

In the
Supreme Court of Ohio

COUPLE TO COUPLE LEAGUE	:	Case No. 2010-0864
INTERNATIONAL, INC.,	:	
	:	
Appellee,	:	
	:	
v.	:	On Appeal from the
	:	Ohio Board of Tax Appeals,
RICHARD A. LEVIN, TAX	:	Case No. 2007-M-101
COMMISSIONER OF OHIO,	:	
	:	
Appellant.	:	

**MERIT BRIEF OF APPELLANT RICHARD A. LEVIN,
TAX COMMISSIONER OF OHIO**

ROBERT J. MEYERS* (0014589)
**Counsel of Record*
 Buechner Haffer Meyers & Koenig Co., L.P.A.
 Fourth & Walnut Centre, Third Floor
 105 East Fourth Street, Suite 300
 Cincinnati, Ohio 45202-4057
 Telephone: (513) 579-1500
 Facsimile: (513) 977-4361
 rmeyers@bhmklaw.com

Counsel for Appellee
 Couple to Couple
 League International, Inc.

RICHARD CORDRAY (0038034)
 Ohio Attorney General
 RYAN P. O'ROURKE* (0082651)
**Counsel of Record*
 JULIE E. BRIGNER (0066367)
 Assistant Attorneys General
 Taxation Section
 30 East Broad Street, 25th Floor
 Columbus, Ohio 43215
 Telephone: (614) 466-5967
 Facsimile: (614) 466-8226
 ryan.orourke@ohioattorneygeneral.gov

Counsel for Appellant
 Richard A. Levin,
 Tax Commissioner of Ohio

FILED
 AUG 13 2010
 CLERK OF COURT
 SUPREME COURT OF OHIO

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. STATEMENT OF THE CASE AND FACTS 4

 A. Background of CCLI 4

 B. CCLI’s core business model includes the sale of merchandise and instructional classes. This business model has evolved over time to accommodate changing technologies 5

 C. CCLI’s federal tax returns demonstrate that it “generated sizeable amounts of revenue” on its sale of merchandise and instructional classes 7

 D. CCLI did not provide any probative or competent evidence regarding the extent to which it provided free or reduced-fee merchandise or instructional classes for the 2002 tax year (i.e., the tax year at issue). Very little documentary evidence was presented regarding the extent to which CCLI provided free or reduced-fee merchandise or instructional classes subsequent to the 2002 tax year..... 9

III. ARGUMENT..... 12

Tax Commissioner’s First Proposition of Law: Tax exemption statutes are strictly construed against the party claiming exemption. It is error for the BTA to reverse the Tax Commissioner when no probative or competent evidence is presented to show that his final determination is factually incorrect..... 12

Tax Commissioner’s Second Proposition of Law: Under R.C. 5709.12(B), exemption must be denied where property is primarily used to distribute merchandise and instructional classes on a fee-for-service basis, with only a de minimis level of free or reduced-fee merchandise and instructional classes provided to the general public 13

 A. This Court’s long-line of caselaw is unmistakable in its insistence that exemption under R.C. 5709.12(B) must be denied where the taxpayer’s core business model involves the distribution of literature and merchandise on a fee-for-service basis, with little regard given to the distribution of such items on a free or reduced-fee basis 14

- B. The evidentiary record adduced before the Tax Commissioner and the BTA plainly establishes that CCLI failed to demonstrate by “clear and convincing proof” that it met the requirements of R.C. 5709.12(B).....20

Tax Commissioner’s Third Proposition of Law: An entity cannot prevail under R.C. 5709.12(B) where it uses its property to sell information and merchandise in the commercial marketplace against other competitors.....25

IV. CONCLUSION27

CERTIFICATE OF SERVICE unnumbered

APPENDIX

The Matthew Kelly Found. v. Wilkins
(Oct. 27, 2006), BTA No. 2005-V-676 (unreported) Appx. 1

Girl Scouts—Great Trail Council v. McAndrew
(Jan. 6, 2006), BTA No. 2004-R-166 (unreported) Appx. 6

Article XII, Section 2, Ohio Constitution..... Appx. 11

R.C. 5709.12..... Appx. 12

R.C. 5709.121 Appx. 15

Tax Commissioner’s Notice of Appeal Appx. 17

TABLE OF AUTHORITIES

Cases	Page(s)
<i>A. Schulman, Inc. v. Levin</i> 116 Ohio St.3d 105, 2007-Ohio-5585	13
<i>Alcan Aluminum Corp. v. Limbach</i> (1989), 42 Ohio St.3d 121	13
<i>American Soc. for Metals v. Limbach</i> (1991), 59 Ohio St.3d 38	2, 18, 19, 23, 25
<i>American Humanist Assn. v. Bd. Of Tax Appeals,</i> (1963), 174 Ohio St. 545	1, 14, 19, 25
<i>American Issue Publishing Co. v. Evatt</i> (1940), 137 Ohio St. 264	1, 15, 19, 25
<i>Battelle Memorial Inst. v. Dunn</i> (1947), 148 Ohio St. 53	2, 16, 17, 18, 19, 23, 35
<i>Bethesda Healthcare, Inc. v. Wilkins</i> 101 Ohio St.3d 420, 2004-Ohio-1749	12
<i>Cincinnati College v. State</i> (1850), 19 OHIO 110.....	12
<i>First Baptist Church of Milford v. Wilkins</i> 110 Ohio St.3d 496, 2006-Ohio-4966	13
<i>Girl Scouts—Great Trail Council v. McAndrew</i> (Jan. 6, 2006) BTA No. 2004-R-166 (unreported).....	24
<i>Girl Scouts-Great Trail Council v. Levin</i> 113 Ohio St.3d 24, 2007-Ohio-972	23, 24, 25
<i>Hatchadorian v. Lindley</i> (1986), 21 Ohio St.3d 66	13
<i>Herb Soc. of America v. Tracy</i> (1994), 71 Ohio St.3d 374	1, 14, 19, 25
<i>Highland Park Owners, Inc. v. Tracy</i> (1994), 71 Ohio St.3d 405	14

<i>Hosp. Service Assn. of Toledo v. Evatt</i> (1944), 144 Ohio St. 179	13
<i>Lutheran Book Shop v. Bowers</i> (1955), 164 Ohio St. 359	passim
<i>The Matthew Kelly Found. v. Wilkins</i> (Oct. 27, 2009) BTA No. 2005-V-676 (unreported).....	18
<i>Planned Parenthood Assn. v. Tax Commr.</i> (1966), 5 Ohio St.2d 117	1, 14, 18, 19, 25
<i>Seven Hills Schools v. Kinney</i> (1986), 28 Ohio St.3d 186	18
<i>The Incorporated Trustees of the Gospel Worker Society v. Evatt</i> (1942), 140 Ohio St. 185	2, 16, 18, 19, 23, 25
<i>True Christianity Evangelism v. Zaino</i> (2001), 91 Ohio St.3d 117	1, 14, 15, 19, 25
<i>Welfare Fedn. of Cleveland v. Glander</i> (1945), 146 Ohio St. 146	13
<i>Youngstown Metro. Housing Auth. v. Evatt</i> (1944), 143 Ohio St. 268	13, 20
<i>Zindorf v. Otterbein Press</i> (1941), 138 Ohio St. 287	passim

Constitutional Provisions, Statutes, and Rules

Page(s)

Article XII, Section 2, Ohio Constitution.....	12
R.C. 5709.12(B).....	passim
R.C. 5709.121	18

I. INTRODUCTION

The Ohio Board of Tax Appeals' ("BTA") two-member majority decision and order granting a real property exemption to Couple to Couple League International, Inc. ("CCLI") for the 2002 tax year threatens to upset this Court's deeply-rooted tax exemption jurisprudence. In concluding that CCLI's property was "used exclusively for charitable purposes" under R.C. 5709.12(B), the majority committed two fundamental errors. First, it largely disregarded this Court's relevant precedent in the realm of charitable tax exemptions. Second, and perhaps more problematic, the majority shirked its duty to fully consider the record adduced during the Tax Commissioner's administrative proceedings, as well as the evidence presented during the BTA's hearing. As cogently illustrated by chairperson Margulies' partial dissenting opinion, the evidence stands unrebutted in demonstrating that CCLI "generated sizeable amounts of revenue" from the sale of merchandise and instructional classes in the commercial marketplace. Supplement ("Supp.") 380; BTA Decision and Order 11 (Margulies' Partial Dissent). Distilled to its essence, the majority opinion simply failed to apply the relevant law to the relevant facts. The majority's failures are more fully addressed in turn.

This Court has long held that, as a general matter, the dissemination of information for the benefit of mankind is a charitable act. *American Issue Publishing Co. v. Evatt* (1940), 137 Ohio St. 264, 266. See also *True Christianity Evangelism v. Zaino* (2001), 91 Ohio St.3d 117, 120; *Herb Soc. of America v. Tracy* (1994), 71 Ohio St.3d 374, 376; *American Humanist Assn. v. Bd. of Tax Appeals* (1963), 174 Ohio St. 545, 546. Cf. *Planned Parenthood Assn. v. Tax Commr.* (1966), 5 Ohio St.2d 117, 119-120. However, the Court's jurisprudence has drawn a sharp line where a taxpayer overwhelmingly disseminates information on a fee-for-service basis, with little regard given to the distribution of such information on a free or reduced-fee basis. *Zindorf v.*

Otterbein Press (1941), 138 Ohio St. 287, 290. See also *American Soc. for Metals v. Limbach* (1991), 59 Ohio St.3d 38, 40; *Lutheran Book Shop v. Bowers* (1955), 164 Ohio St. 359; *Battelle Memorial Inst. v. Dunn* (1947), 148 Ohio St. 53, 60-61; *The Incorporated Trustees of the Gospel Worker Society v. Evatt* (1942), 140 Ohio St. 185. A separate, but related, principle that emanates from this Court's decisional law is that exemption must be denied where a taxpayer's core business model involves the offering of merchandise for sale in the commercial marketplace against other competitors. See *Zindorf*, 138 Ohio St. at paragraph 2 of the syllabus; *Lutheran Book Shop*, 164 Ohio St. at 361-362. Here, the record establishes that CCLI's property was primarily used to promote the principles of natural family planning through the sale of merchandise and instructional classes, with little regard given to the distribution of such materials on a free or reduced-fee basis. Moreover, it is equally clear that such items were readily available for sale in the commercial marketplace. According to *Zindorf* and its progeny, the foregoing activities plainly fall outside the sweep of R.C. 5709.12(B). Remarkably, the majority ignored this relevant precedent—completely absent from the decision and order is any analysis of, let alone a citation to, *Zindorf*, *Battelle Memorial Inst.*, *American Soc. for Metals*, or *Gospel Worker Society*. At a bare minimum, the majority abdicated its responsibility to consider this Court's clear guidance in the realm of charitable tax exemptions.

The error resting with the majority's failure to address *Zindorf* and its progeny is further compounded by the majority's failure to consider the record adduced during the Tax Commissioner's administrative proceedings, as well as the evidence presented during the BTA's hearing. As poignantly illustrated in chairperson Margulies' partial dissenting opinion, the evidence in this case is overwhelming. CCLI's federal tax returns demonstrate that, over the span of numerous fiscal years, it made several hundreds of thousands of dollars of gross profit on

the sale of merchandise in the commercial marketplace. Such merchandise included “videos, books, coffee mugs, t-shirts, totes, compact discs, tapes, and Christmas cards.” Supp. 380; BTA Decision and Order 11 (Margulies’ Partial Dissent). The overwhelming commercial aspect of CCLI’s activities is further magnified by reference to the financial information presented with regard to CCLI’s instructional classes. As indicated on its federal tax returns, CCLI likewise generated several hundreds of thousands of dollars in revenue from the sale of these classes.

The evidence regarding the extent to which CCLI distributed free or reduced-fee merchandise and instructional classes is quite bleak. For the tax year at issue (i.e., 2002), neither of CCLI’s two witnesses could provide any probative or competent testimony regarding the extent to which CCLI distributed free or reduced-fee materials to the general public. Indeed, the only two fiscal years for which information was provided regarding the extent to which CCLI distributed free or reduced-fee merchandise were 2005 and 2007. In fiscal year 2005, a mere 7.36% of CCLI’s gross sales included the provision of free merchandise. For fiscal year 2007, the percentage was even less, 4.37%.

An examination of the extent to which CCLI provided free or reduced-fee instructional classes is bleaker still. For the 2002 tax year, CCLI presented no information regarding the extent to which it provided free or reduced-fee instructional classes to the general public. Moreover, for fiscal years 2005, 2006, and 2007, chairperson Margulies, found that “CCLI only offered 1½ to 2 percent of its classes for free.” Supp. 381; BTA Decision and Order 12 (Margulies’ Partial Dissent).

The paucity of free and reduced-fee merchandise and instructional classes provided by CCLI can possibly be traced, at least in-part, to the manner by which CCLI conducted its business. Throughout the course of several years, CCLI transacted business solely through its

website. Yet, nowhere on the website did CCLI publicize the availability of free or reduced-fee merchandise to the general public, nor, to a particularized needy subset of the general public. Indeed, CCLI did not create a formal financial assistance policy until January of 2008—a date that precedes the BTA hearing date (i.e., June 20, 2008) by only five months.

In sum, this Court's settled-precedent, coupled with the overwhelming evidence adduced below, demonstrate that CCLI's property is not used "exclusively for charitable purposes" as required by R.C. 5709.12(B). Accordingly, this Court should reverse the BTA's decision and order that granted a real property exemption to CCLI.¹

II. STATEMENT OF THE CASE AND FACTS

A. Background of CCLI.

As reflected on CCLI's real property exemption application, CCLI seeks exemption from real property taxes for the 2002 tax year. Supp. 243-244. CCLI is a § 501(c)(3) organization that bases its corporate headquarters out of Cincinnati, Ohio. Supp. 67, 172. It was formed in 1971 for the purpose of promoting the principles of natural family planning. Supp. 72. CCLI promotes the principles of natural family planning through what it refers to as the "triple-strand" approach. Supp. 8; Hearing Record ("H.R.") 28-29. As explained by Andrew Alderson, executive director of CCLI, the "triple-strand" approach encourages: (1) fertility awareness; (2) breastfeeding; and (3) adherence to the moral teachings of the Catholic Church. Supp. 8; H.R. 28-29. Separate and apart from CCLI, other natural family planning organizations operate in Minnesota, Maryland, Wisconsin, and Oregon. Supp. 157.

¹ We note that the BTA denied exemption for property that CCLI used as a parking area. Supp. 379; BTA Decision and Order 10. CCLI did not file a cross-appeal with respect to the denial of exemption for the parking area; thus, the taxable status of this particular portion of CCLI's property is not at issue here.

