ORIGINAL

In the
Supreme Court of Ohio

ANDERSON/MALTBIE PARTNERSHIP	:	
and	:	
LKH VICTORY CORP (dba CINCINNATI COLLEGE PREPARATORY ACADEMY)	:	
Appellees,	:	Case No. 2009-1671
v.	:	Appeal from Ohio Board of Tax Appeals Case No. 2007-A-11
RICHARD A. LEVIN, Tax Commissioner of Ohio,	:	
Appellant.	:	

BRIEF OF APPELLANT

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INTRODUCTION

For over one-hundred and fifty years, Ohio, as expressly authorized in its Constitution, has provided an exemption from real property taxes for "public schoolhouses" conditioned on requirement that the property is "not leased or otherwise used with a view to profit." R.C. 5709.07(A)(1). Applying the plain meaning of this provision, appellant Tax Commissioner denied an exemption to appellee, Anderson/Maltbie Partnership ("AMP"), a commercial real estate partnership that had leased the subject property to a community school at terms of over $275,000.00 per year. The subsequent reversal of that ruling by the BTA not only ignores the plain meaning of the statute, but directly contradicts two lines of case law issued by this Court.

Under *Gerke v. Purcell* (1874), 25 Ohio St 229, "public schoolhouses" are institutions of purely public charity and the real property used for such purpose cannot also be used for commercial purposes and still qualify for exemption. In the alternative, under *Watterson v. Halliday* (1907), 77 Ohio St. 150, the term "public schoolhouses" is limited to property owned by the state or private entities holding title exclusively for the benefit of the state and would therefore preclude an exemption to private, for-profit property owners such as the appellee. Under either scenario, it is clear that the General Assembly never intended for commercial real estate such as that in question to obtain an exemption as detailed below.

STATEMENT OF THE CASE AND FACTS

A. Procedural Posture

The BTA reversed the Commissioner's final determination and granted real property tax exemption under the "public schoolhouses" provision of R.C. 5709.07(A)(1) to appellee, Anderson/Maltbie Partnership ("AMP"). AMP is an owner of commercial real estate that, for the 2000, 2001, and 2002 tax years at issue, leased the commercial real estate at issue for profit to a community school, co-appellee LKH Victory Corp. d/b/a Cincinnati College Preparatory Academy ("CCPA").[1]

B. Statement of Facts

In lieu of an evidentiary hearing before the Board of Tax Appeals, the parties filed a mutually agreed-upon Stipulation of Facts on July 10, 2008 (the "Stipulations"). Supp. 1-5. The evidentiary record consists of the Statutory Transcript ("S.T.") submitted to the BTA by the Tax Commissioner on March 14, 2007, and the Stipulations.

1. Anderson/Maltbie Partnership is a For-Profit Entity.

AMP is a for-profit general partnership in the commercial real estate business. Supp. 1-2, Stip. ¶2. The partnership is comprised of two real estate entrepreneurs and developers: William F. Maltbie III and Jeffrey R. Anderson. Mr. Maltbie is the CEO of Wm. Maltbie and Associates, an international commercial real estate brokerage and consulting company. Supp. 1-2, 11-15 Stip. ¶2; S.T. 7-10, 217-219. Mr. Anderson is a commercial real estate broker and developer. Id.

AMP owns the real property at issue, which is located at 1141 Central Parkway, Cincinnati, Ohio, with Hamilton County parcel number 076-0001-00100-00 (hereinafter "subject

[1] On December 30, 2002, AMP and CCPA filed an application for real property tax exemption for tax year 2002 and remission for tax years 1999, 2000, and 2001, for parcel number 076-0001-0010-00. Supp. 16-23. AMP and CCPA have since acknowledged that they are not entitled to remission for 1999. AMP BTA brief at footnote 2.

property"). Supp. 2-3, Stip. ¶8. The property consists of 0.792 acres, including a 48,038 sq. ft., three-floor building with an underground garage. S.T. 213, 216. AMP purchased the subject property on June 23, 1987 for $1,325,000. Supp. 3, Stip. ¶10. Prior to the July 28, 1999 lease of the subject property to CCPA AMP used the property for other for-profit business purposes.

2. AMP Used the Subject Property for the Sole Purpose of Profiting From Rental Payments Under a For-Profit Commercial Lease.

