ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.

Re CARB 164146M-2021 [2021] ABCGYARB 2164146

Calgary Assessment Review Board, D Mullen, A Maciag, J Wallace, 14 December 2021

Challenge to the municipal tax assessment of a Public Foundation's building leased to charitable and non-charitable tenants.

Key words: Municipal Property Tax, Calgary, Alberta, Canada, Property Assessment, Use, Shared Space, Private Tenants

1. The Kahanoff Centre for Charitable Activities is a public foundation (the Foundation). Its main purpose is to provide other charitable and non-profit organizations with office space and meeting facilities to assist them in reducing their administrative costs, thereby allowing for an increased flow of charitable and benevolent activities and support to the citizens of Calgary. Revenues received by the Foundation are used to meet the organization's objectives and are directed towards benevolent activities which benefit the community.

2. The Foundation owns the Kahanoff Centre for Charitable Activities (KCCA Building) housing approximately 30 charitable organizations which variously have exempt and taxable status. There are some vacant spaces in the building.

3. It also operates KHUB in the building which is a shared space for tenants, charities, and non-profit organizations to use on short-term rental basis. It allows for collaborative and flexible open space for seminars and networking, and includes 13 individual offices, 20 workspaces and 2 meeting rooms available for use/rent. Typical clients include smaller organizations without their own office space, or which require additional occasional office or workspace access.

4. Base rents are generally at 25% below market rental rates at time of entering the lease. Typical leases also specify that renewed leases will be set at 75% of market rental rates at the time of renewal.

5. Operating cost budgets are set at the beginning of each calendar year. If actual operating costs are below budget, the difference is refunded to the tenants. The KCCA Foundation often absorbs the difference if actual operating costs are greater than budget. This allows the tenants greater certainty in their budgeting and ensures that resources that have been directed towards charitable activities are not unexpectedly curtailed.

6. There are tenants who are private companies, as well as nonprofits that are not charities. Any surplus income is applied to the objects of the Foundation.

7. The Foundation argued that the entire KCCA Building should be exempt from municipal property tax except for that portion which is occupied by taxable tenants.

8. The Municipal Government Act, R.S.A. 2000, Chapter M-26 s 362(1) exempts from taxation property that is used for a charitable or benevolent purpose that is for the benefit of the general public, and owned by a non-profit organization.

9. The Minister can make further regulations which are contained in Community Organization Property Tax Exemption Regulation (COPTER) Alta Reg 281/1998. Part 2 of COPTER states:

    Exemption under section 362(1)(n)(iii) of the Act

    10(1) Property referred to in section 362(1)(n)(iii) of the Act is not exempt from taxation unless:
    the charitable or benevolent purpose for which the property is primarily used is a purpose that benefits the general public in the municipality in which the property is located, and
    the resources of the non-profit organization that holds the property are devoted chiefly to the charitable or benevolent purpose for which the property is used

10. Further:

    Primary use of property
    4(1) Property is not exempt from taxation under section 362(1)(n)(iii), (iv) or (v) of the Act or Part 3 of this Regulation unless the property is primarily used for the purpose or use described in those provisions.
    (2) For the purposes of this Regulation, a property is primarily used for a purpose or use if the property is used for the specified purpose or use at least 60% of the time that the property is in use.

11. There are other provisions about restricted 'member only' fee based private club use of property.

12. The Assessor of The City of Calgary (City) determined that some space in the building was exempt.

13. The City noted that the application for exemption in the 2021 assessment year did not apply for the 2,538 square feet of vacant space or the 13 parking spaces to be exempt.

14. While it was argued that the starting position should be that the whole of the KCCA Building should be treated as exempt, and then be made taxable if a non-exempt tenant moves in, this was not accepted. This was because there is no certainty that any space in the KCCA Building will be used for charitable or benevolent purposes as the KCCA Foundation does not rent exclusively to those types of organizations. Until a tenant or use by the occupant can be demonstrated it is not possible to determine if the use of the space or occupant meets the criteria for exemption.

15. The Board found that it could not make the whole of the KCCA Building exempt from taxation because the areas not being used could be leased by exempt or taxable tenants at the determination of the administration of the KCCA Foundation. If a new lease was signed after the assessment information was gathered, it may not be until the next information gathering period that that tenant criteria would be considered, and the space/use changed to taxable. The Board considered this lag was unfair and unreasonable to the tax base.

16. The Board declined to alter the assessment.

IMPLICATIONS

All parties and the Board acknowledged the good works and benevolent nature of the KCCA Foundation and the benefits it provides to the citizens of the City of Calgary.

Some would argue, as occurred in Commissioner of Taxation v Word Investments Ltd, that income generated by a charity for its purposes ought not to be subject to income tax.

Others would point out that direct taxes and property taxes that are largely linked to providing services such as roads, rubbish removal, and utilities, should be considered in a separate taxing category.

For further debate on the issues refer McGregor-Lowndes, Myles, Turnour, Matthew, & Turnour, Elizabeth Not for profit income tax exemption: Is there a hole in the bucket, dear Henry? *Australian Tax Forum* 26(4) (2011): 601.

VIEW THE CASE

This case may be viewed at
https://www.canlii.org/en/ab/abcgyarb/doc/2021/2021abcgyarb2164146/2021abcgyarb2164146.html
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