

IN THE SUPREME COURT OF OHIO

Appeal From the Ohio Board of Tax Appeals

NORTHEAST OHIO PSYCHIATRIC
INSTITUTE,

Appellant,

v.

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

Appellee.

Case No. 08-335 **08-0033**

Appeal from BTA
Case No. 2005-Z-1683

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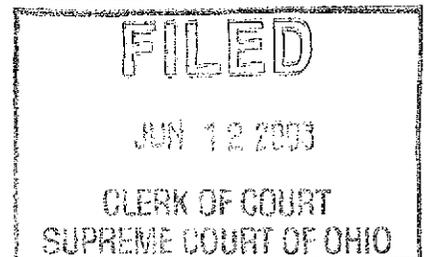


TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iv
I. INTRODUCTION.....	1
II. STATEMENT OF THE FACTS.....	1
A. Use of the Property.....	1
B. Northeast’s Activities.....	2
C. Portage Path Activities.....	3
III. LAW AND ARGUMENT.....	5
A. Standard of Review.....	5
B. Real Property Standard.....	5
C. The Interplay of R.C. 5709.12 and R.C. 5709.121.....	6
D. A Charitable Institution’s Use under R.C. 5709.121.....	7
E. Charitable Institution under R.C. 5709.12.....	7
Proposition of Law I:	
Northeast’s fee-based rental business demonstrates that it is not a charitable institution under R.C. 5709.121 even though its profits are used to support Portage Path.....	8
Proposition of Law II:	
Northeast’s fee based psychiatric placement and consulting service demonstrates that it is not a charitable institution under R.C. 5709.121 even though the profits are used to support Portage Path.....	12
1. Northeast’s Reliance upon <i>Community Health Professionals</i> , 113 Ohio St.3d 432, 2007-Ohio-2336; is misplaced.....	18
2. Northeast’s claim that the property is exempt because it is under the control of a charitable institution is incorrect.....	19

Proposition of Law III:

Northeast did not use the property exclusively for charitable purposes under R.C. 5709.12.....20

Proposition of Law IV:

Northeast’s and Amicus Curiae are jurisdictionally barred from seeking a presumption that a 501(c)(3) entity is a charitable institution under R.C. 5709.121 because it is not contained in its notice of appeal to this Court.....21

Proposition of Law V:

The request that the Court create a presumption of law that an entity’s status as a 501(c)(3) entity qualifies it as “charitable” under R.C. 5709.121 (1) directly conflicts with this Court’s vast body of case law; (2) unlawfully places the burden of proof on the Tax Commissioner to demonstrate that a 501(c)(3) is not a charitable institution in direct conflict with R.C. 5715.271 and (3) violates the principal of law that tax exemptions are to be narrowly construed and (4) intrudes on an area that is best reserved for the legislature.23

IV. CONCLUSION25

APPX.

Thomaston Woods Limited Partnership v. Lawrence (June 15, 2001), BTA Case No. 99-L-551 Appx. 1

University of Cincinnati Medical Associates, Inc. v. Zaino (October 4, 2002), BTA Case No. 99-A-1411 Appx. 6

Oikos Community Development Corporation v. Zaino (November 9, 2001), BTA Case No. 00-2037 Appx. 12

Riverside Medical Center v. The Department of Revenue (Ill. App. 2003), 795 N.E.2d 361 Appx. 16

Humane Society Foundation of Hancock County v. Tracy (October 15, 1999), BTA Case No. 98-J-884 Appx. 20

The Matthew Kelly Foundation v. Wilkins, BTA 05-676 Appx. 24

Missionary Church, Ohio District, Inc., dba Hilty Memorial Home v. Limbach (March. 19, 1993), BTA Case No. 90-A-504.....Appx. 29

Northeast Ohio Psychiatric Institute Notice of Appeal to Ohio Board of Tax Appeals, December 6, 2005Appx. 34

TABLE OF AUTHORITIES

CASES

<i>Akron Golf Charities</i> , 34 Ohio St. 3d 13	19
<i>Alcan Aluminum Corp. v. Limbach</i> (1989), 42 Ohio St.3d 121	5
<i>Belgrade Gardens v. Kosydar</i> (1974), 38 Ohio St.2d 135	5
<i>Bethesda Healthcare, Inc. v. Wilkins</i> (2004) , 101 Ohio St. 3d 420	passim
<i>Buckeye Int'l, Inc. v. Limbach</i> (1992), 64 Ohio St. 3d 264	21
<i>C.E. Morris Co. v. Foley Construction Co.</i> (1978), 54 Ohio St. 2d 279	3
<i>Cleveland Electric Illuminating Co. v. Lindley</i> (1982), 69 Ohio St. 2d 71	21
<i>Cleveland Osteopathic Hospital v. Zangerle</i> (1950), 153 Ohio St. 222	14
<i>Columbus Youth League v. County Board of Revision</i> (1961), 172 Ohio St. 156	15
<i>Community Health Professionals, Inc. v. Levin</i> (2007), 113 Ohio St.3d 432, ¶21	7, 18
<i>Episcopal Parish of Christ Church v. Kinney</i> (1979), 58 Ohio St. 2d 199	5, 6, 7, 19, 20
<i>Federated Dept. Stores, Inc. v. Lindley</i> (1983), 5 Ohio St. 3d 213	5
<i>Hubbard Press v. Tracy</i> (1993), 67 Ohio St. 3d 564	15
<i>Humane Society Foundation of Hancock County v. Tracy</i> (October 15, 1999), BTA Case No. 98-J-884	16

<i>Joint Hospital Services v. Lindley</i> (1977), 52 Ohio St.2d 153	10, 12
<i>Kish, Admx. v. Central National Insurance Group of Omaha</i> (1981), 67 Ohio St. 2d 41	3
<i>Lincoln Memorial Hospital, Inc. v. Warren</i> (1968), 13 Ohio St. 2d 109	8, 10
<i>Missionary Church v. Limbach</i> (March 19, 1993), BTA Case No. 90-A-504	24
<i>National Headquarters Disabled American Veterans v. Bowers</i> (1960), 171 Ohio St. 312	14
<i>Natl. Tube Co. v. Glander</i> (1952), 157 Ohio St. 407	5
<i>OCLC Online Computer Library Center, Inc. v. Kinney</i> (1984), Ohio St. 3d 1986	passim
<i>Ohio Masonic Home v. Bd of Tax Appeals</i> (1977), 52 Ohio St. 2d 127	15
<i>Oikos Community Development Corp. v. Zaino</i> (November 9, 2001), BTA Case No. 00-T-2037	10
<i>Olmsted Falls Bd. of Edn. v. Tracy</i> (1997), 77 Ohio St. 3d 393	6
<i>Planned Parenthood Assn. of Columbus, Inc. v. Tax Commr.</i> (1966), 5 Ohio St. 2d 117	6
<i>Queen City Valves, Inc. v. Peck</i> (1954), 161 Ohio St. 579	22
<i>Riverside Medical Center v. The Department of Revenue</i> (Ill. App. 2003), 795 N.E.2d 361	14
<i>Seven Hills Schools v. Kinney</i> (1986), 28 Ohio St. 3d 186	5, 6, 18, 19, 20
<i>State ex rel. Russell v. Sweeney</i> (1950), 153 Ohio St. 66	24

<i>Strongsville Bd. of Educ. v. Zaino</i> (2001), 92 Ohio St.3d 488.....	22
<i>Summit United Methodist Church v. Kinney</i> (1983), 7 Ohio St. 3d 13.....	8
<i>The Benjamin Rose Institute v. Myers</i> (1915), 92 Ohio St. 252.....	8, 10
<i>The Incorporated Trustees of the Gospel Worker Society v. Evatt</i> (1942), 140 Ohio St. 185.....	13, 14
<i>The Lutheran Book Shop v. Bowers</i> (1955), 164 Ohio St. 359.....	6, 14
<i>The Matthew Kelly Foundation v. Wilkins</i> (October 27, 2006), BTA Case No. 2005-V-676.....	16
<i>The Otterbein Press v. Zindorff</i> (1941), 138 Ohio St. 287.....	13
<i>Thomaston Woods Limited Partnership v. Lawrence</i> (June 15, 2001), BTA Case No. 99-L-551	8, 10, 11
<i>True Christianity Evangelism v. Zaino</i> (2001), 91 Ohio St. 3d 117.....	7
<i>University of Cincinnati Medical Associates, Inc. v. Zaino</i> (October 4, 2002), BTA Case No. 99-A-1411	9, 10, 11
<i>Wheeling Steel Corp. v. Porterfield</i> (1970), 24 Ohio St. 2d 24.....	23

STATUTES

R.C. 5709.01	5
R.C. 5709.12	passim
R.C. 5709.12(B).....	9
R.C. 5709.12(E).....	23
R.C. 5709.121	passim
R.C. 5709.72	23
R.C. 5717.02.....	21

I. INTRODUCTION

Northeast Psychiatric Institute (“Northeast”) is the owner of the real property from which tax exemption is being sought. Northeast generates income as a staffing service and a commercial lessor. Northeast is appealing the Tax Commissioner’s denial of its application for real property exemption for tax year 2003, and the remission of taxes, penalties and interests for tax years 2002-2000. The Tax Commissioner denied Northeast’s application because it concluded that Northeast was not a charitable institution and the property was not used exclusively for charitable purposes pursuant to R.C. 5709.12 and R.C. 5709.121. The BTA affirmed the Tax Commissioner’s holding. From this decision, Northeast initiated this appeal. As will be demonstrated, the holding of the BTA was reasonable and lawful and must be affirmed.

II. STATEMENT OF THE FACTS

A. Use of the Property.

As noted above, Northeast is the owner of the real property which is at issue in this matter. Supp. 19-23, Tr¹ 235-36. Northeast has three tenants: (1) Portage Path Behavioral Health Center (“Portage Path”), (2) a for-profit private physician, Dr. Baer, and (3) a for-profit lab, LabCare. S. Supp. 3. It is unclear how much space Northeast actually leases to each of these tenants. Portage Path claims to use sixty-eight percent (68%) of the property. Supp. 104, Tr. 104. However, its lease with Northeast states that Portage Path uses fifty-seven percent (57%) of the property. Further complicating the issue is the representation by Northeast’s counsel that Portage Path uses sixty-two percent (62%) of the building. Supp. 269, ST. p. 249; See also Supp. 105, Tr 105 and S. Supp. 30. Assuming Northeast’s counsel is correct, Portage

¹“Tr” will be used in the place of the Hearing Record while “ST” will be used in place of the statutory transcript.

Path leases 3,562 square feet of the building. This results in Dr. Baer leasing 1,425 square feet, or twenty-five percent (25%) of the building, and LabCare leasing the remaining 713 square feet, or approximately twelve and a half percent (12.5%) of the building, from Northeast. S. Supp. 30, ST. p. 226.

B. Northeast's Activities.

The record is clear that Northeast is a revenue generating entity and not a charity. Portage Path created Northeast to insulate Portage Path from premises liability, enable Portage Path to recoup rental and insurance payments, and generate income through atypical means as a "non-profit" entity. Supp. 89, Tr 41. Jerome Kraker, Portage Path's president, admitted that Northeast's primary operation is leasing the building on the property and providing psychiatric staffing services. Supp. 107, Tr 115; See also Supp. 264-68. He also admitted that Northeast's leasing business has been profitable since 2001 Supp. 107, Tr 115; See also Supp. 264-68. Northeast enabled Portage Path to be reimbursed for its rental payments under the terms of a contract it has with the Summit County Alcohol, Drug Addiction and Mental Health Board (the "ADAMH Board"). Supp. 108, Tr. 119. The greater the percentage of leased space by Portage Path, the greater amount Portage Path could seek in reimbursement from the ADAMH Board. In 2003, Northeast received rental income of \$66,000 from Portage Path, \$11,000 from LabCare and \$17,425 from Dr. Baer. Supp. 97, Tr. 73-74 and 76.

