

In the
Supreme Court of Ohio

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| Christian Voice of Central Ohio, | : | |
| | : | |
| Appellant, | : | Case No. 14-1626 |
| | : | |
| v. | : | Appeal from the Ohio Board of Tax Appeals |
| | : | Case No. 2011-1446 |
| Joseph W. Testa, | : | |
| Tax Commissioner of Ohio, | : | |
| | : | |
| Appellee. | : | |

MERIT BRIEF OF APPELLEE TAX COMMISSIONER OF OHIO

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I. Introduction

Christian Voice of Central Ohio (“CVCO”) seeks a new and broad definition of the long standing exemption provided for “houses used exclusively for public worship” pursuant to R.C. 5709.07(A)(2). CVCO operates three radio stations, with programming that consists almost exclusively (97 percent) of adult contemporary Christian music. The stations also air commercial advertising/underwriting (8 min./hour), and 60-second devotionals recorded by Pastor John Moriarty. CVCO seeks to overcome the absence of public worship programming content and lack of public worship use of its property by claiming that its listening audience constitutes “a form of religious society” and that the “broadcast and reception of Christian music constitutes a form of public worship.” Appellant’s brief at 10-11.

Such a broad transmutation of the public worship exemption contradicts this Court’s long standing interpretation of this exemption, and violates the principle, that exemptions, being in derogation of equal rights, must be strictly construed. This exemption is meant to be applicable to the “church edifice” or to “places of public worship,” and a “congregation” or “other persons are necessary” in order for “public worship” to take place. *Gerke v. Purcell*, 25 Ohio St. 229, 247-249 (1874). This Court described “places of public worship” as places where “[t]he religious rites and ordinances of the church organization are celebrated or observed.” *Watterson v. Halliday*, 77 Ohio St. 150, 172 (1907).

As is evident from the many departments and offices indicated on the building floor plan, CVCO primarily uses its building for the day-to-day operations of its broadcast radio enterprise. Statutory Transcript (“ST”) 15-17. Appropriately, CVCO is self-described as being “exclusively a music station.” Hearing Transcript (“Tr.”) 92. CVCO does not have a congregation, nor does

it conduct any worship services at its facility or create any worship service programming for its radio stations. As such, the finding of the Board of Tax Appeals (“Board”) that “the activities that occur at the subject property do not rise to such level” as exclusive use for public worship was reasonable and lawful and should be affirmed.

I. Statement of the Case and Facts

A. CVCO and the Property For Which Exemption is Sought

CVCO seeks exemption for its 15,600 square foot building and 2.184 acres of land used for the broadcasting and operation of its contemporary Christian music radio station 104.9 “The River” and two other stations, pursuant to R.C. 5709.07(A)(2) as “houses used exclusively for public worship *** that [are] not *** used with a view to profit.”

CVCO’s purpose and objective is to be “engaged in the business of broadcasting and/or radio casting” *** “and to own, sell, hold, lease, equip, maintain and operate broadcasting and receiving stations” *** “to transmit, sent, and broadcast over the radio, news, talks, speeches, lectures, musical concerts, plays, theatricals, recitals, programs, reviews, readings, reports, signals, and all matter and things of any kind, nature, and description whatsoever.” Appellant’s BTA Exhibit 4 (Articles of Incorporation). CVCO’s description of its purpose also includes: “[t]o solicit funds by gifts or bequest or otherwise, *** to charge and receive compensation for advertising on said radio station.” *Id.*

CVCO purchased parcel number 025-011487-00, located at 881 Johnstown Road, Gahanna, OH 43230 (“subject property”) on May 24, 2007. ST 23-23. On June 17, 2008, CVCO filed an application for exemption from real property taxation, seeking exemption for the subject property pursuant to R.C. 5709.07. ST 1, 23. The parcel is 2.184 acres, and it is

improved with a two-story building with a basement. ST 7, 9, 22. The first two floors are dedicated to many offices used by CVCO's approximately 28 full-time and 6 part-time employees to run the various departments of its radio stations. ST 1, 16-17. The offices on the first floor are: 5 disc jockey offices, 3 production offices, 2 studios, 3 programming director offices, public relations office, promotional events office, and a chapel. ST 16. The second floor is largely dedicated to CVCO's marketing department (almost 50 percent of the floor plan), as well as the President and CFO offices, 2 donor relations offices, other offices, and one conference room. ST 17. The basement has two large meeting rooms, a kitchen, a work room, and a computer room. ST 15.

