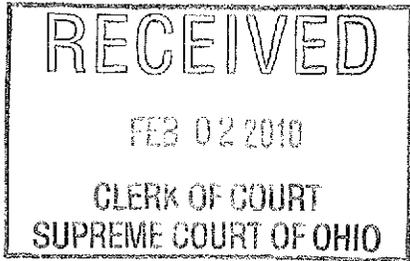


ORIGINAL

IN THE SUPREME COURT OF OHIO

Appeal from the Ohio Board of Tax Appeals

Anderson/Maltbic Partnership :  
 and :  
 LKH Victory Corp (d/b/a Cincinnati : Case No. 09-1671  
 College Preparatory Academy), :  
 Appellees, : Appeal from BTA  
 : Case No. 2007-A-11  
 v. :  
 Richard A. Levin, Tax Commissioner :  
 for the State of Ohio, :  
 Appellant. :



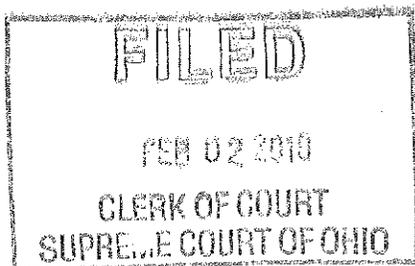
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## ISSUE PRESENTED FOR REVIEW

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Whether the Ohio Board of Tax Appeals acted reasonably and lawfully when it determined that the real property located at 1141 Central Parkway, Cincinnati, Hamilton County, Ohio, which was owned by Anderson/Maltbie Partnership and leased to LKH Victory Corp. d/b/a Cincinnati College Preparatory Academy for use solely as a public school from October 7, 1999 through October 6, 2004, is entitled to a real property tax exemption commencing as of January 1, 2002 and the remission of taxes, penalties, and interest for the years 2000 and 2001.

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## STATEMENT OF THE CASE

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On July 28, 1999, LKH Victory Corp. d/b/a Cincinnati College Preparatory Academy (“CCPA”), as lessee, entered into a triple-net **Lease Agreement**<sup>1</sup> (the “Lease”) with Anderson/Maltbie Partnership (“AMP”), as lessor, for the use of the real property located at 1141 Central Parkway, Cincinnati, Ohio (also commonly known as 315 W. Twelfth Street, Cincinnati, Ohio) and having Hamilton County, Ohio real property parcel number 076-0001-0010-00 (the “Property”). (Supp. 26-58; S.T. 264-296; Stip. ¶8).<sup>2</sup>

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<sup>1</sup> For purposes hereof, the use of the term “triple-net lease” indicates lease provisions whereby the lessee, in addition to rental payments, is also responsible for real estate tax, insurance, and maintenance/utility payments for the Property. (Supp. 2; Stip. ¶8).

<sup>2</sup> Citations herein to “Supp.” are to the **Supplement to Brief of Appellant** filed in this case on December 4, 2009. Citations herein to “Stip.” are to the **Stipulations of Fact** mutually agreed upon by the parties hereto, filed with the Board of Tax Appeals on July 10, 2008 and located at Supp. 1-5. Citations to “S.T.” are to the **Statutory Transcript** submitted to the BTA by the Commissioner on March 14, 2007.

On December 30, 2002, AMP, as the fee title holder of the Property, and CCPA, as a statutorily-created public school leasing the Property, filed an **Application for Real Property Tax Exemption and Remission** (the “Application”) pursuant to R.C. 5715.27. (Supp. 16-23; S.T. 254-261). The Application, identified as DTE No. IIE 3942, seeks to remove the Property from the Hamilton County tax list and duplicate, place the Property on the Hamilton County auditor’s tax exempt list commencing as of January 1, 2002, and have any taxes, interest, and penalties paid in relation to the Property remitted for the tax years 1999,<sup>3</sup> 2000, and 2001.

The Ohio Tax Commissioner (the “Commissioner”) issued a **Final Determination** on the Application on October 27, 2006. (Supp. 7-10; S.T. 1-4). In the Final Determination, the Commissioner incorrectly held that the real property tax exemption available for public schoolhouses and the ground attached thereto under R.C. 5709.07(A)(1) was not available to the Property since CCPA leased the Property from AMP to operate a public school. The Commissioner, therefore, denied the Application. AMP and CCPA timely filed a Notice of Appeal on January 5, 2007 with the Ohio Board of Tax Appeals (the “BTA”).

In its **Decision and Order** issued on August 18, 2009, the BTA reversed the Final Determination, holding that the Commissioner erred when denying the Application. In applying R.C. 5709.07(A)(1), the BTA correctly found that the Property need not be owned by CCPA to qualify for exemption as a public schoolhouse. Rather, the BTA found that the proper test for exemption for leased property is whether the property is presently being used for a statutorily-recognized exempt purpose (e.g., as a public schoolhouse).

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<sup>3</sup> Despite requesting a tax, interest, and penalty remission for 1999, Appellants acknowledge that they are not entitled to such a remission for 1999 pursuant to R.C. 5713.08.

In addition, the BTA correctly concluded that CCPA is a public school and that a public schoolhouse was located on the Property in accordance with R.C. 5709.07(A)(1). The BTA derived this conclusion from long-standing legal precedent establishing that the term “public” in R.C. 5709.07(A)(1) is based on the use of the subject property, not its ownership.

The Commissioner filed a **Notice of Appeal** with the Ohio Supreme Court (this “Court”) on September 17, 2009.

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## **STATEMENT OF THE FACTS**

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### **I. Stipulated Facts**

In lieu of an evidentiary hearing before the BTA, Appellant and Appellees filed with the BTA mutually agreed upon Stipulations of Fact on July 10, 2008. The Stipulations of Fact and the Statutory Transcript submitted to the BTA by the Commissioner comprise the evidentiary record for this matter.

### **II. Legislative Authority for Public Community Schools**

When the Ohio General Assembly passed Am.Sub.H.B. No. 215 and Am.Sub.S.B. No. 55 in 1997, it authorized the creation of community schools in Hamilton County. Community schools established under the authority of R.C. Chapter 3314 are public schools and a part of the State of Ohio’s programs of education. R.C. 3314.01(B). Community schools, as public schools, receive funding from the State of Ohio’s educational appropriations. The funding appropriated to the local school district in which a community school operates is reduced by the amount of funding the community school receives. See R.C. 3314.08.

Ohio law requires that community schools be formed as non-profit corporations under R.C. Chapter 1702, and the school's educational program must be detailed in the charter contract establishing the school. R.C. 3314.03. A community school is formed when a governmental entity (a "Sponsor") enters into a charter contract with the founders of the school. R.C. 3314.02. A public community school is authorized to acquire facilities as needed and contract for any services necessary for the operation of the school. R.C. 3314.01(B).

The Sponsor and the Ohio Department of Education (in the present case, the Ohio Department of Education is the Sponsor) monitor the educational program of the school and its fiscal management to ensure that it complies with its charter contract. R.C. 3314.105, 3314.07, 3314.072, and 3314.073. The Sponsor is authorized to terminate the community school's charter contract, its status as a public community school, and its state funding if the school: (i) fails to comply with the charter contract; (ii) fails to meet generally-accepted standards of fiscal management; or (iii) violates applicable state or federal law. R.C. 3314.07(B). Moreover, a public community school is audited by the Auditor of the State of Ohio in the same fashion as any Ohio school district. R.C. 3314.03 and 117.10.

In addition to statutorily creating public community schools, the Ohio General Assembly also emphasizes by statute that it does not intend for public community schools, like CCPA, to use state funds (which represent a large portion of a public community school's funding) to pay taxes, including real estate taxes. R.C. 3314.082. The Commissioner's position in this case is inapposite to this statutorily-enacted legislative intent.

### III. AMP and CCPA

AMP is an Ohio general partnership consisting of two general partners. (Supp. 1-2; Stip. ¶2). AMP purchased the Property on June 23, 1987 (Supp. 3; Stip. ¶10) and, from June 23, 1987 through December 20, 2006, AMP was the fee simple holder of the Property.

CCPA is a public community school established under the authority of R.C. Chapter 3314. (Supp. 2; Stip. ¶4). It was incorporated in 1998 as an Ohio non-profit corporation for educational purposes, and since its inception has operated and continues to operate as a community school for children in kindergarten through eighth grade. (Supp. 2; Stip. ¶¶3, 5). As an entity organized solely for educational purposes, CCPA applied for and received Section 501(c)(3), Title 26, U.S. Code tax-exempt status from the Internal Revenue Service. (Supp. 2; Stip. ¶6).

In accordance with R.C. 3314.02, CCPA entered into a charter contract with its Sponsor, the Ohio Department of Education, in 1999, which formally established CCPA as a public school under Ohio law. (Supp. 2; Stip. ¶7). The charter contract details the school's educational program. (Supp. 2; Stip. ¶7).

Under the authority of R.C. 3314.01(B), CCPA leased the Property from AMP for the operation of its public school. (Supp. 3; Stip. ¶¶11, 13). The relationship of CCPA and AMP as lessee-lessor was formalized by the Lease, which was amended pursuant to the **First Amendment to Lease** dated October 6, 1999 (the "Amendment"). (Supp. 2-3; Stip. ¶¶8, 9; S.T. 26-58). Under the Lease and the Amendment, CCPA leased the Property from October 7, 1999 through October 6, 2004 (the "Term") and paid monthly rental for the Property of \$22,958.04. (Supp. 3; Stip. ¶¶12, 14; S.T. 26-58). Further, the Lease required that CCPA, as the tenant, pay all real estate taxes and assessments associated with the Property during the Term. (Supp. 3; Stip. ¶15; S.T. 26-58).

During the Term, CCPA leased and used the Property for the sole purpose of operating a public community school for children in kindergarten through eighth grade. (Supp. 2-4; Stip. ¶¶13, 18). In fact, this is the only use of the Property permitted to CCPA by the Lease, CCPA's Articles of Incorporation, CCPA's charter contract, and CCPA's Section 501(c)(3) determination letter. (Supp. 4; Stip. ¶22). Further, during the Term, the Property consisted solely of CCPA's classrooms and administrative offices and, other than leasing the Property to CCPA, AMP did not conduct any business or house any administrative offices at the Property. (Supp. 3, Stip. ¶¶13, 17).

CCPA, a non-profit corporation, did not sublease the Property to any third party or use the Property for the purpose of generating a profit therefrom. (Supp. 4; Stip. ¶19). Rather, the Property served solely as a public schoolhouse containing classrooms and administrative offices from October 7, 1999 through October 6, 2004. (Supp. 3-4; Stip. ¶¶ 12, 13, 18).<sup>4</sup>

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## LAW AND ARGUMENT

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### **I. Standard of Review - The BTA's Decision Must be Affirmed if It is Reasonable and Lawful.**

The Court's revisory jurisdiction in this case is statutorily delineated in R.C. 5717.04: "If upon hearing and consideration of such record and evidence the court decides that the decision of the board appealed from is reasonable and lawful, it shall affirm the same \*\*\*." Thus, this Court's "duty is limited to determination of whether the decision of the Board of Tax Appeals was

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<sup>4</sup> Upon the expiration of the Term, CCPA relocated its school to 1425 Linn Street, Cincinnati, Ohio, where it remains today. CCPA never operated its school at two separate locations. At all times pertinent to the Application and during the Term, CCPA only operated its school at the Property. (Supp. 4; Stip. ¶20).

unreasonable or unlawful.” *Seven Hills School v. Kinney* (1986), 28 Ohio St.3d 186, 186-187, 503 N.E.2d 163.

Based upon the undisputed facts set forth above and the well-established legal precedent set forth below, no basis exists to find the BTA’s decision unreasonable or unlawful. The BTA’s decision is correct and should be upheld.