Northeast also generates income through the operation of a psychiatric staffing service. Supp. 102, Tr. 94. Through this service, Northeast's staffing service places psychiatrists and/or psychiatry residents with companies in need of psychiatry coverage. S. Supp. 6-7, ST. p. 118-19. The hourly rate Northeast charges its customers varies by the job type, the time of day, the level of the license, and the distance traveled. S. Supp. 9, ST. 121. Northeast's hourly rate for its

psychiatric staffing placement services ranges from thirty-five dollars (\$35) to four hundred and fifty dollars (\$450) per hour. S. Supp. 31, ST. p. 231.

Northeast also administers a consulting service for other behavioral health care entities. S. Supp. 10, ST. 125. In 2003, Northeast's consultants were available to assist in administration, clinical administration, finance/accounting, quality assurance, medical records and marketing. Id.

Finally, Northeast owns another property that is a parking lot that is located near the local professional baseball team's stadium. It leases the parking lot to a non-affiliated entity, which charges a fee for parking in the lot during the baseball team's games. Northeast and the non-affiliated entity split the revenue generated by the parking lot.

In 2003, Northeast's total income was over a million dollars (\$1 million). Its rental income from the building its leases was \$179,347. It also generated \$932,446 in psychiatric staffing and consulting fees, and \$3,470 in parking revenue. Supp. 107, Tr. 114-15, S. Supp. 12, 17; ST. 157, 162.

C. Portage Path's Activities.

The record is equally clear that Portage Path is not utilizing the property it leases from Northeast for charitable purposes, let alone exclusively for a charitable purpose. Portage Path² only treats patients that are residents who reside in Summit County and are in need of emergency

² On page 7 of the BTA decision, the BTA mentions in dicta that Portage Path is a charity. The BTA stated this with no factual record, analysis or indication what Revised Code section applied. Facts determined by the BTA must be supported by sufficient probative evidence. *Bethesda Healthcare, Inc. v. Wilkins* (2004), 101 Ohio St.3d 420, ¶18. This Court has held that an appellee need not file a cross-appeal to dispute grounds of a lower court's decision when he does not seek in anyway to modify the judgment of the court below. *Kish, Admx. v. Central National Insurance Group of Omaha* (1981), 67 Ohio St.2d 41, 51. See also *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 280 holding a matter "properly appealed to this court is here for the proper determination of all questions presented by the record."

services. ST. p. 21-22. In fact, if a patient moves out of Summit County, Portage Path can only treat that patient for up to thirty (30) days without prior approval by the Summit County ADAMH Board. Id. When a patient arrives at Portage Path and is unable to pay the cost of the service rendered, the ADAMH Board reimburses Portage Path the entire cost of the service. Supp. 87, Tr. 35; See also Supp. 88, Tr. 38-39. In situations where patients can afford to pay a small portion of the cost of the service, the ADAMH Board pays Portage Path the difference. Id. For example, if a procedure costs \$100, and the patient is able to pay \$50, the ADAMH Board pays the remaining \$50 to Portage Path. Supp. 87, Tr. 36. In 2003, the ADAMH Board reimbursed Portage Path for 93% of its costs. Supp. 195-96.

The cost of the service rendered by Portage Path is identical to the amount it charges its patients. Supp. 105, Tr. 107. Mr. Kraker testified that there is a collection procedure for patients who are unable to afford the full amount of the cost of a specific service. Supp. 105, Tr. 107.

Mr. Kraker admitted that once a collection agency is unable to obtain the full cost charged to a patient, Portage Path deducts, the difference between the cost of the service and the amount paid as bad debt, even though the ADAMH Board reimburses Portage Path for that difference. Supp. 105, Tr. 108. In fact, there is nothing in the record that demonstrates that Portage Path provides any free care or the amount of services it claimed as bad debt. Supp. 112, Tr. 135. Excluding Medicare and Medicaid³ payments, (which accounts for approximately ten to twelve percent of Portage Path's receipts), Portage Path received full payment for the costs of the services charged to its patients. Supp. 111, Tr. 132. In 2003, Portage Path collected \$8,138,842 in fees from governmental agencies, \$1,589,507 in Medicaid and Medicare payments and \$477,899 from patient fees. ST. 189, 194.

³ There is nothing in the record to indicate that Medicaid and Medicare payments are any less than an amount received by any other entity from a private insurance company payor.

By the terms of its contract with the ADAMH Board, Portage Path is precluded from generating income through fundraising unless it was achieved through legacies, bequests or membership campaigns. Supp. 211. Noticeably missing from this list of approved fundraising is income obtained through leasing, income from operating a staffing service or fees generated from parking. Based upon these facts, the BTA held that Northeast is not a charitable institution under R.C. 5709.121, that the use of the property is not used exclusively for charitable purposes under R.C. 5709.12 and affirmed the Tax Commissioner's denial of an exemption. Appellant's Appx. 9-19. As will be shown, the BTA's holding that Northeast is not a charitable institution and that the property is not used exclusively for charitable purposes was reasonable and lawful and must be affirmed.

III. LAW & ARGUMENT

A. Standard of Review

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 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. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the Commissioner's determination was in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213, 215.

When no competent 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*, 42 Ohio St.3d at 123. In reviewing decisions of the Board, the Supreme Court is confined to its statutorily delineated

duties of determining whether the Board's decision is reasonable and lawful. *Episcopal Parish of Christ Church v. Kinney* (1979), 58 Ohio St.2d 199, 201.

B. Real Property Standard

The rule in Ohio is that all real property is subject to taxation and exemption is the exception to the rule. R.C. 5709.01; *Seven Hills Schools v. Kinney* (1986), 28 Ohio St.3d 186. Statutes providing exemption from taxation must be strictly construed. *Natl. Tube Co. v. Glander* (1952), 157 Ohio St. 407. "In all doubtful cases exemption is denied." *A. Schulman, Inc. v. Levin* (2007), 116 Ohio St.3d 105, 106. In fact, the Ohio Supreme has previously held that "if property, employed in one kind of business, is exempted from taxation, the burden will necessarily fall more heavily on property employed in other pursuits." *Bethesda Healthcare, Inc. v. Wilkins* (2004), 101 Ohio St.3d 420, ¶19. The burden rests upon the party claiming an exemption to demonstrate that the property qualifies. *OCLC Online Computer Library Center, Inc. v. Kinney* (1984), 11 Ohio St.3d 198, 201. This must be the rule in order to preserve equality in the burden of taxation. *The Lutheran Book Shop v. Bowers* (1955), 164 Ohio St. 359, 362.

C. The Interplay of R.C. 5709.12 and R.C. 5709.121

R.C. 5709.12 exempts from real property taxation any property that is used exclusively for charitable purposes while R.C. 5709.121 defines exclusive use for charitable purposes by a charitable institution. *Seven Hills Schools*, 28 Ohio St.3d 186. If an institution is charitable, its property may be exempt if it uses the property exclusively for charitable purposes under R.C. 5709.12 or it uses the property under the terms set forth in R.C. 5709.121. *Id.* R.C. 5709.121 has no application to non-charitable institutions seeking tax exemption under R.C. 5709.12. *Bethesda Healthcare, Inc.*, 101 Ohio St.3d 420, at ¶29. Therefore, the first inquiry must be

directed to whether the institution seeking exemption is a charitable or non-charitable institution.

Olmsted Falls Bd. of Edn. v. Tracy (1997), 77 Ohio St.3d 393, 396.

The Supreme Court defined the term “charity” in *Planned Parenthood Assn. of Columbus, Inc. v. Tax Commr.* (1966), 5 Ohio St.2d 117, paragraph one of the syllabus, which stated:

[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, 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.

D. A Charitable Institution’s Use of the Property under R.C. 5709.121

To fall within R.C. 5709.121, the property must (1) be under the direction or control of a charitable institution, (2) be otherwise made available for use in furtherance of or incidental to the institution’s charitable purposes, and (3) not be made available with a view to profit. *OCLC Online Computer Library Center*, 11 Ohio St.3d at 200. Exclusive charitable use in R. C. 5709.121, applies *only* to property belonging to (*i.e.* owned by), a charitable institution. *Episcopal Parish of Christ Church*, 58 Ohio St.2d at 201 quoting *White Cross Hospital Assn.*, 38 Ohio St.2d at 203.

When considering R.C. 5709.121 and the question of whether a charitable institution uses its property in furtherance of or incidentally to its charitable purposes, this court focuses on the relationship between the actual use of the property and the purpose of the institution. *Community Health Professionals, Inc. v. Levin* (2007), 113 Ohio St.3d 432 at ¶21.

E. Charitable Institution under R.C. 5709.12

To grant an exemption from real property taxation pursuant to R.C. 5709.12, it must first be determined that (1) the property belongs to an institution, and (2) the property is being used exclusively for charitable purposes. *True Christianity Evangelism v. Zaino* (2001), 91 Ohio St.3d 117, 118. 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. *Episcopal Parish of Christ Church*, 58 Ohio St.2d at 201, quoting *White Cross Hosp. Assn.*, 38 Ohio St.2d at 203. Thus, R.C. 5790.12 is applicable to “any institution.” *Id.*

Proposition of Law I:

Northeast’s fee-based rental business demonstrates that it is not a charitable institution under R.C. 5709.121 even though its profits are used to support Portage Path.

Real estate that is rented for commercial purposes is not exempt from real property taxation even if the rental income is devoted to a charitable purpose. *The Benjamin Rose Institute v. Myers* (1915), 92 Ohio St. 252, Syllabus. Thus, this Court has consistently denied exemptions even when the rental amounts were at or below market rates and the profits generated were used to support a charitable institution. For example, this Court has held that an institution that was established to supply temporary relief and aid to the poor, elderly and disabled children was not entitled to an exemption for real estate that it owned and rented even though it used the income derived from the rent to maintain the charity. *Id.* In its opinion, the Court noted that even if a church was used during non-service hours for storage or as a gift shop, and even though the rent was used for charitable purposes, its exemption would be lost. *Id.* at 266.

In fact, the Ohio Supreme Court has held that as little as \$9,309 in rental payments supported the denial of an exemption because the Court determined that the income was “used with a view to profit.” *Summit United Methodist Church v. Kinney* (1983), 7 Ohio St.3d 13, 15. In *Lincoln Memorial Hospital, Inc. v. Warren* (1968), 13 Ohio St.2d 109, 110, the evidence presented demonstrated that the property owner rented a hospital building and its land to a nonprofit corporation at a rate to satisfy the property’s mortgage and taxes. The Court held that the property owner’s “use” of the property was in the nature of a rental arrangement and not a “use” by it exclusively for charitable purposes. *Id.*

The BTA has denied the exemption of real property owned by a 501(c)(3) corporation which was used for low income housing. *Thomaston Woods Limited Partnership v. Lawrence* (June 15, 2001), BTA Case No. 99-L-551. Appx 1. The BTA held:

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. The record establishes that the primary use of the property by appellant is to lease it to third parties. While educational organizations lease the property for laudable purposes and perhaps at or below market rents, it does not change the fact that the property owners “use” 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 leasing.

The BTA noted that it is beyond its statutory authority to extend the exemption requirements of R.C. 5709.12 and any modification must be made by the General Assembly, not a judicial or administrative entity. Appx. 1.

Additionally, there is no vicarious exemption from real property. Therefore, a property is not exempt from real property taxation if it is rented to a charitable organization. *OCLC Online Computer Library Center*, 11 Ohio St.3d at 199.. See also *Lincoln Memorial Hospital, Inc.*, 13

Ohio St.2d 109; *Joint Hospital Services v. Lindley* (1977), 52 Ohio St.2d 153; *Hubbard Press v. Tracy* (1993), 67 Ohio St.3d 564; *University of Cincinnati Medical Associates, Inc. v. Zaino* (October 4, 2002), BTA Case No. 99-A-1411; *Thomaston Woods Limited Partnership v. Lawrence* (June 15, 2001), BTA Case No. 99-L-551.

