

**STATE OF INDIANA
Board of Tax Review**

In the matter of the Petition for Review)
of Assessment, Form 131) Petition No. : 20-025-95-2-8-00115

Parcel No. : 250602302005

Assessment Year: 1995

Petitioner: Gregory L. Walz, CPA (Trustee Mervin D. Lung Annuity Trust)
 1726 W. Lincoln Avenue, Suite #1
 Goshen, IN 46526

Findings of Fact and Conclusions of Law

On January 1, 2002, pursuant to Public Law 198-2001, the Indiana Board of Tax Review (IBTR) assumed jurisdiction of all appeals then pending with the State Board of Tax Commissioners (SBTC), or the Appeals Division of the State Board of Tax Commissioners (Appeals Division). For convenience of reference, each entity (the IBTR, SBTC, and Appeals Division) is hereafter, without distinction, referred to as "State". The State having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

Issue

1. Whether the Form 131 petition should be treated as an exemption application.
2. Whether the property should receive a whole or partial exemption.

Findings of Fact

1. If appropriate, any finding of fact made herein shall also be considered a conclusion of law. Also if appropriate, any conclusion of law made herein shall also be considered a finding of fact.

2. Pursuant to Ind. Code § 6-1.1-15-3, Gregory L. Walz, on behalf of the Mervin D. Lung Annuity Trust (the Petitioner), filed a Form 131 petition requesting a review by the State. The Form 131 was filed on July 11, 1997. The Elkhart County Board of Review (County Board) issued its determination on the underlying Form 130 on June 18, 1997.

3. Pursuant to Ind. Code § 6-1.1-15-4, hearings were scheduled for March 2, 2000 and December 19, 2000. At the request of the Petitioner both hearings were continued to a later date. The rescheduled hearing was held on January 2, 2001 before Hearing Officer Patti J. Kindler. Testimony and exhibits were received into evidence. Gregory L. Walz represented the Petitioner. Cathy S. Searcy represented Elkhart County. Robert Price represented Concord Township.

4. At the hearing, the subject Form 131 was made part of the record and labeled Board Exhibit A. The Notice of Hearing on Petition is labeled Board Exhibit B. The two previous Notices of Hearing on Petition are labeled Board Exhibit C and D. In addition, the following items were submitted to the State:
Petitioner's Exhibit 1-copy of a letter from former Elkhart County Auditor; and
Petitioner's Exhibit 2-copy of the Charitable Annuity Trust Agreement.

Respondent's Exhibit 1-letter from Ivy Tech Foundation to the State Board regarding exemption, dated 10/09/94;

Respondent's Exhibit 2-letter of reply from the State Board, dated 11/21/94;

Respondent's Exhibit 3-worksheet for partial exemption, dated 1/11/95;

Respondent's Exhibit 4-Form 136 for 1995 requesting a 54.414% exemption;

Gregory L. Walz, CPA
(Trustee Mervin D. Lung Annuity Trust)
Findings & Conclusions
Page 2 of 12

Respondent's Exhibit 5-worksheet for the 1989 reduction granted by Elkhart County, dated 8/03/95;

Respondent's Exhibit 6-Form 136 filed by the Elkhart County Community Foundation for the years 2000 and 2001; and

Respondent's Exhibit 7-copy of the property record card (PRC) for the subject.

5. The subject property is located at 2521 Industrial Parkway, Elkhart, Elkhart County, Concord Township. The hearing officer did not view the property. The parties to the appeal agreed that the assessed values under appeal are \$24,070 for land and \$330,170 for the improvements.

Whether the assessment of the subject property should be set at zero

6. Mr. Walz testified to the following:
 - (a) Since the Petitioner purchased the subject building prior to 1989, it has been used by Ivy Tech State College as a classroom facility.
 - (b) Ivy Tech College had no budget to purchase the subject property, only a budget for rental expenditures.
 - (c) Therefore, Mervin Lung, a member of the Ivy Tech Board of Directors purchased the subject building with intentions of leasing it to Ivy Tech and to ensure the building would be available to the college in the future.
 - (d) The lease payments were to cover Mr. Lung's mortgage (debt service) for the subject building. Any excess funds from the lease of the subject building were to be applied to the mortgage principal.
 - (e) The County Board applied "functional obsolescence" to the subject building after the 1989 reassessment to compensate for its charitable interest because the legal ownership of the property did not fall under any exempt entity. The obsolescence was revoked after the 1995 reassessment.
 - (f) In 1994 Mr. Lung established an Irrevocable Charitable Remainder Annuity Trust (Charitable Trust) for the subject property with the intent to preserve the building for Ivy Tech present and future community college use.