**II. Real Property Leased and Used Exclusively as a Public Schoolhouse by a Public Community School is Entitled to Exemption under R.C. 5709.07(A)(1).**

Under the authority of R.C. 3314.01(B), CCPA is a public school authorized to acquire facilities as needed for the operation of the school. Indeed, CCPA leased the Property to operate a public school. The Property contained a public schoolhouse, wherein administrative offices and classrooms were located. For the entire Term, the only use put to the Property by CCPA was to operate a public school. CCPA, as a nonprofit corporation and lessee, did not lease or otherwise use the Property with a view to profit therefrom.

Under these undisputed facts and the applicable law, the Property was exempt from taxation for the years 2000 – 2004 by R.C. 5709.07(A)(1), which plainly provides real property tax exemption for:

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[.]

The Commissioner argues that the Property is not entitled to exemption under R.C. 5709.07(A)(1) because it was leased by the owner with a view to profit, irrespective of the uses put to the Property by CCPA as lessee. As determined by the BTA, this position is clearly erroneous and contrary to the controlling case law. The availability of the tax exemption in R.C. 5709.07(A)

hinges on whether a qualified lessee (i.e., a public school, church, or public university) is using the subject real property with a view to profit, not whether a for-profit lessor is using the subject real property with a view to profit.

**A. The BTA has Correctly and Repeatedly Determined that Property Leased by a Public Community School is Entitled to Tax Exemption.**

The BTA entertained the Commissioner’s “leasing” argument on two previous occasions and twice followed applicable case precedents and sound logic in denying the argument.

In 2002, the BTA first addressed a case with facts and legal arguments identical to those at issue presently. In *Performing Arts School of Metro. Toledo, Inc. v. Zaino* (Dec. 20, 2002), B.T.A. Case No. 2001-J-977, unreported<sup>5</sup> (reversed on jurisdictional grounds by *Performing Arts School of Metro. Toledo, Inc. v. Wilkins* (2004), 104 Ohio St.3d 284, 819 N.E.2d 635), an Ohio non-profit corporation, formed for the sole purpose of operating a public community school under R.C. Chapter 3314, leased real property to operate a public school from an Ohio limited partnership. *Id.* at \*6. The lessee-public community school, which paid rent and real estate taxes for the real property under the lease, filed a real property tax exemption application pursuant to R.C. 5715.27. *Id.* at \*1, \*6. The exemption was sought for a public schoolhouse in accordance with R.C. 5709.07(A)(1). *Id.* at \*6.

Consistent with his opposition here, the Commissioner in *Performing Arts School* presented several arguments as to why the exemption should be denied, including that the fee title holder was using the property with a view to profit. *Id.* at \*3-\*5. Recognizing that the

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<sup>5</sup> Copies of all unreported cases cited herein are contained, in alphabetical order, in the Appendix attached hereto.

Commissioner offered and had no judicial authority to support his argument, the BTA dismissed the “leasing” argument as follows:

Although the subject property may produce income for its owner, it is being used as a schoolhouse for educational purposes. PASMT is not using the property with a view to profit. The Attorney General seeks to distinguish *Bexley Village*, upon the difference in language between the exemption conferred upon “lands connected with public institutions of learning, not used with a view to profit,” and the exemption for schoolhouses “and the ground attached to them \* \* \* not leased or otherwise used with a view to profit.” We find nothing in the language which limits the exemption upon the use of the property, without regard to ownership.

Id. at \*10. Thus, the BTA granted the requested tax exemption for the real property leased by the public community school to operate a public school. Id. at \*6-\*7.<sup>6</sup>

In the case at bar, the BTA again considered the Commissioner’s claim that exemption under R.C. 5709.07(A)(1) is unavailable since AMP leases the Property to CCPA for rental payments. *Anderson/Maltbie Partnership v. Wilkins* (Aug. 18, 2009), B.T.A. Case No. 2007-A-11, unreported. After considering factually similar cases under R.C. 5709.07(A)(1), (A)(2), and (A)(4), the BTA reiterated that the Commissioner’s “leasing” argument is simply unsupported and again dismissed it. Id. at \*9-\*11.

By applying the controlling law as set forth below and the BTA’s reasoning from *Performing Arts School* and *Anderson/Maltbie*, this Court should uphold the BTA’s Decision and Order as reasonable and lawful.

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<sup>6</sup> The Commissioner argues that *Performing Arts School* has no precedential value since it was reversed by this Court on jurisdictional grounds. While this may be technically correct, this Court did not question or even address any of the substantive legal issues or authority raised or relied on by the BTA in *Performing Arts School* and the BTA’s analysis and determination should be respected.

**B. This Court and Ohio's Appellate Courts Have Also Consistently Held that the Availability of Tax Exemption for Leased Property Under R.C. 5709.07(A) Is Determined by the Use of Property by the Lessee.**

This Court has made it syllabus law that real property otherwise subject to tax exemption under R.C. 5709.07(A) remains qualified for such exempt status even if the property is leased from a for-profit entity, and not owned by the party entitled to the exemption. *Cleveland State Univ. v. Perk* (1971), 26 Ohio St.2d 1, 268 N.E.2d 577, paragraph two of the syllabus.

In *Cleveland State*, a public university sought a real property tax exemption for several relocatable buildings it leased from a for-profit entity, which buildings were placed and used on university property. Like the Commissioner in the case at bar, the Ohio Auditor argued that the buildings were not subject to tax exemption under R.C. 5709.07(A) because **the owner/lessor** of the buildings was using the buildings with a view to profit:

Appellee also appears to be contending that the language of R.C. 5709.07 “not used with a view to profit” refers to and controls the language “public colleges and academies and all buildings connected therewith”; **that the buildings are used by their owner, Modulux, with a view to profit by deriving rental therefrom, thus precluding tax exemption under the language of R.C. 5709.07 itself.**

Id. at 6, 268 N.E.2d 577 (emphasis added). This Court rejected the argument:

Legal precedent of long standing, however, has adopted a different interpretation of such language. \*\*\*

We conclude, therefore, 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.**

Id. at 6, 8, 268 N.E.2d 577 (emphasis added).

The seminal case subsequently applying the general rule set forth in *Cleveland State is Bexley Village, Ltd. v. Limbach* (1990), 68 Ohio App.3d 306, 588 N.E.2d 246. In *Bexley Village*, a limited partnership which owned an apartment complex and an adjacent parking lot leased the parking lot to Capital University for an initial term of 11 months at \$1 per month, after which the parties renewed the lease on a month-to-month basis. Capital University, which used the leased premises for student parking, was responsible for any real property taxes assessed on the lot. *Id.* at 307, 588 N.E.2d 246. As a result of Capital University's lease and use of the parking lot, the owner of the parking lot sought to have the property exempted from taxation under R.C. 5709.07(A)(4). *Id.* The Ohio tax commissioner aspired to deny this application because the owner was not a qualifying party under the statute (i.e., a public schoolhouse, church, or public college) and the property was leased and used by the owner with a view toward profit.

Like the standard for public schoolhouses in R.C. 5709.07(A)(1), R.C. 5709.07(A)(4) provides that all lands connected with public institutions of learning which are not used with a view to profit are exempt from taxation. Under this standard, the *Bexley Village* court first examined whether the party using the subject property in a statutorily-exempt manner was required to be the owner of such property. The appellate 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, 588 N.E.2d 246 (emphasis added).

The next issue addressed by the *Bexley Village* court was whether the property was being used with a view to profit in violation of R.C. 5709.07(A). While recognizing that the owner of the property was receiving rent and tax payments from the lessee, the court adopted the long-standing general rule that "[i]t is the use of the property which renders it exempt or nonexempt, not

the use of the income derived from it.” Id. at 311, 588 N.E.2d 246. The court explained the “not used with a view to profit” provision as follows:

The provisions are intended to ensure that only property used for the stated purpose is exempted from taxation. Consequently, the issue is the use of the property, rather than the incidents of ownership. **The focus is on the property itself, rather than the lessor or lessee.**

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**Where 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 property is put by the party entitled to exemption under the statute.<sup>7</sup>**

Id. (emphasis added.) Thus, the *Bexley Village* court upheld the BTA’s decision to exempt the subject property from taxation.

C. **The BTA Has Consistently Applied the Identical Analysis in Repeatedly Ordering Tax Exemption for Leased Property Used as Houses of Public Worship Under R.C. 5709.07(A)(2).**

Following the *Bexley Village* decision, the BTA on numerous occasions considered appeals closely resembling the facts in this matter regarding the R.C. 5709.07(A) exemption for houses of public worship. In each, the BTA ruled that a lessee-church’s use of property, despite the payment of rent to the owner thereof, qualified the property for tax exemption under R.C. 5709.07(A)(2). See, *Gary Clair/Christ United Church v. Tracy* (Sept. 11, 1998), B.T.A. Case No. 97-K-306, unreported; *Northcoast Christian Ctr. v. Tracy* (July 18, 1997), B.T.A. Case No.

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<sup>7</sup> The Appellees emphasize that the court referenced R.C. 5709.07 in general, and not to a specific portion thereof, when stating that the phrase “not used with a view to profit” causes the focus to be placed on the use to which the property is put by the party entitled to exemption under the statute.

96-M-811, unreported; and *Jubilee Christian Fellowship, Inc. v. Tracy* (May 17, 2002), B.T.A. Case No. 99-R-239, unreported.

In *Gary Clair*, a church leased property from its owner on a month-to-month basis in exchange for rent payments. The property was used by the church exclusively for public worship. B.T.A. Case No. 97-K-306, unreported at \*1-2. The application for exemption was filed pursuant to R.C. 5709.07(A)(2), which exempts houses used exclusively for public worship and the grounds attached thereto, if not leased or otherwise used with a view to profit. Consistent with his stance in *Bexley Village*, the Tax Commissioner sought to deny the application since the lessor's intent was to profit from the property. *Id.* at \*2. The BTA reversed the Tax Commissioner, ruling:

In the present case, the evidence is unrefuted that the 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. \*\*\* 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 \*8 (emphasis added).

The BTA's ruling in *Northcoast Christian Ctr.* likewise clarifies that a lessee's use of leased property for an exempt purpose exempts such property from taxation under R.C. 5709.07(A). Again, the Tax Commissioner sought to refuse an exemption for real property leased and used for public worship by a church because the subject property was leased with a view to profit (i.e., rent was paid to the owner of the subject real property in the amount of \$21,105 per year). B.T.A. Case No. 96-M-811, unreported at \*2.

On appeal, the BTA addressed the two critical inquiries under R.C. 5707.07(A): (1) which party's use of the property is determinative; and (2) whether the lease of property to an otherwise exempt party bars an exemption. These questions were both answered in favor of

exemption. The proper focus is “on the use the property is put by the party entitled to the exemption under the statute”, and therefore “the lease by which the [lessee] obtains the right to use the property is not a bar to exemption.” Id. at \*6.

In *Jubilee Christian*, the BTA once more reversed the Tax Commissioner’s misapplication of R.C. 5709.07(A). In exchange for rent of \$2,600 per month and the payment of utilities and property taxes, a church leased real property for use as a public house of worship. The church sought exemption from taxation under R.C. 5709.07(A). B.T.A. Case No. 99-R-239, unreported at \*9-\*10. The Tax Commissioner again argued that a tax exemption was improper since the real property owners profited from the lease. Id. at \*1, \*10. Following the precedent and logic of *Cleveland State* and *Bexley Village*, the BTA again rejected the argument:

The fact that all or a portion of a house used for public worship is leased **does not** necessarily disqualify the property for exemption.

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Just as for public colleges, R.C. 5709.07(A)(2) makes a distinction between “houses used exclusively for public worship” and “the ground attached to them that is not leased or otherwise used with a view to profit \* \* \*.” Therefore, as the court in *Bexley Village* instructed, **the focus should be on the use of the property by Jubilee**, since it is the party seeking the exemption.

