

IN THE SUPREME COURT OF OHIO

AKRON GENERAL MEDICAL CENTER,)
)
Appellant,)
)
vs.)
)
JOSEPH W. TESTA,)
TAX COMMISSIONER OF OHIO, and)
STOW-MUNROE FALLS CITY SCHOOLS)
BOARD OF EDUCATION,)
)
Appellees.)

14-0876

CASE NO. _____

Appeal from the Ohio Board of Tax Appeals, BTA Case No. 2012-426

FILED
MAY 28 2014
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT
AKRON GENERAL MEDICAL CENTER

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BOARD OF TAX APPEALS
COLUMBUS, OHIO

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Counsel for Appellee Joseph W. Testa, Tax Commissioner of Ohio

IN THE SUPREME COURT OF OHIO

AKRON GENERAL MEDICAL CENTER,)	
)	
)	Appellant,
)	Appeal from the Ohio Board of Tax
vs.)	Appeals under R.C. 5717.04
)	
)	BTA Case No. 2012-426
JOSEPH W. TESTA,)	
TAX COMMISSIONER OF OHIO, <i>et al.</i>)	
)	
)	Appellees.

Notice of Appeal of Appellant Akron General Medical Center

Pursuant to Ohio Revised Code 5717.04, Appellant Akron General Medical Center (“AGMC”) hereby gives notice of its appeal to the Supreme Court of Ohio from the final Decision and Order of the Ohio Board of Tax Appeals entered in Board of Tax Appeals Case No. 2012-426 on April 29, 2014. A true and correct copy of the final Decision and Order being appealed is attached hereto as Exhibit A and incorporated herein by reference. The appeal is filed as a matter of right under Ohio Revised Code 5717.04.

In this Appeal, Appellant AGMC requests that the Supreme Court of Ohio reverse, vacate, and/or modify the final Decision and Order of the Ohio Board of Tax Appeals, dated April 29, 2014, based upon one or more of the following errors:

1. The Ohio Board of Tax Appeals erred as a matter of law and acted unreasonably and unlawfully by affirming the Tax Commissioner’s denial of a charitable tax exemption under Ohio Revised Code 5709.12 and Ohio Revised Code 5709.121 for approximately 54,439 square feet (approximately 56%) of the AGMC Health & Wellness Center – North, Parcels 56-18081 and 56-18083, located in Summit County, Ohio (the “Property”).

2. The Ohio Board of Tax Appeals erred as a matter of law and acted unreasonably and unlawfully because it did not apply the three-prong test established by the Ohio Supreme Court for determining whether property belonging to a “charitable institution” is exempt from taxation under Ohio Revised Code 5709.12 and 5709.121. *See Community Health Professionals, Inc. v. Levin*, 113 Ohio St.3d 432, 2007-Ohio-2336, 866 N.E.2d 478, ¶ 19.

3. The Ohio Board of Tax Appeals erred as a matter of law and acted unreasonably and unlawfully because it did not apply the plain language of Ohio Revised Code 5709.121(A)(2) in determining whether property belonging to AGMC, a charitable institution, is exempt from taxation under Ohio Revised Code 5709.12 and 5709.121.

4. The Ohio Board of Tax Appeals erred as a matter of law and acted unreasonably and unlawfully because it did not consider or determine, based upon the totality of the circumstances, whether the subject Property is made available “under the direction and control” of AGMC for use “in furtherance of or incidental to” AGMC’s charitable purposes and “not with a view to profit” under Ohio Revised Code 5709.121(A)(2).

5. The Ohio Board of Tax Appeals erred as a matter of law and acted unreasonably and unlawfully by failing to conclude that the Property is entitled to a charitable tax exemption under Ohio Revised Code 5709.12 and 5709.121 because it is made available “under the direction and control” of AGMC, a charitable institution, for use “in furtherance of or incidental to” AGMC’s charitable purposes and “not with a view to profit” under R.C. 5709.121(A)(2).

6. The Ohio Board of Tax Appeals erred as a matter of law and acted unreasonably and unlawfully because it misinterpreted, misconstrued, and misapplied the Ohio Supreme Court’s decision in *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, 2004-Ohio-1749, 806 N.E.2d 142.

7. The Ohio Board of Tax Appeals erred as a matter of law and acted unreasonably and unlawfully because it did not apply the proper legal standard established by the Ohio Supreme Court for determining whether the subject Property is used exclusively for charitable purposes under Ohio Revised Code 5709.12(B).

8. The Ohio Board of Tax Appeals erred as a matter of law and acted unreasonably and unlawfully because it did not consider the totality of circumstances in determining whether the subject Property is used exclusively for charitable purposes under Ohio Revised Code 5709.12(B).

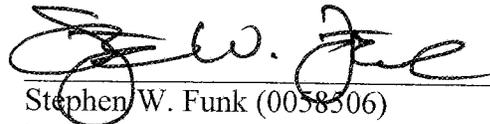
9. The Ohio Board of Tax Appeals erred as a matter of law and acted unreasonably and unlawfully in determining that AGMC is not entitled to a charitable tax exemption for the subject Property under Ohio Revised Code 5709.12 and 5709.121 based solely upon the finding that the “percentage of donated memberships” from 2008 to 2013 is “insufficient to constitute charitable use.” (*See Ex. A, BTA’s Decision and Order, pg. 5*).