CCLI operates “mostly in the United States.” Supp. 6; H.R. 20. However, it also maintains a presence “in a few other countries throughout the world.” Supp. 6; H.R. 19-20. The day-to-day operations of CCLI are carried out by a collection of paid employees, contractors, and volunteers. Supp. 6; H.R. 19. At one point, CCLI employed fifteen individuals at its corporate headquarters; however, this number has fluctuated over time. Supp. 7, 14; H.R. 22, 51-52. The corporate headquarters consists of office space, a warehouse, a parking area, and a separate area for the fire sprinkler system. Supp. 6, 21-22; H.R. 21, 81-82. Mr. Alderson estimated that the percentage breakdown between office-space as compared to warehouse-space was roughly 50/50. Supp. 17; H.R. 64. The individuals employed at the corporate headquarters are split amongst two groups. The first group, the “Programs Team,” develops and oversees the programs that are administered by CCLI. Supp. 7; H.R. 22. The second group, the “Business Team,” provides CCLI’s financial support and oversees the shipping operations. Supp. 7; H.R. 22.

B. CCLI’s core business model includes the sale of merchandise and instructional classes. This business model has evolved over time to accommodate changing technologies.

CCLI’s natural family planning principles are conveyed, with very limited exceptions, on a fee-for-service basis through the sale of various types of merchandise as well as through instructional classes. Supp. 7, 9; H.R. 22-23, 30-32. The evidentiary record contains an extensive listing of the types of merchandise that CCLI offered for sale. The Tax Commissioner’s administrative review process compiled no less than fifty-seven pages of merchandise that CCLI sold. Supp. 90-147. As noted by chairperson Margulies, such merchandise included “videos, books, coffee mugs, t-shirts, totes, compact discs, tapes, and Christmas cards.” Supp. 380; BTA Decision and Order 11 (Margulies’ Partial Dissent). Some

of these items of merchandise offered for sale included: a video concerning the treatment of religion in movies (Supp. 92); a bluegrass-themed CD regarding the sacred (Supp. 97); an interactive computer game for children (Supp. 97); a “Catholicism for Dummies” book (Supp. 114); a book of family activities and craft projects for Lent and Easter (Supp. 120); a Rosary-themed drawing pad for kids (Supp. 125-126); and various cookbooks concerning the preparation of baby food, eliminating sugar from one’s diet, and preparing nutritious meals on a budget (Supp. 137-138, 146-147). Mr. Alderson testified that the merchandise that CCLI sold was also offered for sale in the general marketplace. Supp. 15; H.R. 56-57. He further testified that he was “sure” that other natural family planning organizations offered similar merchandise for sale. Supp. 15; H.R. 56.

Mr. Alderson explained that CCLI originally sold its merchandise through a mail-order catalog business. Supp. 9; H.R. 31. However, over time, CCLI’s business model changed. With the surge in internet commerce over the years, CCLI replaced its mail-order catalog business with a website by which it offered its merchandise for sale. Supp. 9; H.R. 31. As explained by Mr. Alderson: “Over time, with the advent of the web, the – we were able to put a website and then actually sell those materials on the website. And as we have looked at that over time, the catalog was expensive, most people now are web based, so we did away with our catalog.” Supp. 9; H.R. 31. CCLI began selling merchandise on the internet in 2000. Supp. 36; H.R. 139.

The merchandise that CCLI initially offered for sale through its mail-order catalog, and later through its website, was stored on-site at CCLI’s warehouse located at its corporate headquarters in Cincinnati. Supp. 12; H.R. 42-43. The warehouse stored items that were prepared not only by CCLI, but also items that were prepared by third parties. Supp. 9, 12; H.R. 31, 42-43. To assist with the processing of its customers’ orders, CCLI employed a staff to

package and ship the merchandise. Supp. 14; H.R. 50. The staff also managed the inventory levels. Supp. 14; H.R. 50.

In January of 2008, Mr. Alderson testified that CCLI's business model underwent a further revision. Supp. 13; H.R. 48. Seeking to provide heightened levels of service as well as to reduce its costs (as well as the costs of its customers), CCLI decided to curtail the extent to which it sold merchandise over the internet and instead started to recommend that its customers purchase certain items of merchandise through the internet retailer known as Amazon.com. Supp. 9, 11-12, 28; H.R. 31-32, 41-43, 108-109. Specifically, customers that were interested in purchasing items of merchandise prepared by third parties were directed to Amazon.com. Supp. 12; H.R. 42-43. Pursuant to CCLI's agreement with Amazon.com, a page is maintained on Amazon.com's website that provides a listing of books and merchandise that have been recommended by CCLI. Supp. 28; H.R. 108-109.

In spite of the merchandising alternative provided by Amazon.com, CCLI still offered certain lines of merchandise for sale through its own website—these items included materials prepared by CCLI as well as thermometers and manuals that are sold as part of CCLI's natural family planning kit. Supp. 12; H.R. 43-45.

C. CCLI's federal tax returns demonstrate that it "generated sizeable amounts of revenue" on its sale of merchandise and instructional classes.

As stated by chairperson Margulies, CCLI's federal tax returns (i.e. Federal Form 990) as well as other financial information submitted by CCLI reveal that CCLI "generated sizeable amounts of revenue" on its sale of merchandise and instructional classes. Supp. 380; BTA Decision and Order 11 (Margulies' Partial Dissent). The following table represents the extent to which CCLI profited from the sale of merchandise:

Fiscal Year	Gross Sales of Merchandise	Gross Sales Profit	Source of Information
07/01/02 – 6/30/03	\$620,573	\$328,768	2002 Form 990; Supp. 172
07/01/03 – 6/30/04	\$642,595	\$317,451	2003 Form 990; Supp. 201, 209
07/01/04 – 6/30/05	\$568,654	\$278,161	2004 Form 990; Supp. 339
07/01/05 – 6/30/06	\$520,902	\$198,443	2005 Form 990; Supp. 306
07/01/06 – 6/30/07	\$469,016	\$181,554	2006 Form 990; Supp. 280

CCLI's sale of merchandise is not the only avenue by which it "generated a sizeable amount of revenue." As explained above, in addition to selling various items of merchandise, CCLI also provided instructional classes with regard to the principles of natural family planning. Supp. 7, 24; H.R. 22-23, 90. The revenue generated from CCLI's instructional classes is listed on line 2 of the Form 990 as "program service revenue." Supp. 24; H.R. 90. The following table sets forth the amount of revenue that CCLI generated from its instructional classes:

Fiscal Year	Revenue Attributable to CCLI's Instructional Classes	Source of Information
07/01/02 – 6/30/03	\$196,196	2002 Form 990; Supp. 172
07/01/03 – 6/30/04	\$259,374	2003 Form 990; Supp. 201
07/01/04 – 6/30/05	\$246,923	2004 Form 990; Supp. 339
07/01/05 – 6/30/06	\$244,636	2005 Form 990; Supp. 306
07/01/06 – 6/30/07	\$243,597	2006 Form 990; Supp. 280

D. CCLI did not provide any probative or competent evidence regarding the extent to which it provided free or reduced-fee merchandise or instructional classes for the 2002 tax year (i.e., the tax year at issue). Very little documentary evidence was presented regarding the extent to which CCLI provided free or reduced-fee merchandise and instructional classes subsequent to the 2002 tax year.

CCLI has sought exemption from real property taxes for the 2002 tax year. Supp. 243.

At the hearing, none of CCLI's witnesses were able to provide any probative or competent evidence regarding the extent to which CCLI provided free or reduced-fee merchandise and instructional classes for the 2002 tax year. Specifically, Mr. Alderson testified as follows:

Q: Do you know whether in 2002 if Couple to Couple League provided any courses free of charge to its members?

A: I do not know off the top of my head, but I believe we can find out if in that year we did.

Q: Do you know if you provided any courses at a reduced rate in 2002?

A: I don't have firsthand knowledge of that, no but I – we could find that out.

Q: And the same type of questions with the home study courses, you don't know – you have no personal knowledge of whether any home study courses were provided free of charge or at a reduced rate in 2002?

A: I don't, but I know we have tracked that, so we can provide that.

Q: And you don't have any personal knowledge of how much merchandise was sold for a reduced price or –

A: No.

Supp. 14; H.R. 53.

CCLI's business manager, Jack Langlitz, was similarly unable to provide any probative or competent evidence regarding the extent to which CCLI provided free or reduced-fee merchandise and instructional classes for the 2002 tax year. Mr. Langlitz has served as CCLI's business manager for twenty-five and a half years. Supp. 19; H.R. 71. His duties include

overseeing the “overall fiscal operation” of CCLI. Supp. 19; H.R. 71. Mr. Langlitz testified at the BTA hearing as follows:

Q: And in 2002, do you know if couple – how many courses were offered or how many couples or, I guess you said, family unit – unit –

A: Uh-huh.

Q: -- received, if any, free courses?

A: I would have to do the research.

Q: You don’t know. All right. How about, how many family units received courses at a reduced rate in 2002?

A: I apologize, but same answer.

Q: Okay. And as far as your knowledge of free or reduced rate home study courses in 2002, same answer?

A: Yes, ma’am.

* * *

Q: Okay. And, again, you don’t know how much merchandise * * * in 2002 was sold for free?

A: None of that data was requested or prepared.

Supp. 36; H.R. 138-139.

Even assuming arguendo that CCLI did in-fact provide free or reduced-fee merchandise and instructional classes during the 2002 tax year, it would have been very difficult for CCLI’s customers to find out about the availability of such free or reduced-fee items. In 2002, CCLI transacted business through its website. Supp. 36; H.R. 139. However, CCLI’s website did not provide a method by which its customers could obtain free or reduced-fee items. Supp. 36; H.R. 139. Moreover, CCLI did not institute a formal financial assistance policy until January of 2008—about five months prior to the evidentiary hearing conducted before the BTA. Supp. 13;

H.R. 48. Mr. Alderson explained that prior to January of 2008, CCLI did not have any written policy regarding financial assistance. Supp. 13; H.R. 48.

CCLI's financial assistance policy states in-part that "financial assistance should not be advertised as a 'cheaper option' to take the class, but rather, should be considered only when there is a legitimate need" and that "[s]tudents should also be encouraged to search for alternate funding. There are some organizations that are willing to support couples wanting to live their faith." Supp. 275-279. Pursuant to the financial assistance policy, a couple must identify their annual gross income as well as set forth the reasons they are seeking financial assistance. Supp. 275-279. CCLI reserves the right to deny a couple's request for financial assistance. Supp. 275-279.

For fiscal years 2005 and 2007, CCLI created a set of documents, Exhibits 7 (Supp. 367) and 8 (Supp. 368), that purport to show the extent to which CCLI provided free merchandise. No underlying source records accompanied these two exhibits. For fiscal year 2005, 7.36% of CCLI's gross sales included the provision of free merchandise; for fiscal year 2007, 4.37% of CCLI's gross sales included the provision of free merchandise.² No other records were provided to show the extent to which CCLI provided free or reduced-fee merchandise.

As mentioned above, CCLI was unable to provide any probative or competent evidence regarding the extent to which it provided free or reduced-fee merchandise and instructional

² Mr. Langlitz explained how to perform this calculation at the hearing. Supp. 27, 31-33; H.R. 102-103, 120-128. First, on Exhibits 7 and 8 (i.e. Supp. 367-368), subtract the "Instructional fees" from the total listed under the "Total Sales Value" column. Then divide this number by the "Gross sales of inventory, less returns and allowances" listed on line 10a of the Form 990 for the fiscal year in question. The numerical calculations are shown below:

$$\text{For FY 2005: } \$48,795.42 - \$5,424.00 = \$43,371.42 \rightarrow \$43,371.42 \div \$588,654 = 7.36\%$$

$$\text{For FY 2007: } \$26,412.34 - \$3,552.00 = \$22,860.34 \rightarrow \$22,860.34 \div \$469,016 = 4.87\%$$

classes for the 2002 tax year (i.e., the tax year at issue). For the fiscal years of 2005, 2006, and 2007, CCLI provided a document that showed the number of couples that attended CCLI's instructional classes for free. Supp. 369. No underlying source records accompanied this document. As found by chairperson Margulies, this document revealed that "CCLI only offered 1½ to 2 percent of its classes for free." Supp. 382; BTA Decision and Order 13 (Margulies' Partial Dissent). No other records were provided to show the extent to which CCLI provided free or reduced-fee instructional classes.

III. ARGUMENT

Tax Commissioner's First Proposition of Law: Tax exemption statutes are strictly construed against the party claiming exemption. It is error for the BTA to reverse the Tax Commissioner when no probative or competent evidence is presented to show that his final determination is factually incorrect.

Pursuant to Article XII, Section 2 of the Ohio Constitution, all real property in this state is subject to uniform taxation. The principle of uniformity may be disregarded only to the extent that the General Assembly provides an express exemption from taxation. The General Assembly's power to exempt real property from taxation emanates from this same constitutional provision. See *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, 2004-Ohio-1749, ¶ 20. Section 2 provides in relevant part that: "Without limiting the general power, subject to the provisions of Article I of this constitution, to determine the subjects and methods of taxation or exemptions therefrom, general laws may be passed to exempt * * * institutions used exclusively for charitable purposes * * *."

In recognition of the principle of uniformity, this Court has long held that statutes granting real property tax exemptions are to be strictly construed because they "are in derogation of equal rights." *Cincinnati College v. State* (1850), 19 OHIO 110, 115. For over 150 years, the principle

of strict construction has continued unabated. See e.g. *First Baptist Church of Milford v. Wilkins*, 110 Ohio St.3d 496, 2006-Ohio-4966, ¶ 10; *Welfare Fedn. of Cleveland v. Glander* (1945), 146 Ohio St. 146, 177. “A right to exemption from taxation must appear with reasonable certainty in the language of the Constitution or valid statute and must not depend upon a doubtful construction of such language.” *Hosp. Service Assn. of Toledo v. Evatt* (1944), 144 Ohio St. 179, 182. “[H]e who seeks exemption of property from taxation must show by clear and convincing proof his right thereto.” *Youngstown Metro. Housing Auth. v. Evatt* (1944), 143 Ohio St. 268, 273. “In all doubtful cases exemption is denied.” *A. Schulman, Inc. v. Levin*, 116 Ohio St.3d 105, 2007-Ohio-5585, ¶ 7.

“Absent a demonstration that the commissioner’s findings are clearly 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.” *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121, 123 (citing *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66).

Tax Commissioner’s Second Proposition of Law: Under R.C. 5709.12(B), exemption must be denied where property is primarily used to distribute merchandise and instructional classes on a fee-for-service basis, with only a de minimis level of free or reduced-fee merchandise and instructional classes provided to the general public.