On July 28, 1999, AMP entered into a lease contract with LKH Victory Corp. d/b/a Cincinnati College Preparatory Academy ("CCPA"), a non-profit community school, wherein AMP leased property to CCPA for the purpose of operating a school. Supp.2-3, Stip. ¶8, ¶13. AMP leased the subject property to CCPA for the ***sole purpose*** of profiting from rental payments under the lease. Supp. 3, Stip. ¶16. AMP's lease with CCPA was for five years, from October 7, 1999 to October 6, 2004, at a monthly rental amount of $22,958.04 ($275,496.48 per year). Supp. 3, Stip. ¶12, ¶14. In addition to the monthly rent, CCPA also was responsible for real estate taxes and maintenance and utility payments. Supp. 2-3, Stip. ¶8. As a community school, CCPA created and operated pursuant to R.C. Chapter 3314. Supp. 3, Stip. ¶13. After its lease with CCPA expired, AMP listed the property for sale at an asking price of $1,200,000. S.T. 213-216.

Any further facts will be referenced to the evidentiary record in the following Law and Argument Section.

LAW AND ARGUMENT

Proposition of Law:

> **A commercial building owned by a commercial lessor and leased for profit to a community school fails to qualify for the "public schoolhouses" real property tax exemption granted under R.C. 5709.07(A)(1).**

The Commissioner takes this appeal as of right pursuant to R.C. 5717.04 in order to correct a BTA decision that contradicts over fifteen decades of administrative practice and judicial precedent. The BTA has granted real property tax exemption under the "public schoolhouses" provision of R.C. 5709.07(A)(1) to AMP, an owner of commercial real estate that, for the tax years at issue, leased a commercial building for profit to a community school.

The "public schoolhouses" property tax exemption set forth in R.C. 5709.07(A) provides as follows:

> (A) The following property shall be exempt from taxation:
>
> (1) **Public schoolhouses**, the books and furniture in them, and the ground attached to them necessary for the proper occupancy, use, and enjoyment of the schoolhouses, **and not leased or otherwise used with a view to profit**;

Under its plain meaning, the exemption embraces only such real property that is "not leased or otherwise used with a view to profit." Not a single commercial owner/lessor has qualified for the "public schoolhouses" exemption for any real property leased for profit to other persons since its enactment in 1852. Only in one instance has a commercial owner/lessor (represented by the same counsel as AMP here) even attempted to challenge the denial of the "public schoolhouses" exemption at the BTA.[2] The BTA's decision reversing the Commissioner

[2] The *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; Appx. 30-34) (cited in the *BTA Decision and Order* at 6-7, Appx. 10-11).

and granting AMP's exemption claim is truly unprecedented and, for at least seven reasons, is unreasonable and unlawful.

1. The BTA's decision conflicts with the Commissioner's long-standing administrative practice and with the rationale and holding of the seminal judicial decision involving an exemption claim under the "public schoolhouses" provision, *Gerke v. Purcell* (1874) 25 Ohio St. 229.

The meaning of the "public schoolhouses" exemption always has been clear to all concerned, including the Commissioner, county auditors and treasurers, and commercial real estate owners. The seminal court decision concerning a claim under that exemption was decided 135 years ago. In *Gerke v. Purcell* (1874) 25 Ohio St. 229, the Court held that a Catholic Diocese-owned, parochial school building qualified for the exemption. The Court granted the exemption because, as an institution, the Catholic school was a "public charity," id. at 243; and the Diocese owned and used the schoolhouse without a view to profit for the charitable purpose of educating schoolchildren. In so holding, the Court emphasized that to qualify for exemption the property must be used "**to the exclusion of all idea of private gain or profit**." Id. at 247.

AMP is not an institution of "public charity," and AMP did not use the property to the "exclusion of all idea of private gain or profit." AMP's community school lessee, CCPA, may have used the property without any "private gain or profit," but the same cannot be said of AMP's own private use of the property. AMP has stipulated that its use of the commercial building at issue was "**solely for the purpose of profiting** from rental payments under the lease." *BTA Decision and Order* at 5, 8, Appx. 9. Thus, AMP's status as a for-profit owner engaged in for-profit leasing of the commercial real estate at issue defeats the exemption claim.

The controlling guidance provided by *Gerke* and the absence of any subsequent decisions under the "public schoolhouses" exemption by commercial real estate owner/lessors of real property leased for profit should compel reversal of the BTA here.

2. The Commissioner denied AMP's exemption claim under a straight forward application of the statute's plain meaning. Adoption of the BTA's alternative interpretation would require the Court to impermissibly delete words or to insert words not used by the General Assembly.

