

REPRESENTATIVE FOR PETITIONER:
Philip S. Kappes, Lewis & Kappes, P.C.

REPRESENTATIVE FOR RESPONDENT:
Kostas A. Poulakidas, Office of Corporation Counsel

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

PHI DELTA THETA FOUNDATION,)	Petition No.: 49-800-00-2-8-10025
)	49-800-02-2-8-10003
Petitioner,)	49-800-00-2-8-10024
)	49-800-02-2-8-10002
v.)	County: Marion
)	Township: Washington
MARION COUNTY PROPERTY TAX)	Parcel No.: 8018764
ASSESSMENT BOARD OF APPEALS,)	8010828
)	
Respondent.)	Assessment Years: 2000 & 2002
)	

Appeal from the Final Determination of
Marion County Property Tax Assessment Board of Appeals

November 3, 2005

FINAL DETERMINATION

The Indiana Board of Tax Review (Board) having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Issue

*Whether the Petitioner was required to file an exemption application for tax years 2000 and
2002*

Procedural History

1. Pursuant to Ind. Code § 6-1.1-11-7, Christopher Wirthwein, President of Phi Delta Theta Foundation, and Philip S. Kappes, attorney, filed four Form 132s, Petitions for Review of Exemption, on behalf of Phi Delta Theta Foundation (Petitioner) petitioning the Board to conduct an administrative review of the above petitions. The Form 132s were filed on December 14, 2004. The determinations of the Marion County Property Tax Board of Appeals (the PTABOA) were issued on December 1, 2004.

Hearing Facts and Other Matters of Record

2. A hearing was originally scheduled in this matter for August 16, 2005. The parties agreed to continue the hearing to August 24, 2005.
3. Pursuant to Ind. Code § 6-1.1-15-4, a hearing was held on August 24, 2005, in Indianapolis, Indiana, before Brian McKinney, the duly designated Administrative Law Judge authorized by the Board under Ind. Code § 6-1.5-5-2.
4. The Petitioner submitted a pre-hearing brief prior to the hearing.
5. The following persons were sworn in as witnesses and presented testimony:
 - Levester Johnson, Vice President for Student Affairs, Butler University,
 - Anthony T. Bultinck, CPA,
 - Chris A. Wirthwein, Board Chairman, Phi Delta Theta Foundation,
 - Melissa Tetrick, Exemption Deputy, Marion County.
6. The following exhibits were presented:
 - Petitioner Exhibit 1 – Profit & Loss Statements, 1999 – 2002,
 - Petitioner Exhibit 2 – Summary of all property taxes paid thru 12-2004,
 - Petitioner Exhibit 3 – No exhibit submitted,

Petitioner Exhibit 4 – Marion County PTABOA meeting minutes, November 19, 2004 (Phi Delta Theta Foundation).

The Respondent did not present any documentary evidence at the hearing.

7. The following additional items are officially recognized as part of the record of proceedings and labeled Board Exhibits
 - Board Exhibit A – Form 132 Petitions
 - Board Exhibit B – Notice of Hearing
 - Board Exhibit C – Joint Stipulation of the parties

8. The following matters or facts were stipulated and agreed to by the parties:
 - A. Petitioner Phi Delta Theta Foundation (the Foundation) is an Indiana Foundation created under Chapter 246 of the Acts of the Indiana General Assembly of 1921. The Foundation has operated under such Act continuously since its incorporation July 2, 1928.
 - B. The Foundation owns the real estate assessed with the property taxes here in issue, namely a residence housing the Indiana Gamma Chapter of Phi Delta Theta Fraternity (the Fraternity) on the Butler University Campus and located on Lot 3 in the Butler University Fraternity Addition, the same being 705 W. Hampton Drive, Indianapolis, IN and a lot adjoining the residence used in conjunction therewith being Lot 15 in the Addition and located at 704 W. 44th St., Indianapolis, IN.
 - C. The residence has been used exclusively by the Fraternity on the Butler University campus by students of Butler University since its founding in 1859¹.
 - D. The Foundation filed an application for exemption for the assessment dates of March 1 in each of the years 2000, 2002, and 2004 as provided in Ind. Code § 6-1.1-11-1 *et seq.* on March 10, 2004.

¹ The Board questions the accuracy of this stipulation. Butler University has not always occupied its present location. The apparent inaccuracy of this stipulation, however, does not alter the Board's decision.

- E. The denial of exemption by the PTABOA was due to the failure of the Foundation to timely file application for exemption as required by Ind. Code § 6-1.1-11-1 *et seq.*
- F. The Court may take judicial notice of the following:
 - 1. Chapter 246, Acts 1921.
 - 2. Chapter 102, Acts 1919, and all subsequent amendments thereof.
 - 3. The Constitution of the State of Indiana.
 - 4. The transcript of proceedings before the Marion County PTABOA.

