

PT 05-24

Tax Type: Property Tax
Issue: Charitable Ownership/Use

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

WHEATON DRAMA, INC.

v.

**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

No. 04-PT-0033
(03-22-326)
PIN 05-16-302-0632

John White
Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. John M. Mulherin of Mulherin, Rehfeldt & Varchetto, P.C. for Wheaton Drama, Inc.; Mr. Shepard Smith, Special Assistant Attorney General, on behalf of the Illinois Department of Revenue; Mr. Robert Rybica, Assistant State's Attorney, on behalf of the DuPage County Board of Review

Synopsis:

This matter comes on for hearing pursuant to the protest by Wheaton Drama, Inc.'s (hereinafter "WDI" or the "Applicant") of the Illinois Department of Revenue's (hereinafter the "Department") Denial of Non-homestead Property Tax Exemption (hereinafter the "Denial") for the tax year 2003 (hereinafter the "tax year") for certain property owned by applicant located in DuPage County, Illinois. The grounds stated on the Department's denial were that the property at issue was not in exempt ownership and that the property was not in exempt use. Pursuant to applicant's protest, the parties appeared at a hearing on this matter whereat oral testimony was presented and the parties presented for admission into evidence a Stipulation of Facts with attached documents (hereinafter the "Stipulation"). Following a review of the evidence of record, it is

recommended that this matter be resolved in favor of the Department, and in support thereof, I make the following findings of fact and conclusions of law:

Findings of Fact:¹

1. The Department's jurisdiction over this matter and its position herein, that is, that for the tax year at issue, 2003, the property was neither in statutorily exempt ownership nor use, was established by the admission of the Denial of Non-homestead Property Tax Exemption. Stipulation, Ex. No. 3
2. The DuPage Board of Review (hereinafter the "Board") had also denied applicant's petition for exemption for the tax year. Stipulation Ex. No. 1 (DuPage Board of Review Petition For Tax Exemption)
3. The property at issue (hereinafter the "Property") is located at 111 North Hale Street in Wheaton, Illinois. Stipulation, Ex. Nos. 1, 5 (Affidavit For Use For Real Estate Tax Exempt [sic] Purposes by Sheila Zinke), 6 (Trustee's Deed)
4. The property contains 8,302 sq. ft., 3346 sq. ft. of which is a single story building with a basement. Stipulation, Ex. Nos. 2 (Application for Non-homestead Property Tax Exemption), 10 (Photographs of Subject Property)
5. The property is used by the applicant, primarily, as a community theater building. Stipulation Ex. Nos. 1, 2, 5, 13 (Affidavit of Jack Smith)
6. WDI owned the property during the tax year. Stipulation Ex. Nos. 6, 7 (Chicago Title Insurance Company Loan Policy Schedule A)

7. WDI is incorporated in Illinois pursuant to the Illinois General Not For Profit Corporation Act. Stipulation Ex. No. 8 (Illinois Secretary of State document)
8. Applicant is exempt from the imposition of federal income tax pursuant to section 501 (c) (3) of the Internal Revenue Code. Stipulation Ex. No. 11 (Letters from the U. S. Treasury Department-Internal Revenue Service, 1967, 1992)
9. Applicant's net receipts were \$159,928 that included membership income of \$3692.50 and income received from ticket sales to its theater productions of \$106,966. Stipulation Ex. No. 4, p. 13 (financial statements); Tr. pp. 37-8
10. Applicant's costs included \$28,352.91 for play production, \$34,181.65 for utilities and maintenance and 25,893.46 for capital expenditures that included building construction. Total costs were \$108,661.08. Stipulation Ex. No. 4, pp. 14-15
11. Applicant's net income was \$51,267. Stipulation Ex. No. 4, p. 15; Tr. pp. 37-8
12. WDI is a membership organization, with membership fees being \$20 per individual, \$30 for a couple and \$35 for a family membership. Stipulation Ex. No. 5; Tr. p. 15
13. Membership is required of all persons who are eighteen years old and older who wish to participate in applicant's productions, including actors, directors, stage managers, stage designers and lighting and costume

¹ Findings of Fact pertain to the tax year, 2003, unless otherwise stated.

