised Code * * *".

R.C. 5701.13 defines a home for the aged, providing in pertinent part that:

"(A) As used in this section:

(1) 'Nursing home' means a nursing home or a home for the aging, as those terms are defined **[*4]** in section 3721.01 of the Revised Code, that is issued a license pursuant to section 3721.02 of the Revised Code.

(B) As used in Title LVII of the Revised Code, and for the purpose of other sections of the Revised Code that refer specifically to Chapter 5701. or section 5701.13 of the Revised Code, a 'home for the aged' means a place of residence for aged and infirm persons that is either a nursing home, rest home, or adult care facility and that meets all of the following standards:

(1) It is owned by a corporation, unincorporated association, or trust of a charitable, religious, or fraternal nature, which is organized and operated not for profit, which is not formed for the pecuniary gain or profit of, and whose net earnings or any part of whose net earnings is not distributable to, its members, trustees, officers, or other private persons, and which is exempt from federal income taxation under section 501 of the 'Internal Revenue Code of 1986,' 100 Stat. 2085, 26 U.S.C. 1.

(2) It is open to the public without regard to race, color, or national origin;

(3) It does not pay, directly or indirectly, compensation for services rendered, interest on debts incurred, or purchase price **[*5]** for land, building, equipment, supplies, or other goods or chattels, which compensation, interest, or purchase price is unreasonably high;

(4) It provides services for the life of each resident without regard to his ability to continue payment for the full cost of the services.

Exemption from taxation shall be accorded, on proper application, only to those homes or parts of homes which meet the standards and provide the services specified in this section."

As determined by the Tax Commissioner, the original nursing home facility itself and surrounding ground, as well as adjacent parking lots, met the statutory requirements for tax exemption for a home for the aged. However, the adjoining wing wherein the day care center is located was not granted exemption as either a home for the aged or an institution using the property for charitable purposes.

This Board initially acknowledges the general proposition that statutes granting exemption from taxation must be strictly considered. National Tube Co. v. Glander (1952), 157 Ohio St.

C-68

407, paragraph two of the syllabus; White Cross Hospital Assn. v. Bd. of Tax Appeals (1974), 38 Ohio St. 2d 199, 201. "Exemption is the **[*6]** exception to the rule and statutes granting exemptions are strictly construed," Seven Hills Schools v. Kinney (1986), 28 Ohio St. 3d 186.

Appellant argues that the day care facility qualifies for exemption as part and parcel of the nursing home. Thus, this Board must determine whether the day care center, in the tax year in question, met the statutory requirements for tax exemption pursuant to R.C. 5701.13. Upon review of the record before it, and despite the physical proximity of the day care center to the nursing home, it appears to this Board, from the testimony presented to it, that the day care facility is independent of and distinctly separate from the nursing home facility, and as such, does not meet the criteria set forth in R.C. 5701.13.

The day care center is administered as a separate cost center from the overall management of the nursing home, with its own staff and license issued by the state of Ohio for a day care facility. The child care activities carried out at the day care center are separate and distinct from the care of the aged carried out at the nursing home; while there is some intermingling between nursing home and day care administration, staff, **[*7]** residents and children, the day care's purpose and thus its overall operation cannot be attributed to and thereby exempted under the nursing home's operation.

Unlike the intergenerational program described in Maria-Joseph Living Care Center dba, Maria-Joseph Center vs. Joanne Limbach, Tax Commissioner of Ohio (March 19, 1993), B.T.A. Case No. 90-A-1562, whose stated purpose is neither to prepare children for school nor to provide custodial care for children on an all-day basis but to focus on the needs and well-being of the adult participants from the nursing home facility, the program described herein appears, from the evidence and testimony presented, to be first and foremost a day care facility that provides all-day care to children whose parents work in the community. Specifically, the record indicates that appellants felt that through the day care, they could provide a service to their community since at the time of the day care's inception, there was no child care available in the area.(R.22) Appellants even undertook a survey to definitively confirm the need and interest in a day care facility with the residents in the area.(R.24) While the record establishes that **[*8]** the intergenerational component was an early consideration in the day care planning stages, it does not appear from the evidence and testimony presented that it evolved into a major focus of the project.

Based upon the foregoing, this Board considers that, for the tax year in question, the primary purpose of this day care center was the care of children, with the intergenerational activities component simply providing an extra added benefit. For example, although the day care operation began in October of 1988, the intergenerational activities did not begin until March of 1989.(R.140) Had the intergenerational activities component of the day care program been an integral element of the facility, it stands to reason that the program would have been beyond the mere planning stages at the opening of the facility.

Thus, this Board has determined that the day care facility cannot qualify for exemption as part of the already exempted nursing home since the intergenerational activities component of the day care, which directly relates to the question of whether the facility can be exempted, is but a small facet of the overall operation of the day care. As such, it does not rise to the **[*9]** level of being an integral part of the nursing home facility and cannot assume an exempt status.

Besides qualifying pursuant to the nursing home exemption statute, appellant contends that the day care facility also qualifies for exemption pursuant to R.C. 5709.12 and R.C. 5709.121 (B). However, the Ohio Supreme Court has indicated that "a property, to be exempt, must qualify under the criteria of the statute specifically applicable to that property," Rickenbacker Port Auth. v. Limbach (1992), 64 Ohio St. 3d 628, 631. Thus, it would seem that since appellant has failed to qualify under the aforementioned nursing home exemption, it cannot

C-69

attempt to now qualify as a charity or organization using its property for charitable purposes. However, even if this Board would consider the day care as a separate entity needing to qualify separately for exemption, appellant could not carry its burden to prove its right to an exemption under the charity/charitable purpose statutes.

R.C. 5709.12 provides in pertinent part that:

"Real and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation."

R.C. 5709.121 **[*10]** provides in pertinent part that:

"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 is * * *:

* * *

(B) Otherwise made available under the direction or control of such institution * * * for use in furtherance of or incidental to its charitable * * * purposes and not with the view to profit."

The former section, R.C. 5709.12 clearly "exempts from taxation real property belonging to institutions that is used exclusively for charitable purposes" while R.C. 5709.121 defines "exclusive use for charitable purposes." Seven Hills Schools, supra, at 187. This distinction is further discussed by the Supreme Court in Episcopal Parish v. Kinney (1979), 58 Ohio St. 2d 199. Citing to a concurring opinion in White Cross Hospital Assn., supra, at 203, the court in Episcopal Parish, supra, explained the relationship between R.C. 5709.12 and R.C. 5709.121 as follows:

"'Initially, it is important to observe that, although R.C. 5709.121 purports to define the words exclusively for "charitable" or "public" purposes, as those **[*11]** words are used in R.C. 5709.12, the definition is not all encompassing. R.C. 5709.12 states "* * * Real and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation." Thus, any institution, irrespective of its charitable or non-charitable character, may take advantage of a tax exemption if it is making exclusive use of its property." See Wehrle Foundation v. Evatt (1943), 141 Ohio St. 467, 49 N.E. 2d 52. The legislative definition of exclusive charitable use is found in R.C. 5709.121, however, applies only to property "belonging to, "i.e., owned by, a charitable or educational institution, or the state or a political subdivision. The net effect of this is that R.C. 5709.121 has no application to noncharitable institutions seeking tax exemption under R.C. 5709.12. Hence, the first inquiry must be directed to the nature of the institution applying for exemption. * * *.'" Id. at 200-201. (Emphasis supplied)

Thus, this Board's initial inquiry must be whether the day care center is a charitable institution. The Supreme Court has defined a charity as "the attempt in good faith, **[*12]** 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," Planned Parenthood Assn. v. Tax Commr. (1966), 5 Ohio St. 2d 117, paragraph one of the syllabus. For reference to an extended discussion of what constitutes a charitable institution and charitable activities, see Columbus Board of Education v. Limbach, et al., (June 26, 1992) BTA No. 86-H-566, unreported.

It is clear, based upon the evidence in the record, that Appellant's day care facility does not

C-70

fit within the parameters of the Court's definition of "charity." Although appellant contends that the intergenerational activities that occur between the residents of the nursing home facility and the children who attend the day care center are charitable in nature, this Board finds otherwise. The primary purpose for which the day care center is licensed is for the care of children. Regardless **[*13]** of the fact that a portion of the day care center's time is spent in association with the adjoining nursing home facility and its staff and residents, the day care center's primary function is to care for the needs of the children and not the residents of the nursing home. Moreover, simply because the day care center's program has, as part of its curriculum, an element of intergenerational activity, it does not therefore automatically follow that such activity is sufficient to qualify the appellant as a charity.

In addition, testimony from appellant's witness indicates that the goal for the day care center was that it would "break even" in its operation. (R. 26) Fees were set for the center based upon what the market would bear, with a 10 per cent discount given to children of Hilty employees. Although the center had made arrangements for funding for qualified individuals through Title XX funds, no other plan existed for individuals to receive reduced rate care or free care if their ability to pay was limited. The day care center is staffed by 15 individuals, including eight full time, three part time, and four substitute employees. Those employees' wages as well as the **[*14]** entire day care center budget are dependent upon the remuneration the center receives, albeit remuneration at or below cost. Appellant's witnesses indicated that the nursing home budget has been used to supplement the day care budget in order to cover the deficit incurred by the day care in operating well under its capacity; in its brief, it further argues that as a result of the losses suffered by the day care, the day care, is in effect, operating as a charity. However, operating at a loss, in and of itself, does not necessarily equate to operating as a non-profit or charitable organization. Thus, based upon the foregoing, this Board finds that the day care center is not a charity.

Even if this Board were to take a broader approach and consider whether appellant Hilty as a whole is a charity, this Board would be constrained to find that insufficient evidence was presented to afford this Board the opportunity to make an accurate determination. It does not necessarily follow that an exempt home for the aged will automatically qualify as a charitable institution. The standards under which each is exempted are unique unto themselves. In addition, and most importantly, appellant **[*15]** herein, is first and foremost a religious institution, again separate and distinct from a charitable institution. See Episcopal Parish, supra, at 209. "Religious organizations, while their work may include deeds of a charitable nature, may not claim exemption from taxation under the provisions of the law for charitable institutions and governmental entities," The Hubbard Press v. Joanne Limbach, Tax Commissioner of Ohio (June 26, 1992), B.T.A. Case No. 87-E-730, unreported. There is insufficient information before this Board, especially regarding Hilty's fiscal administration, to conclusively decide that it can qualify as a charity.

Having determined that neither the day care center nor Hilty as a whole qualifies as a charity, we need not consider the applicability of R.C. 5709.121. The Supreme Court has stated on numerous occasions that "(t)o fall within the terms of R.C. 5709.121, property must be under the direction or control of a charitable institution," Cincinnati Nature Center v. Bd. of Tax Appeals (1976), 48 Ohio St. 2d 122, 125. See also, Episcopal Parish v. Kinney (1979), 58 Ohio St. 2d 199, 201; Operation Evangelize v. Kinney **[*16]** (1982), 69 Ohio St. 2d 346; Summit United Methodist Church v. Kinney (1982), 2 Ohio St. 3d 72; OCLC Online Computer Library Center, Inc. v. Kinney (1984), 11 Ohio St. 3d 198, 199.

Since the day care center does not qualify as a charity, this Board is limited to making a determination as to whether it used its property exclusively for charitable purposes, pursuant to R.C. 5709.12. Appellant contends that the "Center, as a whole, constitutes a vital therapeutic force in meeting the charitable mission of the home." (Appellant's Brief, p. 13) Further, it favorably compares the facts of this case to those in University Circle Development Foundation v. Perk (1964), 32 Ohio Op. 2d 213, arguing that "(A)s the record in this case

C-71

demonstrates, the Child Care Center is equally an integral part of an officially recognized charitable institution, i.e., Hilty Memorial Home, contributing significantly, on an ongoing basis, to the essential charitable mission of the Home, i.e., to provide therapeutic and rehabilitative services to the residents of the Home for the remainder of their lives regardless of their ability to pay." (Appellant's Brief, p. 16)

The record establishes **[*17]** the contrary to be true. Unlike the appellant in University Circle, supra, which added parking facilities to accommodate the needs of a consortium of hospitals, universities, art museums, and concert halls, appellant herein added a day care center to an otherwise unrelated home for the aged. Arguably, the members of the University Circle consortium could not carry on their businesses without ample parking facilities for use by their own employees as well as patrons. Parking is essential and integral to such institutions' charitable missions, for without a means to park vehicles at their business locations, said businesses could not operate. Herein, however, appellant added a day care center to its home for the aged to purportedly further the home's mission of providing therapeutic and rehabilitative services to the residents of the home. While this Board does not question the laudatory motives of the home in making this service available to the community and the home residents, the evidence and testimony presented is insufficient to establish that the day care center is essential or integral or related in any significant sense to the operation of the home for the **[*18]** aged. The home for the aged can survive without the day care center and moreover, can provide the requisite services that it is required by law to provide, without the day care center; therapeutic and rehabilitative services can be performed for the residents of the home without the day care. In contrast, the aforementioned consortium of businesses in University Circle could not survive without the availability of parking.

The record establishes that the day care center is not using its property exclusively for charitable purposes since it is first and foremost a day care facility licensed by the state of Ohio for the care of children. Any benefits gained through the use of the subject property for intergenerational activities by the children at the day care and the residents are secondary to the ones gained by virtue of its primary use, that is, the care of children. As the Supreme Court stated in an earlier case, S.E.M. Villa II v. Kinney (1981), 66 Ohio St. 2d 67, 70, "We do not question the sincerity of appellant's motives in providing quality care for the elderly. The General Assembly, however, has laid down specific requirements for the granting of a tax exemption, **[*19]** and it is our function to apply those requirements as written." Toledo Retirement Living v. Board of Tax Appeals (1971), 27 Ohio St. 2d 255, 258. While appellant is engaged in praiseworthy activities, said activities do not rise to the level needed to qualify as a charitable institution or charitable purposes under the applicable law. As such, the Board finds that the subject real property is not eligible for exemption under R.C. 5709.12 or R.C. 5709.121.

Upon consideration of the existing record and applicable statutes, the Board finds that the decision of the Appellee Tax Commissioner denying exemption for the day care facility was proper. It is the Decision and Order of the Board of Tax Appeals that the decision of the Tax Commissioner must be and hereby is affirmed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax Law > State & Local Taxes > Administration & Proceedings > Judicial Review
Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > General Overview
Tax Law > State & Local Taxes > Personal Property Tax > Tangible Property > General Overview

C-72

Source: My Sources > Ohio > Find Statutes, Regulations, Administrative Materials & Court Rules > By Administrative Materials > **OH Board of Tax Appeals Decisions**
Terms: **90-a-504** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Monday, June 9, 2008 - 4:07 PM EDT

LexisNexis® About LexisNexis | Terms & Conditions | Contact Us
Copyright © 2008 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

C-73

*1999 Ohio Tax LEXIS 1552, **

Humane Society Foundation Of Hancock County, Appellant, vs. Roger W. Tracy, Tax Commissioner of Ohio, Appellee.

Case No. **98-J-884** (EXEMPTION)

STATE OF OHIO -- BOARD OF TAX APPEALS

1999 Ohio Tax LEXIS 1552

October 15, 1999, Entered

[*1]

APPEARANCES:

For the Appellant - Firmin, Sprague & Huffman Co., By: Robert F. Sprague, 220 West Sandusky Street, P.O. Box 963, Findlay, Ohio 45839-0963.

For the Appellee - Betty D. Montgomery, Attorney General of Ohio, By: Richard Farrin, Assistant, 30 East Broad Street, 16<th> Floor, Columbus, Ohio 43215.

OPINION:
DECISION AND ORDER

Mr. Johnson, Ms. Jackson, and Mr. Manoranjan concur.

The Board of Tax Appeals is considering this matter pursuant to a notice of appeal filed herein by the Humane Society Foundation of Hancock County. ("Appellant") Appellant has appealed from a journal entry of the Tax Commissioner which granted in part and denied in part appellant's application for exemption of real property from taxation for the tax year 1996. n1 The appellant leases the property in question to the Humane Society and The Society for Prevention of Cruelty to Animals ("Society"). The Commissioner determined that the Society's office and kennel facility were entitled to exemption, but its multipurpose building should remain on the tax roll. The journal entry provides in pertinent part:

> "This matter concerns an application for the exemption of real property from taxation. In response to the **[*2]** recommendation of the attorney examiner, dated June 12, 1998, the applicant submitted written objections, which have been considered by this office.
>
> "Principal to the applicant's objections is the fact that the use of the multi-purpose building by the lessee Humane Society is to generate funds for its programs; had the applicant been able to demonstrate its use of the property primarily for charitable, educational or public purpose, (sic) this fund-raising use would not have been fatal to the application. However, the applicant made only vague reference to 'educational activities' and 'other community uses of the facility' in its objections.
>
> "Further, the applicant attempts to distinguish the case of Ohio Masonic Home, cited in the recommendation of the Attorney Examiner, from the instant matter on the basis that the applicant uses 75% to 85% of the proceeds from the bingo operation to fund the charitable activities. However, not only is bingo operations distinct from, and not in furtherance of or incidental to the applicant's charitable purpose (promoting the humane care of animals), this property is primarily used

C-74

to generate income. For such use exemption cannot be granted.
[*3]
"On review of the applicant's objections, the Tax Commissioner finds that neither the factual objections nor the objections to the legal interpretation of applicable statutes is sufficient to overcome the recommendation of the attorney examiner."

n1 Appellant is appealing only the portion of the journal entry that denied exemption.

The matter has been submitted to the Board of Tax Appeals upon the notice of appeal, and the statutory transcript certified herein by the Tax Commissioner. The appellant waived an evidentiary hearing herein.

The appellant is seeking exemption for its multipurpose building pursuant to R.C. 5709.12 which provides in pertinent part:

"(B) * * * Real * * * property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation."

R.C. 5709.121 defines exclusive charitable use as follows:

"Real 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, * * *, or by one or more other such institutions, * * * under a lease, **[*4]** sub-lease, 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, * * * purposes and not with the view to profit."

In *Cincinnati Nature Center v. Bd. of Tax Appeals* (1976), 48 Ohio St.2d 122, the Supreme Court set forth the requirements necessary to fall within the terms of R.C. 5709.121(B):

"(1) The property must be under the direction or control of a charitable institution * * *;

"(2) Be otherwise made available 'for use in furtherance of or incidental to' the

C-75

institution's charitable * * * purposes;

"(3) Not be made available with a view to profit."

The Commissioner agrees that the appellant is a charitable institution and its lease of the property to the Society for its office and kennel facility is entitled to exemption. The issue remains whether the multipurpose facility is being used in furtherance of a charitable purpose, and not with a view to profit.

The findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* **[*5]** (1989), 42 Ohio St.3d 121. It is incumbent upon a taxpayer challenging a decision of the Tax Commissioner to rebut that presumption and establish a right to the relief requested. *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 68. When no competent and probative evidence is developed and properly presented to this Board to establish that the Tax Commissioner's determination is erroneous, said finding is presumed to be correct. *Alcan Aluminum Corp. v. Limbach, supra; Hatchadorian v. Lindley, supra*. The Board further notes that "all real property in this state is subject to taxation, except only such as is expressly exempted therefrom." R.C. 5709.01(A). Exemption from taxation is therefore the exception to the rule and, as in all cases, a statute granting an exemption must be strictly construed. *Seven Hills Schools v. Kinney* (1986), 28 Ohio St.3d 186; *White Cross Hospital Assn. v. Bd. of Tax Appeals* (1974), 38 Ohio St.2d 199; *National Tube Co. v. Glander* (1952), 157 Ohio St. 407. Therefore the burden is upon the appellant to show that the property is primarily being used in furtherance of its charitable purpose.

The Commissioner found that the appellant failed to submit **[*6]** evidence showing that it primarily used the multipurpose building in furtherance of its charitable purpose. The appellant has submitted no evidence herein contradicting the Commissioner's finding. Although the appellant submitted evidence to the Commissioner of some charitable use, the Commissioner found that appellant's primary use of the facility was not charitable. Upon examining the evidence in the record the Board finds this conclusion reasonable.

No evidence has been offered to the Board as to the actual use of the multipurpose facility. From the statutory transcript, it appears that there was some use of the facility for Society meetings, and volunteer appreciation dinners. It is evident that the Society operates a bingo fund raising activity twice a week in the evening. (S.T. 14) The appellant indicates in the brief that the profits generated from the bingo games are returned to the operating budget to cover the expenses of the facility. There is also a schedule of other rentals of the facility for the year 1996 which are entirely social in nature. (S.T. 15)

The Board further finds the requirement that the property not be operated with the view to profit is also lacking. In **[*7]** addressing this question the Supreme Court stated in *American Society for Metals v. Limbach* (1991), 59 Ohio St.3d 38:

> "Statutes providing exemption from taxation must be strictly construed. (citation omitted) More specifically, as we set forth in (citation omitted) 'Exemption is the exception to the rule and statutes granting exemption are strictly construed.'
>
> "The term 'profit,' therefore, must be given its full definition. Profit is 'the excess of the price received over the cost of purchasing and handling or of producing and marketing goods' or 'net income (as in a business) usu. (sic) for a given period of time.' (citation omitted)"

C-76

The appellant concedes that the bingo games generate a profit, but argues that the proceeds are used to fund its charitable activities. However, the Supreme Court has held that property used to produce income for use in furtherance of charitable purposes, may not be exempted from taxation. *Ohio Masonic Home v. Bd. of Tax Appeals* (1977), 52 Ohio St.2d 127; *Burns v. Glander* (1946), 146 Ohio St. 198; *Wehrle Foundation v. Evatt* (1943), 141 Ohio St. 467; *Incorporated Trustees of the Gospel Worker Society v. Evatt* (1942), 140 Ohio **[*8]** St. 185. The syllabus of *The Wehrle Foundation* provides:

> "Property held by a nonprofit corporation for the purpose of ultimate distribution to such selected organizations as are operated for religious, charitable, scientific, literary or educational purposes, or for the prevention of cruelty to children or animals, is not exempt from taxation under Section 5353, General Code. Such property so held is not being used exclusively for charitable purposes, the test being the present use of the property."

The appellant has argued that the use of its multipurpose building is primarily used to further the charitable purposes of the appellant and the Society which distinguishes it from *Ohio Masonic Home v. Bd. of Tax Appeals, supra*, where the property was used solely to generate funds. However, the appellant has submitted no evidence in support of this allegation. The appellant operates a regularly scheduled bingo game that generates a profit. The purpose of this activity is to generate funds. In *Ohio Masonic Home* the appellant was also a charitable organization that used the profits generated from the use of its property to fund its charitable activities which thwarted the **[*9]** exemption. It is the use of the property and not the use of the proceeds which governs eligibility for exemption pursuant to R.C. 5709.121. *Galvin v. Masonic Toledo Trust* (1973), 34 Ohio St.2d 157; *Columbus Youth League v. Bd. of Rev.* (1961), 172 Ohio St. 156. The Board accordingly finds that the multipurpose facility is not being used in furtherance of appellant's charitable purpose.

The appellant next contends that it functions as a governmental agency. It argues that it received quasi-governmental status after the Commissioners of Hancock County requested that it assume the duties and responsibilities for the dog warden's control of dogs, cats and other animals in Hancock County. n2 R.C. 955.15 provides:

> "The board may designate and appoint any officers regularly employed by any society organized under sections 1717.02 to 1717.05, inclusive, of the Revised Code, to act as county dog warden or deputies for the purpose of carrying out sections 955.01 to 955.27, inclusive, and 955.29 to 955.38, inclusive, of the Revised Code, if such society whose agents are so employed owns or controls a suitable place for keeping and destroying dogs."

n2 The affidavit submitted is not the best evidence but it is not an issue in contention by virtue of our consideration of the use of the multipurpose facility. There is no evidence this facility is used by the dog warden. **[*10]**

Appellant contends that because it has assumed through the Society a statutorily imposed governmental function the multipurpose facility is entitled to exemption pursuant to R.C. 5709.121. However, this reliance is misplaced. R.C. 5709.121 does not provide an exemption

C-77

for property belonging to a charitable institution used in furtherance of or incidental to a public purpose where the use of the property by the charitable institution generates a profit.

In *Dayton Metropolitan Housing Authority v. Evatt* (1944), 143 Ohio St. 10, the Supreme Court stated in its syllabus:

> "A use of property to be public must be an exclusive use by the public, open to all the people on a basis of equality to such extent as the capacity of the property admits, or by some public or *quasi*-public agency on behalf of the public, and not simply a use which may incidentally or indirectly promote the public interest or general prosperity of the state and its people."

This rule was more recently applied in *Dayton v. Roderer* (1977), 50 Ohio St.2d 159; and *Cleveland v. Perk* (1972), 29 Ohio St.2d 161. The court held that in order for public property to qualify for exemption from taxation, the **[*11]** property must meet three essential prerequisites: (1) the realty must be public property; (2) the use must be for a public purpose; and (3) the use must be exclusively for that purpose. When private enterprise is given the opportunity to occupy public property and make a profit, even though in so doing it serves not only a public interest and a public purpose, such part of the property loses its identity as public property and its use cannot be said to be exclusively for a public purpose; a private, in addition to the public purpose, is subserved. Accordingly, appellant's argument that it is functioning as a government agency thereby transforming its use of the property into a public use must fail.

The Board therefore finds that the appellant is not using the multipurpose building exclusively for charitable or public purposes, and therefore is not entitled to the requested exemption. Giving effect to the foregoing discussion the Board finds that the journal entry of the Tax Commissioner is correct and is hereby affirmed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax Law > State & Local Taxes > Administration & Proceedings > Judicial Review
Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > Requirements for Exempt Status
Tax Law > State & Local Taxes > Real Property Tax > General Overview

Source: My Sources > Ohio > Find Statutes, Regulations, Administrative Materials & Court Rules > By Administrative Materials > **OH Board of Tax Appeals Decisions**
Terms: **98-j-884** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Monday, June 9, 2008 - 4:08 PM EDT

LexisNexis® About LexisNexis | Terms & Conditions | Contact Us
Copyright © 2008 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

C-78

*1992 Ohio Tax LEXIS 768, **

The Jewish Community Center of Cleveland, Appellant, vs. Joanne Limbach, Tax Commissioner of Ohio, Appellee.

CASE NO. **88-A-124** (REAL PROPERTY EXEMPTION)

STATE OF OHIO -- BOARD OF TAX APPEALS

1992 Ohio Tax LEXIS 768

June 30, 1992

[*1]

APPEARANCES

For the Appellant - Robert D. Markus, Frank C. Krasovec, Jr., Hahn, Loeser and Parks, 3300 BP America Building, 200 Public Square, Cleveland, Ohio 44114-2301

For the Appellee - Lee I. Fisher, Attorney General of Ohio, By: James C. Sauer, Assistant Attorney General, State Office Tower, 16th Floor, 30 East Broad Street, Columbus, Ohio 43266-0410

OPINION:
DECISION AND ORDER

This matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed by the Jewish Community Center of Cleveland. The appeal is taken from a final order of the Tax Commissioner wherein that official ordered a split-listing on an application for the exemption of real property from taxation.

The Jewish Community Center of Cleveland ("JCC") is a nonprofit corporation organized for charitable and educational purposes. JCC provides a full range of programs and services designed to enhance the quality of life within the community, and to enhance the quality of family life for its members. To this end, JCC owns and operates two facilities, one located in the Cleveland Heights section of Cleveland, and one located in Beachwood, Ohio. The JCC is comprised of approximately 12,000 members. **[*2]** The United Way provides JCC with one-third of its overall funding, and two-thirds is obtained from membership fees, and program and services fees.

The real property in question today is the facility known as the Mandel Center located in Beachwood. The building consists of 86,000 square feet of space and is situated on almost 52 acres of land. The facility opened for use in November, 1986. JCC uses the building and the outdoor acreage for a large number of educational, cultural, recreational and athletic programs for people of all ages.

Prior to the construction of the building, JCC filed an application for the exemption of its real property from taxation. The Tax Commissioner commenced proceedings on the application once the facility was completed and in use. Following a hearing of the matter, the Commissioner's hearing examiner issued a recommendation for the split-listing of the property pursuant to R.C. 5713.04. Specifically, it was determined that the majority of the property is used for charitable purposes and is entitled to a tax exemption, but that a small portion of the facility did not qualify for tax exempt status since it was used with a view to profit and not **[*3]** incidental to, or in furtherance of, the organization's charitable purposes.

C-79

Being dissatisfied with the recommendation of the hearing examiner, JCC filed objections with the Tax Commissioner. Following an extensive discussion of the facts and the applicable statutory and case law, the Commissioner issued a decision which affirmed the split-listing of the property. From this final action of the Tax Commissioner, a timely notice of appeal was filed with the Board of Tax Appeals.

This matter is before the Board of Tax Appeals today upon the notice of appeal, the statutory transcript furnished by the Tax Commissioner, the testimony and exhibits presented at the evidentiary hearing before the Board, and the legal briefs of counsel.

The Mandel Center houses many athletic and recreational facilities which have been granted tax exempt status by the Tax Commissioner and are not in issue here. These include an indoor swimming pool, elevated jogging track, fitness center, gymnasium, racquetball courts, men's and women's locker rooms, equipment storage and office areas. Also exempted and not in issue here is the outdoor acreage developed with a swimming pool, camping shelters, softball **[*4]** fields, tennis court, jogging trail, and walking trails.

These athletic and recreational facilities are available for use by any JCC member at no additional cost n1 JCC provides scholarships for persons who wish to become members but cannot afford to pay. Since no one is refused admission because of an inability to pay, and since the facilities further the purpose of providing an educational and recreational center for the community, the Tax Commissioner determined that the described facilities are exempt from taxation for their charitable use.

n1 Annual membership fees depend on the age and family status of the applicant. For example, in 1987, a family membership (two parents with school-age children) cost $ 410 annually; an adult individual membership cost $ 270; a senior adult husband and wife cost $ 315; a senior adult individual membership cost $ 195.

However, there are three athletic accomodations in the Mandel Center for which tax exempt status was denied. These include the men's and the women's health service facilities, which are locker rooms equipped with whirlpool, sauna and steam room, and the Nautilus room, which is equipped with fitness machinery. The use **[*5]** of the special accomodations is restricted to members who pay an additional annual fee. n2 These rooms account for approximately 9.5 percent of the Center's total square footage. The Tax Commissioner determined that the additional fees were imposed with a view for profit, and that the restrictions in usage did not further the organization's charitable purposes.

n2 In 1987, the additional annual fee for the health service was $ 350, and for the Nautilus room was $ 110.

The charitable use tax exemption was also denied for three rooms or areas of the Center which together comprise less than two percent of the building's total square footage. The Center's gift shop sells the works of Israeli and local Jewish artists and artisans; the pro shop sells athletic accessories; and the Center's Cafe sells beverages and Kosher snack foods.

The primary issue before the Board of Tax Appeals today is whether JCC uses the men's and women's health service, Nautilus room, gift shop, pro shop, and cafe in such a manner as to qualify for exemption from taxation under R.C. 5709.12 and 5709.121. For the reasons detailed more fully below, the Board must conclude that it does not.

C-80

R.C. 5709.12 exempts **[*6]** from taxation real property which is used exclusively for charitable purposes. R.C. 5709.121 provides the definition of exclusive charitable use as follows:

"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 is either:

"(A) 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) Otherwise 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."

The first inquiry must be directed to the nature of the institution **[*7]** and finding it to be a charitable institution then the applicability of R.C. 5709.121 must be examined, White Cross Hospital Assn. v. Board of Tax Appeals (1974), 38 Ohio St. 2d 199, 203; Episcopal Parish v. Kinney (1979), 48 Ohio St. 2d 199, 201. See Dayton Art Institute v. Limbach (June 19, 1992) BTA No. 86-A-521, unreported for a discussion of the construction of R.C. 5709.121. The question of the nature of the institution is not in dispute, the Tax Commissioner finding that FCC is a charitable institution, and denied exemption only as to the health service, Nautilus room, shops, and cafe. The inquiry then turns to the determination as to whether such property is used for charitable, educational and public purposes. There are many definitions of charity in the law of trusts and tax exemption, from Ohio and elsewhere. An early general definition in Ohio comes from the 1874 case of Gerke v. Purcell (1874), 25 Ohio St. 229. Syllabus 4:

"4. A charity, in a legal sense, includes not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art, without any particular **[*8]** reference to the poor."

Perhaps the most quoted definition in Ohio tax exemption cases comes from Planned Parenthood Assoc. v. Tax Commissioner (1966), 5 Ohio St. 2d 117, Syllabus 1, as follows:

"1. 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."

For an extended discussion of charitable use, see Columbus Board of Education v. Limbach (June 26, 1992), B.T.A. Case No. 86-H-566, unreported.

In this instance, there is no evidence of charitable activity being carried on in the health facilities, shops and cafe. From the record before us, it is evident that the actual, physical use of such property is that of a private health facility for the exclusive use of paying members, and the shops and cafe are commercial ventures. These uses are **[*9]** functionally removed

C-81

from the JCC purpose of providing educational, cultural and recreational services to the general community.

JCC offers a variety of arguments to explain some connection between the uses of the contested property and the organization's charitable purposes. However, its basic argument is that the men's and women's health service, Nautilus room, gift shop, pro shop and cafe are amenities which attract and retain members thereby enabling JCC to continue to provide its programs and services to the community. On the other hand, the Tax Commissioner points out that the amenities which attract and retain members have already been granted tax exemption. The contested property provide special services for additional fees. The Commissioner characterizes the contested property as an exclusive athletic club and retail operations which bear no functional relationship to any charitable purpose of its owner.

In examining the question of whether such property is functionally related to the furtherance of JCC's charitable purposes, three decisions of the Supreme Court direct to us to a conclusion. In White Cross Hospital Assn. v. Bd. of Tax Appeals (1974), 38 Ohio **[*10]** St. 2d 199, the Court found that a medical office building connected to and operated by a hospital, while convenient and beneficial to the overall operation of the hospital, was not within the hospital's charitable purpose of providing medical care to the public. In Ohio Masonic Home v. Bd. of Tax Appeals (1977), 52 Ohio St. 2d 127, the Court found that land used in farming operations for the purpose of generating income for the institutional care of elderly persons was not an actual, physical use functionally related to the organization's charitable purpose of providing and maintaining a home for the care of the aged. Likewise, in Seven Hills Schools v. Kinney (1986), 28 Ohio St. 3d 186, the Court found that a two-story frame house used as a clothing exchange to generate income for the operation of a school was functionally removed from the organization's purpose of serving as an educational institution.

In the present matter, there is no evidence of any charitable activity being carried on in the contested property. The actual, physical use of the property is that of special exercise areas for the exclusive use of paying members, and as commercial areas for the **[*11]** retail sale of athletic accessories, specialty gifts, and snack goods. These uses are functionally removed from JCC's purpose of providing educational, cultural and recreational services to the general community.

Accordingly, the Board finds that the JCC is a charitable institute; however, the use of such contested property is inconsistent with and not a charitable use within the purview of R.C. 5709.121(A). Our consideration of this matter might conclude here with an affirmance of the Tax Commissioner. See Youngstown Area Jewish Federation v. Limbach (June 30, 1992), B.T.A. 88-G-117, unreported for a similar finding.

At this point then we must state that since the contested property is not made available to any other person or institution, the provisions of R.C. 5709.121(B) would not be applicable.

Assuming arguendo, that we must give further consideration to such provisions and whether the use of such contested property is incidental to, or in furtherance of JCC's charitable purpose and without a view to profit, we would find as follows.

In Cincinnati Nature Center v. Bd. of Tax Appeals (1976), 48 Ohio St. 2d 122, at 125, the Supreme Court considered the status **[*12]** and use of houses owned by a charitable organization and occupied by its employees, and framed the following three prong test in the application of the exemption granted under R.C. 5709.121:

"To fall within the terms of R.C. 5709.121, property must (1) be under the direction or control of a charitable institution or state or political subdivision, (2) be otherwise made available 'for use in furtherance of or incidental to' the institution's 'charitable * * * or public

C-82

purposes,' and (3) not be made available with a view to profit."

We have already concluded that the use of such contested property is not charitable or functionally related. As to the third criterion of the Nature Center test, JCC argues that it has never operated the special service areas with a view to profit. The additional fees are used to defray the costs of the Center's operations for the benefit of all members. JCC points out that approximately 15 percent of membership income is budgeted for scholarships so that no one will be denied a membership because of inability to pay. To the contrary, the Tax Commissioner argues that the focus must be on the actual, physical use of the property, and not the use **[*13]** of the income generated by the property.

We find that all of the arguments advanced by JCC may be concisely summarized as "(t)he whole is the sum of its parts and the whole is entitled to tax exempt status. n3 That is, the whole of the Mandel Center should be exempted from taxation since the contested property enables JCC to generate extra income and good will which ultimately contributes to the pursuit of its overall charitable mission. However, there are several flaws in this argument when viewed from the perspective of the statutes and case law governing charitable exemptions.

n3 Reply brief of the Jewish Community Center of Cleveland, at page 5.

First, the law is clear that it is the actual, physical use of the property which is controlling, not the use of the income derived from the property. Ohio Masonic Home v. Bd. of Tax Appeals, supra, Seven Hills Schools v. Kinney, supra. Second, in order to qualify as a use in furtherance of or incidental to an institution's charitable purpose, the actual, physical use of the property must be functionally related to the charitable purpose. Ohio Masonic Home v. Bd. of Tax Appeals, supra; Seven Hills Schools **[*14]** v. Kinney supra. Third, the property must not be used with the intention to make a profit. Seven Hills Schools v. Kinney, supra; 3d 38. Finally, a liberal interpretation of the statutes is not permitted; since exemptions are the exception to the general rule that all real property is subject to taxation, strict construction of the exemption statutes is required. American Society for Metals v. Limbach, (1991) 59 Ohio St. 3d 38.

