

In the
Supreme Court of Ohio

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BOARD OF TAX APPEALS
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ANDERSON/MALTBIE PARTNERSHIP

And

LKH VICTORY CORP (dba CINCINNATI
COLLEGE PREPARATORY ACADEMY)

Appellees,

v.

WILLIAM W. WILKINS,
(RICHARD A. LEVIN),
Ohio Tax Commissioner,

Appellant.

09-1671
Case No. 2009-_____

Appeal from Ohio Board of Tax Appeals

Case No. 2007-A-11

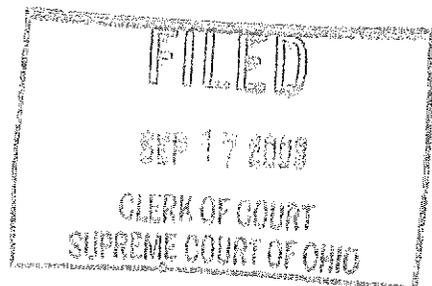
NOTICE OF APPEAL

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ANDERSON/MALTBIE PARTNERSHIP	:	
	:	
And	:	
	:	Case No. 2009-_____
LKH VICTORY CORP (dba CINCINNATI COLLEGE PREPARATORY ACADEMY)	:	
	:	
Appellees,	:	
	:	
v.	:	Appeal from Ohio Board of Tax Appeals
	:	
WILLIAM W. WILKINS, (RICHARD A. LEVIN), Ohio Tax Commissioner,	:	Case No. 2007-A-11
	:	
Appellant.	:	

NOTICE OF APPEAL

Appellant, Richard A. Levin, Tax Commissioner of Ohio, hereby gives notice of his appeal to the Supreme Court of Ohio from a Decision and Order of the Ohio Board of Tax Appeals (the “Board”) journalized in Case No. 2007-A-11 on August 18, 2009. A true copy of the Decision and Order of the Board being appealed is attached hereto as Exhibit A and incorporated herein by reference. This appeal is filed as a matter of right pursuant to Revised Code (“R.C.”) 5717.04.

Appellant complains of the following errors in the Decision and Order of the Board:

1. The Board erred as a matter of fact and law in holding that the subject property qualified for real property exemption under R.C. 5709.07(A)(1), and in reversing the appellant Tax Commissioner’s final determination denying the R.C. 5709.07(A)(1) exemption claim for that property. The Board erred in failing to strictly construe the R.C. 5709.07(A)(1) exemption against the claim of exemption because tax exemptions are in derogation of the rights of all other taxpayers.

2. The Board erred in failing to hold that the for-profit, commercial lease of the subject property by the appellee owner, Anderson/Maltbie Partnership (“AMP”), a for-profit entity engaged in commercial leasing, disqualified the property from the R.C. 5709.07(A)(1) exemption. The Board erred in failing to hold that AMP’s use of the subject property in a for-profit commercial venture, in competition with other for-profit businesses engaged in commercial leasing, disqualified it from exemption under R.C. 5709.07(A)(1).
3. The Board erred in granting real property tax exemption to the subject property because AMP’s leasing of the subject property to LKH Victory Corp. d/b/a Cincinnati College Preparatory Academy (“CCPA”) was, as found by the Tax Commissioner, for the sole purpose of AMP’s profiting from rental payments under the lease.
4. The Board erred by failing to hold that AMP’s substantial annual rental in the amount of \$275,496.48 per year warrants a denial of the R.C. 5709.07(A)(1) exemption, due to the property being “leased or otherwise used with a view to profit” within the meaning of that exemption. The Board erred in holding that even though the property produces substantial income for its lessor/owner, AMP, the property qualifies for the exemption.
5. The Board erred in focusing solely on the lessee’s, CCPA’s, use of the property when determining the “use” of the subject property for R.C. 5709.07(A)(1) exemption purposes. The Board should have affirmed the appellant Commissioner’s determination that because AMP was “using” the leased property with a view to profit in its own for-profit business that such for-profit use disqualified AMP from entitlement to the R.C. 5709.07(A)(1) exemption.

Wherefore, the Appellant Tax Commissioner requests that the Court reverse the unreasonable and unlawful decision of the Board and remand the matter for issuance of an Order denying AMP's application for real property tax exemption for tax year 2002. Appellant further requests remand so that the Board may deny AMP's request for the remission of taxes and interest for tax years 2001 and 2000.

