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A GUIDE TO THE COUNTY AUDITOR'S REVIEW OF REAL PROPERTY EXEMPTION APPLICATIONS

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Introduction

House Bill 225, 129th General Assembly, requires county auditors to review exemption applications for certain types of property within the auditor's county. The properties for which the auditor will be responsible for granting exemption include:

- A public road or highway;
- Property belonging to the federal government of the United States;
- Additions or other improvements to an existing building or structure that belongs to the state or a political subdivision, as defined in section 5713.081 of the Revised Code, and that is exempted from taxation as property used exclusively for a public purpose;
- Property of the boards of trustees and of the housing commissions of the state universities, the northeastern Ohio universities college of medicine, and of the state to be exempted under section 3345.17 of the Revised Code.

H.B. 225 is effective March 22, 2012, and will apply to any eligible application requesting exemption for tax year 2011 or thereafter that the auditor has not already forwarded to the Tax Commissioner for review.

This bulletin is presented as a general guide to assist auditors in understanding their roles in the exemption process. It is important to note that the new law provides auditors the authority to review only a limited subset of exemption applications. ***All applications received by an auditor that do not involve the types of properties listed above shall be handled by the auditor in the manner that previously was employed for all applications for exemption.***

Notifying the Board of Education

(R.C. 5715.27(B))

The board of education of any school district may request a county auditor to provide it with notification of applications for exemption from taxation for property located within that district. If a board of education has requested notification from the auditor, then the auditor must send monthly reports to the board of education of the affected school district of applications that have been filed with the auditor for review. The auditor is not responsible for providing notice for applications that will be forwarded to the Tax Commissioner for review. The notice must be mailed by the 15th day of the month following the end of the month in which the auditor received an application for exemption and the notice must include:

- The name of the property owner or applicant;
- The address of the property;
- The auditor's parcel number.

Even if a board of education has previously requested that the Tax Commissioner provide notice of exemption application filings, it must provide the auditor with a separate notice. Finally, the applications, complaints against continuing exemption, and documentation relating to any determinations are public records.

When May an Application be Considered?
(R.C. 5715.27(C) and (D))

If no school board has requested notice of applications, the auditor may issue a decision regarding an application at any time. If a school board has requested notice of applications, and the auditor has provided such notice in the month following the receipt of the application, the affected board of education may file a statement challenging the application at any time prior to the first day of the third month following the end of the month in which the application was received. Therefore, the auditor must not grant the application or hold a hearing regarding the application prior to the first day of the third month after the application was received, unless the auditor receives a written waiver. As an example, an affected school board has requested of the auditor that it receive notice of exemption applications. An application is received in January. The auditor must provide that notice to the board of education by February 15. After receipt of the notice, the board of education may file a statement of its intention to participate in the case no later than March 31. If an affected school board has not requested of the auditor that it receive notice of exemption applications, and an application is received in January, no notice must be provided at any time.

The school board's statement entitles it to submit evidence and to participate in any hearing on the property. It also vests the school board with a right to appeal the auditor's decision. The auditor is not required to hold a hearing, but is required to accept any evidence offered by the affected school district or the applicant. If a hearing is held, the board of education of the affected school district that has filed a statement has a right to participate.

GENERAL GUIDELINES AND JURISDICTIONAL REQUIREMENTS FOR REVIEWING EXEMPTION APPLICATIONS

Who may file the Exemption Application?
(R.C. 5715.27(A))

One of the most common jurisdictional errors encountered in exemption applications involves who is legally authorized to file an exemption application. Ohio law authorizes only the following parties to file exemption applications:*

- The legal owner of the property
- A vendee in possession of the property under a purchase agreement or land contract
- The beneficiary of a trust that holds title to the property
- A lessee of the property where the initial term of the lease is at least thirty years

<u>If a party other than one authorized by law files the application for exemption, the application must be dismissed for lack of jurisdiction.</u>

* Ohio law provides an exception to this rule for tax increment financing and other similar incentive exemptions which may be filed by the political subdivision that created the exemption.

Treasurer's Certificate
(R.C. 5713.08)

The only acceptable proof of payment of taxes is the treasurer's certificate located on the last page of the application. Copies of receipts, tax bills, or other proofs of payment in lieu of the treasurer's certificate are not acceptable.

What taxes must be paid before the Auditor can consider the request for exemption?
(R.C. 5713.08(C) and R.C. 5713.081(A))

Taxes that may not potentially be remitted after consideration of the case must be paid before the exemption application can be considered on its merits. The authority to remit taxes is limited to the three years preceding the year in which the application is filed, but in every case, the taxes for the year the owner acquired title to the property must be paid. The auditor will also have jurisdiction over a case if the nonremittable taxes are subject to a valid delinquent tax contract.

If the treasurer's certificate does not indicate that the required taxes are paid or subject to a contract, the auditor must send the applicant a letter setting forth the years for which taxes must be paid and requesting a corrected treasurer's certificate as proof of payment within sixty days of the date the letter is mailed. The letter should warn the applicant that, unless the corrected certificate is received by the auditor within the required time period, the application will be dismissed for lack of jurisdiction. Note that a postmark made within the sixty-day period is insufficient to establish a timely filing of the corrected certificate. (See Example #1 for an exception to this noticing rule.)

