

OHIO BOARD OF TAX APPEALS

Youngstown Foursquare Church)
(aka Fifth Avenue Community Church)/)
International Church of the Foursquare)
Gospel,)

Appellant,)

vs.)

Thomas M. Zaino,)
Tax Commissioner of Ohio,)

Appellee.)

CASE NO. 99-S-1367

(Exemption)

DECISION AND ORDER

APPEARANCES:

For the Appellant-

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For the Appellee-

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Entered: June 29, 2001

Mr. Johnson, Ms. Jackson, and Ms. Margulies concur.

This appeal is considered by the Board of Tax Appeals pursuant to a notice of appeal filed herein on August 26, 1999. This appeal is from a final determination of the

Tax Commissioner wherein that official denied an exemption from taxation for tax years 1996, 1997 and 1998 for certain real property owned by appellant.

The record reflects that appellant purchased the subject property, located at 1361 Fifth Avenue in Youngstown, Ohio, on December 12, 1996 from Kingdom Ministries, International. The property consists of three parcels and is improved with a church and annex building. At the time of the sale, appellant agreed to allow certain tenants in the building to continue to rent space until the tenants could find alternative accommodations. By way of corporate resolution dated December 31, 1996, appellant agreed to rent a portion of its property to Ballet Western Reserve for \$500 per month beginning September 1, 1996 and ending January 30, 1997. The rental space was to be used as an arts and theater center. In addition, Ballet Western Reserve agreed to pay one-third of appellant's gas and electric costs and one-third of the cost of snow removal during the period in question. Although it is not entirely clear when Ballet Western Reserve vacated the property, it appears this lease was extended at least through January 1998.

In addition, on November 15, 1996, appellant entered into a lease agreement with District XI Area Agency on Aging, Inc., whereby appellant agreed to lease a portion of its property to that agency for \$300 per month for the period of September 1, 1996 through August 30, 1997. According to the terms of the lease, the rental space was to be used as a senior citizens activity center.

On November 14, 1997, appellant filed an application for real property tax exemption, wherein it requested that the property be placed on the tax-exempt list for tax year 1997 and to have the taxes and penalties on the property remitted for tax year 1996. On June 10, 1999, the Tax Commissioner's attorney examiner recommended that the property be "split listed" for tax year 1997, allowing exemption for only those portions of the building primarily used for public worship. In addition, the examiner recommended that the exemption for 1996 be denied since appellant did not own the property or use it for an exempt purpose as of January 1, 1996. On August 10, 1999, the Tax Commissioner

ordered that the exemption be denied for tax year 1996. The Commissioner further ordered that the property be split listed as recommended for tax years 1997 and 1998.

In the notice of appeal filed on its behalf, appellant sets forth the following assignments of error:

“I would like to appeal the recent ruling regarding the taxation of Fifth Avenue Community Church for the stated leased space of the church facility to Western Reserve Ballet and The Mahoning County Council on Aging.

“Referring to page two of the attached document, Property to remain on tax list:

“For the tax year 1998: Rooms 202 and 207 were exclusively used by Western Reserve Ballet (WRB) for their offices. All other rooms stated, 203, 204, 205, 206, 208, 209, 210, 211 and the ‘social hall’ were shared space by the WRB and the church. The use of these rooms by the church was essential for the operation of the church. The church calendar was considered a priority and the ballet scheduled accordingly.

“For the tax year 1997: Rooms 101 and 103 were exclusively used for office space by the Mahoning County Council on Aging (MCCOA). All other stated rooms 104, 107, 108 and the ‘social hall’ were shared space by the church and the MCCOA. It was essential to use this space for the operation of the church for public worship. The church calendar was considered first and the MCCOA scheduled accordingly.

“Because the organizations involved are tax exempt non-profit organizations, we ask for your consideration. We did not profit ourselves by leasing our space but extended a gesture of consideration and community service by honoring their existing leases, giving them time to relocate.”

On May 18, 2000, an evidentiary hearing was conducted in this matter. The appellant appeared at this hearing through counsel and presented the testimony of Kenneth M. Zinz, appellant's business manager, treasurer and controller. In addition, appellant submitted eleven exhibits for this Board's consideration. The appellee appeared at this hearing through counsel, but did not submit additional evidence or testimony. Accordingly, this matter is considered by the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified to this Board by the Tax Commissioner pursuant to R.C. 5717.02, the testimony and evidence presented at the evidentiary hearing and the briefs filed on behalf of the parties.