personnel. Stipulation Ex. Nos. 5, 9 (Wheaton Drama, Inc. Bylaws, Article II); Tr. pp. 15-16

14. Only members may submit, for applicant's consideration, plays to be produced by applicant on the property. Stipulation Ex. No. 9, Article V
15. Applicant's Bylaws provide that the Membership Governor "can, at his/her discretion, waive the membership dues of any member for financial reasons." Stipulation Ex. No. 9, Article II, section 2
16. Applicant holds meetings once per month on the property whereat members entertain by doing dramatic readings, putting on small plays or using the opportunity to direct members in a performance. Members also are given an opportunity to experience working with lighting and sound during these meetings. Tr. pp. 17-18
17. Between 5500 and 6000 people, in total, attended WDI productions.² Tr. p. 18 WDI charged admission fees of \$12 for its non-musical productions and \$15 for its musical productions. Tr. p. 19 Applicant's Bylaws provide that "the Board shall waive payment of any performance ticket charges upon request." Stipulation Ex. No. 9, Article VI
18. Free admission was offered to several local convalescent communities for the final dress rehearsal for each of applicant's productions, accounting for about 125 free admissions in total. Tr. pp. 19, 26-7, 29 On the occasions

² There is a conflict within the record as to how many productions occurred in 2003. The Attachment to P-Tax 300, found as Stipulation Ex. No. 1, states that applicant had 6 productions on the property during the tax year. In the Affidavit of Jack Smith, Stipulation Ex. No. 13 ¶ 3, the affiant states that there were 5 productions on the property during the tax year. Testimony at the hearing referred to 5 productions (Tr. pp. 13 (Jack Smith), 26 (Jack Smith)). For purposes of this recommendation, I find that applicant presented 5 productions on the property during the tax year.

when there are available seats, members who have already paid to see the performance are permitted seating at no additional charge. Tr. p. 29

19. Applicant provides a summer workshop for children on the property. There is a tuition charge of \$30. Tr. p. 20 Applicant's Bylaws provide that "the Board shall waive payment of any tuition fees upon request" in the case of financial hardship. Stipulation Ex. No. 9, Article VI

Conclusions of Law:

Article IX, Section 6 of the Illinois Constitution of 1970 provides as follows:

The General Assembly by law may exempt from taxation only the property of the State, units of local government and school districts and property used exclusively for agricultural and horticultural societies, and for school, religious, cemetery and charitable purposes.

Pursuant to its authority granted under the Constitution, the General Assembly enacted specific exemptions to the Property Tax Code, 35 **ILCS** 200/1-1 *et seq.* (hereinafter the "Code"). WDI claims exemption from property tax pursuant to section 15-65 of the Code³ that states, in relevant part:

§ 15-65 Charitable purposes. All property of the following is exempt when actually and exclusively used for charitable or beneficent purposes, and not leased or otherwise used with a view to profit:
(a) institutions of public charity.
35 **ILCS** 200/15-65

³ It is noted that on its Application for Non-homestead Property Tax Exemption, Stipulation Ex. No. 2, part 3, applicant stated that it was seeking exemption under section 15-60 of the Act. That provision pertains to taxing district property. Applicant has never claimed or otherwise provided any evidence that it qualified as a taxing district, and, in fact, it is not. Applicant addressed section 15-65 in its post-hearing memorandum of law, entitled Applicants [sic] Statement of Law.

Therefore, the requirements for property exemption under this statutory provision are that the property is owned by a public charity and is “actually and exclusively⁴ used for charitable or beneficent purposes.” Roger Park Post No. 108, American Legion v. Brenza, 8 Ill.2d 286 (1956).

