

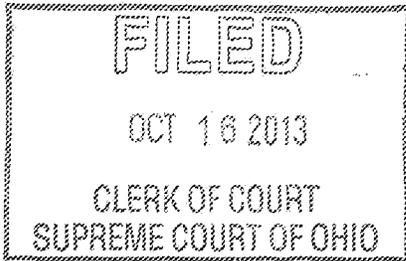
IN THE SUPREME COURT OF OHIO

HITACHI MEDICAL SYSTEMS	)	No. <u>13-1627</u>
AMERICA, INC. and	)	
HMSA PROPERTIES LLC,	)	On Appeal from the
	)	Ohio Board of Tax Appeals
Appellants	)	
v.	)	BTA Case No. 2009-1576
	)	(Real Property Tax Exemption)
JOSEPH W. TESTA (formerly Richard	)	
A. Levin) TAX COMMISSIONER	)	
OF OHIO, and SUMMIT COUNTY	)	
FISCAL OFFICER,	)	
Appellees.	)	

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AMENDED AND CORRECTED NOTICE OF APPEAL OF APPELLANTS  
HITACHI MEDICAL SYSTEMS AMERICA, INC.  
AND HMSA PROPERTIES LLC

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Notice of Appeal of Appellants  
Hitachi Medical Systems America, Inc. and HMSA Properties LLC

Appellants, Hitachi Medical Systems America, Inc. and HMSA Properties LLC, hereby give notice of appeal to the Supreme Court of Ohio from the Decision and Order of the Ohio Board of Tax Appeals entered in Ohio Board of Tax Appeals Case No. 2009-1576 on September 16, 2013. A copy of the Decision appealed from is attached hereto.

Claimed Errors Being Raised on Appeal

Assignment of Error No. 1

The Board of Tax Appeals (the “Board” or “BTA”) erred in affirming the Decision of the Tax Commissioner dismissing the Application for Tax Exemption on the grounds that it was not “filed by” the fee title owner of the subject property, HMSA Properties LLC, but was instead “filed by” Hitachi Medical Systems America, Inc., which was listed as the “applicant,” because:

A. The Application *was* filed by the “owner” of the subject real property, in that the application was signed by Richard A. Kurz, an officer and/or authorized representative of HMSA Properties LLC *and* of Hitachi Medical Systems America, Inc., the sole member of HMSA Properties LLC;

B. HMSA Properties LLC is a single-member limited liability company that is wholly owned by Hitachi Medical Systems America, Inc. HMSA Properties LLC, as a single member limited liability company, is therefore a disregarded entity for federal and state income tax purposes and all of its property is deemed at law to be owned by its sole member, Hitachi Medical Systems America, Inc. for such purposes. Hence, the Application was filed by the owner of the subject real property;

C. According to R.C. 1705.24, HMSA Properties LLC, as a member-managed limited liability company, can only act through its sole member, Hitachi Medical Systems America, Inc. In addition, pursuant to R.C. 1705.25(A)(1), Hitachi Medical Systems America, Inc. “is an agent of the company for the purpose of its business,” and all of its actions “including the execution in the company name of an instrument for apparently carrying on in the usual way the business of the company binds the company.” Therefore, for this reason, the Application was filed by the owner of the subject real property;

D. Hitachi Medical Systems America, Inc. and HMSA Properties LLC share the same address, telephone and fax numbers. Both entities were expressly named in the Application, both participated in the application process and both received all notices relating to the Application;

E. Nothing in R.C. 5715.27(A), or in R.C. 5709.61 - .69, in Ohio Adm. Code 122:4-1 or in any other rule applicable to the enterprise zone program requires that the name of the record title owner be listed on the first page of the Tax Commissioner’s DTE Form 24 Application; and

F. The Decision of the Board affirming Tax Commissioner’s Final Determination adopts a hyper-technical interpretation of R.C. 5715.27(A) which, under the circumstances of this case, serves no legitimate public purpose.