For example, in *University of Cincinnati Medical Associates, Inc.⁴ v. Zaino* (October 4, 2002), BTA Case No. 99-A-1411, a 501(c)(3) corporation leased 25% of its property at or below market rates to the Health Alliance of Greater Cincinnati. Appx. 6. All revenues generated by this lease were used to cover the costs of operating the property, and any surplus was used to reduce the rent of the physicians. Appx. 6. Looking to this Court's holding in *OCLC Online Computer Library Center*, 11 Ohio St.3d 198, the BTA noted "it is the charitable activities of the taxpayer seeking the exemption which must be considered when reviewing an application for charitable exemption and not those of the taxpayer's lessees." Appx. 6. The BTA held:

The appellant is leasing the property to a medical practice corporation affiliated with the University of Cincinnati; in other words, the appellant is a landlord. The BTA held '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. *** Likewise, appellant merely provides the leasable 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 or below market level and uses the rents generated to only cover costs of operations and if any money is left after covering its costs, to reduce the rent charged to the practice corporations, appellant still charges rent 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 for charitable purposes. Further, appellant, itself, does not provide the medical care that is offered at the subject facility; 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.

⁴ Vacated for settlement purposes.

See also *Oikos Community Development Corp. v. Zaino* (November 9, 2001), BTA Case No. 00-T-2037 (BTA denying an exemption of a 501(c)(3) corporation under R.C. 5709.12 even though the rent received was at or below market cost and in no event resulted in a profit to the corporation) Appx. 12.

Moreover, the Supreme Court has repeatedly held that once property is leased commercially, the property loses its ability to be exempt. *The Benjamin Rose Institute*, 92 Ohio St. 252, Syllabus; See also *Lincoln Memorial Hospital, Inc.*, 13 Ohio St.2d at 110. In fact, the Court held that, in commercial leasing situations, the use of the property is a rental agreement, not a charitable use. See *Lincoln Memorial Hospital, Inc.*, 13 Ohio St.2d at 110.

In the present case, Northeast leases the property to Portage Path, Dr. Baer and LabCare. S. Supp. 30, ST. p. 226. Both Dr. Baer and LabCare are for-profit entities that rent approximately thirty-seven percent (37%) of the property from Northeast while Portage leases the remainder. *Id.*; See also S. Supp. 2, ST. 3. , Therefore, Northeast, is a landlord and not a charitable institution and Northeast is barred from seeking a vicarious exemption through the actions of Portage Path. As such, an exemption under R.C. 5709.121 is not appropriate.

Proposition of Law II:

Northeast's fee based psychiatric placement and consulting service demonstrates that it is not a charitable institution under R.C. 5709.121 even though the profits are used to support Portage Path.

This Court has consistently held that generating income to support a charitable entity does not entitle the institution to a charitable exemption. In fact, two common fact patterns that persist in the denial of applications for charitable exemptions are (1) that the activity itself is not charitable and (2) that the activity is competing with commercial or for-profit entities. The Court

has held that satisfying either of these factors is fatal to an application for exemption. In this instance, Northeast meets both.

Initially, leasing property for a fee, collecting parking fees and administering a fee-based staffing and consulting service are not charitable activities. See *Joint Hospital; Hubbard Press* supra. The Court has held repeatedly that charging at or below market rates is not relevant in the determination of whether the use is charitable. In fact, the Court has held just the opposite. See *The Benjamin Rose Institute; Summit United; Lincoln Memorial* supra. Moreover, generating income to support a charitable institution does not support the contention that the property is used for exclusively for charitable purposes. Again, this Court has rejected this argument. *Bethesda; Otterbein Press; Gospel Workers; Cleveland Hospital; Disabled Veterans* supra

In *OCLC Online Computer Library Center*, 11 Ohio St.3d 198, the Ohio Supreme Court denied an exemption to a non-profit corporation with members which included one hundred eighty four (184) academic institutions and libraries in Ohio and over two thousand six hundred (2600) libraries throughout North America. OCLC services are not available to the general public and members are charged a fee for access to its service. *OCLC*, 11 Ohio St.3d 198. Moreover, OCLC does its own independent research on behalf of for-profit companies. *Id.* The only issue before the Court was whether OCLC was a charitable institution under R.C. 5709.12. *Id.* OCLC claimed it was a charitable institution vicariously through its service to charitable entities (i.e. libraries). *Id.* at 199.

The Court rejected OCLC's claim by looking to *Joint Hospital Services*, in which the Court held that the charitable activities of the taxpayer seeking the exemption must be considered when reviewing an application for charitable exemption, not the charitable nature of the institution's customers. The Court noted that although OCLC's service may greatly enhance the

ability of libraries to better serve the general public, OCLC offers a product to charitable institutions for a fee. *OCLC*, 11 Ohio St.3d at 201.

The Court also commented on OCLC's fee based research for private commercial enterprises. *OCLC*, 11 Ohio St.3d at 201. The Court noted that these types of commercial endeavors have previously been determined to preclude the issuance of a charitable tax exemption. *Id.* The Court's holdings in *OCLC* and *Bethesda Healthcare* are a result of a long line of cases which rejected taxpayers' contentions, similar to Northeast's, that generating income to support a potential charitable institution through commercial activities is not subject to exemption.

In fact, in *The Otterbein Press v. Zindorff* (1941), 138 Ohio St. 287, the Ohio Supreme Court rejected a charitable exemption request by a non-profit organization whose purpose was to publish religious periodicals for a fee which was divided between the church and orphans, the elderly, the disabled or the poor. The Court held where a substantial portion of the gross income of a corporation is received for work done in competition with commercial enterprises, the property is not exempt from taxation, even though the beneficiary is a not for profit religious institution. *The Otterbein Press*, 138 Ohio St. 287, Syllabus at ¶2.

In *The Incorporated Trustees of the Gospel Worker Society v. Evatt* (1942), 140 Ohio St. 185, 186, the Ohio Supreme Court continued adhering to its prior holding in *The Otterbein Press* supra in denying a charitable exemption request of a non-profit corporation which published religious papers and pamphlets. In *Gospel Worker Society*, all of the proceeds were used to finance the church's religious and charitable activities. *Id.* at 186, 190. The Court held that the property used to produce income was not exempt from taxation even though a large amount of literature was delivered without any charge. *Id.* at Syllabus ¶2; 186.

In *Cleveland Osteopathic Hospital v. Zangerle* (1950), 153 Ohio St. 222, 227, the Ohio Supreme Court held that despite the fact that a hospital devoted its profits to paying off indebtedness, improving and enlarging its facility, does not make it a tax exempt charitable institution. In Illinois, the courts have denied the charitable nature of hospitals or clinics which acted in a similar manner to Northeast and Portage Path. *Riverside Medical Center v. The Department of Revenue* (Ill. App. 2003), 795 N.E.2d 361, 366-67, Appx. 16.

In *The Lutheran Book Shop*, 164 Ohio St. 359, the Ohio Supreme Court denied a charitable exemption by the Department of The Lutheran Welfare Service of Northwestern Ohio, which was a non-profit organization. The welfare service operated a shop that was open to anyone to purchase bibles, Christian literature, books, stationary, and religious materials for use in churches and in Sunday schools. *Id.*

The Court looked to Section 2 of Article XII of the Ohio Constitution and Section 5353 of the General Code [a predecessor to R.C. 5709.12] and held that property which is used to produce income which is used exclusively for charitable purposes is not exempt from taxation. *Id.* at 361. Moreover, the Court stated where a substantial portion of the non-profit corporation's income is received from work performed in competition with commercial entities; the corporation's property is not exempt under R.C. 5709.12, even though the corporation is a non-profit entity and the property's use is for a charitable institution. *Id.* at 361-62.

In *National Headquarters Disabled American Veterans v. Bowers* (1960), 171 Ohio St. 312, 314, the Ohio Supreme Court held that the property was not entitled to an exemption under R.C. 5709.12 even though the income was from the sale of the items created by disabled war veterans and the proceeds were used exclusively for charitable purposes. In *Columbus Youth League v. County Board of Revision* (1961), 172 Ohio St. 156, 158, the Ohio Supreme Court

noted the justification in denying exemption for non-charitable endeavors used to support charitable institutions in stating:

It is sought here to justify the plaintiff's position upon the theory that the property used for the non-exempt purposes was property which was necessarily employed by the plaintiff for purposes which are exempt and that the use of the property when not employed for purposes which are exempt should not destroy its exemption. This construction would create an entirely new exemption statute. If the plaintiff wishes to claim the benefit of the exemption it should keep itself within the field prescribed by the Legislature. Whether it goes out of that field or not is a matter of choice. It may stay in and receive the exemption. It may depart from it and pay its taxes. It has chosen to depart, therefore its property is subject to taxation. It is the use of the property and not the use of the proceeds derived therefrom which is determinative of the question of tax exemption.

In *Ohio Masonic Home v. Bd of Tax Appeals* (1977), 52 Ohio St.2d 127, the Ohio Supreme Court rejected a charitable exemption request of a non-profit entity which provided and maintained a home for the care of the elderly. At issue, was a tract of land used for farming to produce income to support institutional care of its residents. *Id.* The Court noted that farming is functionally removed from the institution's charitable purpose and even though the net income was used by the institution for its charitable purpose, the farming activity is not in furtherance of or incidental to the function of a home for the elderly. *Id.*

In *Hubbard Press*, the Ohio Supreme Court rejected a charitable exemption request by a non-profit corporation that printed, publish, sold and distributed offering envelopes and other supplies for churches and congregations. Hubbard claimed that it was entitled to an exemption "because the Subject Property is owned by The Hubbard Press, an Ohio not-for-profit corporation organized by the * * * Presbyterian Church * * * solely to be used as a printing plant" for church purposes. *Id.* at 566. The Court held that Hubbard Press utilized the property for printing envelopes which were used by churches and congregations. The Court recognized

those activities (i.e. printing envelopes) were themselves not charitable. *Hubbard Press*, 67 Ohio St.3d 564. The Court noted that any charitable purpose was vicarious at best and the use of that product by a charitable organization or the use of the income in a charitable manner was immaterial as to whether Hubbard Press was a charitable institution. Id.

In *Humane Society Foundation of Hancock County v. Tracy* (October 15, 1999), BTA Case No. 98-J-884, the taxpayer sought an exemption for property used for bingo that generated income to fund its charitable activities. However, the BTA noted that the Ohio Supreme Court has held that property used to produce income for the use of or in furtherance of charitable purposes, may not be exempted from taxation. Appx. 20. The BTA held that the purpose of the activity is to generate funds and not for a charitable purpose and rejected the taxpayer's application for exemption. In *The Matthew Kelly Foundation v. Wilkins* (October 27, 2006), BTA Case No. 2005-V-676, the BTA correctly held that even when the profit is dedicated to a charitable cause, the property is precluded from exemption under R.C. 5709.12 because the sale of materials is in direct competition with other retail outlets and is not in and of itself a charitable activity. Appx. 24.

Here, the Court must look at Northeast's activities; it is a commercial lessor of the property to Portage Path, Dr. Baer, a for-profit entity and LabCare, a for-profit entity. S. Supp. 2, ST. 3. It also owns additional property which it leased to a non-affiliated entity for parking at the local professional baseball team's games and then split the parking profits with that third party. Sup. 107, Tr. 115-16. If these two acts were not bad enough, Northeast also runs a consulting and staffing placement service. Sup. 102, Tr. 94.

The psychiatric staffing placement service charges between thirty-five (\$35) and four hundred and fifty dollars (\$450) an hour and generated almost one million dollars (\$932,446) in

fees alone. Supp. 107, Tr. 114-15, S. Supp. 12, 17; ST. 157, 162. Add in the Northeast's almost two hundred thousand dollars (\$179,347) in rental fees, its four thousand dollars (\$3,470) in parking fees, and its income from its "non-profit" and "charitable" endeavors and Northeast's income tops one million one hundred thousand dollars (\$1.1 million) in 2003. Id.

The Court has consistently held that generating income to support a charitable entity does not entitle the institution to a charitable exemption. In fact, two common fact patterns that persist in the denial of applications for charitable exemptions are (1) that the activity itself is not charitable and (2) that the activity is competing with commercial or for-profit entities. The Court has held that satisfying either of these factors is fatal to an application for exemption. In this instance, Northeast meets both.