CCLI cannot meet the demands of R.C. 5709.12(B) because the primary use of the property at issue involves the promotion of CCLI’s message through the distribution of merchandise and instructional classes on a fee-for-service basis, with only a de minimis level of free or reduced-fee merchandise and instructional classes provided to the general public.

Under R.C. 5709.12(B), an institution’s real property that is “used exclusively for charitable purposes” shall be exempt from taxation. To prevail under R.C. 5709.12(B), the

applicant must show that (1) the property belongs to an institution and (2) the property is used exclusively for charitable purposes. *Highland Park Owners, Inc. v. Tracy* (1994), 71 Ohio St.3d 405, 406-407. This controversy centers on the second prong of the test, that is, whether CCLI is using its property exclusively for charitable purposes.

The General Assembly has never expressly defined what constitutes a “charitable purpose” under R.C. 5709.12(B). *True Christianity Evangelism*, 91 Ohio St.3d at 119.

Nonetheless, this Court has previously defined what the term “charity” means:

In the absence of a legislative definition, “charity,” in the legal sense, is the attempt in good faith, spiritually, physically, intellectually, socially and economically to advance and benefit mankind in general, or those in need of advancement and benefit in particular, without regard to their ability to supply that need from other sources, and without hope or expectation, if not with positive abnegation, of gain or profit by the donor or by the instrumentality of the charity.

Planned Parenthood Assn., 5 Ohio St.2d 117, paragraph one of the syllabus. This Court’s firmly-settled jurisprudence instructs that CCLI is not using its property “exclusively for charitable purposes” and, thus, does not fall within the sweep of R.C. 5709.12(B).

- A. This Court’s long-line of caselaw is unmistakable in its insistence that exemption under R.C. 5709.12(B) must be denied where the taxpayer’s core business model involves the distribution of literature and merchandise on a fee-for-service basis, with little regard given to the distribution of such items on a free or reduced-fee basis.**

It is settled that “[t]he dissemination of useful information to benefit mankind is, traditionally, charity.” *Herb Soc. of America*, 71 Ohio St.3d at 376. Thus, the Court has granted exemption under R.C. 5709.12(B) to an entity that distributed literature relating to human progress, values, and welfare. *American Humanist Assn*, 174 Ohio St. 545. Some of the literature was sold, some given away, and some distributed at cost or less—the entity “[did] not engage in commercial printing or any other competitive activities.” *Id.* Additionally, the Court

has granted exemption under R.C. 5709.12(B) to an entity that undertook a “good-faith attempt to disseminate information to spiritually advance and benefit mankind in general.” *True Christianity Evangelism*, 91 Ohio St.3d at 119. See also *American Issue Publishing*, 137 Ohio St. 264.

In contrast to the aforesaid cases, the Court has drawn a sharp line where property is primarily used to distribute merchandise and information in the commercial marketplace for a price, with little regard given to the distribution of such items to the general public on a free or reduced-fee basis. Indeed, this Court’s long-line of caselaw has been unwavering in its insistence that the element of charity is negated when an entity’s core business model involves the dissemination of merchandise and information on a fee-for-service basis.

The Court’s decision in *Zindorf*, 138 Ohio St. 287, is instructive in this regard. There, the taxpayer sought exemption pursuant to R.C. 5709.12(B)’s predecessor. The taxpayer was a not-for-profit corporation that served as the official publishing unit of the United Brethren Church. *Id.* Its “activities consist[ed] of printing, publishing and binding religious literature and church publications.” *Id.* Publications were distributed to various church agencies at “cost plus a profit.” *Id.* The taxpayer also engaged in commercial printing operations at cost plus a profit for other religious denominations as well as for secular entities. *Id.* In 1938, the taxpayer’s gross sales of religious publications amounted to \$334,441.36, while gross sales attributable to commercial work were \$223,149.72. *Id.* For 1939, the taxpayer’s gross sales figures were \$340,896.28 and \$239,329.67, respectively. *Id.* The taxpayer’s operating profit in 1938 was \$60,000 and in 1939 it was \$90,000. *Id.* Mindful of the tremendous dollar figures relating to the taxpayer’s gross sales and operating profit, the Court denied the taxpayer’s request for exemption. The Court explained that the taxpayer’s “property is not used exclusively for

charitable purposes, but that its printing establishment is conducted in competition with other commercial printing plants.” *Id.* at 290. Indeed, the syllabus law of the Court holds that:

Where a substantial portion of the gross income of a corporation is received for work done in competition with commercial concerns in the same line, the property of such corporation may not be exempted from taxation under Section 5353, General Code [Section 5709.12, Revised Code], even though such corporation be one formed not for profit and owned by a religious institution, for whose use, benefit and behoof the property of the corporation is held.

Id. at paragraph 2 of the syllabus.³

Following in the footsteps of *Zindorf* is the Court’s decision in *Battelle Memorial Inst.*, 148 Ohio St. 53. There, the taxpayer sought exemption under R.C. 5709.12(B) for the multitude of research projects and technical reports that it produced each year relating to the metallurgical arts. *Id.* at 56-57. The results of the research were “widely disseminated.” *Id.* at 57. The taxpayer was at the vanguard of scientific research, as “[m]any persons c[a]me to Battelle from all over the world for consultation in relation to scientific problems.” *Id.* at 57. The research projects were largely funded by commercial industries. *Id.* at 58-59. While the Court recognized that “the dissemination of knowledge for the edification and improvement of mankind is regarded a charitable object,” the Court denied the exemption because the taxpayer’s research projects and scientific publications were **paid** for by those in the metallurgical industry. *Id.* at 60-61. According to the Court: “The ‘sponsored research’ is financed by these commercial

³ The Court reaffirmed the principles of *Zindorf* just a year later in *Gospel Worker Society*, 140 Ohio St. 185. There, the taxpayer’s property was “used in connection with the publication of a number of religious papers, tracts, pamphlets, etc.” *Id.* The publications were distributed according to a variety of subscription prices. *Id.* While some publications were distributed at no charge, the record established that the taxpayer’s sale of publications generated \$378,176.89 in gross sales and a corresponding \$376,292.07 in net sales. *Id.* at 189. On a review of the evidence, the Court found that the taxpayer’s property was not used exclusively for charitable purposes in accordance with Section 5353, General Code, and, thus, denied the request for exemption. *Id.* (citing *Zindorf*).

enterprises and they are the direct beneficiaries of what is produced by the institute for them. Therefore, the real property in issue cannot fairly be said to be used *exclusively* for charitable purposes within the contemplation of the statute.” *Id.* (Italics in original).

Lutheran Book Shop, 164 Ohio St. 359, serves as another powerful illustration of the Court’s insistence that exemption under R.C. 5709.12(B) must be denied where the taxpayer’s core business model involves the distribution of literature and merchandise on a fee-for-service basis. In that case, the taxpayer, a book shop, was organized as a not-for-profit corporation. The book shop sold merchandise such as “Bibles, Christian literature, books, greeting cards, stationery, gifts, and religious materials and supplies for use in churches and Sunday schools.” *Id.* It was open to the public and advertised the availability of its merchandise in a variety of media outlets. *Id.* The book shop sold its merchandise above cost, but provided a 10% discount to churches, pastors, and church organizations. For every tax year at issue, the book shop generated net income on the sale of its merchandise. The Court found that the property was not used exclusively for charitable purposes, and, consequently, denied the book shop’s request for exemption under R.C. 5709.12. The Court first noted that even though the book shop was a not-for-profit corporation, it did not follow that the book shop’s “enterprises may not be conducted for gain, profit or income. There is a distinction between gain, profit, or net income to the incorporators or members, and gain, profit or net income to the corporation as a legal entity.” *Id.* at 361. The Court then went on to explain that while it was true that the book shop existed to provide its patrons with a ready supply of materials and supplies, it was equally true that the book shop conducted itself as a bona fide “commercial enterprise.” *Id.* at 361-362 (citing *Zindorf*). The overwhelming commercial aspect of the book shop’s activities negated any claim that the property was being used exclusively for charitable purposes. *Id.*

A case of a more recent vintage, but fully supportive of the rationale elucidated in *Zindorf*, *Battelle Memorial Inst.*, *Gospel Worker Society*, and *Lutheran Book Shop*, is the Court's decision in *American Soc. for Metals*, 59 Ohio St.3d 38. The taxpayer there was a not-for-profit corporation dedicated to the "study and advancement of knowledge of metals and other materials." *Id.* Exemption was sought under, inter alia, R.C. 5709.12 and R.C. 5709.121. The taxpayer conducted conferences and offered courses relating to the science and technology of metals. *Id.* These courses were open to members at a discount as well as to the general public. *Id.* The taxpayer also provided audio visual materials and laboratory experiment kits to high schools at no charge. *Id.* The taxpayer's building was made available to local organizations without charge. *Id.* The Court denied the taxpayer's request for exemption under both R.C. 5709.12 and R.C. 5709.121 because the property was used to "make a profit." *Id.* at 40. Indeed, the taxpayer's CEO testified that the bulk of its revenue was derived from classes that were held on the subject property. *Id.* Moreover, the CEO testified that the taxpayer's sale of its publications resulted in a net profit. *Id.* In sum, the profit derived from the taxpayer's sale of literature and instructional classes doomed its claim of exemption.⁴ See also *Seven Hills Schools v. Kinney* (1986), 28 Ohio St.3d 186 (clothing exchange operated as business venture denied exemption under, inter alia, R.C. 5709.12).

As a final source of guidance, we direct this Court to *Planned Parenthood*, 5 Ohio St.2d 117. There, a non-profit organization provided women with "medical information and

⁴ The BTA's decision in *The Matthew Kelly Found. v. Wilkins* (Oct. 27, 2009), BTA No. 2005-V-676 (unreported) is congruent with the teachings of *Zindorf*, *Battelle Memorial Inst.*, *Gospel Worker Society*, *Lutheran Book Shop*, and *American Soc. for Metals*. In *The Matthew Kelly Found.*, the BTA denied exemption under R.C. 5709.12(B) to an entity that generated a "significant profit" with regard to the promotion of its spiritual message. The BTA distinguished *True Christianity Evangelism*, noting that "the subject property's primary use is to generate revenue in order for the Foundation to conduct its work."

knowledge concerning the physiology of conception and the means of contraception” along with attendant medical assistance. *Id.* at paragraph 4 of the syllabus. The organization’s services were open to all regardless of their race, religion, or ability to pay. *Id.* at 119-120. Moreover, 89% of the recipients of the organization’s services received such things as instructions and lectures on a reduced-fee basis—13% paid no fee at all. *Id.* at 120. The Court held that the organization’s activities embodied the hallmarks of “charity” and, thus, granted exemption to the organization as an “institution for purposes only of public charity.” *Id.* at 122.

It is manifest from the foregoing review of this Court’s decisional law that the act of distributing materials on a fee-for-service basis, with little regard given to the distribution of such materials on a free or reduced-fee basis, is antithetical to what this Court has come to regard as “charity.” Indeed, it is difficult to conceive how the act of selling someone something is the embodiment of “charity.” To be sure, the dissemination of useful information to benefit mankind is generally regarded as a charitable act. See e.g., *American Issue Publishing*, 137 Ohio St. 264; *American Humanist Assn.*, 174 Ohio St. 545; *Herb Soc. of America*, 71 Ohio St.3d 374; *True Christianity Evangelism*, 91 Ohio St.3d 117. However, as explained in *Zindorf*, *Battelle Memorial Inst.*, *Gospel Worker Society*, *Lutheran Book Shop*, and *American Soc. for Metals*, the element of charity is negated where an entity disseminates information and merchandise on a fee-for-service basis, with little regard given to the distribution of such materials on a free or reduced-fee basis. As we now explain, a review of the evidentiary record confirms that, under this Court’s caselaw, CCLI simply fails to meet the demands of R.C. 5709.12(B).

B. The evidentiary record adduced before the Tax Commissioner and the BTA plainly establishes that CCLI failed to demonstrate by “clear and convincing proof” that it met the requirements of R.C. 5709.12(B).

The distribution of merchandise and instructional classes on a fee-for-service basis is the rule, not the exception, at CCLI. Indeed, for the tax year at issue (i.e., 2002), CCLI’s own two witnesses, Mr. Alderson and Mr. Langlitz, were completely unable to quantify the extent to which CCLI distributed **any** free or reduced-fee merchandise or instructional classes, whether to the general public or to a particularized needy subset of the general public. Supp. 14, 36; H.R. 53, 138-139. Thus, at a bare minimum, CCLI simply failed to meet its evidentiary burden to demonstrate entitlement to the exemption provided for in R.C. 5709.12(B). It is well-settled that “he who seeks exemption of property from taxation must show by clear and convincing proof his right thereto.” *Youngstown Metro. Housing Auth.*, 143 Ohio St. at 273.

Lest there be any doubt as to the manner in which CCLI operated, the financial information presented on CCLI’s federal tax returns (i.e., Form 990) provides a revealing picture of CCLI’s business model and establishes in stark terms that CCLI is, at its core, a fee-for-service operation. These tax returns quantify, inter alia, the extent to which CCLI profited from its sales of merchandise from the second half of the 2002 tax year up through and including the first half of the 2007 tax year. As reflected on CCLI’s Form 990(s), its gross sales profit from the sales of merchandise was as follows: \$328,768 for the period of 07/01/02 – 6/30/03 (Supp. 172); \$317,451 for the period of 07/01/03 – 6/30/04 (Supp. 201, 209); \$278,161 for the period of 07/01/04 – 6/30/05 (Supp. 339); \$198,443 for the period of 07/01/05 – 6/30/06 (Supp. 306); and \$181,554 for the period of 07/01/06 – 6/30/07 (Supp. 280).⁵ Taken together, the foregoing

⁵ This information is presented in tabular form in Section II.C of the brief.

demonstrates that from 07/01/02 up through and including 6/30/07, CCLI generated over \$1.3 million from the sales of merchandise.

Equally telling is the revenue that CCLI generated from its instructional classes. As reflected on CCLI's Form 990s, the following data represents the revenue attributable to CCLI's instructional classes: \$196,196 for the period of 07/01/02 – 6/30/03 (Supp. 172); \$259,374 for the period of 07/01/03 – 6/30/04 (Supp. 201); \$246,923 for the period of 07/01/04 – 6/30/05 (Supp. 339); \$244,636 for the period of 07/01/05 – 6/30/06 (Supp. 306); and \$243,597 for the period of 07/01/06 – 6/30/07 (Supp. 280).⁶ The aforesaid data demonstrates that from 07/01/02 up through and including 6/30/07, CCLI generated over \$1.1 million from its instructional classes.