Assignment of Error No. 2

The Board erred in holding that the list of entities specifically identified in R.C. 5715.27(A) as parties who may file a tax exemption application is exhaustive, where the amendment to that section was adopted by the General Assembly in Sub. H.B. 160 (127<sup>th</sup> General Assembly) in direct response to this Court’s decision in *Performing Arts School of*

*Metro Toledo* and was intended to widen the pool of persons who may file exemption applications. See *Toledo Pub. Schools Bd. of Edn. v. Lucas County Bd. of Revision*, 124 Ohio St.3d 490, 2010-Ohio-253, 924 N.E.2d 345, ¶ 26.

Assignment of Error No. 3

The Board's reliance on the *Bd. of Edn. Of the Columbus City School Dist.* and the *Performing Arts School of Metropolitan Toledo* cases, cited in the Decision and Order appealed from, was misplaced because:

A. Those cases relate to applications for a charitable or educational use property tax exemption, a benefit which can only be conferred by the State, while this case involves enterprise zone abatement which can only be awarded by the City of Twinsburg and the County of Summit in response to an application by the enterprise requesting the City and County to grant such abatement. The DTE Form 24 process was not such an application; rather that form was more of a ministerial step to implement the award of enterprise zone abatement that had already granted by the local authorities;

B. Enterprise zone abatement under R.C. 5709.61-.69 is available to any eligible "enterprise" wishing to enter into an abatement agreement with a board of county commissioners, and is broadly defined by statute to include any form of business organization. An "enterprise" eligible for enterprise zone abatement is not limited by R.C. 5709.61 to the "owner" of the real property;

C. The entities identified as "applicant" and "owner" in the *Performing Arts School of Metropolitan Toledo* case were unrelated entities linked only through a lessor-lessee relationship. In that case, the actions of one entity was not tantamount to the actions of the other entity; and/or

D. The strict interpretation of the word “owner” in the 2004 *Performing Arts School of Metropolitan Toledo* case and in the 2005 *Bd. of Edn. Of the Columbus City School Dist.* case was implicitly rejected by the Ohio General Assembly in 2008 by its enactment of Sub. H.B. 160, which act expanded the scope of entities that can file an exemption application.

Assignment of Error No. 4

The Decision and Order of the Board was unreasonable, erroneous and/or unlawful for the reasons set forth above.

Assignment of Error No. 5

The Decision and Order of the Board ignores the intent of the private and governmental parties to the enterprise zone agreement and is unreasonable, erroneous and/or unlawful.

Assignment of Error No. 6

The Decision and Order of the Board is contrary to R.C. 5709.671, which statute expresses the General Assembly’s policy of encouraging political subdivisions to create enterprise zones for the purpose of creating and retaining new jobs.

Assignment of Error No. 7

The Decision and Order of the Board is against the manifest weight of the evidence.

Assignment of Error No. 8

The Decision and Order of the Board is arbitrary and capricious and manifestly inequitable.

Assignment of Error No. 9

The Board erred in concluding that R.C. 5715.27(A) sets forth an exclusive list of persons authorized to file a tax exemption application.

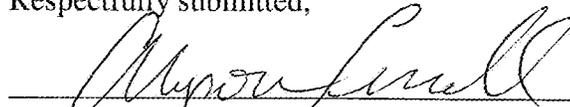
Assignment of Error No. 10

The Decision and Order of the Board and its interpretation of R.C. 5715.27 violates Appellants' right of "equal protection" under Article 1, Section 2, and Article II, Section 26, Ohio Constitution and the Fourteenth Amendment to the U.S. Constitution, Section 1, because:

A. The Board's interpretation of R.C. 5715.27 discriminates, without any rational basis for doing so, between different types of entities that act as the sole member of a limited liability company which is the fee title owner, namely, a *for-profit* entity such as Hitachi Medical Systems America, Inc. (which the Board determined has *no right* under R.C. 5715.27 to file an application for tax exemption in its own name) and a *non-profit* entity (which is expressly *permitted* by R.C. 5701.14 to file an application in its own name); and

B. R.C. 5715.27 discriminates, without any rational basis for doing so, between, on the one hand, an owner, a vendee in possession under a purchase agreement or land contract, the beneficiary of a trust and a lessee for an initial term of not less than thirty years – all of which are permitted to file an application for tax exemption – and, on the other hand, the sole member of a member-managed limited liability company which, according to the Board, is not entitled file such an application.