Nonetheless, Northeast claims that it is a charitable institution and the use of the property by Portage Path is charitable because the money generated by renting the property to Portage Path is at or below market rates and the money generated from the staffing service is used to support Portage Path. See generally Appellant's Brief. However, as discussed above, this Court has previously rejected similar arguments. Moreover,, Northeast's activities (leasing property, charging for parking and charging fees for psychiatric staffing and consulting services) are in direct competition with other for-profit and other commercial entities.

Northeast charges a lower rent amount to Portage Path to keep Portage Path using the property and to enable Portage Path to be reimbursed by the ADAMH Board for its rental expenses. Northeast in leasing its commercial space to Portage Path, Dr. Baer and LabCare is in direct competition with other commercial lessor who may charge a lower rental amount to lure Northeast's tenants to its property. Further, Northeast is in direct competition with other staffing and consulting services that offer their expertise in the health care field. Because Northeast is a

commercial lessor, offers a fee-based parking service in conjunction with a non-affiliated third party and administers a fee-based staffing and consulting service, Northeast is not a charitable institution. Because Northeast is not a charitable institution, R.C. 5709.121 is not applicable. *Seven Hills Schools*, 28 Ohio St.3d 186.

1. Northeast's Reliance upon *Community Health Professionals* (2007), 113 Ohio St.3d 432 is misplaced.

Appellant's reliance upon *Community Health Professionals* is misplaced. The Appellant argues the facts in these two cases are nearly identical and that the outcome of *Community Health Professionals* resulted in the granting of a real property exemption. However, the basis upon which this Court reached its conclusion is totally unresponsive of the arguments advanced by the Appellant. The owner in *Community Health Professionals* is a charitable institution and the Supreme Court never addressed this issue having found that the Tax Commissioner waived it. Significantly, this Court noted factors that would have potentially resulted in a conclusion that *Community Health Professionals* was not a charitable institution had that issue been properly before it.

The Supreme Court stated:

We acknowledge the Tax Commissioner's position that CHP does not use its property in furtherance of or incidentally to its charitable purposes because it charges patients for services rendered, accepts payment from private and government sources, writes off unpaid amounts and does not offer its services free of charge or in accordance with a sliding scale. However, these circumstances concern the question of whether CHP is a charitable institution, which is not before this court. *Community Health Professionals, Inc. v. Levin* (2007), 113 Ohio St.3d 432, ¶22.

In this matter, the Tax Commissioner and the BTA agreed that Northeast was not a charitable institution which bars the application of R.C. 5709.121. *Seven Hills Schools*, 28 Ohio St.3d 186; BTA decision p. 7, Appellant's Appx. p. 17. Therefore, any reliance by Northeast to

Community Health Professionals in this matter is improper because Northeast is not a charitable institution. Moreover, Northeast's reliance upon *Akron Golf Charities* (1987), 34 Ohio St.3d 11 is equally misplaced because (1) it involves an entirely different tax scheme (i.e. sales tax) and (2) the Court noted that you must look at the corporation's operations See Appellant's Brief p. 16. The record clearly demonstrates that Northeast is not a charitable institution and has not used the property exclusively for charitable purposes.

As stated previously, Northeast is a commercial lessor, administers a fee-based staffing and consulting service and receives additional fees for parking space rentals. Supp. 107, Tr. 114-15, S. Supp. 12,17, ST. 157, 162. In looking reviewing Northeast's operations, it cannot be disputed that is does not satisfy R.C. 5709.12 or R.C. 5709.121. Further, the cases cited by Appellant in *Private Duty*, *Miracit*, *Herb Society*, and *Grandview Hospital* are all devoid of analysis by the reviewing body of whether the entity is a charitable institution, as that issue was not before it and instead focused on whether R.C. 5709.121 was satisfied. Because Northeast is not a charitable institution, R.C. 5709.121 does not apply. *Bethesda Healthcare, Inc.*, 101 Ohio St.3d 420, ¶29

2. Northeast's claim that the property is exempt because it is under the control of a charitable institution is incorrect.

Northeast also claims that it is entitled to an exemption because the property is under the control of a charitable institution, which is not the standard for determining exemption. Appellant's Brief p. 17. The Supreme Court in *Episcopal Parish of Christ Church* held that R. C. 5709.121, applies *only* to property belonging to (*i.e. owned by*), a charitable institution. *Episcopal Parish of Christ Church*, 58 Ohio St.2d at 201 quoting *White Cross Hospital Assn.*, 38 Ohio St.2d at 203. There is no dispute that the property at issue is owned by Northeast and a

claim that the property is under the control of a charitable institution is not relevant to the inquiry of whether the property is entitled to exemption under R.C. 5709.121.

As such, Appellant's Proposition of Law II must be rejected. Northeast also claims that the property is made available for use or in furtherance of a charitable public purpose. Appellant's Brief p. 19. Again, this issue is never reached because as stated previously, Northeast is not a charitable institution and as such R.C. 5709.121 is not applicable to noncharitable entity. *Seven Hills Schools*, 28 Ohio St.3d 186. Northeast also seeks a vicarious exemption through the activities of Portage Path. This Court has rejected this contention in *Lincoln Memorial*, *Joint Hospital*, *OCLC* and *Hubbard Press* supra and therefore, any claim for exemption by Northeast through the activities of Portage Path is improper.

Proposition of Law III:

Northeast did not use the property exclusively for charitable purposes under R.C. 5709.12.

Having failed to meet the test under R.C. 5709.121, the applicant equally fails to satisfy R.C. 5709.12 for two reasons. First, the Court has held that commercial leasing of real property is not used exclusively for charitable purposes under R.C. 5709.12. *Summit United Methodist Church*, 7 Ohio St.3d at 15; *Lincoln Memorial Hospital, Inc.*, 13 Ohio St.2d at 110; *The Benjamin Rose Institute*, 92 Ohio St. 252, Syllabus. As stated previously, Northeast leased the property to Dr. Baer, LabCare and Portage Path. S. Supp. 30, ST. 226 Dr. Baer and LabCare are for-profit entities. S. Supp. 2, ST. 3. These for profit entities made up approximately thirty-seven percent (37%) of the leased space. Id. All of Northeast's tenants paid rent to Northeast which resulted in \$179,347 in income in 2003. Supp. 107, Tr. 114-15, S. Supp. 12, 17, ST. 157, 162. As a result, Northeast is not entitled to an exemption pursuant to R.C. 5709.12 as the property was not used exclusively for charitable purposes.

Secondly, Portage Path, even if it were a charitable entity, (which it is not), does not use the property exclusively for charitable purposes. The Court noted in *Bethesda* and *Community Health Professionals* some indicia that are necessary for the use to be exclusively for charitable purposes like free care and a sliding scale. In fact, there is nothing in the record that demonstrates that Portage Path provides any free care or the amount of services it claimed as bad debt. Supp. 112, Tr. 135. Moreover, excluding Medicare and Medicaid⁵ payments, (which accounts for approximately ten to twelve percent of Portage Path's receipts), Portage Path received full payment for the costs of the services charged to its patients. Supp. p. 111, Tr. 132. The ADAMH Board alone reimburses 93% of Portage Path's costs. Supp. 195-96.

In *Bethesda Healthcare, Inc.*, 101 Ohio St.3d 420, the Ohio Supreme Court rejected an application for exemption of the fitness center located within Bethesda North Hospital. When charges are made for the services being offered, the Court must consider the overall operation being conducted to determine whether the property is being used exclusively for charitable purposes. Id. at ¶35. "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.*, 101 Ohio St.3d 420, at ¶39.

The facts in *Bethesda* indicated that only eight (8) full scholarships and an unknown amount of partial memberships were given to persons who were unable to afford the membership fees, which amounted to slightly over one tenth of one percent of the total members. *Bethesda Healthcare, Inc.*, 113 Ohio St.3d 432, ¶38. The Court held that the small numbers of members able to use the fitness center without first paying membership dues indicated that the property

⁵ There is nothing in the record to indicate that Medicaid and Medicare payments are any less than an amount received by any other entity from a private insurance company payor.

was not used exclusively for charitable purposes under R.C. 5709.12. *Bethesda Healthcare, Inc.*, 101 Ohio St.3d 420, at ¶39. Based upon the totality of the evidence presented, Portage Path's use of the property is not exclusively for charitable purposes. There is no evidence of any free care and the sliding scale is immaterial as the difference in the amount paid by patients is reimbursed by the ADAMH Board. Supp. 87, Tr. 36. As a result, there can be no doubt that Northeast's use of the property is not exclusively for charitable purposes and does not satisfy R.C. 5709.12.

Proposition of Law IV:

Northeast's and Amicus Curiae are jurisdictionally barred from seeking a presumption that a 501(c)(3) entity is a charitable institution under R.C. 5709.121 because it is not contained in its notice of appeal to this Court.

It is clear from the record that Northeast's argument in favor of creating 501(c)(3) status as a presumption of a charitable institution under R.C. 5709.121 is being raised herein for the first time. This constitutes a jurisdictional deficiency as Northeast has failed to include any mention of its 501(c)(3) status in its notice of appeal to this Court. Appx. 34. The omission is amplified by the fact that Northeast at least mentioned 501(c)(3) in its notice of appeal to the BTA. Appellant's Proposition of Law No 3 states on page 20 of its brief:

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, in the absence of evidence that it has violated the requirements of its articles or of Section 501(c)(3).

Amicus Curiae The Ohio Council of Behavioral Healthcare Providers Proposition of Law states on page 2 of its brief:

An entity granted Section 501(c)(3) status by the Internal Revenue Service shall be presumed charitable for purposes of R.C. 5709.121 unless it falls into an exception recognized by the Supreme Court of Ohio.

Northeast's failure to include this error in its notice of appeal divests this Court of jurisdiction.

See *Buckeye Int'l, Inc. v. Limbach* (1992), 64 Ohio St.3d 264, 267; *Cleveland Electric Illuminating Co. v. Lindley* (1982), 69 Ohio St.2d 71, 75.

Proposition of Law V:

The request that the Court create a presumption of law that an entity's status as a 501(c)(3) entity qualifies it as "charitable" under R.C. 5709.121 (1) directly conflicts with this Court's vast body of case law; (2) unlawfully places the burden of proof on the Tax Commissioner to demonstrate that a 501(c)(3) is not a charitable institution in direct conflict with R.C. 5715.271 and (3) violates the principal of law that tax exemptions are to be narrowly construed and (4) intrudes on an area that is best reserved for the legislature.

The Appellant's request to create a presumption of law that possessing a 501(c)(3) federal tax designation qualifies any entity as a charitable institution under R.C. 5709.121 is contrary to law for many reasons. First, it directly conflicts with this Court's long line of case law nowhere therein as such status ever been construed to be definitive of an applicant's status as a charitable institution. Repeatedly, the Court has look at the totatlity of facts in reaching such a conclusion. See above. Secondly, by elevating its federal tax status to a presumption, the Appellant's proposal would unlawfully shift the burden away from itself to the Tax Commissioner in direct conflict with R.C. 5715.271 which states:

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 t continued exemption.

Thirdly, Appellant's argument would unlawfully expand the exemption under R.C. 5709.121 in direct contravention of this Court's long standing precedent that exemption from

taxation must be narrowly construed 5739.02(B)(9).. Finally, the argument would intrude upon an area that is best reserved for legislative consideration. Indeed, simple examination of R.C. in Ohio sales and use tax provisions clearly demonstrates that the General Assembly is quite cognizant of 501(c)(3) status and has chosen in which areas it deems it appropriate to use that status as a means of defining charitable exemption under Ohio's tax code.

Moreover, if Northeast wants a legislative change to create a presumption, it can go to the General Assembly and have it amend R.C. 5709.121. Northeast noted in its brief that the General Assembly has exempted property through a legislative fix after the entity was initially denied an exemption by adding R.C. 5709.12(E) and R.C. 5709.72. Appellant's Brief p. 10 and 27. Therefore, if Northeast wishes to create a presumption that an entity which is a 501(c)(3) corporation for federal income tax purposes is a charitable institution under R.C. 5709.121, a legislative change is required.