As presently set forth in R.C. 5709.07(A)(1) and as identically set forth for the tax years at issue in *Gerke*, the "public schoolhouses" exemption expressly limits the scope of the exemption to property "not leased or otherwise used with a view to profit." Thus, the BTA should have affirmed the Commissioner's denial of the exemption based on the plain meaning of R.C. 5709.07(A)(1). The BTA violated this Court's most cardinal rule of statutory interpretation: [i]n interpreting statutes, "it is the duty of this court to give effect to the words used, **not to delete words used or to insert words not used.**" *Cleveland Elec. Illum. Co. v. Cleveland* (1988), 37 Ohio St.3d 50, paragraph three of the syllabus (emphasis added).

In order to grant exemption to AMP here, the BTA either had to ignore the phrase "not leased or otherwise used with a view to profit" or the BTA had to condition that phrase by the insertion of additional language that the General Assembly itself did not utilize. Either way, such judicial re-writing is impermissible. *R.W. Sidley, Inc. v. Limbach* (1993), 66 Ohio St.3d 256, 257 ("Sidley thus asks this court to engage in blatant judicial fiat: to eliminate the words 'for sale' from the applicable statute, in order to avoid purported discrimination. This we cannot do.").

The BTA's decision below is void of any statutory analysis that supports its conclusion that AMP's for-profit use of the commercial real estate was not a disqualifying use of the property. The BTA relies solely on a quotation from its previous decision in *Performing Arts*, which cited *Gerke* for the assertion that, in order for real property to qualify for the "public schoolhouses" exemption, "it is not required that [the] property be owned by PASMT [the community school/lessee in *Performing Arts*]." *Performing Arts* at *8 -*9, Appx. 32.

Though under *Gerke*[3] qualification for the exemption may not **necessarily** require that the educational provider own the property, the only situation where commercial real estate occupied by a community school lessee would be entitled to exemption is a different one from AMP's situation. If the real estate's owner makes the property available without a view to profit, the owner's use of the property would be to the "exclusion of all idea of private gain or profit." That scenario would qualify the property for exemption under *Gerke*. Id. at 247. But that is not AMP's situation. AMP did not donate its property to CCPA or make it available to CCPA without a view to profit; AMP leased the property to CCPA for the purpose of generating substantial rental profits.

The BTA's only attempt at statutory analysis of R.C. 5709.07(A)(1) in *Performing Arts* is a discussion of and quotation from *Gerke*. The BTA's discussion is limited to an analysis of the meaning of the word "public" as a modifier of "schoolhouses" as used in R.C. 5709.07(A)(1), as follows:

> A consideration of this provision of the statute shows that the word 'public,' as here applied to school-houses, colleges, and institutions of learning, is not used in the sense of ownership, but as descriptive of the uses to which property is devoted. The schools and instruction which the property is used to support must be for the benefit of the public.

Performing Arts at *8-*9 (quoting *Gerke* at 246-247), Appx. 32.

This language from *Gerke* concerning the meaning of the word "public" as a modifier to "schoolhouses" in R.C. 5709.07(A)(1) does not provide any insight concerning the meaning of

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[3] As we discuss below in Section 4 of the Proposition of Law, infra, however, this Court's post-*Gerke* case law may narrow the scope of the public schoolhouse exemption to include only real property to which "title is vested in the state, a subdivision thereof, or other persons for the exclusive benefit of the state." *Dayton Metro. Hous. Auth. v. Evatt* (1944), 143 Ohio St. 10, syllabus; *Columbus City School Dist. Bd. of Edn. v. Zaino* (2001), 90 Ohio St.3d 496, 499; *Watterson v. Halliday* (1907), 77 Ohio St. 150, 179-180. The resolution of that question, however, is not necessary here because AMP's claim fails because of its for-profit use of the commercial real estate at issue.

the phrase "not leased or otherwise used with a view to profit" contained in that statute. The word "public" appears only once in R.C. 5709.07(A)(1), modifying the word "schoolhouses."

3. This Court held in *Gerke* that the General Assembly's constitutional authorization to enact the "public schoolhouses" exemption was conferred pursuant to the "institutions of purely public charity" tax exemption classification of former Section 2, Article XII of the Ohio Constitution.