We acknowledge at the outset the affirmative burden placed on an appellant in an appeal taken from a final order of the Tax Commissioner. In *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121, the Supreme Court stated:

“Absent a demonstration that the commissioner’s findings are clearly unreasonable or unlawful, they are presumptively valid. Furthermore, it is error for the BTA to reverse the commissioner’s determination when no competent and probative evidence is presented to show that the commissioner’s determination is factually incorrect. ***” *Id.* at 124. (Citation omitted.)

Turning to appellant’s claim for exemption¹, we first note the general rule that “[a]ll real property in this state is subject to taxation, except only such as is expressly exempted therefrom.” R.C. 5709.01(A). It is as a result of this rule, that “[i]n 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.”

¹ The Tax Commissioner’s attorney examiner determined that the use of the subject property did not qualify for exemption for the period in question under R.C. 5709.121. However, appellant did not claim exemption under this provision in its application for exemption and no such argument was ever proposed by appellant before this Board. Appellant has the duty to establish the right to relief requested. *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 68. Moreover, the taxpayer must show in what manner and to what extent the Tax Commissioner’s determination is in error. *Federated Department Stores v. Lindley* (1983), 5 Ohio St.3d 213. Without testimony or argument on this issue, we find appellant has not overcome the presumption of correctness afforded the Tax Commissioner.

R.C. 5715.271. The Supreme Court explained the rationale for this principle in *Akron Home Medical Services, Inc. v. Lindley* (1986), 25 Ohio St.3d 107:

“*Exceptions* to a particular tax are governed by the oft-stated rules to be found in *Youngstown Metropolitan Housing Authority v. Evatt* (1944), 143 Ohio St. 268, 273 [28 O.O.163]:

“By the decisions it is established in Ohio that exemption statutes are to be strictly construed, it being the settled policy of this state that all property should bear its proportional share of the cost and expense of government; that our law does not favor exemption of property from taxation; and hence that before particular property can be held exempt, it must fall clearly within the class of property specified * * * to be exempt.

“The foundation upon which that policy rests is that statutes granting exemption of property from taxation are in derogation of the rule of uniformity and equality in matters of taxation. (See 38 *Ohio Jurisprudence*, 853, section 114.)’ See also, e.g., *id.* at paragraph two of syllabus; *Cleveland-Cliffs Iron Company v. Glander* (1945), 145 Ohio St. 423, 430 [31 O.O. 39]; *National Tube Company v. Glander* (1952), 157 Ohio St. 407 [47 O.O. 313]; paragraph two of the syllabus; *First National Bank of Wilmington v. Kosydar* (1976), 45 Ohio St. 2d 101 [74 O.O. 2d 206]; *Southwestern Portland Cement Company v. Lindley* (1981), 67 Ohio St.2d 417, 425 [21 O.O.3d 261]; *National Church Residences v. Lindley* (1985), 18 Ohio St.3d 53, 55.” *Id.* at 108.

R.C. 5709.07 provides an exemption from real property taxation for certain property which is used exclusively for public worship and is not leased or otherwise used with a view to profit. That section provides, in pertinent part:

“(A) The following property shall be exempt from taxation:

“* * *

“2) Houses used exclusively for public worship, * * * and the ground attached to them that is not leased or otherwise used with a view to profit and that is necessary for their proper occupancy, use and enjoyment [.]”

Accordingly, in order to determine whether the subject property qualifies for exemption under R.C. 5709.07, we must first determine whether such property was used exclusively for public worship during the period in question. For the reasons set forth below, we find that it was not.

Two seminal cases explored the legislative intent behind the phrase “public worship.” In *Gerke v. Purcell* (1874), 25 Ohio St. 229, the Supreme Court defined “public” to mean an open use, a use that was equally available to the public. Since the use was to be one without a view to profit, the public use must be free as well. In *Watterson v. Holliday* (1907), 77 Ohio St. 150, 82 N. E. 962, the phrase “public worship” was limited to the “religious rites and ordinances” that are celebrated or observed by the church and its parishioners. A more contemporary Supreme Court confirmed this venerable concept in *Faith Fellowship Ministries, Inc. v. Limbach* (1987), 32 Ohio St.3d 432. The Supreme Court held:

“From both cases we can derive the definition of ‘public worship’ to be the open and free celebration or observance of the rites and ordinances of a religious organization.” *Id.* at 435.