B. CVCO's Use of the Property

As is evident from CVCO's purpose, objectives, and the floor plans described above, CVCO's *primary* use of the subject property is to operate and broadcast 104.9 FM "The River" and its two other contemporary Christian music radio stations. Tr. 175-176; Appellant's BTA Exhibit 4, 5. CVCO is self-described as being "exclusively a music station." Tr. 92. The content aired on CVCO's radio stations is primarily music, about 97 percent, selected from the Christian Adult Contemporary chart. Tr. 176, 183. The music is primarily about Christian themes, such as mercy and forgiveness, aiming to be consistent with The River's "promise" of always being "uplifting" and "kids safe." Tr. 170-173. Todd Stach, Chief Creative Officer, described CVCO's programming aiming to be a: "broad welcome mat of uplifting and kids safe" programming that purposely avoids addressing "specific things that [only] certain denominations believe in" trying to avoid excluding people. Tr. 172.

As described above, and indicated in the floor plans, CVCO primarily uses its building space for the operation of its radio stations and its various departments. ST 15-17. The lower level assembly rooms are the all-purpose “primary meeting space,” frequently used by many organizations, including non-profits and faith based. Tr. 81, ST 26. “There’s not many days in a week that we don’t have a group assembling within the [lower level of the] building in some way, shape, or form.” *Id.*

1. CVCO’s For Profit Use

After the 97 percent music programming, the second in line for content aired is CVCO’s commercial advertisements and “underwriting.” Dan Baughman, CVCO President and CEO, estimated that there were approximately 8 minutes of commercials in an hour of programming aired. Tr. 226. Two-thirds of CVCO’s support is derived from the sale of advertising/underwriting, one-third is from contributions. Tr. 60. CVCO’s Gahanna station, 104.9 FM The River, is a commercial station funded primarily by on-air advertising. CVCO’s Newark and Chillicothe stations, broadcast on 89.3 FM are non-commercial stations, and supported by “underwriting” and donations. “Underwriting” is the term used by CVCO for “commercials” on its non-commercial stations. Tr. 219. CVCO uses the term “underwriting” to describe funds received for on-air announcements instead of commercial advertisements, due to FCC restrictions on non-commercial radio stations. Mr. Baughman described underwriting as “basically announcing *** Dan’s Lawn Mower Service (614) blah, blah, blah,” “it’s noncomparative, non-called action, non-qualitative.” Tr. 220.

CVCO’s main source of income and support for operations is generated from the sale of air time to commercial advertisers and underwriters: CVCO generated the following gross

income from the sale of commercial “advertising/underwriting” as indicated on their Form 990 tax returns:

| | |
|------|----------------|
| 2008 | \$1,991,992.00 |
| 2009 | \$1,720,235.00 |
| 2010 | \$1,866,033.00 |
| 2011 | \$2,207,653.00 |

Appellee BTA Ex. B, Fin. Stmts. at 3, Tr. 23. CVCO also earned the following gross income from the rental of its radio towers for advertising purposes:

| | |
|------|-------------|
| 2008 | \$46,335.00 |
| 2009 | \$31,083.00 |
| 2010 | \$14,598.00 |
| 2011 | \$ 7,051.00 |

Tr. 22, 61-62; Appellee BTA Ex. C 990s 2008-2001, Part VII Stmt. of Rev.; Appellee BTA Ex. B, Fin. Stmts. at 3 (main tower site that was rented was sold in 2008, secondary location is still being rented).

CVCO’s financial statements indicate that it receives revenue from a variety of sources, such as: advertising sales, underwriting, contributions, national programs, sales of the Shepherd’s guide (a business directory with advertising space sold in it), rental income, interest and dividends, and gain from the sale of property. Appellee’s BTA Exhibit B; Tr. 22, 38. CVCO witnesses John Parms CPA and Scott Thomson CFO provided testimony regarding CVCO’s revenue producing activities. Tr. 14, 50.

2. CVCO’s Religious Use of the Property

As described above, the programming aired by CVCO is almost exclusively (97 percent) Christian Adult Contemporary music. Tr. 176, 183. Besides music and commercial advertising, the religious programming aired on The River is limited to a 60-second devotional run cyclically

throughout the day, recorded by Pastor John Moriarty, and the syndicated Keep the Faith program, aired Sunday mornings between the hours of 9:00 am-12:00 pm. Tr. 87, 106, 221-222. Pastor Moriarty usually records a new 60-second devotional once a week. Tr. 106. Pastor Moriarty does not have any other programs aired on the River, other than his 60-second devotionals. Tr. 106. CVCO does not produce the Keep the Faith program. Tr. 223. There are no church services or formal preaching done on CVCO's radio stations. Tr. 148, 184. There are no live broadcasts of any traditional worship services at CVCO's facility. Tr. 102.

