

REPRESENTATIVE FOR PETITIONER: Mark Shubert, President, Shubert Construction, Inc.

REPRESENTATIVES FOR RESPONDENT: Terrance Wozniak, St. Joseph County Attorney

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**BEFORE THE  
INDIANA BOARD OF TAX REVIEW**

In the matter of:

SHUBERT CONSTRUCTION, INC.)	Petition No.: 71-003-05-2-8-00001
)	
)	
Petitioner )	County: St. Joseph
)	
v. )	Township: Clay
)	
)	Parcel No: 242023054814
)	
ST. JOSEPH COUNTY )	
PROPERTY TAX ASSESSMENT )	
BOARD OF APPEALS; ST. )	
JOSEPH COUNTY ASSESSOR <sup>1</sup> )	
Respondent )	Assessment Year(s): 2005
)	

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Appeal from the Final Determination of  
[St. Joseph County Property Tax Assessment Board of Appeals]

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**December 27, 2007**

**FINAL DETERMINATION (Amended)**

The Indiana Board of Tax Review (“Board”) having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

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<sup>1</sup> The St. Joseph County Assessor appeared as an additional party under Ind. Code § 6-1.1-15-4(p) (2006). For ease of reference, the Board has captioned County Assessor as a Respondent.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **ISSUE AND SHORT ANSWER**

1. Debbie Werbrouck's School of Dance, Inc. ("Dance School"), which instructs students in various dance-related activities, leases a portion of the subject property from Shubert Construction, Inc. The lease calls for significant rent and contains other terms typical of a commercial lessor-lessee relationship. The Board must decide whether the subject property is owned—and not just occupied and used—for an exempt purpose.
2. It is not. The only facts relating to Shubert Construction's purposes in owning the property—the commercial lease with the Dance School and the fact that it leases the remaining 28% of the subject building to a commercial photographer—show that Shubert owns the property for investment and profit. And those are not exempt purposes under Ind. Code § 6-1.1-10-16.

### **PROCEDURAL HISTORY**

3. On May 13, 2005, Shubert Construction filed an Application for Property Tax Exemption. On August 23, 2005, the St. Joseph County Property Tax Assessment Board of Appeals ("PTABOA") issued its determination denying the requested exemption and finding the property 100% taxable.
4. On September 15, 2005, Shubert Construction timely filed a Form 132 Petition for Review of Exemption asking the Board to review the PTABOA's determination. Shubert Construction claimed that 72% of its real property is exempt under Ind. Code § 6-1.1-10-16 because the Dance School uses it for educational purposes. The Board has jurisdiction to hear Shubert Construction's appeal under Ind. Code § 6-1.5-4-1(a).
5. On September 26, 2007, the Board conducted an administrative hearing on Shubert Construction's Form 132 petition through its duly appointed administrative law judge, Jennifer Bippus ("ALJ"). Neither the ALJ nor the Board inspected the subject property.

6. The following persons were sworn as witnesses at the hearing:

For Shubert Construction:

Deborah Shubert

Mark Shubert

For the PTABOA:

David Wesolowski, St. Joseph County Assessor,

Ann C. Conners, Clay Township Assessor,

Dennis Dillman, St. Joseph County PTABOA,

Ralph Wolfe, St. Joseph County PTABOA,

Kevin Klaybor, St. Joseph County PTABOA.

7. Terrance Wozniak, St. Joseph County Deputy County Attorney, appeared at the hearing for the PTABOA.

8. The parties offered the following exhibits:

Petitioners' Exhibit 1 - Notice of Action Form 120,

Petitioners' Exhibit 2 - Application for Property Tax Exemption,

Petitioners' Exhibit 3 - Articles of Incorporation, Debbie Werbrouck's School of Dance, Inc.

Petitioners' Exhibit 4 - By-laws,

Petitioners' Exhibit 5 - Indiana Board of Tax Review Final Determination,

Petitioners' Exhibit 6 - Commercial Lease,

Petitioners' Exhibit 7 - Letter from Debbie Shubert to the PTABOA,

Petitioners' Exhibit 8 - US Income Tax Return 1120S 2004,

Petitioners' Exhibit 9 - US Income Tax Return 1120S 2003,

Petitioners' Exhibit 10 - US Income Tax Return 1120S 2002,

Petitioners' Exhibit 11 - Form 132 Petition to the IBTR,

Petitioners' Exhibit 12 - Curriculum,

Petitioners' Exhibit 13 - Educational guidelines provided to parents of students,

Petitioners' Exhibit 14 - List of cases supporting exemptions for educational

purposes,

Petitioners' Exhibit 15 - Debbie Werbrouck's dance and administrative qualifications.