It is well established in Illinois that in order to qualify as an institution of public charity, an entity must meet the following criteria: (1) have no capital, capital stock or shareholder, earns no profits or dividends; (2) derives its funds mainly from public and private charity and hold them in trust for the objects and purposes expressed in its charter; (3) dispenses charity to all who need and apply for it; (4) does not place any obstacles of any character in the way of those who need and avail themselves of the benefits it dispenses; and (5) benefits derived are for an indefinite number of persons for their general welfare or in some way reduces the burdens on government. Methodist Old Peoples Home, 39 Ill.2d 149, 156-57 (1968). It is also settled that in assessing charitable use, these five criteria, as well as the statutory mandate that the property be used exclusively for charitable purposes, are applied to the facts of the matter, and that they are constitutional requirements that must be analyzed to assess whether the entity and the property fit into the constitutional limitations placed on the legislature’s right to exempt real property from taxation. Eden Retirement Center, Inc. v. Department of Revenue, 213 Ill.2d 273 (2004). “An applicant for a charitable-use property tax exemption must ‘comply unequivocally with the constitutional requirement of exclusive charitable use.’” (citations omitted) Id. at 287.

⁴ Exclusive use is determined to be the primary purpose for which the property is used and does not include a secondary or incidental purpose. People ex rel. Nordlund v. Association of Winnebago Home for Aged, 40 Ill.2d 91 (1968).

Regarding these criteria, there is no dispute that WDI has no capital, capital stock or shareholders. Stipulation Ex. No. 11. This factor, alone, is “not determinative of whether the subject property is used for charitable purposes.” Decatur Sports Foundation v. Department of Revenue, 177 Ill. App.3d 696 (4th Dist. 1988). The DuPage Board’s position is that applicant does not satisfy significant other criteria established as constitutionally necessary by the Illinois Supreme Court. Specifically, the Board states that WDI earns substantial profit; that its income does not primarily derive from public or private charity, but rather, is from membership dues, tickets and advertising sales; applicant’s benefits inure to its members and are not extended to non-members; that there are obstacles for those persons who would want to participate in applicant’s activities; and that no government burdens are lessened by its activities.⁵ Board’s Brief, *passim*. The Department concurs with the Board. Department’s Statement, *passim*.

There is no dispute that the property is used by the applicant primarily as a theater building wherein its productions are staged and where it holds its monthly meetings. Applicant is correct when it states that an entity involved with the performing arts may qualify as an institution of public charity (Applicant’s Brief pp. 2-4), however, the entity must satisfy the other the requirements set forth in Methodist Old People’s Home v. Korzen. Eden Retirement Center, Inc. v. Department of Revenue, *supra*. Applicant fails to convince that it successfully operates in compliance with the other mandated characteristics of a charity.

⁵ Post hearing, the applicant filed its Applicants [sic] Statement of Law (hereinafter the “Applicant’s Brief”) in reponse to which the Board filed its Brief of the DuPage County Board of Review (hereinafter the “Board’s Brief”). At the close of the hearing, the Department submitted what it had prepared as its closing statement at hearing as its post hearing written brief (hereinafter the “Department’s Statement”).

WDI argues that it benefits an indefinite number of people because its membership and productions are open to the public. Applicant's Brief, p. 6. This averment avoids the reality that it requires the payment of set dues for membership and entry to its productions requires the purchase of a ticket. WDI advises that charging fees for its services, *i.e.* the viewing of its productions or for membership, does not necessarily mean that its benefits are limited to those who can afford the costs or that it places obstacles in the way of those who need and would avail themselves of its benefits, and it supports its position with Illinois case law. However, each case relied on is clearly distinguishable on its facts from those in this matter.

Applicant correctly recognizes that the applicant in Arts Club of Chicago v. Department of Revenue, 334 Ill. App.3d 235 (1st Dist. 2002), required a considerable annual membership fee, placed additional restrictions on who could attain membership and did not allow non-members total access to all of the property for which an exemption was claimed. It is, however, the other facts of record that clearly distinguish the Arts Club of Chicago case from this one, and those facts presented sufficient evidence for the court to conclude that the applicant satisfied the mandates of Methodist Old People's Home.

The primary purpose of the Arts Club was to make "available to the public art and literary works not available at other museums." Id. at 237. About 90% of its permanent art collection was displayed throughout the building, which was open to the public, free of charge, Monday through Friday, 11 a.m. to 6 p.m. and on Saturdays from 11 a.m. to 4 p.m. Its front door advised that the exhibit was open to the public, it advertised in local magazines and newspapers that its exhibit was open to the public for free, and schools

were contacted for the purpose of urging students to view the exhibit at no charge. Id. at 238. The Club held five two-month exhibits in its two first-floor galleries that were free to the public. In addition, approximately one-half of its musical performances, lectures and discussions were free to the public, while the \$10 admission fee to the other one-half were waived if the attendant was told that the visitor was unable to pay. Id.