Respectfully submitted,



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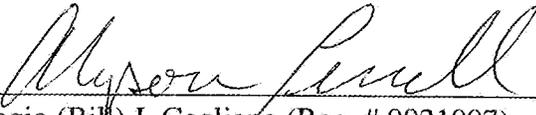
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Attorneys for Appellants

Certificate of Service

I certify that a copy of this Notice of Appeal was sent by certified U.S. mail to Appellee, Tax Commissioner of Ohio, 30 East Broad Street, 22<sup>nd</sup> Floor, Columbus, Ohio 44035, and to Daniel W. Fausey, Assistant Ohio Attorney General, counsel for Tax Commissioner, 30 East Broad Street, 25<sup>th</sup> Floor, Columbus, Ohio 43215, and to Appellee, Summit County Fiscal Officer, 175 South Main Street, Akron, Ohio 44308, and Sherri Bevan Walsh, Summit County Prosecutor, counsel for Summit County Fiscal Officer, 53 University Avenue, 6<sup>th</sup> Floor, Akron, Ohio 44308, on October 16, 2013.

  
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Hitachi Medical Systems America, Inc. and  
HMSA Properties LLC

OHIO BOARD OF TAX APPEALS

Hitachi Medical Systems America, Inc. and )  
HMSA Properties LLC, )  
Appellants, )  
vs. )  
Richard A. Levin, Tax Commissioner )  
of Ohio, )  
Appellee. )

CASE No. 2009-1576  
(REAL PROPERTY TAX  
EXEMPTION)  
DECISION AND ORDER

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Entered SEP 16 2013

Mr. Williamson, Mr. Johrendt, and Mr. Harburger concur.

This matter is before the Board of Tax Appeals upon a notice of appeal filed by appellants Hitachi Medical Systems America, Inc. ("Hitachi") and HMSA Properties LLC ("HMSA"). Appellants appeal from a final determination of the Tax Commissioner, in which the commissioner dismissed Hitachi's application for exemption of real property from taxation. This matter is submitted to the board upon the appellants' notice of appeal, the statutory transcript ("S.T.") certified to this board by the Tax Commissioner, the record of the hearing before this board ("H.R."), and the briefs of counsel.

In his final determination, the Tax Commissioner summarized the issue, now currently before this board, as follows:

"This application was filed by Hitachi Medical Systems America, Inc., a for profit corporation. According to the Limited Warranty Deed, HMSA Properties, LLC acquired title to the subject property on October 5, 2004. There is no evidence that title was subsequently transferred to Hitachi Medical Systems America, Inc. or that Hitachi Medical Systems America, Inc. held title to the subject property at the time this application was filed on October 27, 2006.

"The applicant has requested that the subject property be exempt from real property taxation pursuant to R.C. 5709.63, based on an enterprise zone agreement between the City of Twinsburg, the County of Summit, Hitachi Medical Systems America, Inc. and Alairis Properties, LLC executed on June 30, 2004. \*\*\* Resolution No. 2006-509 makes it clear that Hitachi Medical Systems America, Inc. and HMSA Properties, LLC are separate entities. Resolution No. 2006-509, which was adopted after the subject exemption application was filed, amends the enterprise zone agreement by transferring the real property tax incentive from Alairis Properties, LLC to HMSA Properties, LLC.