Respectfully submitted,
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Ohio Tax Commissioner

OHIO BOARD OF TAX APPEALS

Anderson/Maltbie Partnership and LKH)
Victory Corp (d/b/a Cincinnati College)
Preparatory Academy),)

Appellants,)

vs.)

William W. Wilkins, Tax Commissioner)
of Ohio,)

Appellee.)

CASE NO. 2007-A-11

(REAL PROPERTY TAX EXEMPTION)

DECISION AND ORDER

APPEARANCES:

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Entered **AUG 18 2009**

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

This matter is before the Board of Tax Appeals upon a notice of appeal filed by appellants Anderson/Maltbie Partnership (“Anderson/Maltbie”) and LKH Victory Corp (d/b/a Cincinnati College Preparatory Academy) (“CCPA”). Appellants appeal from a final determination of the Tax Commissioner, in which the commissioner denied their application for exemption of real property from taxation for tax year 2002 and remission of taxes and

interest for tax years 1999¹ through 2001, but granted remission of all penalties charged for tax years 2000-2004. This matter is submitted to the board based upon the appellants' notice of appeal, the statutory transcript ("S.T.") certified to this board by the Tax Commissioner, the stipulation of facts ("Stip.") submitted by the parties in lieu of appearing at a hearing, including exhibits, and the briefs of counsel.

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

"The record reflects that the property was acquired by the applicant Anderson/Maltbie Partnership ***, a for-profit partnership, on June 23, 1987. The partnership is comprised of real estate entrepreneurs and developers William F. Maltbie III, CEO of Wm. Maltbie and Associates, an international commercial real estate brokerage and consulting company, and Jeffrey R. Anderson, a commercial real estate broker and developer. On July 28, 1999 the applicant entered into a lease contract (as amended) with LKH Victory Corporation ***, a non-profit entity, wherein Anderson/Maltbie leases property to LKH for the purposes of operating a school, Cincinnati College Preparatory Academy ***. It is noted that while the subject property is located at 315 W. Twelfth Street in Cincinnati, the lease designates the property to be used by the school as 1141 Central Parkway. It is noted that the 1141 Central Parkway address and 1425 Linn Street are both listed in the record as the school locations.

"The applicant requests exemption pursuant to R.C. 5709.07(A)(1), which provides in part: '[t]he following property shall be exempt from taxation: [p]ublic schoolhouses, the books and furniture in them, and the ground attached to them necessary for the proper occupancy, use, and enjoyment of the schoolhouses, and not leased or otherwise used with a view to profit.' The Ohio Supreme Court held that a private, profit-making venture does not use property for exempt or charitable purposes. *** While the record reflects that Anderson/Maltbie

¹ Appellants acknowledged in their post-hearing brief to this board that they are not entitled to a remission of tax, interest, and penalty for tax year 1999, pursuant to the provisions of R.C. 5713.08. Brief at 2.

leased some property to the charter school for approximately \$300,000 per year, there is no evidence that the subject property is used for anything other than a profit-making venture.

“The record reflects that the property was not leased to the LKH-school and/or used for an exempt purpose until, at the earliest, the October 7, 1999 lease date. Prior to the lease the property was used by Anderson/Maltbie for other for-profit business purposes. The applicant currently has the subject property listed for sale at an asking price of \$1,200,000. *** Further, the lease for the subject years mandates a rental amount of \$250,000 annually for years one through five, \$275,000 yearly for years six through ten, and \$300,000 per year for years eleven through fifteen. ***

**** the property is not entitled to exemption as leased or otherwise used with a view to profit by the owner.” S.T. at 1-2, 4.

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

“(a) By holding that the real property subject to the Real Property Tax Exemption and Remission application (i.e., the real property located at 1141 Central Parkway, Cincinnati, Ohio (which is also commonly known as 315 W. Twelfth Street, Cincinnati, Ohio) and having Hamilton County, Ohio real property parcel number 076-0001-0010-00 was not entitled to a tax exemption and remission pursuant to R.C. 5709.07(A)(1);

“(b) By holding that the real property subject to the Real Property Tax Exemption and Remission application is not entitled to exemption or remission as leased or otherwise used with a view to profit by the owner;

“(c) By holding that the real property subject to the Real Property Tax Exemption and Remission application does not meet the requirements to be exempt from taxation;

“(d) By holding that Appellant LKH Victory Corp (d/b/a Cincinnati College Preparatory Academy) operated as a public community school at multiple locations during the period of time at issue (i.e., October 7, 1999 through October 6, 2004);

“(e) By holding that there is no evidence that the real property subject to the Real Property Tax Exemption and Remission application is used for anything other than a profit-making venture; and

“(f) By failing to acknowledge that 315 W. Twelfth Street, Cincinnati, Ohio and 1141 Central Parkway, Cincinnati, Ohio are one and the same parcel of real property.”

