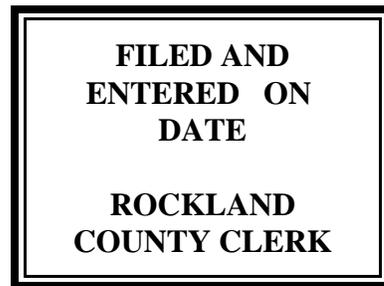


SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND



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OTRADA, INC., AMERICAN RUSSIAN AID
ASSOCIATION,

Plaintiff,

Index No: 5133/03

-against-

**DECISION, ORDER
& JUDGMENT**

ASSESSOR OF THE TOWN OF RAMAPO,
THE TOWN OF RAMAPO and THE BOARD
OF ASSESSMENT REVIEW FOR THE TOWN
OF RAMAPO,

Defendants.

-----X

DICKERSON, J.

OTRADA, INC: TAX EXEMPTION RESTORED

The Plaintiff, Otrada, Inc., American Russian Aid Association [" Otrada "], seeks a restoration of its 100% tax exempt¹ status pursuant to Real Property Tax Law [" R.P.T.L. "] § 420-a(1)(a) which it enjoyed for twenty years prior to 2003 at which time the Defendants reduced Otrada's tax exempt status from 100% to 67%. A trial was held before this Court on June 22, 2005 during which the Defendants sought to explain their rationale in reducing Otrada's tax exemption. For the

reasons set forth below the Defendants have failed to carry their burden of proof and as such Otrada's 100% tax exemption is restored for the tax year 2003.

Preserving Russian Culture

Otrada is a not-for-profit charitable corporation dedicated to the preservation of Russian culture, traditions and language and conducts cultural activities, religious services and religious celebrations for its members².

The Chestnut Ridge Facility

Otrada owns, approximately, 10.5 acres of real property in Chestnut Ridge in the Town of Ramapo. This property was purchased by Otrada in 1978 and was previously a camp for handicapped children which had been abandoned for several years³. There are a number of structures on the property, including rental apartments, a chapel, a theater, an office, a storage facility, a concert hall and a reception hall⁴.

The Residential Units

Since 2003, the rental apartments have been occupied by eight married couples and six single individuals, all members of Otrada

[" the Tenants "], in fourteen separate residential units for which a reduced rent is paid. In addition to paying a reduced rent, the Tenants are responsible for performing certain services at the Otrada campus, including repairs, lawn maintenance, catering, cleaning, decorating and so forth⁵ [" Without the members residing at the premises, Otrada could not carry on the activities for which it was organized "⁶].

Selecting The Tenants

" When choosing members to reside at the Otrada premises, Otrada determines whether these potential residents can perform services needed by Otrada and whether they are willing to devote time to Otrada's activities...Although no written agreement is signed, every resident participates in the organization's activities in some fashion "⁷. It is Plaintiff's position that it would not be possible for Otrada members to perform all the activities required of them if they did not live on the premises⁸. Three of the Tenants work part-time and eleven of the Tenants work full-time at positions outside the Otrada campus⁹.

DEFENDANTS' POSITION

R.P.T.L. § 420-a(1)(a)

Defendants assert that Otrada is not entitled to a 100% tax exemption pursuant to R.P.T.L. § 420-a(1)(a) which provides, " Real property owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, or moral or mental improvement of men, women or children purposes, or for two or more such purposes, and used exclusively for carrying out thereupon one or more such purposes either by the owning corporation or association or by another such corporation or association as hereinafter provided shall be exempt from taxation as provided in this section."

Not Necessary Or Incidental

The Defendants, relying on Yehudi v. Town of Ramapo, 109 A.D.2d 744, 486 N.Y.S.2d 63 (2d Dept. 1985) and Yeshivath Shearith Hapletah v. Assessor of the Town of Fallsburg, 79 N.Y.2d 244, 582 N.Y.S.2d 54 (1992), assert that the use of the subject premises as residences by Otrada members is not necessary or incidental to the Otrada corporate purpose, and, further, that the residences are not used to further the corporate purpose. In Yehudi, supra, at 109 A.D.2d 745, the Court considered whether a residence supplied to a caretaker of a synagogue

and school was tax exempt, stating that the primary use of the residence that was furnished as a convenience to a caretaker was " residential, not religious or educational, and such use is not necessary or incidental to carrying out the purposes for which petitioner was organized." In Yeshivath, supra, at 79 N.Y.2d 745, the Court of Appeals articulated the test for entitlement to a tax exemption stating, " [t]he test for entitlement to tax exemption under the ' used exclusively ' clause of the statute is whether the particular use is ' reasonably incidental to the primary or major purpose of the facility. Put differently, the determination of whether the property is used exclusively for the statutory purposes depends upon whether its primary use is in furtherance of the permitted purposes."