The letter may be on the auditor's letterhead and contain language similar to the following:

"Under Ohio Revised Code section 5713.08, taxes, penalties and interest for the year the applicant took title to the property and prior years must be paid before the Tax Commissioner may consider the application on its merits. Your application indicates you acquired the property in (tax year), but the treasurer's certificate on that application indicates that taxes, penalties, or interest for that year are unpaid (or the treasurer's certificate is blank or missing).

"Please be informed that you have sixty days from the date of this letter to provide our office with a new treasurer's certificate showing the required amounts have been paid. The corrected treasurer's certificate must be received (not postmarked) by this office within this time period, or your application will be dismissed. The new certificate can be obtained from the county treasurer. "

Taxes for land taken for public roads or highways only need to be paid through the date of acquisition if acquired by the state of Ohio. The Ohio Department of Transportation files for exemption of its property using an abbreviated exemption application (DTE Form 30RE) which includes a column to report the date of acquisition and another to report the date

through which taxes are paid. If the taxes are not yet known, as illustrated in Example #1, the state may pay an estimate of the taxes based on the most recent year for which taxes have been calculated which amount is accepted as payment for the current year. This provision applies only to property owned by the state of Ohio, and, in the context of exemption applications under the auditor's jurisdiction, only to state-owned public roads and highways. There is no tax payment requirement for property owned by the federal government due to the doctrine of federal immunity, which holds in pertinent part that the states are without authority to tax property owned by the federal government.

Example #1: The applicant acquires title to the property on February 1, 2012 and files the exemption application on March 1, 2012. The application can be dismissed without sending the letter because it is not possible for the applicant to obtain a treasurer's certificate within sixty days showing that 2012 taxes are paid.

Example #2: The applicant purchased property in 2007 and immediately began using it for an exempt purpose but did not file an exemption application until 2012. Taxes are not eligible for exemption or remission if they were assessed for years prior to the three years preceding the application. Therefore, in this example, taxes for 2008 and prior years must be paid. (Only taxes assessed in the year the application is filed plus the three preceding years may be remitted, but in no case can taxes assessed in the year of acquisition by the owner or any prior year be remitted). In this case the treasurer's certificate must show that taxes are paid in full through 2008 and prior years because those taxes are no longer eligible for remission.

Are exemptions available for partial years?

(R.C. 323.11 and R.C. 5713.08(D))

Real property tax exemptions are determined based on the use of the property on January 1st of the tax year and are granted or denied on a full-year basis unless Ohio law authorizes a partial year exemption for the particular applicant, e.g., property owned by the state of Ohio or the federal government. Exemptions for property owned by the federal government begin on the date the United States of America acquires the property and end on the day following the day the property is transferred to another owner. Exemption for property owned by the state of Ohio begins on the day the property is acquired or the day following the day any private use of the property has ceased, whichever date is later. Consequently, each successful application must include a detailed statement of how the property was used for an exempt purpose for any partial year and on January 1st of any full year for which exemption is requested.

Factors to Consider in Reviewing an Exemption Application

The new statute is intended to decrease delay in the grant of applications that are likely to be granted. Therefore, it is anticipated that most of the exemption applications filed with the auditor will be granted. Nevertheless, an auditor should assure that the property meets the definitional sections and the requirements for exemption. For example, the auditor should assure that the property is used for the purpose that is expressed in the application, or is owned by the entity required by the exemption. Some guidelines for the requirements for the exemption of property to be considered by the county auditor are provided below.

Public Purpose
(R.C. 5709.08)

The auditor will now be responsible for reviewing requests for exemption of public roads or highways, property owned by the federal government of the United States, and additions to already-exempt buildings owned by the state or a political subdivision. Note that the auditor does not have jurisdiction to consider an application for exemption of a new public building or any newly acquired public property other than that used or intended to be used as a public road or highway. Public use exemptions are generally considered pursuant to Ohio Revised Code section 5709.08. There are three prerequisites which all must be met in order for property to qualify for a public use exemption:

1. The property must be public property (i.e., owned by a state or a political subdivision of the state);
2. The use must be for a stated purpose that benefits the public;
3. The property must be used exclusively for a public purpose.

Prospective Use Exemptions for Public Property

Property may be granted a public use exemption based on current or prospective use. Exemption may be granted on a prospective basis if the applicant can demonstrate that the property is being held or prepared for a public use. If this burden is met, the property is entitled to exemption until the plan to use the property is abandoned, efforts to realize the eventual public use of the property have ceased, or the property has been put to an intervening use which does not qualify for exemption.

Leased Public Property – General

Public property that is leased to a private entity and used for the lessee's business does not qualify for exemption. However, property may still be exempt if a public owner leases its property to the state, another political subdivision, or to a charitable or educational institution, and the lessee uses the property for charitable, educational, or public purposes, or if the private entity's use is so incidental and minimal that it does not interfere with the public use of the property. If an applicant requests exemption for public property leased to a for-profit entity, the following information should be included with the application or obtained from the applicant:

- A copy of the lease or management agreement;
- A copy of any fee or membership schedule;
- An income and expense statement for the operation of the property for the years preceding any year for which exemption is requested.