Id. at \*10-\*12 (emphasis added).

In the current matter, the relevant facts are unrefuted and mirror those presented within the controlling precedent handed down by this Court, Ohio’s appellate courts, and the BTA: CCPA leased and possessed the Property for the entire Term under the terms of the Lease; CCPA did not sublease or profit from its use of the Property; and the Property was used as and attached to a public schoolhouse for the entire Term. Thus, since the governing law requires the Commissioner to focus on CCPA’s use of the Property (i.e., as a public schoolhouse) and prohibits the Commissioner

from using the Lease as a bar to exemption, the BTA's Decision and Order was correct, reasonable, and lawful.

III. **Gerke v. Purcell (1874), 25 Ohio St. 229 Directly Contradicts the Commissioner's Position and Supports the BTA's Decision and Order Granting a Tax Exemption for the Property under R.C. 5709.07(A)(1) Due to the Use to Which It is Devoted – as a Public Schoolhouse.**

No time or effort is made in the Appellant's Brief to confront or oppose any of the relevant case law cited above that specifically addresses the issue at hand and mirrors the pertinent facts of this case. This void is understandable given that all of the applicable law squarely refutes the Commissioner's position. Rather, the Commissioner selectively borrows bits and pieces of the 126 year-old decision handed down in *Gerke v. Purcell* (1874), 25 Ohio St. 229 to engineer a series of perplexing contentions in hopes of keeping his flawed position afloat.

*Gerke* contains a complex review of the constitutionality and applicability of Ohio's predecessor statute to R.C. 5709.07(A) and can only be understood by carefully following this Court's two-part analysis of the issues.<sup>8</sup> Such a careful analysis demonstrates that the BTA's decision was reasonable and lawful and that the use of the Property by CCPA as a public schoolhouse qualifies it for tax exemption / remission from 2000 - 2004.

In *Gerke*, this Court addressed a Catholic school's request for tax exemption of real property used to operate a schoolhouse open to the public. To reach its decision, this Court addressed two questions – (A) whether the General Assembly was authorized to exempt the property in question from taxation, which required construction of Section 2, Article 12 of the Ohio Constitution; and (B) whether the General Assembly actually exercised its authority to exempt

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<sup>8</sup> A flowchart is attached hereto in the Appendix to assist in following the two-part analysis this Court underwent in *Gerke*.

the property in question from taxation, which required construction of Section 3 of the tax law of 1859 (which is now codified in R.C. 5709.07(A)). *Id.* at 240.

A. **The Gerke Court Determined that a Public Schoolhouse Owned by a Private Party Constitutionally Qualifies for Property Tax Exemption as a Purely Public Charity.**

To answer the first question, this Court analyzed the word “public” as used in Section 2, Article 12 of the Ohio Constitution. Under the constitutional provision, this Court held that the word “public” is used in various senses - sometimes to describe the use to which property is applied and sometimes to describe the character in which property is owned. *Id.* at 241. As applied to the “public schoolhouses” segment of Ohio’s Constitution schoolhouses, this Court found the word “public” required that the schoolhouse be publicly owned before the General Assembly would be authorized to exempt it from taxation. *Id.* at 242. Since the property at issue was owned by a church and therefore not publicly owned, the property did not constitutionally qualify for exemption as a “public” schoolhouse under this prong of the Constitution.

However, this Court then reviewed whether the property at issue constitutionally qualified for exemption under the “institutions of purely public charity” segment of Ohio’s Constitution. *Id.* at 243. In its analysis, this Court determined that the exemption for institutions of purely public charity<sup>9</sup> “does not depend on the ownership of the property. **The uses that such property subserves, constitute the grounds for its exemption.**” *Id.* (emphasis added). Thus, the question became whether operating a school open to the public was a purely public charity.

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<sup>9</sup> This term is now known as “institutions used exclusively for charitable purposes” in Section 2, Article 12 of the Ohio Constitution.

This Court held that “[t]he maintenance of a school is a charity.” Id. at 243. As such, finding that the school operated by the Catholic church was an institution of purely public charity, this Court explained:

For the purpose of determining the public nature of the charity, it is not material through what particular forms the charity may be administered. If it is established and maintained for the use and benefit of the public, and so conducted that the public can make it available, this is all that is required.

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\*\*\*. If property is appropriated to the support of a charity which is purely public, **we see no good reason why the legislature may not exempt it from taxation, without reference to the manner in which the legal title is held**, and without regard to the form or character of the organization adopted to administer the charity.

Id. at 244-245 (emphasis added). Thus, this Court determined that property used to operate a public school was constitutionally qualified for exemption due to its **use** by an institution for purely public charity (e.g., a public school such as CCPA), **notwithstanding the manner in which the legal title is held**. Id. at 245.

**B. Ohio’s Legislature has Statutorily Authorized Tax Exemption for Property which is Devoted to Public Schoolhouse Use.**

Next, this Court addressed the second question – whether the exemption for the property at issue was authorized by Section 3 of the tax law of 1859, the precursor to what is now R.C. 5709.07(A). In concluding that a statutory exemption is proper for a schoolhouse based on the **use** of the subject real property, **not the nature of its ownership**, this Court explained as follows:

The section of the statute under consideration consists of nine subdivisions, in which are described the various classes of exempted property. **Where persons or organizations are mentioned in the section, it is only done as a means of describing property, and the**

uses to which it is applied, for the purpose of drawing the line between that which is exempt and that which is not. This is apparent from the first clause of the section, which declares that all *property* thereafter described, shall be exempt from taxation.

The property exempted by the first subdivision of the section is described as follows:

**“All public school-houses and houses used exclusively for public worship, the books and furniture therein, and the grounds attached to such buildings necessary for the proper occupancy, use, and enjoyment of the same, and not leased or otherwise used with a view to profit; all public colleges, public academies, all buildings connected with the same, and all lands connected with public institutions of learning, not used with the view to profit. \*\*\*.”**

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 the property is devoted.** The schools and instruction which the property is used to support, must be for the benefit of the public. The word *public* as applied to school-houses, is obviously used in the same sense as when applied to colleges, academies, and other institutions of learning. The statute must be construed in the light of the state of things upon which it was intended to operate. At the time of its passage, there were few, if any (and we know of none), colleges or academies in the state owned by the public, while there were many such institutions in the different parts of the state owned by private, corporate, or other organizations, and founded, mostly, by private donations.

Besides, **the condition prescribing that the property, in order to be exempt, must not be used with a view to profit, does not seem appropriate if intended to apply only to institutions established by the public.** Such institutions are never established and carried on by the public with a view to profit.

Id. at 246-247 (emphasis added).

Thus, the Commissioner either gets lost in or misinterprets the complexity of the *Gerke* decision. With his focus solely on AMP as the owner of the Property (a focus deemed inappropriate by the decisions of *Cleveland State*, *Bexley Village*, *Gary Clair*, *Northcoast Christian*

*Ctr.*, *Jubilee Christian, Performing Arts School*, and the BTA's Decision and Order below in this matter), the Commissioner claims that *Gerke* supports his position because AMP is not a public charity. However, AMP's ownership of the Property is not at issue - it is property's use by a public charity, and not the manner property is owned, that dictates the constitutionality of the exemption. It is CCPA's use of the Property that triggers the exemption, and *Gerke* makes clear that the operator of a public school is an institution of purely public charity. Nowhere in *Gerke* does this Court state or even imply that the subject property cannot be leased to the public charity.

Having passed the test of time, the *Gerke* holding remains good law today and was correctly applied by the BTA when reversing the Commissioner.

**IV. The Standards For Exemption Under The Subparts Of R.C. 5709.07(A) Are Either Substantially Similar Or Identical, Thereby Logically Rendering An Interpretation Under One Subpart Applicable To Another Subpart.**

Recognizing that the grant of the Application is dictated by the legal precedent established by this Court and the appellate court's holdings in *Cleveland State Univ.* and *Bexley Village, Ltd.*, the Commissioner attempts to distance these holdings from the case at bar. To do so, the Commissioner is forced to argue semantics that fly in the face of common logic and also ignores the BTA's recent decisions in *Gary Clair/Christ United Church*, *Northcoast Christian Ctr.*, and *Jubilee Christian*.

In its Decision and Order for the case at bar, the BTA declined adoption of the Commissioner's faulty rationale. The BTA exercised sound and proper reasoning:

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),

granting exemption to houses used exclusively for public worship, and R.C. 5709.07(A)(4) \*\*\*.

*Anderson/Maltbie*, B.T.A. Case No. 2007-A-11, unreported at \*11. Being lawful and reasonable, this reasoning and the BTA's Decision and Order should be applied by this Court.

A. **This Court in *Gerke* Clarified that R.C. 5709.07(A)(1) and (A)(4) Must Be Interpreted in the Same Manner.**

The Commissioner first argues that exemptions under R.C. 5709.07(A)(4) are broader in nature because there is no "limitation pertaining to the 'public' character of the use or ownership of the buildings", while an exemption under R.C. 5709.07(A)(1) is limited by the requirement that the applicable building be "public property". (*Appellant Br.*, pp. 13-14). There is absolutely no foundation for such a wayward proposition, and none is offered by the Commissioner. In fact, this proposition is easily dismissed by the clear and simple wording of the relevant statutory sections:

- 5709.07(A)(4) exempts the following property – "public colleges and academies and all buildings connected with them, and all lands connected with public institutions of learning \*\*\*." (Emphasis added).
- 5709.07(A)(1) exempts the following property – "public schoolhouses \*\*\* and the ground attached to them." (Emphasis added).

Both statutory sections require that property be public to qualify for exemption. Moreover, *Gerke* and its progeny makes clear that, in the context of both (A)(1) and (A)(4), "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 the property is devoted." *Gerke*, 25 Ohio St. at 246-247 (emphasis added). The Commissioner's argument is neither supported nor persuasive.

The Commissioner next claims that the absence of the word "leased" in (A)(4) somehow prohibits the tax exemption sought for the Property in this case. (*Appellant Br.*, p. 14). Though (A)(4) prohibits exemption for buildings and lands connected with public colleges and

academies “used with a view to profit” and (A)(1) prohibits exemption for grounds and buildings attached to public schoolhouses “leased or used with a view to profit”, the difference lacks any relevance under the current facts.

The Commissioner again fails to acknowledge that, when applying the phrases “not used with a view to profit” and “not leased or used with a view to profit” in R.C. 5709.07(A), the focus must be on the use to which property is put by the party entitled to exemption under the statute. *Cleveland State*, 26 Ohio St.2d at 6, 268 N.E.2d 577; *Bexley Village, Ltd.*, 68 Ohio App.3d at 311, 588 N.E.2d 246.<sup>10</sup> Therefore, CCPA’s use of the Property as a public schoolhouse must be the focus of the “not leased or used with a view to profit” analysis.

The Commissioner stipulated that CCPA used the Property solely for the operation of a public school and neither leased nor profited from this use. The General Assembly’s election to add the “lease” language to (A)(1) and exclude it from (A)(4) arguably makes the (A)(1) standard more rigorous, and yet CCPA’s use of the Property easily meets the (A)(1) standard. The Commissioner’s argument amounts to a distinction without a difference.

**B The Statutory Tax Exemption Provisions in R.C. 5709.07(A)(1) and (A)(2) are Identical and Thus Mandate Consistent Application.**

Finally, the Commissioner tries to distance this case from the string of BTA decisions rendered under R.C. 5709.07(A)(2), despite having substantially similar fact patterns. A comparison of the language of (A)(1) and (A)(2) demonstrates the desperation of the Commissioner’s efforts:

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<sup>10</sup> Indeed, three decisions (*i.e.*, *Gary Clair, Northcoast Christian Ctr.*, and *Jubilee Christian*) granted tax exemptions to leased property under R.C. 5709.07(A)(2), which includes the “leased or otherwise used with a view to profit” language identical to that in the public schoolhouse exemption in R.C. 5709.07(A)(1).