In regard to the question of whether the contested property is operated with a view to profit, the Board finds that JCC may confuse the difference between the intent to profit and the intent to put the profit to good use. It argues that no profit is intended since the excess proceeds are used to contribute to the funding of its overall operations. However, the test here is not the purpose for which the excess proceeds are used, but whether the property is used with the intention to generate such excess proceeds, Ohio Masonic Home v. Bd. of Tax Appeals, supra; Seven Hill Schools v. Kinney, supra.

On this question, the Board would find that JCC has failed to meet its burden of proof. There is no doubt that health facilities, **[*15]** shops and cafe generate income. However, there is no indication that such income is exceeded by expenditures. JCC maintains an agency-wide accounting system which consolidates all of the activities of both the Mandel and Mayfield Road facilities. JCC has not presented these accounting records nor any other type of financial information. While JCC may be a nonprofit corporation, the contested property provides an additional source of revenue for contribution to total operations. This objective is inconsistent with the requirement of R.C. 5709.121(B) that the property not be used iwth a view to profit. In the absence of further evidence we would conclude that such contested property is used with a view to profit.

The second issue presented in this matter involves the proper application of R.C. 5713.04. The split-listing provisions of the statute permit a single property to be listed as tax exempt

C-83

in part, and taxable in part, when a property is used for both charitable and noncharitable purposes. As relevant, the statute reads as follows:

"If a separate parcel of improved or unimproved real property has a single ownership and is so used so that part thereof, if a separate **[*16]** entity, would be exempt from taxation, and the balance thereof would not be exempt from taxation, the listing thereof shall be split, and the part thereof used exclusively for an exempt purpose shall be regarded as a separate entity and be listed as exempt, and the balance thereof used for a purpose not exempt shall, with the approaches thereto, be listed at its taxable value and taxed accordingly."

Prior to the enactment of the foregoing provision, the law of charitable exemption in Ohio followed an "all or nothing" approach. That is, a tax exemption required that the whole of the property be devoted to charitable use. If a property was used primarily for exempt purposes, and incidentally for nonexempt purposes, then the whole of the property was deemed taxable and placed on the tax list and duplicate. For example, in Welfare Federation of Cleveland v. Glander (1945), 146 Ohio St. 146, the whole of an eleven-story building owned by a charitable institution and used exclusively for charitable purposes on nine stories, was denied a tax exemption since the two lower floors were used for commercial purposes. With the addition of the split-listing language to R.C. 5713.04, a single **[*17]** building under single ownership may now be exempted in part if the nonexempt uses are separate and distinct from the charitable uses.

In the present matter, JCC argues the "all or nothing" approach in reverse. That is, JCC contends that rooms or areas within a building cannot be split-listed, and that if various rooms on a single floor are used for both nonexempt and exempt purposes, then the whole of the floor must be exempt. JCC argues that R.C. 5713.04 is limited in application to a separate structure located on the same parcel of property, or to a particular floor or floors of a building. In support of its position, JCC relies on the decisions of Goldman v. L. B. Harrison (Club) (1952), 158 Ohio St. 181, and Goldman v. Friars Club, et al., (1952), 158 St. 185.

The Board of Tax Appeals finds that JCC's reliance on Goldman v. Friar's Club, et al., supra, is misplaced. The issue before the Court in that case had nothing to do with split-listing, but was whether the use of the contested property was connected with and incidental to the institutions' charitable purposes. The Court determined that public dormitories, cafeterias and recreational facilities **[*18]** for the use of residents and nonresidents of the Friar's Club, the Young Women's Christian Association, Young Men's Christian Association, and the Fenwick Club were uses integrated with and incidental to those institutions' overall charitable purposes. As noted in our discussion of the facts in the instant matter, the Tax commissioner has already granted JCC an exemption for the same type of facilities.

The Board's reading of Goldman v. L. B. Harrison (Club), supra, and subsequent case authority, lends no support for JCC's position. In Goldman, the Court determined that the then-controlling statute did not contemplate a division of a single property on a percentage basis. Since the exempt uses could not be split from the taxable ones without reliance on a percentage basis, the whole of the property was found taxable. In the present matter, the Tax Commissioner did not use a percentage basis, nor a ratio calculation to split JCC's property, but split the distinct rooms and areas as separate entities.

Less than one year after Goldman, the Court made its first detailed review of the split-listing statute. In Church of God of Cleveland v. Bd. of Tax Appeals **[*19]** (1953), 159 Ohio St. 517, at 520, the Court held that "(t)he word, 'entity', used in the statute means something that has a real and separate existence" so that the charitable uses of distinct parts of a building "may be set off as exempt from taxation, not on a percentage basis but by a split valuation of the separate entities of the property." Thus, the Court ordered an exemption for the first floor of the church and two rooms in the basement, which together comprised approximately 50 percent of the total building.

C-84

The Court repeated this reasoning in New Haven Church of Missionary Baptist v. Bd. of Tax Appeals (1967), 9 Ohio St. 2d 53. It was decided that for purposes of split-listing, a separate entity must by reason of its nonexempt use be figuratively capable of severance from the exempt portion of the building. In Bishop v. Kinney (1982), 2 Ohio St. 3d 52, the Court acknowledged that rooms within a building may constitute separate entities figuratively capable of severance from the remainder of the property. Likewise, in Faith Fellowship Ministries, Inc. v. Limbach (1987), 32 Ohio St. 3d 432, the Court permitted the split-listing of various rooms **[*20]** and stated in its syllabus that "R.C. 5713.04 permits real property to be split into exempt and nonexempt parts if the part which is used in the exempt manner can be precisely delineated, and this delineation is not the product of a calculation of a ration of the part to be exempted to the whole of the property."

Again, property in dispute here is the men's and women's health service rooms, Nautilus room, pro shop, gift shop and cafe. All of the rooms or areas are physically distinct, serve unique functions, and are precisely delineated. The Board has no difficulty in finding that the rooms or areas are separate entities figuratively capable of severance from the exempt portion of the building. The Tax Commissioner's split-listing of the separate entities was appropriate and correct.

Lastly, JCC advances the argument that a denial of an exemption of the disputed property discriminates against it in violation of equal protection guarantees. Basically, JCC believes it unfair that such property must be placed on the tax list while similar facilities owned by hospitals, YMCA's and YWCA's purportedly enjoy charitable exemptions. Accordingly, the argument is not that the split-listing **[*21]** statute is unconstitutional on its face, but that it has been unequally and discriminatory applied to this particular set of facts.

In Cleveland Gear Co. v. Limbach (1988), 35 Ohio St. 3d 339, the Supreme Court determined that an argument concerning the unequal application of the laws must be raised in the appellant's notice of appeal to the Board of Tax Appeals, and that a complete factual record must also be developed before the Board. In this instance, JCC did specify the claimed error in paragraph five of its notice of appeal. However, JCC has failed to develop a factual record to support the claim.

When a statute is challenged on the ground that it is unconstitutional when applied to a particular set of facts, the burden is on the party making the attack to present clear and convincing evidence of an existing set of facts which makes the statute unequal when applied thereto. Belden v. Union Central Life Ins. Co. (1944), 143 Ohio St. 329; Cleveland Gear Co. v. Limbach, supra. The Board of Tax Appeals finds that JCC has not presented such clear and convincing evidence. A simple allegation, not based on first-hand knowledge, that properties owned by **[*22]** YMCA's and similar organizations have not been subject to the split-listing statute, is not sufficient to meet the burden of proving an unequal application. Consequently, the Board of Tax Appeals finds that JCC has failed to present the evidence necessary to support the claim.

Therefore, for the foregoing reasons, it is the decision of the Board of Tax Appeals that the final order of the Tax Commissioner must be, and hereby is, affirmed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax Law > State & Local Taxes > Administration & Proceedings > Judicial Review
Tax Law > State & Local Taxes > Real Property Tax > General Overview
Tax Law > State & Local Taxes > Use Tax > Imposition of Tax

C - 85

Source: My Sources > Ohio > Find Statutes, Regulations, Administrative Materials & Court Rules > By Administrative Materials > **OH Board of Tax Appeals Decisions**
Terms: **88-a-124** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Monday, June 9, 2008 - 4:08 PM EDT

LexisNexis® About LexisNexis | Terms & Conditions | Contact Us
Copyright © 2008 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

C-86

*2001 Ohio Tax LEXIS 340, **

Madisonville Community Urban Redevelopment Corp., Appellant, vs. Roger W. Tracy, Tax Commissioner of Ohio, Appellee.

CASE NO. **98-L-858** (EXEMPTION)

STATE OF OHIO -- BOARD OF TAX APPEALS

2001 Ohio Tax LEXIS 340

March 2, 2001, Entered

[*1]

APPEARANCES:

For the Appellant - Wayne E. Petkovic, Attorney at Law, Delaware, Ohio.

For the Appellee - Betty D. Montgomery, Attorney General of Ohio, By: Richard C. Farrin, Assistant Attorney General, Taxation Section, Columbus, Ohio.

OPINION:
DECISION AND ORDER

Mr. Johnson, Ms. Jackson, and Ms. Margulies concur.

This cause and matter came on to be considered by the Board of Tax Appeals upon the notice of appeal filed by the appellant from a journal entry of the Tax Commissioner. The Tax Commissioner below denied the appellant property owner's application for the exemption of certain real property from taxation for tax year 1996 and remission of taxes, penalties and interest for tax year 1995.

The subject property is a retail strip center and parking lot, identified as Hamilton County parcel numbers 035-0003-0195-00, 035-0003-0034-00, 035-0003-0175-00, and 035-0003-0188-00. The parcels are .005 acre, .188 acre, .165 acre and .94 acre respectively. The subject property is owned by the Madisonville Community Urban Redevelopment Corporation (hereinafter "Madisonville" or "appellant"), an Ohio non-profit corporation organized by virtue of R.C. Chapter 1702. Madisonville was organized to help **[*2]** revitalize a blighted urban neighborhood in Cincinnati. Madisonville is funded through the Community Development Block Grant Program, a United States Department of Housing and Urban Development program. The Tax Commissioner has found that appellant is a community redevelopment corporation as defined in R.C. 1728.01

This matter is now considered by the Board of Tax Appeals pursuant to R.C. 5717.02 upon the notice of appeal, the statutory transcript of the proceedings below as certified by the Tax Commissioner (ST.), the record of testimony (R.) and exhibits (Ex.) adduced in the evidentiary hearing before the Board, and the briefs submitted by counsel for the parties.

In its notice of appeal, Madisonville specified the following errors:

> "1. The final order of the Tax Commissioner unlawfully and erroneously denies real estate tax exemption to the subject property contrary to the pertinent provisions of Revised Code Sections 5709.12, 5709.121 and related provisions of Title 57 of the Revised Code; (sic).

C - 87

"2. The final order of the Tax Commissioner unlawfully and erroneously denies exemption pursuant to the pertinent provisions of Chapter 1728.01 of the Revised Code (sic).

"3. **[*3]** The final order is erroneous in that with respect to parcel 35-3-195, exemption is unlawfully denied when the parcel, owned by a community redevelopment corporation as defined by R.C. 1728.01, is used as a police sub-station in a high crime area, and for which the Appellant charges no rent, pays all utilities, and maintenance, and the property is so contributed by Appellant for the public purpose of providing public safety, and is made available under the direction and control of a political subdivision in furtherance of public purposes without a view to profit. (R.C. 5709.121B).

"4. The final order is erroneous with regard to parcels 35-3-34; 175; and 188 in that the property houses charitable organizations that benefit the community; is used for educational purposes wherein job skills and other educational programs are conducted without charge, and also houses the Historical Society which operates a museum and also is engaged in educational programs of benefit to the community.

"5. The final order is erroneous in that the subject property is a community or area center in which public interest (sic) and educational interests are served and is for charitable and public purposes, **[*4]** and is for the purpose of redevelopment of a blighted area and to improve the economic and social welfare of the citizens within the municipal corporation.

"6. The final order is unlawful and erroneous in that the Appellant is determined not to be a charitable organization, and that the subject property is deemed to not be used for charitable purposes."

Madisonville initially applied for tax exemption of the property in 1996, based upon its non-profit status and the charitable, educational, and/or public use of the property. (ST. 11). The Tax Commissioner, in his journal entry dated July 31, 1998, denied the real property tax exemption for the property for the reasons contained in the recommendation of the attorney examiner. (ST. 1-4). The Tax Commissioner concluded that Madisonville had not met the requirements for exemption provided in R.C. 1728.10, 5709.12, or 5709.121.

It is appropriate to note that the rule in this state is that all real property and its improvements are to be taxable by uniform rule according to value. The General Assembly is, however, empowered by the Ohio Constitution to pass laws to exempt certain types of property. Section 2, Article XII, Ohio Constitution **[*5]** reads, in pertinent part, as follows:

"* * * Land and improvements thereon shall be taxed by uniform rule according to value * * *. Without limiting the general power, subject to the provisions of Article I of this constitution, to determine the subjects and methods of taxation or exemptions therefrom, general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose, * * *."

Thus, exemption from taxation is the exception to the rule. *Seven Hills Schools v. Kinney*

C - 88

(1986), 28 Ohio St.3d 186. Statutes granting exemptions must be strictly construed. *Natl. Tube Co. v. Glander* (1952), 157 Ohio St. 407, paragraph two of the syllabus; *White Cross Hosp. Assn. v. Bd. of Tax Appeals* (1974), 38 Ohio St.2d 199, 201; *American Soc. for Metals v. Limbach* (1991), 59 Ohio St.3d 38.

In reviewing the appellant's appeal, we are also cognizant of the presumption that the findings of the Tax Commissioner are valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. The taxpayer has the burden of proof **[*6]** to demonstrate that it is entitled to the exemption. *Willys-Overland Motors, Inc. v. Evatt* (1943), 141 Ohio St. 402. When challenging a finding of the Tax Commissioner, it is incumbent upon a taxpayer to rebut the presumption and establish its 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.

Madisonville claims exemption under R.C. 1728.10. Madisonville applied for real property tax exemption on March 14, 1996. (ST. 11). Consequently R.C. 1728.10 as effective through December 2, 1996, is the statute at issue. R.C. 1728.10 [145 Ohio Laws v. S.B. 5 effective 7-24-94] provides in relevant part:

> "(A) The improvements made in the development or redevelopment of a blighted area pursuant to Chapter 1728. of the Revised Code are hereby declared to be a public purpose, and except as otherwise provided in division (B) of this section, not more than seventy-five per cent of the assessed valuation of such improvements may be exempted from taxation. With the approval under this division of the board of education of the city, local, or exempted village school district within the territory **[*7]** of which the improvements are or will be located, the portion of the assessed valuation of the improvements exempted from taxation may exceed seventy-five per cent, but shall not exceed one hundred per cent. Not later than thirty days prior to executing the financial agreement, the governing body shall deliver to the board of education a notice stating its intent to declare improvements to be a public purpose under the agreement, describing the parcel and the improvements, providing an estimate of the true value in money of the improvements, specifying the period for which the improvements would be exempted from taxation and the percentage of the assessed valuation of the improvement that would be exempted, and indicating the date on which the governing body intends to execute the agreement. . . ."

The essential requirements of R.C. 1728.10 are the necessity of giving notice to the affected boards of education, getting approval by the boards of education, and having "financial agreements" in place. The municipal corporation where the property is located must certify that a "financial agreement" with the community redevelopment corporation exists. To determine what are proper "financial **[*8]** agreements," the Board must consider R.C. 1728.07, which provides the requirements for financial agreements to enable the property to qualify for exemption under R.C. 1728.10.

R.C. 1728.07 provides as follows:

> "Every approved project shall be evidenced by a financial agreement between the municipal corporation and the community urban redevelopment corporation. Such agreement shall be prepared by the community urban redevelopment corporation and submitted as a separate part of its application for project approval.

C-89

"The financial agreement shall be in the form of a contract requiring full performance within twenty years from the date of completion of the project and shall, as a minimum, include the following:
(A) That all improvements in the project to be constructed or acquired by the corporation shall be exempt from taxation, subject to section 1728.10 of the Revised Code;
(B) That the corporation shall make payments in lieu of real estate taxes not less than the amount as provided by section 1728.11 of the Revised Code; or if the municipal corporation is an impacted city, not less than the amount as provided by section 1728.111 [1728.11.1] of the Revised Code;
(C) **[*9]** That the corporation, its successors and assigns, shall use, develop, and redevelop the real property of the project in accordance with, and for the period of, the community development plan approved by the governing body of the municipal corporation for the blighted area in which the project is situated and shall so bind its successors and assigns by appropriate agreements and covenants running with the land enforceable by the municipal corporation.
(D) If the municipal corporation is an impacted city, the extent of the undertakings and activities of the corporation for the elimination and for the prevention of the development or spread of blight. * * *.
(F) That the corporation shall submit annually, within ninety days after the close of its fiscal year, its auditor's reports to the mayor and governing body of the municipal corporation;
(G) That the corporation shall, upon request, permit inspection of property, equipment, buildings, and other facilities of the corporation, and also permit examination and audit of its books, contracts, records, documents, and papers by authorized representatives of the municipal corporation;
(H) That in the event of any dispute between the parties **[*10]** the matters in controversy shall be resolved by arbitration in the manner provided therein;
(I) That operation under the financial agreement is terminable by the corporation in the manner provided by Chapter 1728. of the Revised Code;
(J) That the corporation shall, at all times prior to the expiration or other termination of the financial agreement, remain bound by Chapter 1728. of the Revised Code; * * *." (Emphasis added)

In the instant case, Madisonville presented to the Board copies of funding agreements that concerned funding of the project through a block grant from the U.S. Department of Housing and Urban Development. (Appellant's Ex. 2, 3, 4). Madisonville argues that these "funding agreements" constitute qualifying financial agreements. Although the terms and conditions presented in the funding agreements may satisfy the requirements of the Community Development Block Grant for the HUD program, these agreements do not satisfy the requirements for a financial agreement contemplated in R.C. 1728.07(A) through (J).

The appellant acknowledges that R.C. Chapter 1728 provides specific requirements for a corporation to qualify as a community urban redevelopment corporation. In **[*11]** reviewing the requirements of Chapter 1728, this Board has previously held that "If all requirements have been satisfied, improvements made in the redevelopment of a blighted area will be deemed a public purpose for which a tax exemption will be granted." *Rehab Project v. Roger W. Tracy, Tax Commissioner of Ohio* (May 23, 1997), BTA Case No. 95-R-418, unreported at 19. (Emphasis added). However, in the instant appeal Madisonville has failed to meet the requirements of R.C. 1728.07 and 1728.10. Patently, if the documents presented were qualifying financial agreements as contemplated by R.C. 1728.07, provision would be made for "payments in lieu of taxes" as provided for in R.C. 1728.07(B).

C-90

Madisonville also claims in its notice of appeal to qualify for tax exemption under R.C. 5709.12 and 5709.121. The appellant's presentation at the hearing and in its brief has all but abandoned its reliance on these statutes for property tax exemption. We will, however, consider the appellant's claim. R.C. 5709.12 states that "real and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation." Two requirements exist **[*12]** for exemption under this section. The property must belong to an institution and the property must be used exclusively for charitable purposes. *Highland Park Owners, Inc. v. Tracy* (1994), 71 Ohio St.3d 405. Although Madisonville may satisfy the first requirement of being an institution, the subject property is not used exclusively for charitable purposes. The property is used by Madisonville Community Corporation, Madisonville Business Association, and Students Concerned About Today and Tomorrow. These organizations are geared toward promoting private economic goals, not charitable goals. Madisonville is also trying to lease portions of the property to private tenants including a short term or daily labor company and a community daycare. Previously a sandwich shop was located in the center. Another portion of the property is leased to the United States Post Office, and a small office is used rent free as a Cincinnati police substation. There is off-street parking for patrons of the businesses. Thus, the Board must find that Madisonville did not use the property exclusively for charitable purposes.

Madisonville does not qualify for exemption under R.C. 5709.121, which provides **[*13]** as follows:

> "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 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.
>
> "(C) It is used by an organization described in division (D) of section 5709.12 of the Revised Code."

Under R.C. 5709.121, the first question is whether Madisonville **[*14]** is a charitable or educational institution. Although Madisonville is a non-profit corporation organized pursuant to R.C. Chapter 1702 to redevelop a blighted area in Cincinnati, it is not a charitable or educational institution. 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. Therefore, the Board must

C-91

conclude that Madisonville does not qualify for property exemption under R.C. 5709.121.

For all of the foregoing reasons, it is the Decision and Order of the Board of Tax Appeals that the property owner has not established its right to exemption from real property tax. Therefore, the decision of the Tax Commissioner must be, and the same hereby is, affirmed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax Law > State & Local Taxes > Administration & Proceedings > Judicial Review
Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > Requirements for Exempt Status
Tax Law > State & Local Taxes > Real Property Tax > General Overview

Source: My Sources > Ohio > Find Statutes, Regulations, Administrative Materials & Court Rules > By Administrative Materials > **OH Board of Tax Appeals Decisions**
Terms: **98-I-858** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Monday, June 9, 2008 - 4:09 PM EDT

LexisNexis® About LexisNexis | Terms & Conditions | Contact Us
Copyright © 2008 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

C-92

*1994 Ohio Tax LEXIS 963, **

Miami Valley Research Foundation, Appellant, vs. Roger W. Tracy, Tax Commissioner of Ohio, Appellee.

CASE NO. **91-J-161** (EXEMPTION)

STATE OF OHIO -- BOARD OF TAX APPEALS

1994 Ohio Tax LEXIS 963

June 17, 1994

[*1]

APPEARANCES:

For the Appellant - Thompson, Hine and Flory, David M. Rickert and Stephen J. Davis, 2000 Courthouse Plaza, Northeast, Dayton, Ohio 45401

For the Appellee - Lee I. Fisher, Jr., Attorney General of Ohio, James C. Sauer, Assistant Attorney General, State Office Tower, 30 East Broad Street, Columbus, Ohio 43215

OPINION:
DECISION AND ORDER

The Board is considering this matter upon a notice of appeal filed herein by Miami Valley Research Foundation. ("Appellant") Appellant appeals from a journal entry of the Tax Commissioner which denied appellant's application for exemption of real property from taxation for the tax year 1988, and remission of unpaid taxes and penalties for tax years 1987, and 1986. The notice of appeal and journal entry are incorporated herein by reference. The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript ("S.T.") certified by the Tax Commissioner, and the evidence adduced at the hearing conducted herein which is contained in the hearing record. ("R.")

The appellant was organized in 1980. (R. 14) Its original articles of incorporation state the purposes for which the corporation was formed:

"A. To **[*2]** foster and promote research, technological, scientific and educational activities and facilities in the Greater Dayton, Ohio Area and to create or preserve jobs and employment opportunities and improve the economic welfare of the Greater Dayton, Ohio Area." (R. 16, Ex. 1)

The appellant has been granted exemption from Federal income tax under section 501(c)(3) of the Internal Revenue Code. (R. 18, 27; Ex. 3)

The property in question is a 2.809 acre parcel. (R. 25) The appellant acquired the subject property as part of a six hundred seventy acre tract conveyed by the state of Ohio, pursuant to an Act of the General Assembly effective July 9, 1981, Am. Hse. Bill No. 400. (R. 20, 21, 35; Exs. 4, 5) A second tract of approximately five hundred eighty-five acres was acquired by purchase with funds provided by the state of Ohio from a capital bill. (R. 37)

A 40,000 square foot facility was constructed on the subject property in 1986. It is used to encourage understanding of a research park and provide space for groups as needed. (R.25) The facility as constructed, was not a typical office building. It had a particular infrastructure, service columns at twenty foot intervals, **[*3]** special ventilation, acid waste removal,

C-93

compressed air and natural gas, which would be suitable to small laboratory companies. (R. 63, 90) The building was actively marketed and used as a marketing tool.

During the years 1986 through 1988, the building was vacant. Its first use was by the appellant, as office space, for use in the marketing of the research park. (R. 25, 39, 46) Since January of 1989, approximately seventeen hundred square feet have been rented to eight different organizations, four for profit and four nonprofit consortiums. (R. 67) The Miami Valley Research Institute is one of the nonprofit organizations. It is a research institute comprised of the four local universities and is involved in a variety of technologies that could be used by these institutions. (R. 68) Appellant leases space to the profit organizations at market rates, and significantly less than market to the nonprofits. (R. 70)

The appellant's purpose in acquiring the land has been to develop a research park. Prior to the development of the property by the appellant, available research space in the Dayton area was non-existent. (R. 25) Because appellant's purpose has been to transform the **[*4]** property into a research park, as opposed to an office park or industrial park, development has been slow. (R. 24) Prospective tenants, which did not meet the restrictions limiting tenants to organizations engaged in scientific or educational activities, have been turned away. (R. 24, 36)

The appellant has focussed its activities in order to attract research organizations from outside the Dayton area. (R. 83) The appellant has, since the time the original application for exemption was filed, developed one hundred fifty acres of the entire property into a research park. (R. 23, 50) The research park currently contains six buildings, including the subject property. (R. 53; Exhibit 6) There are seven organizations located in the park, both profit and nonprofit companies, Mission Research Corporation, Dayton Power & Light, BDM Corporation, Eastman Kodak, Duriron Corporation, Air Force Logistic Command, Battelle Institute, and Wright State University. (R. 59, 60)

The Act which conveyed the property provides, in part:

"The Governor shall convey the real estate described in Section 1 of this act to the Foundation only if, at the date of such conveyance:

(A) The Foundation qualifies **[*5]** as a nonprofit corporation under the laws of this state and qualifies for tax-exempt status under federal law and has been designated as having that status by the Internal Revenue Service * * *" [* Omitted matter.]

The Act also requires that the appellant make prescribed periodic distribution of residual receipts, one-half to the Miami Valley Research Institute, and one-half to the general revenue fund. Residual receipts were defined as the appellant's gross cash receipts less the sum of certain items attributed to operation and management of the property, including all expenditures for operating and maintenance costs and expenses, taxes, insurance and the like. Excluded from net receipts were amounts distributed by the appellant to the Institute for property maintenance costs and expenses, taxes, insurance and the like.

The Act also described the consideration for the conveyance to be the benefit to the state arising from the operation by the Miami Valley Research Institute of a research facility consistent with the promotion of the general welfare of the residents of the state by conducting scientific research activites with educational institutions, governmental agencies, **[*6]** private industry, in a manner which will promote and foster economic development in the state; and the activities of the appellant foundation to encourage other persons and entities to conduct research activities and engage in related manufacturing operations to promote the general welfare and promote economic developments in the state. The Act requires a reverter clause in the deed upon failure to carry out the purpose of the conveyance.

C-94

The appellant seeks exemption of the subject property under R.C. 5709.12 and R.C. 5709.121. R.C. 5709.12 as effective during the period in question contained the following exemption:

"* * * Real and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation. * * *"

[* Omitted matter.]

Charitable use is defined in R.C. 5709.121, as follows:

"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 is either:

"(A) Used by such institution, the state, **[*7]** 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) Otherwise 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."

The threshold issue which we must determine is the nature of the appellant institution, the Miami Valley Research Foundation. In Cincinnati Nature Center Assn. v. Bd. of Tax Appeals (1976), 48 Ohio St. 2d 122, the Supreme Court stated:

"To fall within the terms of R.C. 5709.121, the property must (1) be under the direction or control of a charitable institution or state or political subdivision, (2) be otherwise made available 'for use in furtherance of or incidental to' the institution's 'charitable . . . or public purposes', and (3) not be **[*8]** made available with a view to profit."

The Supreme Court has held that 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 * * *" Planned Parenthood Assn v. Tax Commissioner (1966), 5 Ohio St. 2d 117.

Upon consideration of the evidence adduced, we are compelled to find that appellant is not a charitable institution and its acquisition and improvement of the subject property is not a charitable use. Similarly, in Youngstown Revitalization Foundation v. Limbach (Jan. 11, 1991), B.T.A. Case No. 87-D-1127, unreported, this Board held that real property of a nonprofit foundation acquired for use as part of an overall economic development for a central business district was not exempt as charitable property under R.C. 5709.121. We decided that although economic development is a commendable purpose, it is not charitable within the meaning of the Supreme Court's definition in Planned Parenthood Assn., supra.

In Columbus Board of Education v. Limbach (June 26, 1992), B.T.A. Case No. **[*9]** 86-H-566, unreported, (Order vacated to allow settlement by the parties) we affirmed the Commissioner's denial of an exemption for property owned by the American Chemical Society

C-95

because in our view its dominant purpose was not to benefit the public. We found that the American Chemical Society did encourage and promote chemistry; however, we ultimately concluded that the Society more directly promoted the well-being of chemists and the chemical industry generally, than the well-being of the general public.

In the context of these decisions, we conclude that the appellant institution was formed and is engaged in commercial rather than charitable purposes. The appellant is not engaged in scientific research. It is devoted to development of the land which it owns for commercial purposes albeit as a research park. There is no evidence that the organizations brought to the research park will be engaged in general scientific research for the benefit of the general public, but rather such research will benefit the commercial interests of the occupants of the park. Specifically considering the use of the subject property, it is not limited to use by nonprofit research organizations **[*10]** devoted to the expansion of the general scientific knowledge of the general public. We presume from the firms which have taken space in the subject property that whatever research undertaken will be utilized by the organizations themselves. Parenthetically, we note that one of the tenants is identified as Battelle Institute, which was not entitled to exemption of its real property it claimed was used for charitable purposes under Section 5353, General Code, a predecessor statute to R.C. 5709.12. Battelle Memorial Institute v. Dunn (1947) 148 Ohio St. 53, 61 The rationale of the Court is supportive of our view in the instant case. The Court distinguished between the promotion of science which is charitable and a use essentially for the pecuniary advantage of industrial organizations which is not charitable.

We have found that the appellant's use of the subject property is not charitable in character but commercial, in its promotion of the research park to both profit and nonprofit companies. We have observed the statistics provided of employment and estimated payroll derived from activities in the research park from 1985 to 1991. Much has been achieved during these years. **[*11]** See Exhibit 6. We certainly commend the effort that is being made to enhance the economy of the greater Dayton area; but again, we find the effort to be commercial and not charitable in its motivation and effect. Although not determinative of the issue, we note that the enabling act providing for the conveyance of the property to the appellant recognized the payment of taxes as an appropriate expenditure.

We conclude for all the foregoing reasons that the appellant is not a charitable institution. With respect to any profits that may arise from the appellant's activities, distributions are required to the Miami Vally Research Institute, and the general revenue fund. Profits are not therefore directed to the benefit of public, or any needy individuals. Planned Parenthood Assn. v. Tax Commissioner, supra.

We therefore find that the Tax Commissioner's denial of the application for exemption is in accordance with the evidence and law. The journal entry of the Commissioner is hereby affirmed. It is Ordered that a copy of the foregoing Decision and Order shall be sent to the Commissioner and to the parties by and through their respective counsel.

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax Law > Federal Income Tax Computation > Tax Accounting > General Overview
Tax Law > International Taxes > Americans Operating Abroad > Foreign Tax Credits (IRC secs. 901-908) > General Overview
Tax Law > State & Local Taxes > Administration & Proceedings > Judicial Review

Source: My Sources > Ohio > Find Statutes, Regulations, Administrative Materials & Court Rules > By Administrative Materials > **OH Board of Tax Appeals Decisions**
Terms: **91-j-161** (Edit Search | Suggest Terms for My Search)

C-96

View: Full
Date/Time: Monday, June 9, 2008 - 4:10 PM EDT

LexisNexis® About LexisNexis | Terms & Conditions | Contact Us
Copyright © 2008 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

C-97

*2004 Ohio Tax LEXIS 832, **

New Covenant Believers Church, Appellant, vs. Thomas M. Zaino, Tax Commissioner of Ohio and Columbus City School District Board of Education, Appellees.

CASE NO. **2002-B-926** (REAL PROPERTY TAX EXEMPTION)

STATE OF OHIO -- BOARD OF TAX APPEALS

2004 Ohio Tax LEXIS 832

May 21, 2004

[*1]

APPEARANCES:

For the Appellant - Bricker & Eckler, LLP, Jerry O. Allen, David P. Suich, Alan D. Duffy, Columbus, Ohio.

For the Appellee - Jim Petro, Attorney General of Ohio, Janyce C. Katz, Assistant Attorney General, Columbus, Ohio.

For the BOE - Rich, Crites & Wesp, Mark H. Gillis, Columbus, Ohio.

OPINION:
DECISION AND ORDER

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

This matter is considered once again by the Board of Tax Appeals upon a notice of appeal filed by New Covenant Believers Church ("New Covenant") from a final determination of the Tax Commissioner, in which New Covenant's application for exemption of real property from taxation for tax year 2001 and remission of taxes, penalties and interest for 1998, 1999, and 2000 for parcels totaling over thirty-three (33) acres and improvements thereon was approved in part by granting exemption to all the real property excepting the gymnasium and workout center.

On March 12, 2004, this board journalized a decision and order in the above-styled case. Thereafter, on April 7, 2004, the appellant filed herein a request for reconsideration of that decision and order. To allow time for review of that request, this board vacated the **[*2]** prior decision and order on April 9, 2004.

We have reviewed appellant's argument, presented in its request, that "prior to use by the Handy School in August, 2001, the gymnasium was used by the Church for worship and by Human Services and its Kids Care Academy" and that the subject property thereby qualified for exemption. We find this contention to be without merit, noting very little specific or detailed evidence of usage prior to August, 2001 in the record. Our decision is based in part on the testimony of appellant's chief witness, Howard Landon Tillman, in cross-examination. Therein, Mr. Tillman testified as follows:

> "Q: You applied for exemption in May of 2001. That was prior to beginning use of the gymnasium and the other facilities; is that correct?
>
> "A: Are you talking about for the real property tax exemption?

C-98

"Q: Yes.

"A: Yes, I believe so.

"Q: And you did not begin to use it until August of 2001?

"A: As far as the heavy usage, that's correct." R. 62.

This issue is further addressed in this decision and, additionally, fails on appellant's burden of proof. Our discussion follows below.

New Covenant's notice of appeal reads in pertinent part as follows:

> **[*3]**
> "....Appellant requests that the Board of Tax Appeals find that the Final Determination in question is, in part, erroneous, unreasonable and unlawful with respect to the conclusions reached therein that the gymnasium situated on the subject property does not qualify for exemption. Consequently, it is respectfully requested that such finding regarding the gymnasium be overruled and that the Board issue its order that the gymnasium is exempt from real property tax pursuant to R.C. Sections 5709.07(A)(2) and 5709.12(B)."

An evidentiary hearing was held in which New Covenant, the Tax Commissioner and the board of education appeared and were represented by counsel. This appeal is now submitted upon the notice of appeal, the statutory transcript, the evidence adduced at the hearing, and the arguments of counsel.

We acknowledge at the outset the affirmative burden borne by an appellant in an appeal taken from a final order of the Tax Commissioner. In *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121, the Supreme Court stated:

> "Absent a demonstration that the commissioner's findings are clearly unreasonable or unlawful, they are presumptively valid. **[*4]** Furthermore, it is error for the BTA to reverse the commissioner's determination when no competent and probative evidence is presented to show that the commissioner's determination is factually incorrect." Id. at 123. (Citation omitted.)

Turning to New Covenant's claim for exemption, we first note the general rule that "all real property in this state is subject to taxation, except only such as is expressly exempted therefrom." R.C. 5709.01(A). As a result, "in 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. 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 oftstated rules to be found in *Youngstown Metropolitan Housing Authority v. Evatt* (1944), 143 Ohio St. 268 [28 O.O. 163]:

C-99

"By the decisions it is established in Ohio that exemption statutes are to be strictly construed, it being **[*5]** 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. **[*6]** " Id. at 108.

See, also, *White Cross Hosp. Assn. v. Bd. of Tax Appeals* (1974), 38 Ohio St.2d 199. "Exemption is the exception to the rule and statutes granting exemptions are strictly construed." *Seven Hills Schools v. Kinney* (1986), 28 Ohio St.3d 186.

R.C. 5709.07, a statutory basis upon which New Covenant claims entitlement to exemption, provides in part:

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

"* * *

"(2) Houses used exclusively for public worship * * * 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;"

Accordingly, in order to determine whether the subject property qualifies for exemption under R.C. 5709.07, we must first consider whether any structures and attached ground were used exclusively for public worship, and were necessary for public worship.

In *Faith Fellowship Ministries, Inc. v. Limbach* (1987), 32 Ohio St.3d 432, the court held:

"We can derive the definition of 'public worship' to be the open and free **[*7]** celebration or observance of the rites and ordinances of a religious organization.

"* * *

"The exemption is not of such houses as may be used for the support of public worship; but of houses used exclusively as places of public worship." Id. at 435.

