

**PT 11-20**  
**Tax Type: Property Tax**  
**Issue: Charitable Ownership/Use**

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

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**O.L.L. EDUCATION SERVICES,**

**APPLICANT**

**v.**

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

**No: 09-PT-0040 (08-49-274)**  
**Real Estate Tax Exemption**  
**For 2008 Tax Year**

**P.I.N.S. 08-28-100-012, 013, 014**  
**08-28-120-001, 002**  
**Lake County Parcels**

**Kenneth J. Galvin**  
**Administrative Law Judge**

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**RECOMMENDATION FOR DISPOSITION**

**APPEARANCES:** Mr. David Dunkin, Arnstein & Lehr, on behalf of O.L.L. Education Services; Mr. John Alshuler, Special Assistant Attorney General, on behalf of the Department of Revenue of the State of Illinois.

**SYNOPSIS:**

This proceeding raises the issue of whether Lake County Parcels, captioned above (hereinafter the “subject property”), qualify for exemption from 2008 real estate taxes under 35 ILCS 200/15-35(b), which exempts all property of schools used for school purposes, and 200/15-35(c) which exempts property used for public school or other educational purposes. Exemptions under Section 200/15-35(b) and (c) are proscribed if the property is leased or otherwise used with a view to profit.

The controversy arises as follows: On December 1, 2008, O.L.L. Education Services (hereinafter “OLL”) filed a Real Estate Exemption Complaint for the subject

property with the Board of Review of Lake County (hereinafter the “Board”). The Board reviewed OLL’s complaint and subsequently recommended to the Illinois Department of Revenue (hereinafter the “Department”) that a partial year exemption be granted.

The Department rejected the Board’s recommendation in a determination dated April 16, 2009, finding that the subject property was not in exempt ownership and not in exempt use in 2008.<sup>1</sup> On May 13, 2009, OLL filed a request for a hearing as to the denial and presented evidence at a formal evidentiary hearing on April 15, 2011, with Karen Evans, President and Member of the Board of Directors of OLL, and Kenneth Carwell, President of Special Education Services, Inc. (hereinafter “SES”) presenting oral testimony. Following submission of all evidence and a careful review of the record, it is recommended that the Department’s determination be affirmed.

**FINDINGS OF FACT:**

1. Dept. Ex. No. 1 establishes the Department’s jurisdiction over this matter and its position that the subject property was not in exempt ownership or use in 2008. Tr. p. 9; Dept. Ex. No. 1.
2. OLL was incorporated under the Illinois “General Not-For-Profit Corporation Act” on May 6, 1982. OLL is exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code. On June 13, 2008, OLL was a corporation in good standing with the State of Illinois. Tr. pp. 12, 17-19; App. Ex. Nos. 1, 2 and 3.

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<sup>1</sup> This “Denial of Non-homestead Property Tax Exemption” was issued to “Special Education Services, Inc.” on IDOR Docket 08-49-205, County Reference No. E 18027-18031. On April 14, 2011, a “Superseded Certificate,” on IDOR Docket 08-49-274, was issued to “O.L.L. Education Services,” the true owner of the subject property. The P.I.N.S. and the Department’s findings were the same on both Certificates. Tr. p. 5; Dept. Ex. No. 1.

3. OLL was organized for “management and purchase and rehabilitation of buildings for the purpose of providing school programs for the kids.” OLL owns the “physical school buildings,” but leases the buildings to SES, which operates the schools. OLL does not have any corporate purpose “outside of owning real estate for school purposes and acquiring real estate for school purposes.” OLL and SES have separate Boards of Directors. There is no formal relationship between OLL and SES and they are not subsidiaries. Tr. pp. 18-20, 23, 30, 37, 41.
4. OLL owns five buildings that are leased to SES. SES leases six other buildings from private landlords. Tr. pp. 24-26.
5. The subject property was acquired by OLL on August 17, 2008 for \$1,175,000. It is located at 621 Belvidere Street in Waukegan. OLL renovated the property and took out a mortgage. OLL leased the property to SES for \$17,000/month in 2008. Tr. pp. 27-29; App. Ex. Nos. 6, 7, 8 and 9.
6. SES’s monthly lease payment exceeds OLL’s monthly mortgage payment on the property. The excess is used for OLL’s expenses, such as legal, insurance, and accounting fees, and for down-payments on other buildings. Tr. pp. 29-30.
7. The “Lease Agreement” between OLL and SES states that the authorized use of the property is “as a school facility and related uses, and any uses permitted by local zoning and ordinance.” The Lease Agreement calls for monthly rental payments of \$17,000, \$17,510, \$18,035, \$18,576 and \$19,133 for each of the succeeding five years of the lease. SES may obtain three, sixty month separate renewals of the lease with a 3% per annum increase in the monthly rental. Upon expiration of any lease term, SES must “remove its goods and effects and peacefully yield up the premises to

[OLL].” SES cannot assign the lease or sublet the premises without OLL’s written consent. SES has the right of first refusal should OLL get an offer to buy the subject property. SES is responsible for real estate taxes “as additional rent,” with SES remitting to OLL “monthly, an amount equal to 1/12 of the previous year’s applicable real estate taxes.” Tr. p. 32; App. Ex. No. 9.