A corporation's declaration in its certificate of incorporation that it was organized as a non-profit entity is not conclusive as to its nature. *State ex rel. Russell v. Sweeney* (1950), 153 Ohio St. 66, Syllabus ¶2. The true test is the actual character of the corporation. *Id.* at ¶3. Operating at a loss, in and of itself does not necessarily equate to operating a non-profit or charitable organization. *Missionary Church v. Limbach* (March 19, 1993), Case No. 90-A-504, Appx. 29. A profit may consist of a saving of an expense or the obtaining of a service at a cost lower than that which otherwise would be paid. *Sweeney*, 153 Ohio St. 66, at ¶6. In *State ex rel. Russell v. Sweeney* (1950), 153 Ohio St. 66, 72, the Ohio Supreme Court held:

Profit does not necessarily mean a direct return by way of dividends, interest, capital account or salaries. A saving of expense which would otherwise necessarily be incurred is also a profit to the person benefited. If respondent renders to its incorporators or members, or to businesses in which they are interested and in whose profits they share, a service at a cost lower than that

which would otherwise be paid for such service, then respondent's operations result in a profit to its members.

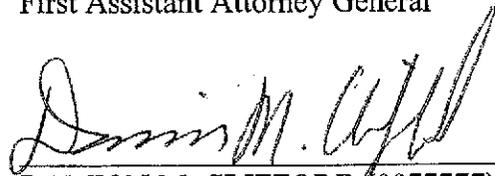
Northeast is a 501(c)(3) entity, yet it operates a staffing and consulting service which generated income close to one million dollars (\$1 million) in 2003, almost two hundred thousand dollars (\$200,000) in leasing fees and almost four thousand dollars (\$4,000) in parking fees in 2003. Supp. 107, Tr. 114-15, S. Supp. 12, 17; ST. 157, 162. These facts demonstrate that a 501(c)(3) can be profitable. There is nothing in the record which indicates what form of review the Internal Revenue Code spends in ascertaining whether a 501(c)(3) is truly adhering to the guidelines and regulations which were used in initially granting an entity 501(c)(3) status. Moreover, there is nothing in the record which demonstrates why a 501(c)(3) or a non-profit entity should be considered a charitable institution pursuant to R.C. 5709.12 or R.C. 5709.121. This matter reiterates why a presumption of an entity's 501(c)(3) status is inappropriate. As such, Northeast's request that a 501(c)(3) entity is presumptively a charitable institution pursuant to R.C. 5709.121 must be denied.

IV. CONCLUSION

Based upon the foregoing analysis, the Tax Commissioner seeks an Order affirming as reasonable and lawful the BTA's determination that Northeast does not satisfy R.C. 5709.12 or R.C. 5709.121 for real property exemption

Respectfully Submitted,

SHERYL CREED MAXFIELD
First Assistant Attorney General

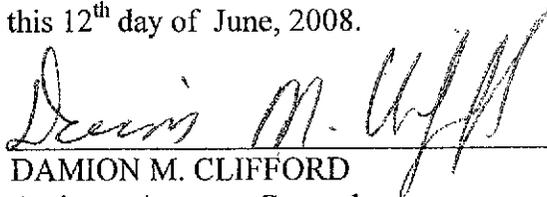


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Appellee was sent by regular U.S. mail to Mary C. Henkel, Vorys, Sater, Seymour and Pease LLP, 221 East Fourth Street, Suite 2100, P. O. Box 0236, Cincinnati, Ohio 45201-0236, counsel for appellant, David H. Seed and Daniel McIntyre, Brindza, McIntyre & Seed LLP, 1111 Superior Avenue, Suite 1025, Cleveland, Ohio 44114, counsel for Amicus Curiae, Ohio School Boards Association, Ohio Association of School Business Officials, Buckeye Association of School Administrators, and John J. Kulewicz and Michael J. Hendershot, Vorys, Sater, Seymour and Please LLP, 52 East Gay Street, P. O. Box 1008, Columbus, Ohio 43216-1008, counsel for Amicus Curiae Ohio Council of Behavioral Health Providers , on this 12th day of June, 2008.



DAMION M. CLIFFORD
Assistant Attorney General

24 of 25 DOCUMENTS

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 1032

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:

"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 incur (sic) no liability . . . ' Black's Law Dictionary, 640. Applicant's general partner, St. Thomas Housing Corporation, is a non-profit 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 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 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 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 [*14] 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." (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 LawState & Local TaxesAdministration & ProceedingsJudicial ReviewTax LawState & Local TaxesPersonal Property TaxExempt PropertyRequirements for Exempt StatusTax LawState & Local TaxesReal Property TaxGeneral Overview

54 of 107 DOCUMENTS

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:

"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.

"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 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 Uni-

versity * * *, 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."

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.

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."

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 not [*19] 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

60 of 107 DOCUMENTS

Oikos Community Development Corporation, Appellant, vs. Thomas M. Zaino, Tax
Commissioner of Ohio Appellee.

CASE NO. 00-T-2037 (REAL PROPERTY EXEMPTION)

STATE OF OHIO -- BOARD OF TAX APPEALS

2001 Ohio Tax LEXIS 1869

November 9, 2001

[*1]

APPEARANCES:

For the Appellant - Mark A. Tuss, Popp & Tuss, Dayton, 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.

The Board of Tax Appeals considers this matter pursuant to a notice of appeal filed by Oikos Community Development Corporation ("Oikos"). Oikos appeals a decision of the Tax Commissioner wherein the Commissioner denied Oikos' application for the exemption of certain real property for 1999 and the remission of real property taxes and interest for tax years 1996, 1997 and 1998. The Tax Commissioner did grant remission of all penalties for the subject tax years.

Oikos is a 501(c)(3) tax-exempt charitable organization founded by four Dayton area churches in 1989 with the goal of working to redevelop and revitalize inner city neighborhoods and work with poor city residents. According to Article III of its Articles of Incorporation, Oikos' purposes include:

"* * * Enhancing and improving the quality of life in the neighborhood of Dayton, Ohio * * *. Encouraging and promoting the rehabilitation [*2] and renovation of the housing stock in the neighborhood, and the commercial revitalization and economic development of the neighborhood.

"Making rehabilitated structures available for sale to the general public with the idea of maintaining a resale price at a level that will encourage their acquisition by low and moderate income families.

"Carrying on any other activities that will promote the development of housing in the service neighborhood for low and moderate income families, the elderly, the handicapped, and other disadvantaged citizens where no adequate housing for such groups exists, pursuant to the Nation Housing Act, as amended or any other local, state, or federal law under which such housing can be provided." (S.T. 37-38.)

In its notice of appeal, as in its application for exemption, Oikos contends that eight parcels of real property owned by it are exempt from taxation. Five of these are multi-family properties, which Oikos rents to tenants with incomes below fifty-percent of the mean area income. n1 The multi-family properties include: parcel R72-067-08-001, containing four one-bedroom units; parcel R72-066-01-0064, containing two three-bedroom rental units; parcel [*3] R72-066-01-0050, containing two three-bedroom rental units; parcel R72-066-01-0057, containing two three-bedroom rental units; and, parcel R72-068-08-0022, containing six two-bedroom rental units and five one-bedroom rental units.

n1 At the time of this Board's hearing, one of the units was unoccupied and an on-site manager used another.

Two of the properties are single-family homes: parcel R72-066-08-0045 and parcel R72-068-08-0023. Both single-family units were unoccupied at the time of the hearing. Oikos represents that it purchases homes for the purpose of either rehabilitating the properties or renting them to persons with low incomes. The homes are eventually sold to low-income, first-time buyers. Oikos will rent the single homes to individuals with the understanding that the individual will purchase the home within a specified period.

The final parcel of real property, parcel R72-066-09-0011, is land that is used as a parking lot. Oikos keeps the lot open to the public without charge.

In reviewing Oikos' appeal, we recognize the presumption that the findings of the Tax Commissioner are valid. See *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121, 123. It is [*4] therefore incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the presumption and establish a right to the relief requested. See *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135, 143; see, also, *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 Tax Commissioner's determination is in error. See *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213, 215.

Additionally, because Oikos seeks to exempt real property from taxation, we note the general rule that statutes granting exemptions from taxation must be strictly construed. *Natl. Tube Co. v. Glander* (1952), 157 Ohio St. 407, at 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. See, also, *Seven Hills Schools v. Kinney* (1986), 28 Ohio St.3d 186 (holding that "exemption from taxation is the exception to the rule and statutes granting exemptions are strictly construed.").

R.C. 5709.01(A) subjects all real property located in Ohio to taxation, [*5] except as expressly exempted therefrom. The General Assembly is empowered by the Ohio Constitution to pass laws to exempt certain types of property. Section 2, Article XII, Ohio Constitution reads 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, * * *."

Oikos argues in its brief that the subject properties are exempt under either R.C. 5709.12 or 5709.121. Before we can proceed to consider the merits of Oikos' claims of error, however, we must address a jurisdictional issue raised by the Commissioner. The Commissioner objects to our consideration of exemption under R.C. 5709.121 on the grounds that Oikos failed to either seek exemption under the statute in its application or to specify exemption under R.C. 5709.121 in its notice of appeal. It is well [*6] 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 that the term "specify" means to "mention specifically, to state in full and explicit terms." *Id.* at 583.

A review of the Application for Exemption filed by Oikos reveals that Oikos left blank question thirteen of the application, which asks, "under what section(s) of the Ohio Revised Code is exemption sought?" Nor does Oikos identify itself as a "charitable institution" in the application. (S.T. 8.) In his denial of the application, the Commissioner limited his determination to R.C. 5709.12. [*7] In so doing, the Commissioner noted that Oikos failed to file any written objections to the examiner's report, a report that also limited discussion of the subject parcels to R.C. 5709.12. (S.T. 2-6.) Finally, Oikos refers only to R.C. 5709.12 in its notice of appeal. It does not specify as error the Commissioner's failure to consider the application under R.C. 5709.121. The record indicates that Oikos first raised R.C. 5709.121 in its argu-

ments at this Board's hearing. Based upon the foregoing, we must conclude that we are restricted in our analysis to a discussion of R.C. 5709.12. *Moraine, supra.* n2

n2 We acknowledge, as is suggested by Oikos, that R.C. 5709.121 purports to define the term "exclusively for charitable purposes," a term found in R.C. 5709.12. Nevertheless, the Supreme Court has determined that the definition is not all encompassing and has held that R.C. 5709.121 actually creates a new basis for exemption. *Episcopal Parish v. Kinney* (1979), 58 Ohio St.2d 119. See, also, the concurring opinion in *White Cross Hospital Assn., supra.* Cf. *Rickenbacker Port Auth. v. Limbach* (1992), 64 Ohio St.3d 628. The General Assembly has thus far declined to amend the definitional provisions contained in R.C. 5709.121.

[*8]

Under R.C. 5709.12(B) all real property owned by institutions used exclusively for charitable purposes is exempted from taxation:

"Lands, houses, and other buildings belonging to a county, township, or municipal corporation and used exclusively for the accommodation or support of the poor, or leased to the state or any political subdivision for public purposes shall be exempt from taxation. Real and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation. * * *."

To grant an exemption under R.C. 5709.12, it must first be determined that (1) the property belongs to an institution, and (2) the property is being used exclusively for charitable purposes. *Highland Park Owners, Inc. v. Tracy* (1994), 71 Ohio St.3d 405, 406. Relying upon *Black's Law Dictionary*, the Court in *Highland* defined the term "institution" 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 character, designed for profit to those composing the organization, or public and charitable in its purposes, or [*9] educational * * *." The Commissioner has determined that Oikos qualifies as an institution, and, upon review, we concur that Oikos meets the first requirement for exemption under R.C. 5709.12.

The second prong of the test represents the more difficult question of whether the property belonging to Oikos is used exclusively for charitable purposes. Initially, we note that the Commissioner now concedes that the parking lot held open for public use is entitled to an exemption as being exclusively used for a charitable purpose. Upon review, we agree. See, e.g., *State Teachers Retirement Bd. v. Kinney* (1981), 68 Ohio St.2d 195.