Jurisdictional Framework

- 9. This matter is governed by the provisions of Ind. Code §§ 6-1.1, 6-1.5, and all other laws relevant and applicable to appeals initiated under those provisions, including all case law pertaining to property tax assessment or matters of administrative law and process.
- 10. The Board is authorized to issue this final determination pursuant to Ind. Code § 6-1.5-5-5.

State Review and Petitioner's Burden

- 11. The Board does not undertake to make the case for the petitioner. The Board bases its decision upon the evidence presented and issues raised during the hearing. See *Whitley Products, Inc. v. State Bd. of Tax Comm'rs*, 704 N.E.2d 1113 (Ind. Tax 1998).
- 12. The petitioner must submit 'probative evidence' that adequately demonstrates the alleged error. Mere allegations, unsupported by factual evidence, will not be considered sufficient to establish an alleged error. See *Whitley Products, Inc. v. State Bd. of Tax Comm'rs*, 704 N.E.2d 1113 (Ind. Tax 1998), and *Herb v. State Bd. of Tax Comm'rs*, 656 N.E.2d 890 (Ind. Tax 1995). ('Probative evidence' is evidence that serves to prove or disprove a fact.)

13. The petitioner has a burden to present more than just ‘de minimis’ evidence in its effort to prove its position. See *Hoogenboom-Nofzinger v. State Bd. of Tax Comm’rs*, 715 N.E.2d 1018 (Ind. Tax 1999). (‘De minimis’ means only a minimal amount.)
14. The petitioner must sufficiently explain the connection between the evidence and petitioner’s assertions in order for it to be considered material to the facts. ‘Conclusory statements’ are of no value to the State in its evaluation of the evidence. See *Heart City Chrysler v. State Bd. of Tax Comm’rs*, 714 N.E.2d 329 (Ind. Tax 1999). (‘Conclusory statements’ are statements, allegations, or assertions that are unsupported by any detailed factual evidence.)
15. The Board will not change the determination of the County Property Tax Assessment Board of Appeals unless the petitioner has established a ‘prima facie case.’ See *Clark v. State Bd. of Tax Comm’rs*, 694 N.E.2d 1230 (Ind. Tax 1998), and *North Park Cinemas, Inc. v. State Bd. of Tax Comm’rs*, 689 N.E.2d 765 (Ind. Tax 1997). (A ‘prima facie case’ is established when the petitioner has presented enough probative and material (i.e. relevant) evidence for the Board (as the fact-finder) to conclude that the petitioner’s position is correct. The petitioner has proven his position by a ‘preponderance of the evidence’ when the petitioner’s evidence is sufficiently persuasive to convince the Board that it outweighs all evidence, and matters officially noticed in the proceeding, that is contrary to the petitioner’s position.)

Constitutional and Statutory Basis for Exemption

16. The General Assembly may exempt from property taxation any property being used for municipal, educational, literary, scientific, religious, or charitable purposes. IND. CONST. Art. 10, § 1.
17. Article 10, §1 of the State Constitution is not self-enacting. The General Assembly must enact legislation granting the exemption.

18. In Indiana, use of property by a nonprofit entity does not establish any inherent right to exemptions. The grant of federal or state income tax exemption does not entitle a taxpayer to property tax exemption because income tax exemption does not depend so much on how property is used, but on how money is spent. *Raintree Friends Housing, Inc. v. Indiana Department of Revenue*, 667 N.E.2d 810 (Ind. Tax 1996) (non-profit status does not entitle a taxpayer to tax exemption). In determining whether property qualifies for an exemption, the predominant and primary use of the property is controlling. *State Bd. of Tax Comm'rs v. Fort Wayne Sport Club*, 258 N.E.2d 874, 881 (Ind. Ct. App. 1970); Ind. Code § 6-1.1-10-36.3.

Basis of Exemption and Burden

19. In Indiana, the general rule is that all property in the State is subject to property taxation. *See* Ind. Code § 6-1.1-2-1.
20. All property receives protection, security, and services from the government, such as fire and police protection, and public schools. These governmental services carry with them a corresponding obligation of pecuniary support – taxation. When property is exempted from taxation, the effect is to shift the amount of taxes it would have paid to other parcels that are not exempt. *See generally, National Association of Miniature Enthusiasts v. State Board of Tax Commissioners*, 671 N.E.2d 218 (Ind. Tax 1996).
21. The transfer of this obligation to non-exempt properties should never be seen as an inconsequential shift. This is why worthwhile activities or noble purpose alone is not enough for tax exemption. Exemption is granted when there is an expectation that a benefit will inure to the public by reason of the exemption. *See Foursquare Tabernacle Church of God in Christ v. State Board of Tax Commissioners*, 550 N.E.2d 850, 854 (Ind. Tax 1990)).
22. The taxpayer seeking exemption bears the burden of proving that the property is entitled to the exemption by showing that the property falls specifically within the statute under which the exemption is being claimed. *Monarch Steel Co. v. State Bd. of Tax Comm'rs*,

611 N.E.2d 708, 713; *Indiana Association of Seventh Day Adventists v. State Board of Tax Commissioners*, 512 N.E.2d 936, 938 (Ind. Tax 1987).