This Court's cases under the "charitable exemption" currently set forth in R.C. 5709.12 and R.C. 5709.121, which were enacted under the same constitutional authorization as the "public schoolhouses" exemption, buttress the plain reading of R.C. 5709.07(A)(1) as applied by the Commissioner.

This Court regularly cites *Gerke* to resolve charitable exemption cases under R.C. 5709.12 and R.C. 5709.121[4] because the charitable exemption set forth in R.C. 5709.12 and R.C. 5709.121 shares a common constitutional authorization and tax exemption classification with the "public schoolhouses" exemption.

The *Gerke* Court's interpretation of the "public schoolhouses" exemption rested not only on the statute's plain meaning, but on a provision of the Ohio Constitution that conferred the General Assembly with the legislative authority to enact property tax exemptions relating to "institutions of purely public charity." Specifically, under former Section 2, Article XII of the Ohio Constitution, as in effect for the tax years at issue in *Gerke*, the General Assembly's legislative power to enact property tax exemptions was limited to a handful of tax classifications, including exemptions related to "public schoolhouses" and "institutions of purely public charity." Id. at 240-241; Appx. 37. The Court determined that the General Assembly validly enacted the "public schoolhouses" exemption pursuant to the "institutions of purely public

[4] See, e.g., *Church of God in Northern Ohio, Inc. v. Levin*, slip opinion, 2009-Ohio-5939, ¶25; *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, ¶38; 2004-Ohio-1749; *Case W. Reserve Univ. v. Wilkins*, 105 Ohio St.3d 276, ¶36; *HighlandPark Owners, Inc. v. Tracy* (1994), 71 Ohio St.3d 405, 406.

charity" classification of the Ohio Constitution[5], rather than the "public schoolhouses" classification[6].

Contemporaneously, the General Assembly enacted a statutory exemption for "buildings belonging to institutions of purely public charity, together with the land actually occupied by the institutions, not leased or otherwise used with a view to profit." Section 2732 of the Revised Statutes (as enacted in Act of April 5, 1859, 2 S & C 1440), Appx. 41-43. This latter exemption is presently codified in modified form in R.C. 5709.12 and R.C. 5709.121, which grant exemption for "property belonging to charitable and educational institutions used exclusively for charitable purposes."

As *Gerke* explained, the General Assembly's intent in enacting the "public schoolhouses" exemption was based on the "institutions of purely public charity" constitutional provision. which underpinned its enactment and buttresses the plain meaning of the exemption as applied by the Commissioner. Had the BTA considered the General Assembly's legislative intent in this light, the BTA may not have strayed so far from the "public schoolhouses" exemption's actual meaning.

From the General Assembly's contemporaneous enactment of the "public schoolhouses" exemption, the General Assembly never has broadened the "charitable exemption" in the way that the BTA's decision would expand the "public schoolhouses" exemption here. This Court's

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[5] See *Gerke*, paragraph five of the syllabus (holding that Section 2, Article XII's classification relating to "institutions of purely public charity" encompasses "schools established by private donations, and which are carried on for the benefit of the public, and not with a view to profit are 'institutions of purely public charity' within the meaning of the provision of the constitution, which authorizes such institutions to be exempt from taxation"); and *Gerke* at 244-247.

[6] See *Gerke*, paragraph two of the syllabus (holding that Section 2, Article XII's classification relating to "public schoolhouses" encompasses only those schoolhouses that are publicly owned); and *Gerke* at 242-243 (further amplifying that schoolhouses "owned by private parties and used with the view to profit" are not "public schoolhouses" within the meaning of the constitutional provision.)

decisions uniformly hold that the profit-making use of property by its owner disqualifies the property from the "exclusively for charitable purposes" exemption currently set forth in R.C. 5709.12 and R.C. 5709.121. *OCLC Online Computer Library Center*, 11 Ohio St.3d at 199; *Joint Hospital Services v. Lindley* (1977), 52 Ohio St.2d 153; *Hubbard Press v. Tracy* (1993), 67 Ohio St.3d 564 (all holding that an owner/lessor may not receive a vicarious exemption through a non-profit entity's use of the property).

Thus, property leased by the owner thereof with a view to profit cannot qualify for charitable exemption. *The Benjamin Rose Institute v. Myers* (1915), 92 Ohio St. 252, syllabus; *Lincoln Memorial Hospital v. Warren* (1968), 13 Ohio St. 2d 109; *Ohio Masonic Home v. Board of Tax Appeals* (1977), 52 Ohio St. 2d 127 (denying exemption for land leased to a farmer for profit because the charitable institution owner's use of the property was "with a view to profit"); *City of Parma Heights v. Wilkins* (2005), 105 Ohio St. 3d 463; and *Northeast Ohio Psychiatric Inst. v. Levin*, 121 Ohio St. 3d 292; 2009-Ohio-583.