Primary Use As Residences

The Defendants contend that " the use of the subject premises as residences by approximately 15 Otrada members is not necessary or incidental to Otrada's corporate purpose. The residences are not used to further the corporate purpose. To the extent that certain corporate business may take place from time to time in the residences themselves does not change the fact that the primary use of the premises are as residences "10.

Mutually Beneficial Arrangement

Hence, it is Defendants' contention that Otrada has reached a mutually beneficial arrangement with a number of its members in that they are provided with the opportunity to live in a community of like-minded people at reduced rentals. In exchange, the Tenants help around the premises as needed and as their schedules allow. Defendants opine that although this arrangement is beneficial to both the Tenants and Otrada, it should not result in a tax exemption since the time donated and tasks performed on the premises could be performed without the need for the member to dwell on the property¹¹.

To support their position the Defendants rely on the testimony of various Tenants, including one member who gives piano lessons for hire in her residence to members of the public, another who performs auto repairs for both Otrada and its members, and yet another member who uses her apartment to meet with Russian immigrants who need help completing forms and translating documents. Defendants contend that in these and other circumstances involving the Tenants, their tasks could be performed if they lived elsewhere.

Commendable But Should Not Be Tax Exempt

It is Defendants' view that " While the work performed by the tenants on behalf of Otrada is commendable, and may be of value to the

organization, the tenants' residence at the site is merely a convenience and a mutually beneficial arrangement whose primary purpose is not to further the organization's aims but rather to provide an affordable, pleasant living space for its members "12.

OTRADA'S POSITION

Relying on Matter of Osborn Memorial Home Assn. v. Assessor of the City of Rye, 275 A.D.2d 714, 713 N.Y.S.2d 186 (2d Dept., 2000) and Matter of New York Botanical Gardens v. Assessor, 55 N.Y.2d 328, 449 N.Y.S.2d 467 (1982), Otrada contends that the Defendants " failed to make out a *prima facie* case and meet its burden of proof to show that the property should be exempt only to the extent of 67% or any other percentage other than 100% ", stating that " the Town had the burden of proving a specific reduction of the exemption by substantial proof, and no such proof was offered "13.

Testimony Of Only Three Tenants

Otrada asserts that the evidence presented by the Defendants on their direct case consisted of the testimony of only three of the Tenants along with the testimony of Mr. Jean Noelizaire, a real property appraiser with the Town of Ramapo Assessor's office. The three Tenants

[Nicolai Tchertkoff, Oleg Ganousei and Ludmilla Mohler¹⁴] testified that they were given the use of the residence at a reduced rental, in return for their agreement to assist the Plaintiff in its activities. They also testified that each helped the Plaintiff to a greater extent than if they were not residents on the Otrada premises¹⁵. Mr. Noelizaire testified, in essence, that one-third of the total square footage of the various buildings on the property were used for residential purposes for its members¹⁶.

Failure To Explain Why Tax Exemption Reduced

Otrada contends that there was " no testimony given by Mr. Noelizaire...that the exemption of the property was reduced from 100% to 67% based on this finding. In fact, there was no testimony of any official of the Town of Ramapo as to the reason why the exemption was reduced. "¹⁷

Exclusive Use of Otrada

Plaintiff contends that the subject property was used exclusively for exempt purposes pursuant to RPTL §420-a(1)(a), and therefore is entitled to a full exemption. Plaintiff states that " once it is determined that the organization is a proper organization to receive a tax exemption and once it is determined that the property was primarily

used for the exempt purposes, the remaining uses must only be justified by being incidental or helpful in carrying out these activities "18. Relying on University Auxiliary Services at Albany v. Smith, 78 A.D.2d 959, 433 N.Y.S.2d 270, (3d Dept. 1980) aff'd 54 N.Y.2d 986, 446 N.Y.S.2d. 41 (1981), Otrada insists that " even if part of the property was used for a business purpose outside of the use for member-residents who assisted in its activities, the property would still be entitled to a 100% exemption "19.