**R.C. 5709.07(A)(1)**

The components of the “public schoolhouses” exemption are as follows (exact language and order):

“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”

**R.C. 5709.07(A)(2)**

The components of the “houses used exclusively for public worship” exemption are as follows (exact language and order):

“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”

Other than applying to different types of public institutions and reversing the order of the last two phrases, these statutory sections are identical. There is no logical reason why cases interpreting the components of (A)(2) are not controlling over the interpretation of those very same components in (A)(1).

In *Gary Clair, Northcoast Christian Ctr.*, and *Jubilee Christian*, the BTA granted tax exemptions under R.C. 5709(A)(2) to churches that leased real property from a for-profit lessor, because the property was not leased or used by the churches with a view to profit. In each case, the BTA ruled that a lessee’s use of property, despite the payment of rent to the owner thereof, qualified the property for tax exemption under R.C. 5709.07. *Gary Clair*, B.T.A. Case No. 97-K-306, unreported at \*8; *Northcoast Christian Ctr.*, B.T.A. Case No. 96-M-811, unreported at \*6; and *Jubilee Christian*, B.T.A. Case No. 99-R-239, unreported at \*12.

Because (A)(1) and (A)(2) have identical standards for exemption, reversing the BTA’s decision in the case at bar would have the effect of the reversing *Gary Clair*,

*Northcoast Christian Ctr., Jubilee Christian*, and the numerous cases decided with reliance thereon. This is not warranted under the relevant facts or the applicable law.<sup>11</sup>

In sum, the BTA did not have to and did not delete or add any words to R.C. 5709.07(A)(1) when deciding this case. Rather, the BTA properly interpreted and applied the exact language of the statute to the facts presented in accordance with the precedents established by this Court, Ohio's appellate courts, and previous BTA decisions. In doing so, the BTA acted reasonably and lawfully.

V. **The Application of and Cases Interpreting R.C. 5709.12 and R.C. 5709.121, Which Explicitly Require that the Subject Property "Belong To" a Qualifying Party, Are Not Relevant to R.C. 5709.07(A), Which Has No Such Requirement.**

Bereft of any support whatsoever, the Commissioner resorts to speculating as to the General Assembly's intentions when codifying R.C. 5709.12 and R.C. 5709.121 in an effort to buttress his position regarding R.C. 5709.07(A). He then proceeds to cite a litany of no less than seven cases addressing and interpreting R.C. 5709.12 and R.C. 5709.121 for the proposition that the profit-making use of property by the owner disqualifies the property from exemption. (Appellant Br., pp. 9-10). See, *OCLC Online Computer Library Ctr., Inc. v. Kinney* (1984), 11 Ohio St.3d 198, 464 N.E.2d 572; *Hubbard Press v. Tracy* (1993), 67 Ohio St.3d 564, 621 N.E.2d 396; *Lincoln Mem. Hosp., Inc. v. Warren* (1968), 13 Ohio St.2d 109, 235 N.E.2d 129; *The Ohio Masonic Home v. Bd. of Tax Appeals* (1977), 52 Ohio St.2d 127, 370 N.E.2d 465; *City of Parma Heights v. Wilkins* (2005), 105 Ohio St.3d 463, 828 N.E.2d 998; *The Benjamin Rose Inst. v. Myers* (1915),

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<sup>11</sup> The Commissioner cites to the obscure case of *Taylor v. Anderson* (1930), 31 O.L.R. 567 to support his position. Though locating this case itself was likely difficult, the effort is in vain. The *Taylor* decision provides very limited facts and the facts provided are not consistent with those in the current matter. Further, the court offers no analysis to explain the reasoning of its decision. For these reasons, *Taylor* has never been followed or even discussed by other courts or in other cases. *Taylor* offers no precedential value here.

92 Ohio St. 252, 110 N.E. 924; *Northeast Ohio Psych. Inst. v. Levin* (2009), 121 Ohio St.3d 292, 903 N.E.2d 1188; and *Watterson v. Halliday* (1907), 77 Ohio St. 150, 82 N.E. 962 (addressing the precursor to R.C. 5709.12 and R.C. 5709.121).<sup>12</sup>

Though impressive in quantity, these cases lack in quality and relevance as they are neither related to nor instructive in the application of R.C. 5709.07(A).

R.C. 5709.12 and R.C. 5709.121 explicitly specify that real property subject to exemption thereunder must be owned by the qualifying party (i.e., a political subdivision or charitable institution). Therefore, the express statutory language brings into issue the owner's use of the property. Quite simply, these statutes are not similar or related to R.C. 5709.07(A), and this Court did not directly or impliedly extend its holdings to R.C. 5709.07(A) in any of the numerous cases relied on by the Commissioner. Thus, neither R.C. 5709.12, R.C. 5709.121, nor these cases are relevant to the current matter, as correctly noted by the BTA in its Decision and Order issued below.

**VI. The Application of R.C. 5709.08 and the Cases Interpreting that Statute to Determine Whether a Schoolhouse is "Public" under R.C. 5709.07(A)(1) is Unreasonable and Contrary to Legislative Intent.**

Despite the long-followed interpretation of "public" as it is used in R.C. 5709.07(A)(1) provided by *Gerke* and its progeny, the Commissioner advocates that *Gerke* be ignored or overruled under the authority of case law decided on grounds wholly unrelated to R.C. 5709.07(A)(1).

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<sup>12</sup> In fact, the Commissioner went as far as citing to a case addressing sales and use tax exemptions under R.C. 5730.02. See *Joint Hosp. Servs., Inc. v. Lindley* (1977), 52 Ohio St.2d 153, 370 N.E.2d 474. Needless to say, this case is irrelevant to this matter.

At pages 11-12 of the Appellant's Brief, the Commissioner cites to several cases addressing the statute that is now R.C. 5709.08 as proper authority for the interpretation of "public" under R.C. 5709.07(A). See, *Dayton Metro. Hous. Auth. v. Evatt* (1944), 143 Ohio St. 10, 53 N.E.2d 896 and *Columbus City School Dist. Bd. of Edn. v. Zaino* (2001), 90 Ohio St.3d 496, 739 N.E.2d 783.

However, as stated by this Court in *Columbus City School Dist. Bd. of Edn.*, 90 Ohio St.3d at 499, 739 N.E.2d 783, these cases are limited in application to R.C. 5709.08:

For property to be considered public property **under R.C. 5709.08** requires that there be ownership "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." *Dayton Metro. Hous. Auth. v. Evatt* (1944), 143 Ohio St. 10 \*\*\*. (Emphasis added).

In fact, these cases do not even reference or address R.C. 5709.07 or its statutory precursors and provide no basis to disregard the longstanding interpretation of "public" under R.C. 5709.07(A) as espoused by this Court in *Gerke*.

The Commissioner fails to recognize the distinct difference between "a public **schoolhouse** and the ground attached thereto" in R.C. 5709.07(A)(1) (emphasis added) and "public **property** used exclusively for a public purpose" in R.C. 5709.08 (emphasis added). As intended by the General Assembly and interpreted by this Court since *Gerke* was decided in 1874, a schoolhouse is made public under R.C. 5709.07(A)(1) by being open for enrollment to the State's children (i.e., in the manner in which it is used). On the other hand and under R.C. 5709.08, property is made public by the manner in which it is owned. Without this clear distinction, there would be no purpose for R.C. 5709.07(A)(1) -- R.C. 5709.08 would serve to provide an exemption for a public schoolhouse owned by the State of Ohio or a political subdivision thereof.

Thus, the application of the standards developed pursuant to exemptions under R.C. 5709.08, as encouraged by the Commissioner, would improperly create an absurd result and moot the intentions and efforts of the General Assembly in enacting R.C. 5709.07(A)(1). This Court has consistently held that statutes are to be construed to avoid such unreasonable or absurd consequences. See, *Canton v. Imperial Bowling Lanes* (1968), 16 Ohio St.2d 47, 242 N.E.2d 566, at paragraph 4 of the syllabus and *Ruckman v. Cubby Drilling, Inc.* (1998), 81 Ohio St.3d 117, 126, 689 N.E.2d 917.

**VII. As a Tax Exemption Statute, R.C. 5709.07(A)(1) Must be Construed Reasonably and Not Contrary to Legislative Intent and Consistent With Both Public Policy and Common Logic.**

R.C. 5709.07(A)(1) is a real property tax exemption statute. As such, the parties do not dispute that this statute is to be strictly construed. However, reliance upon this general axiom alone is deficient. This Court has long required that such strict construction be tempered with reason and in a manner not to defeat the intention of the General Assembly when enacting a tax exemption statute. *Carney v. Cleveland City School Dist. Pub. Library* (1959), 169 Ohio St. 65, 66, 157 N.E.2d 311; *In re Bond Hill-Roselawn Hebrew School* (1949), 151 Ohio St. 70, 84 N.E.2d 270, paragraph one of the syllabus; *In re Estate of Morgan* (1962), 173 Ohio St. 89, 93, 180 N.E.2d 146.

To properly construe a tax exemption statute, this Court must consider the reasons and theory underlying the tax exemption. *Carney*, 169 Ohio St. at 66, 157 N.E.2d 311. In *Carney*, this Court has succinctly described the intent underlying such exemptions:

The entities to which tax exemptions have been granted, whether governmental or nongovernmental<sup>13</sup> in character, are such as are

<sup>13</sup> As set forth in R.C. 2744.01(F), CCPA is a political subdivision of the State of Ohio: “‘Political subdivision’ includes, but is not limited to, a \*\*\* community school established under Chapter 3314 of the Revised Code.”

being operated for the benefit of the public. Where the entity is governmental in character and is supported and maintained from the public revenues, no public benefit would result from a taxation of its property. Since its funds originate from the public revenues, taxation would only result in taking funds derived from public revenues and returning them to the general disbursing fund. The result would be an increase in the cost of collecting taxes and the necessity of a larger appropriation to the entity so that it could return in the form of taxes a part of the revenues allocated to it from taxes.

\*\*\*

Where the entity is nongovernmental in character, deriving its funds from voluntary contributions and perhaps from charges for its services, the exemption is also based on public benefit. That is, nongovernmental entities which have been granted tax exemptions are entities that operate for the benefit of the public. **Since the sole legitimate purpose of taxation is to benefit the public, to tax property already devoted to public use would be merely to divert funds from one public benefit to another.**

Id. at 66-67, 157 N.E.2d 311. See also, *Dayton Metro. Housing Auth.*, 143 Ohio St. at 17, 53 N.E.2d 896.

With respect to R.C. 5709.07(A)(1), it is clear that the General Assembly seeks to avoid the State of Ohio's distribution of tax dollars earmarked to support public schools merely to re-collect these funds as real property taxes; e.g., robbing Peter to pay Paul.

As a nonprofit corporation and public school, CCPA is not using the Property with a view to profit and generates no income from its activities on the Property. Thus, if precluded from the intended benefits of R.C. 5709.07(A)(1)'s public schoolhouse exemption merely because it leases, and does not own, the Property, CCPA's primary source of revenue to pay real property taxes would be tax funds appropriated to it for the education of Ohio's children.

Thus, the Commissioner's desire to treat CCPA both a tax creditor and a tax debtor is not only unsupported by applicable law, it is contrary to legislative intent underlying the enactment of tax exemption statutes, ignores this Court's past admonitions, and serves to inure no public

benefit. As this Court stated in *Dayton Metro. Housing Auth.*, “[t]he product of one tax should not be made the subject of another.” 143 Ohio St. at 17, 53 N.E.2d 896.

