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April 1, 2016

Oregon Tax Court
Regular Division
1163 State Street
Salem, OR 97301-2563

RE: *YU Contemporary, Inc. v. Dept. of Revenue and Multnomah County Assessor*
TC 5245

Trial Date: **April 5 – 6, 2016**

Dear Tax Court Clerk

Enclosed please find Defendant-Intervenor's *Trial Memorandum* in connection to the above-referenced matter.

Thank you for your assistance. Please contact us if you have any questions.

Sincerely,

Amy Goodale
Paralegal to Carlos A. Rasch

Enclosures

cc (w/ enclosures): Michael J. Millender (via Email & U.S. mail)
Daniel Paul (via Email & U.S. mail)

IN THE OREGON TAX COURT
REGULAR DIVISION
Property Tax

YU CONTEMPORARY, INC.,

Plaintiff,

v.

DEPARTMENT OF REVENUE,
State of Oregon,

Defendant.

And

MULTNOMAH COUNTY ASSESSOR,

Defendant-Intervenor.

Case No. 5245

DEFENDANT-INTERVENOR
MULTNOMAH COUNTY
ASSESSOR'S PRETRIAL
MEMORANDUM

Defendant-Intervenor Multnomah County Assessor ("Assessor") submits this memorandum in anticipation of the April 5 and April 6, 2016, trial in the above-captioned case.

It is the Assessor's position that the Plaintiff does not qualify for property tax exemption as an art museum. In the alternative, the Assessor's position is that Plaintiff is not a charitable institution for purposes of ORS 307.130 and, even if the institution was charitable, the property is not in exclusive charitable use. The evidence to be presented at trial will support the Assessor's decision to deny the application for property tax exemption the subject property.

Page 1 – DEFENDANT-INTERVENOR MULTNOMAH COUNTY ASSESSOR'S PRETRIAL
MEMORANDUM

BACKGROUND

In Plaintiff's tax return for 2013, Plaintiff describes itself as "a center for contemporary art in Southeast Portland, Oregon." Plaintiff has 501(c)(3) status under federal income tax law and is registered as a nonprofit in Oregon. Plaintiff requested for exemption on October 16, 2013. (Stipulation of Facts, ¶102). The Assessor denied that application on the basis that the subject property "does not qualify in accordance with ORS 307.130 ." (Intervenor's Exhibit 4).

This appeal followed.

APPLICABLE LAW

In Oregon, taxation of real property is the rule and exemption from taxation is the exception. *Corp. of Sisters of Mercy v. Lane County*, 123 Or 144, 152 (1927); *Benton County v. Allen*, 170 Or 481, 484 (1943). Art museums and charitable institutions enjoy no inherent right to exemption from taxation. *Security Sav. & Trust Co. v. Lane County*, 152 Or 108, 141 (1935). Nor is there a presumption of implied exemption in their favor – they must qualify under a specific statute. *Unander v. U. S. Nat'l Bank*, 224 Or 144 (1960); *Security Sav. & Trust Co.*, 152 Or at 141. Statutes exempting property from property taxation are to be strictly, but reasonably, construed. *Behnke-Walker v. Multnomah County*, 173 Or 510, 521-22 (1944). "Strict but reasonable construction does not require the court to give the narrowest possible meaning to an exemption statute. Rather, it requires an exemption statute be construed reasonably, giving due consideration to the ordinary meaning of the words of the statute and the legislative intent." *North Harbour Corp. v. Dept. of Rev.* 16 OTR 91, 95 (2002). Plaintiff has the burden of proving, by a preponderance of the evidence, that it is entitled to the exemption. *Oregon Methodist Homes, Inc. v. State Tax Commission*, 226 Ore. 298, 307 (1961).