CVCO's building is dedicated to office space used for the operation and broadcasting of its contemporary Christian music radio stations. ST 15-17. The minimal religious usage of the building is limited to the building's chapel and the lower level assembly rooms. The Chapel is used four days a week by Pastor Moriarty, and any available staff, to pray for about 15 minutes on the prayer requests received on CVCO's website. Tr. 88, 103, 217-218, Appellee BTA Ex. A (Response to Interrogatory No. 9). The chapel is also open to the public during business hours, 8:30am -12pm and 1pm- 4:45pm. Appellant's BTA Exhibit 3. There is nothing in the record to indicate if any people outside of CVCO use the chapel. Tr. 218. The lower level assembly rooms are the all-purpose "primary meeting space" in the building, used by a variety of non-profit organizations and some faith based groups. Tr. 81, ST 26. "[S]ome meetings [in the lower level basement rooms] are business, some meetings are worship." Tr. 173. The religious usage of the lower level assembly rooms is limited to "brief" "brown bag lunch" bible studies for the CVCO staff on Wednesdays conducted by Pastor Moriarty, and Pastor Dax Wilsheimer of Epic Church's Wednesday evening youth worship meetings, and Sunday evening worship services. Tr. 86, 88, 112. CVCO does not charge Epic Church for its use of its facility; however Epic

Church does voluntarily tithe a portion of its contributions to CVCO. Tr. 121. CVCO does not hold any regular worship services on the premises, and there is no congregation of people that regularly attend services conducted by CVCO. Tr. 82, 100.

C. CVCO’s Exemption Application, the Tax Commissioner’s Final Determination, and CVCO’s Appeal

In June 2008, CVCO filed an exemption application in which it sought exemption pursuant to R.C. 5709.07. In his final determination, the Tax Commissioner found that CVCO’s property “is used exclusively as a radio station” and “used primarily for broadcasting.” ST 2. As a result, he denied CVCO’s exemption application because the property did not qualify for exemption pursuant to R.C. 5709.07, finding that CVCO’s broadcasting facility is not a house “used exclusively for public worship.” *Id.* CVCO does not conduct any worship services on the property, nor does it have a congregation of “people that assemble to worship together.” *Id.*

CVCO appealed the final determination claiming that the Tax Commissioner erred “by narrowly construing the term, ‘house,’ and the meaning of R.C. 5709.07(A)(2) to limit it to structures where a typical congregation meets to worship.” CVCO also claims that the subject property should be exempted because its previous property had been exempted.

1. Board of Tax Appeals

At the Board hearing, CVCO presented the testimony of ten witnesses: John Parns, Scott Thomson, Pastor John Moriarty, Pastor Dax Welsheimer, Roy Hall, Mary Harris, David Baker, Todd Stach, William Montgomery, and Daniel Baughman. CVCO submitted exhibits 1-6, and the Tax Commissioner submitted exhibits A-D. The Board affirmed the Tax Commissioner’s final determination denying real property exemption to CVCO, finding that CVCO did not operate “as a ‘house of public worship’ on the subject property.” Decision at 4. The Board held

that “CVCO’s activities do not constitute ‘the observation of the rites and ordinances of a religious organization,’ *** but, instead, constitute activities that are generally supportive of Christian religious beliefs.” Decision at 5. The Board additionally found that CVCO’s “sale of on-air advertising, which primarily funds CVCO’s business, is not an exclusive use for public worship, but part of a commercial radio enterprise’s operations.” Decision at 5.

2. Supreme Court Appeal:

CVCO appealed the Board’s decision to this Court pursuant to R.C. 5717.04, claiming that the Board erred in finding that the doctrine of collateral estoppel does not apply, that the Board interpreted the term “house” too narrowly, and that the Board failed to consider the testimony of Pastor John Moriarty and Pastor Dax Welsheimer of Epic Church.

The record before this Court consists of the transcript of the hearing, the Tax Commissioner’s Statutory Transcript, and the parties’ Hearing Exhibits.

III. Law and Argument

Proposition of Law No. 1:

Exemptions from taxation must be strictly construed against the claimed tax reduction.

“All real property in this state is subject to taxation, except only such as is expressly exempted therefrom.” R.C. 5709.01(A). As a result, “in any consideration concerning the exemption from taxation of any property, the burden of proof shall be placed on the property owner to show that the property is entitled to exemption.” R.C. 5715.271. When the General Assembly sees fit to encourage certain activities by the granting of a tax exempt status, it is the duty of the courts to strictly construe exemption provisions, unbendingly applying only the express intent of the General Assembly. *Ohio Children’s Society, Inc. v. Porterfield*, 26 Ohio

St.2d 30, 33, 268 N.E.2d 585 (1971). A taxpayer is not allowed the privilege of an exemption unless the statute specifically allows it, and in all doubtful cases exemptions must be denied. *Youngstown Metro. Hous. Auth. v. Evatt*, 143 Ohio St. 268, 273, 55 N.E.2d 122 (1944).

A. Standard of Review

The standard for review for appeals from the Board is set forth in R.C. 5717.04, as follows:

If upon hearing and consideration of such record and evidence the court decides that the decision of the board appealed from is reasonable and lawful it shall affirm the same, but if the court decides that such decision of the board is unreasonable or unlawful, the court shall reverse and vacate the decision or modify it and enter final judgment in accordance with such modification.