10. The Ohio Board of Tax Appeals erred by finding that “the percentage of donated memberships” varied “from 3% to 0.2% between 2008 and 2013,” as this determination is not supported by reliable and probative evidence in the record, and therefore should be reversed, vacated, or modified by the Ohio Supreme Court.

11. The Ohio Board of Tax Appeals erred as a matter of law and acted unreasonably and unlawfully by failing to conclude that the subject Property is entitled to a charitable tax exemption based only upon Ohio Revised Code 5709.12(B) because the subject Property is used exclusively for charitable purposes, as defined by Ohio law.

WHEREFORE, Appellant Akron General Medical Center respectfully requests that the Supreme Court of Ohio reverse, vacate, and/or modify the final Decision and Order of Ohio Board of Tax Appeals, dated April 29, 2014, under Ohio Revised Code 5717.04 and remand this matter to the Ohio Board of Tax Appeals with instructions to grant AGMC's charitable tax exemption application under Ohio Revised Code 5709.12 and 5709.121 for the subject Property from tax year 2005 to the present. Appellant further request that the Court grant any further relief that may be just or appropriate under the circumstances.

Respectfully submitted,



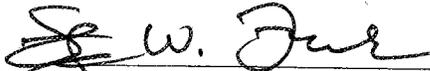
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PROOF OF FILING WITH THE OHIO BOARD OF TAX APPEALS

Pursuant to Ohio Revised Code 5717.04, I hereby certify that on this 28th day of May, 2014, the foregoing Notice of Appeal, with the attached Exhibit A, was timely filed with the Ohio Board of Tax Appeals, 30 East Broad Street, 24th Floor, Columbus Ohio 43215, as evidenced by the file stamp of the Board of Tax Appeals hereon.

Respectfully submitted,



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*Attorneys for Appellant
Akron General Medical Center*

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of May, 2014, a true and correct copy of this Notice of Appeal was served via certified mail in accordance with S.Ct.Prac.R. 3.11(B)(2) upon the following Appellees:

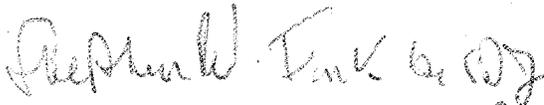
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Moreover, I hereby certify that on this 28th day of May, 2014, a true and correct copy of the Notice of Appeal was served via electronic mail upon attorneys of record for Appellees, Melissa W. Baldwin (Melissa.baldwin@ohioattorneygeneral.gov) and Kelley Gorry (kgorry@richgillislawgroup.com).



Stephen W. Funk

EXHIBIT A

OHIO BOARD OF TAX APPEALS

Akron General Medical Center,)	CASE NO. 2012-426
)	
Appellant,)	(REAL PROPERTY TAX EXEMPTION)
)	
vs.)	DECISION AND ORDER
)	
Joseph W. Testa, Tax Commissioner)	
of Ohio, and Stow-Munroe Falls City)	
Schools Board of Education,)	
)	
Appellee.)	

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Entered **APR 29 2014**

Mr. Williamson and Mr. Johrendt concur. Mr. Harbarger not participating.

Appellant appeals from a final determination of the Tax Commissioner wherein he denied exemption from real property taxation for approximately 54,439 square feet of the improvements located on parcel numbers 56-18081 and 56-18083, located in Summit County, Ohio, for tax year 2008. We proceed to consider the matter upon the notice of appeal, the statutory transcript certified by the commissioner, the record of the hearing before this board ("H.R."), and the parties' post-hearing briefs.

The subject parcels are the site of the Akron General Medical Center Health & Wellness Center-North. At issue in this matter is a portion of that facility,

known as “Lifestyles,” consisting of the following: the Lifestyles Fitness Center, the Sports Performance Center, and the babysitting and KidStyles supervised play area.¹ Appellant explained that Lifestyles “is a department of [Akron General Medical Center] that is clinically integrated with the delivery of health care services by [its] Health & Wellness Center, which seeks to bring together ‘a range of clinical outpatient services’ to provide a ‘full outpatient continuum of care.’” Appellant’s Merit Brief at 5-6 (citing H.R. at 114). In the final determination, the commissioner denied exemption of the above-mentioned portion of the facility “because it is used for the operation of businesses and because a portion is leased for private business.”

Appellant thereafter appealed to this board, arguing that all of the subject property is entitled to exemption as charitable under R.C. 5709.12 and R.C. 5709.121.² At this board’s hearing, appellant presented the testimony of Deborah Gorbach, Vice President of Accounting for Akron General Medical Center (“AGMC”), and Douglas Ribley, Senior Vice President of Health & Wellness Services for AGMC, who testified about the use and operation of the property at issue.

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.