In our decision in *Allegheny West Conference Seventh-Day Adventists v. Limbach* (Aug. 21, 1992), BTA No. 1990-K-507, unreported, we indicated that a "primary use" test would be

C-100

applied to determine if property was being "used exclusively for public worship," within the meaning of R.C. 5709.07. We held:

> "In *Faith Fellowship Ministries, Inc. v. Limbach* (1987), 32 Ohio St.3d 432, the Supreme Court set forth the requisite characteristics which must be demonstrated by an applicant seeking exemption pursuant to R.C. 5709.07. In paragraph one of its syllabus, the court held:
>
> "'For purposes of R.C. 5709.07, 'public worship' means the open and free celebration or observance of the rites and ordinances of a religious organization.' (*Gerke v. Purcell* [1987], 25 Ohio St. 229; and *Watterson v. Halliday* [1907], 77 Ohio St. 150, 82 N.E.2d 962, **[*8]** approved and followed.)
>
> "Although R.C. 5709.07 requires that the property be used exclusively for public worship, the Supreme Court has adopted a primary use test which requires more than merely calculating the amount of time that the property is used in a taxable as opposed to a nontaxable manner. *Faith Fellowship Ministries, Inc.,* supra. Instead, a determination as to taxable status must include an examination of both the quantity and quality of the use for which the property is utilized. As the court held in paragraph two of its syllabus:
>
> "'To qualify for an exemption from real property taxation as a house used exclusively for public worship under R.C. 5709.07, such property must be used in a principal, primary, and essential way to facilitate public worship.'
>
> "Under this test, the court has recognized that those uses of property sought to be exempted which are merely supportive are not entitled to exemption under R.C. 5709.07. See *Faith Fellowship Ministries, Inc.,* supra; *Summit United Methodist Church v. Kinney* (1983), 7 Ohio St.3d 13; *Bishop v. Kinney* (1982), 2 Ohio St.3d 52. **[*9]** " Id. at 4.

More recently, the Supreme Court reaffirmed the use of the "primary use" test in determining qualification for exemption pursuant to R.C. 5709.07 in *True Christianity Evangelism v. Zaino* (2001), 91 Ohio St.3d 117. Therein, the court stated:

> "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 Hts. Baptist Church v. Kinney* (1984), 12 Ohio St.3d 134, 135, 12 OBR 174, 175, 465 N.E.2d 1281, 1282, this Court held that for purposes of R.C. 5709.07, the phrase 'used exclusively for public worship' was equivalent to 'primary use.'" Id. at 120.

In the case before us, the subject property is the gymnasium located in the lower level of the new "multi-use" Focus Center facility. (R. 13, 43). The gymnasium has two high school regulation courts with hardwood flooring and painted lines for basketball and volleyball. There is also a stage and sound system therein. (R. 43, 44). The gymnasium is owned by New Covenant and **[*10]** utilized by the church for special religious services approximately ten percent of its total usage. The other ninety percent of the time, the gymnasium is used by the W.C. Handy Community Middle School of the Performing Arts ("W.C. Handy School") and other programs run by the NCBC Human Services Corporation ("NCBC"). R. 17-33.

C-101

The W.C. Handy School is a 501(c)(3) non-profit corporation under the Internal Revenue Code and an Ohio chartered school which focuses on education through music and the arts. R. 17, 18, Appellant's Exhibit 10. The school uses the gymnasium Monday through Friday from about 8:30 a.m. to 4:30 p.m., mid-August to early June. R. 19.

The W.C. Handy School pays New Covenant a flat fee of $ 12,500 per month pursuant to a "Cost Sharing Agreement." R. 50. This is for a period of about nine months each year W.C. Handy School is in session. n1 R. 50, 61. It is the testimony of Mr. Howard Tillman, corporate business manager for New Covenant and NCBC Human Services Corporation that the $ 12,500 per month fee does not cover New Covenant's costs for operating the gymnasium space. R. 62.

n1 Appellant's Exhibit 18 appears to set this at 9 months and 22 days, whereas Mr. Tillman offered 9 months in his testimony. R. 61. **[*11]**

NCBC is a wholly-owned 501(c)(3) nonprofit corporation of New Covenant established in 1996 to expand the charitable and community services of the church. R. 14, 15. NCBC operates a licensed educational and development program called "Kids Care Academy," a mentoring program called "HONOR," which stands for "Helping Others Now Onto Righteousness," as well as other programs like "Practice Makes Perfect," "Urban Healing Festival," and computer training. R. 15, 16.

The Kids Care Academy, founded in 1996, is a licensed day care service provided for children up to 12 years old. R. 16, 21. The academy serves about 54 children, interacting "with about 200 students a year." R. 21. The service operates Monday through Friday from 6:00 a.m. to 6:00 p.m. all year with a focus on teaching the children behavioral and educational skills. R. 22. The children "are in the gymnasium with their before and after school program, eating meals...and performing motor skill activities" throughout the day. R. 22. At least 65% of the children are from an economically disadvantaged background and receive some sort of public assistance. R. 23. While fees are charged, Mr. Tillman testified that Kids Care Academy **[*12]** does not realize any profit. R. 23.

A typical day starts at about 6:00 a.m. to 8:00 or 8:30 a.m. when the academy is actively utilizing the gymnasium. From 8:30 a.m. to about 4:30 p.m. the gymnasium is used by the W.C. Handy group. The academy children return after school and stay until 6:00 p.m.

During the summer months that W.C. Handy School is not in session, the academy expands its services for the 5-12 age group so that their programs operate from 6:00 a.m. to 6:00 p.m. Monday through Friday in the gymnasium. R. 24, 25.

NCBC's Practice Makes Perfect program is a youth mentoring program designed to teach leadership and team skills utilizing sports as its medium. R. 25. During the year, about 200 students participate in the program which uses the gymnasium in the evenings until about 8:30 p.m. on weekdays and on Saturdays. R. 27.

The HONOR program mentors children ages 5 through 19, with the intent of developing "students socially, taking them through this adulthood process, teaching them life lessons." R. 27, 28. The mentors undergo "extensive youth development training" in preparation for working with these children. R. 28. The gymnasium is used by HONOR primarily on Friday evenings **[*13]** and on weekends, and the children are taught simple skills such as shining shoes, basic hygiene, and interviewing techniques. R. 28.

The Urban Healing Festival combines music with other means to create a positive community and youth experience. The festival lasts about one week and consists of seminars and other

C-102

activities. The subject gymnasium is open during the festival but is primarily used in the event of rain. It is estimated that over a thousand people attend this event. R. 29, 30.

NCBC also uses the gymnasium for a free-of-charge open gym time for the children in the community as well as for lectures and sports leagues. R. 30, 31. Mr. Tillman testified that the purpose of the open gym time was to provide "a safe and enjoyable location for the people in the community to come and enjoy and build relationships." R. 31.

NCBC uses the sports leagues to offer a lower cost alternative that the community can afford. Mr. Tillman opined that no profit is realized by this income and noted that the church probably subsidizes the sports league. R. 32.

Other activities which have taken place at the gymnasium include a "prayer walk," a free "bicycle (helmet) giveaway," a blood drive, and **[*14]** an event to honor Willie O'Ree, the first African-American NHL hockey player. R. 33, 34, Appellant's Exhibits 14-17.

Aerobics was also offered twice a week from 6:30 p.m. to 7:30 p.m. with a fee of $ 25 for the entire series of classes. Part of the fee went to the instructor of the course. R. 46.

Mr. Tillman estimated that the total annual cost of operation for the gymnasium is about $ 250,000 per year before depreciation. R. 35.

Although the use of the gymnasium benefits the community with low-cost recreational and educational programs, there has been no evidence that the facility was used exclusively for public worship as required by R.C. 5709.07 for exemption. It is uncontroverted that special religious services only constitute approximately ten percent of its total usage. R. 17. There is no evidence to show how the other ninety percent of the usage relates to public worship. In fact, testimony indicates that NCBC was formed to remove the community and outreach programs from the religious setting. R. 58, 59. Therefore, we deny appellant's request for exemption pursuant to R.C. 5709.07.

In its reply brief dated July 7, 2003, appellant argues that "use of the Focus Center by the **[*15]** (W.C.) Handy School entitles the Church to exemption under R.C. 5709.07." This appears to be a reference to the exemption provided to "public schoolhouses" under R.C. 5709.07(A)(1). n2 We disagree. In its Application for Real Property Tax Exemption and Remission form (DTE Form 23) filed with the Ohio Department of Taxation on June 15, 2001, NCBC sought exemption pursuant to R.C. 5709.07, R.C. 5709.12, and R.C. 5709.121, and described the property's usage, as follows, in pertinent part:

> "New Covenant Believers Church ('NCBC') uses the property for religious purposes. NCBC has been blessed to have a congregation membership of nearly 1,000 members and weekly attendance which averages 1,200 persons. The current sanctuary in which weekly worship is held has already been exempted from real property taxes. However, land surrounding the sanctuary which will be used for construction of a new sanctuary and a prayer park is not currently exempt. Also, NCBC recently completed a major construction project which added new facilities which are used as a part of NCBC's ministry. We respectfully request that the land and the recently completed facilities be granted tax exemption as well.
>
> "Attached **[*16]** please find a site plan for the newly completed facilities. Each area has been numbered and a description of the use of each area is also included. These new facilities were constructed as part of NCBC's Christian outreach efforts to take a holistic approach in serving the spiritual needs of the community. As you will see, the new facility includes approximately 20 classrooms, which are used for adult Sunday school on Sundays; and during the

C - 103

week they are used by the youth ministry, men's ministry, women's ministry, married ministry, boys and girls mentoring program and a recovery class for recovering alcoholics and drug addicts, as well as by worship teams for rehearsal. The new facilities include a ministry work room, which is used by staff and Sunday school teachers to prepare lessons. Staff offices are also located in the new facilities.

"We have constructed a computer lab, which is used by staff and which we intend to use to provide community technology and employment training. To the extent possible, this training will be provided without charge. However, it may be necessary to make some charges to help to recover some of the costs of operating the program.

"An Ohio Department **[*17]** of Human Services licensed child care center is also housed in the newly constructed facilities. The child care uses its own dedicated space, as well as the gymnasium, for its activities. The child care consists of before- and after-school care for approximately 70 to 75 children. Care is also provided for toddlers and pre-school children. The child care facilities are also used for youth Sunday school.

"In addition to use by the child care, the gymnasium is open to the public for various activities. Open-gym basketball is provided on Saturdays, which is open without charge to the public. Aerobics classes are offered two times a week, which are also open to the public. Open volleyball is also offered, which is open to the public. Tennis instruction currently is offered as well. A very small fee is charged for aerobics and tennis, which is set at an amount to cover the costs of the instructor and supplies."

n2 The Tax Commissioner determined, in his final order, that appellant did not qualify for such an exemption since it was a religious institution. But see: *The Performing Arts of Metropolitan Toledo, Inc. v. Zaino* (Dec. 20, 2002), BTA No. 2001-J-977, unreported. Currently on appeal to the Ohio Supreme Court. **[*18]**

There is no mention of the schoolhouse exemption, nor is there anything noted about the usage of the gymnasium by the W.C. Handy School in the application description. Further, the notice of appeal specifies R.C. 5709.07(A)(2) in this regard and does not cite or relate to R.C. 5709.07(A)(1)--the specific exemption section for public schoolhouses. It is well settled that the Board of Tax Appeals has jurisdiction to consider only the applicability of those sections of the Revised Code raised by an appellant before the Tax Commissioner. See *Moraine Hts. Baptist Church v. Kinney* (1984), 12 Ohio St.3d 134. Cf. *CNG Development Co. v. Limbach* (1992), 63 Ohio St.3d 28. Likewise, "a notice of appeal does not confer jurisdiction upon the Board of Tax Appeals to resolve an issue, unless that issue is clearly specified in the notice of appeal." *Cleveland Elec. Illum. Co. v. Lindley* (1982), 69 Ohio St.2d 71, 75. See, also, *Kern v. Tracy* (1995), 72 Ohio St.3d. In *Queen City Valves, Inc. v. Peck* (1954), 161 Ohio St. 579, the court determined **[*19]** that the term "specify" means to "'mention specifically, to state in full and explicit terms.'" Id. at 583. See *Oikos v. Zaino* (Nov. 9, 2001), BTA No. 2000-T-2037, unreported. Thus, appellant's contention that it is entitled to an exemption based on R.C. 5709.07(A)(1) is without merit.

Appellant also seeks exemption under R.C. 5709.12(B) which states, in part, that "real . . . property belonging to institutions that is used exclusively for charitable purposes shall be

C-104

exempt from taxation."

In its brief, appellee contends, as follows:

> "When contemplating whether this property should be exempted under R.C. 5709.12(B), the question becomes whether property leased is being used in a charitable manner and the answer is no. Case law strongly supports the Tax Commissioner's denial of the exemption even when the profitable use is only minimum. *Zindorf v. Otterbein Press* (1941), 138 Ohio St. 287 (A non profit in competition with a for profit can not (sic) be exempt from taxation); *Thomaston Woods Limited Partnership v. Lawrence* (June 15, 2001), B.T.A. Case No. 99-L-551 (A limited partnership to develop low-income housing **[*20]** is leasing for $ 3000 a year to a Head Start program, which is not a charitable use of the property in question). '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 purpose is the leasing.' *Lincoln Memorial Hospital v. Warren* (1968), 13 Ohio St.2d 109.
>
> "In *Thomaston Woods Limited Partnership v. Lawrence* (June 15, 2001) BTA Case No 99-L-551, this Board stressed that it denied an exemption for real property based upon the existence of the lease rather than the amount of money that the lease brought to the lessor or the charitable activities of the lessee.
>
> "'We note that it is not the amount of net annual rental income received by the property owner that is determinative of a property's exemption status. Even a property that makes no money, or is losing money may be subject to real property taxation. In the instant case, it is the fact that the property owner itself is leasing the property commercially that causes the second prong of the R.C. 5709.12(B) test to not be met.'
>
> "In contrast, in *True Christianity Evangelism v. Zaino,* 91 Ohio St. 3d at 117, **[*21]** the Supreme Court found the distribution of literature advocating Christianity as the only religion to be an exempt charitable activity; however, in that case, the evangelical activity was totally at the expense of the taxpayer and there were no questions of leases or other financial activities raised before this Board or the Court.
>
> "Appellant admitted that it uses the gymnasium for its own activities only ten (10) percent of the time. The rest of that time Appellant leases the property to the Charter school, which, then uses the gymnasium for recreational purposes. Under an agreement with Appellant, the school is paying $ 125,000 for using the property during the ten months the school is in session. While the school, itself, is a charity and is using the gymnasium for recreational activities for its students, Appellant leases the property and that is Appellant's primary use of the property. The leasing activity is not an exempt charitable use. Thus, as the act of leasing rather than the activities of the lessee is the predominant use of the facility, there can be no exemption under R.C. 5709.12. *Thomaston Woods Limited Partnership v. Lawrence* (June 15, 2001) BTA Case No 99-L-551. **[*22]** Therefore, the Tax Commissioner correctly denied Appellant an exemption under either R.C. 5709.12 or R.C. 5739.121 (sic) for its gymnasium." (At 9, 10).

In its reply brief, appellant argues that there is no lease between the W.C. Handy School and New Covenant but rather only a "Space and Cost Sharing Agreement" and further contends

C-105

that even if such an agreement could be construed to be a lease the question of exemption under R.C. 5709.12(B) would turn on whether the subject property was leased with a view to profit rather than simply leased.

A lease is defined as follows:

> "A contract by which a rightful possessor of real property conveys the right to use and occupy that property in exchange for consideration, usu. rent." Black's Law Dictionary 898. (7th ed. 1999).

It is clear that some type of consideration was paid by the W.C. Handy School to New Covenant. The agreement states, as follows:

> "Initially, the School shall pay to the Church Twelve Thousand Five Hundred Dollars ($ 12,500.00) per month during the School Year for the School's shared use of the Shared Space in the Facility ('Minimum Monthly Payment')." (Appellant's Exhibit 18, p. 2).

Regardless of how this **[*23]** payment is characterized, it is consideration within the definition of a lease.

It is uncontroverted that the agreement also sets out the term of the contract. It reads as follows:

> "The initial term of this Agreement shall commencing (sic) on the date of this Agreement and shall continue until June 30, 2003. This Agreement shall automatically be renewed for successive one-year terms, unless either party to this Agreement notifies the other party in writing that it does not desire to renew this Agreement. In the event of such notification, this Agreement and any right to automatic renewals hereunder shall terminate at the end of the then current term." (Id. at 3).

But, in its reply brief, appellant argues that a lease requires exclusive possession of a certain quantity of property n3 not given by this agreement. However, in this regard we direct appellant's attention to the agreement, which states, as follows:

> "The School may use the gymnasium/auditorium, cafeteria and athletic fields upon application to the Church, and only after the Church approves such use..." (Appellant's Exhibit 18, p. 1, 2).

The record reflects that the subject property was used on a regular and **[*24]** consistent basis over the years in question, leading to the conclusion that such approval was previously granted by the church. Such usage and the words of the agreement fulfill the requirement of exclusive possession of a certain quantity of property.

C - 106

n3 Citing *Campanella v. Commerce Exchange Bank* (2000), 139 Ohio App.3d 796.

Thus, for the reasons stated above, we determine that the "Space and Cost Sharing Agreement," as it pertains to the subject property and the issue before us today, does indeed constitute a lease. In doing so, we again direct attention to the words of the agreement which state:

> "Each party, in the performance of the work, duties and obligations required under this Agreement, shall at all times be acting and performing as an independent contractor, rather than as an employee, agent, or representative of the other party. Nothing in this Agreement shall be construed to cause the parties hereto to be treated as partners or joint venturers with each other, it being understood and agreed that the only relationship between The Church and The School is one similar to that of landlord and tenant, and nothing contained in this **[*25]** Agreement will render, or be construed to render, either of the parties hereto liable to any third party for debts, actions, or obligations of the other party." (Id. at 4, emphasis added).

Finally, appellant argues in its reply brief that in examining whether the subject property qualifies for exemption under R.C. 5709.12(B), we must determine whether the property was leased with a view to profit. The commissioner, however, contends, in his brief, that if the W.C. Handy School accounts for ninety percent of the activity at the subject property then we must determine that the act of leasing is the predominate activity of the subject property and deny the exemption.

We find the case of *The Performing Arts of Metropolitan Toledo, Inc. v. Zaino* (Dec. 20, 2002), BTA No. 2001-J-977, unreported, n4 to be instructive here. Therein, we found a lease arrangement from a for-profit limited partnership to a non-profit corporation operating a public community school did not disqualify the property therein from an exemption pursuant to R.C. 5709.07. However, in that case we explained the differences in how such a leasing arrangement affects the consideration of exemption applications under **[*26]** R.C. 5709.07 as opposed to R.C. 5709.12.

n4 Currently on appeal to the Ohio Supreme Court.

Therein, we stated:

> "The commissioner further maintains that appellants' attempt to focus solely on the use of the property by (The Performing Arts of Metropolitan Toledo - "PASMT") fails to recognize the fact that Gomez, the owner of the property, is also using the property. To the contrary, Gomez has given possession to PASMT and receives only income from its use.
>
> "As support for this argument the commissioner cites *Lincoln Memorial Hospital v. Warren* (1968), 13 Ohio St.2d 109, and *Thomaston Woods Limited Partnership v. Lawrence* (June 15, 2001), BTA No. 99-L-551, unreported. *Lincoln Memorial Hospital* addressed a situation where a for-profit corporation held title to a hospital and land. The corporation rented the hospital to a separate non-profit corporation for enough remuneration to discharge the financial obligations of the for-profit corporation. The court denied the exemption sought under R.C.

C-107

5709.12 because the use by the property owner was in the nature of a rental arrangement to another and not a use exclusively for charitable purposes.
[*27]
"In *Thomaston Woods Limited Partnership,* exemption was also sought pursuant to R.C. 5709.12. This board determined that the owner's primary use of the property was to lease it to third parties. The board held that in a lease situation 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.

"These cases construe the applicability of the exemption provided by R.C. 5709.12 to a leasing situation. R.C. 5709.12 requires that the qualifying party own the property in order to be eligible for the exemption. R.C. 5709.07 does not contain a similar restriction." (Id. at 9, 10).

In the case before us, the owner of the subject property has leased the property to the W.C. Handy School which accounts for ninety percent of its usage. Therefore, the predominate usage of the property pursuant to R.C. 5709.12 is leasing.

Although appellant's use of the subject property is certainly commendable, this board must conclude that the property does not qualify for property tax exemption under R.C. 5709.12.

For all of the foregoing reasons, it is the decision and order of the Board of Tax Appeals that the **[*28]** appellant has not established its right to exemption from real property tax for the subject parcel. Therefore, the final determination of the Tax Commissioner must be, and the same hereby is, affirmed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax Law > State & Local Taxes > Administration & Proceedings > Judicial Review
Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > Requirements for Exempt Status
Tax Law > State & Local Taxes > Real Property Tax > General Overview

Source: My Sources > Ohio > Find Statutes, Regulations, Administrative Materials & Court Rules > By Administrative Materials > **OH Board of Tax Appeals Decisions**
Terms: **2002-b-926** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Monday, June 9, 2008 - 4:11 PM EDT

LexisNexis® About LexisNexis | Terms & Conditions | Contact Us
Copyright © 2008 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

C-108

*268 Kan. 488, *; 998 P.2d 88, **;*
*2000 Kan. LEXIS 18, ****

PRESBYTERIAN MANORS, INC., Appellant, v. DOUGLAS COUNTY, KANSAS, Appellee.

No. 81,779

SUPREME COURT OF KANSAS

268 Kan. 488; 998 P.2d 88; 2000 Kan. LEXIS 18

February 4, 2000, Opinion Filed

PRIOR HISTORY: [*1]** Appeal from Board of Tax Appeals of the State of Kansas.

DISPOSITION: Reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant adult care home challenged an order of the Board of Tax Appeals (Kansas) denying a property tax exemption for its adult care home and facility for housing the elderly.

OVERVIEW: The Board of Tax Appeals (BOTA) denied appellant a property tax exemption for its adult care home and facility by relying on its finding that appellant was not operating below its cost of operation. The court reversed, holding that pursuant to the retroactive amendment to Kan. Stat. Ann. §§ 79-201b(2) and (5) that the term "lowest feasible cost" was to be construed according to I.R.C. Rev. Rul. 72-124 and that neither the county nor the BOTA had analyzed appellant's finances in accordance with the ruling. The BOTA failed to review adequately appellant's financial history, its reinvestments, or to compare fees charged to expenses, including indebtedness and reserves. The BOTA gave no weight to appellant's qualifying for exemption under I.R.C. § 501(c)(3) which, although not controlling, should have been given great weight since it indicated that appellant's use of the property was consistent with Rev. Rul. 72-124.

OUTCOME: The court reversed because the Board of Tax Appeals failed to analyze appellant's finances in accordance with the revenue ruling that the legislature intended to be given great weight as expressly shown by a retroactive amendment to the exemption statute.

CORE TERMS: lowest, resident, feasible, net income, exemption, indebtedness, housing, care home, adult, earnings, repair, property tax exemption, income tax, qualify, financial officer, fiscal years, balance sheet, ratio, used exclusively, fee charged, reconsideration, charitable, elderly, current assets, recent years, business practices, decrease, income tax, legislative history, internal revenue code

LEXISNEXIS(R) HEADNOTES
Tax Law > Federal Taxpayer Groups > Exempt Organizations > Charitable, Religious & Scientific Organizations
Tax Law > State & Local Taxes > Personal Property Tax > General Overview
*HN1*Kan. Stat. Ann. §§ 79-201b(2) and (5), as amended, each includes the following

C-109

provision: For purposes of this paragraph and for all taxable years commencing after December 31, 1976, an adult care home which uses its property in a manner which is consistent with the federal internal revenue service ruling 72-124 issued pursuant to section 501(c)(3) of the federal internal revenue code, shall be deemed to be operating at the lowest feasible cost. 1999 Kan. Sess. Laws ch. 154, n 74.

Administrative Law > Judicial Review > Standards of Review > General Overview
Tax Law > State & Local Taxes > Administration & Proceedings > Judicial Review
HN2 Because the Board of Tax Appeals is a specialized agency for the purpose of deciding taxation issues, the court generally gives its decisions deference on tax questions unless the Board of Tax Appeals' interpretation is erroneous as a matter of law.

Administrative Law > Judicial Review > Standards of Review > General Overview
HN3 The standard of review on questions of law, such as statutory interpretation, requires the court's independent and unlimited consideration.

Administrative Law > Judicial Review > Standards of Review > General Overview
Tax Law > State & Local Taxes > Administration & Proceedings > General Overview
Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > Limitations
HN4 Tax exemption statutes are to be strictly construed in favor of imposing the tax and against allowing the exemption for one who does not clearly qualify.

Healthcare Law > Business Administration & Organization > Tax Exemptions > Nonhospital Organizations
Tax Law > Federal Taxpayer Groups > Exempt Organizations > Charitable, Religious & Scientific Organizations
Tax Law > Federal Taxpayer Groups > Individuals > Annuities & Life Insurance (IRC sec. 72) > General Overview
HN5 Rev. Rul. 72-124 explains the requirements that "homes for the aged" must meet to qualify for exemption under section 501(c)(3) of the Internal Revenue Code. Rev. Rul. 72-124, 1972-1 C.B. 145 (prefatorial note). The gist of the ruling is that such an organization, otherwise qualified for charitable status under I.R.C. § 501 (c)(3), will qualify for charitable status if it operates so as to satisfy the three primary needs of aged persons--housing, health care, and financial security. 1972-1 C.B. 146.

Tax Law > Federal Taxpayer Groups > Exempt Organizations > Conditions & Restrictions (IRC secs. 501-505, 521, 526-530)
HN6 Rev. Rul. 72-124, 1972-1C.B. 147, provides in part as follows: The need for financial security, i.e., the aged person's need for protection against the financial risks associated with later years of life, will generally be satisfied if two conditions exist. First, the organization must be committed to an established policy, whether written or in actual practice, of maintaining in residence any persons who become unable to pay their regular charges. This may be done by utilizing the organization's own reserves.

Tax Law > Federal Taxpayer Groups > Exempt Organizations > Conditions & Restrictions (IRC secs. 501-505, 521, 526-530)
HN7 Rev. Rul. 72-124, 1972-1 C.B. 147, provides in part as follows: As to the second condition respecting the provision of financial security, the organization must operate so as to provide its services to the aged at the lowest feasible cost, taking into consideration such expenses as the payment of indebtedness, maintenance of

C-110

adequate reserves sufficient to insure the life care of each resident, and reserves for physical expansion commensurate with the needs of the community and the existing resources of the organization.

Tax Law > Federal Taxpayer Groups > Exempt Organizations > Conditions & Restrictions (IRC secs. 501-505, 521, 526-530)

HN8 Rev. Rul. 72-124, 1972-1 C.B. 147, provides in part as follows: In case of doubt as to whether the organization is operating at the lowest feasible cost, the fact that an organization makes some part of its facilities available at rates below its customary charges for such facilities to persons of more limited means than its regular residents will constitute additional evidence that the organization is attempting to satisfy the need for financial security, provided the organization fulfills the first condition regarding the provision of financial security. The amount of any entrance life care, founder's , or monthly fee charged is not, per se, determinative of whether an organization is operating at the lowest feasible cost, but must be considered in relation to all items of expense, including indebtedness and reserves.

Tax Law > Federal Taxpayer Groups > Exempt Organizations > Charitable, Religious & Scientific Organizations
Tax Law > Federal Taxpayer Groups > Exempt Organizations > Conditions & Restrictions (IRC secs. 501-505, 521, 526-530)
Tax Law > State & Local Taxes > Personal Property Tax > General Overview

HN9 Rev. Rul. 72-124 is no longer simply referenced by the use of "lowest feasible cost" but is expressly set out in Kan. Stat. Ann. § 79-201b Second and Fifth and mandates that a property tax exemption be granted where the use of the property is consistent with the requirements of Rev. Rul. 72-124. The legislature clearly intended that the granting of a federal income tax exemption under I.R.C. § 501 (c)(3) be given great weight in the consideration of an application for exemption under Kan. Stat. Ann. § 79-201b Second and Fifth.

SYLLABUS

SYLLABUS BY THE COURT

1. Although not controlling, the granting of a federal income tax exemption under I.R.C. § 501(c)(3) is to be given great weight in determining if an applicant qualifies for a property tax exemption under K.S.A. 1999 Supp. 79-201b **Second** and **Fifth**.

2. Under K.S.A. 1999 Supp. 79-201b **Second** and **Fifth**, the "lowest feasible cost" is to be interpreted as that term is used and defined in Internal Revenue Ruling 72-124.

3. In an appeal by Presbyterian Manors, Inc., from an order of the Board of Tax Appeals (BOTA), the record is examined, and it is held: The determination by BOTA that Presbyterian Manors failed to meet the lowest feasible cost requirement under K.S.A. 79-201b **Second** and **Fifth** is not supported by substantial evidence, and the order is

COUNSEL: Kasey Alan Rogg, of Martin, Churchill, Blair, Hill, Cole & Hollander, Chartered, of Wichita, argued the cause, and Paul C. Herr, J. Michael Kennalley and W. Stanley Churchill, of the same firm, were on the briefs for appellant.

Evan H. Ice, of Stevens & Brand, L.L.P., of Lawrence, **[***2]** argued the cause and was on

C-111

the briefs for appellee. Jeffrey A. Chanay, of Entz & Chanay, P.A., of Topeka, was on the brief of amicus curiae Kansas Association of Homes and Services for the Aging, Inc.

JUDGES: The opinion of the court was delivered by ALLEGRUCCI, J. ABBOTT and DAVIS, JJ., not participating. GARY W. RULON, J., and MARLA J. LUCKERT, District Judge, assigned.

OPINION BY: ALLEGRUCCI

OPINION

[*488] **[**89]** The opinion of the court was delivered by

ALLEGRUCCI, J.: Presbyterian Manors, Inc., appeals from an order of the Board of Tax Appeals (BOTA) denying a property tax exemption for its adult care home and housing for the elderly facility in Lawrence, Kansas. The court transferred this case from the Court of Appeals, pursuant to K.S.A. 20-3018(c).

[*489] BOTA concluded that Presbyterian Manors did not qualify for property tax exemption under K.S.A. 79-201b because it "neither charges for its services an amount which, in the aggregate, is less than its costs, nor provides its services to residents at the lowest feasible cost." On appeal, the issue is whether the facility in Lawrence operated at the "lowest feasible cost." Presbyterian Manors does not quarrel with BOTA's conclusion that it did not charge **[***3]** its residents an amount less than the actual operating cost.

BOTA's order includes findings of fact, which have not expressly been challenged by Presbyterian Manors. The following relevant findings are from BOTA's order:

"[Presbyterian Manors] has submitted evidence that the property at issue will be used exclusively as an adult care home and for elderly housing purposes. . . . The applicant's nursing home facility is currently licensed in accordance with K.S.A. 39-923.

". . . Presbyterian Manors is a not-for-profit corporation organized in Kansas.

". . . Presbyterian Manors has submitted evidence that it is exempt from paying federal income tax under I.R.C. 501(c)(3) by virtue of satisfying the federal definitions of 'charitable' and 'religious.' . . . Contributions to this type of non-profit organization are deductible for federal income tax purposes, and consequently for state income tax purposes . . . ."

BOTA reviewed Presbyterian Manors' audited financial statements for fiscal years 1993 through 1997 and its net operating income for 1977 through 1997. "The Board finds that the sum of Presbyterian Manor[s'] overall operations resulted in a net income of $ 45,870. The Board **[***4]** further finds that for the past three years, the applicant has experienced a net income from overall operations of $ 534,562." On the basis of these findings, BOTA concluded that "Presbyterian Manors is not operating below its cost of operation."

BOTA's summary of Presbyterian Manors' finances shows that for the years 1995 through 1997, operations income was $ 138,005, $ 269,617, and $ 126,940, respectively. Investment earnings were $ 103,001, $ 108,044, and $ 80,124, respectively.

"13. The Board finds that while the cumulative net income from operations alone is not incredibly high, the net income from operations figures for fiscal years 1995 through 1997 are substantial. The Board also finds that when investment **[*490]** earnings are added in, the net income figures for 1995 through 1997 are quite large, as is the cumulative total net income. Finally, the Board finds that the applicant's Fund Balance is very large, $ 2,682,360

C - 112

in 1995; $ 3,103,014 in 1996; and $ 3,321,544 in 1997. The applicant stated during the **[**90]** hearing that some of the money that has been built up will be used for imminent repairs. However, the applicant's estimates for these repairs made up less than half of the built **[***5]** up net income. The Board also notes that some of the Fund Balance, although not all of it[,] is made up of donor restricted monies.

"14. The Board further finds that the applicant has substantial current assets in comparison to its current liabilities. 2 The applicant had a current ratio of 12.5 to 1 in 1995, 12.1 to 1 in 1996, and 9.8 to 1 in 1997. This ratio is an indicator of the applicant's solvency. The applicant's current ratio indicates that it had sufficient cash on hand or assets readily convertible to cash to meet its current obligations nine to twelve times over on June 30, 1995, 1996, and 1997. Furthermore, the applicant's total liabilities have decreased substantially over this three year period. 3"

The footnotes state:

"2The applicant had current assets of $ 2,546,870 in 1995, $ 2,319,398 in 1996, and $ 2,413,343 in 1997. The applicant had current liabilities of $ 203,833 in 1995, $ 191,410 in 1996, and $ 246,065 in 1997.

"3The applicant's total liabilities were $ 6,828,132 in 1995, $ 5,941,771 in 1996, and $ 3,340,166 in 1997."

On the basis of these findings, BOTA concluded that Presbyterian Manors "is not providing services to its residents at the lowest feasible **[***6]** cost. The applicant's financial statements indicate that the applicant has more than sufficient income to make substantial improvements and sizably reduce its debt."

BOTA further remarked that "the financial evidence submitted to the Board indicates that the applicant is operating more profitably than an entity confined to operating at its lowest feasible cost."

Presbyterian Manors filed a petition for reconsideration, suggesting the legislative history of K.S.A. 79-201b **Second** and **Fifth** showed that the term "lowest feasible cost" was to be construed according to Rev. Rul. 72-124 of the Internal Revenue Code. BOTA summarily denied reconsideration for lack of new evidence. One Board member wrote a concurring opinion for the purpose of "elaborating on the 'lowest feasible cost' analysis." The concurring member prefaced her opinion as follows: **[*491]**

"According to the petitioner, the legislative history of K.S.A. 79-201b dictates that Revenue Ruling 72-124 is the sole basis for determining whether an applicant seeking exemption from ad valorem property tax is providing its services to residents at the lowest feasible cost. I do not agree that the analysis **[***7]** is so limited. While the legislative history does make reference to Revenue Ruling 72-124, the express language of the statute does not. I do not believe the Legislature intended to limit our inquiry so narrowly. However, even if Revenue Ruling 72-124 is determined to be the controlling analysis, I do not agree with the petitioner's argument that the Board's analysis is inconsistent in any way with that ruling."

During the 1999 session, the legislature amended the statute in question by adding a retroactive provision that affects this court's consideration of BOTA's decision. Here are pertinent portions of the statute showing the changes:

"The following described property, to the extent herein specified, shall be and is hereby exempt from all property or ad valorem taxes levied under the laws of the state of Kansas:

. . . .

C-113

"**Second.** All real property, and tangible personal property, actually and regularly used exclusively for adult care home purposes by an adult care home . . . which is operated by a corporation organized not for profit under the laws of the state of Kansas . . . charges to residents for services of which produce an amount which **[***8]** in the aggregate is less than the actual cost of operation of the home or the services of which are provided to residents at the lowest feasible cost, taking into consideration such items as reasonable depreciation, interest on indebtedness, acquisition costs, interest and other expenses of financing acquisition costs, lease expenses and costs of services provided by a parent corporation at its costs and contributions **[**91]** to which are deductible under the Kansas income tax act; . . . . HN1 **For purposes of this paragraph and for all taxable years commencing after December 31, 1976, an adult care home which uses its property in a manner which is consistent with the federal internal revenue service ruling 72-124 issued pursuant to section 501(c)(3) of the federal internal revenue code, shall be deemed to be operating at the lowest feasible cost**. . . .

. . . .

"**Fifth.** All real property and tangible personal property, actually and regularly used exclusively for housing for elderly persons, which is operated by a corporation organized not for profit under the laws of the state of Kansas . . . in which charges to residents produce an amount which in the aggregate is less than the actual **[***9]** cost of operation of the housing facility or the services of which are provided to residents at the lowest feasible cost, taking into consideration such items as reasonable depreciation and interest on indebtedness and contributions to which are deductible under the Kansas income tax act; and all intangible property including moneys, notes and other evidences of debt, and the income therefrom, **[*492]** belonging exclusively to such corporation and used exclusively for the purpose of such housing. **For purposes of this paragraph and for all taxable years commencing after December 31, 1976, an adult care home which uses its property in a manner which is consistent with the federal internal revenue service ruling 72-124 issued pursuant to section 501(c)(3) of the federal internal revenue code, shall be deemed to be operating at the lowest feasible cost**." L. 1999, ch. 154, n 74.

BOTA's decision and its order denying reconsideration in this case were issued in 1998. Thus, the statutes had not yet been modified to make Rev. Rul. 72-124 the controlling standard. HN2 Because BOTA is a specialized agency for the purpose of deciding taxation issues, the court generally gives its decisions **[***10]** deference on tax questions unless BOTA's interpretation is erroneous as a matter of law. **In re Tax Appeal of Boeing Co.**, 261 Kan. 508, 515, 930 P.2d 1366 (1997).

This case presents an unusual situation where the amended statutes that actually control the outcome were not considered by BOTA. Rather than remanding the case for further consideration by BOTA, we will review BOTA's decision to determine whether its analysis and outcome are consistent with the amended statutes. It appears from the concurring opinion on the motion for reconsideration that, to some extent, Rev. Rul. 72-124 entered into BOTA's deliberations. In addition, HN3 the standard of review on questions of law, such as statutory interpretation, requires our independent and unlimited consideration. We bear in mind that HN4 tax exemption statutes are to be strictly construed in favor of imposing the tax and against allowing the exemption for one who does not clearly qualify. **In re Tax Appeal of Harbour Brothers Constr. Co.**, 256 Kan. 216, 223, 883 P.2d 1194 (1994).