The foregoing facts were further expanded upon in the parties' joint stipulation of facts and associated exhibits, submitted in lieu of the parties' appearance at a hearing before this board. Our review of such stipulation identifies the following facts pertinent to our determination herein:

1. Anderson/Maltbie Partnership is an Ohio general partnership involved in a for profit business. Stip. at #2.
2. Anderson/Maltbie purchased the subject property on June 23, 1987, for \$1,325,000. Stip. at #10.
3. CCPA is an Ohio nonprofit corporation with 501(C)(3) tax-exempt status, incorporated for educational purposes on December 14, 1998. Stip. at #3, #6.
4. CCPA is a public, community school for students in grades kindergarten through eighth grade, established pursuant to §3314 of the Ohio Revised Code. Stip. at #4, #5.
5. CCPA entered into a charter contract with the state of Ohio in 1999. Stip. at #7.
6. Pursuant to authority granted in §3314 of the Ohio Revised Code, on July 28, 1999, CCPA entered into a triple-net lease with Anderson/Maltbie for use of the real property located at 1141 Central Parkway, Cincinnati, Ohio, parcel number 076-0001-0010-00. The subject property, consisting of classrooms and administrative offices, is also referred to as 315 W. Twelfth Street. Stip. at #8, #11, #13.
7. The lease was amended on October 6, 1999, and pursuant to its terms, CCPA leased the subject from Anderson/Maltbie from October 7, 1999 through October 6, 2004, at a monthly

- rent of \$22,958.04. CCPA was responsible for the payment of all real estate taxes and assessments, as well as insurance, maintenance and utility payments, associated with the subject. Stip. at #8, #9, #12, #14, #15.
8. Anderson/Maltbie leased the property to CCPA solely for the purpose of profiting from the rental payments under the lease and did not conduct any of its business from the subject property during the lease term. Stip. at #16, #17.
 9. CCPA, during the lease term, leased the subject property solely for the purpose of operating its school and did not use the property for the purpose of generating a profit and did not sublease the premises to a third party. Stip. at #18, #19.
 10. Upon expiration of the lease term, CCPA relocated its school to 1425 Linn Street, Cincinnati, Ohio. CCPA never operated two locations and during the lease term, was only located at the subject property. Stip. at #20.

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 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*, *supra*, 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. *Am. Soc. 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.

The appellants claim that the subject property is eligible for exemption under R.C. 5709.07(A)(1). Specifically, that section, during the tax years in question, provided that the following property shall be exempt from taxation:

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

This board must now determine whether, pursuant to the foregoing statutory provision, certain real property, owned by a for-profit enterprise and leased to a non-profit entity which indisputably used the subject property as a public community school is exempt from real property taxation. Based upon this board’s previous consideration of such question, we find that such property should be exempt.

In *Performing Arts School of Metro. Toledo, Inc. v. Wilkins* (Dec. 20, 2002), BTA No. 2001-J-977, unreported, reversed on jurisdictional grounds, 104 Ohio St.3d 284, 2004-Ohio-6389,² the board considered property under lease for a thirty-nine month rental

² The Tax Commissioner, in his final determination, argues that because the board’s decision in *Performing Arts*, supra, was reversed by the Supreme Court on jurisdictional grounds, it is “of no precedential value in the original or subsequent matters such as the subject application under review.” While we agree with the commissioner that “[t]he issue of a real property tax exemption for a for-profit owner leasing to a charter

term that was utilized as a public community school for grades seven through twelve. The property was owned by a for-profit limited partnership and leased to a non-profit corporation that operated a school. We held:

“The commissioner contends that the lease by the owner to PASMT establishes that the property is being used to produce income, which precludes granting the exemption under R.C. 5709.07. We find to the contrary. R.C. 5709.07 does not preclude the owner’s leasing of property to PASMT for its use in the operation of a community school. The proper test is whether the property is presently being used for an exempt purpose. In keeping with *Gerke [v. Purcell]* (1874), 25 Ohio St. 229], it is not required that property be owned by PASMT to qualify it for exemption.” Id. at 6-7.

