

REPRESENTATIVE FOR PETITIONER:

Deborah Shubert, pro se

REPRESENTATIVE FOR RESPONDENT:

Frank J. Agostino, Attorney

**BEFORE THE  
INDIANA BOARD OF TAX REVIEW**

Shubert Construction, Inc./	)	Petition: 71-024-09-2-8-00001
Benefactor to the Arts, LLC	)	
	)	
	)	
Petitioner,	)	
	)	
v.	)	Parcel: 24-2023-054816
	)	
	)	
St. Joseph County Assessor,	)	County: St. Joseph
	)	
Respondent	)	
	)	
	)	Assessment Year: 2009

Appeal from the Final Determination of  
St. Joseph County Property Tax Assessment Board of Appeals

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**INTRODUCTION**

A taxpayer appealing from the denial of an exemption under Indiana’s general exemption statute, Indiana Code section 6-1.1-10-16(a), has the burden of proving that the property was owned, occupied, and predominately used for an exempt purpose. In this case, the Petitioner, Shubert Construction, Inc failed to show it owned the property for an exempt purpose, and thus, failed to meet its burden of proving it is entitled to an exemption.

## PROCEDURAL HISTORY

1. On May 12, 2009, Shubert Construction, Inc./Benefactor to the Arts, LLC (the Petitioner), applied for a 72% property tax exemption for its real property claiming that the property was exempt under Indiana Code section 6-1.1-10-16(a) because that portion of the property was used for charitable and educational purposes (Form 136). On November 13, 2009, the St. Joseph County Property Tax Assessment Board of Appeals (“PTABOA”) determined that the subject property was 100% taxable for the March 1, 2009, assessment date. On December 14, 2009, the Petitioner filed a Form 132 Petition with the Indiana Board of Tax Review (“Board”).

## HEARING FACTS AND OTHER MATTERS OF RECORD

2. On November 7, 2013, the Board held a hearing in South Bend, Indiana, through Administrative Law Judge Ellen Yuhan.
3. The following persons were sworn as witnesses at the hearing:

For the Petitioner:

Deborah Shubert, owner of Shubert Construction, Inc. and Benefactor to the Arts, LLC,

For the Respondent:

Rosemary Mandrici, St. Joseph County Assessor.

4. The Petitioner submitted the following exhibits:  
Petitioner Exhibit 1 – Application for Property Tax Exemption,  
Petitioner Exhibit 2 – Notification on Exemption Application,  
Petitioner Exhibit 3 – Petition to the Indiana Board of Tax Review,  
Petitioner Exhibit 4 – Articles of Incorporation for Shubert Construction, Inc.,  
Petitioner Exhibit 5 – Bylaws of Shubert Construction, Inc.,  
Petitioner Exhibit 6 – 2006, 2007, and 2008 tax returns for Shubert Construction, Inc.,<sup>1</sup>

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<sup>1</sup> Petitioner Exhibit 6 contains income tax returns that were not redacted. Ms. Shubert agreed to submit redacted copies of the income tax returns.

Petitioner Exhibit 7 – Articles of Incorporation for Benefactor to the Arts,  
Petitioner Exhibit 8 – Operating Agreement for Benefactor to the Arts,  
Petitioner Exhibit 9 – 2009 tax return for Benefactor to the Arts,  
Petitioner Exhibit 10 – Notice of Action on Exemption Application-Clay Township 2010  
and 2012,  
Petitioner Exhibit 11 – Notice of Action on Exemption Application-Penn Township 2010  
and 2012,  
Petitioner Exhibit 12 – Final Determinations of the Indiana Board of Tax Review for  
property tax exemptions for 2005, 2007, 2008, and 2009,  
Petitioner Exhibit 13 – Resume of Debbie Werbrouk,  
Petitioner Exhibit 14 – Curriculum of Debbie Werbrouk’s School of Dance,  
Petitioner Exhibit 15 – Preschool Curriculum Guide,  
Petitioner Exhibit 16 – Letter from Benefactor to the Arts,  
Petitioner Exhibit 17 – Letter from Patchwork Dance Company,  
Petitioner Exhibit 18 – Letter from Superintendent of Schools for Elkhart Community  
Schools.<sup>2</sup>

