OHIO BOARD OF TAX APPEALS

National Steelworkers Oldtimers Community Urban Development Company,	)	CASE NOS. 2006-H-728 2006-H-729
Appellant,	)	(REAL PROPERTY TAX EXEMPTION)
vs.	)	DECISION AND ORDER
William W. Wilkins, Tax Commissioner of Ohio,	)	Appeal Filed Feb. 13, 2009 Stark County Court of Appeals Nos. 2009CA00023 & 2009CA00024
Appellee.	)	

APPEARANCES:

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Entered January 20, 2009

Ms. Margulies, Mr. Eberhart, and Mr. Dunlap concur.

This matter is before the Board of Tax Appeals upon notices of appeal filed by appellant National Steelworkers Oldtimers Community Urban Development Company ("National"). Appellant appeals from final determinations of the Tax Commissioner, in which the commissioner denied National's applications for exemption of real property from taxation for tax year 2002, and remission of penalties

for 1999, 2000 and 2001.[1] National argues the subject properties are owned by an institution and used exclusively for charitable purposes and that the Tax Commissioner erred in finding that the subject properties were not entitled to exemption pursuant to R.C. 5709.12, R.C. 5709.121, and Section 16, Article VIII of the Ohio Constitution.[2] For the following reasons, we find National's properties are not entitled to tax exemption.

This matter is submitted to the board on the appellant's notices of appeal, the statutory transcripts ("S.T."), the record of the hearing before this board ("H.R."), including exhibits, and the briefs of counsel.

In his final determinations, the Tax Commissioner summarized the facts of the instant matters as follows:

> "Even though [Appellant] states that it provides services to some of its residents in the nature of assisting with some daily needs, the property remains an unlicensed independent living facility operated in connection with

[1] While the appellant's notices of appeal name the same entity, the attached final determinations of the Tax Commissioner concern two distinct corporate entities that own separate properties (collectively "National entities"). National Steelworkers Oldtimers Community Urban Development Company of Canton Two, Inc. owns parcel number 02-45630, which the record refers to as Mayfield Manor II and is found in our case number 2006-H-728. National Steelworkers Oldtimers Community Urban Redevelopment Company of Canton, Inc. owns parcel number 02-46813, which the record refers to as Mayfield Manor I and is found in our case number 2006-H-729.

[2] To the extent that appellant questions the constitutionality of the Tax Commissioner's actions, this board, as an administrative agency, is without jurisdiction to consider such claims and is instead to act as a "receiver of evidence for constitutional challenges." *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, 197-198. See, also, *S.S. Kresge v. Bowers* (1960), 170 Ohio St. 405; *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229. Additionally, appellant specified two alleged errors regarding the commissioner's jurisdiction over community reinvestment area property and the exemption requirements for urban redevelopment corporations. Appellant's notice of appeal at 4 and 5 in our case number 2006-H-729. However, we find no support in the record for these alleged errors that were raised but then not argued before this board. Consequently, we find appellant has failed to meet its burden of proof regarding these two alleged errors.

> federal Housing and Urban Development ('HUD') programs.
>
> ***.
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> [Appellant] is requesting exemption for property owned by a nonprofit organization used to provide low-cost housing to elderly tenants and handicapped adults over eighteen years of age. The property, referred to as Mayfield Manor I, has a six-story apartment building located on more than two acres of land. There are 144 one bedroom apartments in the building. [*** Mayfield Manor II has an eight-story apartment building located on approximately two acres of land. There are 66 one-bedroom apartments in the building.] There is a service coordinator located on the premises. Upon request from the residents, the service coordinator provides support and assistance with obtaining housecleaning services, medical insurance paperwork, and prescription medication needs. [Appellant] also provides access to entertainment and social activities for the residents. [Appellant] receives subsidies from the Department of Housing and Urban Development." S.T. at 1-2.

The testimony presented by appellant's witnesses is consistent with the facts as stated by the commissioner. H.R. at 32-33, 40-42. At hearing before this board, appellant presented the testimony of Patricia Kohnke, director of field operations for Elderly Housing Development and Operations Corporation (EHDOC); Cynthia Jean Franz, a resident at Mayfield Manor I; Candace Fontes, the manager of the subject properties; Uris Liburd, a budget specialist and assistant accounting supervisor at EHDOC; and Stephen Wood, a certified public accountant. The appellee Tax Commissioner did not present any witnesses.