HN5 Rev. Rul. 72-124 explains the requirements that "homes for the aged" must meet to qualify for exemption **[***11]** under section 501(c)(3) of the Internal Revenue Code. Rev. Rul. 72-124, 1972-1 C.B. 145 (prefatorial note). The gist of the ruling is that such an organization, otherwise qualified for charitable status under I.R.C. § 501(c)(3), will qualify for

C-114

charitable status if it operates so as to satisfy the three primary needs of aged persons--housing, health care, and financial security. 1972-1 C.B. 146. **[*493]**

Housing may be satisfied by residential facilities designed "to meet some combination of the physical, emotional, recreational, social, religious, and similar needs of aged persons." 1972-1 C.B. 146-47. There is no dispute that Presbyterian Manors meets this requirement.

Health care may be satisfied either by providing some form of health care or by maintaining arrangements with other facilities, organizations, or health personnel for the care of residents. 1972-1 C.B. 147. There is no dispute that Presbyterian Manors meets this requirement.

[92]** Financial security is the need in question. HN6 The pertinent portion of the revenue ruling states:

"The need for financial security, i.e., the aged person's need for protection against the financial **[***12]** risks associated with later years of life, will generally be satisfied if two conditions exist. First, the organization must be committed to an established policy, whether written or in actual practice, of maintaining in residence any persons who become unable to pay their regular charges. This may be done by utilizing the organization's own reserves . . . .

"As HN7 to the second condition respecting the provision of financial security, the organization must operate so as to provide its services to the aged at the lowest feasible cost, taking into consideration such expenses as the payment of indebtedness, maintenance of adequate reserves sufficient to insure the life care of each resident, and reserves for physical expansion commensurate with the needs of the community and the existing resources of the organization. HN8 In case of doubt as to whether the organization is operating at the lowest feasible cost, the fact that an organization makes some part of its facilities available at rates below its customary charges for such facilities to persons of more limited means than its regular residents will constitute additional evidence that the organization is attempting to satisfy the need for **[***13]** financial security, provided the organization fulfills the first condition regarding the provision of financial security. The amount of any entrance life care, founder's, or monthly fee charged is not, **per se**, determinative of whether an organization is operating at the lowest feasible cost, but must be considered in relation to all items of expense, including indebtedness and reserves." 1972-1 C.B. 147.

The first part of the financial security test--the organization is committed to an established policy of maintaining in residence any persons who become unable to pay their regular charges--is met by Presbyterian Manors. The chief financial officer for Presbyterian Manors testified that the corporation's published policy and **[*494]** practice with regard to residents who become unable to pay the listed rates is to permit them to remain in the facility "with peace and dignity" for life. BOTA made no finding contrary to this testimony.

The second part of the financial security test--the organization is operating so as to provide its services at the lowest feasible cost--is the crux of this appeal. The revenue ruling directs taking into consideration expenses such as payment **[***14]** of indebtedness, maintenance of adequate reserves sufficient to insure the life care of each resident, and reserves for physical expansion in making a determination of the lowest feasible cost. 1972-1 C.B. 147. Rev. Rul. 72-124 does not anticipate that adult care homes will operate in the red. It allows the following ordinary uses for net earnings: "to improve the care provided, retire indebtedness, subsidize any resident unable to continue making his monthly payments, or expand the facilities of the home where the needs of the community warrant such expansion." 1972-1 C.B. 146-47. Rev. Rul. 72-124 also requires that the fees charged to residents be considered in relation to expenses, including indebtedness and reserves. 1972-1

C-115

C.B. 147.

Rev. Rul. 72-124 sets out the requirements that must be met by an adult care home and housing for the elderly facilities in order to qualify for exemption under 501(c)(3). The 1999 amendment does not equate a 501(c)(3) federal income tax exemption with a 79-201b **Second** or **Fifth** property tax exemption. In other words, the granting of the 501(c)(3) exemption is **[***15]** not controlling as to the granting of a property tax exemption under 79-201b **Second** or **Fifth**. However, HN9 Rev. Rul. 72-124 is no longer simply referenced by the use of "lowest feasible cost" but is expressly set out in the statute and mandates that an exemption be granted where the use of the property is consistent with the requirements of Rev. Rul. 72-124. We believe the legislature clearly intended that the granting of a federal income tax exemption under 501(c)(3) be given great weight in the consideration of an application for exemption under 79-201b **Second** and **Fifth**.

[93]** The evidence presented to BOTA by Presbyterian Manors that bears on this issue may be found in the financial records offered and the testimony of its chief financial officer. It appears that **[*495]** BOTA relied for its net income from operations, investment earnings, and net income figures on the pared down Annual Operational Analysis for fiscal years 1977 through 1997.

Review of the Lawrence facility's financial records reveals what appears to be significant error in one of the dollar amounts cited by BOTA in support of its conclusion. Paragraph 14 of BOTA's order concludes: **[***16]** "Furthermore, the applicant's total liabilities have decreased substantially over this three year period 3. . . . 3The applicant's total liabilities were $ 6,828,132 in 1995, $ 5,941,771 in 1996, and $ 3,340,166 in 1997." In other words, BOTA believed that total liabilities were cut by more than half--by $ 3,487,966--from 1995 to 1997. In fact, BOTA's figure for total liabilities in 1997 is in error. The 1995 balance sheet shows the figure used by BOTA--$ 6,828,132--as Current YTD Total Liabilities. The 1996 and 1997 balance sheets differ from the 1995 balance sheet in format. The 1996 balance sheet does not actually show the figure used by BOTA--$ 5,941,771--but it can be calculated by subtracting the figure for Total Fund Balance from the figure for Total Liabilities & Fund Balance. If the same calculation is performed using the figures from the 1997 balance sheet, the total liabilities are $ 5,762,551. The difference between this figure and BOTA's is nearly $ 2.5 million. BOTA was not in error in concluding that total liabilities have decreased from 1995 through 1997, but the decrease was from $ 6,828,132 to $ 5,762.551 rather than from $ 6,828,132 to $ 3,340,166.

Evidence offered **[***17]** by Presbyterian Manors that does not appear in BOTA's decision is relevant to the organization's improved financial condition in recent years. The financial officer attributed rising fortunes to a combination of happenstance and sound business practices. Among the factors not directly controllable by Presbyterian Manors were the occupancy rate and the level of health services required by residents. Presbyterian Manors budgets to break even at less than full capacity so that full occupancy may generate more than break-even income. Similarly, when "higher acuity" services are provided to residents, more income is generated. Among the controllable factors were several recently initiated programs, including improved maintenance procedures, group **[*496]** purchasing, and self-insurance. He also testified that Presbyterian Manors had refinanced its industrial revenue bonds to get a lower interest rate.

The Presbyterian Manors officer testified that the financial gains of recent years could be affected by any number of factors. He noted that one workers compensation claim could reverse the reduced costs from self-insurance. He noted that Presbyterian Manors was in the process of becoming licensed **[***18]** for an assisted living unit. Additional regulations would apply to it, and more skilled nursing staff would be required. Thus, higher labor costs were anticipated. In addition, minimum wage increases could hike labor costs. The most recent wage increase was reflected for less than 1 year in the financial records reviewed by

C-116

BOTA. He testified that Presbyterian Manors was using its current financial health for building reserves for workers compensation claims, maintenance, higher labor costs, and repairs. The figure for deferred maintenance costs at the time of the BOTA hearing was $ 620,000.

Presbyterian Manors' financial officer was of the opinion that its residents were provided housing and care at the lowest feasible cost. He testified that Presbyterian Manors worked to find and implement ways to decrease costs. He noted that the savings from Presbyterian Manors' good business practices resulted in smaller fee increases for its residents than for residents in similar facilities.

In summary, the financial officer testified that the organization's implementation of good business practices had trimmed costs in recent years, which was a principal factor in the increased income. He **[***19]** was of the opinion that Presbyterian Manors would have shown a loss were it not for implementation of the good business practices. He believed it also was sound practice to maintain fees at a level **[**94]** high enough to anticipate future needs and based on less than full occupancy.

In considering whether BOTA's analysis of the financial evidence conforms to the revenue ruling, at least two questions come to mind. One is the length of time that should be taken into consideration. There is no guidance on this question in the revenue ruling. BOTA's consideration corresponds neatly with the periods of time that supported the conclusion and excluded financial evidence **[*497]** from time periods that might offer less support for the decision. In a related matter, long enough periods were considered to suggest trends, but there was no systematic analysis of observed and anticipated changes in the taxpayer's financial condition. The lack of analysis was due at least in part to Presbyterian Manors' failing to provide evidence about the increased revenue and Fund Balance, and whether and precisely how that fit into the short-and long-term plans for the organization. We do not believe the legislature intended **[***20]** to discourage charitable organizations from operating according to sound business principles and practices, and yet that could be the result if long-term planning is discouraged by adverse tax consequences. We reject BOTA's limited analysis. As noted by Presbyterian Manors when these parties were last before the appellate courts, Douglas County contended that the court "should look at the entire 11-year life of the Manor." **In re Tax Exemption Application of Presbyterian Manor, Inc.**, 16 Kan. App. 2d 710, 715, 830 P.2d 60 (1992) The entire historical record should be considered in determining if the use was consistent with Rev. Rul. 72-124.

We also question certain shortcomings of BOTA's analysis of financial evidence and where its analysis strays from the federal revenue ruling.

BOTA isolated net income from operations figures for fiscal years 1995 through 1997 and found them to be "substantial." It did not take into account that Presbyterian Manors experienced a net loss from operations in fiscal year 1994 of $ 169,914. BOTA's only comment about the 21-year total net income from operations was that it "is not incredibly high." BOTA took no notice that **[***21]** the 21-year total net income from operations is scarcely more than 1/10th of 1% of total operating revenues.

BOTA discounted evidence that some of Presbyterian Manors' earnings "will be used for imminent repairs" on the ground that repair estimates totalled "less than half of the built up net income." Although Presbyterian Manors' evidence of intended repairs is not a wholly satisfying explanation of uses for its net earnings, that evidence must be taken together with evidence of other intended uses for the purpose of determining whether the property is being **[*498]** used in a manner that is consistent with Rev. Rul. 72-124. The chief financial officer testified that any net income from operations is "reinvested into the facilities, into the people, into the service we provide to those residents." Although this testimony lacks specificity, it should not have been ignored by BOTA, as it seems to have been.

C-117

BOTA focused on the size of Presbyterian Manors' Fund Balance, which was $ 3,321,544 in 1997. It noted that some, but not all, of the Fund Balance was donor-restricted money, but did not indicate the breakdown or its significance. BOTA dwelled on the ratio of current assets **[***22]** to current liabilities--12.5 to 1 in 1995; 12.1 to 1 in 1996; and 9.8 to 1 in 1997--as proof of Presbyterian Manors' solvency. In addition, BOTA focused on the decrease in total liabilities from 1995 through 1997. As we have seen, BOTA miscalculated the total liabilities for 1997. It did not mention that (the miscalculated) total liabilities in 1997, despite the decrease from 1995, still exceeded the Fund Balance ($ 3,340,166 to $ 3,321,544). When the correct figure is used, the 1997 total liabilities far exceed the Fund Balance ($ 5,762,551 to $ 3,321,544). It is not clear that the Fund Balance and the ratio of current assets to current liabilities, on which BOTA placed heavy reliance, actually are relevant factors for consideration under the revenue ruling, which emphasizes comparison of fees charged to expenses, including indebtedness and reserves.

Counsel for Douglas County stated in response to a Board member's question that the Presbyterian Manors facilities in Douglas County previously had been exempted from **[**95]** property tax and that the county revisited the question because "we've seen net operating cash flow over--over six of the last seven years." In a response letter to Presbyterian **[***23]** Manors' letter calling the statutory modifications to the court's attention, counsel for the county characterized Presbyterian Manors' operating profits over the last several years as "enormous." The court is urged to conclude on that basis that Presbyterian Manors is not operating at its lowest feasible cost. The Annual Operational Analysis shows through 1997 that 5, rather than 6, of the last 7 years produced a net income from operations. The same is true of the last 10 years--net income from operations **[*499]** for 5 of 10 years and net loss from operations for 5 years. The difference between net income and net loss from operations in those 10 years was $ 320,164, with the lowest net income from operations of the 5 income-producing years being the most recent year, 1997. We cannot, on this basis, conclude that Presbyterian Manors was not providing its services at its lowest feasible cost. The revenue ruling requires comparing fees charged to expenses, including indebtedness and reserves. It does not appear that either the county or BOTA has analyzed Presbyterian Manors' finances in conformity with the revenue ruling.

In its order, BOTA finds Presbyterian Manors meets all the requirements **[***24]** for an exemption save one. The exemption was denied because Presbyterian Manors' operation of the property in question was "more profitable than an entity confined to operating at its lowest feasible cost." BOTA's analysis ignores that as a nonprofit corporation, any "profit" must be used to benefit the residents and will not go to any private individual or shareholder. It gives no weight to Presbyterian Manors' receiving a federal income tax exemption under I.R.C. § 501(c)(3). Although not controlling, it should be given great weight since the Internal Revenue Service has determined that Presbyterian Manors is using the property in question consistently with Rev. Rul. 72-124.

We find from a review of the record that it does not support BOTA's conclusion that Presbyterian Manors failed "to satisfy the lowest feasible cost requirement imposed by K.S.A. 79-201b **Second** and K.S.A. 79-201b **Fifth**." To the contrary, substantial evidence leads to the conclusion that Presbyterian Manors' use of the property in question is consistent with Rev. Rul. 72-124. For that reason, we hold that BOTA's order is not supported by substantial evidence and the order **[***25]** should be reversed. Presbyterian Manors has met its burden for an exemption under K.S.A. 79-201b **Second** and **Fifth**.

The order of BOTA denying Presbyterian Manors' application for exemption under K.S.A. 1999 Supp. 79-201b **Second** and **Fifth** is reversed.

[*500] ABBOTT and DAVIS, JJ., not participating.

GARY W. RULON, J., and MARLA J. LUCKERT, District Judge, assigned.

C-118

Service: **Get by LEXSEE®**
Citation: **998 p.2d 88**
View: Full
Date/Time: Monday, June 9, 2008 - 4:14 PM EDT

* Signal Legend:
- Warning: Negative treatment is indicated
- Questioned: Validity questioned by citing refs
- Caution: Possible negative treatment
- Positive treatment is indicated
- Citing Refs. With Analysis Available
- Citation information available

* Click on any *Shepard's* signal to *Shepardize®* that case.

LexisNexis® About LexisNexis | Terms & Conditions | Contact Us
Copyright © 2008 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

C-119

*1997 Ohio Tax LEXIS 629, **

Rehab Project, Appellant, vs. Roger W. Tracy, Tax Commissioner of Ohio, Appellee.

CASE NO. **95-R-418** n1 (EXEMPTION)

n1 This appeal is being released this date with several related appeals, B.T.A. Case Nos. 95-R-419 through 95-R-427.

STATE OF OHIO -- BOARD OF TAX APPEALS

1997 Ohio Tax LEXIS 629

May 23, 1997

[*1]

APPEARANCES:

For the Appellant - Walter M. Lawson, Jr., Esq., 119 North West Street, P.O. Box 1255, Lima, Ohio 45802-1255

For the Appellee - Betty D. Montgomery, Esq., Attorney General of Ohio, By: Janyce C. Katz, Esq., Assistant Attorney General, 16th Floor - State Office Tower, 30 East Broad Street, Columbus, Ohio 43226-0410

OPINION:
DECISION AND ORDER

Mr. Johnson, Ms. Jackson and Mr. Manoranjan concur.

This matter is before the Board of Tax Appeals upon a notice of appeal, filed May 17, 1995, by Rehab Project ("Rehab"). Rehab appeals a final order of the Tax Commissioner, dated April 11, 1995. In that order, the Tax Commissioner denied Rehab's application for exemption from taxation of certain real property.

The Tax Commissioner relied on the recommendation of his attorney examiner, which reads, in pertinent part, as follows:

"* * *

"I. Factual Background

"The applicant is requesting exemption for less than one acre and the building on it. The property in question is described as a rehabbed rental. Apparently the applicant renovates property for use both as low income rentals and for resale. This is one of several applications filed by the Rehab Project (ZE 0276 through **[*2]** ZE 0285).

"II. Ohio Revised Code Section 5709.12

"R.C. 5709.12 provides that 'real and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation.' To satisfy the requirements of this section an applicant need not be a

C-120

charitable institution, but it must be an institution. In addition, it must use the property for a charitable purpose. Highland Park Owners, Inc. v. Tracy (1994), 71 Ohio St.3d 405. The warranty deed for this property describes the applicant as a non-profit corporation. There is no evidence that it is a charitable institution, but it is an institution.

"The remaining issue is whether the property in question is used for a charitable purpose. The property in question is used for housing. The general rule in Ohio is that residential property is not exempt from real property taxation. Philada Home Fund v. Bd. of Tax Appeals (1966), 5 Ohio St.2d 135. The syllabus of that case states:

> "'Real property owned by a nonprofit charitable corporation the stated purpose of which is to secure and operate resident apartments for aged and needy persons is not exempt from taxation under **[*3]** section 5709.12, Revised Code, even though it is shown that the rent intended to be charged is at or below cost, and in no event to result in a profit, and that it is expected that some persons unable to pay the full rental will be assisted by subventions from corporate funds. Id. at 135.136.'

"The Court followed that rule in Cogswell Hall v. Kinney (1987), 30 Ohio St.3d 43. The appellant in that case was a nonprofit corporation which furnished low cost housing to 25 elderly women. The Court held that the use of the property was not exclusively for charitable purposes and not entitled to exemption under section 5709.12. Based on these decisions, the property in question is not used for a charitable purpose and therefore is not entitled to exemption.

"III. Conclusion

"It is the recommendation of the attorney examiner that the property is not entitled to exemption and the application should be denied."

The Commissioner's final decision, then, reads as follows:

"The matter concerns an application for the exemption of real property from taxation.

"The Tax Commissioner finds that the property described in the application is not entitled to be exempt from taxation **[*4]** (sic) and the application is therefore denied for reasons set forth in the attached recommendation, which is incorporated into this entry.

"The Tax Commissioner further orders that all penalties charged for these tax years be remitted."

C-121

Rehab, in its notice of appeal, specifically challenges the foregoing, asserting that:

"Comes now Applicant, Rehab Project, and respectfully enters its Notice of Appeal in the above matter. A copy of the Journal Entry is attached hereto including the attached recommendation.

"Your Applicant states that the error in the Decision is I. Factual Background wherein the assumption is made that the applicant renovates property for use both as low income rentals and resale.

"Actually, all property is purchased with the intent to raze and/or rehabilitate the housing unit. The purpose is not only to rehabilitate the house for a new owner but to rehabilitate the neighborhood. The prospective new owners must purchase the property for their own use not as a rental, (sic) classes are provided for the new owners to instruct them on maintenance of their new home.

"The purpose indicated in the preceding paragraph is such that private corporations, **[*5]** (local and national) individuals, church organizations (local and national) and others contribute funds in recognition of the worthy purposes of Rehab Project. All of this is done for charitable purposes. While it is true that the properties are sometimes temporarily rented while being held for sale, this is incidental to the charitable, educational, or public purposes and not with the view to profit (Ohio Revised Code Section 5709.12.1). A copy of the Articles of Incorporation of the charitable institution is attached.

"The following cases are cited for your reference:

"'When property is being used in furtherance of or incidental to an institution's charter provision, i.e., charitable, education or public purposes and not with a view to profit, it is exempt from taxation under RC [sec.] 5709.12.1: American Chemical Society v. Kinney, 69 OS2d 167 (1982).

"The provision, 'property belonging to a charitable institution * * * used exclusively for charitable purposes,' in R.C. [sec.] 5709.12.1 to include property made available under the direction and control of such institution where the use is in furtherance of or incidental to the institution's charitable, educational or public **[*6]** purpose and not with a view to profit: Galvin v. Masonic Toledo Trust, 34 OS2d 157, 63 002d 242, 296 NE2d 542 (1973).

"To prove 'exclusive use' under RC [sec.] 5709.12.1, the general charitable exemption, it is enough if the claiming charitable institution defines its purpose and then shows that the property is used in furtherance of, or incidental to, its purposes: Beth Hamidrosh Hagodol v. Kinney, 16 OApp3d 89, 16 OBR 94, 474 NE2d 658 (1984).

"Revised Code [sec.] 5709.12.1 does not require that the property sought to be exempted from taxation be used at all times solely for charitable purposes and at no other time used for any other purpose: Round Lake Christian Assembly, Inc. v. Commr., 4 OApp3d 189, 4 OBR 292, 447 NE2d 132 (1982)."

C-122

At the evidentiary hearing before this Board, Rehab Project, by and through counsel, offered on its behalf the testimony of Richard L. Rapp, President of Rehab's Board of Trustees, and Cheryl A. Hook, its Executive Director. The Tax Commissioner was represented by counsel, but called no witnesses. This appeal is now submitted upon the notice of the appeal, the statutory transcript certified by the Tax Commissioner ("S.T."), and the **[*7]** record of the testimony ("R."), including exhibits ("Exhs.").

Rehab Project is a non-profit, Ohio corporation. (R. 13-14; Appellant's Exh. 1) Further, the Internal Revenue Service has granted Rehab Project exempt status under Sec. 501(c)(3) of the Internal Revenue Code. (R. 15, 43; Appellant's Exh. 2)

According to the organization's Articles of Incorporation (Appellant's Exh. 1), the stated purposes for which Rehab was organized include:

> "(A) To assist low income families to become self-dependent home owners;
>
> "(B) To redevelop deteriorated and poverty neighborhoods;
>
> "(C) To engage the interest and services of citizens and organizations in preparing low income families for home ownership and in the improvement of target neighborhoods; "* * *."

Rehab conducts its activities in Lima, Ohio, where 7,200 out of 18,000 residential houses, or forty percent, are considered below normal living standards and in need of rehabilitation. (R. 19-20, 38, 65) Houses that have been rehabilitated sell for between $ 35,000 to $ 45,000. (R. 18-19, 45) This program has been quite successful (R. 36-37), as approximately 250 houses have been rehabilitated and sold through Rehab's efforts **[*8]** in the Lima community (R. 43).

Rehab acquires run-down properties in marginal neighborhoods, fixes them up, and sells them to low income buyers n2. (R. 6, 16, 42) Prison inmates do the actual rehabilitation work under the supervision of qualified instructors, who are Rehab employees. (R. 12, 22, 63-64) It is analogous to a "hands on" training program. (R. 64) Although the prisoners receive no certificate or license, they gain skill, build a photographic portfolio of the work they have done, and receive a recommendation from Rehab. (Id.) And, by eliminating the cost of labor and since there is no profit, Rehab's houses can be sold for the cost of materials only. (R. 45)

n2 Low income, as defined by HUD. (R. 17-18, 36, 44, 62)

Reselling the rehabilitated properties to low income individuals is at the heart of the project. (R. 27, 59) In addition to providing training to inmates and home ownership for a class of people that may never have been able to enjoy it, an entire neighborhood can be revitalized. (R. 36-37) As part of its activities, Rehab conducts classes on home buying and home maintenance, as well as budgeting and money management. (R. 24, 31)

The Lima area banks **[*9]** have been very supportive in helping people to procure financing in order to get into these homes. (R. 32) However, many of the individuals hoping to

C-123

purchase homes from Rehab have difficulty qualifying for bank loans; either their credit is bad, or the banks do not want to extend mortgage money on homes in that particular neighborhood. (Id.) Therefore, Rehab developed the "equity lease" program. (R. 16)

Rehabilitated homes that have remained on the market after a period of nine months and have not yet sold are considered for the equity lease program. (R. 35) Potential home buyers who may not have saved an adequate down payment or have had credit problems in the past, but who are otherwise qualified for the program, are allowed to move in. (R. 33) They are, however, required to pay comparable market rent. (R. 26, 33, 46)

At the end of the first year, and every year thereafter, the cost of the property is reduced four percent. (R. 26, 33) Although there is technically no time limit as to how long a property may remain in the equity lease program, there are incentives built into the program to encourage purchase. (R. 22) At the end of the second year, participants incur the cost **[*10]** of all utilities. (R. 23) At the end of the third year, participants pick up insurance costs. (Id.) By the end of five years, these individuals have essentially assumed the total cost of owning that property. (Id.)

Of course, as stated before, Rehab's goal is to put the individuals occupying these residences through the equity lease program into a position to purchase them. And, no property has ever been purchased with the intent or used strictly for rental purposes. (R. 17)

Occasionally, Rehab rents units on a temporary basis. (R. 42) These are short-term rentals between the time properties are purchased to the time they are ready to be rehabilitated. (R. 69) The units are again rented at comparable market rates for their condition (R. 49), but all proceeds, to the extent they exceed expenses, are put into purchasing or rehabilitating other Rehab projects (R. 59, 68).

Rehab Project has an annual budget of $ 550,000. (R. 21, 41) In order to accomplish its goals, Rehab receives $ 200,000 in grants from the City of Lima. (R. 41) These funds pay the director, the various managers and coordinators, as well as the instructors. (R. 13, 20, 41) Approximately $ 350,000, then, comes **[*11]** from donations and contributions from corporations and individuals. (R. 41) Corporate sponsors include, but are not limited to, Bank One, Huntington, Ford Motor Company, churches of various denominations, and the North End Neighborhood Organization. (R. 11-12) Even labor and carpenter unions have volunteered their time and personnel to this project. (R. 65, 67) Only a small portion of the funds needed to keep Rehab operating comes from fees for the rental of Rehab units n3. (R. 42)

n3 Approximately $ 2,500 to $ 3,000 a month. (R. 42)

The specific property at issue in this appeal is located at 656 South West Street in Lima, Ohio, and is identified in the Allen County Auditor's books and records as permanent parcel number 37-3111-11-017.000. The property was leased under the equity lease program until the potential purchaser lost her job at General Dynamics and moved out of state. (R. 51) The property, then, was leased to a single mother with three children who did purchase the house one year after she equity leased it. (Id.)

Rehab applied for an exemption of the property in 1994, based upon its non-profit status and the charitable, educational, and/or public use of the property. **[*12]** The Tax Commissioner denied Rehab's application, which Rehab now appeals.

Prior to beginning our review of this matter, it is significant that the rule in this state is that all real property and its improvements are taxable. The General Assembly is, however,

C-124

empowered by the Ohio Constitution to pass laws to exempt certain types of property. Section 2, Article XII, Ohio Constitution reads, in pertinent part, as follows:

> "* * * Land and improvements thereon shall be taxed by uniform rule according to value * * *. Without limiting the general power, subject to the provisions of Article I of this constitution, to determine the * * * exemptions therefrom, general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose, * * *."

Thus, exemption from taxation is the exception to the rule. Seven Hills Schools v. Kinney (1986), 28 Ohio St. 3d 186. Therefore, statutes granting exemptions must be strictly construed. Natl. Tube Co. v. Glander (1952), 157 Ohio St. 407, paragraph two of the syllabus; **[*13]** White Cross Hosp. Assn. v. Bd. of Tax Appeals (1974), 38 Ohio St. 2d 199, 201; American Soc. for Metals v. Limbach (1991), 59 Ohio St. 3d 38. In addition, the taxpayer has the burden of proof to demonstrate that it is entitled to the exemption. Willys-Overland Motors, Inc. v. Evatt (1943), 141 Ohio St. 402.

It is also axiomatic that the findings of the Tax Commissioner are presumptively valid, and the taxpayer challenging the finding must rebut the presumption and establish a right to the relief requested. Alcan Aluminum Corp. v. Limbach (1989), 42 Ohio St. 3d 121; Belgrade Gardens, Inc. v. Kosydar (1974), 38 Ohio St. 2d 135.

The statutory rule in Ohio is that all property is subject to taxation. R.C. 5709.01. However, the General Assembly has enacted numerous legislative exemptions, including, for example, exemptions for intangible property, R.C. 5709.04; schools, churches, and colleges, R.C. 5709.07; government and public property, R.C. 5709.08 and R.C. 5709.10; nature preserves, R.C. 5709.09; property used exclusively for charitable or public purposes, including homes for the aged, R.C. 5709.12; the property of charitable and educational **[*14]** institutions, R.C. 5709.121; children's homes, R.C. 5709.13; graveyards, monuments, memorials, and historical sites, R.C. 5709.14 through R.C. 5709.18.

R.C. 5709.12 and R.C. 5709.121 deal with the public and/or charitable use of property. R.C. 5709.12(B), as in effect for the year in question n4, exempted real property owned by political subdivisions used for public purposes and real property owned by institutions used exclusively for charitable purposes. Specifically, the statute read as follows:

> "Lands, * * *, and other buildings belonging to a * * * municipal corporation * * *, or leased to * * * any political subdivision for public purposes shall be exempt from taxation. Real * * * property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation."

C-125

n4 Rehab's Application For Real Property Tax Exemption and Remission was filed on January 24, 1994. (S.T. 11) R.C. 5709.12 was amended effective September 29, 1995.

R.C. 5709.121, upon which Rehab Project bases its claim of exemption, provides, inter alia, that:

> "Real property * * * belonging to a charitable * * * institution shall be considered as used exclusively **[*15]** for charitable * * * purposes by such institution * * * if it is * * *:
>
> "(A) Used by such institution, * * *
>
> "(2) For other charitable, educational, or public purposes;
>
> "* * *"

R.C. 5709.12 clearly "exempts from taxation real property that is used exclusively for charitable purposes," while R.C. 5709.121 defines "exclusive use for charitable purposes" by charitable and/or other identified institutions. Seven Hills Schools v. Kinney (1986), 28 Ohio St. 3d 186, 187. This distinction is further discussed by the Supreme Court in Episcopal Parish v. Kinney (1979), 58 Ohio St. 2d 199. Citing to a concurring opinion in White Cross Hosp. Assn. v. Bd. of Tax Appeals (1974), 38 Ohio St. 2d 199, 203, the Court in Episcopal Parish, supra, explained the relationship between R.C. 5709.12 and R.C. 5709.121. In short, the Court in Episcopal Parish determined that the definition of "exclusive charitable use," as stated in R.C. 5709.121, applies only to the use made of property by a charitable institution, or other entities mentioned in the initial portions of R.C. 5709.121.

The Ohio Supreme Court restated this "rule" in Highland Park Owners, Inc. v. Tracy **[*16]** (1994), 71 Ohio St. 3d 405. In that case, the Court stated, citing Episcopal Parish, supra at 864-865, as follows:

> "'* * *. The legislative definition of exclusive charitable use found in R.C. 5709.121, however, applies only to property "belonging to" i.e., owned by, a charitable or educational institution, or the state or a political subdivision. The net effect of this is that R.C. 5709.121 has no application to noncharitable institutions seeking tax exemptions under R.C. 5709.12. Hence the first inquiry must be directed to the nature of the institution applying for an exemption. * * *.'" (Emphasis in original.)

The Court in Highland Park goes on to declare:

> "Thus, to grant exemption under R.C. 5709.12, the arbiter must determine that (1) the property belongs to an institution, and (2) the property is being used

C-126

> exclusively for charitable purposes. * * *. Nevertheless [again citing Episcopal Parish at 848], 'any institution, irrespective of its charitable or non-charitable character, may take advantage of a tax exemption if it is making exclusive charitable use of its property.' * * *."(Emphasis in original.)

The significance of this holding **[*17]** is that when considering exemption requests sought by organizations under R.C. 5709.12, exemption status cannot be denied simply because an institution is not charitable; instead, this Board must look to the use of the property. R.C. 5709.121, on the other hand, applies only to a charitable institution and its use of the property for charitable, educational, or public purposes.

There is no question that Rehab is an "institution" within the meaning of this statutory framework. So, our first inquiry must be whether Rehab qualifies as a "charitable" institution. See Olmsted Falls Bd. of Edn. v. Tracy (1997), 77 Ohio St. 3d 393.

There are many definitions of charity in the law of trusts and tax exemptions. An early, general definition in Ohio comes from the 1874 case of Gerke v. Purcell (1874), 25 Ohio St. 229, paragraph four of the syllabus, which reads as follows:

> "4. A charity, in a legal sense, includes not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art, without any particular reference to the poor."

Perhaps the seminal case defining a "charity" in Ohio tax exemption **[*18]** cases is Planned Parenthood Assn. v. Tax Commr. (1966), 5 Ohio St. 2d 117. In paragraph one of the syllabus, the Ohio Supreme Court states:

> "1. 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."

In the instant appeal, the Board is not persuaded that Rehab has established that it is a "charitable" institution. Rehab Project is a non-profit, Ohio corporation that has been granted exempt status under Sec. 501(c)(3) of the Internal Revenue Code. Its primary purposes, as defined in its Articles of Incorporation, are to assist low income families and to redevelop deteriorated neighborhoods. Rehab accomplishes those goals by rehabilitating housing for purchase by those low income families.

C-127

The source of a large portion of Rehab's operating funds **[*19]** is from public grant moneys. The rest is primarily acquired through private donations. There is also some rental income generated through the equity lease program and temporary rentals. The equity lease program seems to be a sort of financing arrangement, and temporary rentals appear to be minimal. However, rentals charged are at market rates.

The record reflects that Rehab Project has used its funds only to support its own endeavors, and there is no evidence in the record to indicate that Rehab is engaged in or actively supporting any other commercial activities. Thus, it is uncontested that Rehab Project does not exact a profit on its activities.

Although Rehab Project is a not-for-profit institution, that alone does not make it a charitable one. Despite the admirable purpose of Rehab's efforts, the fact remains that the organization is not engaged in a charitable activity, that is, building, selling, and leasing low income housing. Rehab Project performs the same function and uses the subject property in the same way as a commercial, for profit entity; that is, the purchase and rehabilitation of real property for resale. Furthermore, Rehab has an extensive leasing program, for **[*20]** which it exacts market rents.

The rule has been long established that property improved with housing for low income families conveyed to a private corporation from a metropolitan housing corporation was not used exclusively for public purposes and not exempt from taxation. Dayton Metropolitan Hous. Auth. v. Evatt (1944), 143 Ohio St. 10, paragraph one of the syllabus. Such property was not used exclusively for charitable purposes and not exempt from taxation. Youngstown Metropolitan Hous. Auth. v. Evatt (1944), 143 Ohio St. 268, at 278.

The primary use of the subject property by Rehab was, and remains, residential housing. Residential housing, even for low income individuals, is not a charitable purpose. Youngstown, supra; see, also, Columbus Metropolitan, Hous. Auth. v. Thatcher (1942), 140 Ohio St. 38; Goldman v. Friars Club (1952), 158 Ohio St. 185, at 196; and Cleveland v. Carney (1961), 172 Ohio St. 189, at 192. This is true even if the income arising from such use is devoted wholly to a charitable purpose. Youngstown, supra.

The Attorney Examiner's Recommendation to the Commissioner cites several other cases as authority for **[*21]** the position that the subject property is not entitled to be exempt from taxation. Those cases are Philada Home Fund v. Bd. of Tax Appeals (1966), 5 Ohio St. 2d 135, and Cogswell Hall v. Kinney (1987), 30 Ohio St. 3d 43.

In Philada Home Fund, real property was acquired and owned by a nonprofit, charitable corporation, known as the Philada Home Fund. Its stated purpose was to secure and operate resident apartments for aged and needy persons at or below cost. The Supreme Court, affirming the Board of Tax Appeals' denial of exemption, held that real property secured and operated as residential apartments was not used exclusively for charitable purposes. The Court went on to state that this would be true even if, as in the case of Philada Home Fund, the residences were rented to aged and needy persons and the rent to be charged was at or below cost.

The Board of Tax Appeals reached a similar result in Cogswell Hall. In that case, a nonprofit, charitable corporation operated a home for women of modest means. The monthly rental paid by the residents covered less than half of the women's maintenance. The other half was provided by gifts, bequests, and income **[*22]** from endowments. The Board denied the exemption, stating that the Ohio Supreme Court has consistently held that property used for low-cost housing is not an exclusive use. n5

C-128

n5 See St. Barnaleus v. Bd. of Tax Appeals (1948), 150 Ohio St. 484 (in which the Court determined that property owned by a charitable institution and used to provide low-income housing to student nurses was not a present charitable use entitled to exemption), and Beerman Found. v. Bd. of Tax Appeals (1949), 152 Ohio St. 179 (in which the Court found that property used primarily to furnish low-cost housing to disabled veterans of World War II was not used exclusively for charitable purposes). See, also, Church Residences v. Lindley (1985), 18 Ohio St. 3d 53 (subsidized housing not by itself an exclusive, charitable use), and Quaker Apts. v. Kosydar (1974), 38 Ohio St. 2d 20 (low income housing for elderly handicapped not exempt).

Therefore, based upon the existing factual record and applicable case law, the Board finds that Rehab Project does not use its property exclusively for charitable purposes in accordance with the requirements of R.C. 5709.12 and R.C. 5709.121, the **[*23]** provisions upon which Rehab Project bases its claim to exemption.

Although Rehab is engaged in a commendable enterprise which is beneficial to the Lima community, it is beyond our authority to extend the exemption granted for charitable purposes. It must be the subject of legislative action, not judicial or administrative action. Dayton Metropolitan Housing Authority v. Evatt, supra at 33; Youngstown Metropolitan Hous. Auth., supra, at 273; Christian Benevolent Assn. v. Limbach (1994), 69 Ohio St. 3d 296, at 299.

