ORIGINAL

IN THE SUPREME COURT OF OHIO

250 Shoup Mill, LLC, Appellant, v. Joseph W. Testa, Tax Commissioner of Ohio, Appellee.	:	15-0340 On Appeal from Ohio Board of Tax Appeals Ohio Board of Tax Appeals Case No. 2011-2226

NOTICE OF APPEAL OF APPELLANT 250 SHOUP MILL, LLC

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FILED
FEB 26 2015
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Appeal of Appellant 250 Shoup Mill, LLC

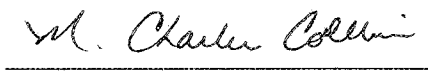
Appellant 250 Shoup Mill, LLC hereby gives notice of appeal to the Supreme Court of Ohio from the Decision and Order of the Ohio Board of Tax Appeals entered in Ohio Board of Tax Appeals case No. 2011-2226 on January 27, 2015. A copy of the decision being appealed is attached hereto.

Appellant sets forth the following claimed errors:

1. The BTA erred in finding that the lease of the property in question is "with a view to profit" and therefore not entitled to exemption under R.C. 5709.07(A)(1).
2. The BTA erred in finding that the property in question is not entitled to exemption under R.C. 5709.12 because appellant does not use the property in question for charitable purposes or R.C. 5709.121 because the property in question does not belong to a charitable or educational institution.

Respectfully submitted,

EASTMAN & SMITH LTD.



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Certificate of Service

I certify that a copy of this **Notice of Appeal** was sent by certified mail to counsel for appellee, Melissa W. Baldwin, Assistant Attorney General, Office of Ohio Attorney General, 30 East Broad Street, 25th Floor, Columbus, OH 43215, on February 25, 2015.

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250 SHOUP MILL, LLC

OHIO BOARD OF TAX APPEALS

250 SHOUP MILL, LLC, (et. al.),

Appellant(s),

vs.

JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO, (et. al.),

Appellee(s).

CASE NO(S). 2011-2226

(EXEMPTION)

DECISION AND ORDER

APPEARANCES:

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Entered Tuesday, January 27, 2015

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

Appellant appeals a final determination of the Tax Commissioner wherein he denied exemption from real property taxation of certain real property, i.e., parcel number E20 01008 0057, located in Montgomery County, Ohio, for tax year 2010. 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, and the parties' written legal argument.

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.

The building located on the subject parcel is used as a charter school operating under R.C. Chapter 3314 by Horizon Science Academy-Dayton High School, Inc. As explained at this board's hearing, the building is

leased to Horizon by the appellant, a title-holding entity, which is solely owned by New Plan Learning, Inc. ("New Plan"). Murat Arabaci, president of New Plan, explained that it is a nonprofit, 501(c)(3) organization that assists charter schools in finding and financing suitable facilities, and that its directors are elected and approved by its charter school tenants, including Horizon Science Academy, Inc., and four other charter schools. Mr. Arabaci further explained that the property is leased at a rate expected to cover the mortgage payments, construction costs, soft costs, debt service coverage ratio, and operating expenses.

Appellant applied for exemption under R.C. 5709.121, which generally provides for exemption of property used for charitable purposes. The commissioner addressed exemption under both R.C. 5709.12 and R.C. 5709.121, which are related, see *Cincinnati Community Kollel v. Testa*, 135 Ohio St.3d 219, 2013-Ohio-396, ¶23, as well as R.C. 5709.07(A)(1) in the final determination. On appeal, appellant argues that the property is exempt under all these sections. While appellant also asserts in its notice of appeal that the property is exempt under R.C. 3314.082, such argument was not raised in the proceedings below and therefore this board lacks jurisdiction to consider exemption under that section. See, e.g., *St. Mark Coptic Orthodox Church v. Testa* (Interim Order, June 13, 2013), BTA No. 2011-Q-1330, unreported.