8. OLL is not exempt from sales and use taxes in the State of Illinois. SES is exempt from sales and use taxes as an organization “organized and operated exclusively for educational purposes.” SES is exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code. Tr. pp. 35, 55; App. Ex. No. 10.
9. OLL’s “Statement of Activity and Functional Expenses” for August 31, 2008, shows “Total Revenues” of \$698,143, of which 96% is “Rental Income.” OLL had “Total Expenditures” of \$646,198, yielding “Excess Revenues over Expenditures” of \$51,945. Note 2 to the Statement says that OLL negotiated a mortgage loan with Citibank for the subject property. “The interest rate is 6.37%, and monthly payments are based on a payment schedule of 179 regular payments of \$6,325 and one irregular payment estimated at \$564,226 due on August 23, 2023 for all unpaid principal and accrued interest.” App. Ex. No. 11.
10. The school operated by SES on the subject property has 70 students. Most students are from Waukegan, North Chicago and Zion. Public school districts send the students to SES because the students are “difficult” and the school districts do not feel that they can offer an appropriate education to these students. Students may have been involved with drug, alcohol, gang violence and may have school attendance issues. If students graduate from SES, they get a diploma from the district that referred them to

SES. Students pay no tuition. Tuition, at a daily rate set by the State, is charged to the district that referred the student. Tr. pp. 36-37, 48, 52, 54.

11. Scalabrinian Education Center changed its name to SES in 1978. Scalabrinian's purpose is "to provide educational therapeutic services for children ages 6 through 18 who exhibit emotional, learning or behavioral problems, but are not mentally retarded, and to do such other things as are reasonably necessary to perform the aforementioned services." SES does not own any real estate and its corporate purpose is only to provide educational services. Tr. pp. 43-44, 46; App. Ex. Nos. 4 and 5.

**CONCLUSIONS OF LAW:**

An examination of the record establishes that OLL has not demonstrated, by the presentation of testimony or through exhibits or argument, evidence sufficient to warrant exempting the subject property from 2008 real estate taxes. Accordingly, under the reasoning given below, the determination by the Department that the subject property does not qualify for exemption should be affirmed. In support thereof, I make the following conclusions.

Article IX, Section 6 of the Illinois Constitution of 1970 limits the General Assembly's power to exempt property from taxation 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.

The General Assembly may not broaden or enlarge the tax exemptions permitted by the constitution or grant exemptions other than those authorized by the constitution. Board of Certified Safety Professionals v. Johnson, 112 Ill. 2d 542 (1986). Furthermore, Article IX, Section 6 does not, in and of itself, grant any exemptions. Rather, it merely authorizes the General Assembly to confer tax exemptions within the limits imposed by the constitution. Locust Grove Cemetery v. Rose, 16 Ill. 2d 132 (1959). Thus, the General Assembly is not constitutionally required to exempt any property from taxation and may place restrictions on those exemptions it chooses to grant. Village of Oak Park v. Rosewell, 115 Ill. App. 3d 497 (1<sup>st</sup> Dist. 1983). In accordance with its constitutional authority, the General Assembly enacted Section 200/15-35(b) of the Property Tax Code which exempts “all property of schools,” used exclusively for school purposes and Section 200/15-35(c) which exempts property used for public school or educational purposes. Exemptions under Sections 200/15-35(b) and (c) are proscribed if the property is “leased or otherwise used with a view to profit.” 35 ILCS 200/15-35.

It is well established in Illinois that a statute exempting property from taxation must be strictly construed against exemption, with all facts construed and debatable questions resolved in favor of taxation. Gas Research Institute v. Department of Revenue, 154 Ill. App. 3d 430 (1<sup>st</sup> Dist. 1987). Moreover, the burden of proving the right to a property tax exemption is on the party seeking exemption, and courts have required such party to prove, by clear and convincing evidence, that it falls within the appropriate statutory exemption. Winona School of Professional Photography v. Department of Revenue, 211 Ill. App. 3d 565 (1<sup>st</sup> Dist. 1991). OLL has the burden of proving, by clear and convincing evidence, that it is entitled to the exemption claimed.