The BTA's decision not only misapprehends *Gerke*, and contravenes the plain meaning of the "public schoolhouses" exemption, it anomalously would create an exemption for the very kind of property that is denied exemption in every other context involving commercial leases to non-profit, charitable lessees. Had the General Assembly truly intended for AMP's commercial real estate to be exempt under the "public schoolhouses" exemption, it is doubtful that it would not likewise have intended the same result for other commercial real estate leased for profit to charitable entities generally. The myriad of cases denying such exemption to commercial lessors under R.C. 5709.12 and R.C. 5709.121 establish that the General Assembly has not had any intention to expand the scope of the charitable exemption in that way.

4. **AMP's exemption claim equally would fail if, in accord with this Court's decision in *Watterson v. Halliday*, the "public schoolhouses" exemption is viewed as a "public property" exemption enacted under the "public schoolhouses" classification of Section 2, Article XII, Ohio Constitution, rather than under the "institutions of purely public charity" classification.**

As noted above, in *Gerke*, this Court held that the "public schoolhouses" exemption was enacted pursuant to the constitutional authority conferred on the General Assembly to enact property tax exemptions relating to "institutions of purely public charity." See *Gerke*, paragraph five of the syllabus, and the discussion in Section 3 of this Proposition of Law, supra at 9, fn.5. AMP's exemption claim equally would fail, however, if the "public schoolhouses" exemption in R.C. 5709.07(A)(1) were to be viewed as a sub-class of the "public property" exemption, constitutionally authorized under the "public schoolhouses" classification of Section 2, Article XII, Ohio Constitution, rather than as a "charitable institution / charitable use" exemption.

If viewed as a sub-class of the "public property" exemption, the "public schoolhouses" exemption would fit squarely within this Court's controlling law in *Columbus City School Dist. Bd. of Edn. v. Zaino* (2001), 90 Ohio St.3d 496, 499, as follows:

> **Public property**, within the meaning of that term **as used in the state Constitution and the statutes exempting such property from taxation**, embraces only such property as is owned by the state or some political subdivision thereof, and **title to which is vested directly in the state or one of its political subdivisions, or some person holding exclusively for the benefit of the state.**

(Emphasis added.) (quoting *Dayton Metro. Hous. Auth. v. Evatt* (1944), 143 Ohio St. 10, 16, paragraph one of the syllabus).[7]

Under *Dayton Metropolitan* and *Columbus City School Dist. Bd. of Edn.*, AMP's commercial real estate would not qualify as "public property" because AMP is a private entity which used the building for its own highly profitable commercial leasing purposes, in

[7] See also *Gerke* at 242-243.

competition with other commercial building lessors. In other words, AMP is not the state, a political subdivision of the state, or other person holding title "exclusively for the benefit of the state." *Columbus City School Dist. Bd. of Edn.* at 499; *Dayton Metropolitan* at 16, paragraph one of the syllabus.

In this Court's only post-*Gerke* case addressing the scope of the "public schoolhouses" exemption, the Court expressly characterized the exemption as one pertaining to the exemption of public property, as follows:

> **[S]chool houses and churches are <u>not</u> dealt with as "institutions of purely public charity," but as what the clause asserts them to be, "public school houses, and houses used exclusively for public worship,"** ***.

Watterson v. Halliday (1907), 77 Ohio St. 150, 179-180. (Emphasis and underlining added.)

Watterson provides a particularly strong independent basis for reversing the BTA's decision and upholding the Commissioner's denial of AMP's exemption claim. It is both the Court's long-standing and most recent precedent on the subject.[8]

Whether the "public schoolhouses" exemption is viewed as an "institution of purely public charity"-related exemption or as "public property"-related exemption, AMP's claim fails. Under either interpretation of the exemption, its plain meaning embraces only that property that is "not leased or otherwise used with a view to profit."

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[8] The Catholic Diocese schoolhouse at issue in *Gerke* potentially would be exempt under R.C. 5709.12 and .121, which provide an exemption for property used for educational purposes.