The General Assembly has exercised its discretion in adopting specific exemptions related to the improvement of housing to which Rehab does not claim to qualify. Under R.C. 5709.40, a municipal corporation may enact an ordinance, declaring improvements to residential property a public purpose, n6 if the improved parcel is located in a blighted area of an impacted city, as those terms are defined in R.C. 1728.01. R.C. Chapter 1728 provides specific requirements for a corporation to qualify as a "community urban redevelopment corporation." If all requirements have been satisfied, improvements made in the redevelopment of a blighted area will be deemed a **[*24]** public purpose for which a tax exemption will be granted. R.C. 1728.10. Similarly, R.C. Chapter 3735 provides for creation of a metropolitan housing authority. The housing authority targets areas where unsafe or unsanitary housing exists and/or where there is a shortage of safe and sanitary housing. R.C. 3735.27. An owner of real property located in a community reinvestment area may file for an exemption. R.C. 3725.67. R.C. 176.01 authorizes a municipal corporation to establish a housing advisory board, which may create a nonprofit corporation to receive and spend public and private funds for rehabilitating housing. R.C. 176.011. Again, there is no claim that the Rehab Project qualifies for specific exemption under any of these sections.

n6 These improvements would be entitled to a tax exemption of up to seventy-five percent of their value for ten years. With approval of the board of education, the exemption could be increased to one hundred percent for thirty years.

In conclusion, Rehab Project is to be praised for its activities in attempting to improve the quality of life in Lima, Ohio. The facts in the present appeal, however, collectively establish that as a matter of law, **[*25]** Rehab is not a charitable institution, nor is the subject real property used exclusively for charitable purposes so as to entitle it to exemption from taxation.

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

Legal Topics:

C-129

For related research and practice materials, see the following legal topics:
Tax Law > Federal Taxpayer Groups > Exempt Organizations > Charitable, Religious & Scientific Organizations
Tax Law > State & Local Taxes > Administration & Proceedings > Judicial Review
Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > General Overview

Source: My Sources > Ohio > Find Statutes, Regulations, Administrative Materials & Court Rules > By Administrative Materials > **OH Board of Tax Appeals Decisions**
Terms: **95-r-418** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Tuesday, May 27, 2008 - 3:32 PM EDT

LexisNexis
About LexisNexis | Terms & Conditions | Contact Us
Copyright © 2008 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

C-130

*1999 Ohio Tax LEXIS 838, **

The Seven Hills Schools, Appellant, vs. Roger W. Tracy, Tax Commissioner of Ohio, Appellee.

CASE NO. **97-M-1572** (REAL PROPERTY EXEMPTION)

STATE OF OHIO -- BOARD OF TAX APPEALS

1999 Ohio Tax LEXIS 838

June 11, 1999, Entered

[*1]

APPEARANCES:

For the Appellant - Kim D. Seaton, John P. Curp, Daniel J. Hoffheimer, Taft, Stettinius & Hollister, LLP, 1800 Star Bank Center, 425 Walnut Street, Cincinnati, Ohio 45202-3957.

For the Appellee - Betty D. Montgomery, Attorney General of Ohio, By: Janyce C. Katz, Assistant Attorney General, State Office Tower, 30 East Broad Street, 16th Floor, Columbus, Ohio 43266-0410.

OPINION:
DECISION AND ORDER

Mr. Johnson Ms. Jackson and Mr. Manoranjan concur.

This cause and matter comes to be considered by the Board of Tax Appeals upon a Notice of Appeal filed herein on November 26, 1997. 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 filed by the appellant. Through his journal entry, the Commissioner found that certain portions of appellant's property should be entitled to exemption, but concluded that other portions of the property should be denied exemption. The appellant has challenged the Commissioner's denial.

The appellant, Seven Hills School ("Seven Hills") is a non-profit corporation which operates an independent preparatory school in Cincinnati, Ohio. The **[*2]** school is the result of a merger of two independent schools, the College Preparatory School for Girls and the Hillsdale-Lotspeich Schools. Currently, the school has two campuses, with a 250-foot by 192.22-foot plat of land at the Red Bank Campus in issue. The subject plat is improved with a 4,784 square foot building currently in use as the Seven Hills School Resale Shop.

The resale shop's origins are in the school's "Clothing Exchange." When students wore uniforms, the Clothing Exchange facilitated the sale of gently used but outgrown uniforms to smaller students. Over time, the Clothing Exchange's inventory grew to include items and clothing other than uniforms. Currently the shop accepts clothing, furniture and similar items for sale to students, their families and the general public.

Seven Hills has previously sought an exemption for real property used in the same manner. In *The Seven Hills Schools v. Kinney*, (Mar. 27, 1986), B.T.A. Case No. 83-B-1238, unreported, this Board affirmed the Tax Commissioner's denial of real property exemption for a parcel of land used as a resale shop. The property in issue in the earlier appeal was a 50 by 170-foot lot improved with a 30 by **[*3]** 27 foot, two-story frame house, then housing the Clothing Exchange. The building has since been razed and the property then in issue is currently used as a parking lot.

C-131

In the earlier appeal, the Board acknowledged certain basic facts which remain true today, *i.e.*, 1) the school is a non-profit, educational institution, 2) the shop did not purchase goods for resale, but sold only items donated, and 3) the funds obtained from the sale of goods were used in furtherance of the school's stated educational purposes. Nevertheless, at that time this Board held:

> "The evidence is clear that the sole use of the subject property is for the production of income. The fact that the items sold have been donated is immaterial. The same may be said as to the ultimate use of the funds."

Seven Hills Schools challenged this Board's determination in the Ohio Supreme Court. In *Seven Hills Schools v. Kinney* (1986), 28 Ohio St.3d 186, the Court affirmed. It rejecting the school's argument that the shop only served the "incidental function of converting property to cash which, in turn is used to support scholarship of the school, a charitable organization," the Court held:

> "In *Ohio Masonic* **[*4]** *Home [v. Bd. of Tax Appeals* (1977), 52 Ohio St.2d 127], this court dealt with the question of what may constitute 'in furtherance of' the taxpayer's purpose. In *Ohio Masonic Home*, a charitable institution--a home for the care of the aged - owned a farm. The proceeds from the income derived from the farm were used, in part, for the care of the home's residents. This court concluded that the farm was taxable because '* * * appellant's purpose is not to farm land, but rather to provide and maintain a place for the care of the aged * * * [and that] farming remains functionally removed from appellant's charitable purpose.' *Id.* at 130. The instant cause is analogous to *Ohio Masonic Home* because appellant's purpose is to be an educational institution and not a clothing distribution center. Thus, the education or charitable function is removed from the property in question."

In a footnote, the Court added:

> "It is the ongoing operation of the clothing exchange as a business venture, apart from any educational purpose, that is fatal to appellant's exemption request. Thus, we are not presented with a situation where it is claimed that the business venture is integrally **[*5]** related to a marketing or business course at an educational facility. Our decision should not be construed as impacting upon traditional fundraising events such as church or school book sales, or bake sales."

Given this backdrop, we proceed to address Seven Hill's new claim that its school resale shop should be entitled to real property exemption. 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.

C-132

As to the law relating to exceptions from taxation, exemption from tax is an exception to **[*6]** the rule that all property is subject to taxation and therefore a statute granting such an exemption must be strictly constructed. *National Tube Co. v. Glander* (1952), 157 Ohio St. 407; *White Cross Hospital Assn. v. Bd. of Tax Appeals* (1974), 38 Ohio St.2d 199.

As a preliminary issue, this Board must address whether the appellant is collaterally estopped from raising a claim that the Tax Commissioner erred in denying it an exemption from real property taxation when a similar claim had been raised in an earlier appeal. As indicated above, while the property is not identical, the issue of whether the school's resale shop is an exempt use of property has been litigated before. *Seven Hills Schools, supra.*

As the Court held in *New Winchester Gardens, Ltd. v. Franklin Cty. Bd. of Revision* (1997), 80 Ohio St.3d 36, "the purpose of collateral estoppel is to preclude 'the relitigation, in a second action, of *an issue* that has been actually and necessarily litigated and determined in a prior action which was based on a different cause of action.' (Emphasis, *sic.*) *Whitehead v. Gen. Tel. Co.* (1969), 20 Ohio St.2d 108, * * *." (Parallel citation omitted.) The elements **[*7]** which must exist are: (1) an administrative proceeding of a judicial nature; (2) an identity of the parties, and (3) an identity of issues. *Am. Soc. For Metals v. Limbach* (1991), 59 Ohio St.3d 38.

We acknowledge that the ultimate issue in this appeal, that of the applicability of R.C. 5709.12 to the Red Bank parcel for tax year 1995, has not been the subject of prior litigation. Therefore, the earlier decision cannot control the exempt status of that parcel. See *Hubbard Press v. Tracy* (1993), 67 Ohio St.3d 564. However, one issue before this Board is whether the use of the school's resale shop can be considered as "not with a view to profit" under R.C. 5709.12. It is the opinion of this Board that that issue has been actually and necessarily litigated and determined in a prior action. Therefore, Seven Hills is estopped from relitigating that issue. *New Winchester Gardens, supra.*

While R.C. 5709.07 provides the exemption for property owned by educational institutions, Seven Hills does not seek exemption under that statute. Instead, Seven Hills identified R.C. 5709.121 as the basis for its exemption. That statute provides:

> "Real property and tangible personal property **[*8]** belonging to a[n] * * * educational institution * * * shall be considered as used exclusively for charitable or public purposes by such institution, * * * if it meets one of the following requirements:
>
> > "(A) It is used by such institution, * * * 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 there;
> >
> > "(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 * * * educational * * * purposes and not with a view to profit.
> >
> > "* * *."

C-133

The Supreme Court has previously concluded that the resale shop is an on-going business venture. The inference to be drawn from such a finding is that the shop is a profit-making activity. Indeed, testimony at hearing indicated that if the shop did not create a source of income for the school, it would be closed. (H.R., p. 77) A finding that the property is used **[*9]** with a profit motive is fatal to any exemption under R.C. 5709.12. As the Court previously found that Seven Hill's resale shop was used with "a view to profit," we find that the current shop is also used in the same manner.

Even if we were to conclude that collateral estoppel is not applicable to the present appeal, this Board is bound by the Court's earlier decision. While appellant argues distinguishing facts, this Board finds no change in circumstances, either factual or legal, which would cause the holding in the earlier case to be inapplicable.

Therefore, considering the record, statutes and case law, this Board of Tax Appeals finds the Tax Commissioner's order in accord with the applicable law. Accordingly, the matter must be, and hereby is, affirmed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax Law > Federal Tax Administration & Procedure > Collateral Estoppel & Res Judicata > Collateral Estoppel
Tax Law > State & Local Taxes > Administration & Proceedings > Judicial Review
Tax Law > State & Local Taxes > Real Property Tax > General Overview

Source: My Sources > Ohio > Find Statutes, Regulations, Administrative Materials & Court Rules > By Administrative Materials > **OH Board of Tax Appeals Decisions**
Terms: **97-m-1572** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Monday, June 9, 2008 - 4:16 PM EDT

About LexisNexis | Terms & Conditions | Contact Us
Copyright © 2008 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

C-134

*2001 Ohio Tax LEXIS 1023, **

Thomaston Woods Limited Partnership, Appellant, vs. James J. Lawrence, Tax Commissioner of Ohio, Appellee.

CASE NO. **99-L-551** (EXEMPTION)

STATE OF OHIO -- BOARD OF TAX APPEALS

2001 Ohio Tax LEXIS 1023

June 15, 2001, Entered

[*1]

APPEARANCES:

For the Appellant - Flach Douglas, Flach Douglas & Co., LPA, Milford, Ohio.

For the Appellee - Betty D. Montgomery, Esq., Attorney General of Ohio, By: James C. Sauer, Esq., Assistant Attorney General, Columbus, Ohio.

OPINION:
DECISION AND ORDER

Mr. Johnson, Ms. Jackson, and Ms. Margulies concur.

This cause and matter came on to be considered by the Board of Tax Appeals upon the notice of appeal filed by Thomaston Woods Limited Partnership (hereinafter Appellant or property owner) from a final journal entry of the Tax Commissioner. The Tax Commissioner denied the property owner's application for the exemption of certain real property from taxation for tax year 1997 and the remission of taxes for tax years 1996, 1995, and 1994.

The subject property, identified as Clermont County parcel number 03-20-23F-197, is a 12.60 acre parcel improved with low-income rental housing. The property owner seeks real property tax exemption for all but two rooms of the subject's community building and .9292 acres of the land.

This matter is now considered by the Board of Tax Appeals pursuant to R.C. 5717.02 upon the notice of appeal, the statutory transcript of the proceedings below as certified **[*2]** by the Tax Commissioner (ST.), the record of testimony (R.) adduced at the evidentiary hearing before this Board, and the briefs submitted by counsel for the parties.

In its notice of appeal, Appellant specified the following errors:

> "Now comes Thomaston Woods Limited Partnership, by and through counsel of its general partnership, St. Thomas Housing Corporation, and herewith files its Notice of Appeal from the Journal Entry of the Tax Commissioner, James J. Lawrence, in Case No. CE 0200 dated April 20, 1999, mailed to Appellant on April 26, 1999. A true copy of the Journal Entry of the Tax Commissioner is attached to this Notice of Appeal and is incorporated herein as if fully rewritten.
>
> "Errors by the Tax Commissioner:

C-135

"1. The Tax Commissioner disregarded the holding of *Highland Park Owners, Inc. vs. Tracy, Tax Commr.*, (1994), 71 Ohio St. 3d 405, 644 N.E.2d 284 wherein, regardless of the ownership, the use of the property, not the ownership, is the determining factor of tax exemption.

"2. The Tax Commissioner erroneously declared that Thomaston Limited Partnership is not an 'institution' encompassed by Ohio Rev. Code Secs. 5709.12 and 5709.121."

The Appellant initially **[*3]** applied for tax exemption of the community building and surrounding land based upon the charitable, educational, and/or public use of the property. The Tax Commissioner, in his journal entry, denied the real property tax exemption for the property. The final determination of the Tax Commissioner provided as follows:

"This matter concerns an application for the exemption of real property from taxation. On February 26, 1999, the attorney examiner issued a recommendation to deny the application. On March 11, 1999, applicant responded with objections.

"Applicant/owner argues that they are an institution which provides low-cost housing. However, the property for which they are claiming exemption is not used for low-cost housing. Applicant/owner is a limited partnership which owns and leases the property to a charitable institution.

"Applicant/owner cites Highland Park Owners, Inc. v. Tracy, (1994), 71 Ohio St.3d 405, which used Black's Law Dictionary (6th Ed. 1990), 800, to define 'institution:'

> 'An establishment, especially one of eleemosynary or public character or one affecting a community. An established or organized *society or corporation*. It may be profit in its **[*4]** character, designed for profit to those composing the organization, or public and charitable in its purposes, or education. . . . .' (emphasis added)

"Applicant/owner is a limited partnership. However, they argue they are an institution. Black's Law Dictionary, 773, defines a 'partnership' as '(a) business owned by two or more persons that is *not organized as a corporation* . . . with the understanding that there shall be a proportional sharing of the profits . . . .' (emphasis added)

"A limited partnership is a partnership which includes 'one or more general partners who manage business and who are personally liable for partnership debts, and or more limited partners who contribute capital and share in profits but who take no part in running business and incure (sic) no liability . . . .' Black's Law Dictionary, 640. Applicant's general partner, St. Thomas Housing Corporation, is a nonprofit corporation. However, the limited partners are three banks and a life insurance company, who all contribute capital and partake in the profits.

"A partnership is not a society or a corporation, as required by the Black's Law Dictionary and the Highland Park court. Applicant/owner **[*5]** is a limited partnership which owns and leases its property to charitable institutions, Head

C-136

> Start and Prime Time. Pursuant to Ohio Revised Code section 5709.121, both the owner and the lessee must be charitable, public or educational institution, and the property must be used for a charitable or public purpose.
>
> "The Tax Commissioner finds that the property described in the application is not entitled to be exempt from taxation and the application is therefore denied for reasons stated above and set forth in the attached recommendation, which is incorporated into this entry.
>
> "The Tax Commissioner further orders that all penalties charged for these tax years be remitted." (ST. at 2-3)

At the outset, it is appropriate to note that the rule in this state is that all real property and its improvements are to be taxed by uniform rule according to value. The General Assembly is, however, empowered by the Ohio Constitution to pass laws to exempt certain types of property. Section 2, Article XII, Ohio Constitution reads, in pertinent part, as follows:

> "* * * Land and improvements thereon shall be taxed by uniform rule according to value * * *. Without limiting the general power, **[*6]** subject to the provisions of Article I of the constitution, to determine the subjects and methods of taxation or exemptions therefrom, general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose, * * *."

Thus, exemption from taxation is the exception to the rule. *Seven Hills Schools v. Kinney* (1986), 28 Ohio St.3d 186. Statutes granting exemptions must be strictly construed. *Natl. Tube Co. v. Glander* (1952), 157 Ohio St. 407, paragraph two of the syllabus; *White Cross Hosp. Assn. v. Bd. of Tax Appeals* (1974), 38 Ohio St.2d 199, 201; *American Soc. for Metals v. Limbach* (1991), 59 Ohio St.3d 38.

We acknowledge at the outset the affirmative burden that is generally borne by an appellant in an appeal taken from a final order of the Tax Commissioner. In *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121, the Supreme Court stated:

> "Absent a demonstration that the commissioner's findings are clearly unreasonable or unlawful, they are presumptively valid. Furthermore, it is error for **[*7]** the BTA to reverse the commissioner's determination when no competent and probative evidence is presented to show that the commissioner's determination is factually incorrect. * * *" *Id.* at 124. (Citation omitted.)

Consequently, the taxpayer has the burden of proof to demonstrate that it is entitled to the exemption. *OCLC Online Computer Library Ctr. Inc. v. Kinney* (1984), 11 Ohio St.3d 198; *Episcopal Parish v. Kinney* (1979), 58 Ohio St.2d 199, at 201.

Appellant asserts that the subject community building and land is exempt under R.C. 5709.12. R.C. 5709.12(B) provides in relevant part that "real and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation." Two requirements exist for exemption under this section. The property must

C-137

belong to an institution and the property must be used exclusively for charitable purposes. *Highland Park Owners, Inc. v. Tracy* (1994), 71 Ohio St.3d 405. In *Highland Park Owners, Inc., supra*, at 407, the term "institution" was defined by the Supreme Court as follows:

> "Black's Law Dictionary (6th Ed. 1990, 800, defines 'institution' as:
>
> "'An establishment, **[*8]** especially one of eleemosynary or public character or one affecting a community. An established or organized society or corporation. It may be private in its character, designed for profit to those composing the organization, or public and charitable in its purposes, or educational (e.g. college or university). * * *.'"

In the instant case, the Appellant is a limited partnership organized to develop low-income housing. The Tax Commissioner has concluded that Appellant is not an "institution" for purposes of R.C. 5709.12(B). The Tax Commissioner distinguishes the meaning of "institution" as announced in *Highland Park Owners, Inc., supra*, from the business structure of the Appellant which is organized as a limited partnership.

In *True Christianity Evangelism v. Tracy* (1999), 87 Ohio St.3d 48, at 50, the Supreme Court noted that the first point of inquiry for exemption under R.C. 5709.12(B) was whether the property belongs to an "institution." Citing *Highland Park Owners, Inc., supra*, the Supreme Court concluded as follows:

> "While the nature of an institution seeking exemption for property under R.C. 5709.121 is relevant, *the nature of the institution seeking exemption* **[*9]** *under R.C. 5709.12(B) is not relevant." Id.* at 50-51. (Emphasis added.)

Based upon the Supreme Court's decisions in *Highland Park Owners, Inc., supra*, and *True Christianity Evangelism, supra*, we disagree with the Tax Commissioner's distinction and hold that a limited partnership may be deemed an "institution" for purposes of R.C. 5709.12(B). There is no specific requirement for corporate status to exist, rather than a limited partnership, to qualify as an "institution" under R.C. 5709.12(B). This Board concludes that a property owner organized and operating as a limited partnership, whether for charitable or non-charitable purposes, may qualify as an "institution" under the definition approved in *Highland Park Owners, Inc., supra*. See also *Episcopal Parish, supra*. Although Appellant is not an institution with a charitable purpose, we conclude that the Appellant qualifies as an institution for purposes of R.C. 5709.12(B).

As for the second requirement of R.C. 5709.12(B), the use of property by the property owner must be examined closely. The facts established in the record reflect that the Appellant does not use the property in a charitable manner. Rather, the Appellant **[*10]** leases the subject property for $ 3,000 a year. (S.T. 26) The lessee uses the property for running a Head Start program for both residents and non-residents of the Appellant's housing complex. (R. 24-26) The lease for the subject property grants the lessee access to an unspecified room for speech therapy, as well as "the right to reasonable access to and use of the bathroom, hallways and playgrounds." (ST. 26) While Appellant argues that the lease rate is designed only to cover the monthly utility expenses, no probative evidence was presented to substantiate this claim. At the Board's hearing, the Appellant's witness knew generally about the lease provisions, but did not know what the building's utility costs were or other costs that were attributable to the rental of the building. In addition, the record establishes that a YMCA latch key program is operated in the building, and a congregation from the area makes the community room

C-138

available for use by its Sunday school. (R. 45) The use of the building by these programs is not covered by the terms of the Head Start lease. (R. 37) No evidence was presented regarding the fees collected by these various programs or individual users. **[*11]**

We note that it is not the amount of net annual rental income received by the property owner that is determinative of a property's exemption status. Even a property that makes no money, or is losing money may be subject to real property taxation. In the instant case, it is the fact that the property owner itself is leasing the property commercially that causes the second prong of the R.C. 5709.12(B) test to not be met.

Appellant also asserts that the activities of St. Thomas Housing Corporation at the subject property should be construed as a charitable use for purposes of R.C. 5709.12(B). St. Thomas Housing Corporation is the general partner of the Appellant and a non-profit corporation. St. Thomas, however, only owns a 1% interest in the subject property. St. Thomas provides some free services at the community building including helping students with homework and running a summer program for resident children. (R. 27-28) These activities are managed by an employee of St. Thomas Housing Corporation, Bridget Tierney, whose title is Director of Resident Services for the entire apartment complex. Her office space is part of the space in the building for which the property owner requests **[*12]** tax exemption. (R. 42, 43)

We agree that the services and activities made available at the community building are commendable and beneficial to the resident families of the Appellant's rental units. However, it is the use, that is the leasing of the subject property by the Appellant, that causes this property owner to fail to meet the second requirement for exemption under the statute.

R.C. 5709.12(B) requires the use of the property to be "exclusively" for charitable purposes. The Supreme Court has determined that this means that the property must be primarily used for charitable purposes. *Moraine Hts. Baptist Church v. Kinney* (1984), 12 Ohio St.3d 134, 135. In the instant case the record establishes that the primary use of the property by the Appellant is to lease it to third parties. 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. **[*13]** *Lincoln Memorial Hospital v. Warren* (1968), 13 Ohio St.2d 109.

It is beyond our authority to extend the property tax exemption granted for charitable purposes under R.C. 5709.12(B). Such an extension must be the subject of legislative action, not judicial or administrative action. *Rehab Project v. Tracy* (May 23, 1997), BTA No. 95-R-419, unreported. Consequently, this Board finds that while the Appellant is an institution for purposes of 5709.12(B), the Appellant does not itself use the property in the required charitable manner to warrant property tax exemption under R.C. 5709.12(B).

The Appellant also asserts that it is a qualified institution under R.C. 5709.121, and therefore satisfies the requirements for real property tax exemption under this statute. This argument also fails for several reasons. R.C. 5709.121 provides as follows:

> "*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 **[*14]** by such institution, the state, or political subdivision, or by one or more other such institutions, the state, or political subdivisions under a

C-139

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, 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.

"(C) It is used by an organization described in division (D) of section 5709.12 of the Revised Code." (Emphasis added)

Under R.C. 5709.121, the threshold requirement is that the property owner be a charitable or educational institution, state or political subdivision. *True Christianity Evangelism, supra* at 50. Upon review of the record, it is clear that the Appellant, Thomaston Woods Limited Partnership, is none of these. Rather the Appellant is a limited partnership organized to develop and manage low-income **[*15]** housing. The limited partners of the Appellant are banks and an insurance company, not charitable or educational institutions. (ST. 63) As stated before, while managing and developing low income housing is also an important and commendable undertaking, it does not satisfy the statutory requirement that the property actually be *owned* by a charitable or educational institution or the state or political subdivision. *True Christianity Evangelism v. Zaino* (2001), 91 Ohio St.3d 117; *Highland Park Owners Inc., supra; Episcopal Parish, supra*; R.C. 5709.121. We acknowledge that St. Thomas Housing Corporation, the general partner, does use the subject property for some charitable and educational activities. However, such use of the property is not exclusive. As noted above, the office for the Director of Resident Services for the entire complex is also maintained in the community building. In addition, St. Thomas Housing Corporation only owns a 1% interest in the property. This ownership interest is insufficient to qualify the Appellant as a charitable or educational institution under R.C. 5709.121. This Board must, therefore, conclude that the property does not qualify for property **[*16]** tax exemption under R.C. 5709.121.

For all of the foregoing reasons, it is the Decision and Order of the Board of Tax Appeals that the Appellant, Thomaston Woods Limited Partnership, has not established its right to exemption from real property tax for the subject parcel. Therefore, the final determination of the Tax Commissioner must be, and the same hereby is, affirmed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax Law > State & Local Taxes > Administration & Proceedings > Judicial Review
Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > Requirements for Exempt Status
Tax Law > State & Local Taxes > Real Property Tax > General Overview

Source: My Sources > Ohio > Find Statutes, Regulations, Administrative Materials & Court Rules > By Administrative Materials > **OH Board of Tax Appeals Decisions**
Terms: **99-I-551** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Monday, June 9, 2008 - 4:17 PM EDT

C-140

LexisNexis® About LexisNexis | Terms & Conditions | Contact Us
Copyright © 2008 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

C-141

*741 N.W.2d 880, *; 2007 Minn. LEXIS 755, **

Under the Rainbow Child Care Center, Inc., Respondent, vs. County of Goodhue, Relator.

A07-468

SUPREME COURT OF MINNESOTA

741 N.W.2d 880; 2007 Minn. LEXIS 755

December 6, 2007, Filed

PRIOR HISTORY: [1]**
Tax Court.
Under the Rainbow Child Care Ctr., Inc. v. County of Goodhue, 2007 Minn. Tax LEXIS 3 (Minn. T.C., Jan. 18, 2007).

DISPOSITION: Reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: The Minnesota Tax Court exempted real property owned by respondent child care center from payment of real property taxes assessed in 2004 and 2005. The tax court concluded that the property qualified for exemption because it was an institution of purely public charity under Minn. Const. art. X, § 1 and Minn. Stat. § 272.02, subd. 7. Relator county appealed.

OVERVIEW: The county argued that the evidence did not establish that the child care center was an institution of pure public charity. The tax court found that the child care center satisfied all of the factors for a charitable exemption except factor three, which examined the extent to which the recipients of the "charity" were required to pay for the assistance received in whole or in part. The supreme court found that the factor three inquiry had to be satisfied if an organization was to be deemed an institution of purely public charity. The tax court's conclusion that the child care center qualified as an institution of purely public charity despite failing to satisfy factor three was an error of law. The center's chid care rates were generally less than the county's maximum authorized rates, but there was no evidence that the maximum authorized rates were actual market rates. It offered no discount for participants in the government programs. Because the payments made from various counties and an Indian community were made for services rendered by the center to qualifying families, they should not have been classified as donations or contributions to the center.

OUTCOME: The judgment was reversed.

CORE TERMS: charity, charitable, public charity, exemption, market rates, donation, nonprofit, qualify, tax exemption, gift, exempt, child care, care center, entity, recipient, rent, considerably, taxation, weekly, property taxes, maximum rates, maximum, housing, funding, executive director, low income, reduced rates, clinic, required to pay, provider

LEXISNEXIS(R) HEADNOTES
Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > Requirements for Exempt Status

C-142

HN1 Minn. Const. art. X, § 1 requires that taxes shall be uniform upon the same class of subjects but exempts from taxation public burying grounds, public school houses, public hospitals, academies, colleges, universities, all seminaries of learning, all churches, church property, houses of worship, institutions of purely public charity, and public property used exclusively for any public purpose. Minn. Stat. § 272.02, subd. 7, echoes this provision, exempting from taxation institutions of purely public charity.

Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > Requirements for Exempt Status

HN2 Because tax exemptions are an exception in derogation of equal rights, all property is presumed to be taxable, and the taxpayer bears the burden of proving entitlement to an exemption. Furthermore, exemptions from property tax liability must be strictly construed. As the burdens of government should be borne by all the citizens in equal proportions, no property should be exempt from taxation in the absence of clear and explicit legislation authorizing the same, and in the construction of a law exempting property from taxation, courts will indulge no presumption that will extend the exemption beyond the plain requirements of the law itself. The Minnesota Supreme Court must therefore construe the purely public charity exemption narrowly and take care to avoid extending the exemption under Minn. Stat. § 272.02, subd. 7, beyond the plain requirements of the law itself.

Civil Procedure > Appeals > Standards of Review > De Novo Review
Tax Law > State & Local Taxes > Administration & Proceedings > Judicial Review

HN3 The Minnesota Supreme Court may review any final order of the tax court on the ground that the tax court lacked jurisdiction or committed an error of law or that its order was not justified by the evidence or in conformity with the law. The supreme court will affirm the tax court when, after an independent review of the record, there is sufficient evidence in the record upon which the tax court could have reasonably based its conclusion. As a result, the supreme court gives great deference to the tax court's determination whether an organization qualifies as a purely public charity, so long as that determination is reasonably supported by the evidence. The supreme court reviews the tax court's legal conclusions de novo.

Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > Requirements for Exempt Status

HN4 There are six factors used to determine whether an organization qualifies as a purely public charity: (1) whether the stated purpose of the undertaking is to be helpful to others without immediate expectation of material reward; (2) whether the entity involved is supported by donations and gifts in whole or in part; (3) whether the recipients of the "charity" are required to pay for the assistance received in whole or in part; (4) whether the income received from gift and donations and charges to users produces a profit to the charitable institution; (5) whether the beneficiaries of the "charity" are restricted or unrestricted and, if restricted, whether the class of persons to whom the charity is made available is one having a reasonable relationship to the charitable objectives; (6) whether dividends, in form or substance, or assets upon dissolution are available to private interests.

Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > Requirements for Exempt Status

HN5 The Minnesota Supreme Court has referred to all six North Star factors in virtually every subsequent case in which the charitable exemption was at issue, and it has recently described the factors as a six-factor test. As a result, the supreme court may have created the impression that all six factors must be examined in every

C-143

case addressing the charitable exemption issue. In the circumstances of a particular case, one or more of the North Star factors may not be helpful in assessing whether an organization is an institution of purely public charity, and if that is true, those factors need not be analyzed. And if other analytical tools are more helpful in identifying whether an organization is an institution of purely public charity, those tools should be utilized. The other side of this coin is that although the supreme court has often stated that not all of the North Star factors must be satisfied in order to qualify for the exemption, some of the factors are, indeed, essential. For example, regardless of the status of the other factors, the supreme court could not envision an organization qualifying as an institution of purely public charity if it makes available to private interests either dividends, in form or substance, or assets upon dissolution, and thus fails to satisfy North Star factor six.

Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > Requirements for Exempt Status

HN6 In applying the North Star factors the Minnesota Supreme Court has never found an organization that did not satisfy factor three to be an institution of purely public charity. The factor three inquiry, the extent to which the recipients of the charity are required to pay for the assistance received, tests for a value that is fundamental to the concept of charity-that is, whether the organization gives anything away. Because this is a core characteristic of an institution of public charity, the third factor must be satisfied if an organization is to be deemed an institution of purely public charity.

Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > Requirements for Exempt Status

HN7 The Minnesota Supreme Court must not lose sight of the fact that both the constitutional provision and the statute that it is applying authorize a tax exemption for institutions of purely public charity, Minn. Const. art. X, § 1; Minn. Stat. § 272.02, subd. 7. Although the supreme court has not developed a precise and all-encompassing definition of the term "charity," it has frequently relied on the following description, which, significantly, defines charity as a gift: The legal meaning of the word "charity" has a broader significance than in common speech and has been expanded in numerous decisions. Charity is broadly defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government.

Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > Requirements for Exempt Status

HN8 Not even every gift with a beneficent purpose necessarily qualifies as charity for these purposes: it is not safe to say as a universal rule that any gift which tends to promote man's well-being is a charity. It has come to be recognized that new objects must be added in order to comprehend within the class of charities a wide variety of gifts which represent a wholly generous and unselfish devotion of wealth to uses which benefit the public generally or whole classes of the public and from which the donor derives no personal advantage. Absent the element of a gift, an endeavor cannot be fairly characterized as a charity.

Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > Requirements for Exempt Status

HN9 By examining the extent to which the recipients of the charity are required to pay for the assistance received in whole or in part, factor three of the North Star tax

C-144

exemption test assesses whether the organization's operation confers a gift. Therefore, if factor three is not satisfied, the organization cannot be found to be an institution of public charity.

Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > Requirements for Exempt Status

HN10 Because Minn. Const. art. X, § 1 and Minn. Stat. § 272.02, subd. 7, limit the exemption to institutions of purely public charity, it is not sufficient that an organization serves a worthwhile purpose, or even that it does so on a nonprofit basis.

Tax Law > Federal Taxpayer Groups > Exempt Organizations > Charitable, Religious & Scientific Organizations
Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > Requirements for Exempt Status

HN11 If the legislature had intended all organizations exempt from payment of federal income taxes under I.R.C. § 501(c)(3) also to be exempt from payment of real property taxes, it could have so provided, as it did with regard to state income taxation, Minn. Stat. § 290.05, subd. 2 (2006). That it has not done so indicates that, in the legislature's view, there is a difference between an entity that qualifies for exemption from payment of federal income taxes because it does good works and from which its owners do not personally benefit, and an entity that qualifies for exemption from payment of property taxes as an institution of purely public charity. The Minnesota Supreme Court has never treated an organization's tax-exempt status for federal income tax purposes as determinative of its inquiry.

Tax Law > Federal Taxpayer Groups > Exempt Organizations > Charitable, Religious & Scientific Organizations

HN12 I.R.C. § 501(c)(3) exempts from payment of income taxes those entities organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > Requirements for Exempt Status

HN13 It is, thus, inherent in the concept of charity that there is a gift--that is, the services, goods, or whatever is conceived as the charitable benefit must be provided to the recipients of the charity without requiring them to pay full value for it. Nevertheless, the expanded legal definition of charity that has evolved in the context of tax exemptions does not require that the charitable benefit be provided to all recipients entirely free of charge. Therefore, the third North Star factor has been refined to require that the charity be provided free of charge, or at considerably reduced rates. And the "considerably reduced rates" requirement has been described as meaning considerably less than market value or cost.

Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > Requirements for Exempt Status

HN14 While granting the exemption to organizations that charged considerably less than market prices, the Minnesota Supreme Court has consistently denied the exemption from property taxes to entities that charged recipients of their "charity" substantially market rates, even where some fees were discounted or forgiven.

Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property >

C-145

Requirements for Exempt Status

HN15 To qualify for the exemption from property taxes as an institution of purely public charity an organization must provide its "charity" to recipients free of charge or at considerably reduced rates. Moreover, it is not sufficient to provide free or reduced-rate goods or services on such a small scale that they are merely an incidental part of the organization's operations. Nor will free or reduced-rate goods or services that are provided primarily for business purposes be adequate. The organization must demonstrate that its intended purpose is to provide a substantial proportion of its goods or services on a charitable basis. If the organization does not operate on these terms, it is indeed not an institution of purely public charity and cannot qualify for tax exemption on that basis.

Education Law > Administration & Operation > Child Care Facilities

HN16 Minn. Stat. § 119B.09, subd. 1 (2006), requires the state to make child care services available to families who need child care to find or keep employment or to obtain the training or education necessary to find employment and who qualify financially. Minn. Stat. § 119B.13, subd. 1(e) (2006), authorizes the Commissioner of Human Services to set out on a county-by-county basis the maximum rates that may be paid for child care from program funds. Under § 119B.13, subds. 1(e) and (f), the county pays the child care provider's full charges up to the maximum; the parent is responsible for payment of the provider's charges in excess of the maximum the county will pay.

Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > Requirements for Exempt Status

HN17 The fact that an entity operates at a loss is not sufficient to satisfy the third North Star factor, because revenues may not cover costs for a variety of reasons, not necessarily because the facility intends to charge a below-cost rent.

Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > Requirements for Exempt Status

HN18 There must be a substantial charitable, or gift, component to an organization's operation in order to qualify as an institution of purely public charity. That means the organization must provide a substantial proportion of its goods or services free or at considerably reduced rates. For that reason, if an organization does not satisfy the third North Star factor, it cannot qualify for tax exemption as an institution of purely public charity.

Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > Requirements for Exempt Status

HN19 When the government pays directly for goods or services on behalf of one of its citizens, the payment is not considered a gift or donation for purposes of determining whether the entity providing the goods or services is exempt from property taxation as an institution of purely public charity.

SYLLABUS

An organization that does not provide goods or services free or at considerably reduced rates as a substantial, not just an incidental, part of its operations is not exempt from payment of real property taxes as an institution of purely public charity.

Payments made by a governmental entity for goods or services provided to one of its citizens

C-146

are not considered donations for purposes of determining whether the entity providing the goods or services is exempt from payment of real property taxes as an institution of purely public charity.

COUNSEL: For Relator's: Stephen N. Betcher, Goodhue County Attorney, Carol K. Lee, Assistant Goodhue County Attorney, Red Wing, MN.

For Respondent's: Daniel J. Biersdorf, Biersdorf & Associates, Minneapolis, MN; Jennifer Lappegaard, Watson & Speight, Red Wing, MN.