5. The Respondent presented the following exhibits:

Respondent Exhibit 1 – 2006 Form 1120S, U. S Income Tax Return, for Shubert  
Construction, Inc.,  
Respondent Exhibit 2 – 2006 Form 8825, Rental Real Estate Income and Expenses of a  
Partnership or an S Corporation, for Shubert Construction, Inc.,  
Respondent Exhibit 3 – 2007 Form 1120S, U. S Income Tax Return, for Shubert  
Construction, Inc.,  
Respondent Exhibit 4 – 2007 Form 8825, Rental Real Estate Income and Expenses of a  
Partnership or an S Corporation, for Shubert Construction, Inc.,  
Respondent Exhibit 5 – 2008 Form 1120S, U. S Income Tax Return, for Shubert  
Construction, Inc.,  
Respondent Exhibit 6 – 2008 Form 8825, Rental Real Estate Income and Expenses of a  
Partnership or an S Corporation, for Shubert Construction, Inc.<sup>3</sup>

7. The following additional items are officially recognized as part of the record of  
proceedings and labeled as Board Exhibits:

Board Exhibit A – Form 132 Petition with attachments,  
Board Exhibit B – Notice of Hearing, dated August 26, 2013,  
Board Exhibit C – Hearing sign-in sheet.

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<sup>2</sup> Respondent’s counsel objected to Petitioner Exhibits 10, 11, and 12 because they did not relate to Shubert Construction, the taxpayer in this case and also because the properties referred to are located in a different county. Counsel’s objections go to the relevancy of the exhibits and not the admissibility. The ALJ admitted the exhibits over the Respondent’s objections.

<sup>3</sup> The Respondent also supplied the documents in a redacted version.

8. The subject property is a dance studio located at 3466 Douglas Road, South Bend, Indiana.
9. Neither the Board nor the ALJ inspected the property.

#### **SUMMARY OF THE PETITIONER'S EVIDENCE AND CONTENTIONS**

10. The property was built by Shubert Construction and, as of the March 1, 2009, assessment date, it was owned by Shubert Construction. *Shubert testimony*. Shubert Construction is a for-profit residential and commercial builder. *Shubert testimony; Resp. Ex. 1, 3*.
11. The property was constructed specifically as an educational facility for dance instruction by the Debbie Werbrouck School of Dance. Since it was constructed, the portion of the property for which the exemption is sought has been continually owned, used, and occupied expressly for this purpose. *Shubert testimony*.
12. Shubert Construction charged rent to the Debbie Werbrouck School of Dance, but at a significantly reduced rate compared to the rent paid by the lessees of the other portion of the subject property for which the Petitioner is not claiming an exemption. *Shubert testimony*.
13. In 2006, Internal Revenue Service (IRS) form 1120S showed that Shubert Construction collected \$57,800 in rental income for the subject property. *Respondent Ex. 1*. For 2007, IRS form 1120S shows rental income in the amount of \$64,000 for the subject property. *Respondent Ex. 3*. The rental income includes rent for both the School of Dance and other non-exempt leased portions of the subject property. *Shubert testimony*.

14. Ownership of the subject property was eventually turned over to Benefactor to the Arts.<sup>4</sup> *Petitioner Ex. 16.* Benefactor to the Arts owns, uses, and occupies the portion of the property for which the exemption is claimed for the sole purpose of dance instruction. *Shubert testimony; Petitioner Ex. 7- 9, 16.*
  
15. The Operating Agreement and Articles of Organization for Benefactor of the Arts provide that the express purpose of Benefactor of the Arts is to promote the education of dance. Specifically, the Articles of Organization for Benefactor for the Arts state: “The purpose of the Company shall be to own and manage real estate to promote education in dance. Specifically, the Company’s mission is to provide real estate to a dance school that will provide educational dance programs for public benefit that are substantially equivalent to those that may be provided by public institutions.” *Shubert testimony; Petitioner Exs. 7, 8.* There is no similar stated purpose in the Articles of Incorporation or By-Laws for Shubert Construction. *Shubert testimony; Petitioner Ex. 4.*
  
