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(FILE NO. 2007-SC-0640-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000305-MR
AND
NO. 2006-CA-000458-MR

ST. ANDREW ORTHODOX CHURCH, INC. APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 05-CI-00175

ROBERT W. THOMPSON, JR., JESSAMINE COUNTY PROPERTY VALUATION ADMINISTRATOR; JESSAMINE COUNTY BOARD OF ASSESSMENT APPEALS APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING IN PART
AND REVERSING IN PART AS TO THE APPEAL
AND
REVERSING AS TO THE CROSS-APEAL

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; NICKELL AND WINE, JUDGES.

WINE, JUDGE: This is an appeal and cross-appeal from an order entered by the Jessamine Circuit Court affirming in part an order of the Kentucky Board of Tax Appeals ("KBTA") denying tax exempt status to a portion of property owned by the appellant, St. Andrew Orthodox Church, Inc. ("St. Andrew"), and remanding the matter to the KBTA for additional findings of fact. For the reasons stated hereafter, we affirm in part and reverse in part as to the appeal and reverse the cross-appeal.

The underlying facts are not in dispute. St. Andrew is a church located in Fayette County, Kentucky. It was organized as a non-stock, non-profit Kentucky corporation in 1981 to promote the religious, educational and charitable goals of the Holy Orthodox Catholic Church and Apostolic Church of Jesus Christ.

On December 10, 2002, St. Andrew purchased two five-acre lots, each with a single-family house located thereon, in Jessamine County. The total purchase price was $630,000. St. Andrew plans to build a new, larger church on the property.

To help pay the mortgage, the houses were leased to individuals who were not members of the church. At various times, the tenants paid rent totaling $12,000 to $16,000 per piece of property per year. There were separate leases for each piece of property, one located at 2300 Brannon Road and one at 2340 Brannon Road. Although the lease agreements provide that the tenants shall maintain the properties, on occasion church members have cut the grass. The January 2002 lease agreement for the 2340 property allowed for the current tenants to sublease the property. While not specified in the lease, the church developed some of the property for outdoor games such as volleyball, soccer, horseshoes and softball. A portion of one lot has been set aside for a meditation area to include a bench and wooden cross. The church also stores some

equipment in the basement of one of the houses. Various church activities, including picnics, have been held on the grounds.

Although no development had yet begun, there was a large sign on the property announcing the plans to build a church. Nor had there been any bids, contracts or construction plans drafted for the development of the proposed church.

The Jessamine County Property Valuation Administrator ("PVA") assessed the properties for the 2003 and 2004 tax years at its $630,000 fair cash value in conformance with Section 172 of the Kentucky Constitution.[1] St. Andrew sought an exemption from taxation under Section 170 of the Kentucky Constitution. The Jessamine County Board of Assessment Appeals ("the BAA") denied the request and held the church owed $5,600 for each year.

St. Andrew appealed the decision of the BAA to the KBTA. A hearing was held on November 8, 2004. On March 2, 2005, the KBTA rendered a decision upholding the assessments (KBTA Order No. K-19271). The KBTA found the pivotal issue to be whether St. Andrew not only owned the property but occupied it as well in order to qualify for a tax exemption under Section 170 of the Kentucky Constitution. The KBTA was not persuaded by the fact that the rent paid by tenants was used to reduce the church debt, nor that the church occasionally used the property for sports activities or storage.

Pursuant to KRS 131.370, St. Andrew appealed the KBTA decision to the Jessamine Circuit Court. On January 31, 2006, the court entered an opinion and order affirming in part and reversing in part the KBTA decision. On page 8 of its extensive and well-researched opinion the trial court found:

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[1] Kentucky Constitution Section 172 provides: "All property, not exempted from taxation by this Constitution, shall be assessed for taxation at its fair cash value . . . ."

> The final viable option and the one which seems most logical to this Court is that a single piece of real estate can be occupied by more than one entity and that the portion which is exempt from property taxes is that portion occupied by the religious institution. Although the approach may sound novel, it is not significantly different from what the PVA is now required to do when apportioning its assessment of farm property between land and improvements.
>
> In the present case it is apparent that the tenants on the property have exclusive possession of the residences. Although they may have agreed to allow the church to store miscellaneous personal property in the basement, that use is not set forth in the lease, it is not significant as to the entire residence, and, at most, it rises only to the level of a license. The tenants would be within their rights to prohibit the church from coming into the houses at any given time. The evidence is equally obvious that as part of its lease agreements the church has retained the right to use the land outside of the curtilege of each residence and that it therefore occupies those areas in both the common and legal sense of that word. The total value of the property must be apportioned accordingly.