In other words, this Court is limited to determining whether the Board's decision was reasonable and lawful. *PPG Industries, Inc. v. Kosydar*, 65 Ohio St.2d 80, 81 (1981).

The Tax Commissioner's findings are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful. *Hatchadorian v. Lindley*, 21 Ohio St.3d 66 (1986); *Alcan Aluminum Corp. v. Limbach*, 42 Ohio St.3d 121 (1989). The taxpayer bears the burden of rebutting this presumption of validity. *Belgrade Gardens v. Kosydar*, 38 Ohio St.2d 135, 143 (1974). It is a familiar rule that in order for a taxpayer to derive the benefit of a statutory exemption from taxation, it must be proven that the property in question satisfies each and every requirement of the exempting statute. *Sun Oil Co. v. Lindley*, 56 Ohio St.2d 313, 317 (1978).

Proposition of Law No. 2:

CVCO's primary use of the subject property, for the operation of 104.9 The River, a contemporary Christian music radio station, and charitable sharing of lower level assembly rooms, does not qualify for exemption as property used "exclusively for public worship" provided under R.C. 5709.07.

CVCO, a contemporary Christian music radio station, once again, seeks to qualify for the "house of public worship" exemption, claiming that its "contemporary Christian music listeners" "constitute a form of religious society" and that the "broadcast and reception of Christian music constitutes a form of public worship," just as other religious themed radio and television stations have sought exemption on this basis before and failed. Appellant's brief at 10-11; *Christian Television of Ohio, Inc. v. Limbach*, BTA No. 85-E-157 (Jun 4, 1987); *Jimmy Swaggart Evangelistic Assoc. v. Kinney*, BTA No. 81-F-26 (Aug. 30, 1982) (affirmed *Jimmy Swaggart Evangelistic Assoc. v. Kinney*, 6th Dist. No. WD-82-64 (March 18, 1983)); *Operate Evangelize-Youth Mission, Inc. v. Kinney*, BTA No. 79-E-656 (Apr. 2, 1981).

R.C. 5709.07(A)(2) provides real property tax exemption for "houses used exclusively for public worship *** that [are] not *** used with a view to profit." "To qualify for this exemption the "property must be used in a principal, primary, and essential way to facilitate the public worship." *Faith Fellowship Ministries, Inc. v. Limbach*, 32 Ohio St.3d 432, 513 N.E.2d 1340 (1987).

The Board's finding that CVCO's "activities that occur on the subject property do not rise to the level" necessary to meet R.C. 5709.07(A)(2)'s "exclusive use" requirements is not "draconian" or "narrow-minded," as CVCO claims; rather it is in line with the well-settled standard in Ohio case law and the principle that exemptions are to be strictly construed against the exemption. Decision at 4; Appellant's brief at 8. The substance of R.C. 5709.07 has been

the law of Ohio since at least 1874, when the Ohio Supreme Court analyzed the constitutional exemption for “houses used exclusively for public worship” in *Gerke*, 25 Ohio St. at 247-249. Ohio Constitution, Article XII, Section 2; Revised Statutes § 2732. In *Gerke*, the Court stated that the exemption is meant to be applicable to the “church edifice” or to “places of public worship.” *Gerke* at 249. The Court held:

[T]here is a marked distinction between property appropriated for the support of public worship, and that which is appropriated as a place of public worship. The exemptions authorized are not of such houses as may be used for the *support* of public worship, but of houses *used exclusively* as *places* of public worship.

Gerke at paragraph ten of the syllabus. (Emphasis added.) The Court also stated that a “congregation” or “other persons are necessary” in order for “public worship” to take place. *Gerke* at 248. In *Watterson*, the Court described “places of public worship” as places where “[t]he religious rites and ordinances of the church organization are celebrated or observed.” *Watterson*, 77 Ohio St. at 172. See *Faith Fellowship Ministries v. Limbach*, 32 Ohio St. 3d 432, 437, 513 N.E.2d 1340 (1987). The Court also stated “[i]t was evidently intended that [the] word [exclusively] should be given special consideration when the right to exemption of property is presented for decision.” *Id.* at 173.

The question is whether CVCO’s 15,600 sq. ft. building and 2.184 acres of land are used “primarily” as a place for “the open and free celebration or observance of the rites and ordinances” of the Christian faith. *Watterson* at 172. CVCO is self-described as being “exclusively a music station.” Tr. 92. Almost all, 97 percent, of the programming aired by CVCO is Christian adult contemporary music. Tr. 182-183. CVCO claims that their “music is ministry,” and that since the music aired is “primarily about Christian themes such as mercy and

forgiveness and the sacrificial atonement of Jesus Christ” this constitutes an act of worship, and that should qualify CVCO’s property as “a place of public worship.” Tr. 91-92; Appellant’s Brief at 11. As evident from the testimony presented at the Board hearing and the floor plan, CVCO “primarily” uses its building to operate its contemporary Christian music radio business through its abundant office space and meeting rooms used by its staff, DJ’s, fund-raising team, community relations team, advertising sales team, marketing, management, etc. Tr. 71-72; ST 15-17. “The offices are used by the employees and volunteers of CVCO exclusively for the purpose of running and managing the day to day operations of the radio stations and associated ministries.” ST 26.

