

PT 10-16
Tax Type: Property Tax
Issue: Charitable Ownership/Use

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

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

v.

GARDEN APARTMENTS NFP, INC.

Applicant

Docket # 10-PT-0001

Tax Year 2009

RECOMMENDATION FOR DISPOSITION

Appearances: Matthew Crain, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; Kurt S. Schroeder of Mathis, Marifian, Richter & Grandy, Ltd. for Garden Apartments NFP, Inc.

Synopsis:

Garden Apartments NFP, Inc. (“applicant”) filed an application for a property tax exemption for the year 2009 for a parcel of property located in Perry County. The parcel contains an apartment building that provides housing for elderly people and people with disabilities who have low income. The applicant seeks a charitable exemption for the property pursuant to section 15-65 of the Property Tax Code (35 ILCS 200/1-1 *et seq.*). The County Board of Review (“County”) determined that the exemption should be granted. The Department of Revenue (“Department”) disagreed and determined that the exemption should be denied

because the property is neither owned by a charitable organization nor used for charitable purposes. The applicant timely protested the Department's decision, and an evidentiary hearing was held. Prior to the hearing, the Department agreed that the property is owned by a charitable organization; the sole remaining issue is whether the property was used for charitable purposes during 2009. After reviewing the record, it is recommended that this matter be resolved in favor of the Department.

FINDINGS OF FACT:

1. The applicant is an Illinois not-for-profit corporation that was organized on March 22, 2004. (Dept. Ex. #1, p. 30)
2. According to its articles of incorporation, the applicant was organized for the following purposes:

To provide elderly persons and individuals with disabilities access to housing facilities and services specially designed to meet their physical, social and psychological needs and to promote their health, security, happiness and usefulness in longer living.

The corporation is organized exclusively for charitable, educational, religious or scientific purposes within the meaning of section 501(c)(3) of the Internal Revenue Code. (Dept. Ex. #1, pp. 31, 34)

3. On June 30, 2004, the applicant acquired property located at 102 E. Randolph Street in Pinckneyville, Illinois from the Pinckneyville Leased Housing Corporation, which is a corporation that was established by the Perry County Housing Authority. The property contains a three-story apartment building with an elevator. (App. Ex. #9, #10, p. 15, #11; Tr. p. 24)
4. Prior to the applicant's acquisition of the property, the Perry County Housing Authority operated the apartment building under a Section 8 Housing Assistance Payments ("HAP") Contract with the Department of Housing and Urban Development ("HUD").

Perry County Housing Authority assigned its rights under the HAP Contract to the applicant. (App. Ex. #10)

5. The applicant has one class of members, and membership is limited to the directors of Five Star Industries, which is a not-for-profit corporation that offers housing and assistance to people with disabilities. (App. Ex. #11, p. 35; Tr. pp. 18-19)
6. The apartment building has 44 one-bedroom units and 1 two-bedroom unit, which is used by the manager. Five of the one-bedroom units are designed for the handicapped with altered bathrooms and kitchens designed to facilitate the use of wheelchairs. (App. Ex. #10, pp. 14-15; Tr. pp. 22-23, 25-26)
7. Under the lease agreement, the tenant pays rent based on his or her income. The tenant agrees that a recertification of his or her income shall be made to the applicant annually from the date of the lease. The tenant's share of the monthly rental payment is subject to adjustment by the applicant to reflect income changes that are disclosed on any recertification of income. (App. Ex. #15, p. 5)
8. According to the lease agreement, the amount of rent payable by the tenant is subject to change by reason of changes in HUD requirements, changes in the tenant's family income, family composition, or the extent of exceptional medical or other unusual expenses in accordance with HUD-established schedules and criteria. (App. Ex. #15, p. 2)
9. If, upon recertification, the tenant's income is found to be sufficient to pay the rent plus any utility allowance, then the tenant will be required to pay the full amount of rent. (App. Ex. #15, p. 5; Tr. p. 75)