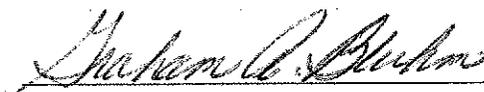
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## CONCLUSION

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The application of the relevant law to the undisputed facts in this case conclusively supports the BTA’s Decision and Order which establishes that the Commissioner’s Final Determination was in error. The decisions of this Court, the Ohio Tenth Appellate District Court, and the BTA mandate that real property being used exclusively as a public schoolhouse by a lessee pursuant to a lease from a for-profit organization be entitled to tax exemption under R.C. 5709.07(A)(1). As such, the BTA’s Decision and Order was reasonable and lawful, and should be upheld.

Respectfully submitted,  
EASTMAN & SMITH LTD.



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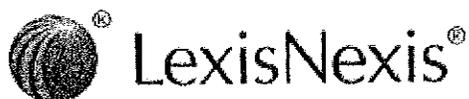
**CERTIFICATE OF SERVICE**

This is to certify that a true copy of the foregoing **BRIEF OF APPELLEES** was sent via ordinary U.S. mail to Sophia Hussain, counsel of record for Appellant, at Rhodes State Office Tower, 30 East Broad Street, 25<sup>th</sup> Floor, Columbus, Ohio 43215-3428, on this 1<sup>st</sup> day of February, 2010.

  
\_\_\_\_\_  
Graham A. Bluhm  
Eastman & Smith Ltd.

An Attorney for Appellees

## **APPENDIX**



LEXSEE 2009 OHIO TAX LEXIS 1211

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)

STATE OF OHIO --  
BOARD OF TAX AP-  
PEALS

*2009 Ohio Tax LEXIS  
1211*

August 18, 2009, Entered

**[\*1] APPEARANCES:**

For the Appellants - Eastman & Smith Ltd., Graham A. Bluhm

For the Appellee - Richard Cordray, Attorney General of Ohio, Sophia Hussain, Assistant Attorney General

**OPINION:**

**DECISION AND ORDER**

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 1999 n1 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.

n1 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.

**[\*2]**

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 [\*3] 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 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 [\*4] 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 Ex-

emption 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 [\*5] 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. [\*6] 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 [\*7] 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.

[\*8] 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 [\*9] 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, n2 the board considered property under lease for a thirty-nine month rental term that was utilized as a public community school for grades seven through twelve. [\*10] 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.

n2 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 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.

[\*11]

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), n3 granting exemption to houses used exclusively for public worship, and R.C. 5709.07(A)(4), n4 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 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 [\*12] 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.

n3 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.

n4 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.

[\*13]

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 [\*14] 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 [\*15] 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 [\*16] such a large amount has never been held to be exempt, not even for colleges and universi-

ties." 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.) [\*17] 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.

Sally F. Van Meter, Board Secretary

#### Legal Topics:

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

Tax LawState & Local TaxesAdministration & ProceedingsJudicial ReviewTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral OverviewTax LawState & Local TaxesReal Property TaxExemptions



LEXSEE 1998 OHIO TAX LEXIS 1231

Gary Clair/Christ United  
Church, Appellant, vs.  
Roger W. Tracy, Tax  
Commissioner of Ohio,  
Appellee.

CASE NO. 97-K-306  
(EXEMPTION)

STATE OF OHIO --  
BOARD OF TAX AP-  
PEALS

*1998 Ohio Tax LEXIS*  
*1231*

September 11, 1998

[\*1]

## APPEARANCES:

For the Appellant - Gary Clair, Pro Se, 28 Stoner  
Road, Clinton, Ohio 44821

For the Appellee Tax Commissioner - Betty D.  
Montgomery, Attorney General of Ohio, By: Phyllis J.  
Shambaugh, Assistant Attorney General, State Office  
Tower-16th Floor, 30 East Broad Street, Columbus,  
Ohio 43266-0410

## OPINION:

## DECISION AND ORDER

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

This cause and matter is before the Board of Tax Appeals as a result of a notice of appeal filed on March 25, 1997 by the above-named appellant. Appellant appeals a journal entry of the Tax Commissioner dated March 10, 1997 in which that official denied appellant's application for real property tax exemption for tax year 1995. The real property whose taxable status is at issue is located in Clinton, Ohio and appears in the records of the Summit County Auditor as parcel number 28-01106.

Denying appellant's application, the Tax Commissioner referred to the recommendation of his attorney examiner:

"Title to the property is in the name of Gary Clair. Mr. Clair leases the property to Christ Unity Church. A letter was sent to the applicant at the name and address listed in the application seeking additional information [\*2] concerning the particular use of the property. Specifically, the letter requested a copy of the lease between Gary Clair and Christ Unity Church. The applicant, however, has not provided the Department with any additional information.

"Ohio Revised Code section 5709.07(A)(2) provides tax exemption for:

"[']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.[']

"This exemption was recently reviewed in Full Gospel Pentecostal Holiness Church v. Limbach (Sept. 3, 1993), B.T.A. No. 91-R-432. In that case, the property was owned by one church and leased to another congregation for a rental amount intended only to offset the owner's expenses. In finding that the property qualified for exemption, the Board of Tax Appeals stated that 'the appropriate test is whether or not the parties intended to make a profit from the transaction.'

"The lessor in this case is an individual rather than another church. The applicant has not provided a copy of the lease. There is no reason to believe that the lessor's [\*3] intent was other than to make a profit. Under these circumstances, the property does not qualify for tax exemption. Therefore, the attorney examiner recommends that the ap-

plication for exemption be denied." S.T. 6.

Appellant appealed, stating as follows:

"I hereby set forth my notice of appeal. I would like to specify the errors for which I am complaining (appealing, [sic] but the tax commissioner prefers complaining). However, since in the tax commissioners [sic] infinite wisdom, he chose to be vague, I can only guess, it is either his belief that the church in question is leased or that I truly make a profit. Both and more are in error.

"1) This property is not leased. The church is rented month to month. However his own example (BTA No 91-R-432) does not find fault with this.

"2) So it must be profit. This term is in error since it is paid in the form of an hourly wage [and] because I do most of the work at less than minimum. And even then, these wages are used to pay utility bills and acquire antiques [sic] and antique [sic] parts necessary to maintain [and] renovate a 128 year old structure and keep it historically correct. The church has been run this way [\*4] throughout most of its history. Which brings to some [sic] of the as yet unanswered questions. Is the Church 'Grandfathered in' under tax exemption because of its age? If a person is no longer allowed to own a church and maintain tax exempt status, why was I not informed by the tax commissioner. It has been used exclusively as a church for its entire 128 year history. And this church doesn't have a tele-evangelist living in a mansion or paying Stanley Gault \$ 500,000 to be chairman for a year (like United Way). This church exists on a shoe-string. It is in error not to let me know whether you want to add more strings or take them away."

This matter is now considered by this Board based upon appellant's notice of appeal, the statutory transcript certified by the Tax Commissioner and the evidence presented at the hearing conducted by this Board on March 24, 1998.

We acknowledge at the outset the affirmative burden which 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 [\*5] unreasonable or unlawful, they are presumptively valid. Furthermore, it is error for the BTA to reverse the commissioner's determination when no competent and probative evidence is presented to show that the commissioner's determination is factually incorrect. \* \* \* *Id.* at 124. (Citation omitted.)

Further, when considering a claim that property is entitled to exemption from taxation, we note the general rule that "all real property in this state is subject to taxation, except only such as is expressly exempted therefrom." R.C. 5709.01(A). It is as a result of this rule, that "in any consideration concerning the exemption from taxation of any property, the burden of proof shall be placed on the property owner to show that the property is entitled to exemption." R.C. 5715.271. It is obvious from the preceding statutory framework that exemption from taxation is the exception to the rule and a statute granting an exemption must be strictly construed. *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; *Seven Hills Schools v. Kinney* (1986), 28 Ohio St.3d [\*6] 186.

Turning now to the exemption which was considered by the Tax Commissioner to have been the one under which exemption was sought, n1 R.C. 5709.07 provides in pertinent part:

"(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."

n1 We note that in his application filed with the Tax Commissioner, appellant indicated that exemption for the property was sought pursuant to R.C. 5713.08. See S.T. 9. However, this statute is not one granting exemption to real property, but is instead the statute which sets forth the procedures to be followed by county auditors in listing properties entitled to exemption and the limitations imposed upon the Tax Commissioner's ability to consider an application for exemption. Apparently, it was the Tax Commissioner's attorney examiner who first construed appellant's statement included on the application, i.e., that the subject property was being "used as and is church for worship of God by Christ Unity Inc. with Sunday serves [sic] [and] Sunday School," see S.T. 9, as a claim for exemption under R.C. 5709.07. Accordingly, we will consider appellant's challenge on appeal to be restricted to the Tax Commissioner's denial of exemption under this statute.

[\*7]

The primary issue presented in this appeal is whether the Tax Commissioner improperly denied exemption to the subject property under the preceding statute because it was leased by appellant, a private individual, to a church. n2 In our decision in *Temple Beth Or v. Tracy* (Mar. 12, 1993), B.T.A. No. 90-M-291, unreported, we indicated that R.C. 5709.07 imposes two separate requirements for exemption: (1) the property must be used exclusively for public worship; and (2) it must not be "leased or used \* \* \* with a view to profit." See, also, *Full Gospel Pentecostal Holiness Church v. Limbach* (Sept. 3, 1993), B.T.A. No. 91-R-432, unreported (stating that in the context of the second requirement, "the appropriate test is whether or not the parties intended to make a profit from the transaction."); *Bd. of Trustees of the Presbytery of the Western Reserve v. Tracy* (Sept. 3, 1993), B.T.A. No. 92-A-360, unreported; *Jerusalem Primitive Baptist Church v. Tracy* (May 1, 1998), B.T.A. No. 97-A-321, unreported.

n2 As required by R.C. 5709.07, exemption is restricted to "houses used exclusively for public worship." The only evidence which is contained in the record before us regarding the use of the property by the lessee, Christ Unity Church, has been provided by appellant, who testified that he is not a member of the church

and is "actually an atheist." H.R. 11. As we have no reason to believe that appellant would have been in attendance at any of the lessee's services, we question appellant's competence to testify regarding whether the lessee's use qualifies as "public worship." However, the Auditor, who recommended that the property be granted exemption, and the Tax Commissioner, who denied the exemption on other grounds, seems to presuppose that the lessee occupies the subject property and uses it for public worship. Accordingly, we will not consider this aspect of R.C. 5709.07 to be in issue in this case.

[\*8]

In the present case, the evidence is unrefuted that the 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." n3

n3 We acknowledge appellant's testimony that the property is leased on a monthly basis due to the lessee's uncertainty as to whether or not they will continue to use the property. Should the lessee vacate the property, the Auditor may cause the property to be removed from the tax exempt list. See R.C. 5713.07; R.C. 5713.08.

Based upon the foregoing, it is the decision of the Board of Tax Appeals that appellant's arguments are well-taken. It is the order of this Board that the journal entry of the Tax Commissioner must be, and hereby is, reversed.

#### Legal Topics:

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

Tax Law  
Federal Tax Administration & Procedure  
Audits & Investigations  
Examinations (IRC secs. 7601-7606, 7608-7613)  
Church Tax Examinations & Inquiries  
Tax Law  
State & Local Taxes  
Administration & Proceedings  
Judicial Review  
Tax Law  
State & Local Taxes  
Real Property Tax  
Exemptions



LEXSEE 2002 OHIO TAX LEXIS 927

Jubilee Christian Fellowship, Inc., Appellant, vs.  
 Roger W. Tracy, Tax  
 Commissioner of Ohio,  
 Appellee.

CASE NO. 99-R-239  
 (EXEMPTION)

STATE OF OHIO --  
 BOARD OF TAX AP-  
 PEALS

2002 Ohio Tax LEXIS  
 927

May 17, 2002

[\*1]

## APPEARANCES:

For the Appellant - James E. Roberts, Roth, Blair,  
 Roberts, Strasfeld & Lodge, Youngstown, OH.

