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In the
Supreme Court of Ohio

JOSEPH W. TESTA,
TAX COMMISSIONER OF OHIO,

Appellant,

v.

CITY OF CINCINNATI,

Appellee.

Case No. **14-0531**

On appeal from the
Ohio Board of Tax Appeals

BTA Case Nos. 2013-K-143 through -148

2014 APR - 7 PM 3:15

FILED/RECEIVED
BOARD OF TAX APPEALS

NOTICE OF APPEAL OF JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO

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CLERK OF COURT
SUPREME COURT OF OHIO

Appellant, Joseph W. Testa, Tax Commissioner of Ohio (“Commissioner”), hereby gives notice of his appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio, from a Decision and Order of the Ohio Board of Tax Appeals (“Board”), journalized and entered on March 6, 2014. A true and accurate copy of this Decision and Order is attached as Exhibit A.

The Commissioner complains of the following errors in the Board’s Decision and Order:

1. The Board’s March 6, 2014 Decision and Order was unreasonable and unlawful.
2. The Board erred in granting exemption from real property taxation, pursuant to R.C. 5709.08, for six golf courses owned by the City of Cincinnati (“City”).
3. The Board erred in determining that the six golf courses owned by the City of Cincinnati were used “exclusively for a public purpose requirement” pursuant to R.C. 5709.08.
4. The Board erred in failing to find that the six golf course owned by the City of Cincinnati were operated by a private company, for profit, and in competition with other private entities in the area, thereby creating a private, for-profit use of the property and negating the possibility of exemption for public purposes pursuant to R.C. 5709.08.
5. The Board erred in failing to correctly apply this Court’s reasoning in *City of Parma Heights v. Wilkins*, 105 Ohio St.3d 463, 2005-Ohio-2818 (2005), wherein this Court explained the well-settled rule that “‘when . . . public enterprise is given the opportunity to occupy public property in part and makes a profit, even though in so doing it serves not only the public, but the public interest and a public purpose,’ the property no longer meets the R.C. 5709.08 requirement that the property be ‘used exclusively for a public purpose.’”
6. The Board erred as a matter of fact and law in determining that the monies earned by Billy Casper Golf Management, Inc. (“BCG”), in managing the City’s golf courses at issue in this matter, were merely “incidental” and thus did not violate the “exclusively for a public

purpose requirement” of R.C. 5709.08. Moreover, the Board erred in failing to properly calculate the income earned by BCG on the golf courses and in comparing that income to revenue to the City.

7. The Board erred in determining that BCG was “not . . . a private enterprise [that] is occupying publicly-owned property and profiting thereby,” contrary to this Court’s decision in *Parma Heights*.

8. The Board erred in failing to conclude that the City and BCG engaged in a “public-private partnership business,” entering into competition with similar, privately-operated enterprises, and that such a partnership fails to qualify as an “exclusive” public use, as set forth in *City of Cleveland v. Board of Tax Appeals*, 153 Ohio St. 97 (1950).

9. The Board erred in failing to conclude that the City’s agreement with BCG was the functional equivalent of a lease, by virtue of BCG’s full possessory rights and control of the City’s golf courses, and that, as a result, the golf courses no longer qualified as “public property devoted exclusively to a public purpose,” per R.C. 5709.08, and consistent with this Court’s holding in *City of Cleveland v. Perk*, 29 Ohio St.2d 161 (1972).

10. The Board erred in failing to conclude that BCG is an independent contractor, not an agent for the City, and that BCG retains “significant authority” over the operation and management of the City’s golf courses, thereby negating the “exclusive” public use requirement of R.C. 5709.08.

Respectfully submitted,

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In the
Supreme Court of Ohio

JOSEPH W. TESTA,
TAX COMMISSIONER OF OHIO,

Appellant,

v.

CITY OF CINCINNATI,

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Case No. _____

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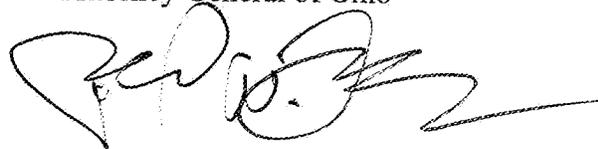
PRAECIPE

TO THE SECRETARY OF THE OHIO BOARD OF TAX APPEALS:

Pursuant to R.C. 5717.04, appellant, Joseph W. Testa, Tax Commissioner of Ohio, hereby requests that the Ohio Board of Tax Appeals ("Board") file with the Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, a certified transcript of the record of the Board's proceedings in the above-captioned matters, including any evidence considered by the Board in rendering its decisions in those matters.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on this 7th day of April, 2014, a true copy of the foregoing "Notice of Appeal" and "Praecipe" was served: (1) by hand delivery upon the Ohio Supreme Court, 65 S. Front Street, Columbus, Ohio 43215, and the Ohio Board of Tax Appeals, 30 E. Broad Street, 24th Floor, Columbus, Ohio 43215; and (2) by certified mail upon the following:

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Counsel for Appellant, Paul Macke


Daniel W. Fausey

OHIO BOARD OF TAX APPEALS

City of Cincinnati,)	CASE NOS. 2011-143
)	through 2011-148
Appellant,)	
)	(REAL PROPERTY TAX EXEMPTION)
vs.)	
)	DECISION AND ORDER
Joseph W. Testa, Tax Commissioner)	
of Ohio,)	
)	
Appellee.)	