The auditor should review this and any other information deemed to be pertinent to ensure the requirements of the exemption are met.

Public Property Leased to Private Operator

Public property that is leased to a private, for-profit operator is not exempt. However, a public owner may outsource management of its public property to a for-profit entity as long

as the private operator is operating as an agent of the public owner and not as an independent contractor. Indications that a private operator is an independent contractor include:

- In addition to or in lieu of a flat management fee, the operator receives a performance-based fee or commission;
- The employees who manage the facility are the operator's employees rather than the public owner's employees;
- The operator is responsible for maintaining liability insurance for the facility.

Property that has been privatized to this extent is no longer used exclusively for a public purpose and is not eligible for exemption.

Colleges and Universities
(R.C. 3317.45)

When H.B. 225 was introduced, the question of whether property owned by a public college or university was eligible for exemption under R.C. 3317.45 seemed well-settled. The Supreme Court had previously held that such property was exempt even if it was leased to another entity for use as a private business and where the lease payments were used to support the university.

In November 2011, the Supreme Court provided additional explanation of that standard in *Columbus City School Dist. v. Testa,* Slip Opinion No. 2011-Ohio-5534. In that case the Court explained that a secondary use of the property to produce income was not fatal to the exemption as long as the primary use of the property is, to some degree, operationally connected to university activities. The Court further held that the primary use could be either prospective or current. Given that, the question of whether the property of public colleges and universities is always exempt is not as easy to answer as it was once presumed to be. Auditors are encouraged to consider these types of exemption cases carefully following the issuance of this recent opinion.

Auditors should also be aware that not all property generally considered to be state university property is actually owned by the state of Ohio. Sometimes property is titled to a foundation or board in support of a university rather than in the name of the state for the use and benefit of the institution. ***While such property is eligible for exemption under R.C. 3317.45, it is not eligible for proration of the tax exemption from the date of acquisition to the end of the year that is available to state-owned property.***

Issuing the Determination
(R.C. 5715.27; R.C. 5717.02(B))

If the auditor determines that the tax exemption should be granted, the tax list and duplicate must be corrected accordingly. The auditor must give notice to all who participated in the exemption application of the determination. In other words, if the board of education participated in the exemption by filing a statement, it should receive notice of the auditor's determination. A party's appeal rights run from the date the auditor's determination is received by the appealing party. In order to confirm that an appeal is timely filed, the date upon which the determination was received is critical. Therefore, in the event the decision is

a denial in whole or part or if a board of education is participating, the decision should be sent by certified mail, with some method of identifying the date of receipt (i.e., return receipt requested). The statute also requires notice to the county treasurer if a tax certificate has been sold under R.C. 5721.32 or 5721.33 with respect to the property for which an exemption has been requested. The auditor may also make different determinations for years during which the application pended should the auditor determine the use of the property or other relevant facts changed during the pendency of the application.

Complaints against Continuing Exemption
(R.C. 5715.27(E))

The new law also permits complaints against the continuing exemption of real property to be filed with the auditor if the auditor originally granted exemption of the property. Complaints against continuing exemption may be filed by any individual or entity authorized to file a complaint with the board of revision pursuant to R.C. 5715.19. Like an application for exemption, a complaint against exemption must be filed before December 31 in the tax year for which exemption is questioned. The auditor's duties with respect to a complaint against continuing exemption are similar to the duties with respect to the original application for exemption. The auditor must confirm that the property is used in the manner contemplated by the original exemption. Should the auditor conclude that exemption is no longer proper, the tax list and duplicate must be corrected. The auditor should provide notice of the decision confirming or denying continuing exemption to the persons who participated in the complaint against continuing exemption in the same manner as determinations from applications for exemption are issued (certified mail, with some method of identifying the date of receipt). This is because the auditor's determinations on complaints against continuing exemption are also appealable to the Ohio Board of Tax Appeals. As an appellant has a limited time in which to appeal, it is critical that the date of receipt of the auditor's determination can be established.

Auditor's Responsibilities should Determination be Appealed
(R.C. 5717.02)

Any party to the application process before the auditor may appeal to the Board of Tax Appeals pursuant to R.C. 5717.02. The appellant must file a copy of its notice of appeal with the auditor and with the Board of Tax Appeals within sixty days of receiving the auditor's decision. If filed by certified mail, express mail, or authorized delivery service, the date of mailing is deemed to be the date of receipt. Upon the filing of the notice of appeal, the auditor is required to certify to the Board of Tax Appeals a transcript of the record of the proceedings held. The auditor's determination letter should explain why the exemption was granted (or denied). Should the auditor wish to defend the determination before the Board of Tax Appeals, he may do so personally or he may seek representation from the county prosecuting attorney. Note that, unlike Board of Revision complaints, appeals of decisions relating to real property tax exemption may only be taken to the Board of Tax Appeals.