And, in quoting from *Watterson v. Holliday, supra*, the *Faith Fellowship* court observed:

“The exemption is not of such houses as may be used for the support of public worship; but of houses used exclusively as places of public worship.” *Id.* at 435

In our decision in *Allegheny West Conference Seventh-Day Adventists v. Limbach*, (August 21, 1992), B.T.A. Case No. 90-K-507, unreported, we indicated that a “primary use” test would be applied to determine if property was being “used exclusively for public worship,” within the meaning of R.C. 5709.07. We noted:

“In *Faith Fellowship Ministries, Inc. v. Limbach* (1987), 32 Ohio St.3d 432, the Supreme Court set forth the requisite characteristics which must be demonstrated by an applicant seeking exemption pursuant to R.C. 5709.07. In paragraph one of its syllabus, the court held:

“‘For purposes of R.C. 5709.07, “public worship” means the open and free celebration or observance of the rites and ordinances of a religious organization.’ (*Gerke v. Purcell* [1874], 25 Ohio St. 229; and *Waterson v. Halliday* [1907], 77 Ohio St. 150, 82 N.E.2d 962, approved and followed.)

“Although R.C. 5709.07 requires that the property be used exclusively for public worship, the Supreme Court has adopted a primary use test which requires more than merely calculating the amount of time that the property is used in a taxable as opposed to a nontaxable manner. *Faith Fellowship Ministries, Inc., supra*. Instead, a determination as to taxable status must include an examination of both the quantity and quality of the use for which the property is utilized. As the court held in paragraph two of its syllabus:

“‘To qualify for an exemption from real property taxation as a house used exclusively for public worship under R.C. 5709.07, such property must be used in a principal, primary, and essential way to facilitate public worship.’

“Under this test, the court has recognized that those uses of property sought to be exempted which are merely supportive are

not entitled to exemption under R.C. 5709.07. See *Faith Fellowship Ministries, Inc., supra*; *Summit United Methodist Church v. Kinney* (1983), 7 Ohio St.3d 13; *Bishop v. Kinney* (1982), 2 Ohio St.3d 52.” *Id* at 5.

See, also, *Sylvania Church of God, Inc. v. Tracy* (January 27, 1995), B.T.A. No. 93-P-252, unreported.

The Supreme Court recently reaffirmed the use of the “primary use” test in determining qualification for exemption pursuant to R.C. 5709.07 in *True Christianity Evangelism v. Zaino* (2001), 91 Ohio St.3d 117. Therein, the Court stated:

“The General Assembly has used the phrase ‘used exclusively’ as a limitation in both R.C. 5709.07 (houses used exclusively for public worship) and R.C. 5709.12 (property used exclusively for charitable purposes). In *Moraine Hts. Baptist Church v. Kinney* (1984), 12 Ohio St.3d 134, 135, 12 OBR 174, 175, 465 N.E.2d 1281, 1282, this Court held that for purposes of R.C. 5709.07, the phrase ‘used exclusively for public worship’ was equivalent to ‘primary use.’” *Id* at 120.

In determining whether the property is primarily used for public worship, the fact that a portion of the property is leased does not necessarily disqualify the property for exemption. In *First Baptist Church of Lone Star Texas v. Limbach* (Aug. 21, 1987), B.T.A. No. 85-E-738, unreported, the Tax Commissioner denied the tax exempt status of property owned by a church group in Middleton, Ohio. The group, headquartered in Texas, hired a pastor to start a mission in Ohio. After the purchase of a small church, the pastor resigned and the group was unable to employ another qualified individual. Thereafter, for a number of years, the group rented the building in Middleton. Eventually the group sold the building. During the leased period, the church, as owner, applied for exemption. In overturning the Tax Commissioner’s denial of exemption, this Board stated:

“Since 1976, the appellant always intended to use the subject property as a place used exclusively for public worship. From 1976 to 1982, the appellant itself actually used the subject property for such purposes. In more recent years, the

appellant unable to find a pastor willing to establish a missionary Baptist Church in Middleton, Ohio, leased the subject to other churches. The leases were not entered into with a profit motive. The leases were a means in which the subject could be utilized as a place of public worship. Under these circumstances, the Board finds the primary and controlling use of the subject property was a place of public worship. ***. The Board finds that the use of the subject as well as the intent of the appellant established a right to an exemption.”