With regard to the multi-tenant properties and the single-family homes, R.C. 5709.12 does not expressly state whether properties rented at or below market rates by charitable institutions are "used exclusively for charitable purposes." However, the Supreme Court has consistently held that real property rented and used for private residential purposes is not entitled to an exemption under the statute. The Court has found such properties to be taxable, not because the use fails to be a charitable one, but because the use fails to be "exclusively" charitable, as [*10] expressly required by R.C. 5709.12. In *Beerman Foundation, Inc. v. Bd. of Tax Appeals* (1949), 152 Ohio St. 178, the Court considered an application for exemption filed by the owner of several apartment buildings. The apartments were leased to disabled war veterans, their wives and their children, at prices significantly less than market rents. Although the Court acknowledged that the apartments were made available at below cost to aid veterans who had impaired earning power, the Court found that the use was not exclusively charitable:

"We agree with counsel for appellant in the instant case that housing for the needy, aged, sick, orphans or widows is charity entitling the property so used to be exempted from taxation. However, we are of the opinion that such housing would not be used exclusively for charitable purposes if each and every occupant was required to pay for accommodations.

"The use of the property in the instant case is primarily for furnishing low-rent housing and not exclusively for charitable purposes." *Id.* at 182.

See, also, *Doctors Hospital v. Bd. of Tax Appeals* (1962), 173 Ohio St. 283.

The Court revisited the issue in *Philada Home Fund v. [*11] Bd. of Tax Appeals* (1966), 5 Ohio St.2d 135. There, the Court reaffirmed and clarified its previous holdings in cases such as *Beerman*:

"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 under 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 the syllabus.

The Court has continued to apply this rationale in subsequent cases concerning property rented at below market prices. See *National Church Residences v. Lindley* (1985), 18 Ohio St.3d 53 ("The furnishing of low-cost housing at or below market prices, where residents pay a part or all of their rental costs, is not, in and of itself, an exclusive use of the property for charitable purposes."); and, *Cogswell Hall, Inc. v. Kinney* (1987), 30 Ohio St.3d 43 (property rented to elderly women at rates that cover less than half of the maintenance costs held taxable). [*12] Similarly, property that is rehabilitated for purchase by low-income families has been held taxable as not being used exclusively for charitable purposes. *Dayton Metropolitan Hous. Auth. v. Evatt* (1944), 143 Ohio St. 10, at paragraph one of the syllabus; *Rehab Project v. Tracy* (May 23, 1997), BTA 95-R-418, unreported.

Oikos nevertheless maintains that the foregoing case law is inapplicable to the parcels under consideration. Oikos refers to amendments made to R.C. 5709.12 and 5709.121 in 1993, which it claims have legislatively made the subject properties exempt. We disagree. With regard to R.C. 5709.121, we again note that Oikos failed to raise the statute in either its application or its notice of appeal. As to R.C. 5709.12, the amendments did not alter R.C. 5709.12(B), which sets forth the "exclusively used for charitable purposes" language. Instead, the amendments added R.C. 5709.12(D), which defines some of the organizations entitled to seek exemption under the statute. Am. Sub. H.B. 782, effective January 8, 1993, 144 Ohio Laws, Part IV. A later amendment further defined "institutions" but added no new exemption. Am. Sub. H.B. 281, effective July 2, 1993, 145 Ohio Laws, [*13] Part III, 5278. Moreover, in the uncodified section of Am. Sub. H.B. 782, the General Assembly expressly stated that the amendments were remedial in nature and were meant to "clarify the intent of the General Assembly that organizations of the kind described * * * are, and always have been, entitled to the tax exemption provided * * *" in R.C. 5709.12. Am. Sub. H.B. 782, Uncodified Section 9. n3

n3 Although not before this Board, it appears that a similar rationale would apply to the amendments made to R.C. 5709.121.

Based upon all of the foregoing, we must conclude that the rental units and the single family properties are, as a matter of law, not used exclusively for charitable purposes and therefore do not qualify for tax exempt status under R.C. 5709.12. In reaching this determination, we find that Oikos is to be commended for its efforts to improve both the quality of life in Dayton and the condition of that city's neighborhoods. However, while these actions are notable, we must apply the pertinent law to the facts. Under the facts presented we must find that the Commissioner's determination is correct.

In conclusion, we find, based upon our review and the concessions of [*14] the Tax Commissioner, that Parcel No. R72-066-09-0011, which is used as a free parking lot available to the public, is entitled to exemption under R.C. 5709.12. We further find that Oikos has failed to sustain its burden with respect to its contentions regarding the other seven parcels. We therefore conclude that the remaining portion of the Commissioner's decision is supported by a preponderance of the record and is in accordance with law.

Accordingly, the Board of Tax Appeals determines and orders that the Tax Commissioner's decision must be, and the same hereby is, modified in accord with this decision and order; and, in all other respects, the Tax Commissioner's decision is hereby affirmed.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawState & Local TaxesAdministration & ProceedingsJudicial ReviewTax LawState & Local TaxesPersonal Property TaxExempt PropertyRequirements for Exempt StatusTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral Overview

LEXSEE

RIVERSIDE MEDICAL CENTER, an Illinois not-for-profit corporation, Plaintiff-Appellee, v. THE DEPARTMENT OF REVENUE OF Presiding THE STATE OF ILLINOIS and THE KANKAKEE COUNTY BOARD OF REVIEW, Defendants-Appellants.

No. 3-02-0590, 3-02-0602 cons

APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

342 Ill. App. 3d 603; 795 N.E.2d 361; 2003 Ill. App. LEXIS 958; 276 Ill. Dec. 1008

June 11, 2003, Assigned; July 9, 2003, Submitted
July 30, 2003, Filed

SUBSEQUENT HISTORY: [***1] Released for Publication September 8, 2003.

PRIOR HISTORY: Appeal from the Circuit Court for the 21st Judicial Circuit, Kankakee County, Illinois. No. 01-MR-950. Honorable Fred S. Carr, Jr., Judge Presiding.

DISPOSITION: Order of the circuit court reversed; decision of the department of revenue confirmed.

COUNSEL: For Kankakee County Board of Review Defendant-Appellant: Mr. Lawrence M. Bauer Deputy Director, State's Attorneys Appellate Prosecutor, Ottawa, Mr. Edward D. Smith, State's Attorney, Kankakee County Courthouse, Kankakee, IL, Ms. Brenda [***2] Gorski, Assistant State's Attorney, Kankakee, IL, Mr. David O. Edwards, Giffin, Winning, Cohen & Bodewes, P.C., Springfield, IL.

For Department of Revenue, Defendant-Appellant: Hon. Lisa Madigan, Attorney General, Chicago, IL, Ms. Karen J. Dimond, Assistant Attorney General, Chicago, IL. ARGUER: Brenda Gorski, David Edwards & Karen Dimond.

For Riverside Medical Center, Plaintiff-Appellee: Mr. Gregory A. Deck, Deck & Baron, Kankakee, IL. Gregory A. Deck (argued).

JUDGES: Present - HONORABLE MARY W. McDADE, Presiding Justice, HONORABLE TOBIAS G. BARRY, Justice, HONORABLE TOM M. LYTTON, Justice. PRESIDING JUSTICE McDADE delivered the opinion of the court. LYTTON and BARRY, JJ., concur.

OPINION BY: MARY W. McDADE

OPINION

[**362] [*604] PRESIDING JUSTICE McDADE delivered the opinion of the court:

In this appeal, the defendants, the Illinois Department of Revenue and the Kankakee County Board of Review, seek review of the decision of the Kankakee County circuit court granting the plaintiff, Riverside Medical Center, a charitable exemption from property taxes under section 15-65 of the Property Tax Code (35 ILCS 200/15-65 (West 2000) for clinics it owns in Bourbonnais, Maneto and Momence. The defendants argue that the subject properties do not meet the requirements [**363] for an exemption. For the following reasons, we reverse the order of the circuit court of Kankakee County and confirm the decision of the Illinois Department of Revenue.

FACTS

The plaintiff, Riverside Medical Center, is a not-for-profit corporation that owns a hospital and eight clinics in and around Kankakee. Three clinics are located in Bourbonnais, Momence and Maneto. Riverside applied to the Illinois Department of Revenue (the Department) for property tax exemptions for these clinics for 1998 on the basis that the properties were used for charitable purposes. The Department granted the exemptions, except [***3] for portions that were rented out to private physicians. Following the Department's determination, the Kankakee County Board of Review requested a formal hearing.

The matter proceeded to an administrative hearing before [*605] administrative law judge Alan Marcus. The parties stipulated that the only parts of the clinics that were potentially eligible for an exemption were

those portions that had not been rented to private doctors. David Schroeder, the chief financial officer and treasurer of Riverside Health System, was the only witness.

Schroeder testified to the corporate and financial structure of the Riverside system. Riverside Health Systems is a not-for-profit corporation that is exempt from federal income tax pursuant to *section 501(c) (3) of the Internal Revenue Code of 1954 (the Code) (26 U.S.C. § 501(c)(3) (2000))*. The corporation is also designated as a public charity under *Section 509(a) (1) of the Code (26 U.S.C. § 509(a) (1) (2000))*.

The corporation's articles of incorporation dedicate it to the improvement of the health of the communities it serves through the provision of charitable health care. The charter devotes Riverside's [***4] operations and revenue to that purpose. The system covers its operating costs through patient fees, grants, and donations. The three clinics obtained almost 100% of their revenue from patient fees, with rent also a minor contributing income source. Donations amounted to 0.05% of Riverside's 1998 revenue. Riverside budgets 3% of its total budget for charity care; however, there was no evidence presented to indicate that Riverside limits charity care to only 3% of its budget. Riverside is a party to agreements with Medicare, Medicaid and other large health insurers to provide health care at discounted prices to members of those plans. In 1998, Riverside provided \$ 191,670,616 worth of patient services. After discounts due to Riverside's agreements with the insurers, it received only \$ 92,558,756, or approximately 50% of the value of the medical services rendered. The three clinics at issue ran a combined deficit of \$ 850,000 in 1998. The Riverside system as a whole, however, had a net revenue of approximately \$ 10 million in 1998.

Schroeder testified that the clinics fulfill their charitable purpose by giving charity care to patients who are unable to pay. The clinics do this in two [***5] ways. First, a physician working at the clinic may choose to give informal care to a patient with whose financial situation he or she is familiar. In those cases, the physician will treat the patient, but will not bill for the services. Rather, the care will be given free from the outset.

Second, the clinic gives out "charity care" to those individuals that it later determines are unable to pay. The clinic gives care to all patients who come to the clinic and does not demand proof of ability to pay before treatment is administered. Later, the clinic bills the patient. Upon [**364] nonpayment, another bill is sent out 30 days later. The [*606] clinic repeats this process several times. If, after several invoices are sent to the patient, the bill remains unpaid, the clinic turns the account over, to its collections department. The department contacts the patient by phone to determine why the bill

has not been paid. If the patient, at that time, indicates that he or she is unable to pay, the collections agent gives the patient an opportunity to submit a charity care application. If the patient indicates on the application an inability to pay, the bill is written off as uncollectible and further efforts [***6] at collection are discontinued. The clinics do not advertise the availability of charity care.

Following the hearing, Judge Marcus issued a recommendation that the subject properties not be given a tax exemption. The judge noted that 97% of the clinics' revenues came from patient billing, and that Riverside could not produce documentation to prove the amount of charity care actually given in 1998. The judge believed that this, in conjunction with the fact that the clinics billed all patients and did not advertise the availability of charity care, led to the conclusion that the clinics were not primarily used for charitable purposes. The judge characterized the 3% budget for charity care as *de minimus* and found that the clinics were primarily used for providing medical care to patients who were able to pay. The Director of the Department of Revenue, acting in accordance with the judge's recommendation, issued an order denying an exemption on November 6, 2001.

Riverside filed a complaint for administrative review on December 7, 2001. The court, after hearing argument in the matter, found that the ruling of the Department was clearly erroneous. The court found the clinic deficit [***7] of \$ 850,000 was not *de minimus* and issued tax exemptions for the properties. The Kankakee Board of Review (the Board) and the Illinois Department of Revenue now appeal that decision.