CCLI's failure to meet the demands of R.C. 5709.12(B) is further magnified by the de minimis levels of free or reduced-fee merchandise and instructional classes that it provided to its customers. As stated above, CCLI presented no documentary evidence or testimony on this point for the relevant tax year at issue—that is, 2002. Supp. 14, 36; H.R. 53, 138-39. Likewise, no testimony or documentary evidence was presented for the 2003 or 2004 tax years. It is only beginning with the 2005 fiscal year that CCLI first revealed the extent to which it distributed free or reduced-fee merchandise or instructional classes to the general public or a particularized needy subset of the general public. Specifically, for fiscal year 2005, CCLI presented a single-page exhibit (bereft of any supporting documentary evidence) that claims to show (through a series of calculations) that 7.36% of CCLI's gross sales included the provision of free merchandise. Supp. 368. No such information was presented for fiscal year 2006. For fiscal year 2007, CCLI presented a single-page exhibit (bereft of any supporting documentary

⁶ This information is also presented in tabular form in Section II.C of the brief.

evidence) that claims to show (through a series of calculations) that 4.37% of CCLI's gross sales included the provision of free merchandise. Supp. 367. Aside from fiscal years 2005 and 2007, no records were provided to show the extent to which CCLI provided free or reduced-fee merchandise.

Paralleling CCLI's lack of evidentiary support regarding the extent to which it provided free or reduced-fee merchandise is its lack of evidentiary support regarding the extent to which it provided free or reduced-fee instructional classes. Indeed, the picture is quite bleak. For the relevant tax year at issue (i.e., 2002), CCLI presented no documentary evidence on this point. For fiscal years 2003 and 2004, the song remains the same—no documentary evidence was presented to establish the extent to which members of the general public or a particularized needy subset of the general public were afforded the opportunity to participate in CCLI's instructional classes at a free or reduced-fee rate. While CCLI presented a single-page exhibit (bereft of any supporting documentary evidence) that claims to show the extent to which it provided free instructional classes for fiscal years 2005, 2006, and 2007, chairperson Margulies found that this exhibit demonstrated that “CCLI only offered 1½ to 2 percent of its classes for free.” Supp. 382; BTA Decision and Order 13 (Margulies' Partial Dissent). Aside from fiscal years 2005, 2006, and 2007, no records were provided to show the extent to which CCLI provided free or reduced-fee instructional classes.

The de minimis levels of free and reduced-fee merchandise and instructional classes that CCLI provided to the general public should come as little surprise because CCLI never advertised the availability of such free or reduced-fee items on its website. Supp. 36; H.R. 139. Indeed, a written financial assistance policy was not in place at CCLI during the 2002 tax year. Presumably seeking to cure this deficiency, CCLI created a formal financial assistance policy in

January of 2008—only five months prior to the evidentiary hearing held before the BTA. Supp. 13; H.R. 48. No testimony or documentary evidence was presented to establish the manner in which CCLI conveyed the existence of its financial assistance policy to the general public, nor was any testimony or documentary evidence presented to establish the extent to which members of the general public availed themselves of the financial assistance policy. Perhaps most telling, under the policy, CCLI reserves the right to deny a couple's request for financial assistance. Supp. 275-279.

The two-member majority opinion is remarkable in its failure to analyze not only this Court's relevant caselaw in the area of charitable tax exemptions, but also in its cavalier dismissal of the overwhelming record adduced during the Tax Commissioner's administrative proceedings, as well as the evidence presented during the BTA's hearing. No analysis of *Zindorf*, *Battelle Memorial Inst.*, *American Soc. for Metals*, or *Gospel Worker Society*, is contained in the majority opinion, let alone a bare citation to such cases. Likewise, nowhere in the majority's decision is any probing analysis of the information presented on CCLI's federal tax returns which shows that CCLI generated several hundreds of thousands of dollars from the sale of merchandise and instructional classes—nor was any mention given to the paltry levels of free or reduced-fee merchandise and instructional classes that CCLI provided. Curiously, the majority predicated its decision largely on an expansive reading of *Girl Scouts—Great Trail Council v. Levin*, 113 Ohio St.3d 24, 2007-Ohio-972. BTA Decision and Order 9 (explaining that “this case is remarkably similar to *Girl Scouts* * * * ”). The majority's reading of *Girl Scouts* is deeply flawed.

In *Girl Scouts*, the Court granted exemption under R.C. 5709.12(B) for a store that represented roughly 2%⁷ of the Girl Scouts' entire property. 2007-Ohio-972, ¶ 2-3. According to the underlying BTA decision, the "Girl Scouts [are] a non-profit organization [that] provides informal educational programming for girls * * * [and] with experiences and educational opportunities about careers, about being a good citizen, and about the world." *Girl Scouts—Great Trail Council v. McAndrew* (Jan. 6, 2006), BTA No. 2004-R-166 (unreported). The store sold only items reflecting membership in the Girl Scouts; however, members were not required to purchase such items. 2007-Ohio-972, ¶ 3. The merchandise was not offered in competition with other commercial enterprises; rather, the merchandise was sold to help defray the costs of the Girls Scouts' operations. *Id.* at ¶ 18. As the Court explained, the store simply existed to accommodate the Girl Scouts in fulfilling their charitable function. *Id.* at ¶ 18-19.

Several factors distinguish *Girls Scouts* from the instant appeal. First, the portion of CCLI's property solely devoted to housing the merchandise held for sale (i.e. CCLI's warehouse) is far greater than what was present in *Girl Scouts*. Whereas in *Girl Scouts* the store represented a mere 2% of the total property, CCLI's warehouse represents 50% of the entirety of CCLI's property; the other 50% represents CCLI's administrative offices. Supp. 17; H.R. 64. What occurs in the administrative offices is somewhat of a mystery, as the majority even concluded that "[v]ery little information regarding the real property itself was presented at hearing." Supp. 375; BTA Decision and Order 6. Second, there was an absence of any competition with commercial concerns in the *Girl Scouts* case; here, Mr. Alderson freely admitted that the merchandise it offered for sale was readily available in the commercial marketplace. Supp. 15; H.R. 56-57. Moreover, whereas the Girl Scouts only sold items that

⁷ The entire property consisted of 12,000 square feet; the store encompassed 256 square feet.

reflected membership in its organization, CCLI sold many items that were prepared by third parties unassociated with CCLI. Supp. 9, 12; H.R. 31, 42-43. Finally, the store in *Girl Scouts* played an incidental part in accommodating the costs of fulfilling the Girl Scouts' charitable functions. Here, the selling of merchandise and instructional classes is the sine qua non of CCLI's existence.

In sum, the massive amounts of revenue that CCLI generated from the sale of its merchandise and instructional classes coupled with the de minimis levels of free or reduced-fee merchandise and instructional classes that it provided to the general public leads inexorably to the conclusion that CCLI cannot meet the demands of R.C. 5709.12(B). In stark contrast to the fact-patterns presented in cases such as *American Issue Publishing*, *American Humanist Assn.*, *Herb Soc. of America*, *Planned Parenthood Assn.*, and *True Christianity Evangelism*, CCLI's core business model involves the promotion of its message on a fee-for-service basis, with little concern given to the distribution of materials and instructional classes on a free or reduced-fee basis. Put simply, exemption should be denied because CCLI falls squarely within the sweep of *Zindorf*, *Battelle Memorial Inst.*, *Gospel Worker Society*, *Lutheran Book Shop*, and *American Soc. for Metals*.

Tax Commissioner's Third Proposition of Law: An entity cannot prevail under R.C. 5709.12(B) where it uses its property to sell information and merchandise in the commercial marketplace against other competitors.

A separate, but related, factor that this Court has looked to with respect to claims brought under R.C. 5709.12(B) is whether the taxpayer offers its merchandise for sale in the commercial marketplace against other competitors. Indeed, the syllabus law from *Zindorf* states that:

Where a substantial portion of the gross income of a corporation is received for work done in competition with

commercial concerns in the same line, the property of such corporation may not be exempted from taxation under Section 5353, General Code [Section 5709.12, Revised Code], even though such corporation be one formed not for profit and owned by a religious institution, for whose use, benefit and behoof the property of the corporation is held. (Emphasis added.)

138 Ohio St. at paragraph 2 of the syllabus. The facts from *Zindorf* are more fully recounted in Section III.A of the brief; nonetheless, we reiterate that exemption was denied to a taxpayer that was a not-for-profit corporation that served as the official publishing unit of the United Brethren Church. *Id.* “In addition to religious printing, appellant [did] commercial printing for persons and corporations outside the church.” *Id.* Approximately 10% to 20% of the taxpayer’s resources (i.e., labor and machinery) were devoted to commercial printing operation—moreover, 40% of the taxpayer’s total revenues were attributable to commercial printing. *Id.*

The reasoning of *Zindorf* was reaffirmed in the later case of *Lutheran Book Shop*, 164 Ohio St. 359. Though the relevant facts from *Lutheran Book Shop* were set forth in Section III.A of the brief, we again note that the taxpayer, a book shop, offered for sale “Bibles, Christian literature, books, greeting cards, stationery, gifts, and religious materials and supplies for use in churches and Sunday schools.” *Id.* The book shop advertised the availability of its merchandise in the commercial marketplace “by means of newspapers, radio, telephone directories and passenger-bus cards.” *Id.* The Court denied exemption under R.C. 5709.12, noting that the book shop competed in the marketplace against commercial concerns in the same line. *Id.* at 361 (quoting *Zindorf*).

The testimony and documentary evidence confirm that CCLI offered a wide variety of merchandise for sale in the commercial marketplace against other competitors. Indeed, the Tax Commissioner’s administrative review process compiled no less than fifty-seven pages of merchandise that CCLI offered for sale. Supp. 90-147. As noted by chairperson Margulies, such

merchandise included “videos, books, coffee mugs, t-shirts, totes, compact discs, tapes, and Christmas cards.” Supp. 380; BTA Decision and Order 11 (Margulies’ Partial Dissent). Some of the items of merchandise offered for sale by CCLI were created and prepared by CCLI; other items of merchandise were created and prepared by third parties. Supp. 9, 12; H.R. 31, 42-43.

As for the merchandise prepared and offered for sale by CCLI, Mr. Alderson testified to the existence of several other natural family planning organizations. Supp. 15; H.R. 54-56. He further testified that he was “sure” that these organizations sold similar types of books and videos. Supp. 15; H.R. 56. As for the merchandise prepared by third-parties but offered for sale by CCLI, Mr. Alderson testified that such merchandise was available elsewhere in the commercial marketplace. Supp. 15; H.R. 56-57. Lest there be any doubt about the availability of such third-party items in the marketplace, CCLI now provides recommendations on Amazon.com to prospective buyers of third-party merchandise. Supp. 9, 11-12, 28; H.R. 31-32, 41-43, 108-109.

In sum, the testimony and documentary evidence firmly demonstrate that CCLI offered a wide variety of merchandise for sale in the commercial marketplace against other competitors. Under the reasoning set forth in *Zindorf* and *Lutheran Book Shop*, CCLI’s request for exemption should therefore be denied.

IV. CONCLUSION

For the foregoing reasons, this Court should reverse the portion of the BTA’s Decision and Order that granted a real property tax exemption to CCLI.

Respectfully Submitted,

RICHARD CORDRAY
Ohio Attorney General



RYAN P. O'ROURKE* (0082651)

**Counsel of Record*

JULIE E. BRIGNER (0066367)

Assistant Attorneys General

Taxation Section

30 East Broad Street, 25th Floor

Columbus, Ohio 43215

Telephone: (614) 466-5967

Facsimile: (614) 466-8226

ryan.orourke@ohioattorneygeneral.gov

Counsel for Appellant
Richard A. Levin,
Tax Commissioner of Ohio

CERTIFICATE OF SERVICE

I certify that a copy of the Merit Brief of Appellant Richard A. Levin, Tax Commissioner of Ohio, was sent by regular U.S. mail on this 13th day of August, 2010 to the following:

Robert J. Meyers
Buechner Haffer Meyers & Koenig Co., L.P.A.
Fourth & Walnut Centre, Third Floor
105 East Fourth Street, Suite 300
Cincinnati, Ohio 45202-4057

Counsel for Appellee
Couple to Couple
League International, Inc.



Ryan P. O'Rourke



2 of 3 DOCUMENTS

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

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

STATE OF OHIO -- BOARD OF TAX APPEALS

2006 Ohio Tax LEXIS 1368

October 27, 2006, Entered

[*1]

APPEARANCES:

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

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

OPINION:

DECISION AND ORDER

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

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

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

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

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

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

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

The subject property is a commercial lot improved with a two-story office building containing 2,655 square feet of space. S.T. at 244. The subject is located at 2330 Kemper Lane, Cincinnati, Ohio, bears the auditor's parcel number 063-0003-0053-00, and is titled in the name of The Matthew Kelly Foundation, a non-profit 501(C)(3) corporation. H.R. at 28, S.T. at 244. The Foundation purchased the property in August 2001.

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

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

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

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

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

[*5]

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

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

* * *

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

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

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

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

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

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

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

[*7]

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

We begin our review by observing that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121, 123. Consequently, it is incumbent upon a taxpayer challenging a determination of the Tax Commissioner to rebut that presumption. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135, 143; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138, 142. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213, 215. When no competent and/or probative [*8] evidence is developed and properly presented to the board to establish that the commissioner's determination is "clearly unreasonable or unlawful," the determination is presumed to be correct. *Alcan Aluminum* at 123.

The rule in Ohio is that all real property is subject to taxation. R.C. 5709.01. Exemption from taxation is the exception to the rule. *Seven Hills Schools v. Kinney* (1986), 28 Ohio St.3d 186. The burden of establishing that real property should be exempt is on the taxpayer. Exemption statutes must be strictly construed. *American Society for Metals v. Limbach* (1991), 59 Ohio St.3d 38, *Faith Fellowship Ministries, Inc. v. Limbach* (1987), 32 Ohio St.3d 432; *White Cross Hospital Assn. v. Bd. of Tax Appeals* (1974), 38 Ohio St.2d 199; *Goldman v. Robert E. Bentley Post* (1952), 158 Ohio St. 205; *Natl. Tube Co. v. Glander* (1952), 157 Ohio St. 407; and *Willys-Overland Motors, Inc. v. Evatt* (1943), 141 Ohio St. 402; *First Baptist Church of Milford v. Wilkins*, 110 Ohio St.3d 496, 2006-O [*9] hio-4966.

