

HOME BY HOME, LLC
1619 WENTWORTH DRIVE
MONTGOMERY, AL 36106-2636,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA
ALABAMA TAX TRIBUNAL

DOCKET NO. BPT. 14-1041

**FINAL ORDER DENYING TAXPAYER'S
APPLICATION FOR REHEARING**

The Taxpayer is a single member Alabama LLC that is wholly owned by International Xchange Organization, Inc., which qualifies as a §501(c)(3) organization. The issue is whether the Taxpayer is exempted from Alabama's business privilege tax by Code of Ala. 1975, §40-14A-43. That statute exempts from the business privilege tax any organization that qualifies as a §501(a) organization, which includes a §501(c)(3) organization.

The Taxpayer initially argued that because it is a disregarded entity for federal and State income tax purposes, it should be allowed the same tax exempt status as its parent. The Tribunal entered a Final Order on August 10, 2015 holding that while the Taxpayer was a disregarded entity for federal and Alabama income tax purposes, it was not a disregarded entity for Alabama business privilege tax purposes based on Code of Ala. 1975, §10A-5A-1.07(b). That statute provides that "for purposes of (Alabama) taxation, other than Chapter 14A of Title 40," an LLC shall be treated in the same manner for Alabama purposes "as it is for federal income tax purposes." As stated in the August 10 Final Order – "Based on the above exception, a single member LLC is not a disregarded entity for purposes of the Alabama business privilege tax. . . ." *Home By Home* at 2. The

Tribunal accordingly held that the Taxpayer was liable for the business privilege tax in dispute.

The Taxpayer has timely applied for a rehearing. It argues that the Department has not subjected other similarly situated entities to the business privilege tax, and that subjecting the Taxpayer to the tax “flies in the face of longstanding Department policy of not assessing business privilege tax against a disregarded entity wholly owned by an IRS recognized non-profit parent.” Taxpayer’s Application for Rehearing at 2.

To begin, I agree with the Department that the fact that the Department may not have as yet assessed similarly situated taxpayers is of no consequence. The Department has limited resources, and cannot be expected to discover and assess all similarly situated taxpayers.

Concerning the Taxpayer’s claim that there is a longstanding Department policy against subjecting similarly situated entities to the business privilege tax, the Taxpayer has not provided examples of that policy to the Tribunal. And even if there was such a longstanding policy, it would be contrary to the law. The Department cannot be estopped from correctly applying Alabama law based on prior incorrect advice or decisions by Department personnel. *Community Action Agency of Huntsville, Madison County, Inc. v. State*, 406 So.2d 890 (Ala. 1981).

The Taxpayer also argues for the first time on rehearing that it is exempt as an “entity organized and operated exclusively for religious purposes. . . .” Section 40-14A-43.

The Department first contends that the Taxpayer is prohibited from raising a new issue on rehearing, and that allowing it to do so would violate the Department’s due process rights. I disagree. Due process is satisfied if a party to a proceeding is given

notice and an opportunity to respond. See generally, *Rabren v. Baxter*, 239 So.2d 206 (Ala. Civ. App. 1970). In this case, the Department was obviously notified of the Taxpayer's new argument in its application for rehearing, and also had an opportunity to and did in fact respond to the argument. Due process is satisfied.¹

The Department is correct, however, that the Taxpayer's argument that it was organized and operated exclusively for religious purposes must fail on the merits.

To begin, §40-14A-43 is an exemption statute that must be strictly construed for the Department and against the exemption. *Fleming Foods of Alabama, Inc. v. Dept. of Revenue*, 648 So.2d 580, cert. denied 115 S. Ct. 1690 (1995); *Bean Dredging Corp. v. State of Alabama*, 454 So.2d 1009 (Ala. 1984). The exemption thus must be denied unless it is clear that the Taxpayer was organized and operated exclusively for religious purposes. As discussed below, it was not.

I can find no Alabama cases addressing whether an entity is organized and operated exclusively for religious purposes. The Department cites two Illinois appellate court cases, however, that are directly on point.

In *Fairview Haven v. Department of Revenue*, 506 N.E.2d 341 (4th Dist. 1987), the Court addressed the issue of whether a care facility for the elderly that was organized and operated by a church was used exclusively for religious purposes, and thus tax exempt under Illinois law. The Court found that while operating the care facility allowed the church members to perform Christian service work and evangelize, the facility was not operated exclusively for religious purposes.

¹ The Department can also raise a new issue on rehearing in a case, in which case the taxpayer must and will be allowed an opportunity to respond.

Here it is not contested that the operation of Fairview provided an opportunity for members of the Apostolic Christian faith to carry out Christian service work, care for the elderly, and engage in evangelization. However, operation of the nursing home was not necessary for these religious purposes, which could also have been accomplished through other means. (See generally *Yakima First Baptist Homes, Inc. v. Gray*, 82 Wash. 2d 295, 510 P.2d 243; *Christian Retirement Homes, Inc. v. Board of Equalization* (1970), 186 Neb. 11, 180 N.W.2d 136.) In *Yakima* the taxpayer argued that care of the aged was a religious purpose. The court noted that the practice of charity, kindness to other persons and in particular to the aged, and the practice of all virtues are encouraged by religious organizations; however, it cannot be stated that they are religious purposes within commonly accepted definitions of the word.

Fairview Haven, 506 N.E.2d at 349.

In *Faith Builders Church, Inc. v. Department of Revenue*, 882 N.E.2d 1256 (4th Dist. 2008), the same Illinois Court held that a child care center operated by a church was not operated exclusively for religious purposes.

The church had argued that “its only reason for taking these children into its care is to spread the Gospel to them and their parents and, therefore, it uses (the day care) primarily for a religious purpose.” The Court rejected that argument, holding that while operating the facility furthered the church’s charitable purpose, it did not do so primarily for a religious purpose.

In a sense, everything a deeply devout person does has a religious purpose. But if that formulation determined the exemption from property taxes, religious identity would effectively be the sole criterion. A church could open a restaurant, for instance, and because waiters attempted to evangelize customers while taking their orders, the restaurant would be exempt. But the operation of a restaurant is not necessary for evangelism and religious instruction, although, like any other social activity, it can provide the occasion for those religious purposes. The same could be said of a day-care facility. Day care is simply not a “religious purpose” within the commonly accepted definition of that term.

Faith Builders Church, 882 N.E.2d at 1264.

In this case, the Taxpayer's Articles of Organization indicate that it was organized for the purpose of repairing and building homes for the needy in Haiti, and also "[t]o engage in any and all other lawful purposes for which limited liability companies can and are organized under the laws of the State of Alabama." The latter phrase may in itself disqualify the Taxpayer for the "religious purpose" exemption, but assuming that it does not, repairing and constructing houses for the needy, while a commendable activity, is not in itself a religious activity, nor does it serve a strictly religious purpose. That is, repairing and building houses "is simply not a 'religious purpose' within the commonly accepted definition of that term." *Faith Builders Church*, 882 N.E.2d at 1264.

The Taxpayer's application for rehearing is denied. The August 10, 2015 Final Order is affirmed.

This Final Order On Rehearing may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2B-2(m).

Entered September 25, 2015.

BILL THOMPSON
Chief Tax Tribunal Judge

bt:dr

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