10. The rent includes the following utilities: water, sewer, trash disposal, and basic cable.
The tenant is responsible for paying electricity. (App. Ex. #15, p. 2)
11. The tenant must pay a security deposit at the time that the lease agreement is executed.
The tenant does not have to pay an application or entrance fee. (App. Ex. #15, p. 2; Tr. p. 42)
12. The applicant's right to terminate the lease agreement is governed by the HUD regulation at 24 CFR Part 247. The regulation provides that the applicant may terminate the agreement when, *inter alia*, the tenant has been in "material noncompliance" with the agreement. (App. Ex. #15, p. 3)
13. "Material noncompliance" with the lease agreement includes, *inter alia*, one or more "substantial violation" of the agreement or repeated "minor violations" of the agreement that have an adverse financial effect. A substantial violation of the agreement includes the nonpayment of rent or any other financial obligation that is due under the agreement beyond any grace period permitted under State law. A minor violation includes the payment of rent after the due date but within any grace period permitted under State law. (App. Ex. #15, p. 3)
14. If the tenant does not vacate the premises on the effective date of the termination of the lease agreement, the applicant may pursue all judicial remedies under State or local law for the eviction of the tenant and in accordance with the HUD regulation. (App. Ex. #15, p. 3)
15. In the event that HUD terminates the assistance payment, the tenant is responsible for the full amount of the rent payment. (App. Ex. #15, p. 8; Tr. p. 76)

16. If the Section 8 Housing Assistance contract terminates for any reason, then the lease agreement terminates automatically. (App. Ex. #15, p. 9)

17. The applicant's bylaws contain the following provision, which is titled "Waiver of Rent":

The corporation shall maintain a policy with regard to waiving the rental payment for any and all tenants that are unable to pay the minimum amount set by the federal Department of Housing and Urban Development in its Section 8 program due to financial hardship. The waiver applies to any tenants that have lost federal, state, or local government assistance or are waiting for an eligibility determination, the tenant would be otherwise subject to eviction if the minimum rent requirement of the Section 8 program was imposed, the tenant's income has decreased due to a change in circumstances, including but not limited to loss of employment, a death in the family has occurred, or other applicable situations, as determined by the Department of Housing and Urban Development, have occurred. (Dept. Ex. #1, pp. 44-45)

18. On April 1, 2008, the applicant entered into a lease agreement with a tenant who lives in unit #309. The applicant initially received \$575.00 monthly from HUD as a housing assistance payment for the unit. The tenant's portion of the rent is zero. The tenant paid \$25.00 as a security deposit for the unit. (App. Ex. #14, p. 2)

19. On August 1, 2010, the applicant entered into a lease agreement with a tenant who lives in unit #211. The applicant receives \$584.00 monthly from HUD as a housing assistance payment for the unit. The tenant's portion of the rent is zero. The tenant paid \$25.00 as a security deposit for the unit. (App. Ex. #15, p. 2; Tr. p. 73)

20. For the units that are occupied, the tenant's portion of the rent may change depending on the tenant's income, but the applicant will continue to receive the full amount of rent, which is currently \$584.00, for the unit. The difference between \$584.00 and the tenant's portion of the rent is paid by HUD. (Tr. pp. 74, 77-78)

21. For the fiscal year ending June 30, 2009, the applicant's audited financial statement shows the following as revenues on the Statement of Activities:

Public Support	
Allocated by HUD	\$ 123,148
Rental Income	<u>92,348</u>
Total Public Support	215,496
Other Revenue	
Interest Income	900
Laundry and Vending	<u>2,757</u>
Total Other Revenue	3,657
 Total Revenues	 \$ 219,153 (App. Ex. #13, p.
76)	

22. For the fiscal year ending June 30, 2010, the applicant's un-audited financial statement shows the following as revenues on the Statement of Activities:

Rents	\$ 98,887
Tenant Assistance Payments	206,209
Vacancies	(74,056)
Rent Income – Unsubsidized	4,500
Interest Inc—Replacement Rsrv	26
Vending Revenue	4,496
Other Revenue	<u>20</u>
 Total Income	 \$ 240,082 (App. Ex. #13, p.
86)	

23. The applicant's bylaws previously included the following provision:

COMPENSATION. Directors shall not receive any stated salaries for their services, but by resolution of the board of directors a fixed sum and expenses of attendance, if any, may be allowed for each regular or special meeting of the board. (Dept. Ex. #1, p. 40)