Patricia Kohnke testified that as director of field operations for EHDOC, a non-profit corporation, she oversees the operations of the subject properties.[3] H.R. at 19, 75, 185. EHDOC manages 45 similar low-income senior housing properties nationwide, while its agents serve as the majority of directors on the boards of the various non-profit corporate entities that own the properties. H.R. at 19-20, 42, 75-80; appellant's Exs. 3. Kohnke testified that EHDOC arranges the financing for construction of apartment buildings through loan agreements with the federal government's Department of Housing and Urban Development ("HUD") and its sponsored entities, which provide "seed money" and enter into subsidy arrangements with HUD to provide low-income housing to senior citizens and disabled adults. H.R. at 33, 81, 83; appellant's Exs. 7 at 7, 23. EHDOC is able to charge a fee for its management services. H.R. at 218. At the subject properties, Kohnke testified that HUD sets the market rent amount that EHDOC can receive for each unit, with tenants paying thirty percent of their income and HUD paying the balance. H.R. at 104-105. Tenants can be evicted for non-payment of rent, although Kohnke testified that has never occurred. H.R. at 102; appellant's Exs. 5.

Kohnke stated that EHDOC's mission is to "build, develop and manage quality senior housing with support services in place to keep people aging in place as long as possible." H.R. at 75. By staffing its properties with a service coordinator, Kohnke testified that EHDOC provides a benefit for its low-income residents akin to

[3] EHDOC is formerly known as National Council of Senior Citizens Housing Management Corporation, which was part of the National Council of Senior Citizens. H.R. at 75-76, 78.

an assisted living facility that would normally cost $2,000 to $3,000 per month. H.R. at 55; appellant's Exs. 12. The coordinators offer the residents support services by contacting various providers, such as Meals-on-Wheels, taxi companies, pharmacies, medical professionals, beauticians, and exercise trainers. H.R. at 40-41, 58, 145-150; appellant's Exs. 12, 13. They also assist tenants with personal finance issues, personal hygiene, apartment maintenance, and arranging social activities. Id. Through these various tenant contacts, the coordinators monitor the residents and offer assistance before problems escalate. H.R. at 60. Kohnke testified that the coordinators' daily interaction with residents provides an intangible benefit, comparable to "a surrogate family." H.R. at 47-48. She explained that by extending the time senior residents are able to live independently, EHDOC not only serves the needs of its tenants, but is able to keep low-income residents out of nursing homes, thereby deferring those much higher costs that would otherwise be borne by states and the federal government. H.R. at 55.

Cynthia Jean Franz, a resident at Mayfield Manor I, testified that she finds the living conditions much better at her current apartment than the public housing where she previously resided. H.R. at 117. She partially attributes this improved standard of living to the service coordinator, who has helped her to arrange grief counseling and to obtain medication and food. H.R. at 111.

Stephen Wood, a certified public accountant, testified that he has conducted annual HUD-required audits of the National entities for nine years. H.R. at 183-184; appellant's Exs. 6-10. Wood testified that EHDOC and the National entities

are not-for-profit corporations that have been granted an exemption from federal income tax pursuant to section 501(c)(3) of the Internal Revenue Code and receive no tax shelter benefit from the subject properties. H.R. at 185, 192-193. See also S.T. at appellant's Ex. 3 in case number 2006-H-728 and appellant's Ex. 4 in case number 2006-H-729. Finally, Wood also testified that while EHDOC charges a fee for its management services, the National entities have accrued portions of that expense. H.R. at 224-225; appellant's Exs. 7 at 7.

We begin our review by observing that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121, 123. Consequently, it is incumbent upon a taxpayer challenging a determination of the Tax Commissioner to rebut that presumption. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135, 143; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138, 142. Moreover, 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, 215. When no competent and/or probative evidence is developed and properly presented to the board to establish that the commissioner's determination is "clearly unreasonable or unlawful," the determination is presumed to be correct. *Alcan Aluminum*, at 123.

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.

American Society for Metals v. Limbach (1991), 59 Ohio St.3d 38, 40; *Faith Fellowship Ministries, Inc. v. Limbach* (1987), 32 Ohio St.3d 432; *White Cross Hospital Assn. v. Bd. of Tax Appeals* (1974), 38 Ohio St.2d 199; *Goldman v. Robert E. Bentley Post* (1952), 158 Ohio St. 205; *Natl. Tube Co. v. Glander* (1952), 157 Ohio St. 407; and *Willys-Overland Motors, Inc. v. Evatt* (1943), 141 Ohio St. 402.