APPEARANCES:

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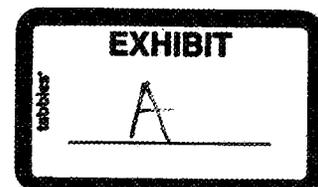
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Entered **MAR 06 2014**

Mr. Williamson, Mr. Johrendt, and Mr. Harbarger concur.

Appellant appeals six final determinations of the Tax Commissioner wherein he denied exemption from real property taxation for six golf courses owned by the appellant ("the City") and located in Hamilton County, Ohio, for tax years 2010



and thereafter.¹ We proceed to consider the matters upon the notices of appeal, the statutory transcripts certified by the commissioner, the record of the hearing before this board (“H.R.”), and the parties’ briefs.

These matters emanate from final determinations of the commissioner in which he denied exemption to the subject properties in response to a complaint against the continued exemption of real property from taxation filed by Paul A. Macke, the owner of several other golf courses near the subject properties. As explained in the final determinations, the subject golf courses, while owned by the City, are operated by Billy Casper Golf Management, Inc. (“BCG”), a for-profit corporation, pursuant to a management contract. The commissioner found the courses were not entitled to exemption under R.C. 5709.08, which exempts “public property used exclusively for a public purpose,” because BCG occupies and uses the subject properties to make a profit, and, in doing so, competes with similar, private enterprises. The City appealed all six final determinations, arguing that the fact that the properties are not leased to BCG makes these situations distinguishable from cases where exemption was denied, that no unfair competitive advantage exists, that the relationship between it and BCG is that of principal-agent, and that the “managed competition” created by its contract with BCG does not serve private interests.

At this board’s hearing, the City presented the testimony of Christopher A. Bigham, Director of Recreation for the city of Cincinnati, Steve Pacella, Superintendent of Administrative Services for the Cincinnati Recreation Commission, and Joseph Livingood, Senior Vice President of BCG, who testified regarding the operation of the golf courses and the relationship between the City and BCG.

¹ Specifically, the commissioner denied exemption of parcel numbers 111-0004-0001-90 and 111-0002-0002-90 (Avon Fields Golf Course); 182-0003-0004-90 and 182-0003-0011-90 (Dunham Golf Course); 015-0003-0004-90 (Reeves Golf Course); 570-0040-023-90, 570-0040-0355-90, 570-0040-0408-90, 570-0050-0072-90, 570-0040-0401-90, 570-0040-0232-90, 570-0040-0229-90, 570-0050-0073-90, 570-0040-0230-90, 570-0040-0407-90, 570-0040-0228-90, 570-0040-0028-90, 570-0040-0406-90, 570-0040-0403-90, and 570-0040-0105-90 (Neumann Golf Course); 550-0163-0010-00 and 550-0152-0003-90 (Woodland Golf Course); and 590-0110-0001-00 and 590-0121-0001-90 (Glenview Golf Course).

In our review of this matter, we are mindful that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. Consequently, it is incumbent upon a taxpayer challenging a determination of the commissioner to rebut the presumption and to establish a clear right to the requested relief. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. In this regard, 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.

Because this matter involves the exemption of real property, we are also mindful that the rule in Ohio is that all real property is subject to taxation. R.C. 5709.01. Exemption from taxation is the exception to the rule. *Seven Hills Schools v. Kinney* (1986), 28 Ohio St.3d 186. The burden of establishing that real property should be exempt is on the taxpayer. Exemption statutes must be strictly construed. *Am. Soc. for Metals v. Limbach* (1991), 59 Ohio St.3d 38; *Faith Fellowship Ministries, Inc. v. Limbach* (1987), 32 Ohio St.3d 432; *Willys-Overland Motors, Inc. v. Evatt* (1943), 141 Ohio St. 402. However, such construction must also be reasonable. *In re Estate of Morgan v. Bowers* (1962), 173 Ohio St. 89.