5. **The BTA erroneously relied on and misapplied cases involving the real property exemption for "public colleges and academies and all buildings used in connection with them ***," currently set forth in R.C. 5709.07(A)(4), whose express language provides a far broader exemption than granted under the "public schoolhouses" exemption in R.C. 5709.07(A)(1).**

The BTA heavily relied on cases decided under the statutory language currently set forth in R.C. 5709.07(A)(4) providing property tax exemption to "public colleges and academies **and all buildings used in connection with them**, and all lands connected with public institutions, not used with a view to profit." (Emphasis added.) See *BTA Decision and Order* at 8-9 (citing *Bexley Village, Ltd. v. Limbach* (1990), 68 Ohio App.3d 306, 311; and *Cleveland State Univ. v. Perk* (1971), 26 Ohio St.2d 1). The BTA ignored this Court's recognition that the General Assembly "used **entirely different** language" in enacting R.C. 5709.07(A)(4) than the language contained in the other R.C. 5709.07(A) exemptions. *Denison University v. Board of Tax Appeals* (1965), 2 Ohio St.2d 17, 22 (quoting *Watterson*) (emphasis added). Ohio court decisions uniformly have held that R.C. 5709.07(A)(4)'s language instead provides exemption for a much broader class of "buildings" than do the statutory tax exemptions for various kinds of "public property." This is so for two reasons.

First, because R.C. 5709.07(A)(4) exempts all buildings "used in connection with" public colleges and academies, the scope of the R.C. 5709.07(A)(4) exemption does not contain any limitation pertaining to the "public" character of the use or ownership of the buildings. No matter their "public property" or non-"public property" use or status, if the buildings "are with reasonable certainty used in furthering or carrying out the necessary purposes of the college" they will qualify for the R.C. 5709.07(A)(4) exemption. *Denison University v. Board of Tax Appeals* (1965), 2 Ohio St.2d 17, paragraph two of syllabus; *Cleveland State* at 9-10 (quoting

Denison) (granting R.C. 5709.07(A)(4) exemption for moveable, temporary structures leased for profit to a public college); see also *Bexley* at 310-311.

By contrast, R.C. 5709.07(A)(1) contains a crucial exemption requirement that is missing from the R.C. 5709.07(A)(4) exemption: that the building must be "public" property that is "not leased or otherwise used with a view to profit." Thus, the cases decided under the broader R.C. 5709.07(A)(4) exemption are of no help to AMP, whose for-profit ownership and lease of the building at issue plainly fail to qualify it as a "public" schoolhouse.

Second, again in contrast to the language of R.C. 5709.07(A)(1), as well as R.C. 5709.07(A)(2), and R.C. 5709.07(A)(3), the language of R.C. 5709.07(A)(4) omits "leasing" as a disqualifying "use" under the exemption. More favorable exemption treatment of leased property under R.C. 5709.07(A)(4) than the exemption afforded under the other provisions of R.C. 5709.07(A)(1) is easily reconciled on the basis of this difference in statutory language alone. Under the doctrine of *expressio unius est exclusio alterius*, the inclusion of "leasing" as a disqualifying use in the other three sub-divisions of R.C. 5709.07(A) implies that the General Assembly intended that a leasing disqualification not apply to R.C. 5709.07(A)(4). *Kroger Co. v. Bowers* (1965), 3 Ohio St. 2d 76, 78.

6. The BTA misrelied on previous BTA decisions concerning the "house of public worship" exemption set forth in R.C. 5709.07(A)(2).

In its decision below, the BTA heavily relied on three of its previous decisions under the "house of public worship" exemption set forth in R. C. 5709.07(A)(2) [9], which provides as follows:

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[9] See *BTA Decision and Order* at 7-8, Appx. 11-12 (citing *Gary Clair/Christ United Church v. Tracy* (Sept. 11, 1998), BTA Case No. 1997-K-306, unreported, Appx. 20-22; *Jubilee Christian Fellowship, Inc. v. Tracy* (May 17, 2002), BTA Case No. 1999-R-239, unreported, Appx.23-26; and *Northcoast Christian Ctr. v. Tracy* (July 18, 1997), BTA Case No. 1996-M-811, unreported, Appx.27-29.

(A) The following property shall be exempt from taxation:

***

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

(Emphasis added.)