For the Appellee - Betty D. Montgomery, Attorney  
 General of Ohio, By: Richard C. Farrin, Assistant At-  
 torney General, Columbus, Ohio.

## OPINION:

## DECISION AND ORDER

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

This matter is before the Board of Tax Appeals upon a notice of appeal filed by Jubilee Christian Fellowship, Inc. ("Jubilee"). Jubilee appeals from a journal entry of the Tax Commissioner, in which the commissioner denied Jubilee's application for the exemption of real property from taxation for tax year 1996 and remission of taxes, penalties, and interest for tax year 1995.

The Tax Commissioner's basis for denial rests on the fact that the subject property is leased by Jubilee from Mr. and Mrs. Dennis Orr, presumably for a profit, and is therefore, in the commissioner's opinion, not exempt under R.C. 5709.07.

In its notice of appeal, Jubilee contends that at all relevant times, the subject property was used as a public house of worship. Jubilee argues that property leased to a church for use as a public house of worship is exempt from taxation, even if the property owner [\*2] generates a profit.

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 ("S.T."), the record of the evidentiary hearing held before this board ("R."), and the briefs of counsel. At the hearing, Jubilee was represented by counsel, and Pastor Jeffrey H. Mincher testified on its behalf. The Tax Commissioner appeared through counsel and rested on the statutory transcript and submitted no evidence in addition to cross-examination.

The subject property consists of approximately 5.68 acres of land, improved with a building that is used for religious purposes. It is located in the Canfield Township School District, Mahoning County, Ohio, and is identified in the auditor's records as permanent parcel number 26-039-0-011.00-0.

Initially, it is important to note 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 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 [\*3] 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.

Turning to Jubilee's claim for exemption, we first note the general rule that "all real property in this state is subject to taxation, except only such as is expressly exempted therefrom." R.C. 5709.01(A). It is as a result of this rule, that "in any consideration concerning the exemption from taxation of any property, the burden of proof shall be placed on the property owner to show that the property is entitled to exemption." R.C. 5715.271. The Supreme Court of Ohio explained the rationale for this principle in *Akron Home Medical Services, Inc. v. Lindley* (1986), 25 Ohio St.3d 107:

"Exceptions to a particular tax are governed by the oft-stated rules to be found in *Youngstown Metropolitan Housing*

*Authority v. Evatt* (1944), 143 Ohio St. 268, 273 [28 O.O. 163]:

"By the decisions it is established in Ohio that exemption statutes are to be strictly construed, it being the settled policy [\*4] of this state that all property should bear its proportional share of the cost and expense of government; that our law does not favor exemption of property from taxation; and hence that before particular property can be held exempt, it must fall clearly within the class of property specified \* \* \* to be exempt.

"The foundation upon which that policy rests is that statutes granting exemption of property from taxation are in derogation of the rule of uniformity and equality in matters of taxation. (See 38 Ohio Jurisprudence, 853, section 114.)' See, also, e.g., *id.*, at paragraph two of the syllabus; *Cleveland-Cliffs Iron Co. v. Glander* (1945), 145 Ohio St. 423, 430 [31 O.O. 39]; *Natl. Tube Co. v. Glander* (1952), 157 Ohio St. 417 [47 O.O. 313], paragraph two of the syllabus; *First Natl. Bank of Wilmington v. Kosydar* (1976), 45 Ohio St.2d 101 [74 O.O.2d 206]; *Southwestern Portland Cement Co. v. Lindley* (1981), 67 Ohio St.2d 417, 425 [21 O.O.3d 261]; *Natl. Church Residences v. Lindley* (1985), 18 Ohio St.3d 53, 55." *Id.* at 108.

See, also, *White Cross Hosp. Assn. v. Bd. of Tax Appeals* (1974), 38 Ohio St.2d 199, 201. "Exemption is the exception to the rule and [\*5] statutes granting exemptions are strictly construed." *Seven Hills Schools v. Kinney* (1986), 28 Ohio St.3d 186.

R.C. 5709.07 provides an exemption from real property taxation for houses that are used exclusively for public worship and the attached grounds that are not leased or otherwise used with a view to profit. That section reads, in pertinent part:

"(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[.]"

Accordingly, in order to determine whether the subject property qualifies for exemption under R.C. 5709.07, we must first determine whether such property was used exclusively for public worship during the period in question. For the reasons set forth below, we find that it was.

Two seminal cases explored the legislative intent behind the phrase "public worship." In *Gerke v. Purcell* (1874), 25 Ohio St. 229, the Supreme Court defined "public" to mean an open use, a use that was equally available to the public. [\*6] In *Watterson v. Halliday* (1907), 77 Ohio St. 150, the phrase "public worship" was limited to the "religious rites and ordinances" that are celebrated or observed by the church and its parishioners. The Supreme Court confirmed this concept in a more recent decision, *Faith Fellowship Ministries, Inc. v. Limbach* (1987), 32 Ohio St.3d 432. In that case, the court held:

"From both cases we can derive the definition of 'public worship' to be the open and free celebration or observance of the rites and ordinances of a religious organization." *Id.* at 435.

And, in quoting from *Watterson*, supra, the *Faith Fellowship* court observed:

"The exemption is not of such houses as may be used for the support of public worship; but of houses used exclusively as places of public worship." *Id.* at 435.

In our decision in *Allegheny West Conference Seventh-Day Adventists v. Limbach* (Aug. 21, 1992), B.T.A. No. 90-K-507, unreported, we indicated that a "primary use" test would be applied to determine if property was being "used exclusively for public worship" within the meaning of R.C. 5709.07. We noted:

"In *Faith Fellowship Ministries, Inc. v. Limbach* (1987), [\*7] 32 Ohio St.3d 432, the Supreme Court set forth the requisite characteristics which must be

demonstrated by an applicant seeking exemption pursuant to R.C. 5709.07. In paragraph one of its syllabus, the court held:

"For purposes of R.C. 5709.07, "public worship" means the open and free celebration or observance of the rites and ordinances of a religious organization.' (*Gerke v. Purcell* [1874], 25 Ohio St. 229; and *Watterson v. Halliday* [1907], 77 Ohio St. 150, 82 N.E.2d 962, approved and followed.)

"Although R.C. 5709.07 requires that the property be used exclusively for public worship, the Supreme Court has adopted a primary use test which requires more than merely calculating the amount of time that the property is used in a taxable as opposed to a nontaxable manner. *Faith Fellowship Ministries, Inc., supra*. Instead, a determination as to taxable status must include an examination of both the quantity and quality of the use for which the property is utilized. As the court held in paragraph two of its syllabus:

"To qualify for an exemption from real property taxation as a house used exclusively for public worship under R.C. 5709.07, such property must be [\*8] used in a principal, primary, and essential way to facilitate public worship.'

"Under this test, the court has recognized that those uses of property sought to be exempted which are merely supportive are not entitled to exemption under R.C. 5709.07. See *Faith Fellowship Ministries, Inc., supra*; *Summit United Methodist Church v. Kinney*

(1983), 7 Ohio St.3d 13; *Bishop v. Kinney* (1982), 2 Ohio St.3d 52." Id. at 5.

See, also, *Sylvania Church of God, Inc. v. Tracy* (Jan. 27, 1995), B.T.A. No. 93-P-252, unreported.

Most recently, the Supreme Court reaffirmed the use of the "primary use" test in determining qualification for exemption pursuant to R.C. 5709.07 in *True Christianity Evangelism v. Zaino* (2001), 91 Ohio St.3d 117. The court held:

"The General Assembly has used the phrase 'used exclusively' as a limitation in both R.C. 5709.07 (houses used exclusively for public worship) and R.C. 5709.12 (property used exclusively for charitable purposes). In *Moraine Hts. Baptist Church v. Kinney* (1984), 12 Ohio St.3d 134, 135, 12 OBR 174, 175, 465 N.E.2d 1281, 1282, this Court held that for purposes of R.C. 5709.07, the phrase 'used exclusively for public worship' [\*9] was equivalent to 'primary use.'" Id. at 120.

In his testimony before the board, Pastor Mincher stated that the entire subject property was used exclusively for church purposes. (R. 13) Pastor Mincher testified that Jubilee conducted church services on the property on Sundays and Wednesdays. (R. 20) The building located on the subject property was divided into two parts. The newer section contained the main sanctuary, and the older section was used for religious education classes, children's church, and church offices. (R. 21-22)

Further, Pastor Mincher stated that Jubilee did not rent or sublease any portion of the property to others. During its tenure, Jubilee was presented with opportunities to rent out space, but all such offers were rejected. (R. 14, 19, 20) Under its five-year lease with the Orrs, Jubilee was obligated to pay rent at the rate of \$ 2,600 a month, as well as utilities and property taxes. (R. 17, 18) The Tax Commissioner did not present any evidence to refute Pastor Mincher's credible testimony.

In this board's opinion, the activities that Pastor Mincher described are exactly the types of uses that constitute "public worship" under R.C. 5709.07(A)(2). See *Gerke* [\*10] and *Faith Fellowship Ministries, supra*. Furthermore, Pastor Mincher's testimony establishes that these activities represent the "exclusive" or "primary" use of the subject property. Therefore, we

find that the subject property is primarily used as a house of public worship.

In his final determination, the Tax Commissioner does not contest that the subject property is being used as a house of public worship. Instead, it is the Tax Commissioner's position that pursuant to R.C. 5709.07(A)(2), "properties leased to a church for profit or with a view to profit are not exempt from real property taxation." (S.T. 4)

The fact that all or a portion of a house used for public worship is leased does not necessarily disqualify the property for exemption. *Clair v. Tracy* (Sept. 11, 1998), B.T.A. No. 97-K-306, unreported; *Northcoast Christian Center v. Tracy* (July 18, 1997), B.T.A. No. 96-M-811, unreported; *Full Gospel Pentecostal Holiness Church v. Limbach* (Sept. 3, 1993), B.T.A. No. 91-R-432, unreported; *First Baptist Church of Lone Star Texas v. Limbach* (Aug. 21, 1987), B.T.A. No. 85-E-738, unreported.

Although it deals with the exemption for public colleges, the Tenth District [\*11] Court of Appeals' decision in *Bexley Village, Ltd. v. Limbach* (1990), 68 Ohio App.3d 306, may provide some assistance. n1 In *Bexley Village*, Capital University leased vacant land for use as a parking lot from a private for-profit developer. The court opined that the focus should be on the use to which the property is put by the party entitled to exemption. The court explained that R.C. 5709.07 includes two separate and distinct clauses. First, "public colleges \* \* \* and all buildings connected therewith are exempt from taxation regardless of whether the property is used with a view toward profit." Id. at 308; see, also, *Cleveland State Univ. v. Perk* (1971), 26 Ohio St.2d 1. Second, all other lands connected with public institutions of learning "are exempted from taxation if they are not used with a view towards profit." *Bexley Village* at 308; see *Denison Univ. v. Bd. of Tax Appeals* (1965), 2 Ohio St.2d 17.

n1 Although in different subsections, the exemptions for public colleges and houses of public worship are both found in R.C. 5709.07.

Just as for public colleges, R.C. 5709.07(A)(2) makes a distinction between "houses used exclusively for public worship" [\*12] and "the ground attached to them that is not leased or otherwise used with a view to profit \* \* \*." Therefore, as the court in *Bexley Village* instructed, the focus should be on the use of the property by Jubilee, since it is the party seeking the exemption. See, also, *Temple Beth Or v. Limbach* (Mar. 12, 1993), B.T.A. No. 90-M-291, unreported. If the property consists of a building used as a house of public worship and not additional ground attached thereto, then we need not review nor analyze whether the property is used with "a view to profit." *Full Gospel Pentecostal Holiness Church, supra*, and *Presbytery of the Western Reserve* (Sept. 3, 1993), B.T.A. No. 92-A-360, unreported. It is irrelevant. *Bexley Village*.