- (g) Mr. Lung had no financial benefits from the subject property after it was turned over to the charitable trust. His intent was to distribute all the principal and income of the trust to the Community Foundation of Elkhart County after the trust expired. All profits from the building were to go to the Elkhart Community Foundation (Petitioner Exhibit 2).
- (h) The subject building was remodeled and improved into a campus classroom and the property taxes actually increased adding an additional burden onto Mr. Lung's charitable trust.
- (i) Since, the charitable trust was established all excess funds and income are legally allocated to a charitable foundation and therefore, the subject property should be allowed a 100% exemption. Mr. Lung lost all opportunities to have any control over the property after signing the charitable trust agreement and therefore, should have received a full tax exemption.

8. Mr. Price testified to the following:

- (a) The Township Assessor is in favor of 100% exemption for the subject property because of its charitable interest and benefit to the community.
- (b) Mr. Miller, the former County Auditor, had said he would take care of the calculations for exemption for the County Board and agreed to calculate the amount of exemption allowable for the subject property during the 1995 Form 136 appeal.
- (c) According to Mr. Miller's calculations the subject building was allowed an exemption of 54.414% derived from the Petitioner's federal worksheet (Respondent's Exhibit 3).
- (d) Much of the paperwork is missing regarding the 1995 appeal from the County Board. There was no public hearing by the County Board for an exemption for the subject property. The legal process was not carried forth in the proper manner.
- (e) Mr. Miller gave obsolescence to the subject building after the 1989 appeal because he did not know of another way to exempt the property.
- (f) Since the charitable trust was developed for 1995 and beyond, the issue is no

- longer obsolescence, but how much of the subject property is exempt under the laws of Indiana.
- (g) Obsolescence was not applied to the subject property for the year 1995. The term obsolescence was a misnomer and was not applicable for the subject property after the charitable trust was formed.
- (h) The subject property should have received a full exemption since it was made into a charitable trust in 1995.
9. Ms. Searcy testified that the Form 131 document and several other relevant documents were missing from the Court House files. Ms. Searcy questioned Mr. Walz regarding the County Board's decision on obsolescence.
10. Mr. Walz testified that no obsolescence was given at the 1995 County Board Hearing.
11. Ms. Searcy questioned whether the Petitioner is requesting obsolescence or an exemption for the subject property for the year 1995.
12. Mr. Walz testified that the taxpayer is seeking a 100% exemption for the year 1995. He contended that the term obsolescence came from the past reductions allowed by the County Board before the subject property was established as a charitable trust.
13. Ms. Searcy asked if the property was getting a partial exemption for 1995.
14. Mr. Price contended that the subject property is receiving 54.414% partial exemption for the land and improvements for the year 1995.
15. The Issue in this appeal is clearly whether the subject property qualifies for an exemption. The wrong form was used to petition for review of exemption. However, due to irregularities in the past (the granting of obsolescence) and the fact that many forms were missing, the State will treat the Form 131 petition as a Form 132 petition

for review of exemption.

Conclusions of Law

1. The Petitioner is limited to the issues raised on the Form 130 petition filed with the Property Tax Assessment Board of Appeals (PTABOA) or issues that are raised as a result of the PTABOA's action on the Form 130 petition. 50 IAC 17-5-3. See also the Forms 130 and 131 petitions authorized under Ind. Code §§ 6-1.1-15-1, -2.1, and -4. In addition, Indiana courts have long recognized the principle of exhaustion of administrative remedies and have insisted that every designated administrative step of the review process be completed. *State v. Sproles*, 672 N.E. 2d 1353 (Ind. 1996); *County Board of Review of Assessments for Lake County v. Kranz* (1964), 224 Ind. 358, 66 N.E. 2d 896. Regarding the Form 130/131 process, the levels of review are clearly outlined by statute. First, the Form 130 petition is filed with the County and acted upon by the PTABOA. Ind. Code §§ 6-1.1-15-1 and -2.1. If the taxpayer, township assessor, or certain members of the PTABOA disagree with the PTABOA's decision on the Form 130, then a Form 131 petition may be filed with the State. Ind. Code § 6-1.1-15-3. Form 131 petitioners who raise new issues at the State level of appeal circumvent review of the issues by the PTABOA and, thus, do not follow the prescribed statutory scheme required by the statutes and case law. Once an appeal is filed with the State, however, the State has the discretion to address issues not raised on the Form 131 petition. *Joyce Sportswear Co. v. State Board of Tax Commissioners*, 684 N.E. 2d 1189, 1191 (Ind. Tax 1997). In this appeal, such discretion will not be exercised and the Petitioner is limited to the issues raised on the Form 131 petition filed with the State.
2. The State is the proper body to hear an appeal of the action of the County pursuant to Ind. Code § 6-1.1-15-3.