Respondent Exhibit 1 - Notice of Action Form 120,

Respondent Exhibit 2 - Application for Property Tax Exemption,

Respondent Exhibit 3 - Indiana Board of Tax Review Final Determination,

Respondent Exhibit 4 - By-Laws,

Respondent Exhibit 5 - Indiana Board of Tax Review Final Determination,

Respondent Exhibit 6 - Property Record Card,

Respondent Exhibit 7 - Commercial Lease,

Respondent Exhibit 8 - Letter from Debbie Shubert to the PTABOA,

Respondent Exhibit 9 - US Income Tax Return 1120S 2004,

Respondent Exhibit 10 - US Income Tax Return 1120S 2003,

Respondent Exhibit 11 - US Income Tax Return 1120S 2002,

Respondent Exhibit 12 - Form 132 Petition to the IBTR,

Respondent Exhibit 13 - Curriculum,

Respondent Exhibit 14 - Debbie Werbrouck's School of Dance brochure.

9. The following additional items are part of the record of proceedings:

Board Exhibit A - The Form 132 Petition with attachments,

Board Exhibit B - Notice of Hearing,

Board Exhibit C - Notice of County Assessor's Appearance as Additional Party,

Board Exhibit D - Hearing Sign In Sheet.

10. The subject property consists of land and improvements located at 3466 Douglas Road in South Bend, Indiana. Shubert Construction requests a 72% exemption, equaling the portion of the subject building leased to the Dance School.

## FINDINGS OF FACT

11. This case involves a business relationship between two corporations—the Dance School and Shubert Construction—both of which are owned by Debbie and Mark Shubert.
12. The Dance School is a for-profit subchapter-S corporation that operates out of three locations, including the subject property. *D. Shubert testimony*. It employs trained dancers to instruct children and teenagers in various dance-related activities. *Id.*; *see also Pet'r Ex. 11*. Shubert Construction is a for-profit corporation that owns and leases real estate.
13. Shubert Construction leases 72% of the subject building to the Dance School. *D. Shubert testimony*. It leases the remaining 28% of the building to a commercial photographer. *Id.*
14. The Dance School and Shubert entered into a 5-year commercial lease beginning on November 1, 2004. *D. Shubert testimony; Pet'r Ex. 6*. The lease requires the Dance School to pay Shubert Construction monthly rent of \$3,500 plus late fees for any untimely payments. *Id.* The lease also requires the Dance School to pay increased rent if it holds over after the lease expires. *Id.*
15. And the lease restricts how the Dance School can use the leased premises. For example, the Dance School cannot sublease the premises without Shubert Construction's approval. *Id.* The lease, however, does not limit the Dance School to performing educational activities on the premises. *Id.*
16. Shubert Construction can terminate the lease and evict the Dance School if the Dance School breaches any of the lease's material terms. *Id.* And if Shubert Construction opts to evict the Dance School, the lease allows Shubert Construction to recover its costs, including reasonable attorney fees. *Id.*
17. The Board previously issued a final determination granting an exemption to Mark and Debbie Shubert for one of the Dance School's other locations. *Pet'r Ex. 5, (Mark &*

*Deborah Shubert v. Elkhart County Prop. Tax Assessment Bd. of Appeals*, Pet. No: 20-015-05-2-8-0002 (Ind. Bd. of Tax Rev. Dec. 18, 2006)).

## CONCLUSIONS OF LAW AND ANALYSIS

### A. Burden of proof

18. Shubert construction claims that its property should be exempt from taxation under Ind. Code § 6-1.1-10-16. Thus, it bears the burden of proving, by a preponderance of the evidence, that the subject property is owned, occupied, and predominately used for one of the exempt purposes listed in that statute. *See Indianapolis Osteopathic Hosp. Inc. v. Dep't of Local Gov't Fin.*, 818 N.E.2d 1009, 1114 (Ind. Tax Ct. 2004). While Ind. Code § 6-1.1-10-16(a) lists a number of exempt purposes, Shubert claims only that its property is used for educational purposes.

### B. The subject property does not qualify for exemption

19. Generally speaking, tangible property located in Indiana is taxable. *See* Ind. Code § 6-1.1-2-1. Nonetheless, the Indiana Constitution allows the General Assembly to exempt any property being used for municipal, educational, literary, scientific, religious, or charitable purposes. IND. CONST. Art. 10, § 1. The Indiana General Assembly, in turn, has enacted legislation exempting property that is owned, occupied, and used for educational, literary, scientific, religious, or charitable purposes. *See* Ind. Code § 6-1.1-10-16(a)-(c), (e).
20. The parties spent much of their time debating (1) whether teaching dance classes qualifies as an educational, rather than recreational, activity, and (2) whether the fact that the Dance School profits from its teaching activities renders its activities non-exempt. But the Board need not decide those issues, because Shubert Construction failed to prove a separate essential element of its exemption claim—that it owns the subject property for an exempt purpose.