16. Space at the subject property is also provided free of charge to Patchwork Dance Company (Patchwork), a non-profit 501(c )(3) dance organization. Patchworks activities enhance the community benefits provided by the Petitioners and by the School of Dance. These activities include live performances, in-school workshops for public school students and teachers, master classes with visiting guest artists, free lectures on subjects including age-appropriate developmental programs, dance history, music, injury prevention, and career opportunities. *Petitioner Ex. 17.* Because the Petitioners have provided use of the property to the School of Dance and Patchwork at generous rates, both of those entities have been able to provide scholarships. *Petitioner Ex. 17.* The Shuberts and their companies, Shubert Construction, Inc., and Benefactor to the Arts, LLC, which are both wholly owned and controlled by the Shuberts, have enabled and

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<sup>4</sup> According to the Articles of Organization and By-Laws, Benefactor for the Arts was organized on March 31, 2009. *Petitioner Ex. 7-8.* The record does not indicate when ownership of the building was transferred from Shubert Construction to Benefactor of the Arts, but the principal place of business for Benefactor of the Arts is not the subject property. *Petitioner’s Ex. 8, pg. 4.*

supported the educational and charitable missions of the School of Dance and Patchwork. *Petitioner Exhibits 1, 16- 17.*

#### **SUMMARY OF THE RESPONDENT'S CASE**

17. The subject property is not eligible for exemption pursuant to Indiana Code section 6-1.1-10-16, because the property was not owned for a charitable or educational purpose on March 1, 2009. *Agostino argument.*
18. Shubert Construction, Inc. owned the property on March 1, 2009. Shubert Construction is a for-profit corporation that engages in the business of commercial and residential construction. Neither the Articles of Incorporation nor the bylaws for Shubert Construction indicate the company was formed for a charitable or an educational purpose. *Agostino argument; Petitioner Exhibits 4 and 5.*
19. Shubert Construction collected rent from the School of Dance. Shubert Construction's income tax returns show rents collected for studio building 15 were \$57,800 for 2006, \$64,600 for 2007, and \$74,100 for 2008.<sup>5</sup> *Agostino argument; Respondent Exhibits 2, 4, and 6.*

#### **BASIS OF EXEMPTION AND BURDEN**

20. The general rule is that all property is subject to taxation. Ind. Code § 6-1.1-2-1. The General Assembly has exercised its constitutional power to exempt certain types of property from taxation. Ind. Const., Art. 10, § 1; *Indianapolis Osteopathic Hospital, Inc. v. Dep't. of Local Gov't. Fin.*, 818 N.E.2d 1009, 1014 (Ind. Tax Ct. 2004).
21. When property is exempt from taxation, the effect is to shift the amount of taxes a property owner would have paid to other parcels that are not exempt. *See National Association of*

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<sup>5</sup> The tax return for 2008 was not a final return. *Respondent Exhibit 6.*

*Miniature Enthusiasts v. State Board of Tax Commissioners*, 671 N.E.2d 218 (Ind. Tax Ct. 1996).

22. Worthwhile activity or noble purpose alone is not enough. An exemption is justified because it helps accomplish some public purpose. *Id.* at 220 (citing *Foursquare Tabernacle Church of God in Christ v. State Board of Tax Commissioners*, 550 N.E.2d 850, 854 (Ind. Tax Ct. 1990)).

### ANALYSIS

23. Indiana Code section 6-1.1-10-16(a) states: “All or part of a building is exempt from property taxation if it is owned, occupied, and used by a person for educational, literary, scientific, religious, or charitable purposes.” In this case, the Petitioner is claiming a charitable and educational exemption pursuant to Indiana Code section 6-1.1-10-16(a). *See Board Ex. A.*
24. Exemption statutes are strictly construed against the taxpayer. *National Association of Miniature Enthusiasts*, 671 N.E.2d at 220.
25. Evaluating whether a property is owned, occupied and predominately used for exempt purposes is a “fact sensitive inquiry; there are no bright-line tests.” *Jamestown Homes of Mishawaka, Inc. v. St. Joseph County Assessor*, 914 N.E.2d 13, 14 (Ind. Tax. Ct. 2009). Every exemption case “stand[s] on its own facts” and on how the parties present those facts. *Indianapolis Osteopathic Hosp*, 818 N.E.2d at 101); and *Long v. Wayne Twp. Assessor*, 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005) (explaining that a taxpayer has a duty to walk the Indiana Board through every element of its analysis and it cannot assume the evidence speaks for itself).
26. The Petitioners contend that the portion of the property leased to the School of Dance qualifies for a charitable and educational purpose exemption because it is owned, occupied, and used to teach dance. The parties do not dispute that a portion of the

property is used and occupied for an educational purpose.<sup>6</sup> The question is whether Shubert Construction's ownership of the real property is also for an exempt purpose.