Ohio courts have already considered whether religious themed radio or television stations could qualify for the “house of public worship” exemption. All decisions, except one, held that religious themed radio and television stations are not houses of public worship for tax-exemption purposes. *World Evangelistic Enterprise Corp. v. Tracy*, BTA No. 92-A-158 (May 14, 1993) (reversed *World Evangelistic Enterprise Corp.*, 96 Ohio App.3d 78, 644 N.E.2d 678 (June 29, 1994).); *Christian Television of Ohio, Inc.*, BTA No. 85-E-157; *Jimmy Swaggart Evangelistic Assoc.*, BTA No. 81-F-26 (affirmed *Jimmy Swaggart Evangelistic Assoc.*, 6th Dist. No. WD-82-64; *Operate Evangelize-Youth Mission, Inc.*, BTA No. 79-E-656. The common considerations were that the dominant use of the property was for the operation of the business itself, that there was very little, if any, use of the property for religious services on site, and that there was a no “congregation” or membership of “communicants” assembling regularly for worship. *Operate Evangelize-Youth Mission, Inc.*, BTA No. 79-E-656, at *8 (Board held that recording studio for cassette and radio programs was the dominant use of the property, not use

for religious services.); *Jimmy Swaggart Evangelistic Assoc.*, 6th Dist. No. WD-82-64 at *12-13 (Sixth District Court held that a radio station is not an institutional church and broadcasts do not qualify as public worship.); *Christian Television of Ohio*, BTA No. 85-E-157, *9-10 (Board held that actual use of property and design of property was for use as a television station, it was not a place where people assemble to worship together.). Similarly, CVCO primarily uses its property for the operation of its radio business, religious services on the property are minimal, and CVCO itself has no congregation which assembles regularly for public worship.

By its own admission, CVCO is not a “church.” CVCO witnesses’ testimony indicated that a “church” is something distinct and different from CVCO. Pastor Moriarty stated: “One of my services as well is to help people and direct them to a church.” Tr. 93. CVCO has a church finder on its website to help “unchurched” people find “a church home,” “connect to a church,” “a more traditional kind of church entity.” Tr. 94, 104-106. CVCO witnesses acknowledge that its listeners need a traditional church in order to attend worship services and celebrate and observe the rites and ordinances of their religion, aspects of public worship that are not available through CVCO at its broadcasting facility. *Id.*

The religious use of CVCO’s building is not “principal, primary, and essential” to facilitate public worship. *Faith Fellowship*, 32 Ohio ST.3d at 437. A determination as to the taxable status must include an examination of both the quantity and quality of the use for which the property is utilized. *Id.* CVCO has failed to meet its burden with identifying the quantity and quality any public worship use of the subject property, in comparison to the other uses including charitable uses by CVCO and other unrelated organizations. *Id.* “[E]veryday activities of an individual which express devotion to his or her God” are insufficient to meet the public

worship standard. *Id.* at 432. The on-air religious content is limited to a 60-second devotional recorded by Pastor John Moriarty that is aired cyclically throughout the day and Sunday mornings, 9:00am-12:00pm, CVCO airs a syndicated program Keep the Faith where they talk about “different issues, *** life has confront you with, ... how to get through it” with music as well. Tr. 87, 106, 221-222. CVCO does not produce the Keep the Faith program. Tr. 223. There are no church services or formal preaching done on the radio stations. Tr. 184, 148. Pastor Moriarty’s regular praying over requests received via CVCO’s website in the Chapel is more akin to individual prayer, and is at best “merely supportive” of public worship. “The everyday expression of one’s relationship with a supernatural power may be considered by that individual as worship” however it is not “public worship” which this Court has defined as having a formal connotation. *Faith Fellowship* at 432.

The minimal religious usage of the building is limited to the building’s chapel and the lower level assembly rooms. As CVCO described in its exemption application, “[t]he assembly rooms and the Chapel in the building are utilized for public meetings, church services and fundraising efforts of CVCO and other nonprofit organizations such as Faith Mission (Lutheran Social Services), FEMA (Federal Emergency Management Administration) in connection with Central Ohio Emergency Amateur Radio Community Services and Mission of Mercy.” ST 26; HR 81, 96-97. The chapel is used by Pastor Moriarty and any other available CVCO staff members on Mon., Tues., Thurs., and Friday for 15 minutes to pray on the requests received through CVCO’s website. Tr. 88, 103, 217-218, Appellee BTA Ex. A (Response to Interrogatory No. 9). The chapel is also open to the public 8:30 am – 4:45 pm. Tr. 104, 218. CVCO does not hold any regular worship services on the premises, and there is no CVCO

congregation or membership that regularly attends services conducted by CVCO on the premises. Tr. 82, 100. Pastor Moriarty also holds a brief CVCO staff devotional/bible study on Wednesdays at 11:00am, in the format of a brown bag lunch. Tr. 88.