A. Burden

3. Ind. Code § 6-1.1-15-3 requires the State to review the actions of the PTABOA, but does not require the State to review the initial assessment or undertake reassessment of the property. The State has the ability to decide the administrative appeal based upon the evidence presented and to limit its review to the issues the taxpayer presents. *Whitley Products, Inc. v. State Board of Tax Commissioners*, 704 N.E. 2d 1113, 1118 (Ind. Tax 1998) (citing *North Park Cinemas, Inc. v. State Board of Tax Commissioners*, 689 N.E. 2d 765, 769 (Ind. Tax 1997)).
4. In reviewing the actions of the PTABOA, the State is entitled to presume that its actions are correct. See 50 IAC 17-6-3. “Indeed, if administrative agencies were not entitled to presume that the actions of other administrative agencies were in accordance with Indiana law, there would be a wasteful duplication of effort in the work assigned to agencies.” *Bell v. State Board of Tax Commissioners*, 651 N.E. 2d 816, 820 (Ind. Tax 1995). The taxpayer must overcome that presumption of correctness to prevail in the appeal.
5. It is a fundamental principle of administrative law that the burden of proof is on the person petitioning the agency for relief. 2 Charles H. Koch, Jr., *Administrative Law and Practice*, § 5.51; 73 C.J.S. Public Administrative Law and Procedure, § 128.
6. Taxpayers are expected to make factual presentations to the State regarding alleged errors in assessment. *Whitley*, 704 N.E. 2d at 1119. These presentations should both outline the alleged errors and support the allegations with evidence. “Allegations, unsupported by factual evidence, remain mere allegations.” *Id* (citing *Herb v. State Board of Tax Commissioners*, 656 N.E. 2d. 890, 893 (Ind. Tax 1995)). The State is not required to give weight to evidence that is not probative of the errors the taxpayer alleges. *Whitley*, 704 N.E. 2d at 1119 (citing *Clark v. State Board of Tax Commissioners*, 694 N.E. 2d 1230, 1239, n. 13 (Ind. Tax 1998)).

7. To meet his burden, the taxpayer must present probative evidence in order to make a prima facie case. In order to establish a prima facie case, the taxpayer must introduce evidence “sufficient to establish a given fact and which if not contradicted will remain sufficient.” *Clark*, 694 N.E. 2d at 1233; *GTE North, Inc. v. State Board of Tax Commissioners*, 634 N.E. 2d 882, 887 (Ind. Tax 1994).
8. In the event a taxpayer sustains his burden, the burden then shifts to the local taxing officials to rebut the taxpayer’s evidence and justify its decision with substantial evidence. 2 Charles H. Koch, Jr. at §5.1; 73 C.J.S. at § 128. See *Whitley*, 704 N.E. 2d at 1119 (The substantial evidence requirement for a taxpayer challenging a State Board determination at the Tax Court level is not “triggered” if the taxpayer does not present any probative evidence concerning the error raised. Accordingly, the Tax Court will not reverse the State’s final determination merely because the taxpayer demonstrates flaws in it).

B. Constitutional and Statutory Basis for Exemption

9. The General Assembly may exempt from property taxation any property being used for municipal, educational, literary, scientific, religious, or charitable purposes. Article 10, Section 1, of the Constitution of Indiana.
10. Article 10, Section 1 of the Constitution is not self-enacting. The Indiana General Assembly must enact legislation granting exemption. In this appeal, the Petitioner seeks exemption under Ind. Code § 6-1.1-10-16, which provides that property is exempt from property taxation if it is owned, used, and occupied for educational, literary, scientific, religious, or charitable purposes.
11. In Indiana, use of property by a nonprofit entity does not establish any inherent right to exemption. 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 the property is used but on how much money is spent. *Raintree*

Friends Housing, Inc. v. Indiana Department of Revenue, 667 N.E. 2d 810 (Ind. Tax 1996)(501(c)(3) status does not entitle a taxpayer to tax exemption). For property tax exemption, the property must be predominately used or occupied for the exempt purpose. Ind. Code § 6-1.1-10-36.3.