In its applications for exemption, the National entities claim that the subject properties are exempt from taxation pursuant to R.C. 5709.12 and R.C. 5709.121. Under R.C. 5709.12(A), an independent living facility is defined to mean "***any residential housing facilities and related property that are not a nursing home, residential care facility, or adult care facility as defined in division (A) of section 5701.13 of the Revised Code." Under R.C. 5709.12(B), all "[r]eal and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation ***. *** All property owned and used by a nonprofit organization exclusively for a home for the aged, as defined in section 5701.13 of the Revised Code, also shall be exempt from taxation." Finally, under R.C. 5709.12(C)(1), "***independent living facilities and the lands connected with them *are not exempt from taxation*." (Emphasis added.).

The National entities are not seeking an exemption pursuant to the qualifications contained within R.C. 5701.13 as a "home for the aged," i.e., a licensed nursing home, residential care facility, or adult care facility, recognizing they are not in compliance with that statute. The record, in fact, contains no evidence to indicate the

subject properties are licensed facilities.[4] Appellant's brief at 11. Therefore, we must concur with the commissioner's finding that the subject properties are independent living facilities, pursuant to R.C. 5709.12(A), and, as such, that use has been explicitly precluded from exemption. S.T. at 5; R.C. 5709.12(C)(1) ("*** independent living facilities and the lands connected with them are not exempt from taxation."). Although we find the National entities do not qualify for exemption as independent living facilities, we must next determine whether they qualify under R.C. 5709.12(B) or R.C. 5709.121.

To grant an exemption under R.C. 5709.12(B), it must first be determined that (1) the property belongs to an institution, and (2) the property is being used exclusively for charitable purposes. *Highland Park Owners, Inc. v. Tracy* (1994), 71 Ohio St.3d 405, 406-407.

Moreover, if an institution is found to be "charitable," it can then be held to a more relaxed standard of "exclusive charitable use" found in R.C. 5709.121. That statute provides:

> "Real property and tangible personal property belonging to a charitable *** institution *** shall be considered as used exclusively for charitable *** purposes by such institution, *** if it meets one of the following requirements:
>
> "(A) It is used by such institution, *** or by one or more other such institutions, the state, or political subdivisions under a lease, sublease, or other contractual arrangement:

[4] National asserts that its use of the properties entails more than just the provision of elderly housing since the properties accept disabled adult tenants age 18 and older, with 25 percent of the 215 residents identified as disabled. Appellant's Exs. 11. We note that the record is inconclusive as to how many, if any, of these residents were between the ages of 18 and 62.

> "(1) As a community or area center in which presentations in music, dramatics, the arts, and related fields are made in order to foster public interest and education there;
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> "(2) For other charitable, educational, or public purposes;
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> "(B) It is made available under the direction or control of such institution, *** for use in furtherance of or incidental to its *** charitable *** purposes and not with a view to profit."

Thus, in deciding whether property is exempt under the charitable use provisions of R.C. 5709.12(B) and 5709.121, the first determination is whether a charitable or noncharitable institution is seeking exemption. If the institution is noncharitable, its property may be exempt if it uses the property exclusively for charitable purposes. *Highland Park Owners, Inc.*, supra. If the institution is charitable, its property may be exempt if it uses the property exclusively for charitable purposes or it uses the property under the terms set forth in R.C. 5709.121. *Olmsted Falls Bd. of Edn. v. Tracy* (1997), 77 Ohio St.3d 393, 396; *Episcopal Parish v. Kinney* (1979), 58 Ohio St.2d 199; *White Cross Hosp. Assn. v. Bd. of Tax Appeals* (1974), 38 Ohio St.2d 199. See, also, *Cincinnati Nature Center v. Bd. of Tax Appeals* (1976), 48 Ohio St.2d 122, 125 (To determine whether property is exempt in accordance with R.C. 5709.121, "property must [1] be under the direction or control of a charitable institution or state or political subdivision, [2] be otherwise made available 'for use in furtherance of or incidental to' the institution's 'charitable *** or public purposes,' and [3] not be made available with a view to profit.").