In those cases, the BTA applied the same erroneous reasoning under the "house of public worship" exemption cases that it repeated in its decision below in granting AMP exemption under the "public schoolhouses" exemption. The BTA interpreted the "not leased or otherwise used with a view to profit" requirement in R.C. 5709.07(A)(2) to be inapplicable if the property is leased for profit to a lessee church, which then uses the premises for public worship. In other words, the BTA disregarded the owner's for-profit use of the property.

Further, the BTA's cases adopt an interpretation of R.C. 5709.07(A)(2) that directly conflicts with a long-standing Franklin County Court of Appeals decision, *Taylor v. Anderson* (1930), 31 Ohio Law Reporter 567, Appx. 16-19. In *Taylor*, the court affirmed the denial of the "house of public worship" exemption (then set forth in G.C. 5349 and identical to the current version in R.C. 5709.07(A)(2)) regarding real property owned by a religious organization, the Central Methodist Church of Columbus, which leased the building to another religious organization, which then sub-leased the property to a church, which used the property for public worship. Appx. 38-40.

Under these facts, the *Taylor* Court concluded that: "the property in question does not constitute a house used exclusively for public worship *** and not leased or otherwise used with a view to profit." (Ellipses added by the court). In other words, the *Taylor* Court simply applied

the plain meaning of R.C. 5709.07(A)(2) in interpreting the "not leased or otherwise used with a view to profit" requirement of the "house of public worship" exemption in R.C. 5709.07(A)(2).

The BTA's reliance on its own "house of public worship" exemption cases to support its grant of the "public schoolhouses" exemption to AMP not only impermissibly conflicts with the plain meaning of R.C. 5709.07(A)(2), it also is irreconcilable with *Taylor v. Anderson.*

7. Exemption is the exception to the rule and in derogation of equal rights, imposing a disproportionate burden on the non-exempt. Thus, any doubt concerning the meaning of R.C. 5709.07(A)(1)'s "public schoolhouses" exemption must be construed strictly against the claim of exemption.

In this case, AMP's exemption claim fails under a plain meaning application of R.C. 5709.07(A)(1). To the extent that there is any ambiguity in the applicable exemption statute, the Court's statutory interpretation guidance in *Watterson* is particularly relevant because it directly addresses the provisions of R.C. 5709.07(A), as follows:

> It is manifest, from the carefully worded language of these provisions, that the legislature intended **to place strict limitations upon exemptions**, and great caution has been exercised in the terms expressed, so that the right of exemption conferred would not be abused or unduly enlarged, and **such restrictions are essential to a fair and equitable sharing in the burdens of taxation.**

77 Ohio St. at 171. (Emphasis added.)

Further, "it is established in Ohio that exemption statutes are to be strictly construed, it being the settled policy of this state that all property should bear its proportionate share of the cost and expense of government; *** and hence that before particular property can be held exempt, it must fall clearly within the class of property specified in the Constitution to be exempt. *** In all doubtful cases exemption is denied." *Youngstown Metro. Hous. Auth. v. Evatt* (1944), 143 Ohio St. 268, 273. Accord, *First Baptist Church of Milford, Inc. v. Wilkins*, 110

Ohio St. 3d 496, 2006-Ohio-4966, ¶10 (citing *Cincinnati College v. State* (1850), 19 Ohio 110, 115); *H.R. Options, Inc. v. Wilkins*, 102 Ohio St.3d 1214, 2004-Ohio-2085, ¶2.

CONCLUSION

For the above reasons, this Court should reverse the Board of Tax Appeals decision and uphold the Commissioner's denial of AMP's R.C. 5709.07(A)(1) "public schoolhouses exemption" claim.

Respectfully submitted,

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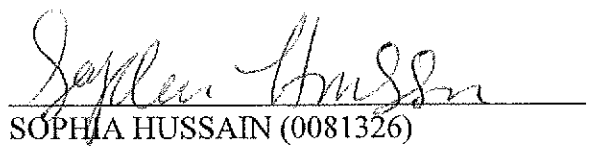

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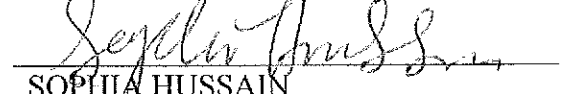
CERTIFICATE OF SERVICE

I hereby certify that a true copy of Brief of Appellant was served by regular U.S. mail upon Graham A. Bluhm, Eastman & Smith Ltd., One SeaGate, 24th Floor, P.O. Box 10032, Toledo, Ohio 43699, counsel for Appellees, on this 14th day of December, 2009.



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