27. The Indiana Supreme Court recently issued a decision in *Hamilton County Property Tax Assessment Board of Appeals v. Oaken Bucket Partners, LLC*, 938 N.E.2d 654 (Ind. 2010) discussing this question. In *Oaken Bucket*, the Court stated that to qualify for an exemption, "the taxpayer must demonstrate that its property is owned for exempt purposes, occupied for exempt purposes, and predominately used for exempt purposes. *Id.* at 657. "Once these three elements are met, regardless of by whom, the property can be exempt from taxation." *Id.* (citing *Sangralea Boys Fund, Inc. v. State Bd. of Tax Comm'rs.*, 686 N.E.2d 954, 959 (Ind. Tax. Ct. 1997)). Unity of these elements is not required, but when such is lacking, both entities must demonstrate they both possess their own exempt purposes. *Id.*
28. *Oaken Bucket* is instructive to the facts of this case. Like *Oaken Bucket*, Shubert Construction is a for-profit company that owned the subject property on March 1, 2009, Shubert Construction showed substantial rental income from this property for the years 2006, 2007, and 2008. Ms. Shubert was unsure about the rents for 2006, but testified the 2007 and 2008 rents were from the School of Dance and the other tenant. And, while Ms. Shubert contends the School of Dance paid a reduced rate, more than 50% less than the other portion of the building, there is no evidence in the record explaining what market rent is versus a reduced or discounted rent as there was in *Oaken Bucket*. In fact, the Petitioners did not introduce any evidence specifying the rent it charged to either the exempt entity or the non-exempt entity.
29. Nonetheless, assuming Shubert Construction did charge the School of Dance significantly below market rent, this fact alone does not answer the question of whether Shubert Construction possessed its "own exempt purposes." *Id.* at 658. To be eligible for an exemption, Shubert Construction must show that it possessed its own exempt

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<sup>6</sup> Despite filing the Form 132 Petition seeking an exemption for both charitable and educational purposes, the Petitioner focused the presentation of her case to the educational purpose of the School of Dance.



purposes. *Id.* Here, Shubert failed to show that it had an exempt purpose separate and apart from that of the School of Dance. There is no question that the School of Dance is an educational institution and possesses an exempt purpose in its own right. But aside from arguing that it charged the School below market rent, Shubert Construction failed to demonstrate an exempt purpose separate from that of the School.

30. Further, Shubert Construction does not “own” this property for an exempt purpose. On this point, *Oaken Bucket* is again instructive. In *Oaken Bucket*, the Supreme Court determined that a for-profit leasing company leasing space to a not-for-profit church, did not “own” the property for an exempt purpose even if it leased the space for below-market rent. *Id.* at 658-59. The Court held that “absent evidence that an owner of leased property possesses an exempt purpose separate and distinct from the exempt purpose of its lessee, the owner holds the property for its own benefit, not that of the public, and thus its property is not entitled to the statutory exemption.” *Id.* at 659.
31. In sum, Shubert Construction has failed to demonstrate that it owned the property for educational purposes (or that it has an exempt purpose independent of the School’s educational purposes).<sup>7</sup>
32. As such, the Petitioner failed to meet its burden of proving it is entitled to an exemption.

#### **SUMMARY OF FINAL DETERMINATION**

33. The Petitioner failed to prove it owned the property for an exempt purpose on the March 1, 2009, assessment date. The Board finds for the Respondent.

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<sup>7</sup> The Board is not analyzing whether Benefactor of the Arts owned the property for charitable and educational purposes because it did not own the property on the relevant March 1, 2009, assessment date.

The Final Determination of the above captioned matter is issued by the Indiana Board of Tax Review.

Date: January 2, 2014

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Chairman, Indiana Board of Tax Review

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Commissioner, Indiana Board of Tax Review

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Commissioner, Indiana Board of Tax Review

**APPEAL RIGHTS -**

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5 and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required not later than forty-five (45) days after the date of this notice. The Indiana Code is available on the Internet at <<http://www.in.gov/legislative/ic/code>>. The Indiana Tax Court's rules are available at <<http://www.in.gov/judiciary/rules/tax/index.html>>.