The court also rejected St. Andrew's argument that it was a public charity as well as a church and thus qualified for an exemption under the public charity provision of Section 170. Nor was the court persuaded by the equal protection and due process arguments made subject to the United States and Kentucky Constitutions or the argument that the PVA could rely on an intra-agency policy memorandum in contravention of KRS 13A.130(1) and (2). Finally, the court rejected the claim that the hearing held before two (2) of the three (3) members of the KBTA violated St. Andrew's due process rights as guaranteed by KRS Chapter 13B.

As a result, St. Andrew filed this appeal seeking an exemption for all of the property owned by St. Andrew. Likewise, because the trial court sought to partition the property for tax purposes, remanding the matter to the KBTA for additional findings of fact, the PVA and BAA filed this cross-appeal.

Because the outcome of this case turns on an issue of law, our review is *de novo*. *Western Kentucky Coca-Cola Bottling Co., Inc. v. Revenue Cabinet*, 80 S.W.3d 787, 790 (Ky.App. 2001). When we review the actions of the KBTA, we may not substitute our judgment for that of the KBTA regarding any question of fact. And we may only reverse the KBTA's final order if one or more of the specific contingencies set forth in KRS 13B.150(2)[2] has occurred. Moreover, it is our responsibility to insure that the circuit court correctly determined that the KBTA's decision is supported by substantial evidence. Substantial evidence is evidence taken by itself or as a whole that "has sufficient probative value to induce conviction in the minds of reasonable men." *Commonwealth, Cabinet for Human Resources v. Bridewell*, 62 S.W.3d 370, 373 (Ky. 2001). If the KBTA's decision is supported by substantial evidence and if it applied the correct law, then we must affirm.

Section 170 of the Kentucky Constitution provides in part:

> There shall be exempt from taxation public property used for public purposes; places of burial not held for private or corporate profit; **real property owned and occupied by, and personal property both tangible and intangible owned by, institutions of religion;** institutions of purely public charity . . . .

(Emphasis added).

In 1990, Section 170 was amended, substituting the words "places actually used for religious worship, with the grounds attached thereto and used and appurtenant to

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[2] According to KRS 13B.150(2), we may reverse the KBTA's final order, in whole or in part, if we find that the order is "(a) In violation of constitutional or statutory provisions; (b) In excess of the statutory authority of the agency; (c) Without support of substantial evidence on the whole record; (d) Arbitrary, capricious, or characterized by abuse of discretion; (e) Based on an ex parte communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing; (f) Prejudiced by a failure of the person conducting a proceeding to be disqualified pursuant to KRS 13B.040(2); or (g) Deficient as otherwise provided by law."

the house of worship, not exceeding one-half (1/2) acre in cities or towns, and not exceeding two (2) acres in the country" with those emphasized above.[3]

Prior to the 1990 amendment, property owned by a church but not used for worship purposes nor as a parsonage nor occupied as a home by the minister or which exceeded the stated acreage was not exempt from taxation. *Calvary Baptist Church v. Milliken*, 148 Ky. 580, 147 S.W. 12 (1912). A parsonage located on the same lot as a church was not exempt from taxation when it was rented, although the rent was paid to the pastor of the church. *Broadway Christian Church v. Commonwealth*, 112 Ky. 448, 66 S.W. 32 (1902). The use rather than the fact of ownership was the controlling factor. *City of Ashland v. Calvary Protestant Episcopal Church of Ashland*, 278 S.W.2d 708 (Ky. 1955).

When asked to interpret the 1990 amendment to Section 170, the Kentucky Attorney General opined in part:

> Our conclusion makes it impossible to supply a clearly delimited answer to your question, for the exemption contains no clearly delimiting language. We believe a proper interpretation should reject the imposition of conditions such as a requirement that the property be used for religious purposes, **or that the property be occupied exclusively by the institution of religion, or that the institution of religion be in current rather than future occupation.** The voters did not intend to impose such conditions. The phrase "owned and occupied by" must be construed in a general and non-restricting sense in order that the plainly manifested purpose of those who created the amendment may be carried out. *Keck v. Manning*, 313 Ky. 433, 231 S.W.2d 604, 607 (1950).

Ky. OAG 91-216, p. 2 (emphasis added).