21. Indiana Code § 6-1.1-10-16 does not require a single entity to own, occupy, and use a property for exempt purposes. *Sangralea Boys Fund, Inc. v. State Bd. of Tax Comm'rs*, 686 N.E.2d 954, 956-59 (Ind. Tax Ct. 1997). But each of those activities—ownership, occupancy, and use—must be for an exempt purpose. *Id.* at 959. Thus, in *Sangralea*, the Indiana Tax Court found that the property owner was entitled to an exemption despite the fact that it did not conduct charitable activities at the property, but rather contracted with its lessee to do so. *Id.* at 959. The court, however, explained that the property was still owned, occupied, and used for charitable purposes, because the owner was motivated by charity when it leased-out the property:

Because a property's exempt status is tied to its use, it is clear that Sangralea is entitled to an exemption. Sangralea owned the property and ensured it was used in charitable work. *Sangralea does not own the property as investment property or with a motive of profit. The use and occupation of the property by the Lessees is in furtherance of Sangralea's exempt purposes.* Sangralea contracted with Lessees to operate the property in a manner consistent with Sangralea's charitable purpose. Lessees and Sangralea have simply come to an agreement as to the method of producing public benefit from the property. No profit is made on the venture, and noble goals are accomplished. Therefore, the property is owned, occupied, and used for charitable purposes.

*Id.* (emphasis added).

22. Here, Shubert Construction focused largely on how the Dance School uses the subject property. Schubert Construction offered little evidence about its own purposes. And the little evidence it did offer points almost exclusively to a finding that it owns the subject property for investment and profit.
23. For example, Shubert Construction leases the property to the Dance School and one other tenant. And the Dance School's lease does not evince an educational purpose. Indeed, while it may be less detailed than some commercial leases, the Dance School's lease reflects a typical commercial lessor-lessee relationship. It does not require the Dance School to use the property for educational purposes. And it calls for significant monthly rent that, absent any evidence to the contrary, the Board infers is the market rate for the subject property's geographic area. It also provides Shubert Construction with several

lessor-friendly remedies, such as the ability to recover its reasonable attorney fees if it evicts the Dance School for materially breaching the lease.

24. And the fact that the Shuberts own both corporations does not change that calculus. As a legal entity, Shubert Construction is separate both from its officers and shareholders and from the Dance School. *See McQuade v. Draw Tite, Inc.*, 659 N.E.2d 1016, 1020 (Ind. 1995) (“Under Indiana law, a corporation is a legal entity separate from its shareholders.”). The Board will not simply impute to Shubert Construction motives held by the Dance School or the Shuberts. Indeed, the Board doubts that the Shuberts would be so eager to blur the lines of separateness between and among themselves and the two corporations if an injured dance student were to file a lawsuit.
25. The lack of evidence showing that Shubert Construction owns the subject property for an exempt purpose distinguishes this case from an earlier case where the Board granted Mark and Deborah Shubert an exemption. *See Mark & Deborah Shubert v. Elkhart County Prop. Tax Assessment Bd. of Appeals*, Pet. No: 20-015-05-2-8-0002 (Ind. Bd. of Tax Rev. Dec. 18, 2006). That case involved a Goshen property owned by the Shuberts in their individual capacities. Like this case, the Dance School ran programs at the Goshen property. But unlike this case, there was no evidence that the Shuberts owned the Goshen property for any reason other than to provide the dance school with a location to conduct educational activities. Indeed the record was silent as to whether the Dance School even paid rent to the Shuberts.
26. Instead, the Elkhart County PTABOA rested its entire case on the fact that neither the Shuberts nor the Dance School was organized as a not-for-profit entity. *Shubert*, slip op. at 5. The Board correctly noted that the exemption statute does not distinguish between for-profit and not-for-profit entities. *Id.* (citing *College Corner, L.P. v. Dep’t of Local Gov’t Fin.*, 840 N.E.2d 905, 911 (Ind. Tax Ct. 2006)). But although a property-owner’s for-profit status does not disqualify its property from receiving an exemption, it must still own the property for an exempt purpose.

27. Thus, Shubert Construction failed to meet its burden of proof because it did not show that it owned the subject property for an exempt purpose.

#### SUMMARY OF FINAL DETERMINATION

28. Shubert Construction failed to prove that it owns the subject property for an exempt purpose. The Board therefore finds for the St. Joseph County PTABOA.

This Final Determination of the above captioned matter is issued this by the Indiana Board of Tax Review on the date first written above.

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Chairman, Indiana Board of Tax Review

#### - Appeal Rights -

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5, as amended effective July 1, 2007, by P.L. 219-2007, and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice. The Indiana Tax Court Rules are available on the Internet at

<<http://www.in.gov/judiciary/rules/tax/index.html>>. The Indiana Code is available on the Internet at <<http://www.in.gov/legislative/ic/code>>. P.L. 219-2007 (SEA 287) is available on the Internet at <<http://www.in.gov/legislative/bills/2007/SE/SE0287.1.html>>