JUDGES: Anderson, Russell A., Chief Justice. Dissenting, Hanson, Page, and Meyer, JJ. HANSON, Justice (dissenting). PAGE, Justice (dissenting). MEYER, Justice (dissenting).

OPINION BY: ANDERSON, Russell A.

OPINION

[*883] Considered and decided by the court en banc without oral argument.

ANDERSON, Russell A., Chief Justice.

In this case, we review the final order of the Minnesota Tax Court exempting real property owned by respondent Under the Rainbow Child Care Center, Inc. (Rainbow), from payment of real property taxes assessed in 2004 and 2005. The tax court concluded that Rainbow's property qualified for tax exemption because Rainbow is an institution of purely **[**2]** public charity under Article X, Section 1 of the Minnesota Constitution and Minn. Stat. § 272.02, subd. 7 (2006), applying the six factors listed in *North Star Research Institute v. County of Hennepin*, 306 Minn. 1, 6, 236 N.W.2d 754, 757 (1975). On certiorari to this court, relator Goodhue County asserts that the evidence did not establish that Rainbow is an institution of purely public charity. We agree and reverse the tax court.

Rainbow is a state-licensed child care center in Red Wing, established as a sole proprietorship in 1994 by Michelle Finholdt, Rainbow's executive director. Rainbow was incorporated in 1995 as a nonprofit corporation under Minn. Stat. ch. 317A (2006). Rainbow's articles of incorporation state that Rainbow's mission is "to provide care [for] children away from their homes" and that Rainbow is "organized exclusively for charitable, scientific, literary, or educational purposes." Rainbow has not realized a profit during any year of its existence.

Tuition must be paid for each of the children enrolled in Rainbow. Rainbow based its child care rates on the average rates charged by other day care centers in Goodhue County. According to a comparison of rates charged **[**3]** by child care centers in Red Wing prepared by Goodhue County, Rainbow's 2006 weekly rates were higher than the two other child care centers in Red Wing for infants, toddlers, and preschool children. Rainbow's weekly rate was lower than that of one center but higher than the rate of the other center for school age children. The tax court found that Rainbow's tuition rates were "at or just below market rates."

Rainbow directed families who had difficulty paying tuition to Goodhue County Social Services, and Rainbow's clients included children whose families received child care assistance payments from Goodhue County, from Pierce County, Wisconsin, and from the Prairie Island Tribal Community. Families that received child care assistance from the counties or from the Prairie Island Tribal Community were charged the same tuition as families that did not receive assistance. Although Rainbow's executive director testified that Rainbow wrote off "several thousands of dollars in unclaimed childcare payments every year," Rainbow offered no scholarships and had in the past pursued collection efforts against families that did not pay.

C-147

The tax court found that all of the *North Star* factors were **[**4]** satisfied by Rainbow except the third factor. Based on this evaluation of the factors, the tax court concluded that Rainbow was entitled to exemption from property taxes assessed in **[*884]** 2004 and 2005 as an institution of purely public charity under Minn. Stat. § 272.02, subd. 7.

I.

Rainbow claims it is exempt from payment of real property taxes as an institution of purely public charity. *HN1*Article X, Section 1 of the Minnesota Constitution requires that "[t]axes shall be uniform upon the same class of subjects" but exempts from taxation "public burying grounds, public school houses, public hospitals, academies, colleges, universities, all seminaries of learning, all churches, church property, houses of worship, *institutions of purely public charity*, and public property used exclusively for any public purpose." (Emphasis added.) Minnesota Statutes § 272.02, subd. 7, echoes this provision, exempting from taxation "[i]nstitutions of purely public charity."

*HN2*Because tax exemptions are "an exception in derogation of equal rights," all property is presumed to be taxable, and the taxpayer bears the burden of proving entitlement to an exemption. *Camping & Educ. Found. v. State*, 282 Minn. 245, 250, 164 N.W.2d 369, 372 (1969); **[**5]** *see also Croixdale, Inc. v. County of Washington*, 726 N.W.2d 483, 487 (Minn. 2007). Furthermore, exemptions from property tax liability must be strictly construed. *E.g., Camping & Educ. Found.*, 282 Minn. at 250, 164 N.W.2d at 372. We have also observed:

> As the burdens of government should be borne by all the citizens in equal proportions, no property should be exempt from taxation in the absence of clear and explicit legislation authorizing the same, and in the construction of a law exempting property from taxation, courts will indulge no presumption that will extend the exemption beyond the plain requirements of the law itself.

St. Peter's Church, Shakopee v. Bd. of County Comm'rs, 12 Minn. 395, 397-98, 12 Gilf. 280 (Gil. 280, 282) (1867). We must therefore construe the purely public charity exemption narrowly and take care to avoid extending the exemption under Minn. Stat. § 272.02, subd. 7, "beyond the plain requirements of the law itself."

HN3"We may review any final order of the tax court on the ground that the tax court lacked jurisdiction or committed an error of law or that its order was not justified by the evidence or in conformity with the law." *Manpower, Inc. v. Comm'r of Revenue*, 724 N.W.2d 526, 528 (Minn. 2006) **[**6]** (citing Minn. Stat. § 271.10, subd. 1 (2006)). We "will affirm the tax court when, after an independent review of the record, there is sufficient evidence in the record upon which the tax court could have reasonably based its conclusion." *Care Inst., Inc.-Maplewood v. County of Ramsey*, 576 N.W.2d 734, 738 (Minn. 1998). As a result, we give great deference to the tax court's determination whether an organization qualifies as a purely public charity, so long as that determination is reasonably supported by the evidence. *Id.* We review the tax court's legal conclusions de novo. *Nw. Racquet Swim & Health Clubs, Inc. v. County of Dakota*, 557 N.W.2d 582, 586 (Minn. 1997).

In this case, the tax court analyzed the six factors listed in our decision in *North Star*:

> *HN4*(1) whether the stated purpose of the undertaking is to be helpful to others without immediate expectation of material reward; (2) whether the entity involved is supported by donations and gifts in whole or in part; (3) whether the recipients of the "charity" are required to pay for the assistance received in whole or in part; (4) whether the income received from gift and donations and charges to users produces a profit to the **[*885]** charitable **[**7]** institution; (5) whether the

C - 148

> beneficiaries of the "charity" are restricted or unrestricted and, if restricted, whether the class of persons to whom the charity is made available is one having a reasonable relationship to the charitable objectives; (6) whether dividends, in form or substance, or assets upon dissolution are available to private interests.

N. Star,306 Minn. at 6, 236 N.W.2d at 757. The tax court found that Rainbow satisfied all of the factors except factor three and concluded that Rainbow qualified as an institution of purely public charity. As we will explain, we conclude that an entity cannot be an institution of purely public charity without satisfying *North Star* factor three, and therefore we reverse.

But first we add a note of caution against overly rigid reliance on the six *North Star* factors. Due in no small part to our own opinions, the *North Star* factors have come to be viewed as a multi-part test to be used in determining whether an organization is an institution of purely public charity. But we did not identify the six factors in *North Star* as the parts of a multi-faceted test. Rather, we simply explained that these were some of the factors we had assessed in **[**8]** previous cases when evaluating "organizations which were engaged in charitable undertakings in the traditional sense." *N. Star*, 306 Minn. at 5-6, 236 N.W.2d at 756-57. And, as pointed out recently by Justice Hanson, we did not indicate in listing the factors in *North Star* that they had all been used in combination in any of those previous cases. *Croixdale*, 726 N.W.2d at 492 (Hanson, J., concurring). Significantly, we found the six factors unhelpful in *North Star* itself, explaining that "[t]here are distinctive characteristics of North Star which make its situation so different from those of charities in the traditional sense that reference to general statements made in our previous cases are of limited value." *N. Star*, 306 Minn. at 7, 236 N.W.2d at 757. Thus, it should be apparent that *North Star* did not establish six mandatory elements that must be considered and satisfied in every charitable exemption case.

We explained the appropriate approach to the *North Star* factors in a contemporaneous case, *Mayo Foundation v. Commissioner of Revenue*, 306 Minn. 25, 236 N.W.2d 767 (1975). In *Mayo Foundation*, the Commissioner argued that our prior cases established seven prerequisites for granting **[**9]** tax exempt status as a charitable institution. *Id.* at 35-36, 236 N.W.2d at 772-73. We rejected the Commissioner's rigid approach, explaining:

> The factors identified by the commissioner are comparable to those set forth in the North Star Research case, and we agree that they are appropriate for the consideration of charitable status. However, the significant difference between the approach advocated by the commissioner and the one which we adopt lies in our view of the weight to be given to the individual factors. *The general language of our definitional statements and the identification of factors in our prior cases are only guides for analysis.* Each case must be decided on its own particular facts and it is not essential that every factor mentioned in our decisions be present before an institution qualifies for exemption.

Id. at 36, 236 N.W.2d at 773 (emphasis added). We have reiterated in subsequent cases the methodology described in *Mayo Foundation*: that the *North Star* factors are intended to serve only as guidelines, *e.g.*, *Cmty. Mem'l Home at Osakis, Minn., Inc. v. County of Douglas*, 573 N.W.2d 83, 86 (Minn. 1997); that not all factors must be satisfied to qualify for the exemption, **[**10]** *e.g.*, *Croixdale*, 726 N.W.2d at 488; and **[*886]** that each case must be decided on its own facts, *e.g.*, *Chateau Cmty. Hous. Ass'n v. County of Hennepin*, 452 N.W.2d 240, 242 (Minn. 1990).

Nevertheless, HN5 we have referred to all six *North Star* factors in virtually every subsequent case in which the charitable exemption was at issue, and we have recently described the factors as a "six-factor test," *Croixdale*, 726 N.W.2d at 488. As a result, we may have created the impression that all six factors must be examined in every case addressing the charitable exemption issue. But as *North Star* itself illustrates, that is not true. In the circumstances of a

C-149

particular case, one or more of the *North Star* factors may not be helpful in assessing whether an organization is an institution of purely public charity, and if that is true, those factors need not be analyzed. And if other analytical tools are more helpful in identifying whether an organization is an institution of purely public charity, those tools should be utilized.

The other side of this coin is that although we have often stated that not all of the *North Star* factors must be satisfied in order to qualify for the exemption, some of the factors are, **[**11]** indeed, essential. For example, regardless of the status of the other factors, we cannot envision an organization qualifying as an institution of purely public charity if it makes available to private interests either dividends, in form or substance, or assets upon dissolution, and thus fails to satisfy *North Star* factor six. *N. Star*, 306 Minn. at 6, 236 N.W.2d at 757. Here, the tax court found that Rainbow satisfied all the *North Star* factors except factor three, which examines the extent to which "the recipients of the 'charity' are required to pay for the assistance received in whole or in part." *Id.* at 6, 236 N.W.2d at 757. Relying on our statements that not every factor must be satisfied, the tax court concluded that even though factor three was not satisfied, Rainbow qualified as an institution of purely public charity.

Despite our statements that not all the *North Star* factors must be satisfied in order to qualify for the exemption, *HN6*in applying those factors we have never found an organization that did not satisfy factor three to be an institution of purely public charity. The factor three inquiry, the extent to which the recipients of the charity are required to pay for the **[**12]** assistance received, tests for a value that is fundamental to the concept of charity-that is, whether the organization *gives* anything away. Because this is a core characteristic of an institution of public charity, we now clarify that the third factor must be satisfied if an organization is to be deemed an institution of purely public charity.

*HN7*We must not lose sight of the fact that both the constitutional provision and the statute that we are applying authorize a tax exemption for institutions of purely public *charity*. Minn. Const. art. X, § 1; Minn. Stat. § 272.02, subd. 7. Although we have not developed a precise and all-encompassing definition of the term "charity," we have frequently relied on the following description, which, significantly, defines charity as a gift:

> The legal meaning of the word "charity" has a broader significance than in common speech and has been expanded in numerous decisions. Charity is broadly defined as a *gift*, to be applied consistently with existing laws, for the benefit of an indefinite number of persons by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting **[**13]** them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government.

[*887] *Junior Achievement of Minneapolis, Inc. v. State*, 271 Minn. 385, 390, 135 N.W.2d 881, 885 (1965) (emphasis added) (internal quotation marks omitted). We explained further in *Junior Achievement* that *HN8*not even every gift with a beneficent purpose necessarily qualifies as charity for these purposes: "it is not safe to say as a universal rule that any *gift* which tends to promote man's well-being is a charity." *Id.* at 390, 135 N.W.2d at 885 (emphasis added). We then quoted a Massachusetts decision that explained:

> It has come to be recognized that new objects must be added in order to comprehend within the class of charities a wide variety of *gifts* which represent a wholly generous and unselfish devotion of wealth to uses which benefit the public generally or whole classes of the public and from which the donor derives no personal advantage.

C-150

Id. at 391, 135 N.W.2d at 885 (emphasis added) (quoting *Boston Chamber of Commerce v. Assessors of Boston*, 315 Mass. 712, 54 N.E.2d 199, 202 (Mass. 1944)). Although each of these statements addressed the breadth of purposes that **[**14]** a charity may serve, the common thread was another element--one that is inherent in the common understanding of charity: that charity is a gift. Absent the element of a gift, we fail to see how an endeavor can be fairly characterized as a charity.

*HN9*By examining the extent to which "the recipients of the 'charity' are required to pay for the assistance received in whole or in part," factor three assesses whether the organization's operation confers a gift. *N. Star*, 306 Minn. at 6, 236 N.W.2d at 757. Therefore, if factor three is not satisfied, the organization cannot be found to be an institution of public charity. *See SHARE v. Comm'r of Revenue*, 363 N.W.2d 47, 52 (Minn. 1985) (although discussing other *North Star* factors, stating that "SHARE's charitable exemption claim is defeated by application of factor three" because "SHARE provides no service without a fee").

*HN10*Because the constitutional provision and the statute at issue here limit the exemption to institutions of purely public *charity*, it is not sufficient that an organization serves a worthwhile purpose, or even that it does so on a nonprofit basis. For example, in *SHARE* the organization's purpose was to "improve the availability **[**15]** and accessibility of quality of health care and health services," and it operated on a nonprofit basis, satisfying *North Star* factors one, four, and six. *Id.* at 51. We held that satisfaction of those three factors "does not itself qualify an institution as a 'purely public charity.' " *Id.*

This point illuminates the fundamental difference between our analysis and that of the dissent. The dissent believes that "the essence of a charity lies in the nature of the service provided" and therefore, "the question of whether an organization is a charity depends primarily on the nature of the service it provides." In contrast, we understand the essence of charity, as defined in our cases, to be the provision of the service as a gift to the recipient. The dissent instead sees the extent to which the recipients are charged for the service simply as a matter of the mechanism for funding the service, which "has limited materiality to the question of whether the organization is a charity." This primary emphasis on purpose and the concomitant marginalization of the gift factor allow the dissent to conclude that Rainbow could be deemed a purely public charity based simply on finding that (a) Rainbow's **[**16]** objectives "qualify as traditionally charitable," (b) it is "organized so that no individual can profit from ownership of its assets," and (c) it does not offer its services only to "a **[*888]** select and favored few."[1] This analysis would, in essence, hold that serving a worthwhile purpose and operating on a nonprofit basis is sufficient to exempt an organization from taxation as a "purely public charity." This interpretation of charity would expand the tax exemption far too broadly, for several reasons.

FOOTNOTES

1 Although the dissent explains that the tax court found Rainbow also satisfies the other *North Star* factors, except factor three, and would affirm on that basis, the dissent states that the analysis could end with the findings described in the text and "tax exemption should be recognized."

First, this expansive view of charity is contrary to the vast majority of our cases applying the exemption. The dissent relies on a passage in *North Star* in which we stated:

> The tendency of our decisions has been to sustain exemption where these traditionally "charitable" objectives are being furthered, so long as no individual profits from ownership of the "charity" are realized and so long as the undertaking **[**17]** is not a subterfuge by which the needs of a select and favored few are

C-151

accommodated.

306 Minn. at 6, 236 N.W.2d at 757. Although this language does, indeed, suggest reference to charitable "objectives" and lack of individual profits as bases for applying the exemption, the dissent extracts too much from this lone passage that is, because we did not rely on it in deciding *North Star*, only dicta. Limiting the inquiry to an entity's objectives and the nonprofit nature of its operations is not supported by the cases on which the passage presumably relies. No case is cited directly in support of the passage, either in *North Star* or by the dissent in this case. In *North Star*, the passage followed immediately the recitation of the six *North Star* factors, which in turn followed a listing of several "charitable undertakings in the traditional sense" and citations to cases in which they had been addressed. *Id.* at 5-6 & nn.4-8, 236 N.W.2d at 756-57 & nn.4-8. Of the five cases cited, only one could be said to lack the element of a charitable *gift*. See *Assembly Homes, Inc. v. Yellow Medicine County*, 273 Minn. 197, 140 N.W.2d 336 (1966), discussed below. Moreover, in numerous cases since *North Star* **[**18]** we have declined to exempt from taxation as purely public charities organizations that merely had traditionally charitable objectives and operated without profit to any individuals. See, for example, *SHARE*, 363 N.W.2d at 53 ("Although providing low cost health care on a non-profit basis is certainly worth encouraging, we are unable to conclude that it satisfies the requirements of that narrow charitable exemption."), and cases discussed below.[2]

FOOTNOTES

2 The dissent states that the six-factor *North Star* test was developed "to provide guidance in determining whether activities that were not traditionally viewed as being charitable could nevertheless qualify as charitable," perhaps implying that the alternative "objectives plus nonprofit" test is therefore the test appropriate for traditional charities. But as explained above, the six factors were listed in *North Star* as factors assessed in cases of *traditional* charities, and the court went on to conclude that the factors were inapplicable to the task of evaluating a non-traditional entity such as North Star.

Beyond its incompatibility with the actual rulings in our cases applying the charitable tax exemption, the dissent's broad interpretation **[**19]** of charity is contrary to the principle that tax exemptions must be construed narrowly. *See, e.g.*, *Camping & Educ. Found.*, 282 Minn. at 250, 164 N.W.2d at 372. Far from being narrow, this interpretation of charity would have expansive consequences in two obvious respects. First, any enterprise that serves a beneficial purpose and operates on a nonprofit **[*889]** basis would enjoy exemption from property taxes as a purely public charity. Indeed, the dissent's view would grant exemption from payment of property taxes to virtually any organization exempt from payment of federal income taxes under I.R.C. § 501(c)(3) (2000). [3] *HN11*If the legislature had intended all organizations exempt from payment of federal income taxes under I.R.C. § 501(c)(3) also to be exempt from payment of real property taxes, it could have so provided, as it did with regard to state income taxation. *See* Minn. Stat. § 290.05, subd. 2 (2006) (providing exemption from state income and franchise taxes for organizations exempt from federal income taxation under Subchapter F of the Internal Revenue Code, which includes section 501 (c)(3)). That it has not done so indicates that, in the legislature's view, there is a difference between **[**20]** an entity that qualifies for exemption from payment of federal income taxes because it does good works and from which its owners do not personally benefit, and an entity that qualifies for exemption from payment of property taxes as an institution of purely public charity. We have never treated an organization's tax-exempt status for federal income tax purposes as determinative of our inquiry. *See, e.g.*, *SHARE*, 363 N.W.2d at 50 (determinations of tax exemption for purposes of federal and state income taxation "are not controlling on the issue"); *Rio Vista Non-Profit Hous. Corp. v. County of Ramsey*, 277 N.W.2d 187, 189 (Minn. 1979).

C-152

FOOTNOTES

3 *HN12*Section 501(c)(3) exempts from payment of income taxes those entities "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition * * *, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual."

The second broad consequence of the dissent's interpretation of charity would be that a "charitable" enterprise could charge **[**21]** the same for its services as a for-profit competitor and nevertheless enjoy exemption from property taxation, as long as no profits inured to the benefit of members of the organization. This result flies in the face of our observation that *North Star* factor three "is intended to assess whether people will benefit from the organization's activities to an extent greater than if the organization were merely providing a service as part of the private market." *Skyline Pres. Found. v. County of Polk*, 621 N.W.2d 727, 733 (Minn. 2001).

The legislature and governor, not this court, should make the policy judgments that determine the scope of tax exemptions. *See State v. N. Star Research & Dev. Inst.*, 294 Minn. 56, 80, 200 N.W.2d 410, 425 (1972) ("We unhesitatingly concede that the legislature, rather than this court, should determine the policy of this state with regard to the exemption, if any, from taxes that corporations such as North Star should be given."). The dissent criticizes our focus on requiring a gift in order to find that an organization provides charity as diluting the goal of tax exemption. In the dissent's view, "[t]hat goal is to encourage charitable services because, as we **[**22]** observed in *North Star*, 'people will benefit in an economic sense from [a] charitable undertaking.' " We note that people benefit most from a charitable undertaking when they are not required to pay full value for the benefit received. Moreover, in our view the goal of the purely public charity exemption is to encourage and make more economically viable precisely the form of charity that confers benefit without demanding full payment. The legislature may, of course, choose to encourage other forms of economically or otherwise publicly beneficial **[*890]** endeavors by providing various forms of tax incentives, and it has done so. *See, e.g.*, Minn. Stat. § 272.02, subd. 13 (2006) (exempting from property taxation property used to provide emergency shelter for victims of domestic violence). But merely because an endeavor provides economic or other social benefit does not make it a charity. And, once again, those tax policy choices are appropriately left to the political branches.

*HN13*It is, thus, inherent in the concept of charity that there is a gift--that is, the services, goods, or whatever is conceived as the charitable benefit must be provided to the recipients of the charity without requiring **[**23]** them to pay full value for it.[4] Nevertheless, the expanded legal definition of charity that has evolved in the context of tax exemptions does not require that the charitable benefit be provided to all recipients entirely free of charge. Therefore, the third *North Star* factor has been refined to require that the charity be provided "free of charge, *or at considerably reduced rates*." *Cmty. Mem'l Home*, 573 N.W.2d at 87 (emphasis added). And the "considerably reduced rates" requirement has been described as meaning "considerably less than market value or cost." *Id.*

FOOTNOTES

4 The position we take here is not unique. For example, the Pennsylvania Supreme Court limited the definition of purely public charity to an entity that, among other things, "[d]onates or renders gratuitously a substantial portion of its services." *Hosp. Utilization Project v. Commonwealth*, 507 Pa. 1, 487 A.2d 1306, 1317 (Pa. 1985). The Pennsylvania legislature subsequently incorporated this requirement into one of the statutory criteria for an institution of purely public charity. 10 Pa. Cons. Stat. Ann. § 375(d)(1) (2007). The

C-153

Oregon Supreme Court similarly held that one of the required elements of a charitable institution exempt from **[**24]** payment of property taxes is that "the organization's performance must involve a gift or giving." *Sw. Or. Pub. Defender Servs., Inc. v. Dep't of Revenue*, 312 Ore. 82, 817 P.2d 1292, 1296 (Or. 1991). In *Utah County v. Intermountain Health Care, Inc.*, the Utah Supreme Court observed that an entity was exempt from property taxes "only if it meets the definition of a 'charity' or if its property is used exclusively for 'charitable' purposes." 709 P.2d 265, 269 (Utah 1985). An "essential element of charity is an *act of giving*." *Id.* The Utah court then adopted the following identifying features of a "gift": "either * * * a substantial imbalance in the exchange between the charity and the recipient of its services or * * * the lessening of a government burden through the charity's operation." *Id.* The Illinois Supreme Court similarly required that an entity exempt from payment of property taxes as a charitable institution, among other requirements, "dispense[] charity to all who need and apply for it, * * * not provide gain or profit in a private sense to any person connected with it, and * * * not appear to place obstacles of any character in the way of those who need and would avail themselves of the **[**25]** charitable benefits it dispenses." *Methodist Old Peoples Home v. Korzen*, 39 Ill. 2d 149, 233 N.E.2d 537, 542 (Ill. 1968).

Utilizing this standard, we held in *Rio Vista* that a private nonprofit entity providing housing to moderate and low income people was an institution of purely public charity entitled to the exemption. 277 N.W.2d 187, 192 (Minn. 1979). In *Rio Vista*, the corporation offered two rent levels, a basic level and a higher fair market level, but almost all of the tenants paid the basic rent and none was wealthy enough to pay the fair market rent. *Id.* at 188. Similarly, in *Worthington Dormitory, Inc. v. Commissioner of Revenue*, a community-based nonprofit organization provided rental housing for students at the local community college. 292 N.W.2d 276, 278 (Minn. 1980). This court reversed the ruling of the tax court that the organization was not a purely public charity for tax exemption purposes. *Id.* at 277. The court concluded that the students paid less than cost for the housing they received and that it was "doubtful" that the students paid "market rents," because they **[*891]** paid substantially less than the charges at comparable state-operated dormitory facilities. *Id.* at 281.

*HN14*While granting **[**26]** the exemption to organizations that charged considerably less than market prices, we have consistently denied the exemption from property taxes to entities that charged recipients of their "charity" substantially market rates, even where some fees were discounted or forgiven. In *Chateau Community Housing*, the organization seeking the charitable exemption provided student and faculty housing on a nonprofit basis. 452 N.W.2d 240, 243 (Minn. 1990). We found that Chateau provided no scholarships or rent assistance to needy students, that students were evicted for nonpayment of rent, and that in contrast to the discounted rental rates in *Rio Vista* and *Worthington*, Chateau charged rents comparable to private housing and considerably higher than university-owned housing. 452 N.W.2d at 243-44. As a result, we affirmed denial of the purely public charity exemption. *Id.* at 244.

Similarly, in *SHARE*, we affirmed denial of the purely public charity exemption to a health maintenance organization. 363 N.W.2d 47, 48 (Minn. 1985). The HMO, SHARE,provided no services without a fee, except for a one-time short-term project, and had no policy to provide substantial discounts to those for whom cost of treatment **[**27]** would be an unreasonable burden. *Id.* at 52. Rather, HMO membership would be discontinued if an individual could not pay the full monthly fee. *Id.* In addition to assessing the other *North Star* factors, we declared that "SHARE's charitable exemption claim is defeated by application of factor three--whether recipients of the charity are required to pay for the assistance in whole or in part." *Id.* The fact that some of the HMO members were participants in Medicare whose fees were largely paid by that federal program did not change our assessment. *Id.* at 49, 52-53.

In *Chisago Health Services v. Commissioner of Revenue*, we affirmed the tax court's rejection of the purely public charity exemption for a health clinic that furnished outpatient services at

C-154

market level fees. 462 N.W.2d 386, 387 (Minn. 1990). We explained that the clinic claimed to have an open door policy, but all patients were billed for medical services, and the clinic simply wrote off the bills as uncollectible if a patient was unable to pay. *Id.* at 388. The clinic accepted payment at reduced rates from Medicare and Medicaid, but we declined to view the discounted payments as an extension of charity to the patients by the **[**28]** clinic. *Id.* at 388, 391. Rather, we agreed with the tax court's ruling that there was no difference between those Medicare and Medicaid discounts and the business discounts negotiated by HMOs and health insurers with other public and private clinics and hospitals. *Id.* at 391. Likewise, we endorsed the tax court's conclusion that writing off a small number of uncollectible accounts was not charity but merely a business practice similar to that of other health care providers. *Id.*

Community Memorial Home was another case in which we affirmed the tax court's denial of the purely public charity exemption for an organization that charged essentially market rates. 573 N.W.2d 83, 85, 87 (Minn. 1997). *Community Memorial Home* involved an assisted living facility that attempted to satisfy factor three by showing that it lost money each year. *Id.* at 87. We rejected that argument, pointing out that the losses could be caused by numerous factors. *Id.* The facility also relied on the fact that it accepted grant payments from the county for some residents at less than full rent, but we remarked that the facility had not **[*892]** shown that "acceptance of referrals from Douglas County is anything more than a **[**29]** business decision to fill empty rental units." *Id.* at 88. We concluded that "[t]he record is devoid of evidence demonstrating that [the organization's] intended purpose is to provide housing and services for the economically disadvantaged or that it will continue to do so in the future." *Id.*

In summary, these cases establish that*HN15* to qualify for the exemption from property taxes as an institution of purely public charity an organization must provide its "charity" to recipients free of charge or at considerably reduced rates. Moreover, it is not sufficient to provide free or reduced-rate goods or services on such a small scale that they are merely an incidental part of the organization's operations. Nor will free or reduced-rate goods or services that are provided primarily for business purposes be adequate. The organization must demonstrate that its intended purpose is to provide a substantial proportion of its goods or services on a charitable basis. If the organization does not operate on these terms, it is indeed not an institution of purely public charity and cannot qualify for tax exemption on that basis.

We now apply these principles to the case at hand. The tax court found that **[**30]** Rainbow did not satisfy factor three, and we agree. We differ with the tax court in two respects, however. First, the tax court's finding that Rainbow's tuition was "at or just below market rates" is not supported by the evidence. Second, and more importantly, because we hold, for the reasons discussed above, that satisfaction of the third *North Star* factor is essential to qualify as a purely public charity, the tax court's conclusion that Rainbow qualified as an institution of purely public charity despite failing to satisfy factor three is an error of law.

We first address the tax court's factual finding that Rainbow's tuition was "at or just below market rates." The memorandum accompanying the tax court's findings of fact and conclusions of law lists child care rates that the court characterizes as "representative of the child care rates in Goodhue County as of July 1, 2006." It was against these "representative" rates that the court compared Rainbow's rates and concluded that Rainbow's rates were "at or just below market rates." But these "representative" rates come from an exhibit introduced by the county that in fact lists the *maximum* child care rates that Goodhue County is authorized **[**31]** to pay. [5] Rainbow's child care rates are indeed generally less than the county's maximum authorized rates. [6] But there is no evidence that the maximum authorized rates are actual market rates. [7]

FOOTNOTES

C-155

5 HN16 Minnesota Statutes § 119B.09, subd. 1 (2006), requires the state to make child care services available "to families who need child care to find or keep employment or to obtain the training or education necessary to find employment" and who qualify financially. Minnesota Statutes § 119B.13, subd. 1(e) (2006), authorizes the Commissioner of Human Services to set out on a county-by-county basis the maximum rates that may be paid for child care from program funds. Under section 119B.13, subds. 1(e) and (f), the county pays the child care provider's full charges up to the maximum; the parent is responsible for payment of the provider's charges in excess of the maximum the county will pay.

6 For example, Goodhue County's maximum daily rate in 2006 for full-day infant child care was $ 49.82, but Rainbow's rate was $ 34.00. Similarly, Goodhue County's maximum rate in 2006 for weekly toddler child care was $ 151.58, but Rainbow's rate was $ 127.00.

7 The dissent concludes that the county's maximum authorized **[**32]** rates "are actually below market rates" because "[w]hen Rainbow commenced operations at the subject property in 2003," the maximum rates had been frozen by legislative action at 2002 levels. Rainbow provided no evidence and there is none in the record of the relationship between the county's maximum rates and actual rates charged other than the evidence concerning the other two child care centers in Red Wing. There is, then, no basis in the record from which the dissent's conclusion can be drawn. Regardless of how the county's maximum authorized rates were set, the record is clear that rates at the three competing child care centers in Red Wing were significantly less than the county's maximum authorized rates across all categories of care. Again, compared to the only market of which there is any evidence in this record, the county's maximum authorized rates are not below market rates.

[*893] A different exhibit lists the actual rates charged by child care centers in Red Wing in 2006. According to that exhibit, Rainbow's 2006 weekly rates were generally higher than the rates of the other Red Wing child care centers. Rainbow's weekly rates were higher than both of the other child care centers **[**33]** in Red Wing for infants, toddlers, and preschool children, who constituted 55 of Rainbow's 70-child licensed capacity. For school age children, Rainbow's weekly rates were lower than those of one center, but higher than those of the other. But school age children occupied only 15 of Rainbow's 70 licensed spots. Thus, when Rainbow's rates are compared to actual market rates, the tax court's finding that Rainbow's rates were "at or just below market rates" during the years in question is not supported by the evidence. Rather, Rainbow's weekly rates were for the most part above market rates.

The dissent questions whether there is sufficient evidence in this case to establish the "market" for child care services in Red Wing. But the burden fell squarely on Rainbow, as the entity seeking the exemption, to prove that its rates were substantially less than either market or cost and therefore the burden fell squarely on Rainbow to provide evidence of the "market" against which its rates should be compared. The evidence Rainbow offered of market rates for child care were its own and those of the two other child care centers located in Red Wing. Rainbow's executive director testified that Rainbow **[**34]** sets its child care rates "[s]o we are running average with everybody else in the area."

The dissent argues that the only "true 'market rates' are those that would be charged by a for-profit corporation" and, because there were no for-profit child care centers in Red Wing County, "there is no evidence of a true market rate." Noting that the other two child care centers in Red Wing are, like Rainbow, nonprofit organizations, the dissent raises what could be legitimate questions in the proper case about measuring against the "market" if the "market" comprised entirely charitable enterprises. But even assuming a more appropriate market rate would be that charged by for-profit entities, the evidence presented by Rainbow as to the "market" shows that it comprises three nonprofit entities, of which Rainbow's weekly rates are generally the highest. 8 Rainbow met its burden to show what the market rates were

C-156

by comparing its rates to its competitors, but did not meet its burden to show its rates were substantially below those market rates.

FOOTNOTES

8 The dissent suggests that comparison to other providers' rates should take into account differing cost levels. For example, noting that Rainbow is larger **[**35]** than its two competitors, the dissent concludes, "[a]s a result, one would expect that Rainbow would have greater space and staff needs, with correspondingly greater insurance costs." But Rainbow introduced no evidence of greater space or staff needs or the presumed associated greater costs.

The dissent further posits that, regardless of whether Rainbow's child care rates are less than market rates, Rainbow still **[*894]** satisfies *North Star* factor three because its child care rates are less than its costs. The dissent opines that "[t]here is no dispute that Rainbow's rates are below cost, because it has operated at a loss in every year of its existence." But we have rejected a bright line test that would equate simply operating at a loss with operating a charity. We held that *HN17* the fact that an entity operates at a loss is not sufficient to satisfy the third *North Star* factor, *Community Memorial Home*, 573 N.W.2d at 87, because revenues may not cover costs for a variety of reasons, "not necessarily because the facility intends to charge a below-cost rent." *Care Inst., Inc.-Roseville v. County of Ramsey*, 612 N.W.2d 443, 449 (Minn. 2000). There is no evidence in this record that Rainbow deliberately **[**36]** charged below-cost rates during the years at issue. Indeed, the record before us--consisting of little more than Rainbow's federal tax information returns--is not sufficient to support any conclusions as to why Rainbow operates at a loss.

Further, even if we were to accept that Rainbow's rates are below cost, precedent requires Rainbow's rates to be "considerably less" than cost "as a means of proving that [rates] were established for the stated charitable purpose rather than for purely business reasons." *Croixdale*, 726 N.W.2d at 488. The dissent presents a comparison of Rainbow's revenues and operating expenses in an effort to demonstrate that Rainbow's rates are "sufficiently below cost to meet the factor three test," but the dissent's comparison is flawed. For Rainbow's "operating expenses," the dissent relies on "total expenses" reported by Rainbow on its federal tax information returns for the years at issue. Indeed, that is the only evidence of expenses in the record before us. But for Rainbow's "revenues from rates," the dissent relies on a schedule prepared by Rainbow for the purpose of arguing that it received substantial contributions (in the form of government payments, gifts, **[**37]** and volunteer labor) in the years in question as a percentage of "total enrollment billed." There was no testimony at trial as to how "total enrollment billed" was calculated or what it includes or excludes. We think a more appropriate comparison for this purpose is between Rainbow's "total expenses," as reported on its federal tax information returns, and "program service revenue," as reported on those same federal tax information returns. That comparison shows that Rainbow's rates were not significantly less than cost in the years at issue-and, in fact, were in one instance more than cost:

	2003	2004	2005
Program Service Revenue	$ 415,627	$ 488,457	$ 513,821
Total Expenses	$ 430,390	$ 480,930	$ 525,211
Excess (Deficit) for the Year	($ 14,763)	$ 7,527	($ 11,390)
Excess (Deficit) as a Percentage of Program	(3.55%)	1.54%	(2.29%)
Service Revenue			

C-157

These results are consistent with an organization that is a nonprofit under both Minn. Stat. ch. 317A and I.R.C. § 501(c)(3), but not with an organization that is "so organized and operated that its commercial activities are subordinate to or incidental to any possible charitable activities." *Mayo Found.*, 306 Minn. at 36, 236 N.W.2d at 773.

Turning to the larger issue **[**38]** of whether Rainbow qualifies as an institution **[*895]** of purely public charity, the case before us fits the pattern of the cases in which the exemption has been denied, especially the *Chisago Health Services* and *Community Memorial Home* cases. Rainbow sets its rates at or above market level and charges all the recipients of its services at those rates. Rainbow makes no accommodations for those who are unable to pay the full rates. The tax court found that Rainbow "offers no scholarships" and "retains the right to dismiss a child in the event that families are unable to afford fee payments," findings that Rainbow does not challenge. [9] It is clear that, as the tax court correctly concluded, Rainbow does not satisfy the third *North Star* factor. It is equally clear that Rainbow does not provide any services on a charitable basis and cannot therefore qualify as an institution of purely public charity.

FOOTNOTES

9 The dissent cites testimony of Rainbow's executive director that Rainbow provided services to some children for no or lower fees and wrote off "several thousands of dollars in unclaimed child care payments every year." Without further explanation or evidentiary support, which is entirely absent, there **[**39]** is no way to know the actual circumstances of those write-offs. The write-offs could be based merely on uncollectible billings, which this court refused to consider as charity in *Chisago Health Services*, 462 N.W.2d at 391. Moreover, even if the write-offs represented lowered rates for low income families, "several thousands of dollars" is hardly indicative of a purpose to provide services on a charitable basis when compared to Rainbow's annual program services revenues in excess of $ 400,000.