[3] This amendment was approved by the citizens of the Commonwealth when the measure was placed on the ballot and presented to the voters in the following language: "Are you in favor of providing a tax exemption for the real property owned and occupied by, and personal property, both tangible and intangible, owned by, institutions of religion?"

While opinions of the Attorney General are persuasive, they are not binding authority on the courts. As stated in *York v. Commonwealth*, 815 S.W.2d 415, 417 (Ky.App. 1991):

> Attorney general opinions are usually sought by state officials concerning their official duties, since the attorney general is the legal advisor of all the "state officers, departments, commissions, and agencies" of the Commonwealth. . . . The government officials are expected to abide by the opinion until a court decrees otherwise or the legislature changes the law.

But, "[t]his Court may give 'great weight' to the reasoning and opinion expressed in Attorney General's opinions." *Woodward, Hobson & Fulton, L.L.P. v. Revenue Cabinet*, 69 S.W.3d 476, 480 (Ky.App. 2002).

The analysis by the Attorney General is clearly consistent with how the courts interpret constitutional provisions. Courts do not restrict constitutional meaning with technical constructions. *Herold v. Talbott*, 261 Ky. 634, 88 S.W.2d 303, 305 (1935). A rule of constitutional construction is to give effect to the intent of the framers of the instrument and of the people adopting it. The Constitution should not be construed so as to defeat the obvious intent of its framers if another interpretation may be adopted equally in accordance with the words and sense which will carry out the intent. Further, the intent must be gathered both from the letter and the spirit of the document (*Grantz v. Grauman*, 302 S.W.2d 364, 367 (Ky. 1957)), and we must give meaning not only to its express provisions, but also to what is implied. *Payne v. Davis*, 254 S.W.2d 710, 713 (Ky. 1953). A "'cardinal rule' of constitutional interpretation is the principle that rules of construction may not be employed where the language of the provision is clear and unambiguous." *Fletcher v. Graham*, 192 S.W.3d 350, 358 (Ky. 2006).

Section 170, as amended in 1990, clearly broadens the class of properties which may be held by a religious institution and not be subject to an *ad valorem* tax. By narrowly construing the words "owned and occupied," the KBTA and circuit court have thwarted the intentions of the people as well as the drafters of the amendment to Section 170.

BLACK'S LAW DICTIONARY 1106 (7th ed. 1999) defines "occupancy" as: "**1.** The act or condition of holding, possessing or residing in or on something; actual possession, residence, or tenancy, especially of a dwelling or land . . . **3.** The period or term during which one owns, rents or otherwise occupies property . . . **5.** The use to which property is put." Thus the definition of "occupancy" or "to occupy" is much broader than found by the KBTA.

It is a rule of general application that provisions for exemption from payment of taxes will be strictly construed, and all doubts and implications resolved against it. *Gray v. Methodist Episcopal Church, South, Widows & Orphans Home*, 272 Ky. 646, 114 S.W.2d 1141 (1938). A claim to exemption must be clearly and positively established by proof of facts essential to bringing the claimant within the contemplation of the Constitution. "Exemptions from taxation are generally disfavored and all doubts are resolved against the exemption." *LWD Equipment, Inc. v. Revenue Cabinet*, 136 S.W.3d 472, 475 (Ky. 2004). *See also Camera Center, Inc. v. Revenue Cabinet*, 34 S.W.3d 39, 41 (Ky. 2000). From the facts before the KBTA and the circuit court, it is apparent that St. Andrew intended to use all the property for a future church, prayer, meditation, family, social and related church activities.

The trial court was faced with the Solomon-like task of balancing the interest of the Commonwealth's right to tax under Section 172 against the privilege of an exemption under Section 170. Unfortunately, the attempt to fashion different degrees of occupancy would create a Gordian knot. Such a tiered system would actually rewrite Section 170 to the extent that the former acreage restrictions would be revived.

Because there was no evidence that St. Andrew intended to use the property for investment purposes or to construct anything other than a church, the KBTA order was without substantial evidence on the whole record. Further, KBTA's interpretation of "occupied" is contrary to the intent of Section 170. Therefore, the Jessamine Circuit Court's order affirming the KBTA's decision to sustain the BAA is reversed in part regarding the denial of an exemption from taxation as to the houses. That portion of the order which did allow for the tax exemption as to the undeveloped portion of the property is affirmed. Finally because the subject property is exempt under Section 170, it is not necessary to address the other claims raised by St. Andrew supporting its contention that the property should be exempt from taxation.

ALL CONCUR.

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