ANALYSIS

Riverside claims an exemption from Illinois property taxes under section 15-65 of the Property Tax Code (35 ILCS 200/15-65 (West 2000)). The provision states that all institutions of public charity are exempt from property tax when "actually and exclusively used for charitable or beneficent purposes, and not leased or otherwise used with a view to profit." 35 ILCS 200/15-65 (West 2000). While the parties do not dispute that the clinics are institutions of public charity, they do dispute whether the clinics are used exclusively for charitable purposes. The Board and the Department argue that the amount of charity care actually given by the clinics is insufficient, when compared to care given by the clinics that is paid for by patients. The State [*607] characterizes the clinics' practice of ceasing collection efforts in cases where the patient is unable to pay as the writing off of bad debts rather than the providing of charity care.

[***8] In reviewing an administrative decision under the Administrative Review Law (735 ILCS 5/3-101 et seq. (West 2000)), the appellate court reviews the administrative agency's decision, rather than that of the trial

342 Ill. App. 3d 603, *, 795 N.E.2d 361, **;
2003 Ill. App. LEXIS 958, ***, 276 Ill. Dec. 1008

court. *Peoria & Pekin Union Ry. Co. v. Department of Revenue*, 301 Ill. App. 3d 736, 739-40, 704 N.E.2d 884, 887, 235 Ill. Dec. 311 (1998). The decision of the administrative agency should not be overturned unless it is clearly erroneous. *Lutheran Church of the Good Sheperd of Bourbonnais v. Department of Revenue*, 316 Ill. App. 3d 828, 831, 737 N.E.2d 1075, 1078, 250 Ill. Dec. 98 (2000) In other words, the determination should not be overturned unless the record leaves [***365] the reviewing court with the "definite and firm conviction that a mistake has been committed." *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 395, 763 N.E.2d 272, 282, 261 Ill. Dec. 302 (2001), quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 92 L. Ed. 746, 766, 68 S. Ct. 525, 542 (1948).

To determine whether the clinics are eligible for a property tax exemption [***9] under section 15-65, we use the test established in *Methodist Old Peoples Home v. Korzen*, 39 Ill. 2d 149, 233 N.E.2d 537 (1968). In order to be eligible, the alleged charity must show that: (1) it is set up for the benefit of an indeterminate number of persons; (2) it has no capital, capital stock or shareholders and earns no profits or dividends; (3) it derives its funds primarily from public and private charity and holds those funds in trust for the objectives and purposes expressed in its charter; (4) it dispenses charity to all who need and apply for it, does not provide gain or profit in a private sense to any person connected with it, and does not appear to place obstacles of any character in the way of those who need and would avail themselves of the charitable benefits it dispenses; (5) the property is actually and factually used exclusively for the charitable purpose, regardless of any intent expressed in the organization's charter or bylaws; and (6) charity use is the primary purpose for which the property is used and not a secondary or incidental purpose. *Old Peoples Home*, 39 Ill. 2d at 156-57, 233 N.E.2d at 541-42.

With regard to the first [***10] factor, the record clearly indicates that the clinics are set up for the benefit of an indefinite number of individuals. The clinics do not place a numerical limit on the number of people who can receive charity care. Although the clinic only sets aside 3% of its budget for charity care, there is no indication that charity care is limited by that amount. The clinics' witness testified, and the State does not dispute, that the clinics will offer charity care to anyone who is unable to pay for services rendered.

[*608] Second, the Riverside system does not have shareholders or capital like a traditional corporation. Profits are not distributed to owners, and all assets are used to further the system's charitable mission. The three clinics, as constituents of the Riverside system, share these attributes. We note, however, that Riverside had a

net revenue of \$ 10 million in 1998. While we do not believe this fact necessarily requires a finding in favor of taxation, in general this level of revenue is not consistent with the provision of charity.

We find on the third factor that, as the State points out, Riverside and the clinics do not derive the majority of their funds from private or public [***11] charity. Ninety-seven percent of Riverside's revenues for 1998 came from patient billings: The clinics also had income from rental space. Only 0.05% came from donations. No grants or donations were made directly to the three clinics at issue, and it is unclear whether donations made to Riverside were in any way used for the benefit of the clinics. This factor clearly does not favor Riverside's position.

Riverside also falls short on the fourth factor. As the State points out, the clinics do not dispense charity to all who need it and they place obstacles in the way of those who seek charity. The clinics do this in several ways. First, they do not advertise the fact that they provide charity care to those who cannot afford to pay for medical services. The State contends that this fact prevents many who may be in need of charity services from receiving charity treatment, since they do not know that such care is available. Second, the [**366] State asserts that the clinics place obstacles in the way of those eligible for charity care by sending bills to all patients and not stating on the bill at any time that charity care may be available. Therefore, those who would otherwise need charity care [***12] may pay their bill anyway, despite their eligibility for free care.

Riverside responds by arguing that it provides care to all who come to the clinics without regard to their ability to pay. The record indicates that (1) Riverside does not perform any precare screening to determine whether a patient can afford to pay his or her bill; (2) the clinics give the same care to all patients, regardless of the ability to pay; and (3) the clinics do not turn patients away. Furthermore, the clinics do not pursue collection efforts once it has been determined that the patient cannot pay the medical bill.

The cases of *Highland Park Hospital v. Department of Revenue*, 155 Ill. App. 3d 272, 507 N.E.2d 1331, 107 Ill. Dec. 962 (1987), and *Alivio Medical Center v. Illinois Department of Revenue*, 299 Ill. App. 3d 647, 702 N.E.2d 189, 234 Ill. Dec. 23 (1998), deal squarely with the issue. In *Highland Park*, the hospital gave free care in a manner similar to that used by Riverside. All [*609] patients were seen by a doctor without any preliminary screening concerning the ability to pay. The patient was then billed after the visit. After 90 days, if the patient was unable [***13] to pay the bill, the debt was classified as uncollectible and written off as free care. The

clinic in *Highland Park* wrote off approximately 6% of its care in this way. *Highland Park*, 155 Ill. App. 3d at 276, 507 N.E.2d at 1334.

Similarly, in *Alivio*, the clinic wrote off around 25% of its billings as charity care. *Alivio*, 299 Ill. App. 3d at 649, 702 N.E.2d at 191. The clinic would charge each patient the full price of services following the visit but reduced the amount based on the patient's ability to pay if the full amount had not been paid after several statements were sent. *Alivio*, 299 Ill. App. 3d at 649, 702 N.E.2d at 191.

In both cases, the court found that the clinics were not giving charity care but, rather, were writing off "bad debts." *Alivio*, 299 Ill. App. 3d at 652, 702 N.E.2d at 193; *Highland Park*, 155 Ill. App. 3d at 280-81, 507 N.E.2d at 1336. In both cases, too, the court found relevant the fact that the clinics did not advertise the availability of charity care. *Alivio*, 299 Ill. App. 3d at 652, 702 N.E.2d at 193. *Highland Park*, 155 Ill. App. 3d at 281, 507 N.E.2d at 1337. [***14] The decisions in *Highland Park* and *Alivio* are persuasive and we agree with and adopt the reasoning.

Next to be determined is whether the clinics were actually used exclusively for charitable purposes. To determine the use of the clinics, it is appropriate to consider the bylaws and charter of the allegedly charitable organization. *Chicago Patrolmen's Ass'n v. Department of Revenue*, 171 Ill. 2d 263, 271, 664 N.E.2d 52, 57, 215 Ill. Dec. 655 (1996). However, even if the organization's charter devotes it to charitable service, the court should examine whether the organization is acting pursuant to the charter and is actually performing charitable works. *Morton Temple Ass'n, Inc. v. Department of Revenue*, 158 Ill. App. 3d 794, 796, 511 N.E.2d 892, 893, 110 Ill. Dec. 715 (1987).

The Riverside charter devotes the clinics to the provision of charitable health care in the areas that it serves. However, the clinics must actually provide exclusively charitable care to the community. This the clinics do not do. Although the Riverside [**367] system provides 3% of its budget for charity care, and even though the three clinics at issue ran an \$ 850,000 deficit for 1998, the evidence [***15] indicates that the primary use of the clinics is to provide care to patients who are able to pay, either individually or through Medicare, Medicaid or private insurance. Furthermore, the failure of Riverside to advertise the availability of charity care assures that such care will remain a small percentage of the total care provided by the clinics.

Riverside argues, however, that its charity care is not limited to [*610] the provision of free care. It points out that it also provides discounted care to patients through Medicare, Medicaid and private insurance. Specifically,

Riverside claims to give this care at 50% of actual cost. We are unpersuaded by the argument. Although Riverside does give discounts, these discounts are given pursuant to contract. The large insurers have negotiated preferential rates with Riverside, but there is no indication that Riverside agreed to the arrangement in pursuit of its charitable mission. It may be that Riverside agreed to the rate discounts as a way of attracting a reliable stream of business from patients insured by the large insurers. At any rate, we are confident that these discounts are not charitable and do not warrant a finding in favor of Riverside.

[***16] Sixth and finally, it must be determined whether charity is the primary use of the subject property or rather whether it is a secondary or incidental use. For the reasons discussed in the previous paragraph, charity appears to be, at best, a secondary use of the properties in question. It is difficult to determine exactly how much charity care was given at the clinics themselves since such information was not submitted to the record, but it appears that it does not amount to the majority of the care given by the clinic. Charity care given by the clinics may be as little as the 3% budgeted for that purpose by the Riverside system generally.

The evidence in the record indicates that the three clinics in the Riverside system are not used primarily for charitable purposes. In fact, the clinics at issue here share significant characteristics with the institutions in *Alivio* and *Highland Park*, in that they do not advertise the availability of charity care and only extend such care when patients do not pay after repeated billings. In *Alivio* and *Highland*, the appellate court denied the requested exemption. The same result obtains here. The ruling of the [*611] Department of Revenue [***17] was not clearly erroneous and it is confirmed.

CONCLUSION

The record and applicable case law support the conclusion that the Riverside clinics are not eligible for a charitable exemption from state property taxes. The clinics are not used primarily for charitable purposes. Rather, charity care appears to be a use secondary to the primary function of providing health care to paying customers. Also, the cases of *Alivio* and *Highland Park*, which present billing schemes similar to the one used by the Riverside clinics, support the conclusion that an exemption should not be granted. The order of the Kankakee County circuit court finding the denial of an exemption by the Illinois Department of Revenue to have been clearly erroneous is reversed and the decision of the Illinois Department of Revenue is confirmed.

Confirmed.

LYTTON and BARRY, JJ., concur.

4 of 4 DOCUMENTS

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, 16th 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 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 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)"

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 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 LawState & Local TaxesAdministration & ProceedingsJudicial ReviewTax LawState & Local TaxesPersonal Property TaxExempt PropertyRequirements for Exempt StatusTax LawState & Local TaxesReal Property TaxGeneral Overview

45 of 107 DOCUMENTS

The Matthew Kelly Foundation, Appellant, vs. William W. Wilkins, Tax Commissioner
of Ohio, Appellee.

CASE NO. 2005-V-676 (REAL PROPERTY TAX EXEMPTION)

STATE OF OHIO -- BOARD OF TAX APPEALS

2006 Ohio Tax LEXIS 1368

October 27, 2006, Entered

[*1]

APPEARANCES:

For the Appellant - Jones Law Offices, Robyn R. Jones, 175 South Third Street, Suite 800, Columbus, OH 43215

For the Appellee - Jim Petro, Attorney General of Ohio, Janyce C. Katz, Assistant Attorney General, Taxation Section, State Office Tower -- 16th Floor, 30 East Broad Street, Columbus, OH 43215

OPINION:

DECISION AND ORDER

(Vacating Decision and Order of October 6, 2006 and Granting Appellee's Motion for Reconsideration)

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

This matter is once again before this board upon a motion for reconsideration/correction filed by the appellee Tax Commissioner. The commissioner asks this board to correct a factual error appearing in our decision and order dated October 6, 2006 wherein we erroneously stated that the subject property was purchased by appellant The Matthew Kelly Foundation in August of 2004. *The Matthew Kelly Foundation v. Wilkins* (Oct. 6, 2006), BTA No. 2005-V-676, unreported at 2. As evidenced by the application for exemption as well as a copy of the deed in which appellant acquired title, the record before us indicates that the subject property was purchased by the appellant in August of 2001. Statutory Transcript, [*2] "S.T." at 238, 242.