We first address exemption under the "charitable use" sections – R.C. 5709.12 and R.C. 5709.121. "[P]ursuant to R.C. 5709.12(B), 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 property in order to be exempt from taxation." *Cincinnati Community Kollel v. Testa*, 135 Ohio St.3d 219, 2013-Ohio-396, ¶23. R.C. 5709.121(A) provides that "[r]eal property *** belonging to a charitable or educational institution *** shall be considered as used exclusively for charitable or public purposes by such institution *** if***:

> "(1) It is used by such institution, the state, or political subdivision, or by one or more other such institutions, the state, or political subdivisions under a lease, sublease, or other contractual arrangement:
>
> "***
>
> "(b) For other charitable, educational, or public purposes.
>
> "(2) It is made available under the direction and control of such institution, the state, or political subdivision for use in furtherance of or incidental to its charitable, educational, or public purposes and not with a view to profit."

The Supreme Court has broadly defined "charity" in *Planned Parenthood Assn. v. Tax Commr.* (1966), 5 Ohio St.2d 117, as follows:

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

At the outset, we find that the property is not entitled to exemption under R.C. 5709.12, as the owner (appellant) does not use the property for charitable purposes. Appellant's sole use of the property is to hold the property and lease it to Horizon. Such use is not charitable. See *Chagrin Realty, Inc. v. Testa* (Apr. 29, 2014), BTA No. 2011-2523, unreported.

We further find that the property is not entitled to exemption under R.C. 5709.121, as the property does not belong to a charitable or educational institution. While appellant argues that it is an "educational

institution," it is clear that appellant exists merely to hold title to the property and provide a vehicle for New Plan to assist Horizon in meeting its facility needs. Moreover, appellant's status as a nonprofit organization is not dispositive in the determination of whether it is a charitable institution under R.C. 5709.121. See *Dialysis Clinic, Inc. v. Levin*, 127 Ohio St.3d 215, 2010-Ohio-5071, at ¶25. Appellant therefore does not meet the requisite requirement of R.C. 5709.121 that the property belong to a charitable or educational institution.

We next turn to exemption under R.C. 5709.07(A)(1), which, prior to it being revised in 2011, provided for exemption of "[p]ublic schoolhouses, ***, and the ground attached to them necessary for the proper occupancy, use, and enjoyment of the schoolhouses, and not leased or otherwise used with a view to profit." The commissioner denied exemption under this section, citing *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, and explaining that "the lessee, a non-profit corporation, is operating a charter school on the subject property, while the appellant, whether non-profit or for-profit, is primarily acting as a landlord collecting substantial market-rate rent. *** Therefore, the applicant clearly has entered into the lease for the subject property as an investment and with a view to profit."

The commissioner cites *Anderson/Maltbie Partnership*, supra, as dispositive in this matter. In that case, the Supreme Court found that a for-profit partnership that leased property to an Ohio community school was not entitled to tax exemption based on the school's use of the property, because the school occupied the property under a commercial, for-profit lease. In doing so, it relied on its previous decision in *Gerke v. Purcell* (1874), 25 Ohio St. 229, where it stated that "the 'exclusion of all idea of private gain or profit' constitutes a basic condition that private property must satisfy to qualify for this exemption." *Anderson/Maltbie*, supra, at ¶20 (citing *Gerke*, supra, at 247). The appellant in this matter argues that *Anderson/Maltbie* is distinguishable, because the lessor in that case was clearly a for-profit entity that entered into the lease solely for profit. Here, appellant argues, because 250 Shoup Mill, LLC and New Plan are both nonprofit entities, it is clear that no profit can be made from leasing the subject properties.

Upon review of the record in this matter, we find that, while any excess of rental income over expenses is not distributed to any private for-profit entities or individuals, New Plan, through distributions from its title-holding entities, does profit from its leases. While it appears to use the profits to subsidize the operations of other tenant charter schools, it is not the use of any profits that determines the exempt status of the subject properties. See, e.g., *Hubbard Press v. Tracy* (1993), 67 Ohio St.3d 564, 566. It does not appear that any excess revenues from a single charter school are held for the future benefit of that certain school; instead, it appears that excess revenues are distributed among all of New Plan's tenant schools. We therefore find that the lease of the property is "with a view to profit" and, accordingly, the properties are not entitled to exemption under R.C. 5709.07(A)(1) for tax year 2010.

Based upon the foregoing, we find that appellant has failed to sufficiently prove that the commissioner's final determination was in error. Therefore, the final determination must be, and hereby is, affirmed.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Williamson		
Mr. Johrendt		
Mr. Harbarger		

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.

Kathleen M. Crowley, Board Secretary