24. The minutes for the meeting of the Board of Directors on May 10, 2010 include the following:

[S]ince the incorporation of the Corporation on March 22, 2004, the board of directors of the Corporation has never adopted a resolution to allow a fixed sum and expenses of attendance to be paid to the directors for their attendance at regular or special board meetings, nor has the Corporation at any time paid its directors any sum or expenses for their attendance at regular or special board meetings. (App. Ex. #8)

25. At the meeting on May 10, 2010, the Board resolved that the bylaws are amended effective as of the date of their initial adoption on August 9, 2004 for the section concerning compensation to read as follows:

COMPENSATION. Directors shall not receive any stated salaries for their services, nor shall the board of directors at any time adopt a resolution to allow a fixed sum and expenses of attendance to be paid to the directors for their attendance at regular or special board meetings. (App. Ex. #8)

26. The HAP Contract indicates that under certain circumstances, if a unit becomes vacant the applicant may receive housing assistance payments in the amount of 80% of the contract rent for a vacancy period not exceeding 60 days. (App. Ex. #10, p. 6)

27. The HAP Contract indicates that under certain circumstances, if a unit remains vacant for 60 days the owner may submit a claim to receive additional housing assistance payments, but these additional payments shall not be made for more than 12 months for any vacancy period. (App. Ex. #10, p. 18; Tr. pp. 27-28)

28. The applicant currently has 36 units that are occupied, and it has not sought additional funds from HUD for its unoccupied units. (Tr. pp. 64-65, 74)

29. The applicant has no capital, capital stock, or shareholders and is exempt from federal income taxes under section 501(c)(3) of the Internal Revenue Code pursuant to a determination made by the IRS on July 13, 2006. (Dept. Ex. #1, p. 55)

30. The applicant is exempt from retailers' occupation taxes and use taxes pursuant to a determination made by the Department on November 26, 2005. (App. Ex. #5)

CONCLUSIONS OF LAW:

It is well-established under Illinois law that taxation is the rule, and tax exemption is the exception. Eden Retirement Center, Inc. v. Department of Revenue, 213 Ill. 2d 273, 285 (2004).

“[A]ll property is subject to taxation, unless exempt by statute, in conformity with the constitutional provisions relating thereto.” *Id.* Statutes granting tax exemptions must be strictly construed in favor of taxation. *Id.* at 288; Chicago Patrolmen’s Association v. Department of Revenue, 171 Ill. 2d 263, 271 (1996); People ex rel. County Collector v. Hopedale Medical Foundation, 46 Ill. 2d 450, 462 (1970). All facts are to be construed and all debatable questions resolved in favor of taxation. Eden Retirement Center, Inc., at 289. Every presumption is against the intention of the State to exempt the property from taxation. Oasis, Midwest Center for Human Potential v. Rosewell, 55 Ill. App. 3d 851, 856 (1st Dist. 1977). Whenever doubt arises, it must be resolved in favor of requiring the tax to be paid. Quad Cities Open, Inc. v. City of Silvis, 208 Ill. 2d 498, 508 (2004).

The burden of proof is on the party who seeks to qualify its property for an exemption. Eden Retirement Center, Inc., *supra*; Chicago Patrolmen’s Association, *supra*. The burden is a very heavy one. Provena Covenant Medical Center v. Department of Revenue, 236 Ill. 2d 368, 388 (2010) (Provena I); Oasis, Midwest Center for Human Potential, *supra*. The party claiming the exemption bears the burden of proving by clear and convincing evidence that the property in question falls within both the constitutional authorization and the terms of the statute under which the exemption is claimed. Eden Retirement Center, Inc., *supra*; Board of Certified Safety Professionals of the Americas, Inc. v. Johnson, 112 Ill. 2d 542, 547 (1986) (citing Coyne Electrical School v. Paschen, 12 Ill. 2d 387, 390 (1957)).

Authority to grant property tax exemptions emanates from article IX, section 6 of the Illinois Constitution of 1970. Section 6 authorizes the General Assembly to exempt certain property from taxes and provides, in part, 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. Ill. Const. 1970, art. IX, §6.

The constitution does not require the legislature to exempt property from taxation; an exemption exists only when the legislature chooses to create one by enacting a law. Eden Retirement Center, Inc., at 290. “The legislature cannot add to or broaden the exemptions that section 6 of article IX specifies.” *Id.* at 286. By enacting an exemption statute, the legislature may place restrictions, limitations, and conditions on an exemption, but the legislature cannot make the exemption broader than the provisions of the constitution. *Id.* at 291.