In contrast, in this matter, for the five productions held at the property, free seating was made available only for the final dress rehearsal for each production, that is, for one performance for each production. The invitation for these free performances was extended mainly to several local convalescent communities, with a total free seating thus provided to about 125 people out of the 5500-6000 people that paid to see the productions. Even when there was seating available for a regular performance, free seating was extended to a member who had already paid for a ticket and had previously seen the performance. Tr. p. 29.

Further, only WDI members are allowed to participate in the actual presentation of the productions, as actors, directors, stage staff and crew. Tr. pp. 14-16. Only members are allowed to have their plays presented by applicant. Stipulation Ex. No. 9, Article V, section 2 (Play Reading Committee shall meet to discuss and evaluate plays submitted by the Committee, the membership and potential directors; Musical Play Reading Committee shall meet to discuss and evaluate plays submitted by the Committee, the membership and potential directors; Children's Play Reading Committee shall meet to discuss and evaluate plays submitted by the Committee, the membership and potential directors). While the Arts Club did host a members exhibit every few years, it regularly and predominately displayed the art of non-members in both its permanent

collection as well as at the five exhibitions it held each year. Id. at 247. WDI has a waiver of membership dues in its Bylaws, and there was testimony that membership dues were waived for ten people during the tax year. Tr. p. 16. However, there is no evidence in this record that the waiver is meaningful, in that there is no evidence that anyone knows about it. DuPage Art League v. Department of Revenue, 177 Ill. App.3d 895 (2nd Dist. 1988). “Statements of the agents of an institution and the wording of its governing legal documents evidencing an intention to use its property exclusively for charitable purposes do not relieve such institutions of the burden of proving that its property actual and factually is so used.” Morton Temple Association v. Department of Revenue, 158 Ill. App.3d 794, 796 (3rd Dist. 1987).

In addition, the applicant herein uses the property each month for a meeting whereat members, only, are provided a forum to, *inter alia*, act, direct and stage readings in a small setting for experience and enjoyment. Although there was testimony at hearing (Tr. p. 18) that the public is invited to attend, there is no evidence that this is advertised in any way. Nor would any of the public be allowed to participate at these meetings without being a member.

These facts, unlike those in the Arts Club of Chicago, lead to the conclusion that a major benefit of WDI’s purpose, which is to expose people to the arts, is not extended by this applicant to an indefinite number of people or without obstacles, namely, the payment of the cost of admission or membership.

Applicant also cites Resurrection Lutheran Church v. Department of Revenue, 212 Ill. App.3d 964 (1st Dist. 1991) to support its position that charging tuition and admission fees to programs does not defeat a grant of property exemption. The record of

that matter included the facts that the MoMing Dance and Arts Center charged tuition for its classes and admission fees to dance concerts. For those students who could pay the class tuition, the fees were “substantially less than enough to cover regular operating expenses.” Id. at 972. In fact, “each performance event incurred a loss of approximately \$1,000 to \$8,000. Id. Further, if a student could not pay the tuition, he was allowed into a work-study program whereby the student was assigned a job, usually janitorial, in exchange for the right to attend the instructional class. Id. at 968.

In contrast, there is nothing in this record that indicates that the membership or admission fees were less than enough to cover WDI’s operating expenses. Quite the contrary is true. For the tax year, production income was \$106,996 and production expense was \$28,352.91. Stipulation Ex. No. 4, pp. 13-15. Despite the fact that its income in this area far exceeded its expenses, only the final dress rehearsal for each production was made available to a small group of people for free seating, and only about 125 persons, in total, used the opportunity. On the other hand, although it lost money for each dance performance, MoMing offered as many as 44 complimentary tickets out of a total of 140 for each performance. Resurrection Lutheran Church v. Department of Revenue, supra at 973. In addition, MoMing offered dance studio space for a period of time on Friday afternoons during which anyone could use the space for free movement. Id. at 963. There is no competent evidence of record that WDI makes the property available for use by non-members at no charge.