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

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

Therefore, to grant an exemption under R.C. 5709.12, it must first be determined that (1) the property belongs to an institution, and (2) the property is being used exclusively for charitable purposes. *Highland Park Owners, Inc. v. Tracy* (1994), 71 Ohio St.3d 405, 406. In addition, to qualify for exemption under the above statute, real property must not be used with a view to profit, *Am. Soc. for Metals, supra*, and should not compete with commercial enterprises, *Lutheran Book Shop v. Bowers* (1955), 164 Ohio St. 359. See, also, *Seven Hills Schools, supra*; *Seven Hills Schools v. Tracy*

(June 11, 1999), BTA No. 1997-M-1572, unreported; *Youngstown Area Jewish Fedn. v. Limbach* (June 30, 1992), BTA No. 1988-G-117, [*10] unreported; *Jewish Community Ctr. of Cleveland v. Limbach* (June 30, 1992), BTA No. 1988-A-124, unreported; and *Dayton Art Inst. v. Limbach* (June 19, 1992), BTA No. 1986-A-521, unreported.

In the present matter, we find that the Foundation (a non-profit 501(c)(3) entity) is necessarily an "institution" for the purposes of the first prong of the test found in *Highland Park Owners, Inc., supra*.

As to the second prong of the test, the General Assembly has not defined what activities of an institution constitute charitable purposes. However, the Supreme Court of Ohio held in *Planned Parenthood Assn. of Columbus, Inc. v. Tax Commr. (1966)*, 5 Ohio St.2d 117, paragraph one of the syllabus, that:

"[I]n the absence of a legislative definition, 'charity,' in the legal sense, is the attempt in good faith, spiritually, physically, intellectually, socially and economically to advance and benefit mankind in general, or those in need of advancement and benefit in particular, without regard to their ability to supply that need from other sources, and without hope or expectation, if not with positive abnegation, of gain or profit [*11] by the donor or by the instrumentality of the charity."

Furthermore, the phrase "used exclusively" has been interpreted by the court to mean primary use. *True Christianity Evangelism v. Zaino (2001)*, 91 Ohio St.3d 117, 118. "Whether an institution renders sufficient services to persons who are unable to afford them to be considered as making charitable use of property must be determined on the totality of the circumstances * * *." *Bethesda Healthcare, Inc., 101 Ohio St.3d 420, 2004-Ohio-1749*, at 39.

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

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

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

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

In the past this board has also determined that property used for profit by an institution did not qualify for tax exemption. See *Jewish Community Center, supra*; *Youngstown Area Jewish Federation, supra* (finding that a gift shop that produced a profit and was operated by a charitable institution is [*14] not tax exempt); *Humane Society Foundation of Hancock County v. Tracy* (Oct. 15, 1999), BTA No. 1998-J-884, unreported (holding that the use of a multi-purpose building by a charitable institution to conduct bingo sessions for profit defeats property tax exemption); *Thomaston Woods Limited Partnership v. Lawrence* (June 15, 2001), BTA No. 1999-L-551, unreported (finding that property that is leased by an institution for \$ 3000 a year to a Head Start program is not tax exempt).

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

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

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

Legal Topics:

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

Tax Law State & Local Taxes Administration & Proceedings Judicial Review Tax Law State & Local Taxes Personal Property Tax Exempt Property Limitations Tax Law State & Local Taxes Personal Property Tax Exempt Property Requirements for Exempt Status



2 of 2 DOCUMENTS

Girl Scouts -- Great Trail Council, Appellant, vs. J. Patrick McAndrew, Tax Commissioner of Ohio, Appellee.

CASE NO. 2004-R-166 (REAL PROPERTY TAX EXEMPTION)

STATE OF OHIO -- BOARD OF TAX APPEALS

2006 Ohio Tax LEXIS 64

January 9, 2006; January 6, 2006, Entered

[*1]

APPEARANCES:

For the Appellant -- Krugliak, Wilkins, Griffiths & Dougherty Co., LPA, Gregory D. Swope, 4775 Munson Street, N.W., P.O. Box 36963, Canton, OH 44735-6963

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

OPINION:

DECISION AND ORDER

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

This matter is before the Board of Tax Appeals upon a notice of appeal filed by the Girl Scouts -- Great Trail Council ("Great Trail"). Great Trail appeals from a final determination of the Tax Commissioner, in which the commissioner denied appellant's application for exemption of real property from taxation for tax year 2002, and remission of taxes, penalties, and interest for 2001.

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

A merit hearing was held in the board's offices in Columbus, Ohio. Doreen M. Smith, a CPA, and Debra E. Koyle, the chief [*2] financial officer for Great Trail, testified as witnesses on behalf of the appellant. The Tax Commissioner was represented by counsel, but presented no additional witnesses or documentary evidence aside from cross-examination. This matter is submitted to the board on the appellant's notice of appeal, the statutory transcript ("S.T."), the record of the hearing before this board ("H.R."), including exhibits, and the briefs of counsel.

The following facts are undisputed. The Girl Scouts is a non-profit organization. Girl scouting provides informal educational programming for girls ages five to seventeen. The organization provides girls with experiences and educational opportunities about careers, about being a good citizen, and about the world.

The Great Trail property totals approximately three acres. The office building consists of approximately twelve thousand square feet. Great Trail operates a small store in a part of its office building. The store comprises a sixteen foot by sixteen foot area, or approximately three percent of Great Trail's real estate. While the majority of Great Trail's property has been granted exemption from real estate taxes, the store portion has not.

Only [*3] Girl Scout items are offered for sale in the store. There are basically two categories of merchandise. The first category consists of items reflecting a girl's membership in Girl Scouts, including uniforms, badges, patches, pins, handbooks, and other Girl Scout resources. The second category consists of clothing with the Girl Scout logo, including polo shirts, tee shirts, and sweatshirts.

As to the first category of items, Great Trail is required to purchase these items directly from the National Equipment Service ("NES"). Great Trail must pay for these items and the shipping costs at the time of order. NES also sets the prices to be charged by Great Trail to the individual girl scouts, and Great Trail cannot deviate from those preset prices. Although not mandatory, these items are earned by the scouts by completing certain programs and tasks and make them feel a part of the organization. These items can only be purchased from a Girl Scout store because the individual scout must provide proof that the merit badge, patch, or pin was earned. n1 Category one items account for eighty-five to ninety percent of store sales. The mark-up for these items is twenty to twenty-five percent.

n1 Some items can be purchased from the national Girl Scout organization's online store at the same price as available at Great Trail's store.

[*4]

The second category of items basically promotes girl scouting. Great Trail purchases these goods from vendors licensed through the national Girl Scout organization. Great Trail establishes the sales prices for these goods. Sales prices are set based upon an item's cost and shipping charge, with no consideration of the market or profit. The mark-up is generally twenty-five to thirty percent.

Great Trail does not advertise the store to the general public. The store provides an outlet to Girl Scout members to purchase items intrinsically and historically linked to Girl Scout membership. In fact, this is the only outlet for Girl Scout items in Stark County. Ms. Koyle testified that the store would not exist if not to provide these items for its members. H.R. at 40.

Prior to 2003, the store had not made a profit for eleven years. In 2003, the store made a profit of \$ 2,363. This was, in part, due to the fact that Great Trail had moved its headquarters and store into its new building.

The store employs a full-time shop supervisor and a part-time assistant. Both these employees receive employee benefits. In addition to salaries and benefits, other direct expenses include credit card fees, [*5] bank service charges, office supplies, postage, and shipping expenses.

Indirect expenses have been allocated to the store based upon a historical percentage of indirect costs. These include a percentage of the salary and benefits of Debra Koyle, Great Trail's chief financial officer, who is in charge of overseeing the operation of the store, and utilities, telephone, and depreciation.

We begin our review by observing that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121, 123. Consequently, it is incumbent upon a taxpayer challenging a determination of the Tax Commissioner to rebut that presumption. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135, 143; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138, 142. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213, 215. When no competent and/or probative evidence is developed and properly [*6] presented to the board to establish that the commissioner's determination is "clearly unreasonable or unlawful," the determination is presumed to be correct. *Alcan Aluminum* at 123.

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

Great Trail applied for exemption under R.C. 5709.12, [*7] which was granted for tax year 2002 under R.C. 5709.12 for all of its property except the Girl Scout shop. Under R.C. 5709.12(B), all real property owned by institutions used exclusively for charitable purposes is exempt from taxation:

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

Therefore, to grant an exemption under R.C. 5709.12, it must first be determined that (1) the property belongs to an institution, and (2) the property is being used exclusively for charitable purposes. *Highland Park Owners, Inc. v. Tracy* (1994), 71 Ohio St.3d 405, 406. In addition, to qualify for exemption under the above statute, real property must not be used with a view to profit, *Am. Soc. for Metals v. Limbach* (1991), 59 Ohio St.3d 38, and cannot be in competition with commercial [*8] enterprises, *Lutheran Book Shop v. Bowers* (1955), 164 Ohio St. 359. See, also, *Seven Hills Schools v. Kinney, supra*; *Seven Hills Schools v. Tracy* (June 11, 1999), BTA No. 1997-M-1572, unreported; *Youngstown Area Jewish Fedn. v. Limbach* (June 30, 1992), BTA No. 1988-G-117, unreported; *Jewish Community Ctr. of Cleveland v. Limbach* (June 30, 1992), BTA No. 1988-A-124, unreported; and *Dayton Art Inst. v. Limbach* (June 19, 1992), BTA No. 1986-A-521, unreported.

In the present matter, the subject property is owned by Great Trail, a nonprofit corporation. Since the Tax Commissioner granted, at least in part, Great Trail's application for exemption of real property from taxation under R.C. 5709.12, he first made a determination that the appellant was an institution under that statute. We agree.

As to the second prong of the test, the General Assembly has not defined what activities of an institution constitute charitable purposes. However, the Supreme Court of Ohio held in *Planned Parenthood Assn. of Columbus, Inc. v. Tax Commr.* (1966), 5 Ohio St.2d 117, paragraph one of the syllabus, [*9] that:

"in the absence of a legislative definition, charity,' in the legal sense, is the attempt in good faith, spiritually, physically, intellectually, socially and economically to advance and benefit mankind in general, or those in need of advancement and benefit in particular, without regard to their ability to supply that need from other sources, and without hope or expectation, if not with positive abnegation, of gain or profit by the donor or by the instrumentality of the charity."

Furthermore, the phrase "used exclusively" has been interpreted by the court to mean primary use. *True Christian Evangelism v. Zaino* (2001), 91 Ohio St.3d 117, 118.

The burden is on Great Trails to prove by competent, probative, and reliable evidence that the subject property was used primarily for exempt purposes. The record demonstrates that Great Trail was selling only Girl Scout merchandise, some of which could not be obtained from any other licensed source. The goods that could be purchased from the national Girl Scouts online store sold for the exact same price. Therefore, Great Trail could not be deemed to be in competition with other commercial enterprises. [*10]

Further, a majority of the items sold, eighty-five to ninety percent, was category one items, such as uniforms, badges, patches, and pins. These items are an integral part of the Girl Scout program.

The record also establishes that these items were sold only as an accommodation to Great Trail's scout members. Otherwise, the testimony shows, there would be no need for the store, and the store would not exist.

The sales prices were set to cover costs, which included the cost of the goods and the direct and indirect costs of operating the store. In fact, before 2003, the store had not made a profit for eleven years.

The Tax Commissioner denied Great Trail's application for exemption based upon *Seven Hills Schools v. Kinney, supra*. The facts in that case, however, are distinguishable from the facts in the present matter. In *Seven Hills*, the store sold general merchandise. In the present appeal, Great Trail sold only Girl Scout merchandise. In *Seven Hills*, the goal was to generate profits for scholarships. In the present matter, the goal was to provide these items to its members at a price set to cover costs. In *Seven Hills*, a profit was generated. [*11] In the case before us, a slight profit was generated in one out of twelve years of operation.

Based upon the existing record, we find that Great Trail is an institution using its property for charitable purposes and did not operate the store with a view to profit. Therefore, the subject property is entitled to exemption from real estate taxes.

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.

Ms. Margulies dissents.

I respectfully dissent from the majority opinion. Because I interpret statutory and case law to preclude the real property tax exemption of the retail, for-profit store at issue in this appeal, I would affirm the decision of the Tax Commissioner.

In assessing this case under the two-prong test for exemption under R.C. 5709.12, I agree with the majority that the Girl Scouts -- Great Trail Council, appellant herein, is an "institution" as contemplated by the statute. However, I disagree that appellant meets the second prong of the exemption test, i.e., that the portion of the property at issue occupied by a retail store is being used exclusively for charitable [*12] purposes and not with a view to profit.

Exemption from taxation in Ohio is the exception to the rule. *Seven Hills School v. Kinney* (1986), 28 Ohio St.3d 186. The taxpayer requesting real property tax exemption shoulders a heavy burden of proof, because tax exemption statutes must be strictly construed. *White Cross Hospital Assn. v. Bd. Of Tax Appeals* (1974), 38 Ohio St.2d 199.

The majority opinion correctly characterizes the second prong of the test for real property exemption under the law: "In addition, to qualify for exemption under the above statute [R.C. 5709.12], real property must not be used with a view to profit, *Am. Soc. For Metals v. Limbach* (1991), 59 Ohio St.3d 38, and cannot be in competition with commercial enterprises, *Lutheran Book Shop v. Bowers* (1955), 164 Ohio St. 359."

However, in my opinion, the application of that test to the facts of this case leads to the conclusion that the subject property is not tax exempt. The evidence in this case demonstrates that the store in question does operate for profit. The record contains testimony that [*13] all items sold within the store are "marked up" between 20 and 30 percent. S.T. at 24, 38. The record also contains testimony that the Girl Scouts store operated in 2003 at a profit. S.T. at 18. The majority relies upon the fact that the store in question had not operated at a profit for a number of years prior to 2003; however, the testimony demonstrated that 2003 was the first full year that the store operated in its present location, and the relocation had resulted in an increase in business at the store. S.T. at 18.

The Ohio Supreme Court has examined a variety of cases in which it has determined that certain property was not exempt from taxation because it involved an operation for profit. See *Incorporated Trustees of Gospel Worker Society v. Evatt* (1942), 140 Ohio St. 185 (holding that under the Ohio Constitution and the applicable statute, property used to produce income to be used exclusively for charitable purposes is not exempt from taxation); *Lutheran Book Shop v. Bowers* (1955), 164 Ohio St. 259 (holding that a small bookstore located in a church is not tax exempt because it operated at a profit); *Ohio Masonic Home v. Bd. Of Tax Appeals* (1977), 52 Ohio St.2d 127 [*14] (finding that land used for farming that generated an income to be used for the institutional care of the elderly is not tax exempt); *Seven Hills Schools v. Kinney* (1986), 28 Ohio St.3d 186 (holding that a school's "clothing exchange" does not qualify for tax exemption because it operates at a profit); *Hubbard Press v. Tracy* (1993), 67 Ohio St.3d 564 (holding that the subject property used for the printing of envelopes to be used by churches and congregations is not tax exempt).

