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## Opinion of the Tax Commissioner

Date Issued: November 21, 2008

Opinion No: 08-0010

Tax: Commercial Activity

XXXX  
XXXX  
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XXXX

Subject: Nonprofit Organization

This request for an Opinion of the Tax Commissioner was received on August 4, 2008. The Tax Commissioner requested additional information on August 28, 2008, and the taxpayer supplemented its request with such information on September 18, 2008. The request is two-fold: (1) whether a homeowners association is considered a “person” and therefore subject to the commercial activity tax (hereinafter “CAT”); and (2) whether certain assessments are considered “membership dues” and therefore excluded from the association’s gross receipts.

### **STATEMENT OF FACTS**

XXXX Condominium Association (hereinafter “Taxpayer”) is a homeowners association for the XXXX Condominiums. Taxpayer is not organized for a profit and is incorporated in the state of Ohio as a not-for-profit entity pursuant to Chapter 1702 of the Revised Code.<sup>1</sup> Taxpayer does not distribute earnings to its directors, officers, or other private persons, and is exempt from Ohio’s income and corporate franchise taxes. Taxpayer collects from its members certain membership dues and money from different types of annual assessments for the common expenses, such as costs of salaries, wages, payroll taxes, legal and accounting fees, a working capital fund, supplies, materials, parts, services, landscaping, and repairs.

### **QUESTIONS PRESENTED**

1. Is a homeowners association considered a “person” for purposes of the CAT, or instead is such association excluded from that definition as a nonprofit organization?
2. If “membership dues” are excluded from a taxpayer’s gross receipts for purposes of the CAT, does the term “membership dues” include annual dues and association assessments (e.g., road, capital improvement, reserve, and general operating assessments)?

### **ANALYSIS**

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<sup>1</sup> See Articles of Incorporation filed MMDDYY and Statement of Continued Existence filed on MMDDYY with the Ohio Secretary of State.

## *Discussion of “Nonprofit Organizations”*

### *General Definitions*

Pursuant to R.C. 5751.02(A), the CAT is a tax levied on each person with a certain amount of taxable gross receipts for the privilege of doing business in this state. The term “doing business” is defined in R.C. 5751.02(A) as “engaging in any activity, whether legal or illegal, that is conducted for, or results in, gain, profit, or income, at any time during the calendar year.” For CAT purposes, the term “person” is broadly defined in R.C. 5751.01(A) to include individuals, associations, and other types of entities, but specifically excludes “nonprofit organizations.” The term “nonprofit organizations” is not defined under either Ohio or federal law. Under the general law provisions, Ohio uses the term “nonprofit *corporations*” and federal law uses the term “*charitable* organizations.” Therefore, for CAT purposes, neither term fits exactly with the term “nonprofit organizations.” For that reason, the Department promulgated Ohio Adm. Code 5703-29-10, which defines “nonprofit organizations” for purposes of the CAT.

### *Ohio Adm. Code 5703-29-10*

Ohio Adm. Code 5703-29-10 states that, solely for CAT purposes, an entity that meets both prongs of a two-prong test is considered a “nonprofit organization.” A nonprofit organization is excluded from the definition of a “person” and is therefore not subject to the CAT.

#### *First Prong: Organized Other than for Pecuniary Gain or Profit*

The first prong of the nonprofit test is two-fold: (1) the entity must not be organized for the pecuniary gain or profit of the entity; and (2) no part of the entity’s net earnings may be distributable to the entity’s members, directors, officers, or other private persons, unless otherwise permitted by law.

As is typical of homeowners associations, Taxpayer states that it is not organized for pecuniary gain or profit and does not distribute any of its earnings to its directors, members, officers, or other private persons. Taxpayer is organized under Chapter 1702 of the Revised Code, which, as discussed *infra*, is one of the chapters for nonprofit organizations specified in the rule. In addition, a homeowners association such as Taxpayer is not engaged in a business activity. Therefore, looking at the facts Taxpayer presents, it appears that the organization meets the first prong of the test.

#### *Second Prong: Operating Consistent with Organization*

The second prong of the nonprofit test is that the entity is operating consistent with its organization.

Taxpayer states that it operates consistent with its organization, in that it does not operate for pecuniary gain or profit and does not distribute its earnings to its directors, members, officers, or other private persons. Taxpayer submitted Declaration of Condominium Ownership (“the Declaration”) with attached exhibits including the bylaws of the association that administers the condominium property, XXXX Condominium Association (“the Bylaws”). Article II, Section 5 of the Bylaws (Exhibit D of the Declaration) addresses compensation, and states that “[m]embers of the Board [of Managers] shall receive no compensation for their services as members of the Board unless expressly provided for in resolutions duly adopted by the Unit Owners.” Article III, Section 5 of the Bylaws (Exhibit D of Declaration) addresses officer compensation, and states “officers shall receive no compensation for their services as officers unless expressly provided for in a resolution duly adopted by the Board.” Paragraph (B)(1) of Ohio Adm. Code 5703-29-10 states, in pertinent part, as follows: “The payment of reasonable compensation for services rendered \* \* \* is not pecuniary gain or profit or distribution of net earnings.” Thus, the reasonable payment for services associated with attending Board meetings does not, in and of itself, prevent Taxpayer from qualifying as a nonprofit organization for purposes of the CAT.

The rule also includes an illustrative list of chapters within Title 17 of the Revised Code for those entities organized under the laws of Ohio, including entities organized pursuant to Chapter 1702 of the Revised Code. Those chapters address specific entities meeting the definition of nonprofit organizations for CAT purposes; however such list is not exhaustive. Since Taxpayer is a not-for-profit corporation organized under the provisions of Chapter 1702 of the Revised Code and is operating consistent with that organization, Taxpayer appears to meet the definition of a nonprofit organization, and is excluded from the definition of a “person” for purposes of the CAT.

*“Membership Dues” and Assessments*

Because Taxpayer meets the definition of a “nonprofit organization,” as that term is defined in Ohio Adm. Code 5703-29-10, Taxpayer is not subject to the CAT. Accordingly, it is unnecessary to answer Taxpayer’s second question regarding the definition of the term “membership dues.”

**ANSWER**

1. According to the facts presented, Taxpayer meets the definition of a “nonprofit organization” for purposes of the CAT and therefore is not included in the definition of a “person” and is not subject to the CAT.
2. Since Taxpayer is not a “person” and accordingly is not subject to the CAT, it is unnecessary to answer this question regarding the definition of “membership dues.”

**CLOSING**

This Opinion applies only to Taxpayer. It may not be transferred or assigned. In addition, the tax consequences stated in this Opinion are subject to change for any of the reasons provided in R.C. 5703.53(C). It is the duty of Taxpayer to be aware of such changes pursuant to R.C. 5703.53(E).

Richard A. Levin  
Tax Commissioner