In arriving at our determination, we looked to our and other courts’ consideration of exemption requests made pursuant to other provisions for exemption within the same section of the Revised Code, i.e., R.C. 5709.07, including R.C. 5709.07(A)(2),³ granting exemption to houses used exclusively for public worship, and R.C. 5709.07(A)(4),⁴ which provides exemption from taxation for “public colleges and academies and all buildings connected therewith.” In *Jubilee Christian Fellowship, Inc. v. Tracy* (May 17, 2002), BTA No. 1999-R-239, unreported, we held that a church leased from private owners was entitled to exemption, since the property was used exclusively for public worship, and the church did not lease or otherwise use the property. In *Gary Clair/Christ United Church v. Tracy* (Sept. 11, 1998), BTA No. 1997-K-306, unreported, we held that the “evidence is unrefuted that the

school has not been finally determined by the Court,” it has been determined by this board and due regard will be given to our earlier pronouncements on such issue.

³ R.C. 5709.07(A)(2) provides that “[h]ouses used exclusively for public worship, the books and furniture in them, and the ground attached to them that is not leased or otherwise used with a view to profit and that is necessary for their proper occupancy, use, and enjoyment” shall be exempt from taxation.

⁴ R.C. 5709.07(A)(4) 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.

lessee, by virtue of its monthly rental, has possession to the subject property. The evidence is also unrefuted that the lessee uses the property as a house of public worship. Appellant testified before this Board, credibly, that the modest rent charged the lessee is used to offset the expenses unique to a property of the age and type of the subject. Accordingly, we find that the subject property is used 'exclusively for public worship' and 'that it is not leased or otherwise used with a view to profit.'" Id. at 6. In *Northcoast Christian Ctr. v. Tracy* (July 18, 1997), BTA No. 1996-M-811, unreported, we held that a church's lease of a former movie theater in a shopping center was exempt, holding that pursuant to the "court's directive in *Bexley Village, Ltd. v. Limbach* (1990), 68 Ohio App.3d 306), this Board must focus on the use the property is put by the party entitled exemption under the statute. We return to the Commissioner's finding that the appellant qualifies as a 'house of public worship'. *** The Board further finds that the lease by which appellant obtains the right to use the property is not a bar to exemption." Id. at 5.

Further, the courts have agreed that properties used by various educational institutions did not lose their exempt status by virtue of being leased by the educational institution. In *Bexley Village, Ltd. v. Limbach* (1990), 68 Ohio App.3d 306, 311, the court held that "[w]here the property is used for educational purposes, the property is exempt from taxation even though it produces income for its true owner. When applying the phrase 'not used with a view to profit' found in R.C. 5709.07, the court should focus on the use to which the property is put by the party entitled to exemption under the statute." In *Cleveland State Univ. v. Perk* (1971), 26 Ohio St.2d 1, paragraph two of the syllabus, the court determined that "under the provisions of R.C. 5709.07, exempting from taxation 'public colleges and

academies and all buildings connected therewith,' buildings located on the campus of a state university and used exclusively for classrooms and faculty offices are exempt from taxation, even though such buildings are not owned by the university, but are leased for a term of years, with provision for rental therefor, from a corporation for profit."

The commissioner claims that the foregoing analysis, comparing the instant exemption provision to other portions of R.C. 5709.07, is inappropriate because "the statutory language granting exemption to public colleges and academies is fundamentally different from the language granting exemption to public schoolhouses." Brief at 5. The commissioner argues that based upon the placement of the phrase "used with a view to profit," the exemption in R.C. 5709.07(A)(4) for public colleges and academies is granted to an institution, not a real property structure, while the exemption granted in R.C. 5709.07(A)(1) is for the real property structure. We are not convinced by the commissioner's interpretation of the statutory language under consideration. R.C. 5709.07 (A) specifically states that "the following *property* shall be exempt from taxation." Clearly, it is the property, not the institution, that is exempted.