In the past this board has also determined that property used for profit by an institution did not qualify for tax exemption. See *Jewish Community Center v. Limbach* (June 30, 1992), BTA No. 1988-A-124, unreported, *Youngstown Area Jewish Federation v. Limbach* (June 30, 1992), BTA No. 1988-G-117, unreported (finding that a gift shop that produced a profit and was operated by a charitable institution is not tax exempt); *Humane Society Foundation of Hancock County v. Tracy* (Oct. 15, 1999), BTA No. 1998-J-884, unreported (holding that the use of a multi-purpose building by a charitable institution to conduct bingo sessions for profit defeats [*15] property tax exemption); *Thomaston Woods Limited Partnership v. Lawrence* (June 15, 2001), BTA No. 1999-L-551, unreported (finding that property that is leased by an institution for \$ 3000 a year to a Head Start program is not tax exempt).

It is clear from a review of the record and the applicable law that the store in question does not meet the second prong of the test established by the Ohio Supreme Court, and thus the subject property should not be entitled to exemption from taxation. Accordingly, I would affirm the final determination of the Tax Commissioner.

BOARD OF TAX APPEALS

RESULT OF VOTE	YES	NO	DATE
Ms. Margulies			12/15/05
Mr. Eberhart			12/21/05
Mr. Dunlap			12/15/05

Legal Topics:

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

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

1 of 1 DOCUMENT

PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2010 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH FILE 54 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2010 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 1, 2010 ***

CONSTITUTION OF THE STATE OF OHIO
ARTICLE XII. FINANCE AND TAXATION

Go to the Ohio Code Archive Directory

Oh. Const. Art. XII, § 2 (2010)

§ 2. Limitation on tax rate; exemption

No property, taxed according to value, shall be so taxed in excess of one per cent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation. Land and improvements thereon shall be taxed by uniform rule according to value, except that laws may be passed to reduce taxes by providing for a reduction in value of the homestead of permanently and totally disabled residents, residents sixty-five years of age and older, and residents sixty years of age or older who are surviving spouses of deceased residents who were sixty-five years of age or older or permanently and totally disabled and receiving a reduction in the value of their homestead at the time of death, provided the surviving spouse continues to reside in a qualifying homestead, and providing for income and other qualifications to obtain such reduction. Without limiting the general power, subject to the provisions of Article I of this constitution, to determine the subjects and methods of taxation or exemptions therefrom, general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose, but all such laws shall be subject to alteration or repeal; and the value of all property so exempted shall, from time to time, be ascertained and published as may be directed by law.

LEXSTAT ORC 5709.12

PAGE'S OHIO REVISED CODE ANNOTATED
 Copyright (c) 2010 by Matthew Bender & Company, Inc
 a member of the LexisNexis Group
 All rights reserved.

*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED
 WITH THE SECRETARY OF STATE THROUGH FILE 54 ***
 *** ANNOTATIONS CURRENT THROUGH APRIL 1, 2010 ***
 *** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 1, 2010 ***

TITLE 57. TAXATION
 CHAPTER 5709. TAXABLE PROPERTY -- EXEMPTIONS

Go to the Ohio Code Archive Directory

ORC Ann. 5709.12 (2010)

§ 5709.12. Exemption of property used for charitable or public purposes

(A) As used in this section, "independent living facilities" means any residential housing facilities and related property that are not a nursing home, residential care facility, or adult care facility as defined in division (A) of *section 5701.13 of the Revised Code*.

(B) Lands, houses, and other buildings belonging to a county, township, or municipal corporation and used exclusively for the accommodation or support of the poor, or leased to the state or any political subdivision for public purposes shall be exempt from taxation. Real and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation, including real property belonging to an institution that is a nonprofit corporation that receives a grant under the Thomas Alva Edison grant program authorized by division (C) of *section 122.33 of the Revised Code* at any time during the tax year and being held for leasing or resale to others. If, at any time during a tax year for which such property is exempted from taxation, the corporation ceases to qualify for such a grant, the director of development shall notify the tax commissioner, and the tax commissioner shall cause the property to be restored to the tax list beginning with the following tax year. All property owned and used by a nonprofit organization exclusively for a home for the aged, as defined in *section 5701.13 of the Revised Code*, also shall be exempt from taxation.

(C) (1) If a home for the aged described in division (B)(1) of *section 5701.13 of the Revised Code* is operated in conjunction with or at the same site as independent living facilities, the exemption granted in division (B) of this section shall include kitchen, dining room, clinic, entry ways, maintenance and storage areas, and land necessary for access commonly used by both residents of the home for the aged and residents of the independent living facilities. Other facilities commonly used by both residents of the home for the aged and residents of independent living units shall be exempt from taxation only if the other facilities are used primarily by the residents of the home for the aged. Vacant land currently unused by the home, and independent living facilities and the lands connected with them are not exempt from taxation. Except as provided in division (A)(1) of *section 5709.121 [5709.12.1] of the Revised Code*, property of a home leased for nonresidential purposes is not exempt from taxation.

(2) Independent living facilities are exempt from taxation if they are operated in conjunction with or at the same site as a home for the aged described in division (B)(2) of *section 5701.13 of the Revised Code*; operated by a corporation, association, or trust described in division (B)(1)(b) of that section; operated exclusively for the benefit of members of the corporation, association, or trust who are retired, aged, or infirm; and provided to those members without charge in consideration of their service, without compensation, to a charitable, religious, fraternal, or educational institution. For the purposes of division (C)(2) of this section, "compensation" does not include furnishing room and board, clothing, health care, or other necessities, or stipends or other de minimis payments to defray the cost thereof.

(D) (1) A private corporation established under federal law, *defined in 36 U.S.C. 1101, Pub. L. No. 102-199, 105 Stat. 1629, as amended, the objects of which include encouraging the advancement of science generally, or of a particular branch of science, the promotion of scientific research, the improvement of the qualifications and usefulness of scientists, or the increase and diffusion of scientific knowledge is conclusively presumed to be a charitable or educational institution. A private corporation established as a nonprofit corporation under the laws of a state, that is exempt from federal income taxation under *section 501(c)(3) of the Internal Revenue Code of 1986, 100 Stat. 2085, 26 U.S.C.A. 1*, as amended, and has as its principal purpose one or more of the foregoing objects, also is conclusively presumed to be a charitable or educational institution.

The fact that an organization described in this division operates in a manner that results in an excess of revenues over expenses shall not be used to deny the exemption granted by this section, provided such excess is used, or is held for use, for exempt purposes or to establish a reserve against future contingencies; and, provided further, that such excess may not be distributed to individual persons or to entities that would not be entitled to the tax exemptions provided by this chapter. Nor shall the fact that any scientific information diffused by the organization is of particular interest or benefit to any of its individual members be used to deny the exemption granted by this section, provided that such scientific information is available to the public for purchase or otherwise.

(2) Division (D)(2) of this section does not apply to real property exempted from taxation under this section and division (A)(3) of *section 5709.121 [5709.12.1] of the Revised Code* and belonging to a nonprofit corporation described in division (D)(1) of this section that has received a grant under the Thomas Alva Edison grant program authorized by division (C) of *section 122.33 of the Revised Code* during any of the tax years the property was exempted from taxation.

When a private corporation described in division (D)(1) of this section sells all or any portion of a tract, lot, or parcel of real estate that has been exempt from taxation under this section and *section 5709.121 [5709.12.1] of the Revised Code*, the portion sold shall be restored to the tax list for the year following the year of the sale and, except in connection with a sale and transfer of such a tract, lot, or parcel to a county land reutilization corporation organized under Chapter 1724. of the Revised Code, a charge shall be levied against the sold property in an amount equal to the tax savings on such property during the four tax years preceding the year the property is placed on the tax list. The tax savings equals the amount of the additional taxes that would have been levied if such property had not been exempt from taxation.

The charge constitutes a lien of the state upon such property as of the first day of January of the tax year in which the charge is levied and continues until discharged as provided by law. The charge may also be remitted for all or any portion of such property that the tax commissioner determines is entitled to exemption from real property taxation for the year such property is restored to the tax list under any provision of the Revised Code, other than sections 725.02, 1728.10, 3735.67, 5709.40, 5709.41, 5709.62, 5709.63, 5709.71, 5709.73, 5709.78, and 5709.84, upon an application for exemption covering the year such property is restored to the tax list filed under *section 5715.27 of the Revised Code*.

(E) Real property held by an organization organized and operated exclusively for charitable purposes as described under *section 501(c)(3) of the Internal Revenue Code* and exempt from federal taxation under *section 501(a) of the Internal Revenue Code, 26 U.S.C.A. 501(a) and (c)(3)*, as amended, for the purpose of constructing or rehabilitating residences for eventual transfer to qualified low-income families through sale, lease, or land installment contract, shall be exempt from taxation.

The exemption shall commence on the day title to the property is transferred to the organization and shall continue to the end of the tax year in which the organization transfers title to the property to a qualified low-income family. In no case shall the exemption extend beyond the second succeeding tax year following the year in which the title was transferred to the organization. If the title is transferred to the organization and from the organization to a qualified low-income family in the same tax year, the exemption shall continue to the end of that tax year. The proportionate amount of taxes that are a lien but not yet determined, assessed, and levied for the tax year in which title is transferred to the organization shall be remitted by the county auditor for each day of the year that title is held by the organization.

Upon transferring the title to another person, the organization shall file with the county auditor an affidavit affirming that the title was transferred to a qualified low-income family or that the title was not transferred to a qualified low-income family, as the case may be; if the title was transferred to a qualified low-income family, the affidavit shall identify the transferee by name. If the organization transfers title to the property to anyone other than a qualified low-income family, the exemption, if it has not previously expired, shall terminate, and the property shall be restored to the tax list for the year following the year of the transfer and a charge shall be levied against the property in an amount equal to the amount of additional taxes that would have been levied if such property had not been exempt from taxation. The charge

constitutes a lien of the state upon such property as of the first day of January of the tax year in which the charge is levied and continues until discharged as provided by law.

The application for exemption shall be filed as otherwise required under *section 5715.27 of the Revised Code*, except that the organization holding the property shall file with its application documentation substantiating its status as an organization organized and operated exclusively for charitable purposes under *section 501(c)(3) of the Internal Revenue Code* and its qualification for exemption from federal taxation under *section 501(a) of the Internal Revenue Code*, and affirming its intention to construct or rehabilitate the property for the eventual transfer to qualified low-income families.

As used in this division, "qualified low-income family" means a family whose income does not exceed two hundred per cent of the official federal poverty guidelines as revised annually in accordance with section 673(2) of the "Omnibus Budget Reconciliation Act of 1981," *95 Stat. 511, 42 U.S.C.A. 9902*, as amended, for a family size equal to the size of the family whose income is being determined.

(F) Real property held by a county land reutilization corporation organized under Chapter 1724. of the Revised Code shall be exempt from taxation. Notwithstanding *section 5715.27 of the Revised Code*, a county land reutilization corporation is not required to apply to any county or state agency in order to qualify for the exemption.

The exemption shall commence on the day title to the property is transferred to the corporation and shall continue to the end of the tax year in which the instrument transferring title from the corporation to another owner is recorded, if the use to which the other owner puts the property does not qualify for an exemption under this section or any other section of the Revised Code. If the title to the property is transferred to the corporation and from the corporation in the same tax year, the exemption shall continue to the end of that tax year. The proportionate amount of taxes that are a lien but not yet determined, assessed, and levied for the tax year in which title is transferred to the corporation shall be remitted by the county auditor for each day of the year that title is held by the corporation.

Upon transferring the title to another person, the corporation shall file with the county auditor an affidavit affirming that the title was transferred to such other person and shall identify the transferee by name. If the corporation transfers title to the property to anyone that does not qualify or the use to which the property is put does not qualify the property for an exemption under this section or any other section of the Revised Code, the exemption, if it has not previously expired, shall terminate, and the property shall be restored to the tax list for the year following the year of the transfer. A charge shall be levied against the property in an amount equal to the amount of additional taxes that would have been levied if such property had not been exempt from taxation. The charge constitutes a lien of the state upon such property as of the first day of January of the tax year in which the charge is levied and continues until discharged as provided by law.

In lieu of the application for exemption otherwise required to be filed as required under *section 5715.27 of the Revised Code*, a county land reutilization corporation holding the property shall, upon the request of any county or state agency, submit its articles of incorporation substantiating its status as a county land reutilization corporation.

LEXSTAT ORC 5709.121

PAGE'S OHIO REVISED CODE ANNOTATED
 Copyright (c) 2010 by Matthew Bender & Company, Inc
 a member of the LexisNexis Group
 All rights reserved.

*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED
 WITH THE SECRETARY OF STATE THROUGH FILE 54 ***
 *** ANNOTATIONS CURRENT THROUGH APRIL 1, 2010 ***
 *** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 1, 2010 ***

TITLE 57. TAXATION
 CHAPTER 5709. TAXABLE PROPERTY -- EXEMPTIONS

Go to the Ohio Code Archive Directory

ORC Ann. 5709.121 (2010)

§ 5709.121. Exclusive charitable or public use, defined

(A) Real property and tangible personal property belonging to a charitable or educational institution or to the state or a political subdivision, shall be considered as used exclusively for charitable or public purposes by such institution, the state, or political subdivision, if it meets one of the following requirements:

(1) It is used by such institution, the state, or political subdivision, or by one or more other such institutions, the state, or political subdivisions under a lease, sublease, or other contractual arrangement:

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

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

(2) It is made available under the direction or control of such institution, the state, or political subdivision for use in furtherance of or incidental to its charitable, educational, or public purposes and not with the view to profit.

(3) It is used by an organization described in division (D) of *section 5709.12 of the Revised Code*. If the organization is a corporation that receives a grant under the Thomas Alva Edison grant program authorized by division (C) of *section 122.33 of the Revised Code* at any time during the tax year, "used," for the purposes of this division, includes holding property for lease or resale to others.

(B) (1) Property described in division (A)(1)(a) of this section shall continue to be considered as used exclusively for charitable or public purposes even if the property is conveyed through one conveyance or a series of conveyances to an entity that is not a charitable or educational institution and is not the state or a political subdivision, provided that all of the following conditions apply with respect to that property:

(a) The property has been listed as exempt on the county auditor's tax list and duplicate for the county in which it is located for the ten tax years immediately preceding the year in which the property is conveyed through one conveyance or a series of conveyances;

(b) The owner to which the property is conveyed through one conveyance or a series of conveyances leases the property through one lease or a series of leases to the entity that owned or occupied the property for the ten tax years immediately preceding the year in which the property is conveyed or an affiliate of such prior owner or occupant;

(c) The property includes improvements that are at least fifty years old;

(d) The property is being renovated in connection with a claim for historic preservation tax credits available under federal law;

(e) The property continues to be used for the purposes described in division (A)(1)(a) of this section after its conveyance; and

(f) The property is certified by the United States secretary of the interior as a "certified historic structure" or certified as part of a certified historic structure.