The commissioner's motion for reconsideration is granted to correct the year in which appellant took title to the subject property. Furthermore, we vacate our decision and order dated October 6, 2006 and issue our corrected decision and order today.

This matter is before the Board of Tax Appeals upon a notice of appeal filed by appellant The Matthew Kelly Foundation ("Foundation"). The Foundation appeals from a final determination of the Tax Commissioner, in which the commissioner denied the Foundation's application for exemption of real property from taxation for tax year 2004, and remission of taxes, penalties, and interest for 2002 and 2003.

The Foundation argues the subject property was owned by an institution and used exclusively for charitable purposes pursuant to R.C. 5709.12, and that the Tax Commissioner erred in finding that the subject property was not entitled to exemption.

At hearing before this board, appellant presented the testimony of Mr. Matthew Kelly, founder and executive director of the Foundation. This matter is submitted to the board on the appellant's notice of appeal, the statutory transcript, the record of the hearing before this board [*3] ("H.R."), including exhibits, and the briefs of counsel.

The subject property is a commercial lot improved with a two-story office building containing 2,655 square feet of space. S.T. at 244. The subject is located at 2330 Kemper Lane, Cincinnati, Ohio, bears the auditor's parcel number 063-

0003-0053-00, and is titled in the name of The Matthew Kelly Foundation, a non-profit 501(C)(3) corporation. H.R. at 28, S.T. at 244. The Foundation purchased the property in August 2001.

The Foundation promotes the spiritual message of Mr. Kelly through organizing speaking engagements for a fee, paid retreats, and the sale of his published books, CDs and tapes (hereinafter "merchandise"). The Foundation organizes paid retreats in Milford, Ohio from \$ 275 to \$ 325 per person; in Fatima, Portugal for \$ 1,895 to \$ 2,195 per person; and in Assisi/Rome, Italy for \$ 2,395 per person. S.T. at 9-11, 114, 172. The Tax Commissioner concluded that annually, the Foundation earned approximately \$ 93,000 for Mr. Kelly's speaking fees, n1 \$ 47,000 from special events, \$ 906,000 from admissions and merchandise sales, \$ 183,000 from the European retreats, and \$ 353,000 in royalties from the sale of Mr. Kelly's [*4] merchandise. S.T. at 3, 98.

n1 Although Mr. Kelly testified that his speaking fees were \$ 203,000 in 2005 (H.R. at 12), he identified a document prepared by his accountants showing the receipts from his speaking fees were: \$ 302,254 in 2005, \$ 187,166 in 2004, and \$ 135,670 in 2003. H.R. at 13, Ex. B.

The record establishes that a considerable portion of the Foundation's work is to distribute merchandise, n2 offer free or reduced-fee speaking events, n3 publish a free newsletter, and provide individual scholarships to the Foundation's retreats. Monies received from the Foundation's sale of speaking engagements, retreats, and merchandise, as well as donations made to the Foundation, pay for the costs associated with items provided free of charge. While Mr. Kelly is personally compensated with an annual salary of \$ 72,000, he testified that all of the money received by the Foundation is used to defray the costs of the charitable work of spreading his inspirational message to young adults. H.R. at 12.

n2 Mr. Kelly testified that in 2005 the foundation provided 53,346 items (which include books, DVDs, and workbooks) for free. H.R. at 14, Ex. B.

n3 Mr. Kelly testified that the speaking engagements are for a negotiated amount between \$ 1,200 and \$ 3,000. H.R. at 52.

[*5]

Mr. Kelly is also the sole owner of Beacon Publishing, Inc. ("Beacon"). Beacon is a for-profit subchapter S corporation. H.R. at 50. When asked why he started his own publishing company, Mr. Kelly testified:

"Partly because we're giving so many books away into high schools. Generally, if I publish a book with a publishing company, an author would receive generally a 40 percent discount off the list price. So, for example, take 'The Rhythm of Life' as an example, it retails at \$ 20, so at a 40 percent discount, you would get - you would be paying \$ 12 a copy. Whereas with Beacon Publishing, we can publish our own edition at much less than half the price.

* * *

"Beacon Publishing owns the rights to all of my copyrighted material. If they're not publishing it, they're licensing rights to Simon & Shuster, Random House, Riley or any - In any of the countries around the world where the material is published, they're licensing the rights to those publishing companies." H.R. at 29-30.

Beacon manages the licensing of Mr. Kelly's merchandise, which is published and sold n4 through a variety of outlets, including the Foundation. The Foundation purchases from Beacon all of the books [*6] and materials sold and/or given away. H.R. at 32. When asked if the Foundation makes a profit from the retail sale of merchandise, Mr. Kelly testified:

"There is a large profit made. It funds the work we do in schools. I do not receive any of that money." H.R. at 35.

Further, Beacon Publishing makes a profit on the sale of materials to the Foundation. H.R. at 34.

n4 Mr. Kelly testified that his published works are sold through mainstream retail distribution stores such as Barnes & Noble, Sam's Club and Wal-Mart. H.R. at 22, S.T. at 218.

Appellant maintains that the for-profit activities of Beacon have no relationship to the use of the subject property. Specifically, Mr. Kelly testified that the address for Beacon is his home, that he is the sole employee of Beacon, and that the phone number for Beacon is his personal cellular phone. H.R. at 36, 44, 57. n5

n5 While our decision today is limited to the Foundation's use of the subject property, Mr. Kelly's testimony that Beacon Publishing (which sells the licensing rights to publish Mr. Kelly's nine books which have been translated into seven languages and have sold more than 700,000 copies in 26 countries) operates out of his home, using his cellular phone, is questionable. Although Mr. Kelly maintains the following facts are borne from error, the record reflects that the address of the subject property, 2330 Kemper Lane, is listed as Beacon's address in Beacon's Articles of Incorporation filed with the Ohio Secretary of State (S.T. at 85); Mr. Kelly's acceptance as statutory agent for Beacon filed with the Secretary of State (S.T. at 90); and Beacon's 2002 and 2003 tax returns (Ex. A). Furthermore, the Foundation's web site contains references and links to Beacon. H.R. at 48-49. Additionally, Mr. Kelly acknowledged the existence of a second for-profit entity filed with the Secretary of State that may have used the same address. H.R. at 42-43.

[*7]

At hearing, Mr. Kelly testified that the subject property is used by the Foundation as office and storage space for seven employees: an office manager who manages the accounting function, H.R. at 19; a graphic designer, Id.; an events coordinator, Id. at 19-20; a director of development who works with larger donors, Id. at 20; a director of marketing and public relations, Id.; and a retreat coordinator, Id. at 21.

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 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 [*8] 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, *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; *First Baptist Church of Milford v. Wilkins*, 110 Ohio St.3d 496, 2006-O [*9] hio-4966.

The Foundation applied for exemption under R.C. 5709.12. Under R.C. 5709.12(B), all real property owned by institutions used exclusively for charitable purposes is exempt from taxation:

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

Therefore, to grant an exemption under R.C. 5709.12, it must first be determined that (1) the property belongs to an institution, and (2) the property is being used exclusively for charitable purposes. *Highland Park Owners, Inc. v. Tracy* (1994), 71 Ohio St.3d 405, 406. In addition, to qualify for exemption under the above statute, real property must not be used with a view to profit. *Am. Soc. for Metals, supra*, and should not compete with commercial enterprises, *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, [*10] 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 the Foundation (a non-profit 501(c)(3) entity) is necessarily an "institution" for the purposes of the first prong of the test found in *Highland Park Owners, Inc., supra*.

As to the second prong of the test, the General Assembly has not defined what activities of an institution constitute charitable purposes. 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, 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 [*11] 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 Christianity 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., 101 Ohio St.3d 420, 2004-Ohio-1749*, at 39.

Based upon the existing record, we find that the Foundation is not an institution using its property primarily for charitable purposes.

The evidence in this case demonstrates that the Foundation does generate a significant profit. The record contains testimony that the Foundation makes a "large profit" from the promotion and sale of Mr. Kelly's written and spoken word. H.R. at 35. Even when that profit is dedicated to a charitable cause, the property is precluded from the exemption found in R.C. 5709.12. *Am. Soc. for Metals v. Limbach, supra*. Further, the Foundation's sale of materials is in [*12] direct competition with other retail outlets, and precludes exemption. *Lutheran Book Shop, supra*.

Beyond Mr. Kelly's testimony as to the number of materials that were given away by the Foundation in 2005 (see fn 2, supra), the record lacks any quantification of "free" speaking engagements or the number of retreat scholarships provided. Conversely, the record aptly demonstrates that the Foundation earned approximately \$ 906,000 from admissions and merchandise sales; \$ 93,000 in speaking fees; \$ 47,000 from special events; and \$ 183,000 from its sponsored European retreats. S.T. at 3, 98. While we understand the Foundation's mission is to promote Mr. Kelly's inspirational message, the evidence before us indicates the primary use of the property is to generate revenue to support the Foundation's message.

The Ohio Supreme Court has examined a variety of cases in which it has determined that certain property was not exempt from taxation because it involved an operation for profit. See *Incorporated Trustees of Gospel Worker Society v. Evatt* (1942), 140 Ohio St. 185 (holding that under the Ohio Constitution and the applicable [*13] statute, property used to produce income to be used exclusively for charitable purposes is not exempt from taxation); *Lutheran Book Shop, supra* (holding that a small bookstore located in a church is not tax exempt because it operated at a profit); *Ohio Masonic Home v. Bd. Of Tax Appeals* (1977), 52 Ohio St.2d 127 (finding that land used for farming that generated an income to be used for the institutional care of the elderly is not tax exempt); *Seven Hills Schools, supra* (holding that a school's "clothing exchange" does not qualify for tax exemption because it operates at a profit); *Hubbard Press v. Tracy* (1993), 67 Ohio St.3d 564 (holding that the subject property used for the printing of envelopes to be used by churches and congregations is not tax exempt).

In the past this board has also determined that property used for profit by an institution did not qualify for tax exemption. See *Jewish Community Center, supra*; *Youngstown Area Jewish Federation, supra* (finding that a gift shop that produced a profit and was operated by a charitable institution is [*14] not tax exempt); *Humane Society Foundation of Hancock County v. Tracy* (Oct. 15, 1999), BTA No. 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); *Thomaston Woods Limited Partnership v. Lawrence* (June 15, 2001), BTA No. 1999-L-551, unreported (finding that property that is leased by an institution for \$ 3000 a year to a Head Start program is not tax exempt).

Conversely, in *True Christianity Evangelism v. Zaino, supra*, the court held that the property owner's primary use of the property for charitable activities met the criterion for exemption.

It is clear from a review of the record and the applicable law that the Foundation's use of the subject property does not meet the second prong of the test established by the Ohio Supreme Court, and thus the subject property is not entitled to exemption from taxation. Unlike the facts before the court in *True Christianity Evangelism v. Zaino, supra*, it is evident that the subject property's primary use is to generate revenue in order for the Foundation to [*15] conduct its work. Accordingly, the primary use of the property fails to meet the second prong of the test set forth in *Highland Park Owners, Inc., supra*.

Accordingly, it is the decision and order of the Board of Tax Appeals that the Tax Commissioner's final determination must be, and the same hereby is, affirmed.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawState & Local TaxesAdministration & ProceedingsJudicial ReviewTax LawState & Local TaxesEstate & Gift TaxGeneral OverviewTax LawState & Local TaxesPersonal Property TaxExempt PropertyRequirements for Exempt Status

14 of 16 DOCUMENTS

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 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. 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 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 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 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 LawState & Local TaxesAdministration & ProceedingsJudicial ReviewTax LawState & Local TaxesPersonal Property TaxExempt PropertyGeneral OverviewTax LawState & Local TaxesPersonal Property TaxTangible PropertyGeneral Overview