Rainbow's acceptance of government payments for some of its clients does not change this conclusion. It is true that more than 20% of the fees received by Rainbow are paid by county or tribal governments for families that cannot afford to pay the full rates themselves. But our cases make it clear that the receipt of government payment of fees on behalf of some of the client families does not transform Rainbow's fee-for-services operation into a charity. In *Community Memorial Home* and *Chisago Health Services*, we did not consider even the acceptance of *discounted* rates paid for participants in government programs as evidence of a charitable endeavor. *Cmty. Mem'l Home*, 573 N.W.2d at 87; *Chisago Health Servs.*, 462 N.W.2d at 391. **[**40]** Rather, in *Community Memorial Home* we looked to the purpose of the organization and found no evidence of overall intent to serve the disadvantaged on a charitable basis. *Cmty. Mem'l Home*, 573 N.W.2d at 88; *see also Chisago Health Servs.*, 462 N.W.2d at 391-92. [10]

FOOTNOTES

10 In contrast, in *Rio Vista*, where government rent subsidies for some families appear to have been considered by the court in making its determination, the overall purpose of the corporation was to provide housing to people of low to moderate means, and the overall rental rate structure was well below market value. 277 N.W.2d at 188, 191-92.

Here, the same is true of Rainbow. Although Rainbow accepted government payments, it offered no discount for participants in the government programs. Therefore, this did not represent charity provided by Rainbow to these families, because Rainbow was fully

C-158

compensated for the services it provided. As in *Community Memorial Home*, there is no evidence that Rainbow's intended purpose was to provide day care to the economically disadvantaged; rather, Rainbow's purpose was to provide day care to those who could pay, either on their own or through government subsidy.

We are aware of only one case--*Assembly* **[**41]** *Homes*--in which the purely public charity exemption was granted to an organization that charged a market rate fee to all and some of those fees were paid by **[*896]** government programs. 273 Minn. 197, 140 N.W.2d 336 (1966). In *Assembly Homes* we held a nursing home was exempt from property taxation as a purely public charity, even though we found that its rates, which were paid for some patients by county welfare boards and the U.S. Veterans Administration, were "similar to the rates charged generally in the State of Minnesota by nursing homes." *Id.* at 201, 204, 140 N.W.2d at 339, 341. The case predated *North Star*, so there was no discussion of the *North Star* factors, and it is not entirely clear which characteristics determined the court's ruling. It is noteworthy that the court quoted and apparently relied on a case in which it stated, "It is not thereby meant that the institution must dispense charity or that it may not charge a fee for services rendered." *Assembly Homes*, 273 Minn. at 204, 140 N.W.2d at 341 (quoting *State v. Browning*, 192 Minn. 25, 29, 255 N.W. 254, 256 (1934)). But the *Browning* case involved the "public hospital" tax exemption, not the purely public charity exemption. 192 Minn. at 26, 255 N.W. at 254. **[**42]** Some of the court's language in *Assembly Homes* suggested that all that was necessary to qualify for the purely public charity exemption was to serve a public, benevolent purpose on a nonprofit basis. To the extent that *Assembly Homes* stood for the proposition that an organization can be a purely public charity without providing goods or services free or at considerably reduced rates or can qualify for the exemption merely by serving a benevolent purpose on a nonprofit basis, it has been implicitly overruled by numerous subsequent cases discussed above, and today it is explicitly overruled to that extent.

In summary, *HN18*there must be a substantial charitable, or gift, component to an organization's operation in order to qualify as an institution of purely public charity. That means the organization must provide a substantial proportion of its goods or services free or at considerably reduced rates. For that reason, if an organization does not satisfy the third *North Star* factor, it cannot qualify for tax exemption as an institution of purely public charity.

Applying these principles to this case, we hold that the tax court erred as a matter of law in concluding that Rainbow qualified for **[**43]** tax exemption as an institution of purely public charity during the years at issue despite failing to satisfy the third *North Star* factor. Because Rainbow did not prove that it provided child care services free or at substantially less than market rates or cost during 2004 and 2005, it was not an institution of purely public charity during those years and its property was not exempt from taxation. We therefore reverse the tax court's decision.

II.

Because Rainbow failed to meet a threshold condition for qualification as an institution of purely public charity, we need not address any other aspects of the tax court's decision. However, we address the tax court's treatment of payments made to Rainbow by various counties and by the Prairie Island Tribal Community in order to provide guidance to the tax court and to the parties in future cases, particularly in light of the dissent's view that those payments could be treated as donations.

Rainbow received payments from various counties for care of children whose families qualified for child care assistance. Rainbow also received payments from the Prairie Island Tribal Community for care of children of its members. The tax court characterized **[**44]** these payments, amounting to at least 20% of Rainbow's operating resources in each of the tax years in question, as "public donations" and concluded **[*897]** on that basis that factor two

C-159

of the *North Star* analysis weighed in favor of status as an institution of purely public charity. Because these payments were made for services rendered by Rainbow to qualifying families, they should not have been classified as donations or contributions to Rainbow.

More than 40 years ago, in *Assembly Homes,* we held a nursing home to be exempt from property taxes as an institution of public charity whose "charges for services are paid for by individual patients, by county welfare boards, and by the U.S. Veterans Administration." 273 Minn. at 204, 140 N.W.2d at 341. But we did not explicitly characterize the payments from the county and federal governments as donations or gifts. In *Rio Vista*, we again addressed the status of an entity that received government payments. In that case, which involved a nonprofit corporation established to provide low-rent housing to families with low and moderate incomes, there were two different types of government payments. *Rio Vista*, 277 N.W.2d at 188. First, the facility was **[**45]** constructed under a federal housing program known as "section 236," under which the federal government guaranteed the construction loan. *Id.* Rio Vista made the principal payments on the loan and interest payments at the rate of one percent; the federal government paid to the lender the difference between the interest rate charged by the bank (seven percent) and the interest paid by Rio Vista. *Id.* Second, the federal government subsidized the rents of qualifying low-income tenants. *Id.* at 188-89. We agreed that the government assistance provided to Rio Vista qualified as "donations," noting that Rio Vista owed its "very existence" to the government's guarantee and funding of the low-interest construction loan and "significant rent assistance." *Id.* at 190-91. We stated that "[t]he fact that the donor is the Federal Government and not a private institution does not preclude a determination that Rio Vista is supported in part by donations." *Id.* Again, we did not distinguish between the government's interest subsidy and its rent subsidy.

But since *Rio Vista*, we have declined, both explicitly and implicitly, to classify government payments as "donations" when, like the rent subsidies in *Assembly* **[**46]** *Homes* and *Rio Vista*, they are direct payments for goods or services. [11] In *Chisago Health Services*, the health care clinic argued that it was exempt from payment of property taxes in part because it received 26 percent of its revenues from Medicare and Medicaid payments, monies the clinic argued should be counted as donations. 462 N.W.2d at 391. We declined to extend "the *Rio Vista* rationale" to treat the government's payments as donations, noting that "the government's payments under the Medicare and Medicaid programs are more accurately characterized as payments for services rendered, not as donations." *Id.* In *SHARE*, the fees charged by the health maintenance organization to its members covered by Medicare were largely paid by the Federal Health Care Financing Administration, but we did not characterize the federal agency's payments as donations, although federal grants awarded to the HMO to establish a health care program for low-income patients were treated as support from donations. 363 N.W.2d at 49-51. In *Community Memorial Home*, the rents of more than half of **[*898]** the nursing home's residents were paid, in whole or in part, through grant programs administered by the county. 573 N.W.2d at 85. **[**47]** Again, we did not treat the county's payments as donations. *Id.* at 87 (concluding that the taxpayer had not sustained its burden of proof to show that it was supported by charitable donations despite accepting payments to care for county residents at less than market rates because the decision to do so "appears to be a business decision" designed to reduce the number of empty rental units).

FOOTNOTES

11 In addition, we note that after *Rio Vista* the legislature amended the charitable tax exemption provision to expressly state that government rent assistance and financing assistance provided for low-income housing are not gifts or donations to the owner. *See* Minn. Stat. § 272.02, subd. 7 (2006).

To the extent any uncertainty remains as to the appropriate treatment of government

C-160

payments, we hold that HN19 when the government pays directly for goods or services on behalf of one of its citizens, the payment is not considered a gift or donation for purposes of determining whether the entity providing the goods or services is exempt from property taxation as an institution of purely public charity.

Reversed.

DISSENT BY: HANSON, PAGE, MEYER

DISSENT

HANSON, Justice (dissenting).

I respectfully dissent. I would affirm the well-reasoned **[**48]** decision of the tax court and hold that Rainbow qualifies for tax exempt status as an institution of purely public charity under Minn. Const. art. X, § 1 and Minn. Stat. § 272.02, subd. 7 (2006).

I appreciate the caution stated by the majority that we are not to apply an "overly rigid reliance on the six *North Star* factors," and I agree with the majority's criticism of some of our past cases for having done so. But I am disappointed that, ultimately, the majority does not heed that caution and, instead, regresses to a strict application of just one of the six *North Star* factors--relying on some of the very decisions that have fostered confusion.

More specifically, I do not agree that *North Star* factor three--"whether the recipients of the 'charity' are required to pay for the assistance received in whole or in part"--trumps all other factors. *N. Star Research Inst. v. County of Hennepin*, 306 Minn. 1, 6, 236 N.W.2d 754, 757 (1975) To the contrary, I believe that the question of whether an organization is a charity depends primarily on the nature of the service it provides and only secondarily on the type of funding mechanisms it uses to support that service. Because factor three addresses **[**49]** only one of many funding mechanisms that may be used by a nonprofit organization, it has limited materiality to the question of whether the organization is a charity.

Even if we were, for the first time, to give factor three such overwhelming importance, I believe that the majority has incorrectly applied that factor by focusing only on market rates and not cost. First, I do not believe that any true market rates can be determined for Goodhue County. Second, our cases allow the taxpayer to prove factor three on the basis of either market or cost, and Rainbow has proven that its rates are well below cost.

1. How should the *North Star* factors be used?

As I argued in the concurring opinion in *Croixdale, Inc. v. County of Washington*, the six factor test of *North Star* was designed to provide guidance in determining whether activities that were not traditionally viewed as being charitable could nevertheless qualify as charitable. 726 N.W.2d 483, 492 (Minn. 2007) (Hanson, J., concurring). In *North Star*, we observed that, although an assessment of organizations that deal with traditional charitable **[*899]** undertakings could be made by use of the six factors,

> [t]he tendency of our decisions has been to **[**50]** sustain exemption where these traditionally "charitable" objectives are being furthered, so long as no individual profits from ownership of the "charity" are realized and so long as the undertaking is not a subterfuge by which the needs of a select and favored few are accommodated.

N. Star, 306 Minn. at 6, 236 N.W.2d at 757.

C-161

There is no doubt that the objectives of Rainbow qualify as traditionally charitable. In *North Star* we identified traditional charitable undertakings as including "education of young people" and the promotion of the "moral and educational welfare of youth." *Id.* at 5-6, 236 N.W.2d at 756-57. Rainbow's articles of incorporation state that Rainbow is "organized exclusively for charitable, scientific, literary, or educational purposes within the meaning of section 501(c)(3) of the Internal Revenue Code" and that the specific purposes of Rainbow are "to provide care of children away from their home within the meaning of section 501(k) of the Internal Revenue Code." One Rainbow witness expanded on these purposes by explaining that Rainbow is engaged in providing for "healthy development of young children so that they can be successful in school and later in life" and providing **[**51]** a "safe environment for children to be in when the[ir] parents are working." That witness also explained that the government placed a high value on child care services, because a small investment in child care assistance to low income families will produce a high social and economic return, allowing the parents to have consistency of employment, pay taxes, and contribute to the community, while assuring parents that their children are safe and are engaged in appropriate developmental activities. From this I conclude that Rainbow is surely providing services that are traditionally regarded as "charitable."

Further, Rainbow is organized so that no individual can profit from ownership of its assets. Although persons in control of some nonprofits may have abused the nonprofit status by extracting excessive salaries and benefits, that clearly has not occurred at Rainbow--where the Executive Director drew a salary of only $ 29,000 in 2005. [1] Although Rainbow has acquired some assets, those assets may only be used for the benefit of its charitable services and, on dissolution, they could not go to benefit any individual but must be transferred to another tax-exempt charity. And although some **[**52]** nonprofits may have also abused their nonprofit status by offering their services to only a select and favored few, that clearly has not occurred at Rainbow-where the public is welcome on a nondiscriminatory basis, with no restrictions on who can use the services. In fact, a significant percentage of the parents whose children are served at Rainbow are low income and qualify to receive county assistance. Although Rainbow works with low income parents to help them obtain public assistance, it also provides service to some children with no or lower fees. The statement in the tax court decision and the majority opinion that Rainbow "offers no scholarships" may be semantically true, but the uncontradicted testimony of Rainbow's Executive Director was that Rainbow has taken children without payment or for payment lower than the going rate, and that Rainbow writes off "several thousands of dollars in unclaimed child care payments every year."

FOOTNOTES

1 The Executive Director's salary in 2003, the first year at the subject property, was $ 43,000 and in 2004 was $ 23,000.

[*900] Under *North Star*, the analysis could end right there and tax exemption should be recognized. But the tax court did not end the analysis **[**53]** there. The court made a thorough and reasoned review of all of the *North Star* factors. The tax court found that Rainbow was a nonprofit corporation that is exempt from federal and state income taxes; has not realized a profit in any year; meets its expenses by multiple funding mechanisms that include fees, grants, fundraisers, cash and in-kind donations of labor, and government payments; pays reasonable, non-excessive compensation to its employees; provides services to the general public, including low income families; uses its resources to provide benefits equally to all of the users of its services; and provides a service that has been recognized by the state as being important--increasing the availability of affordable child care services for low income families. The tax court found that Rainbow satisfied all but factor three and granted tax exemption. [2] The tax court's decision is persuasive and should be affirmed.

C-162

FOOTNOTES

2 As discussed below, I conclude that the tax court applied factor three too narrowly and that factor three was also met. But even if factor three was not met, the grant of tax exemption is appropriate based on the other five factors.

The majority opinion considers only **[**54]** factor three-whether the recipients of the service pay a fee-to be fundamental to the concept of charity. But, as *North Star* established years ago, the essence of a charity lies in the nature of the service provided, not in the funding mechanisms used to support that service. [3] The payment of fees for a charitable service is but one funding mechanism. Indeed, many charities are well advised to increase the portion of their funding that is self-supporting so they can avoid both the uncertainty of private donations and the time and effort required to obtain them. Rainbow's Executive Director testified that it limited its requests for private donations to two annual fundraising events because it was concerned that it not "burn out [its] participants because there are so many fundraisers [for] schools and extracurricular programs" and it hoped to reduce the time spent fundraising so that it could maximize the time spent serving the children.

FOOTNOTES

3 Even the county's witness, a former assessor, acknowledged that the "charity" that low income families receive from Rainbow is the service it provides.

By focusing only on the fact that a charity charges a fee, the majority dilutes the goal of tax exemption. **[**55]** That goal is to encourage charitable services because, as we observed in *North Star*, "people will benefit in an economic sense from [a] charitable undertaking" that, among other things, provides an education that will enable a young person to "add more to the well-being of a society than one who is not so advantaged." 306 Minn. at 7, 236 N.W.2d at 757. A charitable undertaking can only contribute to the well-being of society if it has adequate funding to support its operations. From this perspective, it should not matter whether that funding is in the form of fees, grants, private donations, public payments or some combination of these. The state's legitimate concern with the use of fees for part of the funding is that it not produce excessive earnings, support excessive compensation, or enable the organization to serve a select and favored few. The record does not provide any basis for having those concerns about Rainbow.

2. What are "considerably reduced rates"?

The majority opinion states that a charity must "provide a substantial proportion **[*901]** of its goods and services" to recipients "free of charge or at considerably reduced rates." The majority opinion then reduces that principle **[**56]** to a simple formula that compares Rainbow's published rates to the rates of two other child care centers to establish a "market rate."

None of our prior decisions gives such prominence to factor three. Instead, our decisions recognize factor three as only one part of a multipart test. Further, those cases have identified two *alternative* measures to satisfy factor three-market or cost. *E.g., Croixdale, Inc.*, 726 N.W.2d at 494. We have generally framed factor three in terms of whether recipients receive services at a rate "considerably less than market value or cost." *Cmty. Mem'l Home at Osakis, Minn., Inc. v. County of Douglas*, 573 N.W.2d 83, 87 (Minn. 1997) (internal quotation marks omitted).

C-163

There is no dispute that Rainbow's rates are below cost, because it has operated at a loss in every year of its existence. Further, I would conclude that Rainbow's rates are also below the market value of its services.

A. What are "market rates"?

We must be candid about the artificiality of any determination of "market rates" for Goodhue County. Rainbow provides services in Red Wing, where only three child care centers had been licensed on the assessment dates for the tax years in question. [4] This **[**57]** is a small sampling for establishing a "market." Further, all three are nonprofit, tax-exempt organizations. This raises several questions about the validity of determining market rates by simply comparing the rates of other child care centers. For example, if all three were to charge equal rates, would all three be denied tax exemption because none could meet the majority's requirement that its rates be "considerably below market"? And, should the "market rate" be based on the actual rates charged by nonprofit organizations, which (like Rainbow) typically operate at low cost, benefiting from volunteer labor and donations to cover part of their expenses? If one nonprofit organization is able to subsidize its rates by private donations, do those subsidized rates nevertheless represent the "market"? Can we say that a rate is at "market" if it does not recover even the low nonprofit operating expenses, the organization operates at a loss, and the organization can only stay in operation because it receives private donations to make up the shortfall in operating income?

FOOTNOTES

4 A fourth center was added in 2006, after those tax assessments.

Perhaps the true "market rates" are those that would be **[**58]** charged by a for-profit corporation. But Red Wing did not have any for-profit child care centers and thus there is no evidence of a true market rate.

Finally, any comparison of rates of other providers should make adjustments for the differing cost levels incurred by each operation and, perhaps more importantly, differences in the type and quality of the services each provides. Rainbow is slightly larger than one of the day care centers and nearly twice as large as the other. And the next largest center has the benefit of being located in a church facility. As a result, one would expect that Rainbow would have greater space and staff needs, with correspondingly greater insurance costs.

Further, Rainbow's staff is capable of providing a greater range of services. As the Executive Director of the Child Care Resource's Referral Program testified, Rainbow has both English- and Spanish-speaking staff, whereas the other two centers have only English-speaking staff. He **[*902]** confirmed that this was an important factor with the growing Hispanic population. Further, he explained that Rainbow's staff has training and experience to serve a greater range of special needs. This witness also emphasized **[**59]** that Rainbow's infant care program is larger, being licensed for up to 16, while each of the other two were only licensed for up to 8. He explained that there is always a shortage of infant care because it is more expensive to provide and brings in less revenue due to the higher ratio of care givers to each infant.

Given these differences between the type and quality of the services provided, the rates of the other two centers cannot fairly be said to represent the market rate for Rainbow. Even so, Rainbow's rates compare favorably to them. Its hourly and daily rates are at or below the other two in every age category. Although its weekly rates are somewhat higher in some categories, this only reflects a difference in the degree of discount given to parents who are able to commit to full weeks.

C-164

The majority does recognize that Rainbow's rates are less than the county's maximum authorized rates but questions whether the tax court was correct in concluding that the county's maximum rates represent "actual market rates." I **[**60]** conclude that the county's maximum authorized rates are actually below market rates and that this would support the conclusion that Rainbow's rates were well below market.

The maximum rates for Goodhue County provided in the record are those effective July 1, 2006. Those rates were established through a rather tortured process. When Rainbow commenced operations at the subject property in 2003, the maximum rates were frozen at 2002 levels. Act of June 5, 2003, ch. 14, art. 9, § 34, 2003 Minn. Laws 1st Spec. Sess. 1751, 2137-38. Those rates remained frozen at 2002 levels through June 30, 2005. *Id.* Then, in 2005, the legislature set the maximum rates for the period July 1, 2005, through December 31, 2005, for counties like Goodhue at the greater of the 100th percentile of the rates shown in a 2002 provider rate survey or the rates identified in Department of Human Services Bulletin No. 03-68-07. Act of July 14, 2005, 1st Spec. Sess., ch. 4, art. 3, § 1, 2005 Minn. Laws 2454, 2525-26 (codified at Minn. Stat. § 119B.13, subd. 1(a) (Supp. 2005)). Commencing January 1, 2006, the maximum rates were increased to the lesser of the 75th percentile for like-care arrangements in the county or the **[**61]** previous year's rates for like-care arrangements increased by 1.75 percent. *Id.* In 2006, the legislature increased the maximum rates in counties like Goodhue to the rates for like-care arrangements in the county effective January 1, 2006, increased by six percent. Act of June 2, 2006, ch. 282, art. 2, § 2, 2006 Minn. Laws 1194, 1197 (codified at Minn. Stat. § 119B.13, subd. 1(a) (2006)). From this history, I would conclude that the maximum rates for 2003 through 2006 were well below the market rate.

In any event, Rainbow's rates compare favorably to the maximum rates authorized for 2006, with the most relevant comparisons being the full day and weekly rates:

***2*MAXIMUM RATES**	**RAINBOW'S RATES**	**PERCENTAGE OF MAXIMUM**	
Infant Hourly	$ 5.40	$ 5.50	102%
Full Day	$ 49.82	$ 34.00	68%
Weekly	$ 167.48	$ 142.00	85%
Toddler Hourly	$ 4.31	$ 4.50	104%
Full Day	$ 43.14	$ 30.00	70%
Weekly	$ 151.58	$ 127.00	84%
Preschool Hourly	$ 4.31	$ 4.25	99%
Full Day	$ 43.14	$ 29.00	67%
Weekly	$ 146.28	$ 121.00	83%
School Age Hourly	$ 4.24	$ 4.00	94%
Full Day	$ 34.98	$ 27.00	77%
Weekly	$ 143.10	$ 112.00	78%

[*903] Based on all of the comparisons noted above, I would conclude that the tax court understated the case when it found that Rainbow's rates were "at or just below **[**62]** market rates." I would conclude that Rainbow's rates were considerably below market and, accordingly, that Rainbow satisfied factor three.

B. Are Rainbow's rates below cost?

Because of the difficulties in determining market rates, our decisions have turned to an alternative measure: are the rates below cost? This alternative measure does not present the difficulties inherent in the comparison between organizations that offer somewhat different

C-165

services and have different costs.

It seems counter-intuitive to suggest that Rainbow's rates might be either above market or above cost where it has operated at a loss for its entire existence. Should a provider be expected to nevertheless reduce its rates, operate at an even greater loss, and hope that it will be able to make up the larger shortfall by private donations? Because the evidence shows that Rainbow pays reasonable salaries and incurs appropriate operating expenses, the fact that its rates still do not cover its costs suggests that the rates are sufficiently below cost to meet the factor three test.

More specifically, the comparison of Rainbow's operating income (loss) is as follows:

	2003	**2004**	**2005**
Revenue from Rates	$ 386,863	$ 468,073	$ 496,644
Operating Expenses	$ 430,390	$ 480,930	$ 525,211
Net Operating Income (Loss)R	($ 43,527)	($ 12,857)	($ 28,567)

These **[**63]** calculations include in revenue the payments made by Goodhue County; the Prairie Island Tribal Community; Pierce County, Wisconsin; and the Minnesota Food Program. According to our case law, these payments are more appropriately treated as contributions. *See, e.g., Rio Vista Non-Profit Hous. Corp. v. County of Ramsey*, 277 N.W.2d 187, 191 (Minn. 1979) (holding that the rent assistance paid by the federal government should be treated as a "donation" for the second factor of the *North Star* test); *Assembly Homes, Inc. v. Yellow Medicine County*, 273 Minn. 197, 140 N.W.2d 336 (1966) (granting tax exemption to a nursing home even though the resident care was paid for primarily by the county and the Veterans Administration). This is especially true of the Minnesota Food Program, which does not reimburse for fees charged to parents, but instead for the cost of meals served.

Taking the Food Program payments out of revenues would increase the losses in each year by another $ 24,000. Taking all government payments out of revenues would increase losses by another $ 90,376 **[*904]** in 2003; $ 147,614 in 2004; and $ 121,663 in 2005.

Using this alternative measure, Rainbow's rates were considerably below cost **[**64]** and satisfy factor three of the *North Star* test.

PAGE, Justice (dissenting).

I join in the dissent of Justice Hanson.

MEYER, Justice (dissenting).

I join in the dissent of Justice Hanson.

Service: **Get by LEXSEE®**
Citation: **741 n.w. 2d 880**
View: **Full**
Date/Time: Monday, June 9, 2008 - 4:21 PM EDT

* Signal Legend:
- Warning: Negative treatment is indicated
- Questioned: Validity questioned by citing refs
- Caution: Possible negative treatment
- Positive treatment is indicated
- Citing Refs. With Analysis Available

C-166

- Citation information available
* Click on any *Shepard's* signal to *Shepardize®* that case.

About LexisNexis | Terms & Conditions | Contact Us
Copyright © 2008 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

C-167

*2002 Ohio Tax LEXIS 1531, **

University of Cincinnati Medical Associates, Inc., Appellant, vs. Thomas M. Zaino, Tax Commissioner of Ohio, Appellee.

CASE NO. **99-A-1411** (EXEMPTION)

STATE OF OHIO -- BOARD OF TAX APPEALS

2002 Ohio Tax LEXIS 1531

October 4, 2002

[*1]

APPEARANCES:

For the Appellant - Joel S. Brant, James F. McCarthy, Katz, Teller, Brant & Hild, Cincinnati, Ohio.

For the Tax Commissioner - Betty D. Montgomery, Attorney General of Ohio, By: Richard C. Farrin, Assistant Attorney General, Columbus, Ohio.

OPINION:
DECISION AND ORDER

Mr. Johnson, Ms. Jackson, and Ms. Margulies concur.

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein by the above-named appellant from a journal entry of the Tax Commissioner. Therein, the Tax Commissioner denied appellant's application for the exemption of certain real property from taxation for tax year 1997, but granted remission of all penalties for said tax year.

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified to the board by the Tax Commissioner, the testimony presented at a hearing before this board, and the briefs submitted by counsel to both parties.

In reviewing appellant's appeal, we first recognize 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 **[*2]** a finding of the Tax 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.

We also acknowledge the general proposition that statutes granting exemption from taxation must be strictly considered. *National Tube Co. v. Glander* (1952), 157 Ohio St. 407, paragraph two of the syllabus; *White Cross Hospital 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." *Seven Hills Schools v. Kinney* (1986), 28 Ohio St.3d 186.

In the instant matter, appellant appeals from the Tax Commissioner's journal entry, which states, in pertinent part, as follows:

C-168

"This matter concerns an application for the exemption of real property from taxation. On June 4, 1999 the attorney examiner issued a recommendation to deny the application. **[*3]** On July 1, 1999 the applicant filed written objections to that recommendation. In addition, the applicant amended the application to request exemption for the property in question under R.C. 3345.17.

"In its objections the applicant states that it leases approximately 25% of the building to the Health Alliance of Greater Cincinnati. All revenues generated are used to cover the costs of operating the property, and any surplus is used to reduce the rent of the Practice Corporation. It is well settled law in Ohio that it is the present use of the property rather than the ultimate use of the proceeds from the property that determines whether the use is for an exempt purpose. * * * Therefore, the part of the property that is leased to the Health Alliance of Greater Cincinnati does not satisfy the requirements for exemption, * * * regardless of how the revenues generated from this lease are used.

"In addition, the applicant asserts that, because of its relationship with the University of Cincinnati, the part of the property that is used by the Practice Corporation qualifies for exemption under R.C. 5709.07(A)(4) which provides exemption for '(p)ublic colleges and academies and all buildings **[*4]** connected with them, and all lands connected with public institutions of learning, not used with a view to profit.' If this section were to apply, then the University of Cincinnati must be a public college within the meaning of this section. Pursuant to R.C. 3345.01, the University of Cincinnati is specifically recognized as a state university, and property of trustees of state universities must satisfy the requirements for exemption as set out in R.C. 3345.17. The Ohio Supreme Court has held that in order for property to be exempt, the property must qualify under the statute that specifically applies to that property rather than under the provisions of another statute. * * * Based on these cases, R.C. 3345.17 is the specific section that would apply to property of universities, not R.C. 5709.07. Therefore, since an application for exemption for property of the University of Cincinnati would not be reviewed under R.C. 5709.07, then it follows that property of another entity would not be reviewed under this section based on its relationship with the university. For this reason, * * * the property in question is not entitled to exemption under R.C. 5709.07.

"The applicant also objects **[*5]** to the recommendation that the property in question should not be exempt under R.C. 5709.12. To demonstrate that it is a charitable institution, it points out its status as a nonprofit organization. However, a nonprofit organization is not necessarily a charitable institution. * * * In addition, the applicant has not adequately described the Practice Corporation, which uses this facility, and has not provided the Articles of Incorporation for this entity. It has not described the number of staff members at this facility, how many patients are treated, or the number of hours per week a medical student works there. The applicant has not shown that the primary purpose of this facility is to educate and train medical students and residents. To the contrary, it appears that this is merely an incidental use of the property. In addition, the patients are not treated without regard to their ability to pay. Since the applicant has not sufficiently described a use of the property that can be considered to be charitable, then it is not entitled to exemption under R.C. 5709.12.

"The property in question is owned by the applicant. It is not owned by the state for the benefit of the university, **[*6]** nor does the University of Cincinnati own or lease this property. Therefore, it is not property of a state university and is not entitled to exemption under R.C. 3345.17.

C-169

"The Tax Commissioner finds that the property described in the application is not entitled to be exempt from taxation and the application is therefore denied for the reasons set forth above and in the attached recommendation, which is incorporated into this entry.

"* * *"

In its notice of appeal from the foregoing decision of the Tax Commissioner, the University of Cincinnati Medical Associates, Inc. n1 (hereinafter "UCMA"), specified the following errors:

"(a) The Tax Commissioner incorrectly found that the Property did not qualify for exemption from taxation of real property under either R.C. 5709.07, R.C. 5709.12, or R.C. 3345.17. * * * (t)he Taxpayer believes that the Property qualifies for exemption under R.C. 5709.12, or, in the alternative, the Property qualifies for exemption under R.C. 5709.07 or R.C. 3345.17.

"(b) The Tax Commissioner erred in finding that the Property does not qualify for exemption from taxation of real property under R.C. 5709.12. In order to qualify for exemption under R.C. 5709.12 **[*7]** the property must (1) belong to an institution and (2) be used exclusively for charitable purposes. The Tax Commissioner found that the Taxpayer is an institution. However, the Tax Commissioner erred in finding that the Property is not used for charitable purposes. The Taxpayer believes the Property is used for charitable purposes. The Taxpayer is a nonprofit organization formed exclusively for charitable, educational and scientific purposes and is exempt from tax under Section 501(c)(3) of the Internal Revenue Code.* * *

"(c) The Tax Commissioner erred by failing to analyze whether the Property meets the requirements of R.C. 5709.121. * * * The taxpayer believes * * * that the Property meets each of the requirements of R.C. 5709.121 and, therefore, must be found to be used exclusively for charitable purposes. The Tax Commissioner erred by not finding that the Taxpayer is a charitable or educational institution entitled to the benefits of applying R.C. 5709.121, by not finding that the Property met each of the requirements of R.C. 5709.121, and by not even analyzing whether the Property met the requirements of R.C. 5709.121.

"(d) The Tax Commissioner erred in finding that the Property **[*8]** did not qualify for exemption under R.C. 5709.07. Specifically, the Tax Commissioner erred in finding that the Property does not qualify under R.C. 5709.07(A)(4). The Taxpayer believes that, because of its relationship with the University of Cincinnati, the property qualified for exemption under R.C. 5709.07(A)(4). * * * The Taxpayer believes the Tax Commissioner is incorrect in finding that the relationship with the University of Cincinnati disqualifies the Property from applying for exemption under R.C. 5709.07(A)(4). Since the Property is connected with a public institution of learning and not used with a view to a profit, the Taxpayer believes the Property qualifies for exemption under R.C. 5709.07(A)(4).

"(e) The Tax Commissioner erred in finding that the Property did not qualify for exemption under R.C. 3345.17. * * *

"(f) The Tax Commissioner erred in failing to analyze in more detail whether the Property qualified for exemption under R.C. 5709.07 or R.C. 3345.17. * * * The

C-170

Tax Commissioner's circular and inconsistent reasoning has deprived the Taxpayer of obtaining any analysis of whether the Property qualifies for exemption under either R.C. 5709.07 or R.C. 3345.17.

"(g) **[*9]** The Tax Commissioner erred in finding that the part of the Property which is leased to the Health Alliance does not satisfy the requirements for exemption regardless of how the revenues generated by the lease are used. * * *"

n1 In December 1999, UCMA underwent a name change to "University of Cincinnati Physicians, Inc." In addition, the number of members on the board of trustees was also reduced, but no other changes were made. Accordingly, although no longer known as UCMA, all discussions in the instant opinion will refer to appellant as UCMA, its name during the year in question.

According to Daniel Gahl, administrator of UCMA and Assistant Dean of Clinical Affairs for the College of Medicine, University of Cincinnati, appellant herein, UCMA, "is a tax-exempt charitable organization seated by the resolution of the Board of Trustees of the University of Cincinnati to provide those services in support of the University and College of Medicine's mission of education, research and clinical practice." (R., p. 21) When the Board of Trustees of the University of Cincinnati passed a resolution authorizing the formation of UCMA in November 1987 (Ex. 2), it specifically provided for **[*10]** the creation of an Ohio nonprofit, 501(c)(3) corporation, to be known as UCMA, and "to be organized and operated exclusively for educational, charitable, or scientific purposes by conducting and supporting activities which benefit, or carry out the purposes of the University of Cincinnati, but which shall not be engaged in the practice of medicine." (Ex. 1, p. 1) Further, Articles Third and Fourth of the corporation's articles of incorporation (Ex. 3) provide:

"THIRD: The Corporation is organized and shall be operated exclusively for educational, charitable and scientific purposes within the meaning of Section 501 (c)(3) of the Internal Revenue Code of 1986, * * * to conduct and support activities for the benefit of, to perform the functions of and carry out the purposes of the University of Cincinnati * * *, principally with respect to the University's College of Medicine * * * by support of its education and teaching, patient care and community service responsibilities by implementing a College Faculty Practice Plan for the University approved by the Trustees of the University * * *, and to carry out such other activities as shall be approved by the Trustees of the Corporation. **[*11]**

"* * *

"FOURTH: The Corporation is formed not for pecuniary profit or financial gain. No part of the net earnings of the Corporation shall inure to the benefit of or be distributable to its Trustees or officers, private individuals or organizations, except that the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered, including payments to the University pursuant to agreements for services rendered to the Corporation by the University or its employees, to make payments for reasonable expenses of members of the Board of Trustees of the Corporation and to make payments and distributions in furtherance of the purposes set forth in Article THIRD hereof."

C-171

Finally, UCMA, in its amended code of regulations (Ex. 4), sets forth its vision and mission as follows:

> "The vision of University of Cincinnati Physicians, Inc. ('UCP') is to achieve unparalleled excellence in the delivery of clinical care by UCP's Clinical Members. The mission of UCP is to support the Greater Cincinnati community and beyond through healing, teaching, and research. 'Clinical Members' shall mean (i) physicians, dentists, osteopaths and other health care practitioners **[*12]** of any class that may be designated from time to time by the Trustees, who are full-time members of the faculty of the College of Medicine of the University of Cincinnati (the 'College') whose appointment is in a clinical department, and who practice within a practice plan approved by the Dean of the College, and (ii) other health care practitioners who qualify as Clinical Members under rules adopted from time to time by the Trustees."

Thus, UCMA claims that it is an Ohio non-profit tax exempt organization under section 501(c)(3) I.R.C. which is organized exclusively for educational and charitable purposes. UCMA performs support administrative functions exclusively for the medical school departments and faculty practice plans associated with the university. (R., p. 49)

The subject property is located on Montgomery Road in Cincinnati, Hamilton County, and consists of a medical office building located on approximately 1.668 acres of land. "There are five tenants in the property. Three of the five tenants are practice corporations of the University of Cincinnati. The fourth is a joint venture between one of the practice corporations and another entity, and the fifth entity in that **[*13]** property is the Health Alliance of Greater Cincinnati." (R., p. 13)

UCMA seeks exemption for the subject property, first, pursuant to R.C. 5709.07(A)(4). That section provides that "(P)ublic 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" shall be exempt from taxation. However, we find that if UCMA seeks exemption from taxation on the basis of its relationship with the University of Cincinnati, then it more appropriately must seek exemption pursuant to R.C. 3345.17, which provides that "(A)ll property, personal, real or mixed of the boards of trustees * * * of the state universities, * * * and of the state held for the use and benefit of any such institution, which is used for the support of such institution, is exempt from taxation so long as such property is used for the support of such university or college." Specifically, the Supreme Court, in *Rickenbacker Port Auth. v. Limbach* (1992), 64 Ohio St.3d 628, stated "* * * we essentially held in *Toledo Retirement* [*Toledo Business & Professional Women's Retirement Living, Inc. v. Bd. of Tax Appeals* (1971), 27 Ohio St.2d **[*14]** 255] that a property, to be exempt, must qualify under the criteria of the statute specifically applicable to that property. See, also, *Summit United Methodist Church v. Kinney* (1982), 2 Ohio St.3d 72, * * * (primarily religious institution could not qualify for exemption under statute exempting property belonging to 'charitable' institution.)" In the instant matter, we are considering the University of Cincinnati, which is recognized and designated as a "state university" pursuant to R.C. 3345.011. As such, the exemption of property belonging to or associated with such university must be considered pursuant to R.C. 3345.17.