¹ Based upon the recommendation of the Summit County Fiscal Office, the commissioner granted appellant’s application for exemption, in part, and split-listed the property as authorized by R.C. 5713.04. The exemption portion constitutes approximately 44.38%, or 43,431 square feet, of the facility based on its usage, including: the emergency department, laboratory, diagnostics department, administration area, building services area, conference rooms, physical therapy areas, and common areas and corridors.

² Appellant has conceded, in its post-hearing merit brief, that it is not entitled to an exemption of portions of the property that are leased to third parties. Appellant’s Merit Brief at 3.

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.

Initially, we note the argument of the commissioner in his post-hearing brief that this board lacks jurisdiction to consider the exemption of the “medical office building” located on the parcels, as the building was constructed after the underlying application for exemption was filed. Accordingly, it was not (and could not have been) considered by the commissioner in the proceedings prior to this appeal, and is not mentioned in the final determination. We agree that we lack jurisdiction over the medical office building, and will not make any determination regarding the taxable status of it. See *CNG Dev. Co. v. Limbach* (1992), 63 Ohio St.3d 28; *Am. Fiber Sys., Inc. v. Levin*, 125 Ohio St.3d 374, 2010-Ohio-1468.

As to the remaining improvements at issue, AGMC has applied for exemption under R.C. 5709.12 and R.C. 5709.121. As the Supreme Court recently explained in *Cincinnati Community Kollel v. Testa*, 135 Ohio St.3d 219, 2013-Ohio-396, “pursuant to R.C. 5709.12, any institution, charitable or noncharitable, may qualify for a tax exemption if it is making exclusive charitable use of its property. But if the property belongs to a charitable or educational institution, R.C. 5709.121 defines what constitutes exclusive use of the property in order to be exempt from taxation.” *Id.* at ¶23. R.C. 5709.121(A) provides that “[r]eal property and tangible personal property belonging to a charitable or educational institution *** shall be considered as used exclusively for charitable or public purposes by such institution *** if *** (1) [i]t is used by such institution, *** or by one or more such institutions, *** under a lease,

sublease, or other contractual arrangement *** (b) [f]or other charitable, educational, or public purposes,” or if “(2) [i]t is made available under the direction and control of such institution *** for use in furtherance of or incidental to its charitable, educational, or public purposes and not with a view to profit.”

In the healthcare context, the court has further stated that “[o]ur case law has predicated entitlement to the charitable-use exemption on services being provided ‘on a nonprofit basis to those in need, *without regard to race, creed, or ability to pay.*’ (Emphasis added.)” *Dialysis Clinic, Inc. v. Levin*, 127 Ohio St.3d 215, 2010-Ohio-5071, ¶26 (citing *Church of God in N. Ohio, Inc. v. Levin*, 124 Ohio St.3d 36, 2009-Ohio-5939, ¶19). The court in *Dialysis Clinic* further explained that an institution may be deemed “charitable” if the institution meets that charitable use standard. *Id.* at ¶27.

The court has considered a similar facility to the one now under consideration, in *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, 2004-Ohio-1749. The *Dialysis Clinic* court explained the basic facts of *Bethesda* as follows:

“In *Bethesda*, a nonprofit corporation sought an exemption for a portion of a building that it leased to itself for accounting purposes; the area housed a fitness facility that was open only to dues-paying members and their guests, with minimal access for the public. The exemption was denied, for although a small number of memberships were given away through scholarships, analogous to giving ‘free care,’ the facility itself was not open to the public at large.” *Id.* at ¶45.

AGMC argues that this matter is distinguishable from *Bethesda*, because (1) the Lifestyles facility is owned outright by AGMC, not a separate nonprofit entity, (2) Lifestyles is a “shared environment” used by both hospital patients and members and clinically integrated with the hospital, and (3) provides more free and discounted memberships that Bethesda provided.

Despite AGMC’s arguments, we find the facts of this matter substantially similar to those of *Bethesda*. Just as in *Bethesda*, there appears to be no dispute that AGMC is a charitable institution. However, the *Bethesda* court noted that

“when charges are made for the services being offered, we must consider the overall operation being conducted to determine whether the property is being used exclusively for charitable purposes.” *Id.* at ¶35. It continued: “While members of the Fitness Center may receive more attention, by better-trained instructors, and receive services that are not available at other fitness centers, these facts do not make the use of the property by the Fitness Center a charitable one.” *Id.* at ¶36. As in *Bethesda*, we find that AGMC renders an insufficient amount of services to persons who are unable to afford them to be considered as making charitable use of the property. As the commissioner notes in his brief, the percentage of donated memberships to Lifestyles varied from 3% to 0.2% between 2008 and 2013. Commissioner’s Brief at 8, fn. 5. While we acknowledge that “there is no absolute percentage,” of free memberships required, *Bethesda*, *supra*, at ¶39, we find the amount given by AGMC for Lifestyles is insufficient to constitute charitable use. Therefore, we find that the portions of the subject property not previously granted exemption by the commissioner are not entitled to exemption as charitable.

Based upon the foregoing, we find that AGMC has failed to satisfy its burden that the determination of the commissioner was in error. Accordingly, we find that the final determination of the Tax Commissioner must be, and hereby is, affirmed.

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