(2) Notwithstanding *section 5715.27 of the Revised Code*, an application for exemption from taxation of property described in division (B)(1) of this section may be filed by either the owner of the property or its occupant.

(C) For purposes of this section, an institution that meets all of the following requirements is conclusively presumed to be a charitable institution:

(1) The institution is a nonprofit corporation or association, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(2) The institution is exempt from federal income taxation under *section 501(a) of the Internal Revenue Code*;

(3) The majority of the institution's board of directors are appointed by the mayor or legislative authority of a municipal corporation or a board of county commissioners, or a combination thereof;

(4) The primary purpose of the institution is to assist in the development and revitalization of downtown urban areas.

ORIGINAL

RECEIVED
OFFICE OF TAX APPEALS

2010 MAY 13 PM 12:39

In the
Supreme Court of Ohio

COUPLE TO COUPLE LEAGUE
INTERNATIONAL, INC.,

Appellee,

v.

RICHARD A. LEVIN,
TAX COMMISSIONER OF OHIO,

Appellant.

10-0864

Case No. 2010-

Appeal from Ohio Board of Tax Appeals

Case No. 2007-M-101

NOTICE OF APPEAL

ROBERT J. MEYERS* (0014589)
*Counsel of Record
Buechner Haffer Meyers & Koenig Co., L.P.A.
Fourth & Walnut Centre, Third Floor
105 East Fourth Street, Suite 300
Cincinnati, Ohio 45202-4057
Telephone: (513) 579-1500
Facsimile: (513) 977-4361
rmeyers@bhmklaw.com

Counsel for Appellee
Couple to Couple League International

RICHARD CORDRAY(0038034)
Attorney General of Ohio
JULIE E. BRIGNER* (0081326)
*Counsel of Record
Assistant Attorney General
30 East Broad Street, 25th Floor
Columbus, Ohio 43215-3428
Telephone: (614) 728-8674
Facsimile: (866) 372-7126
julie.brigner@ohioattorneygeneral.gov

Counsel for Appellant
Richard A. Levin, Tax Commissioner of Ohio

FILED
MAY 13 2010
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL

Appellant, Richard A. Levin, Tax Commissioner of Ohio (the "Commissioner"), hereby gives notice of his appeal to the Supreme Court of Ohio from a Decision and Order of the Ohio Board of Tax Appeals (the "BTA") journalized in Case No. 2007-M-101 on April 13, 2010 denying a real property tax exemption under R.C. 5709.12 to Couple to Couple League International, Inc. ("Couple to Couple"), as owner of the subject real property (a warehouse/office building and the land thereunder). The BTA reasonably and lawfully upheld the Commissioner's final determination concerning the parking lot adjacent to the subject property. A true copy of the Decision and Order of the BTA being appealed is attached hereto as Exhibit A and incorporated herein by reference. This appeal is filed as a matter of right pursuant to Revised Code ("R.C.") 5717.04.

The Decision and Order of the BTA was authored by a two-member majority of the BTA consisting of BTA members William E Dunlap and Michael J. Johrendt. BTA chairperson Pamela L. Margulies concurred in that part of the BTA decision affirming the Commissioner's final determination in part, but dissented from the remainder of the BTA decision. Ms. Margulies would have affirmed the Commissioner's final determination in its entirety.

The Commissioner, as appellant, complains of the following errors in the Decision and Order of the BTA:

1. The BTA erred as a matter of fact and law in holding that the subject property qualified for real property exemption pursuant to R.C. 5709.12(B), and in reversing the Commissioner's final determination denying the R.C. 5709.12 exemption claim for that property. The BTA should have affirmed the Commissioner's final determination in its entirety.

2. Because real property tax exemptions are a matter of legislative grace and in derogation of the rights of all other taxpayers, the Board erred in failing to strictly construe the R.C. 5709.12 exemption against the claim of exemption and in failing to require Couple to Couple, the real property tax exemption claimant, to establish by clear and convincing proof each of the requirements of exemption under R.C. 5709.12. See, e.g., R.C. 5709.01(A); R.C. 5715.271; *Cincinnati College v. State* (1850), 19 Ohio 110, 115; *Youngstown Metropolitan Housing Authority v. Evatt* (1944), 143 Ohio St. 268, 273; *First Baptist Church of Milford, Inc. v. Wilkins*, 110 Ohio St.3d 496, 2006-Ohio-4966, ¶10.

3. The Board erred as a matter of fact and law in holding that the property was used “exclusively for charitable purposes” within the meaning of R.C. 5739.12.

4. The Board erred in failing to accord the proper deference to the Commissioner’s findings in his final determination denying the exemption claim, namely, that those findings must be upheld unless the one challenging those findings demonstrates the findings to be “clearly unreasonable or unlawful.” *Am. Fiber Sys. v. Levin*, Slip Opinion No. 2010-Ohio-1468, ¶42 (citing *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66, paragraph one of the syllabus). The Commissioner’s findings that the BTA erred in ignoring or otherwise failing to uphold include, but are not limited to:

- (i) Couple to Couple used the subject property exclusively for profit-making, income producing purposes, rather than “exclusively for charitable purposes”;
- (ii) The various items of coffee mugs, videos, books, T-shirts, totes, compact discs and other merchandise that Couple to Couple held for storage, distribution and sale at the subject property were: (a) not provided, in

significant numbers, free of charge, and (b) not provided at a reduced rate on a sliding scale to those who could not pay the full price for them;

- (iii) The subject property's use was exclusively for the purpose of a commercial activity in competition with other businesses;
- (iv) Regarding the various items of merchandise that it stored and held for sale at the subject property, Couple to Couple passed on the costs it incurred to acquire or produce these items, together with substantial profit thereon, in the prices it charged its customers for these items, rather than absorb those expenses and costs itself.

5. In direct contradiction to the Commissioner's findings in his final determination and of the facts established in the evidentiary record, the BTA erred as a matter of fact and law in holding that "the items [i.e., the items of merchandise stored and held for sale in the warehouse portion of the subject property], while sold for more than the cost of the items themselves, were not sold 'with a view to profit.'" *BTA Decision and Order* at 8. Remarkably, the BTA neither cited nor relied on any evidence for such a finding.

6. The BTA erred by ignoring the overwhelming evidentiary record establishing that Couple to Couple derived substantial profits from the sales of the merchandise located on the subject property and from the training classes conducted thereon and, thus, used the property "with a view to profit" in competition with commercial enterprises engaged in selling the same kinds of merchandise and services. The two-member majority of the BTA should have adopted the factual and legal analysis set forth by BTA Chairperson Margulies' dissent on this issue and affirmed the Commissioner's denial of the exemption claim. *BTA Decision and Order* at 10-14. See particularly Ms. Margulies analysis of Couple to Couple's gross sales and gross profit

figures, *id.* at 12-13, showing that Couple to Couple consistently has earned substantial profits from its sales of merchandise and training classes. Gross profit margins on the sale of merchandise consistently approximated 100% or greater, with total profits averaging several hundred thousands of dollars. Similarly, the “tuition” generated by Couple to Couple’s training classes consistently generated hundreds of thousands of dollars of income for Couple to Couple. Yet, by its own account, Couple to Couple “only offered 1½ to 2 percent of its classes for free.” *Id.* at 13 (citing to Couple to Couple’s BTA Ex. 11).

7. The BTA erred in contravening this Court’s established precedent pursuant to which income producing activities for substantial profit in competition with commercial enterprises have never qualified as “charitable” activities for purposes of the R.C. 5709.12 exemption, see, e.g., *Lutheran Book Shop v. Bowes* (1955), 164 Ohio St. 359; *Seven Hills Schools v Kinney* (1986), 28 Ohio St.3d 186, and this Court’s established precedent requiring the exemption claimant provide goods and services irrespective of ability to pay. See, e.g., *Planned Parenthood Ass’n of Columbus, Ohio, Inc. v. Tax Commissioner* (1966), 5 Ohio St.2d 117, 120 (charging a maximum of \$10 per individual for all of the interviews, lectures, instructions, examinations and prescriptions which constituted the charitable activities therein at issue, and providing free or reduced prices for the vast majority of individuals receiving the services).

8. The BTA compounded its errors by misreading and misapplying *Girl Scouts-Great Trail Council v. Levin*, 113 Ohio St.3d 24, 2007-Ohio-972, which involved a fundamentally different factual scenario, as cogently recognized by BTA Chairperson Margulies. *BTA Decision and Order* at 13-14. The BTA should have adopted Ms. Margulies’ conclusion that “the activities in question, the sale of products and materials and the classes offered for a fee, were not charitable in nature and certainly did not generate ‘incidental’ revenue.” *Id.* at 14

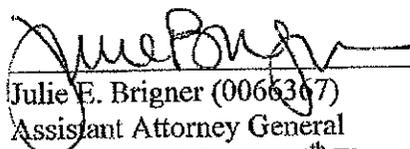
(citing to *Community Health Professionals Inc. v. Levin*, 113 Ohio St.3d 24, 2007-Ohio-972, ¶23; *Girl Scouts*, at ¶17; and *Northeast Ohio Psychiatric Institute v. Levin*, 121 Ohio St.3d 292, 2009-Ohio-583, ¶16).

9. The BTA erred in holding that Couple to Couple was entitled to exemption pursuant to R.C. 5709.12(B) in light of its finding that Couple to Couple presented “[v]ery little information regarding the real property itself” and, therefore, failed to meet its affirmative burden of establishing both the manner and extent of the claimed error in the Commissioner’s final determination. *Am. Fiber Sys.*, 2010-Ohio-1468, ¶12.

Wherefore, the Commissioner requests that the Court reverse that portion of the Decision and Order of the BTA that reversed the Commissioner’s final determination as unreasonable and unlawful and to remand the matter for issuance of an Order denying Couple to Couple’s application for real property tax exemption for tax year 2002 in its entirety.

Respectfully submitted,

RICHARD CORDRAY
Attorney General of Ohio



Julie E. Brigner (0066367)
Assistant Attorney General
30 East Broad Street, 25th Floor
Columbus, Ohio 43215-3428
Telephone: (614) 728-8674
Facsimile: (866) 372-7126
julie.brigner@ohioattorneygeneral.gov

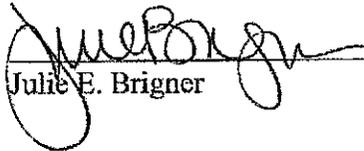
Counsel of Appellant Richard A. Levin,
Tax Commissioner of Ohio

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Notice of Appeal was filed by hand delivery with the Ohio Board of Tax Appeals, 30 E. Broad St., 24th Floor, Columbus, Ohio 43215, and was served by certified mail, return receipt requested, on this 13th day of May, 2010 upon the following:

Robert J. Meyers, Esq.
Buechner Haffer Meyers &
Koenig Co., L.P.A.
Fourth & Walnut Centre, Third Floor
105 East Fourth Street, Suite 300
Cincinnati, Ohio 45202-4057

Counsel for Appellee


Julie E. Brigner

natural family planning options. CCLI provides materials and programming, in the form of classes taught by volunteer instructors, to assist families and individuals in spacing children in accordance with practices accepted by the Catholic Church.

The organization, founded in 1971, promotes natural family-planning options, which include fertility awareness, temperature charting, and the encouragement of breastfeeding. The program also has a moral component. As explained by the executive director at the hearing before the board, "We don't teach natural family planning as a course in biology, as much as we do ground it in Catholic Church teaching." Hearing Record (H.R.) at 29.

In 1995 CCLI purchased two parcels of land and applied for exemption from real property taxation, which was granted in part. At the time, the portion of the property used as CCLI's business offices was granted exemption. However, also located on the same parcel was a single-family residence. As the residence was leased, the parcel was split listed and value for a portion of the land and the residence remained on the tax list. CCLI also had purchased an additional parcel of vacant land, but that parcel was not included in its original exemption application. In 2002 CCLI razed the rental property and filed a new application for exemption, listing both parcels owned by the organization. In an attachment to the application for exemption, CCLI explained that it was now seeking full exemption of the parcel previously split-listed and exemption of the parcel that had inadvertently been omitted. S.T. at 220.

Instead of granting full exemption to the previously split-listed parcel and the small parcel previously omitted, the Tax Commissioner denied exemption for the

small parcel and returned the entire larger parcel to the tax list. The Tax Commissioner determined that "the subject property is used to produce income, and since it is used for commercial activity in competition with other businesses, then it is not used exclusively for a charitable purpose." S.T. at 3.

The Tax Commissioner's determination is based upon his conclusion that CCLI's property is used to distribute a significant number of books and promotional items for profit. By using the property to produce income, the Tax Commissioner determined, the property was not entitled to exemption under R.C. 5709.12.

CCLI appeals to this board and assigns the following as error:

"1. The Tax Commissioner erred in finding that the subject property is not used exclusively for charitable purposes and thereby not exempt from taxation under R.C. 5709.12.

"2. The Tax Commissioner erred in finding that the subject property is used with a view for profit and is in competition with commercial entities and thereby not exempt from taxation under R.C. 5709.12."

The matter is considered upon the notice of appeal, the statutory transcript certified to this board by the Tax Commissioner, the testimony and evidence presented at the hearing held, and the legal argument provided by the parties. At the hearing, CCLI presented the testimony of Andrew B. Alderson, its executive director, and Jack Langlitz, its business manager. Mr. Alderson provided testimony regarding the purposes and goals of CCLI and Mr. Langlitz provided testimony regarding the financial structure of the organization.

We begin by acknowledging the duties imposed upon the Board of Tax Appeals when reviewing a decision of the Tax Commissioner. The Tax Commissioner's findings are entitled to a presumption of correctness, and it is incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the presumption and establish a right to the relief requested. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121; *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St. 2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

As to the law relating to exceptions from taxation, exemption from tax is an exception to the rule that all property is subject to taxation, and therefore a statute granting such an exemption must be strictly construed. *Nat. Tube Co. v. Glander* (1952), 157 Ohio St. 407; *White Cross Hospital Assn. v. Bd. of Tax Appeals* (1974), 38 Ohio St.2d 199.

The statute upon which CCLI relies in seeking exemption is R.C. 5709.12(B), which provides in pertinent part:

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

Any institution, whether charitable or noncharitable, may receive exemption for its property if that institution uses the property exclusively for charitable purposes. Therefore, the first question posed is whether CCLI is an institution. If the answer to

that question is in the affirmative, the second question to be answered is whether the real property under consideration is used "exclusively for charitable purposes." *Highland Park Owners, Inc. v. Tracy* (1994), 71 Ohio St.3d 405.