CVCO allows Epic Church, an unrelated third party, to use the building's basement meeting room every Wednesday evening for youth group meetings, and Sunday evenings for discipleship worship services. Tr. 112. CVCO does not charge Epic Church for its use of its facility; however Epic Church does voluntarily tithe a portion of its contributions to CVCO. Tr. 121.

The religious use of the property, detailed above, does not rise to the level of the "primary" or "exclusive" "public worship" use of the property. The Board correctly found that "CVCO's activities do not constitute [public worship] 'the observation of the rites and ordinances of a religious organization' ***but, instead, constitute activities that are generally supportive of Christian religious beliefs." Decision at 4-5; Tr. 55-56. Thus, the Board's finding that CVCO does not operate as a "'house of public worship' on the subject property," and as a result its building does not qualify for the exemption pursuant to R.C. 5709.07(A)(2) was reasonable and lawful and should be affirmed. Decision at 4.

- A. *World Evangelistic Enterprise Corp., 96 Ohio App.3d 78, is both factually distinguishable and contradictory to the Supreme Court's interpretation of the "house of public worship" exemption.*

In *World Evangelistic Enterprise Corp.* the Second District Court of Appeals found that a Christian radio broadcast facility was a "house used exclusively for public worship," holding that the term "house" and the terminology in R.C. 5709.07 "must be construed broadly." 96 Ohio App.3d at 83. Relying upon this holding in *World Evangelistic Enterprise Corp.* CVCO seeks to

have the exemption for “houses of public worship” applied in a much broader way that has never been done before by this Court, claiming that its listening audience is “a religious society” and that “the broadcast and reception of Christian music constitutes a form of public worship.” Appellant’s brief at 10-11. Such a broad interpretation of the exemption claimed by CVCO and held in *World Evangelistic Enterprise Corp.* deviates greatly from the guidance provided by this Court in *Gerke* and *Watterson*, discussed above, and violates the principal that exemptions from taxation should be strictly construed. *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (1952). This Court emphasized that “[i]t was evidently intended that [the] word [exclusively] should be given special consideration when the right to exemption of property is presented for decision.” *Gerke*, 25 Ohio St. at 173. “[T]here is a marked distinction between property appropriated for the support of public worship” which was not authorized to be exempted and property “**appropriated as a place of public worship**” which is what was intended to be exempted. *Gerke* at paragraph ten of the syllabus. (Emphasis added.)

To the extent that CVCO attempts to rely upon *World Evangelistic Enterprise Corp. v. Tracy*, 96 Ohio App.3d 78 the facts in that case are distinguishable from this case. *World Evangelistic Enterprise Corp.* was operating a non-commercial radio station, it was not using its property with a view to profit, it did not sell any commercial advertising, and it was supported strictly by the donations of its listeners in conjunction with contributions of local churches and radio program producers. BTA No. 92-A-158 at *5. Also, *World Evangelistic Enterprise Corp.*’s radio programming contained a significant amount of religious programming content, much more than CVCO. It included a Sunday morning worship service from a church in Chicago, inspirational music, devotional prayers, and youth programs with biblical and spiritual

themes, Bible teaching programs, call-in programs, and activity announcements. 96 Ohio App.3d at 79.

In contrast to the programming described in *World Evangelistic Enterprise Corp.*, CVCO's radio programming content is almost exclusively adult contemporary Christian music. The courts holding in *World Evangelistic Enterprise Corp.* does not support CVCO's claim that Christian music constitutes a form of public worship. In addition, CVCO erroneously claims through self-serving testimony alone, that 60 percent of its listeners are individuals who use religious radio broadcast because they cannot attend religious services in a traditional church, based upon a study done by George Barna of Christian listening audiences in cities similar in size to "ours." Tr. 93, 188.

Proposition of Law No. 3:

CVCO's operation of its radio business, on the subject property, as a commercial enterprise, evidenced by the production of \$7.75 million from the sale of commercial advertising, over four years, defeats exemption as a house "used exclusively for public worship" "without a view to profit" pursuant to R.C. 5709.07(A)(2).