Pursuant to this constitutional authority, the General Assembly enacted section 15-65 of the Property Tax Code, which allows exemptions for charitable purposes and provides in relevant part as follows:

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....

(c) Old people's homes, facilities for persons with a developmental disability, and not-for-profit organizations providing services or facilities related to the goals of educational, social and physical development, if, upon making application for the exemption, the applicant provides affirmative evidence that the home or facility or organization is an exempt organization under paragraph (3) of Section 501(c) of the Internal Revenue Code or its successor, and either: (i) the bylaws of the home or facility or not-for-profit organization provide for a waiver or reduction, based on an individual's ability to pay, of any entrance fee, assignment of assets, or fee for services, or (ii) the home or facility is qualified, built or financed under Section 202 of the National Housing Act of 1959, as amended.

An applicant that has been granted an exemption under this subsection on the basis that its bylaws provide for a waiver or reduction, based on an individual's ability to pay, of any entrance fee, assignment of assets, or fee for services may be periodically reviewed by the Department to determine if the waiver or reduction was a past policy or is a current policy. The Department may revoke the exemption if it finds that the policy for waiver or reduction is no longer current....35 ILCS 200/15-65(a), (c).

Property may be exempt under subsection (a) if it is (1) owned by an entity that is an institution of public charity; (2) actually and exclusively used for charitable purposes; and (3) not used with a view to profit. *Id.*; Chicago Patrolmen's Association, *supra*. Whether property is actually and exclusively used for charitable purposes depends on the primary use of the property. Methodist Old Peoples Home v. Korzen, 39 Ill. 2d 149, 156-57 (1968). If the primary use of the property is charitable, then the property is "exclusively used" for charitable purposes. Cook County Masonic Temple Association v. Department of Revenue, 104 Ill. App. 3d 658, 661 (1st Dist. 1982). Incidental acts of charity by an organization are not enough to establish that the use of the property is charitable. Morton Temple Association, Inc. v. Department of Revenue, 158 Ill. App. 3d 794, 796 (3rd Dist. 1987).

The Supreme Court set forth the constitutional standards for a charitable purposes exemption in Methodist Old Peoples Home, *supra*, and reiterated them in Eden Retirement Center, Inc., *supra*, and Provena I, *supra*. The following guidelines are characteristics of a charitable institution: (1) the organization has no capital, capital stock or shareholders; (2) the organization earns no profits or dividends but rather derives its funds mainly from public and private charity and holds them in trust for the objects and purposes expressed in its charter; (3) the organization dispenses charity to all who need and apply for it; (4) the organization does not provide gain or profit in a private sense to any person connected with it; (5) the organization does not appear to place any obstacles in the way of those who need and would avail themselves of the charitable benefits it dispenses; and (6) the primary purpose for which the property is used, and not any secondary or incidental purpose, must be charitable. Methodist Old Peoples Home, at 156-57. For purposes of applying these criteria, the court defined charity as "a gift to be applied ... for the benefit of an indefinite number of persons, persuading them to an educational

or religious conviction, for their general welfare--or in some way reducing the burdens of government.” *Id.* In Eden Retirement Center, Inc., *supra*, the Supreme Court indicated that these guidelines must be considered in addition to determining whether the applicant meets the requirements under subsection (c) of section 15-65. *Id.* at 290-291.

The Department argues that the property does not qualify for the exemption because the applicant leases the units with a view to profit; the applicant receives rent for each unit, which is subsidized by the government. The Department notes that even for the units where the tenants are paying no rent, the applicant is receiving a subsidy for those units, and the leasing of those units does not qualify for the charitable exemption. The Department contends that the applicant places obstacles in the way of those seeking charity because there are income checks and requirements that the tenants comply with the HUD contracts. In addition, the Department claims that the applicant has not presented evidence regarding a policy of waiving all rents or dealing with situations where a tenant is unable to pay rent when his or her subsidy is removed.