An analysis of whether the subject property meets the requirements for exemption from property taxes for assessment year 2008 must begin with the question of whether the subject property is leased or otherwise used with a view to profit. 35 ILCS 200/15-35 excludes from exemption property that is leased or otherwise used with a view to profit. OLL is seeking exemption of the subject property under 35 ILCS 200/15-35(b) and (c). In Swank v. Department of Revenue, 336 Ill. App. 3d 851 (2d Dist. 2003), the court was asked to determine whether properties “used with a view to profit,” even if used for educational purposes, are entitled to tax exemption under section 200/15-35(b) and (c) of the Property Tax Code. “Stated another way,” does the “used with a view to profit” exclusion of section 35 ILCS 200/15-35 apply to properties falling within the parameters of section 15-35(b) and (c). *Id.* at 856. The Department’s position in Swank was that any property used with a view to profit, even if used for educational purposes, was excluded from the section 15-35 tax exemption. *Id.* at 857. The court held that section 15-35 excludes from tax exemption property held for profit, even if used for school purposes. The court stated explicitly that it declined “to extend tax exemption under section 15-35 to properties held for profit, even if they are used for educational purposes.” *Id.* at 863.

Based on Swank, as discussed above, I conclude that property tax exemption under Section 15-35 cannot be “extended” to properties of schools [35 ILCS 200/15-35(b)] or property “donated, granted, received or used for public school” or other educational purposes [35 ILCS 200/15-35(c), if the property is leased or otherwise used with a view to profit.

OLL acquired the subject property on August 17, 2008 for \$1,175,000. It is located at 621 Belvidere Street in Waukegan. Tr. pp. 27-29; App. Ex. Nos. 6, 7, 8 and 9.

The school operated by SES on the subject property has 70 students. Most students are from Waukegan, North Chicago and Zion. Public school districts send the students to SES because the students are “difficult” and the school districts do not feel that they can offer an appropriate education to these students. Students may have been involved with drug, alcohol, and gang violence or have school attendance issues. If students graduate from SES, they get a diploma from the district that referred them to SES. Students pay no tuition. Tuition is charged at a daily rate set by the State to the district that referred the student to SES. Tr. pp. 36-37, 48, 52, 54.

There was testimony at the hearing that “the original intent” in setting up OLL “was to set up an organization that was separate from the schools because we were trying to protect the schools and the property from each other’s liabilities.” Tr. p. 16. “And the thought was if we kept the two organizations distinct, that if we got sued, which we do sometimes, we could protect ourselves better if we had it in separate organizations.” Tr. pp. 22-23. Counsel for OLL argued in his closing statement that “[W]ere there to be a cause of action... against the school, the underlying owner *per se* of the real estate needs to be insulated from any potential liability.” Tr. p. 59. However, even assuming for the sake of argument, that OLL was set up separate from SES in order to protect OLL from SES’s lawsuits, OLL cannot now avoid its existence, as a separate entity from SES, to avoid the burden of property taxation. Lombard Public Facilities Corp. v. Department of Revenue, 378 Ill. App. 3d 921, 934 (2d Dist. 2008).

**The Leased Property Is Used by OLL With A View Toward Profit:** The terms of the “Lease Agreement” governed the rights and responsibilities of OLL and SES with regard to the subject property in 2008. The “Lease Agreement” between OLL and

SES states that the authorized use of the property is “as a school facility and related uses, and any uses permitted by local zoning and ordinance.” App. Ex. No. 9.

SES leased the property from OLL for \$17,000/month in 2008. The Lease Agreement calls for monthly rental payments of \$17,000, \$17,510, \$18,035, \$18,576 and \$19,133 for each of the succeeding five years of the lease. SES may obtain three, sixty month separate renewals of the lease with a 3% per annum increase in the monthly rental. App. Ex. No. 9.

Ms. Evans testified that SES’s lease payments exceed OLL’s mortgage payment on the property. According to her testimony, the excess is used for OLL’s expenses such as legal fees, insurance and accounting fees. “We’ve accumulated enough through the years to make a down payment on another building.” Tr. pp. 29-30. Note 2 to OLL’s Financial Statements states that OLL negotiated a mortgage loan with Citibank for the subject property. “The interest rate is 6.37%, and monthly payments are based on a payment schedule of 179 regular payments of \$6,325 and one irregular payment estimated at \$564,226 due on August 23, 2023 for all unpaid principal and accrued interest.” App. Ex. No. 11. Ms. Evans testified that “over \$14,000 [of SES’s monthly payment to OLL] goes to repayment of two mortgage payments.” Tr. p. 27. However, OLL’s Financial Statements do not mention “two mortgage payments” on the subject property and there is no evidence in the record about two mortgage payments.