In *Temple Beth Or v. Limbach* (Mar. 12, 1993), B.T.A. No. 90-M-291, unreported, the appellant purchased property then in use as a church. Concurrent with the sale, appellant entered into a lease agreement with the previous owners to rent certain portions of the facility back to the Fairhaven Church for a term of three years at a rental rate of two thousand dollars per month, escalating each year thereafter. The appellant also agreed to rent a portion of its property to the Jewish Federation of Greater Dayton, Inc. The Tax Commissioner ordered the property to be split listed, allowing exemption for only those portions of the building not leased to Fairhaven Church or the Jewish Foundation. An appeal was filed with this Board. In making our determination, we reversed the denial of the exemption for the leased property where the primary and controlling use of the property by both the lessee and lessor was a place of public worship. Specifically, we stated:

“The [Fairhaven] Church used the building in the same manner as it did when it was the record owner. The rooms, if under the total control of either the Church or the Temple, would have qualified for tax exemption. This Board finds that the primary and controlling use of the subject property by both the lessor and the lessee was as a place of public worship.” *Id* at 7.

However, the Board affirmed the Commissioner's denial of the exemption for the space leased to the Jewish Foundation, finding that the leased property was not used primarily for public worship:

“With respect to the lease with the Dayton Jewish Foundation, this Board finds that the room in issue was not used in a primary and essential way to facilitate public worship. *Faith Fellowship Ministries, supra*. While there was little testimony on the purpose of the Dayton Jewish Foundation, this Board notes that said organization is a charitable organization which operates similarly to United Way. It is an umbrella group which fundraises and supports local, national and international Jewish interests. The Rabbi testified that leased room was used as an outreach location, where informational and educational meetings were held. While the use is related to the Temple in that both support the Jewish community at large, the purposes are very different. This Board cannot find that the primary use of the room is essential for public worship.” *Id.* at 8.

Applying this rationale to the case presently before us, we find appellant has failed to establish that the property leased to Ballet Western Reserve and District XI Area Agency on Aging, Inc. was used in a primary and essential way to facilitate public worship. As set forth in the lease agreements, the property in question was to be used as an arts and theater center and a senior citizens activity center.

At the hearing before this Board, appellant submitted evidence attempting to establish that some rooms leased to its tenants were, in fact, used jointly by the tenants and the church. However, as set forth above, it is the use of the property that determines whether or not the property qualifies for exemption under R.C. 5709.07. Therefore, even if we were to accept appellant's contentions that a portion of the property was partially used by the church during the period in question, this alone is insufficient to establish a right to exemption. In order to qualify for exemption, appellant must establish that the property was used in an exempt manner, i.e. that the property was used primarily for public worship.

Further, at the hearing, this Board's attorney examiner asked appellant's witness if he was aware how appellant's tenants were using the leased property during the period in question. However, appellant's witness never directly answered this question. Based upon the foregoing, we find appellant has failed to establish that the leased property was used "in a principal, primary, and essential way to facilitate public worship." *Faith Fellowship Ministries, Inc., supra*. Accordingly, we find appellant's use of the property fails to qualify for exemption under R.C. 5709.07 for the period in question.

In the brief filed on appellant's behalf, counsel contends that, at the time appellant purchased the subject property, the equitable title of the leased portion of the property remained with the seller since appellant did not have the right to occupy this space. Therefore, according to appellant, the entire "group of property rights acquired by appellant" were used exclusively for public worship. Even if we were to accept appellant's contentions, we find they have no impact upon whether the leased portion of the subject property qualifies for exemption under R.C. 5709.07. In its brief, appellant agrees that the subject property should be split listed. As set forth above, it is the use of the property that determines its entitlement to exemption under R.C. 5709.07. Appellant has not submitted any evidence that the leased portion of the property was primarily used for public worship and, therefore, has failed to meet its burden of establishing that portion of the property qualifies for exemption.

Appellant further contends that the subject property is entitled to exemption because appellant did not profit from the leases with its tenants. Rather, according to appellant, it was merely covering expenses. We find that we need not address this contention. In order to qualify for exemption under R.C. 5709.07, the property must be used primarily for public worship. Since we have determined that not to be the case herein, we need not address the second requirement set forth in R.C. 5709.07, *i.e.*, whether the property is leased with a view to profit.

Giving consideration to the notice of appeal, the evidence presented, the briefs submitted on behalf of the parties and the applicable statutes and case law, we find

the Tax Commissioner properly denied appellant's application for exemption for tax years 1997 and 1998 for that portion of the property that was rented to Ballet Western Reserve and District XI Area Agency on Aging, Inc.

While we empathize with appellant's position and recognize the social importance of the service provided by appellant's lessees, the terms of the statute are clear and unequivocal. In order to qualify for exemption, the property must be used exclusively for public worship. Since the property leased to Ballet Western Reserve and District XI Area Agency on Aging was not used in a primary and essential way to facilitate public worship, appellant is precluded from claiming exemption under that provision.

Based upon the foregoing, we find that the final determination of the Tax Commissioner is correct and hereby affirm such determination.

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