Although the board acknowledges that there is a presumption in favor of the Tax Commissioner, based upon the foregoing, the Board of Tax Appeals finds that the subject property is used primarily as a house of public worship. As such, it is entitled to exemption from taxation.

Accordingly, it is the decision and order of the Board of Tax Appeals that the decision of the Tax Commissioner is reversed.

#### Legal Topics:

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

Tax LawState & Local TaxesAdministration & ProceedingsJudicial ReviewTax LawState & Local TaxesPersonal Property TaxExempt PropertyLimitationsTax LawState & Local TaxesReal Property TaxExemptions



LEXSEE 1997 OHIO TAX LEXIS 851

Northcoast Christian  
Center Appellant, vs.  
Roger W. Tracy, Tax  
Commissioner of Ohio,  
Appellee.

CASE NO. 96-M-811  
(Exemption)

STATE OF OHIO --  
BOARD OF TAX AP-  
PEALS

1997 Ohio Tax LEXIS  
851

July 18, 1997

[\*1]

#### APPEARANCES

For the Appellant- K. Ronald Bailey, K. Ronald Bailey & Assoc., Co., L.P.A., P.O. Box 830, Sandusky, Ohio 44871-0830, Robert P. Bochk, Attorney-at-Law, 516 West Washington Street, Sandusky, Ohio 44870

For the Appellee- Betty D. Montgomery, Attorney General of Ohio, By: Richard C. Farrin, Assistant Attorney General, State Office Tower, 30 East Broad Street, 16th Floor, Columbus, Ohio 43266-0410

#### OPINION:

##### DECISION AND ORDER

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

This cause and matter comes to be considered by the Board of Tax Appeals upon a notice of appeal filed herein on June 28, 1996. Appellant appeals from a Journal Entry of the Tax Commissioner, appellee herein, wherein the Commissioner denied appellant's application for real property exemption for tax year 1994.

The appellant, Northcoast Christian Center, is an evangelical church formed in 1991 and located in Sandusky, Ohio. In 1993, the Church contracted with Perkins Plaza, Inc. to lease a former four-bay movie thea-

ter located in the rear of a strip shopping center. The Church made significant modifications to the building, removing walls and redesigning many of the spaces for uses necessary to its ministry. [\*2]

The original term of the lease is ten years. The lease agreement also obligates the Church to pay its pro-rata share of real estate taxes and assessments.

On December 30, 1994, the Church applied for exemption from real property taxation for that portion of the subject property which was equal to its pro-rata share of real property taxes paid to the lessor. The Commissioner denied the application. The Commissioner first found that "the subject property is unquestionably used by the applicant as a house of public worship". However, the Commissioner concluded that exemption was not proper.

Referring to the language "not leased or used with a view to profit" contained in R.C. 5709.07, the Commissioner indicated that the property was managed by a for-profit property management corporation, and then concluded that the payment of \$ 21,105 annually to a for-profit corporation was a prima facie showing that the property was leased "with a view to profit".

An appeal to this Board ensued. Not only did appellant specify as error the Commissioner's findings relative to R.C. 5709.07, it also raised constitutional arguments under both the Ohio and United States Constitutions. While the proper [\*3] forum to raise such issues, this Board is a mere repository of evidence relating to constitutional questions and has no authority to consider the legal issues raised. *MCI Telecommunications Corp. v. Limbach (1994), 68 Ohio St. 3d 195.*

The matter is considered upon the notice of appeal, the testimony and other evidence presented at the hearing before this Board, and the argument presented by counsel.

R.C. 5715.27(A) permits the "owner of any property" to file an application for the exemption of real property from taxation. A lessee who is obligated to pay real estate taxes assessed against the real property has standing to file such an application. *Cleveland St. Univ. v. Perk (1971), 26 Ohio St. 2d 1.* The Commissioner did not question appellant's standing to apply for exemption, but found that the requirements of R.C. 5709.07(A)(2) had not been met. We hold appellant has standing to make an application for exemption in the instant case.

The Commissioner rejected appellant's application because appellant leased property from a for-profit organization. The Tax Commissioner found, as a matter of law, that the lessor's profit from the lease with

appellant vitiated the [\*4] statutory exemption conferred upon houses of worship. This Board finds that the Commissioner's determination is based upon a misreading of R.C. 5709.07. R.C. 5709.07 provides, in pertinent part:

"(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 property occupancy, use and enjoyment;

\*\*\*

"(C) As used in this section, 'church' means a fellowship of believers, congregation, society, corporation, convention, or association that is formed primarily or exclusively for religious purposes and that is not formed for the private profit of any person."

In *Bexley Village, Ltd. v. Limbach* (1990), 68 Ohio App. 3d 306, the Franklin County Court of Appeals had the opportunity to consider the propriety of granting exemption under R.C. 5709.07(A) to real property leased by a university. Both *Bexley Village, Ltd.*, a for-profit corporation, and its lessee, Capital University, applied for exemption from real property taxation of a parcel of land owned by *Bexley Village, [\*5] Ltd.* and leased to the University. The Commissioner denied exemption, but this Board found exemption to be proper. Upon appeal, the Court of Appeals considered whether the leasehold interest indicated that the property was "used with a view towards profit". (While the yearly rental in that case was \$ 1.00, the appellant argued that the for-profit lessor profited by avoiding real property taxes and maintenance expenses it would have incurred.)

The Court of Appeals recognized that the words "used with a view towards profit" are not uncommon throughout the exemption statutes. The Court then reviewed two Supreme Court cases which considered whether a leased property was "used with a view towards profit." Both *Rose Inst. v. Myers* (1915), 92 Ohio St. 252, and *State, ex rel. Boss v. Hess* (1925), 113 Ohio St. 53, were cases in which a charitable and an

educational organization were each denied exemption for property leased for a profit to non-exempt lessees even though the proceeds garnered from the leases were used for exempt purposes. Finding that critical emphasis was placed upon the use of the property, rather than ownership, the Court held:

"Where the property is [\*6] 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."

Following the Court's directive in *Bexley Village, Ltd.*, 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 testimony before this Board is consistent with the Commissioner's findings. The Board further finds that the lease by which appellant obtains the right to use the property is not a bar to exemption.

Our holding herein is consistent with the Supreme Court's consideration of "charitable use" under R.C. 5709.12. In *Highland Park Owners, Inc. v. Tracy* (1994), 71 Ohio St. 3d 405, the Court, citing *Gerke v. Purcell* (1874), 25 Ohio St. 229, for the proposition that exemption from taxation is controlled by the use of property, rather than ownership thereof, held that, under R.C. 5709.12, [\*7] any property used exclusively for charitable purposes may be exempt from taxation. See, also, *Wilson, Aud. v. Licking Aerie No. 387, F.O.E.* (1922), 104 Ohio St. 137 (Property belonging to institutions of public charity can only be exempt under the constitution when used exclusively for charitable purposes).

Considering the record, statutes, and case law, the Board of Tax Appeals finds and determines that the Tax Commissioner erred when denying exemption to appellant because it leased the subject property. Therefore, the decision of the Tax Commissioner must be, and hereby is, reversed.

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
Tax LawState & Local TaxesAdministration & ProceedingsJudicial ReviewTax LawState & Local Taxes-

Personal Property Tax Exempt Property General Over-  
view Tax Law State & Local Taxes Real Property Tax-

Assessment & Valuation General Overview



LEXSEE 2002 OHIO TAX LEXIS 2627

The Performing Arts  
School of Metropolitan  
Toledo, Inc. and Gomez  
Enterprises, a Limited  
Partnership, Appellants,  
vs. Thomas M. Zaino,  
Tax Commissioner of  
Ohio, Appellee.

Case No. 2001-J-977  
(EXEMPTION)

STATE OF OHIO --  
BOARD OF TAX AP-  
PEALS

*2002 Ohio Tax LEXIS*  
2627

December 20, 2002

[\*1]

## APPEARANCES:

For the Appellants - Eastman & Smith, Ltd., Amy J. Borman, Graham A. Bluhm, M. Charles Collins, Of Counsel, One SeaGate, 24th Floor, P.O. Box 10032, Toledo, Ohio 43699-0032

For the Appellee - Betty D. Montgomery, Attorney General of Ohio, Richard C. Farrin, Assistant Attorney General, 30 East Broad Street, 16th Floor, Columbus, Ohio 43215-3428

## OPINION:

## DECISION AND ORDER UPON RECONSIDERATION

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

The Board of Tax Appeals is again considering this matter pursuant to a notice of appeal filed by The Performing Arts School of Metropolitan Toledo, Inc., and Gomez Enterprises, a limited partnership. ("Appellants") Appellants have appealed from a final determination of the Tax Commissioner that denied appellants' application for the exemption of real prop-

erty from taxation. The commissioner's final determination provides in pertinent part:

"In response to the recommendation of the attorney examiner, dated June 28, 2001, the applicant submitted written objections, which have been considered by this office. On review of the applicant's objections, the Tax Commissioner finds that neither the factual objections nor the objections to [\*2] the legal interpretation of applicable statutes is sufficient to overcome the recommendation of the attorney examiner.

"Namely, the applicant has amended the application to add the owner of the property as an applicant. As well, the applicant states that the property should be granted exemption as used as a charter school. However, as stated in the recommendation, the property is leased to the school by the owner Gomez Enterprises, a for-profit limited partnership. The property is leased to the school for a thirty-nine month term at a rental amount of \$ 195,000.00, payable in installments of \$ 5000.00 per month.

"Ohio Revised Code section 5709.07

"It is noted that the applicant has applied for exemption under R.C. 2477.01, and under R.C. 3314.01 et. seq. Neither of these sections provide (sic) exemption from taxation for real property. However, Ohio Revised Code section 5709.07 does provide exemption to property used as a school, and states in part (sic)

"(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, [\*3] and not

leased or otherwise used  
with a view to profit.

"The applicant states that the property should be granted exemption as being used as a school, regardless of the lease and the use with a view to profit by the business owner. The applicant cites several cases in support of its statement, including *Cleveland State University v. Perk* (1971), 26 Ohio St.2d 1, 5, wherein the Court held 'that a lessee of buildings located on land which is owned by the lessee [university] \* \* \* has standing to file \* \* \* an application for exemption of such buildings from taxation'. [Emphasis added]. It is noted that the Cleveland State case dealt with property owned by a state university, and the statutory provisions governing exemption for state universities do not apply in this case.

"As well, the applicant cites several other cases concerning exemptions granted to schools or churches which leased property. In *Bexley Village, Ltd. v. Limbach* (1990), 68 Ohio St.3d 306, the Court held that property owned by a for-profit entity and leased to a college for \$ 1.00 a year was entitled to exemption. In *Northcoast Christian Center v. Tracy* (July 18, 1997) B.T.A. No. 96-M-811, [\*4] the Board of Tax Appeals ('Board') held that property owned by a business but leased to a church for worship was also exempt. The Board in *Northcoast* cited the *Bexley Village* case in its decision, noting the nominal \$ 1.00 per year lease. Later, in *Gary Clair/Christ United Church v. Tracy* (September 11, 1998), B.T.A. No. 97-K-306, the Board found that the appropriate test for exemption of leased property was whether the parties intended to make a profit from the lease. *Gary Clair* at 6. The Board held that leased property could be exempted as not used with a view to profit where the modest rent charged was used merely to offset the expenses unique to an historic, 128-year old church. *Id.*

"More recently, the Board held that the use of property by the owner must be examined in order to determine exemption, and that leased property may be subject to.4 taxation where, as here, the lease is commercial in nature. *Thomaston Woods Limited Partnership v. Lawrence* (June 15, 2001) B.T.A. No. 99-L-551. Here, the for-profit owner charges a rent of approximately \$ 60,000 per year. Unlike the cases cited above, the apparent intent of the owner of the subject property is [\*5] to make a profit from a commercial lease. Applying the case law cited above, the property is not entitled to exemption as used with a view to profit by the owner."

n1 An unreported decision and order was previously issued by the board under date of Sep. 6, 2002, which reversed the final determination of the Tax Commissioner. The decision was vacated by an unreported order issued Oct. 4, 2002, to afford an opportunity to fully consider the Attorney General's motion for reconsideration/clarification as to application of an exemption to the land which is privately owned and improved by the buildings occupied by a charter school.