Are 2004 and 2005 Tax Years Included?

It is the position of Otrada that the prayer for relief in the complaint in this action requested an exemption not only for 2003, but " for any other tax year up through the trial of this action "20. Otrada quotes 24B Carmody Wait 2nd, Declaratory Judgements, Section 147:168, which states "...A declaratory action should give real relief so that a second action for enforcement of the rights declared need not be brought." Otrada contends that when the instant action was commenced, the prayer for relief requested a declaration of the rights of the parties through the trial of this action, thereby avoiding the necessity of commencing a second and third action for each year that was involved²¹. Otrada asserts that the proof taken at trial was not restricted to the tax year 2003 in that the questions posed to witnesses by both the Town Attorney and by Otrada's attorney related to years

prior to 2003 and up through the present year. Hence, Plaintiff requests that any judgement made by this Court in the instant matter declare the rights of the Plaintiff for 2003, 2004 and 2005.

DISCUSSION

The Defendants' Burden of Proof

The burden of proof in tax exemption proceedings is, generally, on the taxpayer [See e.g. New York Botanical Garden v. Assessors of the Town of Washington, 55 N.Y.2d 328, 334-335, 449 N.Y.S.2d 467 (1982) (" Generally, the burden of proof lies with the taxpayer who is seeking to have real property declared tax exempt "); Watchtower Bible & Tract Soc. v. Haring , 8 N.Y.2d 350, 207 N.Y.S.2d 673 (1960)].

However, in a situation where a municipality withdraws a previously granted tax exemption, it is the municipality that bears the burden of proving that the real property is subject to taxation [See e.g. New York Botanical Garden v. Assessors of the Town of Washington, *supra* at 55 N.Y.2d 328, 334-335 ("...under the circumstances presented here, in which the municipality, pursuant to its power under section 420 (subd. 1, para. (B)), is seeking to withdraw a previously granted exemption, the municipality bears the burden of proving that the real property is subject to taxation "); Miriam Osborn Memorial Home Assn. v. Assessor of the City of Rye, 275 A.D.2d 714, 715, 713 N.Y.S.2d 186 (2d Dept.

2000) (" Where as here, a municipality seeks to withdraw an existing exemption under RPTL 420-a(1), the burden is with the municipality to prove that the petitioner is no longer entitled to the exemption "); Miriam Osborn Memorial Home Assn. v. Assessor of the City of Rye, 6 Misc. 3d 1035(A), 800 N.Y.S.2d 350, 2005 WL562748 (N.Y. Sup.) (March 10, 2005); Miriam Osborne Memorial Home Assn. v. Assessor of the City of Rye, Dickerson, J., Supreme Court Westchester County, Index No. 16987/03, February 3, 2005)].

Hence, in the instant matter, the Defendants must present sufficient evidence to meet their burden of proof as to why Otrada is no longer entitled to a 100% tax exemption.

Defendants' Evidence

Mr. Noelizaire testified at trial that some time in May 2003, he conducted an inspection of the property owned by Plaintiff, stating that the purpose of his inspection was to " make sure that I checked out all the buildings on the grounds and what they were for. "²². Mr. Noelizaire testified that he learned from his inspection of the subject property that Otrada's residential properties, which he characterized as " non-profit purpose ", measured 6,572 square feet, or 67%, out of a total square footage of all the Otrada buildings of 19,591, which information he reported to the Assessor of the Town of Ramapo²³.

Mr. Noelizaire testified that as a real property appraiser for the Town of Ramapo Assessor's Office, his only job regarding his 2003 inspection of the Otrada property was to report his findings to the Assessor, which he stated that he did, and not to make a decision as to what portion of the property should be exempt²⁴. Also, Mr. Noelizaire testified that he did not make any recommendations to the Assessor as to how much of the property should be exempt and how much should be non-exempt²⁵.

Defendants Did Not Meet Their Burden

It is evident to this Court that Defendants did not provide sufficient evidence at trial to meet their burden of proving why the exemption on the subject property was reduced from 100% to 67%. Mr. Noelizaire testified that his only job for the Assessor's office was to inspect the Otrada property, including all the buildings on the premises, for the purpose of determining their use, and to report that information to the Assessor. There was no testimony either by the Assessor or by anyone else from the Assessor's office as to why Otrada's exemption was reduced and, in particular, that the decision to reduce the exemption was made as a result of the Assessor learning that, approximately, one-third of the subject property was used as residences for Otrada members. A simple statement by Mr. Noelizaire that " 67 percent of the subject property was being used for non-profit purpose ",

without any further testimony as to why the assessment was reduced is simply insufficient. The Court is not expected to make any assumptions as to why the Assessor chose to reduce Otrada's tax exemption. It is up to the Defendants to prove their case which they have woefully failed to do.