In addition to not being exempt as being used exclusively as a "house of public worship," CVCO's property cannot qualify for exemption because it is being used with a "view to profit." The Board properly held that "even if CVCO's activities relating to its broadcasts and other activities could be considered exclusive use for public worship,** its sale of on-air advertising, which primarily funds CVCO's business, is not an exclusive use for public worship, but part of a commercial radio enterprise's operations." Decision at 5 (citing Appellee's BTA Ex. B). CVCO's main source of income and support for its operations is generated from the sale of air time sold to commercial advertisers, on its commercial radio station, 104.9 FM and underwriters, on its non-commercial station 89.3 FM. Appellee's BTA Ex. B.

The Court has repeatedly held that “a profit motive may be reflected by the accumulation of a surplus.” *Woodland Gardens Apts., Inc. v. Porterfield*, 16 Ohio St. 56, 57 (1968); *The Lutheran Book Shop v. Bowers*, 164 Ohio St. 359, 131 N.E.2d 219 (1955); *American Jersey Cattle Club v. Glander*, 152 Ohio St. 506 (1950). The Court has also held that a non-profit 501(c)(3) corporation does not qualify for real property exemption if it is “operate[d] as a commercial enterprise” with a view to profit. *Lutheran Book Shop*, 164 Ohio at 361. In *The Lutheran Book Shop*, the Court held:

The fact that a corporation is one not for profit does not mean that its 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.*

In *Jimmy Swaggart Evangelistic Association*, BTA No. 81-F-26, the Board held that the religious radio station that sold air time at a profit of approximately \$200,000 annually could not qualify for exemption because it was being operated as a “commercial enterprise” “with a view to profit.” *Jimmy Swaggart* at *9. “We do not see how a non-profit radio station that sells air-time *** is entitled to exemption any more than a for-profit one, which might do exactly the same thing.” *Id.* at *10. See also *Christian Television of Ohio*, BTA No. 85-E-157 at *4 (denying exemption to television station that sold commercial advertising). *World Evangelistic Enterprise Corp.*, which was granted exemption by the second appellant district, did not sell air time and was a noncommercial radio station. BTA No. 92-A-158 at *5 (“It is noted that WEEC is supported strictly by donations of its listeners in conjunction with contributions of local churches and radio program producers.”). In addition, the Board and Supreme Court have repeatedly held that the use of proceeds to support charitable or religious activities does not cure the “view to

profit” use of the property. “The rule is well established *** that it is the use of the property and not the use of the proceeds *** which is determinative of the question of tax exemption.” *Columbus Youth League v. County Board of Revision*, 172 Ohio St. 156, 158, 174 N.E.2d 110 (1961) (citing *Benjamin Rose Institute v. Myers Treas.*, 92 Ohio St. 252, 266, 110 N.E. 924 (1916)); *Lutheran Book Shop*, 164 Ohio St. 359; *Incorporated Trustees of the Gospel Worker Society v. Evatt*, 140 St. 185, 42 N.E.2d 900 (1942).

CVCO, despite being a non-profit 501(c)(3) corporation, is operating a radio business “as a commercial enterprise” that is producing a significant amount of income from its commercial sale of on-air advertisements. Two-thirds of CVCO’s support is derived from the sale of advertising/underwriting, one-third is from contributions. Tr. 60. Over a four year period, CVCO sold more than \$7.75 million worth of commercial advertising time on the radio station operated on the property. Appellee BTA Ex. B, Fin. Stmts. at 3, HR 23. The sale of advertising is its main source of income. HR 60. CVCO also produces income from the rental of its radio towers for advertising (2008: \$46,335, 2009: \$31,083, 2010: \$14,598, 2011: \$7,051). HR 22, 61-62; Appellee BTA Ex. C 990s 2008-2001, PartVII Stmt. of Rev.; Appellee BTA Ex. B, Fin. Stmts. at 3. Even though CVCO is recognized as tax exempt by the IRS, it is required to and has been filing 990T income tax returns for its unrelated business income from advertising sales, rental income, sales of property owned, and sales of an advertising book, the Shepherd’s Guide, in 2008. Appellee BTA Ex. C, 990s 2008-2011, PartVII Stmt. of Rev., 990Ts 2009-2011; Appellee BTA Ex. B, Fin. Stmts. at 3; HR 22, 38-40. CVCO is producing a significant income from its for-profit activities, it has devoted significant square footage of building space to

marketing efforts, and as a result it is using the property to operate its commercial radio enterprise and using the property “with a view to profit” defeating its eligibility for exemption.

Proposition of Law No. 4:

The doctrine of collateral estoppel does not apply when different tax years and different property are at issue. A new determination of the exempt status of real property, contrary to a determination of that issue in a prior tax year, does not constitute the “same issue” for purposes of collateral estoppel. The real property exemption application at issue must be evaluated with the instant facts under the current statutory and case law standards. Hubbard Press v. Tracy, 67 Ohio St.3d 564 (1993).