The matter has been submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified by the Tax Commissioner and the briefs filed by counsel for the parties. Although the board had scheduled the matter for hearing, the parties did not submit evidence.

The facts are not in dispute. The subject property is a 1.870-acre parcel improved with a two-story building with classrooms and offices, a one-story recreation area, and parking lot, identified on the auditor's records as parcel 20-06168. The Performing Arts School of Metropolitan [\*6] Toledo, Inc., ("PASMT") a non-profit corporation, leases n2 the property from Gomez Enterprises, a for-profit limited partnership. PASMT is operating a public community school for grades seven through twelve established under the authority of R.C. Chapter 3314. The lease term is thirty-nine months for a rental amount of \$ 195,000, payable in monthly installments of \$ 5,000.

n2 The lease is commonly referred to as a "triple-net lease," as its provisions require that the lessee, in addition to the rental payments, is also responsible for the payment of taxes, insurance and maintenance/utilities.

R.C. 5709.07, which provides an exemption for schools, reads:

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

"(1) Public school-houses, the books and furniture in them, and the ground attached to them necessary for the proper occupancy, use, and enjoyment of the school-houses, and not leased or otherwise used with a view to profit;

\* \* \* "

The commissioner contends that the exemption should be denied because the property is not a "public schoolhouse" within the context of R.C. 5709.07 because the property is not owned by a public entity. Since the term "public schoolhouse" [\*7] is not defined in R.C. 5709.07, the commissioner has cited several cases that have construed the term "public property" as contained in what is currently R.C. 5709.08. These cases have held that "public property" embraces only such property that is owned by the state or a political subdivision. See *Bd. of Park Commrs. of City of Troy v. Bd. of Tax Appeals* (1954), 160 Ohio St. 451; *Dayton Metro. Hous. Auth. v. Evatt* (1944), 143 Ohio St. 10. However, the Supreme Court has not extended this construction to "public schoolhouse" as contained in R.C. 5709.07.

In *Gerke v. Purcell* (1874), 25 Ohio St. 229 the Supreme Court construed the term "public" contained in Section 2, Article 12 of the Ohio Constitution and section 3 of the tax law of 1859, S & S 761, now R.C. 5709.07. With respect to the constitutional provision the court held that the term "public" as applied to schoolhouses required the property to be publicly owned. However, the court also determined that the term "public" under the statute is based on the use of the property, not its ownership. The court stated:

"A consideration of this provision of the statute shows that the word 'public,' as here applied to school-houses, [\*8] colleges, and institutions of learning, is not used in the sense of ownership, but as descriptive of the uses to which the property is devoted. The schools and instruction which the property is used to support, must be for the benefit of the public. The word public as applied to school-houses, is obviously used in the same sense as when applied to colleges, academies, and other institutions of learning. The statute must be construed in the light of the state of things upon which it was intended to operate. At the time of its passage, there were few, if any (and we know of none), colleges or academies in the state owned by the public, while there were many such institutions in the different parts of the state owned by private, corporate, or other organizations, and founded, mostly, by private donations.

"Besides, the condition prescribing that the property, in order to be exempt,

must not be used with a view to profit, does not seem appropriate if intended to apply only to institutions established by the public. Such institutions are never established and carried on by the public with a view to profit."

The General Assembly in the creation of community schools has expressly designated [\*9] such a school a "public school \* \* \* and part of the state's program of education." R.C. 3314.01(B). In so doing the community school is brought within the exemption granted by R.C. 5709.07(A), consistent with the ruling in *Gerke*. 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 n3 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*, it is not required that property be owned by PASMT to qualify it for exemption.

n3 R.C. 3314.01(B) authorizes a community school to "acquire facilities as needed."

In construing the exemption provided for public colleges and academies in R.C. 5709.07A(4), the Franklin County Court of Appeals has held that the statute cannot be read so narrowly that a property loses its exempt status when it is leased from an owner. *Bexley Village, Ltd. v. Limbach* (1990), 68 Ohio App.3d 306. The court stated at p. 311: [\*10]

"Where 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."

Although the subject property may produce income for its owner, it is being used as a schoolhouse for educational purposes. PASMT is not using the property with a view to profit. The Attorney General seeks to distinguish *Bexley Village*, upon the difference in language between the exemption conferred upon "lands connected with public institutions of learning, not used with a view to profit," and the exemption for school-

houses "and the ground attached to them \* \* \* not leased or otherwise used with a view to profit." We find nothing in the language which limits the exemption upon the use of the property, without regard to ownership.

The board finds the analysis of the exemption by the Supreme Court in *Cleveland State Univ. v. Perk* (1971), 26 Ohio St.2d 1 compelling. Although the court construed the portion of R.C. 5709.07 exempting [\*11] from taxation "public colleges and academies and all buildings connected therewith," language that is now contained in R.C. 5709.07(A)(4), the reasoning is applicable to this appeal. In *Cleveland State Univ.*, a for-profit corporation leased buildings to the state university that used the buildings as classrooms. The Supreme Court stated at p. 7:

"We do not think the term 'not used with a view to profit' refers to or controls the clauses 'all public colleges, public academies, all buildings connected with the same,' but refers to simply the clause preceding it in the statute 'all lands connected with public institutions of learning, not used with a view to profit.'"

Extending this reasoning to R.C. 5709.07(A)(1) requires the conclusion that the phrase "not leased or otherwise used with a view to profit" does not control the term "public schoolhouses," but refers simply to the clause preceding it in the statute, i.e., "the ground attached to them necessary for the proper occupancy, use, and enjoyment of the schoolhouses."

Our determination here is also consistent with our application of R.C. 5709.07(A)(3) granting exemption to houses used for public worship, and the similar [\*12] limitation that the "land is not leased or otherwise used for profit." We have focused upon the use of the property, requiring that no restrictions be placed upon its use for public worship. See *First Christian Church of Medina v. Zaino* (Apr. 12, 2002), BTA No. 2000-N-480, unreported; *Youngstown Foursquare Church v. Zaino* (June 29, 2001), BTA No. 1999-S-1367, unreported; *World Harvest Church of God v. Zaino* (Jan. 26, 2001), BTA No. 1999-B-1914, unreported. It is uncontroverted that PASMT is using the subject property as a public community school without restrictions upon its public use.

In *Temple Beth Or v. Limbach* (Mar. 12, 1993), BTA No. 1990-M-291, unreported, the board granted exemption to the temple's property which was being leased to a church for a three-year term at a rate of \$ 2,000 per month, finding that the primary and control-

ling use was as a place of worship, which established the exemption. In *Full Gospel Pentecostal Holiness Church v. Limbach* (Sept. 3, 1993), BTA Case No. 1991-R-432, unreported, the board granted exemption where a church was leasing its property to another church. Although we made reference to the monthly rate of \$ 582.44, which [\*13] covered the mortgage and insurance, our finding that there was no intent to profit from the lease was not determinative of the question of exemption. Similarly in *Northcoast Christian Center v. Tracy* (July 18, 1997), BTA No. 1996-M-811, unreported, we granted exemption to what had been a four-bay movie theater in a strip shopping center leased to Northcoast, upon its conversion and use for public worship. In *Gary Clair/Christ United Church v. Tracy* (Sep 11, 1998) BTA Case No. 1997-K-306, unreported, a private owner rented a one hundred twenty-eight year old church building which was used as a house of public worship. A modest rental was charged to offset utilities and provide maintenance. Although we commented on the amount of the rental and lack of profit in each case, the granting of the exemption turned upon the primary use of the property for public worship. Most recently, in *Jubilee Christian Fellowship, Inc. v. Tracy* (May 17, 2002) BTA Case No. 1999-R-239, unreported, we again held that the 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. [\*14]

The commissioner maintains that to focus solely on the use of the property by PASMT fails to recognize the fact that Gomez, the owner of the property, is also using the property. To the contrary, Gomez has given possession to PASMT for its use, and receives only the income.

In support of this contention the commissioner cites *Lincoln Memorial Hospital v. Warren* (1968), 13 Ohio St. 2d 109, and *Thomaston Woods Limited Partnership v. Lawrence* (June 15, 2001), BTA No. 1999-L-551, unreported. *Lincoln Memorial Hospital* addressed a situation where a for-profit corporation, in order to maintain its affiliation with a Blue Cross organization, formed a nonprofit corporation to operate the hospital. The nonprofit corporation assumed the payment of the loan for construction and equipping of the hospital, and all other expenses of the hospital. The court expressed the view that ownership and use must coincide to sustain the exemption for charitable purposes. R.C. 5709.12 The court also observed that a large majority of the patients paid for their accommodations and nonpaying patients were decidedly in the minority. We do not find this case persuasive in applying the exemption for public [\*15] schoolhouses.

In *Thomaston Woods Limited Partnership*, exemption was also sought pursuant to R.C. 5709.12. The Supreme Court has held in *Highland Park Owners, Inc. v. Tracy* (1994) 71 Ohio St.3d 405, that property owned by an institution which is used exclusively for charitable purposes is exempt under R.C. 5709.12. The board determined that the owner *Thomaston Woods'* primary use of the property was to lease it to third parties. The board held that in a lease situation where it is the lessee who is engaged in the charitable activity, then for purposes of R.C. 5709.12(B), the lessor's primary use of the property is the leasing and not charitable. These cases construe the applicability of the exemption provided by R.C. 5709.12 to a leasing situation. R.C. 5709.12 requires that the qualifying party own the property in order to be eligible for the exemption. R.C. 5709.07 does not provide a similar restriction.

The commissioner also cites *Summit United Methodist Church v. Kinney* (1983), 7 Ohio St.3d 13 in support of his claim that exemption should be denied. In that case exemption was denied to a church that leased property to a third party. The lessee was using the property [\*16] as a day care center, not a religious use under R.C. 5709.07. However, in the subject appeal the party seeking the exemption, PASMT, is using the property, the land and the improvements as a public school, a use for which an exemption is expressly granted under R.C. 5709.07(A)(1).

The Attorney General also introduces a new argument that title must be vested in the state or a political subdivision, pointing to the tax exemption provided by

R.C. 3313.44 to property vested in boards of education. The argument is that R.C. 3313.375, which provides a board of education may enter into a lease-purchase agreement for construction of a school building, does not vest title in the board until the end of the lease term and all the obligations provided in the agreement have been satisfied. The suggestion is made that under a lease-purchase, the property would not be exempt. However, R.C. 3313.44 and 3313.375 are specific in application and limited in their scope. There is no reason to believe that the general exemption in R.C. 5709.07 would not apply to the lease-purchase arrangement so long as the building is being used as a schoolhouse. We have been given no judicial authority which supports [\*17] the argument, and we are not persuaded.

Therefore, for all of the foregoing reasons, the board finds that the Tax Commissioner's final determination denying exemption to the subject property, the land and the improvements used as a public schoolhouse, is in error and it is hereby reversed.

#### Legal Topics:

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

Tax LawState & Local TaxesAdministration & ProceedingsJudicial ReviewTax LawState & Local Taxes-Personal Property TaxExempt PropertyRequirements for Exempt StatusTax LawState & Local TaxesPublic Utilities TaxExemptions