1 **I. Plaintiff Is Not An Exempt Art Museum.**

2 Plaintiff does not qualify as an art museum under ORS 307.130(a), and is not subject to
3 exemption under the statute. Even if the Court were to somehow conclude that Plaintiff did meet
4 the definition (which it does not), Plaintiff would still not qualify for tax exemption because the
5 Property or any portion thereof is not “actually and exclusively occupied or used in the literary,
6 benevolent, charitable or scientific work” carried on by Plaintiff. ORS 307.130(2)(a).
7

8 A. Plaintiff Does Not Qualify As An Art Museum

9 Under ORS 307.130(a) an “art museum” is defined as a nonprofit corporation organized
10 to display works of art to the public. While the Assessor does not dispute that the definition of
11 an art museum is on its face, broad, looking at the circumstances as a whole, Plaintiff does not fit
12 the definition. First, Plaintiff does not even describe itself as, or hold itself out to the public as
13 an art museum, but rather a center for contemporary arts. The Property during the relevant time
14 period had no sign or indication it is an art museum, no advertisement of upcoming exhibits or
15 events on the premises, and no permanent exhibit to display to the public. Plaintiff’s public
16 Facebook page described itself as an “art gallery.” (Intervenor’s Exhibit 43). In its request for a
17 grant, Plaintiff describes itself as a “non-profit art institution” whose mission is “to support
18 emerging and under-acknowledged artists, propose new modes of production, and stimulate the
19 ongoing discourse around art.” (Intervenor’s Exhibit 38, p. 2). Nowhere does Plaintiff hold
20 itself out, or act as an art museum. Further, the property itself is not used exclusively for the
21 display of art. Instead, the property:
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- 23
24 • has commercial uses and tenants;
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- 1 • the exhibit space is also used for significant periods of time as an event space, for
- 2 which Plaintiff has generated tens of thousands of dollars in income from rentals
- 3 of that space;
- 4 • portions of the property are seemingly used as works spaces for artists in which
- 5 the artist stay and live out of temporarily; and
- 6
- 7 • the property lacks any sort easily publicly recognizable distinction as to its use or
- 8 purpose (i.e., no signs, posted hours, reception area, admission area, displayed
- 9 exhibits).

10 No member of the public passing by would have any idea as to the activities or events that occur
11 at the Property. While Plaintiff may display art from time to time, an art museum it is not, nor
12 does it pretend to be.

13
14 B. Even If Considered An Art Museum, Plaintiff Is Not Eligible For Exemption

15 Assuming that the Court agrees with Plaintiff that it is an art museum under the definition
16 of ORS 307.130, in order to qualify for exemption, Plaintiff would have to demonstrate that the
17 portion of the property that it seeks exemption for is “actually and exclusively occupied or used
18 in the literary, benevolent, charitable or scientific work carried on by such institutions.” ORS
19 307.130(2)(a). Plaintiff is unable to meet that burden.

20 As described above, the Property is or was used for a variety of commercial purposes,
21 including use by tenants for a print shop, recording company, a commercial real estate
22 development company, a game company, and magazine. In fact, the recording company and
23 magazine are/were owned, operated, or associated with two of Plaintiff’s founders, Curtis Knapp
24 and Aaron F. Jamison, respectively. (Intervenor’s Exhibits 21, 28). Each of these businesses

1 either listed the Property as its principal place of business, had a lease with Plaintiff, or were
2 operated out of the Property. None of these commercial businesses appear to be associated with
3 Plaintiff or its mission.

4 Additionally, the space which Plaintiff uses for its exhibits is also used as an event space,
5 for which Plaintiff charges and collects tens of thousands of dollars a year. (Stipulated Facts,
6 ¶78). Between October 2013 and December 31, 2015, Plaintiff used the event space for 9 art
7 exhibitions, 23 musical performances, and 26 private events, including for weddings and
8 corporate events. Plaintiff also charged for many of the art and musical performances. Much of
9 the time, the event space, which is Plaintiff's primary exhibit space, sat empty and was not
10 utilized at all, let alone for artistic purposes. While Plaintiff does at times display art, it is clear
11 that this is not the primary purpose of the Property given all its other mixed and commingled
12 uses. Further, there appears to be little to no public outreach with regard to its art exhibitions.
13 Rather, at trial, the Assessor intends to show that the majority of the attendances to Plaintiff's art
14 exhibits were by members, artists, and donors. Therefore, not only is Plaintiff not an art
15 museum, but the Property itself was not exclusively used for art or to further any sort of
16 charitable work as required under the statute. Rather, the facts show a long history of mixed
17 commercial use, use by Plaintiff's founders for their benefit, primary use by Plaintiff's members,
18 and only incidental benefit to the public at large, if at all.