The City seeks exemption under R.C. 5709.08. The requirements to qualify for an exemption thereunder are as follows: (1) the property "must be public property, (2) it must be used for a public purpose, and (3) the use must be exclusively for a public purpose." *Columbus City School Dist. Bd. of Edn. v. Zaino* (2001), 90 Ohio St.3d 496, 497. The court explained the application of these requirements where a private entity is also involved, in *City of Parma Heights v. Wilkins*, 105 Ohio St.3d 463, 2005-Ohio-2818:

"We have said in past cases that 'whenever public property is used by a private citizen for a private purpose, that use generally prevents exemption.' *Whitehouse v. Tracy* (1995), 72 Ohio St.3d 178, 181, ***. The rule explained more than 30 years ago remains true today:

‘When *** private enterprise is given the opportunity to occupy public property in part and make a profit, even though in so doing it serves not only the public, but the public interest and a public purpose,’ the property no longer meets the R.C. 5709.08 requirement that the property be ‘used exclusively for a public purpose.’ *Cleveland v. Perk* (1972), 29 Ohio St.2d 161, 166 *** (holding that areas of a city-owned airport that were leased to private entities for commercial enterprises were not exempt from real property taxes).” Id. at ¶12.

In that case, the court affirmed this board’s decision denying exemption under R.C. 5709.08 of a city-owned ice rink leased to a third-party private enterprise, noting that the third party’s use of the property “was not consistent with the text of or purposes underlying R.C. 5709.08, which is designed to help governmental bodies rather than private commercial interests.” Id. at ¶14. The court rejected the city’s argument that the goal of leasing to a third party “development and management firm” was “the public-spirited one of providing a better ice-skating facility for the benefit of area residents,” given this board’s finding that the third party firm leased the property with a view to profit. Id. at ¶15.

The commissioner argues that *Parma Heights* is dispositive in this matter. The City argues that the facts of these matters are distinguishable, because BCG does not lease the subject properties from the City, but, rather, merely enjoys a “non-exclusive right to occupy the courses.” City Post-Hearing Reply Brief at 3. Indeed, the City notes that testimony at this board’s hearing demonstrates that the City intentionally did not lease the property to BCG in order to retain control over the properties. H.R. at 34. However, the commissioner notes that, under the terms of the management agreement, BCG has exclusive responsibility and control over the areas within the boundaries of the golf courses. H.R., Ex. D. at 609.

We find the lack of a lease, and the terms of the management contract, sufficiently distinguish these matters from *Parma Heights*. The City continues to exercise significant authority over the subject golf courses through the Cincinnati Recreation Commission (“CRC”), including the right to enter the properties at any

time, to approve rate schedules, budgets, marking plans, programs, and hours of operations, and to approve capital expenditures. BCG simply carries out the day-to-day operations of the courses according to CRC's direction and control.²

Under the management contract, the City receives all operating revenues, including greens fees and cart rentals fees, which it reinvests into the golf facilities. BCG only receives a flat management fee, a portion of merchandise and food and beverage sales, and may receive an incentive fee if certain revenue targets are met. This is therefore not a situation where a private enterprise is occupying publicly-owned property and profiting thereby; instead, the fruit of BCG's labor is largely reaped by the City. BCG receives only a portion of the revenue from merchandise and food and beverage sales – just as did the thirty-party contractor before it.³ Such revenues are incidental and do not violate the “exclusively for a public purpose requirement” of R.C. 5709.08. Indeed, the court held thus in a case involving a snack shop on a golf course leased to a private concessioner. *South-Western City Schools Bd. of Edn. v. Kinney* (1986), 24 Ohio St.3d 184. The court found that any revenues received from concessions were “inconsequential and trivial.” *Id.* at 187. Here, the record indicates that CRC's municipal golf fund saw revenues of approximately \$5,300,000 to \$6,655,000 during the years 2007 through 2012. H.R., Ex. 8. Although it is unclear what is included in these figures, i.e., greens fees and cart rental fees, food and beverage sales, and/or merchandise sales, even using a possibly understated number, and the commissioner's statements regarding's BCG's profits from merchandise and food and beverage sales being between approximately \$180,000 to \$250,000 per year, Commissioner's Post-Hearing Brief at 4-5, BCG's share of the revenues from the golf courses was no more than 5%.

² For example, Steve Pacella, Superintendent of Administrative Services for CRC, testified that BCG asked to close one of the courses during the winter months because it was losing money during that time, and CRC denied the request. H.R. at 156-157.

³ At this board's hearing, Mr. Bigham testified that BCG assumed a previous contract for food, beverage, and merchandise sales from Cincinnati Concessions. He further indicated that, as long as he could recall, food, beverage, and merchandise sales at the courses have been operated by a private third-party. H.R. at 28-29.

Further, as the City notes, it – not BCG – remains responsible for the payment of all real property taxes. The court in *Parma Heights* specifically noted that, under the terms of the lease in that case, a tax exemption would benefit the private, third-party lessee – not the public owner. *Parma Heights*, supra, at ¶17. Here, exemption from real property taxes will benefit the City, not BCG. We therefore find the facts of these matters distinguishable from *Parma Heights*.

Based upon the foregoing, we find that the subject properties are entitled to exemption under R.C. 5709.08. Accordingly, the final determinations of the Tax Commissioner are hereby reversed.

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



A.J. Groeber, Board Secretary