In addition, the commissioner argues that "[t]he public school house exemption already focuses on the property, which is why there was no need to include the 'connected with' language [found in R.C. 5709.07(A)(4)] in R.C. 5709.07(A)(1). This absence of the 'connected with' language further indicates that the focus is on whether the property is leased with a view for profit, not on the nature of the lessee. *** The General Assembly intended for the public schoolhouse exemption to be applied to the building, by way of the owner. Thus, unity of ownership and use is necessary for the public schoolhouse exemption." Brief at 7.

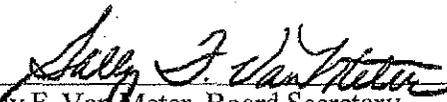
However, we find nothing in the law to support the commissioner's argument. As we stated in *Performing Arts*, supra, "[w]e find nothing in the language which limits the exemption upon the use of the property, without regard to ownership." Id. at 7. We also draw an analogy to the exemption granted in *Bexley*, supra, where the court concluded that "unity of ownership and use is not required to satisfy the 'connected with' element of R.C. 5709.07." Id. at 310.

The commissioner also argues that the substantial annual rent collected by Anderson/Maltbie from CCPA, i.e., \$275,496.48, demonstrates use of the subject property with a view to profit, thereby making it ineligible for an exemption. The commissioner states that "[p]roperty owned and leased by a for-profit corporation, for such a large amount has never been held to be exempt, not even for colleges and universities." Brief at 8-9. However, regardless of the amount, as we stated previously in *Performing Arts*, supra, even though "the subject property may produce income for its owner, it is being *used* as a schoolhouse for educational purposes." (Emphasis added.) Id. at 7. CCPA is not *using* the property with a view to profit.

Finally, the commissioner supports his position with regard to the subject property with a series of cases in which a property was found not to be exempt, pursuant to R.C. 5709.12 and R.C. 5709.121. See Brief at 11. We find such cases distinguishable from the instant matter because the exemption determinations in those matters have been made pursuant to different statutory provisions, and, as such, different requirements. In those cases, based upon the statutory provisions of R.C. 5709.12 and R.C. 5709.121, the subject property must be owned by a qualifying entity.

In sum, the commissioner's position may best be summarized by his statement at the outset of his brief that "[t]he proper focus for the exemption of real property is the use of the property by the *owner*." (Emphasis added.) Brief at 1. Clearly, based upon the foregoing, we find such perspective is not supported by current case law. Accordingly, in the interest of maintaining the consistent treatment by this board and the courts regarding exemptions claimed under R.C. 5709.07, as discussed herein, we find, pursuant to R.C. 5709.07(A)(1), that the subject property is entitled to exemption from real property taxation as it is undeniably being used as a school. 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, reversed.

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


Sally F. Van Meter, Board Secretary

BEFORE THE BOARD OF TAX APPEALS
STATE OF OHIO

ANDERSON/MALTBIE PARTNERSHIP :
And :
LKH VICTORY CORP (dba CINCINNATI : Case No. 2009-_____
COLLEGE PREPARATORY ACADEMY) :
Appellants, :
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Appeal from Ohio Board of Tax Appeals :
WILLIAM W. WILKINS, :
(RICHARD A. LEVIN), : Case No. 2007-A-11
Ohio Tax Commissioner, :
Appellee. :

PRAECIPE

TO THE OHIO BOARD OF TAX APPEALS

Demand is hereby made that the Ohio Board of Tax Appeals ("Board") prepare, transmit and file with the Supreme Court of Ohio a certified transcript of the records and proceedings of the Board pertaining to its Order in the above-styled matter; including in said certified transcript, the Board's Order, the original papers in the case or a transcript thereof, and all evidence with originals or copies of all exhibits as adduced in said proceeding considered by the Board in making its Order.

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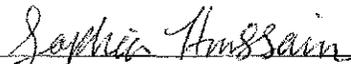
Counsel of Appellee Richard A. Levin,
Ohio Tax Commissioner

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Notice of Appeal and Praecipe were filed by hand delivery with the Ohio Board of Tax Appeals, 30 E. Broad St., 24th Floor, Columbus, Ohio 43215, and by certified mail, and were served upon Graham A. Bluhm, Eastman & Smith Ltd., One SeaGate, 24th Floor, P.O. Box 10032, Toledo, Ohio 43699, counsel for Appellants, by certified mail return receipt requested this 17 day of September, 2009.



SOPHIA HUSSAIN
Assistant Attorney General