The Tax Commissioner found that CCLI was an institution. S.T. at 2. We agree. However, the Tax Commissioner held that CCLI's use of the property was not exclusively charitable. In *True Christianity Evangelism v. Zaino* (2001), 91 Ohio St.3d 117, the Ohio Supreme Court interpreted the terms "exclusively for charitable purposes" as found in R.C. 5709.12. Therein 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, *** this court held that for purposes of R.C. 5709.07, the phrase 'used exclusively for public worship' was equivalent to 'primary use.' There is no indication that the phrase 'used exclusively' as used in R.C. 5709.12 is to be interpreted differently than it is in R.C. 5709.07." *Id.* at 120. (Parallel citations omitted.)

Therefore, this board must determine whether the primary use of CCLI's real property is charitable.

In *Olmsted Falls Bd. of Edn. v. Tracy* (1997), 77 Ohio St.3d 393, the Supreme Court reaffirmed the definition of "charity" set forth in *Planned Parenthood v. Tax Commr.* (1966), 5 Ohio St.2d 177. In paragraph one of the syllabus, the Supreme Court defined "charity" in the following manner:

"In the absence of a legislative definition, 'charity,' in the legal sense, is the attempt in good faith, spiritually, physically, intellectually, socially and economically to advance and benefit mankind in general or those in need of advancement and

benefit in particular, without regard to their ability to supply that need from other sources, and without hope or expectation, if not with positive abnegation, of gain or profit by the donor or by the instrumentality of the charity.”

There is no question that CCLI attempts in good faith to spiritually, physically, intellectually and socially advance and benefit those with a particular need. Natural family-planning serves as a benefit to those members of the Catholic Church who seek to strictly follow the canons of their faith. At hearing, the executive director testified that instruction was provided regardless of ability to pay, as outlined by CCLP's constitution. H.R. at 34-35.

The Tax Commissioner, however, argues that the property's use is not primarily charitable because a major component of what the property is used for is the dissemination of books published and other items sold by CCLI. This, according to the Tax Commissioner, is a commercial activity, and, as such, removes the property from qualification for exemption.

Very little information regarding the real property itself was presented at hearing. CCLI claims by brief that the building consists of 13,500 square feet and 22.4 percent of that building is dedicated to the sale and distribution of books and promotional items. The executive director testified at hearing that, while he was unsure of the breakdown, the warehouse-to-office space could have been as much as 50-50. H.R. at 64. Fifteen employees, divided into two major departments, the programs team and the business team, are housed onsite. H.R. at 22. While the basic divisions remain,

the number of employees has decreased since 2002, the year for which exemption was sought. H.R. at 51, 52.

One reason for the reduction in employees is the types of items currently warehoused. In earlier years, CCLI stocked natural family-planning books, whether published by CCLI or merely approved by it, and promoted those books through a written catalogue. H.R. at 31, 42. With the popularity of the Internet and the advent of E-tailers such as Amazon.com, it became more cost efficient to direct customers to web-based retailers for the purchase of books not published by CCLI. H.R. at 43. Therefore, CCLI stopped warehousing non-published materials, except for those integral to its instructional program, such as thermometers. H.R. at 44. Currently, the bulk of the items CCLI warehouses and sells are self-published items. H.R. at 38.

The Tax Commissioner argues that the activities of warehousing and selling items places CCLI in competition with a commercial enterprise. In *Seven Hills Schools v. Kinney* (1986), 28 Ohio St.3d 186, the Supreme Court made clear that the activities of a store that served as a clothing resale shop, while supportive of an educational institution, were not "in furtherance of" its charitable mission. In *Lutheran Book Shop v. Bowers* (1955), 164 Ohio St. 359, the court found a corporation was not exempt from taxation under the precursor to R.C. 5709.12 when a substantial portion of the gross income of that corporation was received for work done in competition with commercial concerns in the same line.

Not all sales activities require a finding of competition with commercial enterprise. In *Girl Scouts-Great Trail Council v. Levin*, 113 Ohio St.3d 24, 2007-Ohio-

972, merchandise was sold from a small portion of an office building owned by the not-for-profit Girl Scouts organization. All of the items sold related to the Girl Scouts. Some of the items were produced by the national organization and some items were produced by vendors licensed by the national organization. The Supreme Court held in that appeal that the store was an “essential and integral” part of the Girl Scouts’ operations and the items were not sold “with a view to profit.” Id. at ¶17, 18.

We find the court’s reasoning applies in the present appeal. The items sold by CCLI are specific to its cause. The books and instructional materials are not items which help to support its mission – they are a part of the mission itself. As such, the area in which the activities take place is an essential and integral part of CCLI’s operations. The items, while sold for more than the cost of the items themselves, were not sold “with a view to profit.” See *Bowers v. Akron City Hosp.* (1968), 16 Ohio St.2d 94. The fact that CCLI’s practices have changed over the years, or that items offered for sale include promotional items such as coffee mugs, does not compel a different conclusion.

The Tax Commissioner compares the present facts with the facts of *The Matthew Kelly Foundation v. Wilkins* (Oct. 27, 2006), BTA No. 2005-V-676, unreported. In that appeal, the board affirmed the Tax Commissioner’s denial of exemption for the administrative offices of a private foundation. The evidence in that appeal indicated that the administrative offices served as the planning point for speaking engagements and retreats as well as the distribution center for materials produced by Matthew Kelly, an inspirational speaker. That foundation, however,

served as the not-for-profit arm of a for-profit printing house which some evidence indicated was located at the same address. In this case, there is no correlating for-profit entity. Instead, this case is remarkably similar to *Girl Scouts*, which was also decided under R.C. 5709.12.¹

We now consider the exempt status of the smaller parcel. According to the record, the smaller parcel of land sits directly at street level, while the larger parcel is subject to a steep incline. The only use to which the smaller parcel of land was put was for overflow parking for visitors of a neighboring business. According to the executive director, CCLI employees and guests do not use the parking area. H.R. at 60.

In *Bowers*, supra, the issue was the exempt nature of an adjacent parking lot. The court held that parking lot served as an “essential and integral” part of the charitable institution’s facilities; therefore exemption was proper. See, also, *Good Samaritan Hosp. v. Porterfield* (1972), 29 Ohio St.2d 25 (wherein the court relied upon *Bowers* so as to conclude that building materials used in the construction of a parking garage which was used to provide parking for hospital patrons were not subject to sales and use tax under former R.C. 5739.02(B)(13)).

In *State Teachers Retirement Bd. v. Kinney* (1981), 68 Ohio St.2d 195, the Supreme Court acknowledged and distinguished its prior decisions, ultimately

¹ CCLI argues that this board should consider not only R.C. 5709.12, but R.C. 5709.121 as a basis for exemption. This board has previously held that R.C. 5709.121 cannot be considered unless identified on the complaint as a basis for exemption and considered by the Tax Commissioner in his review. *The Old West End Association, Inc. v. Wilkins* (Oct. 27, 2006), BTA No. 2005-H-359, unreported, affirmed (Jan 18, 2008), Lucas App. No. L-06-1374, 2006-Ohio-366. See, also, *Ohio Bell Tel. Co. v. Levin*, 124 Ohio St.3d 211, 2009-Ohio-6189. We would note, however, that in *Girl Scouts*, a case decided by this board only under R.C. 5709.12, the Supreme Court did consider the language of R.C. 5709.121 in making its determination.

concluding that a parking garage attached to a governmental building was not essential to the function of the building, nor used in furtherance of its public function. In *Case W. Res. Univ. v. Tracy* (1999), 84 Ohio St.3d 316, the court set forth a test for the exemption of a parking garage, to wit, whether the parking garage served as “an essential and integral part of the charitable and/or educational activities” of the charitable or educational institutions. *Id.* at 322.

In the present appeal, the testimony presented at hearing indicated that the parcel is not used by those visiting or working at CCLI’s offices. Therefore, this board cannot find that the parking area is an essential and integral part of CCLI’s mission. Therefore, we find that the Tax Commissioner was correct when he concluded that the property was not properly exempted from taxation.

Considering the record, statutes, and case law, the Board of Tax Appeals finds the Tax Commissioner’s final determination must be affirmed in part and reversed in part, consistent with this decision and order.

Ms. Margulies concurs in part and dissents in part.

I respectfully concur in part and dissent in part from the majority opinion. Based on the record in this case and applicable case law, I would deny the tax exemption under R.C. 5709.12(B) for the subject property.

To be qualified for tax exemption under R.C. 5709.12(B), property must (1) be owned by an institution and (2) be used “exclusively for charitable purposes.” *Highland Park Owners, Inc. v. Tracy*, *supra*. Couple to Couple League International,

Inc. (CCLI) meets the first prong of the test as an institution, but it fails to meet the second prong of the *Highland* test.

The majority finds that the items sold by CCLI were “specific to its cause,” [natural family planning], and although the items were sold for more than their cost, they were not sold “with a view to profit.” However, my review of the record of CCLI’s sales and warehousing activities, as evidenced by tax returns, other financial information, and the listing of goods for sale for tax years beginning in 2002, the year for which the exemption was requested, and ending in 2007, leads me to conclude that such activities were much expanded from CCLI’s natural family planning mission and generated sizeable amounts of revenue.

The evidence in the record indicates that CCLI engaged in a business on the premises involving the sale of large quantities of goods.² There were fifty-seven (57) pages of products offered for sale to the public on CCLI’s website, S.T. at 47-104, including videos, books, coffee mugs, t-shirts, totes, compact discs, tapes, and Christmas cards. Some of the videos, compact discs, and tapes offered were a film critic’s review of the treatment of religion in movies, S.T. at 49; a compilation of songs and reflections, S.T. at 54; an interactive computer game for children, S.T. at 54; a collection of lullabies, S.T. at 55; and teen dating advice, S.T. at 61.

² The majority appears to rely on evidence introduced at the hearing before this board regarding the extent of CCLI’s sales of goods during the period of time subsequent to January 2008, H.R. at 47-48. CCLI’s representative testified that its sales practices changed in January 2008. H.R. at 48, a period of time too far removed from 2002, the year for which exemption was requested. As stated above, I have relied upon the evidence contained in the statutory transcript and the hearing record regarding the sales of goods, including tax returns and other documentary evidence, which represents CCLI’s activities and actual revenue for tax years beginning 7/1/02 and ending 6/30/07.

Some of the subjects of the books offered for sale on the CCLI website were as follows:

1. Health, such as breast cancer prevention, vaccination information, yeast-related maladies, and depression, S.T. at 60, 91, 102.
2. Cookbooks and diet, including recipes, making baby food, whole foods for children and adults, and removing sugar from diets, S.T. at 95, 103-104.
3. Choosing a good wife or a good husband, S.T. at 64, 88.
4. Dressing with dignity, S.T. at 65-66
5. Parenting guides, S.T. at 68, 83, 87, 90, 91, 91, 93, 94, 98, 99.
6. Prayer books, S.T. at 69, 73.
7. General Catholic Church doctrine, including annulment and "Catholicism for Dummies," S.T. at 70, 71.
8. Self-help, such as being kinder, balancing work and home, and adjusting to the transition from work to home, S.T. at 75, 90, 95.
9. Family activities and craft projects for Lent and Easter, S.T. at 77.
10. Religious teaching guides for grades 1-8, S.T. at 79-80, 83.

Approximately one-half of the building located on the subject property is warehouse space utilized in connection with the sale of goods and materials. H.R. at 64. CCLI's own exhibits demonstrate that the sale of goods generates substantial sums of money on an annual basis. For tax year 7/01/02-6/30/03, the gross sales of products produced revenue of \$620,573, with a resulting gross profit of \$328,768. S.T. at 129.

For tax year 7/01/03-6/30/04, gross product sales raised \$642,595 and the gross profit from sales was \$317,451. S.T. at 166, 158. In tax year 7/01/04-6/30/05, the gross sales amount was \$568,654 and the gross sales profit was \$278,161. H.R., Appellant's Ex. 6 at unnumbered p. 1. In tax year 7/01/05-6/30/06, gross sales were \$520,902 and the gross profit was \$198,443. H.R., Appellant's Ex. 5 at unnumbered p.1. For tax year 7/01/06-6/30/07, the gross sales were \$469,016 and the gross profit from the sales of goods was \$181,554. H.R., Appellant's Ex. 4 at unnumbered p.1.

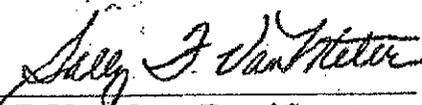
The other half of the building located on the subject property was used as CCLI's offices to administer the organization's activities. One such activity was CCLI's offering of classes for a fee. The "tuition" (non-materials) fees generated for fiscal year 2003 were \$196,196, S.T. at 129, 134; for fiscal year 2004, \$259,374, S.T. at 158; for fiscal year 2005, \$246,923, H.R., Appellant's Ex. 6 at unnumbered page 1; for fiscal year 2006, \$244,636, H.R., Appellant's Ex. 5 at unnumbered page 1; and for fiscal year 2007, \$243,597, H.R., Appellant's Ex. 4 at unnumbered page 1. The record illustrates that during fiscal years 2005-2007, CCLI only offered 1½ to 2 percent of its classes for free. H.R. Appellant's Ex. 11.

Clearly, based on the record herein, CCLI's use of the subject property was not "exclusively charitable" during the period in question so as to qualify the property for exemption under the pertinent case law. In order to be entitled to statutory exemption, a property can generate limited revenue and maintain its charitable character. As the Ohio Supreme Court characterized its own decisions in a recent opinion: "To be sure, we have held that charitable activities may generate *incidental*

revenue and still qualify as charitable. *Community Health Professionals Inc. v. Levin*, 113 Ohio St.3d. 432, 2007-Ohio-2336 *** paragraph 23; *Girl Scouts – Great Trail Council v. Levin*, 113 Ohio St.3d 24, 2007-Ohio-972 *** paragraph 17.” *Northeast Ohio Psychiatric Institute v. Levin*, 121 Ohio St.3d 292, 2009-Ohio-583, paragraph 16. (Emphasis added.). In the instant case, the activities in question, the sale of products and materials and the classes offered for a fee, were not charitable in nature and certainly did not generate “incidental” revenue.³

Thus, the property was not exclusively used for charitable purposes, as required under R.C. 5709.12(B), and I would find that it is not entitled to exemption from taxation. Accordingly, I dissent from the majority’s determination that part of the subject property is exempt from taxation, and concur in the conclusion that the remainder of the subject property is not tax exempt.

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


Sally F. Van Meter, Board Secretary

³ One of the witnesses for CCLI at the hearing before this board testified that approximately fifty (50) percent of CCLI’s revenues were generated from the sale of goods and the offering of classes for a fee. H.R. at 38.