On this same issue of whether charging for services fatally violates a Methodist Old People’s Home criteria, applicant’s reliance on Decatur Sports Foundation v. Department of Revenue, 177 Ill. App.3d 696 (4th Dist. 1988) and Vermilion County

Museum Society v. Department of Revenue, 273 Ill. App.3d 675 (4th Dist. 1995) is misplaced. In the Vermilion County Museum matter, a museum society sought exemption for its museum facility. There was a \$10 membership fee that allowed members free admittance to the museum and a quarterly publication. Id. at 678. There was an admission fee of \$1.00 for adults and \$.50 for children. Id. at 679. It was acknowledged that although there was no waiver policy in place, school children came to the facility by busload, and were admitted without charge. Id. The court granted the property exemption finding that the admission fee was “an insignificant hindrance to admission” (id.) and that “[t]he admission fee evidence clearly indicates that the fees are only a small portion of the overall cost of maintaining and exhibiting the Society’s museum.” Id. Entry to WDI’s productions are not *diminimus* and free seating is not generally provided. Furthermore, the benefits of membership were not extensive in the Vermilion case. That applicant only provided the member with a free quarterly publication and free admittance to the museum. In this matter, membership is necessary to participate in the organization. Only members can have their plays produced, and only members can be part of any production, including anything that is presented at monthly meetings.

In the Decatur case, a private foundation owned 40 acres improved and used the property as fields for various sports. The fields were open to “anyone ‘interested in furthering youth activities or charitable events.’” Decatur Sports Foundation v. Department of Revenue, supra at 701. A group that held baseball games for boys and girls used the fields most extensively during the pertinent tax year, and paid \$1.00 for the privilege. Other groups paid a \$25 fee to use the fields, which covered the costs for field

preparation and lights. Id. “Organizations which did not require field preparation or lighting were not charged the \$25.” Id. And, as the appellate court noted, the property owner did “not require membership in order to use the field.” Id. at 706. These facts differ from the ones in the instant matter in that WDI does require membership for those that wish to have productions presented, to act in, to direct or to be part of the stage crew of productions, and free seating at the productions is clearly limited.

I must conclude from the evidence of record that the property is used exclusively by WDI members and admissions paying persons and that applicant’s benefits inure exclusively to its members and persons paying the cost of admission. I also must conclude that, despite provisions in the Bylaws for waivers of membership fees, ticket charges and class tuition to its children’s summer workshop,⁶ (Stipulation Ex. No. 9, Article VI, section 5, 6) applicant has failed to prove clearly and convincingly that it made these waiver provisions known so that members of the public could meaningfully participate in its programs and activities in the case of financial hardship. Morton Temple Ass’n v. Department of Revenue, supra at 796 (“Statements of the agents of an institution and the wording of its governing legal documents evidencing an intention to use its property exclusively for charitable purposes do not relieve such institutions of the burden of proving that its property actually and factually is so used.”); Highland Park Hospital v. Department of Revenue, 155 Ill. App.3d 272 (2nd Dist. 1987).

Given that I conclude that applicant’s benefits do not inure to an indefinite number of persons, and that there are obstacles in place preventing those who need or would otherwise avail themselves of its benefits, I am unable to conclude from this

⁶ The tuition for the children’s summer workshop was about \$30. Tr. p. 20

record that applicant relieves a burden of government. Compare Decatur Sports Foundation v. Department of Revenue, *supra* at 705-06 (sufficient evidence of record that without the field, the park district would, *inter alia*, have to expend more monies for additional fields and reduce the number of games allowed to be played, thereby, applicant reduced “the burden of government by privately supplementing public recreational facilities).

Further, both the Department and the Board argue that WDI fails to satisfy the Methodist Old People’s Home requirement that the organization is funded primarily by public and private charity. The record certainly supports this. For the tax year, applicant’s total income was \$159,928. Stipulation Ex. No. 4. Of this, ticket sales were \$106,996 or 67% of its income. Membership income was \$3692.50 or 2.3% of its income. Thus, 69% of WDI’s income resulted from its fees for admittance to its productions and membership. Applicant’s total expenditures for the tax year were \$108,661 with \$28,353, or 26%, spent on its productions. Building operation and maintenance costs were \$44,182 or 41% of its expenses. The children’s summer workshop cost applicant \$964. WDI had a net revenue of \$51,267 which is 32% of its total income.