\*\*\*\*\*

"The express language of the statute [R.C. 5715.27(A)] permits only an owner to apply for exemption from real property taxation. \*\*\* Therefore, Hitachi Medical Systems America, Inc. was not authorized under R.C. 5715.27(A) to file this application for exemption. Since Hitachi Medical Systems America, Inc. has not met the procedural requirements of the statute, then the Tax Commissioner does not have jurisdiction to consider this application." S.T. at 1-2.

In the notice of appeal filed with this board, appellants further elaborated upon the instant facts, stating in pertinent part:

"A. The Application was filed by the 'owner' of the Property, in that the application was signed by Richard A.

Kurz, an officer and/or authorized representative of HMSA Properties LLC and of Hitachi Medical Systems America, Inc.

"B. HMSA Properties LLC is a single-member limited liability company which is wholly owned by Hitachi Medical Systems America. HMSA Properties LLC, as a single member limited liability company, is a disregarded entity for federal and state income tax purposes and all property of that limited liability company is deemed the property of its sole member, Hitachi Medical Systems America, Inc. \*\*\* Therefore, the Application was filed by the Owner of the Property.

"C. HMSA Properties LLC, as a member-managed limited liability company, can only act through its sole member, Hitachi Medical Systems America, Inc. See Ohio Revised Code Section 1705.24. Moreover, Section 1705.25(A)(1) provides that 'every member is an agent of the company for the purpose of its business and the act of every member, including the execution in the company name of an instrument for apparently carrying on in the usual way the business of the company binds the company....' Therefore, the Application was filed by the Owner of the Property.

"D. Hitachi Medical Systems America, Inc. and HMSA Properties LLC share the same address, telephone and fax number. Both entities are expressly named in the Application, both participated in the application process, both received all notices relating to the Application and both were represented in connection with the grant of Enterprise Zone abatement by the City of Twinsburg and County of Summit. This is not a case where one party acted without the knowledge, consent or authority of the other party. Moreover, the City of Twinsburg and the County of Summit are supportive of the Enterprise Zone abatement granted with respect to this Property. \*\*\*

"E. Nothing in Ohio Revised Code Section 5715.27(A) or in Sections 5709.61 - .69 (dealing with Enterprise Zone abatement) or in Ohio Administrative Code Chapter 122:4-1 or in any other rules applicable to the enterprise zone program requires that the name of the record title owner be listed on the first page of the DTE Form 24 application. \*\*\*

"F. The Tax Commissioner's Final Determination adopts a hyper technical interpretation of Ohio Revised Code Section 5715.27(A) which, under the circumstances described above, serves no legitimate public purpose." Notice of Appeal at 2-3. (Emphasis sic.)

It is Hitachi's position that "[t]he decision of the Tax Commissioner, based on an inflexible and untenable interpretation of §5715.27 which serves no legitimate public purpose given the specific facts of this case, flies in the face of the public policy of the State of Ohio and must be reversed." Brief at 20. Specifically, Hitachi contends that "[f]rom a tax standpoint, HMSA \*\*\* does not exist. \*\*\* The real estate taxes on the property are paid by its sole member, Hitachi \*\*\*; depreciation on the property is deducted by Hitachi \*\*\*; insurance on the property is deducted by Hitachi \*\*\*; and it was Hitachi \*\*\* that entered into the enterprise zone agreement with the City of Twinsburg and Summit County in June of 2004. \*\*\* HMSA \*\*\* has no officers or directors. \*\*\* Its sole member is Hitachi \*\*\* which directs and takes action on behalf of HMSA \*\*\*. Brief at 3.

Hitachi contends that its filing of the exemption application was made "on behalf of" the fee owner, H.R. at 7; it completed the exemption application, however, listing itself as the applicant. The issue for the board is not whether Hitachi could act on behalf of HMSA, it is whether Hitachi could properly apply for the subject exemption.