The applicant argues that it meets the requirements of section 15-65(c), and it also meets most of the guidelines of Methodist Old Peoples Home, *supra*. The applicant believes it benefits an indefinite number of people, subject to the number of units in the apartment building, and it reduces a burden on government. Prior to the applicant’s ownership, the building was owned by the Perry County Housing Authority, and the applicant has relieved the government of the burden of maintaining and operating the building. The applicant claims that it has no intention to make a profit; it only intends to break even and provide a service to the community. The applicant contends that it dispenses charity to everyone who needs and applies for it, subject to the number of units in the building. Also, the applicant believes that there are no significant obstacles to charity; the security deposits are minimal, and there are no entrance fees. Finally,

the applicant argues that the primary use of the property is charitable because the applicant does not intend to make a profit, and the applicant is providing a significant benefit to the community.

Despite the applicant's averments, the evidence does not support a finding that the applicant meets most of the guidelines in Methodist Old Peoples Home, *supra*. The applicant does meet one guideline by not having capital, capital stock or shareholders, but the applicant's income is not derived mainly from public or private charity. The majority of the applicant's income consists of subsidy payments from HUD and rent payments from its tenants. The subsidy payments from HUD are not contributions but rather are payments received pursuant to a contract for services. These payments, therefore, are not considered to be public charity. The fact that the applicant's primary funding source is not public or private charity is not, by itself, dispositive. Provena Covenant Medical Center v. Department of Revenue, 384 Ill. App. 3d 734, 746 (4th Dist. 2008), *aff'd*, 236 Ill. 2d 368 (2010) (Provena II) (citing American College of Surgeons v. Korzen, 36 Ill. 2d 340, 348 (1967)). Nevertheless, the applicant has failed to meet other guidelines.

The evidence presented raises doubt that the applicant gives charity to all who need and apply for it. Although during the year in question the applicant had one tenant whose rent payment was zero, the applicant still received a payment from HUD for the full amount of the tenant's rent. The rent for one unit is currently \$584.00 per month, and HUD pays the difference between that amount and the amount that the tenant pays. So when the tenant pays zero, the applicant still receives \$584.00; the payment is simply from a different source. This makes the applicant appear to be comparable to other rental property owners because the applicant receives compensation, either from the tenant or from HUD, for the housing services it provides.¹

¹ Nothing in the record indicates that the compensation received is not the fair market value for the rental of the units.

Although the testimony indicated that the applicant provided free personal items to those tenants who needed them (tr. p. 65), the record lacks substantiation for this, and the evidence does not support a finding that the applicant provided free housing services to those in need. The applicant did not allow anyone to live in the apartment building while the applicant was not being compensated for its housing services, and the evidence did not show that the security deposit was ever waived. Charity is considered to be a gift. Provena II, supra; Methodist Old Peoples Home, supra. Because the applicant received compensation for its services, the record does not include one example of where the applicant provided charity (i.e., free housing) to anyone who needed it.

The record also does not support a finding that no obstacles were placed in the way of those seeking charity. According to the lease agreement, if HUD terminates the assistance payments, then the tenant is responsible for the full amount of the rent payment. The “Waiver of Rent” provision in the bylaws applies to all tenants who are “unable to pay the minimum amount set by the federal Department of [HUD] in its Section 8 program”; the provision does not apply if the HUD payments terminate. Nothing in the record suggests that the applicant assists those whose HUD assistance has terminated. If the HAP contract terminates for any reason, then the lease agreement automatically terminates. The lease agreement also requires a security deposit to be paid. Although the testimony indicated that the applicant has never evicted anyone for failing to pay rent (tr. p. 70), the lease agreement allows the applicant to pursue all judicial remedies under State or local law for the eviction of a tenant.

The applicant undoubtedly provides a useful service for the community. The applicant’s operations are laudable, but laudable acts do not necessarily constitute charity. See Rogers Park Post No. 108, American Legion v. Brenza, 8 Ill. 2d 286, 291 (1956). As previously mentioned,

exemption provisions are strictly construed, and all doubts must be resolved in favor of taxation. Eden Retirement Center, Inc., *supra*. The evidence presented in this case falls short of showing clearly and convincingly that the applicant used the property primarily for charitable purposes during 2009. The request for an exemption must, therefore, be denied.

Recommendation:

For the foregoing reasons, it is recommended that the applicant's request for an exemption be denied.

Linda Olivero
Administrative Law Judge

Enter: December 20, 2010