SES’s monthly rent in 2008 of \$17,000 is \$10,675 more than OLL’s regular monthly mortgage payment of \$6,325. It must be noted that OLL’s “Statement of Activity and Functional Expenses” for August 31, 2008, shows “Total Revenues” of

\$698,143, of which 96% is “Rental Income.” OLL had “Total Expenditures” of \$646,198, yielding “Excess Revenues over Expenditures” of \$51,945.

The concern in 35 ILCS 200/15-35 is whether the property is leased or used with a view to profit. In People v. Withers Home, 312 Ill. 136, 140 (1924), the Court noted that “former decisions of this court” show that the phrase “not leased or otherwise used with a view to profit,” “has the ordinary meaning of the words.” “If real estate is leased for rent, whether in cash or in other forms of consideration, it is used for profit.” If the primary use of the property is for the production of income “with a view to profit,” the tax-exempt status is destroyed. Northern Ill. University Foundation v. Sweet, 237 Ill. App. 3d 28 (2d Dist. 1992). I conclude that OLL is leasing the subject property for rent, namely \$17,000/month for the year 2008, and according to established case law, this is using the subject property with a view to profit, a use proscribed by 35 ILCS 200/15-35.

In Turnverein “Lincoln” v. Bd. Of Appeals, 358 Ill. 135, 143 (1934), the Court stated, with regard to the argument that income from rented property was offset by operating expenses, that “it need only be observed that if property, however owned, is let for a return, it is used for profit and so far as liability to the burden of taxation is concerned, it is immaterial whether the owner actually makes a profit or sustains a loss.” In Village of Oak Park v. Rosewell, 115 Ill. App. 3d 497, 500 (1<sup>st</sup> Dist. 1983), where a parking lot was leased by a religious institution to a Village for use as a municipal parking lot, the court noted that where property is leased with a view to profit, it is “immaterial” whether the income derived is used for religious purposes and it is “irrelevant” whether the property actually generates a profit or a loss, or whether the revenues are totally offset by operational or maintenance costs.

OLL argues that the lease payments paid by SES are offset by OLL's operating expenses. This argument is not borne out by the record in this case. SES's monthly lease payments to OLL are \$10,675 more than OLL's monthly mortgage payments. OLL has been able to save and use some of SES's "overage" or "excess rent," as Ms. Evans described it, to make a down payment on another building. Tr. p. 29. As OLL, a not-for-profit organization, collects the "overage" and "excess rent" from SES, it made a "profit" of \$51,945. I am unable to determine from the record that the lease payments are offset by OLL's operating expenses. Even if I could make this determination, according to the established case law, it is "irrelevant" and "immaterial" that OLL's revenues from the lease may be less than its expenses or that OLL may have sustained a loss on the lease. I am forced to conclude from the record that OLL is leasing the subject property to SES "for a return" and with a view to profit.

OLL has failed to prove that the subject property is not leased or otherwise used with a view to profit. According to Swank, property tax exemption cannot be "extended" to property held for profit, even if the property is used for public school or educational purposes. I am unable to conclude that the subject property is exempt under 35 ILCS 200/15-35(c).

**Property of Schools:** Counsel for OLL argued in his opening statement that the subject property was exempt under 35 ILCS 200/15-35(b), which he noted was "extremely broad." Tr. p. 8. 35 ILCS 200/15-35(b) exempts "property of schools on which the schools are located." OLL's leasing of the subject property with a view to profit would proscribe exemption under Section 15-35(b). But assuming *arguendo*, that the subject property was not leased with a view to profit, it would still not qualify for

exemption under 35 ILCS 200/15-35(b) because I am unable to conclude from the record of this case that the subject property was “property of schools.”

OLL was organized for “management and purchase and rehabilitation of buildings for the purpose of providing school programs for the kids.” OLL owns the “physical school buildings,” but leases the buildings to SES, which operates the schools. Ms. Evans testified that OLL does not have any corporate purpose “outside of owning real estate for school purposes and acquiring real estate for school purposes.”<sup>2</sup> Tr. p. 18. Counsel for OLL stated in his closing argument that “OLL does nothing else, has no other corporate purpose but to own real estate, which is used for schools.” Tr. p. 61.