C. Basis of Exemption and Burden

12. In Indiana, the general rule is that all property in the State is subject to property taxation. Ind. Code § 6-1.1-2-1.
13. The courts of some states construe constitutional and statutory tax exemptions liberally, some strictly. Indiana courts have been committed to a strict construction from an early date. *Orr v. Baker* (1853) 4 Ind. 86; *Monarch Steel Co., Inc. v. State Board of Tax Commissioners*, 669 N.E. 2d 199 (Ind. Tax 1996).
14. Strict construction construes exemption from the concept of the taxpayer citizen. All property receives protection, security, and services from the government, e.g., fire and police protection and public schools. This security, protection, and other services always 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. *National Association of Miniature Enthusiasts v. State Board of Tax Commissioners (NAME)*, 671 N.E. 2d 218 (Ind. Tax 1996). Non-exempt property picks up a portion of taxes that the exempt would otherwise have paid, and this should never be seen as an inconsequential shift.
15. This is why worthwhile activities or noble purpose is not enough to justify tax exemption. Exemption is justified and upheld on the basis of the accomplishment of a public purpose. *NAME*, 671 N.E. 2d at 220 (citing *Foursquare Tabernacle Church of God in Christ v. State Board of Tax Commissioners*, 550 N.E. 2d 850, 854 (Ind. Tax 1990)).

16. 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*, 611 N.E. 2d at 714; *Indiana Association of Seventh Day Adventists v. State Board of Tax Commissioners*, 512 N.E. 2d 936, 938 (Ind. Tax 1987).

D. Conclusions Regarding the Exemption Claim

20. The Petitioner contends that the subject building should be 100% exempt from taxation beginning in the year 1995. The Petitioner contends that the owner Mervin D. Lung, to ensure the future use and benefit of the property for Ivy Tech State College, placed the subject property in a Charitable Trust on December 12, 1994.
21. The Petitioner testified that Mr. Lung leased the building to Ivy Tech and the lease payments were to cover Mr. Lung's debt service. The Petitioner testified that Mr. Lung received no financial benefit from the ownership of the subject building once the Charitable Trust agreement was developed.
22. Mr. Price, Concord Township Assessor, testified that he agreed with the Petitioner that the building should be 100% exempt because of its charitable interest and benefit to the community.
23. This is not a simple case of determining whether the subject building assessed served a charitable purpose within Elkhart County. In the case at bar, there is no question that the Mervin D. Lung Charitable Trust did indeed benefit Ivy Tech State College and the community of Elkhart. The issue in this case is whether the real estate held in the Charitable Trust was exempt from property taxation, in whole or in part, under the statutes of Indiana Code.

24. The Respondent's evidence indicates that prior to receiving the Charitable Trust, a member of the Ivy Tech Foundation wrote to the State Board of Tax Commissioners on October 19, 1994 to inquire whether part or all of the subject building would be eligible for exemption under IC 6-1.1-10-16 once the Charitable Trust was established (Respondent's Exhibit 1).
25. The State Board of Tax Commissioners replied on November 21, 1994 (Respondent's Exhibit 2). Their opinion was as follows:
- Applying the facts provided by the Foundation, the real property could not qualify for exemption under IC 6-1.1-10-16. In order for property to qualify for exemption under IC 6-1.1-10-16, the *owner* must occupy and use the property for an exempt purpose. Because the property will be placed in a charitable remainder trust, the Foundation will not be the owner of the property as defined in IC 6-1.1-1-9. In this instance, the owner of the real property would not occupy and use the property for an exempt purpose.
 - However, the real property would qualify for partial exemption from property taxation under IC 6-1.1-10-33, which reads:
 - (a) Tangible property, which is under the control of an executor or a trustee, is exempt from property taxation if it is to be used and applied:
 - (1) Within this state for a municipal, educational, literary, scientific, religious, or charitable purpose: or
 - (2) For the benefit of this state or a state institution.
 - (b) Subsection (a) does not apply unless the executor or trustee diligently and in good faith carries out the provisions of the will or trust agreement by using and applying the property for the intended purpose.
26. However, the current state of the law indicates that unity of ownership and occupancy are not necessary to qualify for an exemption. See *Sangralea Boys Fund, Inc. v. State Board of Tax Commissioners*, 686 N.E. 2d 954 (Ind. Tax 1997).

27. In the present case, the property is held, in trust, for the benefit of an educational institution. The property is currently being used by that educational institution. The Township Assessor believes the property qualifies for a complete exemption.
28. The property is held in trust, and thus qualifies for an exemption under Ind. Code § 6-1.1-10-33. That statute states: “Tangible property which is held under control of an executor or a trustee is exempt from property taxation if it is to be used and applied: (1) within this state for a municipal, educational, literary, scientific, religious, or charitable purpose; or (2) for the benefit of this state or a state institution.”
29. Everyone agrees that the property is held in trust and is used for educational purposes. The reason for granting a 54.14% exemption and not a 100% exemption was based on the letter from the State. However, the State’s opinion in that matter has been superceded by case law. Accordingly, the property qualifies for a 100% exemption.

The above stated findings and conclusions are issued in conjunction with, and serve as the basis for, the Final Determination in the above captioned matter, both issued by the Indiana Board of Tax Review this ____ day of _____, 2002.

Chairman, Indiana Board of Tax Review