In *Bd. of Edn. of the Columbus City School Dist. v. Wilkins*, 106 Ohio St.3d 200, 2005-Ohio-4556, ¶10, the court held that "[t]he requirements for filing an application for real-property tax exemption are found in R.C. 5715.27(A),<sup>1</sup> which

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<sup>1</sup> The version of R.C. 5715.27(A) applicable to the instant matter, by virtue of uncodified language contained in H.B. 160, effective June 20, 2008, provided:

provides that "the *owner* of any property may file an application with the tax commissioner, on forms prescribed by the commissioner, requesting that such property be exempted from taxation \*\*\*" (Emphasis added.) In *Performing Arts [School of Metro. Toledo, Inc v. Wilkins]*, 104 Ohio St.3d 284, 2004-Ohio-6389], we found that the word 'owner' as used in R.C. 5715.27 'refers only to a legal title holder of the real property for which a tax exemption is sought.' Id. at paragraph one of the syllabus." Further, the court went on:

"The holder of the legal title and the owner of the property for the purpose of filing an application for exemption under R.C. 5715.27 is 'Columbus State Community College District, Trustee.' The applicant filing the application for exemption in this case, 'Columbus State Community College District,' was not the owner of the property and therefore lacked standing to petition the Tax Commissioner for exemption under R.C. 5715.27. Id. at ¶12.

The court held that a "threshold question when considering an application for exemption filed under R.C. 5715.27 is whether the applicant has standing." Id. at ¶9. It went on to conclude that the applicant for exemption, Columbus State Community College District, constituted a different legal entity than the actual deeded owner, Columbus State Community College District, trustee, and as such, the applicant did not have standing to apply for an exemption. Thus, the failure to list the complete name of the applicant, albeit by one word, changed the nature and corporate identity of the applicant and rendered the exemption application in question ripe for dismissal.

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"Except as provided in section 3735.67 of the Revised Code, the owner, a vendee in possession under a purchase agreement or a land contract, the beneficiary of a trust, or a lessee for an initial term of not less than thirty years of any property may file an application with the tax commissioner, on forms prescribed by the commissioner, requesting that such property be exempted from taxation and that taxes, interest and penalties be remitted as provided in division (C) of section 5713.08 of the Revised Code."

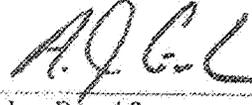
Herein, Hitachi, a corporation, is listed as the applicant on the exemption application. HMSA, however, the owner of the subject property, is a different legal entity, a limited liability company, which appellants argue is also a disregarded entity for income tax purposes. As this board has held previously, the fact that the owner is a disregarded entity "does not change the fact that the appellant is a legal entity separate and apart from its sole member \*\*\*." *Homes at Second Avenue, LLC v. Wilkins* (Nov. 30, 2010), BTA No. 2006-M-1069, unreported at 13. Hitachi and HMSA are not one and the same entity. The Supreme Court has held that only the owner can apply for exemption and Hitachi was not the owner; therefore, Hitachi did not have standing to apply for the exemption under consideration.

Appellants also contend that the commissioner's actions constitute "the taking of property without due process" and a violation of the taxpayers' equal protection rights. While the Ohio Supreme Court has authorized this board to accept evidence on constitutional points, it has clearly stated that we have no jurisdiction to decide constitutional claims. *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229; *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, 198. Therefore, we acknowledge appellants' constitutional claims, but make no finding in relation thereto.

The Board of Tax Appeals has no express or implied equity jurisdiction. *Columbus Southern Lumber Co. v. Peck* (1953), 159 Ohio St. 564. As

a creature of statute, we have only the jurisdiction, power, and duties expressly given by the General Assembly. *Steward v. Evatt* (1944), 143 Ohio St. 547. See, also, *HealthSouth Corp. v. Levin*, 121 Ohio St.3d 282, 2009- Ohio-584, ¶ 24; *Gen. Motors Corp. v. Limbach* (1993), 67 Ohio St.3d 90, 93. Accordingly, we are constrained to affirm the commissioner's final determination, dismissing the taxpayers' application for exemption for lack of jurisdiction.

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.



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A.J. Groeber, Board Secretary