While the General Assembly has not defined what activities of an institution constitute charitable purposes, the Supreme Court of Ohio held in *Planned Parenthood Assn. of Columbus, Inc. v. Tax Commr.* (1966), 5 Ohio St.2d 117, paragraph one of the syllabus, that:

> "[I]n 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, of gain or profit by the donor or by the instrumentality of the charity."

Furthermore, the phrase "used exclusively" has been interpreted by the court to mean primary use. *True Christian Evangelism v. Zaino* (2001), 91 Ohio St.3d 117, 118. "Whether an institution renders sufficient services to persons who are unable to afford them to be considered as making charitable use of property must be determined on the totality of the circumstances ***." *Bethesda Healthcare, Inc.,* 101 Ohio St.3d 420, 2004-Ohio-1749, at 39.

In the present matters, we first find that the National entities are not the type of institutions permitted the broader definition of "exclusive charitable use" found under R.C. 5709.121, where the threshold requirement is that the property owner be a charitable or educational institution, state or political subdivision. *True Christianity Evangelism* (1999), 87 Ohio St. 3d 48, 50. Although the record indicates that the National entities are not-for-profit corporations that may operate the subject properties without a view to profit, the entities own apartment buildings and receive market rent

from tenants. H.R. at 104-105. In *Rehab Project v. Tracy* (May 23, 1997), BTA No. 1995-R-418, unreported, which involved "rehabbed" properties that were leased for purchase under an equity-lease program to low-income tenants, this board stated:

> "Although Rehab Project is a not-for-profit institution, that alone does not make it a charitable one. Despite the admirable purpose of Rehab's efforts, the fact remains that the organization is not engaged in a charitable activity, that is, building, selling, and leasing low income housing. Rehab Project performs the same function and uses the subject property in the same way as a commercial, for profit entity; that is, the purchase and rehabilitation of real property for resale. Furthermore, Rehab has an extensive leasing program, for which it exacts market rents."
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> ***
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> "The primary use of the subject property by Rehab was, and remains, residential housing. Residential housing, even for low income individuals, is not a charitable purpose."

The same can be said about the National entities. While non-profit organizations, the primary purpose of these entities is to provide subsidized housing for which they receive rent, comparable to commercial, for-profit entities. Accordingly, we find that the National entities do not qualify as charitable institutions for purposes of making an exemption determination under R.C. 5709.121.

Even though we find the National entities to be noncharitable institutions, their property could be exempt if used exclusively for charitable purposes. *Highland Park Owners, Inc.*, supra. However, the Supreme Court has consistently held that real property rented and used purely for private residential purposes is not entitled to an exemption under R.C. 5709.12(B). In *Philada Home Fund v. Bd. of Tax*

Appeals (1966), 5 Ohio St.2d 135, despite finding a charitable purpose, the court went on to hold that "[t]he only use of this property is for private residential housing. A long line of Ohio cases hold that property partly or incidentally used for private residence is nonexempt as not used exclusively for charitable purposes." Later, in *National Church Residences* v. *Lindley* (1985), 18 Ohio St.3d 53, which approved *Philada*, at 55, the court held "the furnishing of low-cost housing at or below market prices, where residents pay a part or all of their rental costs, is not, in and of itself, an exclusive use of the property for charitable purposes."

The court in *National Church Residences* also rejected a "services exception" that had been established previously in *Carmelite Sisters, St. Rita's Home v. Bd. of Review* (1969), 18 Ohio St.2d 41, where exemption was granted based on additional services provided to elderly tenants beyond those traditionally provided to apartment residents. In rejecting the services exception, the court relied on the criteria for the provision of senior housing required by subsequently enacted R.C. 5701.13 and the vicarious nature of the services provided to residents. See, also, *Cogswell Hall v. Kinney* (1987), 30 Ohio St.3d 43 (property rented to elderly women at rates that cover less than half of the maintenance costs held taxable); *Oikos Community Dev. Corp. v. Zaino* (Nov. 9, 2001), BTA No. 2000-T-2037, unreported (finding a 501(c)(3) tax-exempt charitable organization's renting of multi-family properties to low-income tenants was not an exclusive use for charitable purposes and did not qualify for tax exempt status).