OLL and SES have separate Boards of Directors. There is no formal relationship between OLL and SES and they are not subsidiaries. Tr. pp. 20, 23, 30, 37, 41. In fact, OLL owns five buildings that are leased to SES. SES leases six other buildings from private landlords. Tr. pp. 24-26. The record shows conclusively that OLL owns the subject property and OLL is not a “school.” The only way that this property can be exempted under 35 ILCS 200/15-35(b) is if SES can be considered the equitable or beneficial owner of the subject property.

Ownership of real estate is a broad concept and can apply to one other than the record titleholder. Mason v. Rosewell, 107 Ill. App. 3d 943, 946 (1st Dist. 1982). Title refers only to a legal relationship, while ownership is comparable to control. The term “owner” may include one who has the control or occupation of land with a claim of ownership. People v. Chicago Title & Trust Co., 75 Ill. 2d 479, 489 (1979). The primary

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<sup>2</sup> OLL’s “Amended and Restated Bylaws” state in Article II that OLL shall have no more than two members. Article IIA describes the “classes of members.” There was no testimony at the hearing as to who these members are.

incidents of ownership include the right to possession, use and enjoyment of the property, the right to change or improve the property and the right to alienate the property at will. Wheaton College v. Department of Revenue, 155 Ill. App. 3d 945, 947 (2d Dist. 1987). The “owner” of property, for tax purposes, is the person or entity that (1) exercises rights of control over the property; and (2) derives benefits there from. People v. Chicago Title & Trust Co., 75 Ill. 2d 479, 489 (1979).

A fair reading of the “Lease Agreement” between OLL and SES fails to demonstrate, by the requisite clear and convincing evidence, that SES qualifies as the “owner” of the subject property. OLL rented the property to SES for \$17,000/month in 2008. SES is responsible for real estate taxes “as additional rent,” with SES remitting to OLL “monthly, an amount equal to 1/12 of the previous year’s applicable real estate taxes.” App. Ex. No. 9. The payment of the real estate taxes is part of the rent and it clearly benefits OLL not to have to pay these expenses.

At the end of the lease term, SES must remove its goods and effects and peacefully “yield up” the premises to OLL. There is no provision in the lease requiring OLL to sell the property to SES. The Lease Agreement is not an installment purchase agreement, as in Christian Action Ministry v. Dept. of Local Government Affairs, 74 Ill. 2d 51 (1978), where the Court held that, for property tax exemption purposes, a purchaser of property pursuant to an installment land contract would be treated as the owner of the property for property tax purposes. SES does have the right of first refusal on the subject property if OLL receives an offer from another buyer. However, the Lease Agreement, as written, would allow OLL to retain this property indefinitely with SES paying the property taxes. This clearly benefits OLL. In Coles Cumberland Dev. v. Department of

Revenue, 284 Ill. App. 3d 351 (4th Dist. 1996), the lease contained provisions similar to those in OLL's Lease Agreement with SES. The court in Coles found that the provisions did not show sufficient incidents of ownership in the lessee to warrant a tax exemption.

SES does retain control over any alterations or improvements that it makes to the property. Alterations, improvements and trade fixtures "shall remain Tenant's property and may be removed prior to termination of Tenant's occupancy." App. Ex. No. 9. SES's "control" over these alterations and improvements is not indicative of "ownership" for present purposes because such property already belongs to SES, and its removal does not change or alter the subject property.

Moreover, SES is not at liberty to alienate its interest in the property in a full and free manner that would demonstrate "ownership." SES cannot assign the lease or sublet the premises without OLL's written consent. The Lease Agreement does not give SES any other rights to alienate the property. The right to choose when and if the property may be transferred is one of the most significant incidents of ownership. Henderson County Retirement Center, Inc., v. Department of Revenue, 237 Ill. App. 3d 522 (3d Dist. 1992). In this case, SES has no power to force the sale or transfer of the property, further showing that SES cannot be considered the beneficial owner of the property. I conclude that the record in this case does not establish that SES enjoyed such primary incidents of ownership in the subject property that it could be considered its "owner." The subject property does not qualify for exemption under 35 ILCS 200/15-35(b) as "property of schools."

WHEREFORE, for the reasons stated above, it is recommended that the Department's determination which denied the exemption from 2008 real estate taxes on

the grounds that the subject property was not in exempt ownership or use should be affirmed, and Lake County Parcels 08-28-100-012, 013, 014 and 08-28-120-001 and 002 should not be exempt from 2008 real estate taxes.

ENTER:

August 8, 2011

Kenneth J. Galvin  
Administrative Law Judge