The subject property is owned by an Ohio non-profit, 501(c)(3) corporation, UCMA. Although formed by resolution of the Board of Trustees of the University of Cincinnati, it is neither owned by the University of Cincinnati nor by the state of Ohio. Therefore, the subject cannot be exempt pursuant to the provisions of R.C. 3345.17, which it clearly does not satisfy.

C-172

Next, appellant seeks exemption pursuant to R.C. 5709.12 or R.C. 5709.121. However, in its Application for Real Property Tax Exemption and Remission, appellant never sought exemption from taxation **[*15]** pursuant to R.C. 5709.121, only R.C. 5709.12. (S.T., p. 16) Accordingly, this board only has jurisdiction to consider the applicability of the claim raised by appellant before the Tax Commissioner and is restricted in its analysis to a discussion of R.C. 5709.12. See *Moraine Hts. Baptist Church v. Kinney* (1984), 12 Ohio St.3d 134; cf *CNG Development Co. v. Limbach* (1992), 63 Ohio St.3d 28.

R.C. 5709.12 provides that "real * * * property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation." Two requirements exist for exemption under this section. The property must belong to an institution and the property must be used exclusively for charitable purposes. *Highland Park Owners, Inc. v. Tracy* (1994), 71 Ohio St.3d 405.

In *Highland*, the Supreme Court, citing Black's Law Dictionary, defined "institution" as "(A)n establishment, especially one of eleemosynary or public character or one affecting a community. An established or organized society or corporation. It may be private in its character, designed for profit to those composing the organization, or public and charitable in its purposes, or educational * * *." Based **[*16]** upon such description, we find that appellant meets the first requirement for exemption under R.C. 5709.12.

Next, under R.C. 5709.12, appellant must use the subject property exclusively for charitable purposes. The Supreme Court discusses exclusive use for charitable purposes in *True Christianity Evangelism v. Zaino* (2001), 91 Ohio St.3d 117, when it cites paragraph one of the syllabus in *Am. Commt. of Rabbinical College of Telshe, Inc. v. Bd. of Tax Appeals* (1951), 156 Ohio St. 376, where it held "If operated without any view to profit, an institution used exclusively for the lawful advancement of education and of religion is an institution used exclusively for charitable purposes, within the meaning of Section 2 of Article XII of the Constitution and of Section 5353, General Code [now R.C. 5709.12]." The court in *True Christianity* went on to state that "In past cases we have held that '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 in particular, without regard to their ability to supply that need from other sources, and **[*17]** without hope or expectation, if not with positive abnegation, of gain or profit by the donor or by the instrumentality of the charity." *Planned Parenthood Assn. of Columbus, Inc. v. Tax Commr.* (1966), 5 Ohio St.2d 117, * * * paragraph one of the syllabus. It is against this definition that appellant's activities must be measured to determine if they constitute a charitable purpose." Further, the Supreme Court held in *True Christianity*, supra, that there is no indication that the phrase "used exclusively" in R.C. 5709.12 should be interpreted any differently than it has been in R.C. 5709.07, where it has been held to mean "primary use." See *Moraine Hts.*, supra.

In evaluating appellant's activities, we first look to the Written Objection to Recommendation of the Attorney Examiner (S.T., p. 3-7), wherein appellant indicated that:

> "UCMA provides facilities and services to medical practice corporations operated by the faculty of the University of Cincinnati College of Medicine (the 'Practice Corporations'). The Practice Corporations are corporations exempt from tax under 501 (c)(3) of the Internal Revenue Code. UCMA leases approximately 25% of the building to The Health Alliance **[*18]** of Greater Cincinnati. The remainder of the building is leased to the Practice Corporations at below fair market rents. All of the revenues generated from the Property are used to cover the costs of operating the Property. Any surplus is used to reduce the rent of the Practice Corporations."

C-173

In determining whether the subject's use is for an exempt purpose, we must consider the current use of the property rather than the ultimate use of the proceeds from the property. *Lutheran Book Shop v. Bowers* (1955), 164 Ohio St. 359; *Incorporated Trustees of the Gospel Worker Society v. Evatt* (1942), 140 Ohio St. 185. Further, as the Supreme Court clearly stated, "it is the charitable activities of the taxpayer seeking the exemption which must be considered when reviewing an application for a charitable exemption," and not those of the taxpayer's lessees. *OCLC Online Computer Library Ctr., Inc. v. Kinney* (1984), 11 Ohio St.3d 198, 201.

In the instant matter, the appellant is leasing the subject property to medical practice corporations affiliated with the University of Cincinnati; in other words, the appellant is a landlord. Regardless of its lessees' activities, which may or may **[*19]** not be "charitable" in nature, appellant may not claim a vicarious exemption through them for itself. See *OCLC*, supra; *National Church Residences v. Lindley* (1985), 18 Ohio St.3d 53. In *OCLC*, the appellant, a non-profit corporation, sought exemption for its facilities, from where it provided online computer information to libraries around North America. The court held that "(A)lthough OCLC's service may greatly enhance the ability of libraries to better serve the public, OCLC essentially offers a product to charitable institutions, for a fee exceeding its cost, and, as the board concluded, is not itself a charitable organization." Likewise, appellant merely provides the leaseable building space, at a reasonable cost, for certain medical groups, not unlike a commercial lessor of real property. While appellant arguably establishes its rents at a below-market level and uses the rents generated to only cover costs of operations and if any rent money is left after covering its costs, to reduce the rent charged to the practice corporations, appellant still charges rents to first, cover its own costs. Appellant is not giving away the space in its building rent-free and it is **[*20]** not, in turn, acting as a charity or for charitable purposes. See *Falls Masonic Temple Co. v. Limbach* (June 30, 1993), B.T.A. No. 90-A-1563, unreported. Further, appellant, itself, does not provide the medical care that is offered at the subject facility (Ex. 1, p. 1); it is merely the lessor of the building. While the lessee tenants/practice corporations and other health care providers may act as charitable organizations, it is not their use of the building, but UCMA's, which is relevant to the instant outcome.

Accordingly, based upon the foregoing, this board finds that appellant has not overcome the presumption of validity of the Tax Commissioner's determination. See *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66. Thus, this board finds that the Tax Commissioner's findings were not unreasonable and unlawful.

It is the decision and order of the Board of Tax Appeals that the decision of the Tax Commissioner must be and hereby is affirmed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax Law > Federal Taxpayer Groups > Exempt Organizations > Charitable, Religious & Scientific Organizations
Tax Law > State & Local Taxes > Administration & Proceedings > Judicial Review
Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > Requirements for Exempt Status

Source: My Sources > Ohio > Find Statutes, Regulations, Administrative Materials & Court Rules > By Administrative Materials > **OH Board of Tax Appeals Decisions**
Terms: **99-a-1411** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Monday, June 9, 2008 - 5:00 PM EDT

C-174

LexisNexis® About LexisNexis | Terms & Conditions | Contact Us
Copyright © 2008 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

C-175

*264 Ill. App. 3d 919, *; 637 N.E.2d 463, **;*
*1994 Ill. App. LEXIS 915, ***; 201 Ill. Dec. 874*

VICTORY CHURCH and COLONIAL BANK AND TRUST COMPANY, AS TRUSTEE UNDER TRUST NO. 872, Plaintiffs-Appellants, v. ILLINOIS DEPARTMENT OF REVENUE, Defendant-Appellee.

No. 1-93-2143

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, THIRD DIVISION

264 Ill. App. 3d 919; 637 N.E.2d 463; 1994 Ill. App. LEXIS 915; 201 Ill. Dec. 874

June 15, 1994, Decided

SUBSEQUENT HISTORY: [*1]** Released for Publication August 12, 1994.

PRIOR HISTORY: Appeal from the Circuit Court of Cook County. Honorable John Ward, Judge Presiding.

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, church and trustee, sought review of a judgment of the Circuit Court of Cook County (Illinois), which affirmed the decision of defendant Illinois Department of Revenue (department) denying plaintiffs a property tax exemption for 1990. Plaintiffs asserted that a lessee was entitled to a real estate tax exemption for property it used exclusively for religious purposes.

OVERVIEW: The issue was whether an owner who used real estate for profit, but leased it exclusively for religious and school purposes, was entitled to a real estate tax exemption. The trial court affirmed the denial of tax exemption for 1990. Plaintiffs asserted that the language of § 19.2 of the Revenue Act of 1939, Ill. Rev. Stat. ch. 120, para. 500.2 (1989), now 35 Ill. Comp. Stat. 205/19.2 (1992), referred to the nature of the activities on the premises, not the ownership of the property. Before one looked to the primary use to which the property was used after the leasing, one had to look first to see if the owner of the real estate was entitled to exemption from property taxes. If the owner of the property was exempt from taxes, then one could proceed to examine the use of the property to see if the tax-exempt status continued or was destroyed. The property was leased by the owner to the church for a profit. In light of the presumption in favor of taxation, the court concluded that the department correctly found that the property was not exempt from property taxes. The court affirmed the trial court's judgment.

OUTCOME: The court affirmed the trial court's judgment affirming the department's decision denying plaintiffs a property tax exemption for 1990.

CORE TERMS: exemption, tax exemption, exempt, real estate, estate taxes, religious purposes, religious, ownership, taxation, leasing, religious organization, school purposes, parking lots, primary use, leased, property taxes, lessee, lease, property leased, tax exempt status, used exclusively, destroyed, tax exempt, agreed to pay

C-176

LEXISNEXIS(R) HEADNOTES

Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > General Overview

HN1 Property leased to a religious organization for profit is not exempt from taxation.

Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > General Overview

HN2 Section 19.2 of the Revenue Act of 1939, Ill. Rev. Stat. ch. 120, para. 500.2 (1989), now 35 Ill. Comp. Stat. 205/19.2 (1992), exempts the following kinds of property from real estate taxes: All property used exclusively for religious purposes, or used exclusively for school and religious purposes, or for orphanages and not leased or otherwise used with a view to profit. Ill. Rev. Stat. ch. 120, para. 500.2, 35 Ill. Comp. Stat. 205/19.2 (1992).

Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > General Overview

HN3 In determining whether property is included within the scope of a tax exemption, all facts are to be construed and all debatable questions resolved in favor of taxation. There is a presumption that no exemption is intended, and the party claiming the exemption has the burden of showing that the property clearly falls within a statutory exemption.

Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > General Overview

HN4 The test for exemption is use and not ownership, and in such a case, property is exempt even though the legal title is in an individual.

Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > General Overview

HN5 Section 19.2 provides that property that is leased or otherwise used with a view to profit is not exempt from real estate taxes. Ill. Rev. Stat. ch. 120, para. 500.2 (1989), 35 Ill. Comp. Stat. 205/19.2 (1992). Whether property is used for profit depends on the intent of the owner in using the property.

Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > General Overview

HN6 It is the primary use to which the property is devoted after the leasing, which determines whether the tax-exempt status continues. If the primary use is for the production of income, that is, with a view to profit, the tax exempt status is destroyed.

COUNSEL: John W. Mauck, of Mauck, Bellande, Baker & Connell, of Chicago, for appellants.

Roland W. Burris, Attorney General, of Chicago (Mary E. Welsh, Assistant Attorney General, of counsel), for appellee.

JUDGES: CERDA, TULLY, RIZZI

OPINION BY: CERDA

OPINION

C-177

[*920] [463] JUSTICE CERDA** delivered the opinion of the court:

This is an administrative action brought by plaintiffs, the Victory Christian Church (Victory Church) and the Colonial Bank and Trust Company, as trustee under trust number 872 (Colonial). After defendant, the Illinois Department of Revenue, denied plaintiffs a property tax exemption for 1990, the circuit court affirmed its decision. On appeal, plaintiffs assert that a lessee is entitled to a real estate tax exemption for property it uses exclusively for religious purposes.

[464]** The issue to be decided in this case is whether an owner who uses real estate for profit, but leases it exclusively for religious and school purposes, is entitled to a real estate tax exemption.

The facts are not in dispute. Victory Church is a religious organization that leases improved property from Colonial, whose sole beneficiary is George Apostolou. **[***2]** The property consists of a two-story building and three vacant lots used for parking. According to the lease, Victory Church agreed to pay $ 8,000 per month through May 1990, then $ 8,500 per month through the end of 1990. In addition, Victory Church agreed to pay any property taxes if its application for tax exemption was denied. All parties agree that the property was used exclusively for religious and school purposes.

In 1987, the property was exempt from real estate taxes, but in **[*921]** 1988, defendant granted a tax exemption for the building, but not for the parking lots. After plaintiffs appealed the administrative decision, the circuit and appellate courts ruled that the parking lots were not entitled to a tax exemption. See *Faith Christian Fellowship, Inc. v. Department of Revenue* (1992), 226 Ill. App. 3d 322, 589 N.E.2d 796, 168 Ill. Dec. 396.

In 1990, the building was returned to the tax rolls and plaintiffs applied for real estate tax exemptions. After a hearing before an administrative law judge, plaintiffs were denied exemptions on all parcels. Plaintiffs appealed the decision relating to the building, but have dropped **[***3]** their objection to the taxation of the parking lots and have paid the taxes due on those lots.

The trial court reversed the administrative judge's decision and granted a tax exemption for the building. Meanwhile, the second district rendered a decision in *American National Bank & Trust Co. v. Department of Revenue* (1993), 242 Ill. App. 3d 716, 611 N.E.2d 32, 183 Ill. Dec. 179, which ruled that HN1 property leased to a religious organization for profit was not exempt from taxation. On defendant's motion to reconsider, the trial court reversed its ruling and affirmed the denial of tax exemption for 1990.

We must decide whether property leased to a religious organization by a private, for-profit party and used for religious and school purposes is exempt from real estate taxes under HN2 Section 19.2 of the Revenue Act of 1939 (Ill. Rev. Stat. 1989, ch. 120, par. 500.2 (now 35 ILCS 205/19.2 (West 1992))), which exempts the following kinds of property from real estate taxes:

> "All property used exclusively for religious purposes, or used exclusively for school and religious purposes, or for orphanages and not leased or otherwise used **[***4]** with a view to profit." Ill. Rev. Stat. 1989, ch. 120, par. 500.2 (now 35 ILCS 205/19.2 (West 1992)).

Plaintiffs assert that the statute's language refers to the nature of the activities on the premises, not the ownership of the property. Plaintiffs argue that *American National Bank &*

C-178

Trust Co., 242 Ill. App. 3d 716, 611 N.E.2d 32, 183 Ill. Dec. 179, ignored the supreme court's rationale in *People ex rel. Bracher v. Salvation Army* (1922), 305 Ill. 545, 548, 137 N.E. 430.

In response, defendant asserts that it is the property owner's use, not the lessee's use, that is dispositive. While legal ownership is not a test for exemption, defendant argues, leasing a property for profit precludes exemption even when the lessee uses the property exclusively for religious purposes. Defendant contends that the property is not tax exempt because its owner is a private entity that collects rent and is profit motivated.

[*922] For the reasons that follow, we affirm the circuit court judgment.

*HN3*In determining whether property is included within the scope of a tax exemption, all facts are to be construed **[***5]** and all debatable questions resolved in favor of taxation. (*City of Chicago v. Illinois Department of Revenue* (1992), 147 Ill. 2d 484, 491-92, 590 N.E.2d 478, 168 Ill. Dec. 841.) There is a presumption that no exemption is intended and the party claiming the exemption has the burden of showing that the property clearly falls within a statutory exemption. *Village of Oak Park v. Rosewell* (1983), 115 Ill. App. 3d 497, 499-500, 450 N.E.2d 981, 71 Ill. Dec. 293.

[465]** In *Salvation Army,* 305 Ill. at 548, 137 N.E. 430, the Illinois Supreme Court ruled that the Salvation Army was entitled to a tax exemption on property it was purchasing pursuant to a contract for sale and was using for an exempt purpose. The State's attorney had argued that the Salvation Army was not the owner of the property and in order to be entitled to exemption, use and ownership must concur. The supreme court set out that *HN4* the test for exemption is use and not ownership, and in such a case, property is exempt even though the legal title is in an individual. **[***6]** *Salvation Army,* 305 Ill. at 548, 137 N.E.430.

*HN5*Section 19.2 provides that property that is "leased or otherwise used with a view to profit" is not exempt from real estate taxes. (Ill. Rev. Stat. 1989, ch. 120, par. 500.2 (now 35 ILCS 205/19.2 (West 1992)).) Whether property is used for profit depends on the intent of the owner in using the property. *People ex rel. Goodman v. University of Illinois Foundation* (1944), 388 Ill. 363, 371, 58 N.E.2d 33; *American National Bank & Trust Co.,* 242 Ill. App. 3d at 724, 611 N.E.2d 32.

The reasoning in the case of *Childrens Development Center v. Olson* (1972), 52 Ill. 2d 332, 288 N.E.2d 388, is helpful. In that case the court stated:

> "We likewise consider that *HN6*it is the primary use to which the property is devoted after the leasing which determines whether the tax-exempt status continues. If the primary use is for the production of income, that is, ' with a view to profit', the tax exempt status is destroyed." *Children's Development Center,* 52 Ill. 2d. at 336. **[***7]**

This case indicates that before one looks to the primary use to which the property is used after the leasing, one must look first to see if the owner of the real estate is entitled to exemption from property taxes. If the owner of the property is exempt from taxes, then one may proceed to examine the use of the property to see if the tax exempt status continues or is destroyed.

In this case, the property is owned by George Apostolou and leased to Victory Church for a profit. In light of the presumption in favor of taxation, we conclude that the Department

C-179

correctly found **[*923]** that the property was not exempt from property taxes. To decide otherwise would allow any private property not entitled to exemption to become tax exempt merely by leasing it to a religious or school organization.

Based on the foregoing, we affirm the circuit court's judgment.

AFFIRMED.

TULLY, P.J., AND RIZZI, J., CONCUR.

Service: **Get by LEXSEE®**
Citation: **637 N.E.2d 463**
View: Full
Date/Time: Monday, June 9, 2008 - 4:34 PM EDT

* Signal Legend:
- Warning: Negative treatment is indicated
- Questioned: Validity questioned by citing refs
- Caution: Possible negative treatment
- Positive treatment is indicated
- Citing Refs. With Analysis Available
- Citation information available

* Click on any *Shepard's* signal to *Shepardize®* that case.

LexisNexis® About LexisNexis | Terms & Conditions | Contact Us
Copyright © 2008 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

C-180

*1992 Ohio Tax LEXIS 767, **

Youngstown Area Jewish Federation fka Jewish Foundation of Youngstown, Appellant, vs. Joanne Limbach, Tax Commissioner of Ohio, Appellee.

CASE NO. **88-G-117** (REAL PROPERTY EXEMPTION)

STATE OF OHIO -- BOARD OF TAX APPEALS

1992 Ohio Tax LEXIS 767

June 30, 1992

[*1]

APPEARANCES

For the Appellant - Leonard D. Schivavone, Friedman & Rummell Co., L.P.A., 40 N. Phelps Street, Youngstown, Ohio 44503, David Belinky, 511 Mohawk Street, Columbus, Ohio 43206

For the Appellee - Lee I. Fisher, Attorney General of Ohio, By: James C. Sauer, Assistant Attorney General, State Office Tower-16th Floor, 30 East Broad Street, Columbus, Ohio 43266-0410

OPINION:
DECISION AND ORDER

This matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed by the Youngstown Area Jewish Federation. The appeal is taken from a final order of the Tax Commissioner wherein that official ordered a split-listing on an application for the exemption of real property from taxation.

The Youngstown Area Jewish Federation ("Federation") is a nonprofit corporation organized for purpose of raising money to carry on its own charitable, educational, and religious work, and to assist the charitable work of other organizations. The Federation owns approximately 12 acres of land in Youngstown, Ohio, which have previously been granted tax exempt status. In October of 1983, construction of two buildings on the land was completed and the facilities opened for use.

The first **[*2]** building located on the Federation's property is the Jewish Home for the Aged, commonly known as Heritage Manor. Heritage Manor is used to provide full-time care for bedfast and infirmed persons. The second building on the property is the Jewish Community Center ("JCC"). The JCC is used to provide numerous educational, charitable and recreational services to the community.

Following a hearing on the Federation's application for tax exemption of the two buildings, the Tax Commissioner's hearing examiner recommended that the majority of the property be permitted exemption, and that a relatively small portion be denied exemption. Specifically, the examiner determined that Heritage Manor was used as a home for the aged, as defined in R.C. 5701.13; and that most of the JCC was used primarily for educational and social service purposes open to members and the general public. It was also determined that a health club and gift shop located within the JCC were used for private purposes and with a view to profit so as to disqualify the two areas from a charitable use.

Being dissatisfied with the recommendation of the hearing examiner, the Federation filed objections with the Tax Commissioner. **[*3]** Upon a review of the facts, the statutes and

C-181

case law, the Commissioner affirmed the recommendation and ordered a split-listing of the Federation's property. That is, all of the property was granted an exemption from taxation except for the JCC health club and retail sales area which were ordered to remain on the tax list.

From the final action of the Tax Commissioner, a timely notice of appeal was filed with the Board of Tax Appeals. At the evidentiary hearing before the Board, the Federation and the Tax Commissioner entered appearances through counsel but no testimony or exhibits were presented. The parties have also declined the opportunity to present their arguments in legal briefs. Consequently, this matter is before the Board of Tax Appeals for resolution today upon the notice of appeal, and the statutory transcript furnished by the Tax Commissioner.

As noted above, the JCC is used to provide many social programs and services which are in furtherance of or incidental to the Federation's charitable purposes. Since no one is refused a membership because of an inability to pay, and since the facilities further the purpose of providing an educational and recreational center **[*4]** for the community, the Tax Commissioner permitted tax exemption for those portions of the building which are available for use by any JCC member. The exempted facilities, not at issue here, include a licensed day-care and preschool center, library, multipurpose room, auditorium, exercise rooms, locker rooms, indoor swimming pool, handball courts, meeting rooms, activity rooms and offices.

The two accommodations for which tax exemption was denied include the Center's health club which offers private showers, private locker room, steam and sauna rooms, whirlpool, CAM II fitness center, towel service and a television lounge. The use of the health club is restricted to members who pay an annual fee in addition to the regular membership fee. In 1984, the additional annual fees (excluding massage fees) were $ 165 for men, $ 110 for women and $ 250 for married couples. The health club was denied exemption upon the determination that the additional fees were imposed with a view to profit, and that the restrictions in usage were functionally removed from the Federation's charitable purposes.

The second accommodation is the retail sales area located in the basketroom. This area offers **[*5]** for sale "a complete line of racquetball, health club and physical education equipment and supplies." n1 The retail sales are made pursuant to a vendor's license. This area was denied tax exemption upon the finding that it was used for commercial purposes and with a view to profit.

n1 The JCC 1984 Fall Program Guide, at page 26 (Statutory transcript, at 135)

The first three errors assigned in the Federation's notice of appeal center on the issue of whether the JCC uses the health club and retail sales area in a manner as to qualify for exemption from taxation under R.C. 5709.12 and 5709.121. For the reasons detailed more fully below, the Board must conclude that it does not.

R.C. 5709.12 exempts from taxation real property which is used exclusively for charitable purposes. R.C. 5709.121 provides the definition of exclusive charitable use as follows:

"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 is either:

"(A) Used by such institution, the **[*6]** state, or political subdivision, or by one or more other such institutions, the state, or political subdivisions under a lease, sublease, or other

C-182

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) Otherwise 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."

The first inquiry must be directed to the nature of the institution and finding it to be a charitable institution then the applicability of R.C. 5709.121 must be examined, White Cross Hospital Assn. v. Board of Tax Appeals (1974), 38 Ohio St. 2d 199, 203; Episcopal Parish v. Kinney (1979), 48 Ohio St. 2d 199, 201. See Dayton Art Institute v. Limbach (June 19, 1992) BTA No. 86-A-521, for a discussion of the construction of R.C. 5709.121. The question of the nature of the institution is not in dispute, the Tax Commissioner finding **[*7]** that the Federation is a charitable institution, and denied exemption only as to the health club and gift shop. The inquiry then turns to the determination as to whether the subject property is used for charitable, educational and public purposes. There are many definitions of charity in the law of trusts and tax exemption, from Ohio and elsewhere. An early general definition in Ohio comes from the 1874 case of Gerke v. Purcell (1874), 25 Ohio St. 229. Syllabus 4:

"4. A charity, in a legal sense, includes not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art, without any particular reference to the poor."

Perhaps the most quoted definition in Ohio tax exemption cases comes from Planned Parenthood Assoc. v. Tax Commissioner (1966), 5 Ohio St. 2d 117, Syllabus 1, as follows:

"1. 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 **[*8]** 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."

In this instance, there is no evidence of any charitable activity being carried on in the JCC health club and retail sales area. From the record before us, it is evident that the actual, physical use of the property is that of a private physical fitness facility for the exclusive use of paying members, and as a commercial venture for the retail sale of athletic accessories. These uses are functionally removed from the Federation's purpose of providing educational, cultural and recreational services to the general community. Accordingly, the subject areas are not used in furtherance of or incidental to the organization's charitable purposes.

It appears to the Board that the health club and retail shop area are essentially commercial activities. There is no doubt that the disputed property generates income. However, there is no indication that such income is exceeded by expenditures. The Federation has not presented its accounting records nor any other type of financial information. While the Federation **[*9]** may be a nonprofit corporation, it appears that the JCC health club and retail sales area are used in a manner inconsistent with the requirement of R.C. 5709.121 that the property be used for charitable purposes. Our consideration of this appeal can therefore be resolved at this point, and we conclude that the Tax Commissioner's order should be affirmed. It is not necessary to consider the application of R.C. 5709.121 (B) as to whether these uses are in furtherance of or incidental to Federation's charitable purpose and not with a view to profit. If required to do so, for reasons already stated, we would find to

C-183

the contrary, and affirm the Tax Commissioner's order.

The fourth error assigned in the notice of appeal presents a challenge to the split-listing provisions of R.C. 5713.04. Specifically, the Federation contends that "split-listing is inappropriate in a situation, such as this, where incidental uses of property are clearly related to an overall charitable use."

As discussed above, the Board of Tax Appeals finds that the operation of a special health club for the exclusive use of paying members, and the operation of a commercial venture for the retail sale of athletic **[*10]** accessories, are not uses related to the Federation's charitable purpose of providing educational, recreational and social services to the general community. Consequently, an application of the split-listing statute is entirely appropriate in this situation. That is, were it not for split-listing, the noncharitable uses would destroy the tax exemption available for the charitable uses.

The split-listing provisions of R.C. 5713.04 permit a single property under single ownership to be listed as tax exempt in part, and taxable in part, when the property is used for both charitable and noncharitable purposes. As relevant, the statute reads as follows:

"If a separate parcel of improved or unimproved real property has a single ownership and is so used so that part thereof, if a separate entity, would be exempt from taxation, and the balance thereof would not be exempt from taxation, the listing thereof shall be split, and the part thereof used exclusively for an exempt purpose shall be regarded as a separate entity and be listed as exempt, and the balance thereof used for a purpose not exempt shall, with the approaches thereto, be listed at its taxable value and taxed accordingly." **[*11]**

Prior to the enactment of the foregoing provision, the law of charitable exemption in Ohio followed an "all or nothing" approach. That is, a tax exemption required that the whole of the property be devoted to charitable use. If a property was used primarily for exempt purposes, and incidentally for nonexempt purposes, then the whole of the property was deemed taxable and placed on the tax list and duplicate. For example, in Welfare Federation of Cleveland v. Glander (1945), 146 Ohio St. 146, the whole of an eleven-story building owned by a charitable institution and used exclusively for charitable purposes on nine stories, was denied a tax exemption since the two lower floors were used for commercial purposes. With the addition of the split-listing language to R.C. 5713.04, a single building under single ownership may now be exempted in part if the nonexempt uses are separate and distinct from the charitable uses.

A proper application of Revised Code section 5713.04 requires that the part of the real property which is used in an exempt manner must be precisely delineated, and that the nonexempt use must be figuratively capable of severance from the exempt portion of the **[*12]** property. New Haven Church of Missionary Baptist v. Bd. of Tax Appeals (1967), 9 Ohio St. 2d 53; Bishop v. Kinney (1982), 2 Ohio St. 3d 52; Faith Fellowship Ministries, Inc. v. Limbach (1987), 32 Ohio St. 3d 432. In this matter, the health club and retail sales area are physically distinct, precisely delineated and serve unique functions. The Board has no difficulty in finding that the nonexempt uses are separate entities figuratively capable of severance from the exempt portion of the building. The Tax Commissioner's split-listing of the separate entities was appropriate and correct.

The final error assigned in the Federation's notice of appeal reads as follows:

"The Tax Commissioner's determination to split-list the subject property is not in conformity with the Tax Commissioner's prior determinations with respect to similar institutions and, therefore, denies the Appellant full equal protection and application of the law to which it is entitled under the Ohio Constitution and United States Constitution."

C-184

In Cleveland Gear Co. v. Limbach (1988), 35 Ohio St. 3d 229, the Supreme Court determined that an argument concerning the unequal application of the laws **[*13]** must be raised in the appellant's notice of appeal to the Board of Tax Appeals, and that a complete factual record must also be developed before the Board. In this instance, the Federation has specified the claimed error in the notice of appeal; however, it has failed to develop a factual record to support the claim.

When a statute is challenged on the ground that it is unconstitutional when applied to a particular set of facts, the burden is on the party making the attack to present clear and convincing evidence of an existing set of facts which makes the statute unequal when applied thereto. Belden v. Union Central Life Ins. Co. (1944), 143 Ohio St. 329; Cleveland Gear Co. v. Limbach, supra. Here, the Federation has not presented any evidence at all. Consequently, the Board of Tax Appeals finds the claim of error to be without merit.

Therefore, for the foregoing reasons, it is the decision of the Board of Tax Appeals that the final order of the Tax Commissioner must be, and hereby is, affirmed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax Law > State & Local Taxes > Administration & Proceedings > Judicial Review
Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > Requirements for Exempt Status
Tax Law > State & Local Taxes > Real Property Tax > General Overview

Source: My Sources > Ohio > Find Statutes, Regulations, Administrative Materials & Court Rules > By Administrative Materials > **OH Board of Tax Appeals Decisions**
Terms: **88-G-117** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Monday, June 9, 2008 - 4:18 PM EDT

LexisNexis® About LexisNexis | Terms & Conditions | Contact Us
Copyright © 2008 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

C-185

*1991 Ohio Tax LEXIS 59, **

Youngstown, Revitalization Foundation, Appellant, vs. Joanne Limbach, Tax Commissioner of Ohio, Appellee.

CASE NO. **87-D-1127** (REAL PROPERTY) (TAX EXEMPTION)

STATE OF OHIO -- BOARD OF TAX APPEALS

1991 Ohio Tax LEXIS 59

January 11, 1991

[*1]

APPEARANCES

For the Appellant - Mark G. Mangie, Attorney at Law, 910 Wick Building, Youngstown, Ohio 44503

For the Appellee - Anthony J. Celebrezze, Jr., Attorney General of Ohio, By: Floyd J. Miller, Assistant Attorney General, State Office Tower, 16th Floor, 30 East Broad Street, Columbus, Ohio 43215

OPINION:
DECISION AND ORDER

This cause and matter came on to be considered by the Board of Tax Appeals upon a Notice of Appeal filed herein under date of September 30, 1987 by the Appellant above-named. This Appeal is from a decision of the Tax Commissioner dated September 3, 1987, wherein said official denied an exemption from taxation for 1986 for certain real property owned by the Appellant.

Appellant is a not-for-profit foundation organized to promote revitalization of downtown Youngstown and economic development of the city.

The property herein involves a 5.6 acre tract of land that is owned by the applicant. A two-story brick structure which measures 144'X60' is situated on the structure which measures 144'X'60 is situated on the property.

The matter was submitted to the Board of Tax Appeals upon the Notice of Appeal and the statutory transcripts certified by the Tax Commissioner. **[*2]** A record hearing herein was requested by the Appellant; no one appeared for the Appellant, the Attorney General appeared for the Appellee. No briefs were supplied by either the Appellant or the Appellee.

Appellant contends that it should be granted an exemption pursuant to R.C. 5709.08, 5713.08, 5713.081, and 5709.121.

The purposes of the Youngstown Revitalization Foundation, as stated in its Articles of Incorporation, is:

"to improve, promote and enhance the appearance and economic health of the City of Youngstown and its residents by stimulating investment in the Youngstown central business district by providing low-interest loans, acquiring buildings and vacant lands for the purpose of redevelopment and preservation and revitalization and to engage consultants for the preparation of comprehensive plans, marketing studies, architectural designs and renovation

C-186

programs, site improvements, and financial assistance for renovation. To further promote in any way consistent with its general and public welfare, the central business district of the City of Youngstown and to contract with private work, governmental persons or political subdivisions to carry out such purposes. To further **[*3]** do all things necessary and beneficial to improve, maintain and revitalize the central business district of the City of Youngstown. To receive and accept property, gifts, bequeaths, or devise from any person, firm, trust, corporation or governmental entity to carry out such purposes."

The Appellant herein acquired the property for use as part of an overall economic development for the central business district in the City of Youngstown. The Appellant's intent upon acquiring the property was to hold it for future conveyance to the City of Youngstown as part of a general economic development. The Appellant was holding the property awaiting certain matching grants submitted to the Ohio Department of Natural Resources and the National Park Service. The future use of the 5.6 acre tract of land is as a park area.

R.C. section 5709.08 states, in pertinent part:

"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 . . ."

The real property herein does not belong to the state or United States. Therefore, R.C. 5709.08 is not applicable to the **[*4]** Appellant's claim for relief.

Appellant also contends that it should be granted an exemption pursuant to R.C. 5709.121, which reads as follows:

"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 is either:

"(A) 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) Otherwise 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."

The Revised Code requires a showing first that the owner is a charitable **[*5]** institution and second, that either the owner or another charitable institution uses the property in furtherance of a charitable purpose. Operation Evangelize v. Kinney (1982), 69 Ohio St. 2d 346. Further the exemptions from real property under R.C. 5709.121 are to be strictly construed against the exemption. Goldmen v. Robert E. Bentley Post No. 50 (1952), 158 Ohio St. 205.

Since R.C. 5709.121 is applicable to property belonging to a charitable institution, the first inquiry is directed to the nature of the institution. Though the Appellant herein is a not-for-profit foundation, its primary purpose is the economic development of the central business

C-187

district of the City of Youngstown. Though this may be a commendable purpose, it is not charitable as the Supreme Court has defined "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. In re: Estate of Wilder: The Planned Parenthood Association of Columbus, Ohio, Inc. **[*6]** v. Tax Commissioner (1966), 5 Ohio St. 2d 117.

The second part of the test requires that the property be exclusively used for charitable purposes. At the time of the application herein, the property was vacant and not in use. Subsequent to the decision of the Tax Commissioner, the Appellant stated in its Notice of Appeal that the property was to be transferred in October 1987 to the City of Youngstown for development of a city park. However, that does not change the use of the property for the period of time of the claimed exemption.

Appellant also contends it should be granted an exemption pursuant to R.C. 5713.08 and 5713.081. Briefly, neither of these sections is applicable to a claimed exemption. R.C. 5713.08 (A) directs the County Auditor to make a list of all real property which is exempt. R.C. 5713.08 (B) is directed to unpaid taxes, interest and penalties which have become a lien upon the property after the property has first been used for exempt purposes. R.c. 5713.08 (C) simply states that real property acquired by the State in fee simple is exempt from taxation from the date of acquisition.

R.C. 5713.081 is directed to the collection of delinquent taxes on public **[*7]** owned property, and not to the exemption claimed by any institution.

For the foregoing reasons, the Board of Tax Appeals finds and determines that the subject property does not qualify for an exemption from taxation under R.C. 5709.121, 5709.08, 5713.08 or 5713.081.

It is the Order of the Board of Tax Appeals that the decision of the Tax Commissioner must be, and hereby is, affirmed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax Law > State & Local Taxes > Administration & Proceedings > Judicial Review
Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > General Overview
Tax Law > State & Local Taxes > Real Property Tax > General Overview

Source: My Sources > Ohio > Find Statutes, Regulations, Administrative Materials & Court Rules > By Administrative Materials > **OH Board of Tax Appeals Decisions**
Terms: **87-d-1127** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Monday, June 9, 2008 - 4:19 PM EDT

LexisNexis® About LexisNexis | Terms & Conditions | Contact Us
Copyright © 2008 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

C-188

5715.27 Application for exemption - rights of board of education - complaint against exemption.

(A) Except as provided in section 3735.67 of the Revised Code, 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 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, 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 granted exemption by the commissioner under this section.

(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 the 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 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.

Effective Date: 09-26-2003

C-189

Certificate of Service

A copy of *Amicus Curiae*, Ohio School Boards Association, Ohio Association of School Business Officials, and Buckeye Association of School Administrator's Brief was sent via Overnight Mail on this 10 day of June, 2008, to Mary C. Henkel, Esq., Vorys, Sater, Seymour and Pease LLP, 221 East Fourth Street, Suite 2100, P.O. Box 0236, Cincinnati, OH 45201-0236, Damion M. Clifford, Esq. Assistant Attorney General, 16th Floor – Rhodes Tower, Columbus, OH 43215, and to John J. Kulewicz, Esq. and Michael J. Hendershot, Esq., Vorys, Sater, Seymour and Pease LLP, 52 East Gay Street, P.O. Box 1008, Columbus, OH 43216-1008.

David H Seed

David H. Seed (0066033)