Based on the foregoing case law and statutory requirements, we find the subject properties are not eligible for exemption by solely providing subsidized housing to handicapped adults and elderly tenants. National argues, however, that it fulfills the entities' charitable mission and distinguishes itself from other housing providers with the services provided by the on-site coordinators. Appellant's brief at 10-11. For the following reasons, we find the provision of service coordinators at the subject properties does not demonstrate the properties are being used exclusively for charitable purposes.

We agree with National that the staff at the subject properties not only provides the traditional administrative and maintenance/repair services that any apartment complex would offer, but it also coordinates services between the tenants and social service providers that support the tenants in their goal to live independently. H.R. at 40-41; appellant's Exs. 12, 13. Nevertheless, we find that many of these services are provided by third parties and can be characterized as vicariously charitable in nature, as in *National Church Residences*, supra ("Suffice it to say that any charitable activities *** were provided by volunteer agents or benevolent organizations, and not by appellants who simply contacted these persons or organizations for the purpose of having them provide services for their residents. In the final analysis, appellants are attempting to obtain a vicarious charitable exemption similar to the theory advanced by the taxpayer and rejected by this court in *OCLC Online Computer Library Center, Inc. v. Kinney* (1984), 11 Ohio St. 3d 198.").

We also acknowledge some of National's tenants receive extra oversight directly from the service coordinators that would not normally be provided in a traditional subsidized housing setting. Appellant's Exs. 12, 13. This includes services such as medication monitoring, individual counseling, and assistance with activities of daily living. H.R. at 40-41, 58, 111, 145-150; appellant's Exs. 12, 13. Yet, again in *National Church Residences*, supra, even where the applicant did not necessarily qualify as a "home for the aged" under R.C. 5701.13, the Ohio Supreme Court rejected tax exemption when the legislature had established specific criteria for that area, citing *Toledo Retirement Living v. Board of Tax Appeals* (1971) 27 Ohio St. 2d 255, syllabus ("The General Assembly has exclusive power to choose the subjects, and to establish the criteria, for exemption from taxation. After the General Assembly has marked a specific use of property for exemption and has established the criteria therefor, the function of the judicial branch is limited to interpreting and applying those criteria. *** [T]o qualify its property for exemption from taxation, an institution which characterizes itself as a public charity, but whose purpose is to provide a 'home for the aged,' must meet the criteria therefor adopted by the General Assembly."). See, also, *Rickenbacker Port Authority v. Limbach* (1992), 64 Ohio St. 3d 628 ("the taxpayer [could not] qualify for exemption under the charitable use statute, since its general language could no longer be construed as applying to property for which specific criteria had been established. Hence, we essentially held in *Toledo Retirement* that a property, to be exempt, must qualify under the criteria of the statute specifically applicable to that property."). In this instance, while the National properties may not

qualify as a "home for the aged," the type of services provided by the service coordinators brings them within the ambit of R.C. 5701.13.[5] As noted above, National concedes it does not meet that statute's requirements.

Finally, this board has previously found a charitable exemption when the use of specific services was an integral requirement for all residents as a condition for admission. See *88/96 LP and Community Housing Network v. Wilkins* (July 20, 2007), BTA No. 2005-A-55, unreported, at 12 (involving property described as "permanent affordable housing linked to a safety net" used to "provide case management services, mental health treatment, drug and alcohol treatment, health services, and those types of services that will help the individuals develop life skills so that they can continue to live in the apartment."); *St. Vincent Hotel, Inc. v. Tracy* (Apr. 25, 1997), BTA No. 1996-K-419, et. seq., unreported (finding property used as part of a general "life skills" program, which provides housing, is entitled to exemption). By contrast, the National entities do not require as a condition for living at the subject properties that its tenants utilize any services. Instead, the extra oversight provided by the service coordinators is simply available for the tenants on request.

Whereas National's intent is admirable, review of the record in this case and the applicable law demonstrates that the properties are not being used exclusively for charitable purposes as set forth in R.C. 5709.12(B). *Highland Park Owners, Inc.*, supra. Thus, the subject properties are not entitled to exemption from taxation.

[5] See R.C. 5701.13(B)(2) ("Exemption from taxation shall be accorded *** only to those homes or parts of homes which meet the standards and provide the services specified in this section.).

Accordingly, it is the decision and order of the Board of Tax Appeals that the Tax Commissioner's final determination must be, and is, affirmed.

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