21 **II. Plaintiff is Not a Charitable Institution With a Charitable Purpose**

22 ORS 307.130(2) provides that the property owned by charitable institutions is exempt
23 from property taxation, but only such property that is used for charitable purposes. Oregon
24 courts look to answer two main questions in determining whether property falls within the
25

1 "charitable institutions" exemption of ORS 307.130. First, is the entity seeking the exemption a
2 "charitable institution," and second, whether the property is "*actually and exclusively* occupied or
3 used in the * * * charitable * * * work carried on" by the organization. *See Corvallis*
4 *Neighborhood Hous. Servs. v. Linn County Assessor*, 21 OTR 95, 100 (2013) (emphasis added).

5 A. Not a Charitable Institution

6 Plaintiff's income tax exemption under IRC section 501(c)(3) is not determinative when
7 analyzing whether an institution is as "charitable institution" for the purposes of property tax
8 exemption. "The mere fact that an organization is * * * a charity does not establish any inherent
9 right to exemption" from property taxes. *Dove Lewis Memorial Emergency Veterinary Clinic,*
10 *Inc. v. Dept. of Rev.*, 301 Ore. 423, 427 (1986).

11 Oregon courts look to three sub-questions to determine whether a given organization is a
12 "charitable institution" for the purposes of ORS 307.130: (1) the organization must have charity
13 as its primary, if not sole, object; (2) the organization must be performing in a manner that
14 furthers its charitable object; and (3) the organization's performance must involve a gift or
15 giving." *SW Oregon Pub. Def. Services v. Dept. of Rev.*, 312 Ore. 82, 89, 817 P2d 1292 (1991);
16 See also OAR 150-307.130(A)(3).

17 B. Charitable Object

18 For an entity to meet the first element, the inquiry focuses upon whether the organization
19 seeking exemption exists to enrich the private individuals who own or operate it, or whether it
20 exists to benefit society at large "without an eye to private gain." *Corvallis Neighborhood Hous.*
21 *Servs. v. Linn County Assessor*, 2013 Ore. Tax LEXIS 41, 13 (2013). An exempt organization
22

1 “must have charity as its primary, if not sole object.” *SW Oregon Pub. Def. Services*, 312 Or at
2 89.

3 Oregon Courts will regard the articles of incorporation and bylaws as *prima facie*
4 evidence of the purpose of the organization. *Dove Lewis*, 301 Or at 423. Although courts do
5 accept those documents as *prima facie* evidence of the purpose of the organization, the purpose
6 as set forth in these documents does not necessary establish that the organization has charity as
7 its primary, if not sole, object. *Newspace Ctr. For Photography v. Multnomah County Assessor*,
8 Ore. Tax LEXIS 117; 2014 WL 3509471*15 (March 29, 2016). Plaintiff’s Articles of
9 Incorporation are silent as to its purpose. (Intervenor’s Exhibit 5). Plaintiff’s bylaws describe its
10 purpose is “to provide a permanent national caliber professional arts center for the display of
11 national, regional and local visual and performing arts; to provide infrastructure to promote and
12 support the Portland arts community; to create a vehicle to expose contemporary arts and the
13 Portland art community to the City of Portland and the nation at large; and to provide other
14 activities and services that are necessary or appropriate to carry out these purposes.”
15

16 (Intervenor’s Exhibit 10, p.1).

17
18 Plaintiff’s stated purpose is akin to the *Newspace* case, in which a photography
19 organization was seeking exemption, much like Plaintiff is in this case. In *Newspace*, the
20 plaintiff in that case had bylaws which stated that its purpose was “to offer fine art photography
21 education, support the arts community, and enhance public awareness of fine art photography
22 through gallery exhibits, receptions, lectures, projects with other art organizations, ***events for
23 patrons, facilities used by students and renters, and programs for youth and the community.” (*Id.*
24 at *16 -17). The court correctly pointed out that “it is difficult to find a clear element of charity
25

1 in Plaintiff's stated purpose. Photography education and public awareness are culturally
2 enriching, but not necessarily charitable." (*Id.*) The Court in *Newspace* analyzed the meaning of
3 charitable and found that while supporting the arts community and enhancing public awareness
4 was certainly worthwhile and beneficial, it was not charitable as the word is commonly
5 understood to mean. (*Id.* at *18.) The Court quoted *Oregon County Fair v. Dept. of Rev.*, 10
6 OTR 200, 204-05 (1986) for its analysis stating that "[F]or purposes of ORS 307.130, the term
7 'charitable' must be applied in its narrow and traditional sense of relieving pain, alleviating
8 disease or removing constraints. Citing *Benton County v. Allen*, 170 Or 481, 485 (1943).