CVCO’s claim that the doctrine of collateral estoppel was violated when the property at issue was not exempted, when its previous location in previous tax years was exempted, is erroneous. It was reasonable and lawful for the Board to hold that the doctrine was not violated by holding that CVCO’s exemption granted at its previous location, for previous tax years, was irrelevant for determining whether the denial of exemption for its current property was proper. Decision at 3.

“The basic elements that must exist before the doctrine [of collateral estoppel] can be applied *** are: (1) an administrative proceeding of a judicial nature, (2) an identity of the parties, and (3) an identity of the issues.” *Hubbard Press v. Tracy*, 67 Ohio St.3d 564, 565, 621 N.E.2d 396 (1993) (quoting *Am. Soc. for Metals v. Limbach*, 59 Ohio St.3d 38, 39, 569 N.E.2d 1065 (1991)). The Ohio Supreme Court has only “acknowledged a narrow range of applicability for the doctrine of collateral estoppel in tax proceedings.” *Olmsted Falls Bd. of Educ. v. Cuyahoga County Bd. of Rev.*, 122 Ohio St.3d 134, 2009-Ohio-2461, ¶ 17, 909 N.E.2d 597. The United State Supreme Court and Ohio Supreme Court have consistently held that when different tax years are involved the doctrine of collateral estoppel does not apply. *Limbach v.*

Hooven & Allison, 466 U.S. 353, 362, 104 S.Ct. 1837, 80 L.Ed.2d 356 (1984) (U.S. Supreme Court held that the Ohio Tax Commissioner was not collaterally estopped from assessing personal property taxes since different tax years were at issue from the earlier case.); *Hubbard Press*, 67 Ohio St.3d at 565 (Collateral estoppel does not apply and there is no identity of issues when different tax years are involved.). The U.S. Supreme Court held that “[a]n earlier decision of the Board of Tax Appeals involving the same facts, questions, and parties, but different tax years, was not conclusive under the collateral-estoppel doctrine.” *Limbach v. Hooven & Allison* at 354 (citing *Commr. of Internal Revenue v. Sunnen*, 333 U.S. 591, 68 S.Ct. 715 (1984)).

A taxpayer is not entitled to exemption on the basis that it was previously granted an exemption to a separate property for a different time period. *Hubbard Press* at 565. In addition, “[t]he fact that property has previously been granted an exemption is not evidence that it is entitled to a continued exemption.” R.C. 5715.271. See R.C. 5713.08. The Court stated in *Hubbard Press*: “the issue now before us involves [the current] tax year ***, and whatever proceeding took place in the [earlier] hearing did not concern [the current] tax year ***.” 67 Ohio St.3d at 565. Similarly, in *World Evangelistic Enterprise Corp.*, the radio station claimed that it should qualify for exemption because its former property was exempt. *World Evangelistic Enterprise Corp. v. Tracy*, BTA No. 92-A-158 (May 14, 1993). The Board held that it “is required to base an exemption determination on the use of the property during the tax lien year, and not previous years.” *Id.* at *7-8 (citing *Columbus Youth League v. County Bd. of Rev.*, 172 Ohio St. 156, 158, 174 N.E.2d 110 (1961)).

In this appeal, not only are different tax years involved from CVCO’s previous grant of exemption, the property for which exemption is being sought is different as well. Different

property, a different time period, necessitates a different set of facts and circumstances considered when determining the previous grant of exemption. CVCO was not privy to the conclusions that the Commissioner made in regard to the testimony and evidence in the previous consideration of exemption. Tr. 212-213.

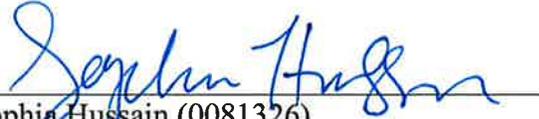
CVCO claims that its “business, operations, and format did not change once it moved from New Albany to Gahanna, Ohio.” However, there is no evidence in the record to support this, except a few self-serving statements. In fact, Daniel Baughman’s, CVCO President and CEO, testimony contradicts this claim. Mr. Boughman, stated that CVCO in its earlier years was solely listener supported and did not sell commercial advertising; indicating that CVCO’s operation may have been viewed as operating without a “view to profit” making exemption more favorable. Also, Todd Stach, Chief Creative Officer, testified that WCVO successfully changed their operations in order to increase their audience from 33,000 in 2000 to 225,000 in 2014. Tr. 186. CVCO’s claims of collateral estoppel are erroneous; the Board’s finding that the doctrine of collateral estoppel was not violated was reasonable and lawful and should be affirmed.

Conclusion

For all the above reasons, the Court should affirm the decision of the Board affirming the Tax Commissioner’s final determination, finding that the CVCO does not operate as a “house of public worship” on the subject property.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the forgoing Merit Brief of Appellee Tax Commissioner was Ohio was served upon the following by regular U.S. Mail on this 24 day of February, 2015:

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