Conclusion

Accordingly, judgement is granted in favor of the Plaintiff such that the subject property is to receive a 100% exemption for the 2003 tax year only, the sole year presently before this court, as Plaintiff did not file separate proceedings for 2004 and 2005. The assessment rolls are to be corrected accordingly, and any overpayments of taxes are to be refunded with interest.

This constitutes the Decision, Order and Judgement of this Court.

Dated: White Plains, N.Y.
October 3, 2005

HON. THOMAS A. DICKERSON
JUSTICE SUPREME COURT

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ENDNOTES

1. For other cases involving the tax exempt status of religious institutions see Matter of Gemilas Chasudim Keren Luzer, Inc. v. Assessor of the Town of Ramapo, 5 Misc. 3d 1026(A) (West. Sup. 2004)(Free Loan Society seeks tax exemption); Salvation & Praise Deliverance Center, Inc. v. Assessor of the Town of Poughkeepsie, 6 Misc. 3d 1021(A)(West. Sup. 2005)(bar claim action granted; Article 7 petition moot); Matter of Adult Home at Erie Station, Inc. v. Assessor of the City of Middletown, 8 Misc. 3d 1010(A)(West. Sup. 2005)(adult home seeks tax exemption); Matter of Congregation Kneset Israel v. Assessor of the Town of Ramapo, 8 Misc. 3d 1021(A)(West. Sup. 2005)(RPTL § 462; What are officiating clergymen?).
2. Plaintiff's Post Trial Memorandum Of Law dated August 23, 2005 [" P. Memo. "] at p. 1; Tr. Trans. at pp. 68-71.
3. P. Memo. at p. 1; Tr. Trans. at p. 71.
4. R. Tr. Ex. A (site plan).
5. P. Memo. at p. 1; P. Tr. Ex. 1.
6. P. Memo. at p. 1; Tr. Trans. at pp. 73-74.
5. P. Memo. at p. 1; Tr. Trans. at pp. 74-75, 84-96.
8. P. Memo. at p. 2; Tr. Trans. at pp. 75-79; 39-42,48,56.
9. Defendants' Memorandum of Law dated August 24, 2005 [" D. Memo. "] at pp. 5-8; Tr. Trans. at pp. 30-32,45,46,51-54,56,57,85-96.
10. D. Memo. at p. 10. Defendants rely upon International Fellowship, Inc. v. Comerford, 2001 WL 1750612 (Sup. Ct. Chautauqua Cty. 2001). Although, in Comerford, the premises served as the corporate offices of the exempt organization, and was the management, administration, bookkeeping and record storage center for the corporation, the Court found that the primary use of the premises was as a residence for the organization's corporate officers and that there was no evidence that the corporate purposes required the officers to reside at the premises.
11. D. Memo. at pp. 11-12.

12.D. Memo. at p. 13.

13.P. Memo. at p. 6-7.

14. See P. Tr. Ex. 1 for a description of apartments, rents and services performed by the Tenants for Otrada.

15.Tr. Trans. at pp. 27-59.

16.Tr. Trans. at pp. 23 & 27.

17.P. Memo. at p. 6.

18. P. Memo. at p. 8.

19. P. Memo. at p. 8.

20. P. Memo. at p. 3.

21.P. Memo. at p. 4.

22.Tr. Trans. at p. 11.

23.Tr. Trans. at p. 23 (" Q. And of those numbers, were you able to calculate what the percentage of the property being used, what was the percentage of the property being used for rental and residential purposes? A. Yes Q. What was that result? A. We know it was 67 percent of the property being used for non-profit purposes. Q. What did you find as non-profit purposes. A. We found that buildings that were not getting rentals, they were not getting any income from ").

24.Tr. Trans. at p. 25 (" Q. So then you yourself never made any decision as to what portion of the property should be exempt and what portion should not be exempt? A. My job was to report to the Assessor. That was it.").

25.Tr. Trans. at. 26 (" Q. Did you make any recommendations as to how much should be exempt and how much should be non-exempt? A. No.").