Whether the Petitioner was required to file an exemption application for tax years 2000 and 2002

23. The Petitioner contends it was not required to file an exemption application for the years in question.
24. The Respondent contends an exemption application must be filed every even numbered year in accordance with Ind. Code § 6-1.1-11-1 *et. seq.*

Analysis

25. In Indiana, an exemption is a privilege. If the procedures for acquiring an exemption are not followed, the exemption is waived. The procedures for acquiring an exemption are set out in Ind. Code § 6-1.1-11-1 *et. seq.*
26. Ind. Code § 6-1.1-11-3 requires an entity seeking an exemption to file an exemption for to not-for-profit entities. Not-for-profit entities are required to file an exemption application every even numbered year. Ind. Code § 6-1.1-11-3.5. The Petitioner is a not-for-profit entity. *Kappes Argument.*
27. The Petitioner was exempt from property taxes prior to 2000. On or before May 15, 2000, the Petitioner was required to file an exemption application for tax year 2000. No exemption application was filed. Because Petitioner was exempt prior to 2000, the Respondent was required to send notice to the Petitioner that an exemption application had not been filed. Ind. Code § 6-1.1-11-5(b). There is no evidence on the record showing that the Respondent sent said notice to the Petitioner.
28. If the Respondent failed to send out this notice, the Petitioner had until the first Monday in November of the following year to file and have their exemption application approved

by the Respondent. Ind. Code § 6-1.1-11-5(d). The Petitioner failed to file an exemption application before this statutory deadline.

29. The Petitioner was required to file another exemption application for the 2002 tax year on or before May 15, 2002. The Petitioner filed no such application. Because the Petitioner was not exempt in 2001, the Respondent was not required to send out any notice to the Petitioner regarding the 2002 exemption application.
30. On March 10, 2004, the Petitioner filed exemption applications for 2000, 2002, and 2004. The Respondent granted the exemption for 2004, but denied the exemptions for 2000 and 2002 because the exemption applications were untimely filed.
31. The parties are in agreement that the exemption applications for 2000 and 2002 were untimely filed. Petitioner contends that based on Chapter 246 of the Acts of 1921. Petitioner contends the relevant portion is as follows:

Real Estate and Taxation.
Sec. 9. Such corporation may hold and convey any real estate necessary for the transaction of its business or the execution of any trust. Property held by such corporation exclusively for religious, educational, or charitable purpose shall be exempt from taxation.
32. Petitioner argues this is applicable because Ind. Code § 6-1.1-11-2 states that the procedures “apply unless other procedures for obtaining a specific exemption are provided by law.”
33. The act cited by the Petitioner has been repealed by the General Assembly. Ind. Code § 1-1-1-2 states: “All acts enacted before the 1976 regular session of the Indiana general assembly are repealed, except that this repeal does not include the following: ...” The 1921 acts are not listed in the following, and therefore have been repealed.
34. Petitioner’s argument fails. The Petitioner was required to file an exemption application on or before May 15 of 2000 and 2002. The Petitioner did not do so. Accordingly, the Petitioner waived its right to the exemption. The Board finds in favor of the Respondent.

This Final Determination of the above captioned matter is issued this by the Indiana Board of Tax Review on the date first written above.

Commissioner, Indiana Board of Tax Review

IMPORTANT NOTICE

- APPEAL RIGHTS -

You may petition for judicial review of this final determination pursuant to the provisions of Indiana Code § 6-1.1-15-5. The action shall be taken to the Indiana Tax Court under Indiana Code § 4-21.5-5. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice. You must name in the petition and in the petition's caption the persons who were parties to any proceeding that led to the agency action under Indiana Tax Court Rule 4(B)(2), Indiana Trial Rule 10(A), and Indiana Code §§ 4-21.5-5-7(b)(4), 6-1.1-15-5(b). The Tax Court Rules provide a sample petition for judicial review. The Indiana Tax Court Rules are available on the Internet at <http://www.in.gov/judiciary/rules/tax/index.html>. The Indiana Trial Rules are available on the Internet at http://www.in.gov/judiciary/rules/trial_proc/index.html. The Indiana Code is available on the Internet at <http://www.in.gov/legislative/ic/code>.