Clearly, WDI made a profit in the tax year and its profit resulted from income derived primarily from ticket sales and membership fees. These critical facts clearly distinguish this applicant from the others upon which it relies. In Resurrection Lutheran Church v. Department of Revenue, *supra*, MoMing derived 60% of its income from public and private charity. *Id.* at 970 The court in Vermilion County Museum Society v. Department of Revenue, *supra*, found that the admission fee was “only a small portion of

the overall cost of maintaining and exhibiting the Society's museum." Id. at 679. Similarly, the applicant in Decatur Sports Foundation v. Department of Revenue, supra, made no profit and by far, the greatest source of its income was from private charity. Id. at 710. Further, that applicant used all of its money toward the management and upkeep of the fields. Id. at 711. Additionally, it was an undisputed fact in Arts Club of Chicago v. Department of Revenue, supra, that the Club did not make a profit (id. at 244) and that it relied "primarily upon the investment income generated by charitable donations to sustain its existence." Id. at 247. Similarly, most of the income of the Randolph Street Gallery came from grants and contributions. Randolph Street Gallery v. Department of Revenue, supra at 1067.

In cases more akin to the instant matter, one of the bases for the supreme court's denial of property tax exemption in Turverein 'Lincoln' v. Board of Appeals of Cook County, supra, was that the applicant's income was largely from annual dues from its members, the fees that non-members paid and other payments from persons using its facilities. Id. at 145. See also DuPage Art League v. Department of Revenue, supra, at 901 (property tax exemption denied with one of the basis being that "almost all plaintiff's support is from tuition, membership fees and commissions from the sale of art created by its members.").

In this matter, there is no question that the vast majority of WDI's funds are derived from membership dues, ticket fees received by people who attend their productions and other fundraising activities. Stipulation Ex. No. 4, p. 13 (Advertising income \$6970 and Ways and Means income of \$10,764). Not only are the sources of its funds not public or private charity, it is also of serious note that it does not appear that

applicant uses its funds, especially its profits to further extend charity. There is nothing in the record that gives insight into how WDI, despite having a significant surplus of funds in the tax year, used those funds to permit an indefinite number of persons, *i.e.* non-members, benefits of its programs, either to participate more fully in the monthly meetings, the productions or the workshops Nor is there evidence that applicant even used the net gains to advertise that membership and its resulting benefits could be extended to those who were unable to pay the dues. The combination of funding from dues and fees and the fact that the profits were not applied by the applicant toward extending its benefits charitably, is sufficient to find that WDI acted in a manner not permitted for purposes of property tax relief.

It is basic to Illinois property tax exemption law that courts are to strictly construe taxing exemptions, insisting that they keep clearly within the boundaries set forth in the constitution. Methodist Old People's Home v. Korzen, *supra* at 155. Taxation is the rule and tax exemption is the exception. Eden Retirement Center, Inc. v. Department of Revenue, *supra* at 285. Further, "the burden of proving the right to exemption is upon the party seeking it, and in determining whether property is included within the scope of an exemption, all facts are to be construed and all debatable question resolved in favor of taxation." Methodist Old People's Home v. Korzen, *supra* at 155. The applicant for exemption must prove its entitlement by clear and convincing evidence. Immanuel Evangelical Lutheran Church of Springfield v. Department of Revenue, 267 Ill. App.3d 678 (4th Dist. 1994). Based upon the record, WDI failed to satisfy its mandated burden to show, by clear and convincing evidence, that it is entitled to a property tax exemption for the subject property for the tax year.

WHEREFORE for the reasons stated above, it is recommended that the Department's denial of Wheaton Drama, Inc.'s Application for Non-homestead Property Tax Exemption for the tax year 2003 for property identified by DuPage County parcel number 05-16-302-063 be finalized.

Date: 4/21/05

John White
Administrative Law Judge