10 Here, Plaintiff's purpose is very similar, if not almost identical to the plaintiff in
11 *Newspace* in that both have a stated purpose of promoting and supporting the arts. However
12 culturally enriching and beneficial this may be, it is not charitable. The Court in *Newspace* did
13 not find the plaintiff's purpose charitable in that case, nor should it do so here. Based on its
14 stated purpose, Plaintiff does not have charity as its primary or sole object. Any charity would
15 be incidental at best. Plaintiff's purpose also does not relieve any sort of government burden.
16 Further, as the facts will show, the biggest beneficiaries from Plaintiff are its founders and
17 members who get perks of membership, run businesses out of the Property, and are privy to most
18 of Plaintiff's events. Plaintiff does not meet the first criteria of the test.

20 C. Charitable Performance

21 Even assuming that Plaintiff's stated purpose could be construed as charitable, its actual
22 activities must be consistent with that charitable objective. *Mazamas v. Dept. of Rev.*, 12 OTR
23 414, 416 (1993). In determining whether a corporation is performing in a manner that furthers
24 its charitable object, the courts look to the activities and actual uses of the property. *See*
25

1 *Hazelden Spring Brook, Inc. v. Yamhill County Assessor*, TC-MD No 031037D, 2004 WL
2 1237628 at 7 (May 11, 2004). "This determination must focus on the relationship of the activity
3 or use to the institution's exempt purposes." *Mercy Medical Center, Inc. v. Dept. of Rev.*, 12 OTR
4 305, 309 (1992). It is not the incidental or minor activities of the claimant that controls, but
5 rather the principal activity. *Oregon Stamp Soc'y v. Comm'n*, 1 OTR 190, 204 (1963). In
6 addition, a distinction must be made "whether the benefit provided is for the direct good or
7 benefit of the public rather than primarily for the benefit of the organization's members, or
8 simply a by-product of the organization's primary activity." *Enterprise for Employment and*
9 *Education v. Marion County Assessor*, TC-MD 070841C, 2008 Ore. Tax LEXIS 246, *9 (Oct 16,
10 2008). "[I]nstitutions whose primary purpose is the pleasure of its members, whether as a hobby
11 or otherwise, do not merit public tax subsidy." *Eugene Garden Club v. Lane County Dep't of*
12 *Assessment & Taxation*, 2001 Ore. Tax LEXIS 323, 5 (Or. T.C. Aug. 7, 2001). "For example, a
13 rifle club formed primarily for the pleasure of its members also provides safety information and
14 instruction. Since the club's primary purpose is not to provide a direct benefit to the public, its
15 property is not exempt." OAR 150-307.130-(A)(3)(b).

16
17
18 Plaintiff's primary activities appear to be offering space at the Property for artists to come
19 and work on their project and exhibits. The facilities can and are also rented for private events of
20 which Plaintiff has generated more than \$170,000 in income from October 2013 to December
21 2015. Plaintiff does show a limited amount of exhibits per year, has no permanent collection of
22 art, and the space sits empty for extended periods of time. Also, Plaintiff offers free exhibits and
23 concerts, but also charges for them as well, giving members discounts to these events, and
24
25

1 information. Members are also given access to the building to come and go as they please,
2 which is more than the access given to the general public.

3 D. Gift and Giving

4 This third element is the element that there is "gift and giving" to qualify for the ORS
5 307.130 exemption. Gift or giving "is what distinguishes charity from nonprofit." *Samaritan*
6 *Village Inc. v. Benton County Assessor*, 2003 Ore. Tax LEXIS 39 (Jan 23, 2003). In order to be
7 a charitable institution under ORS 307.130, "the organization's performance must involve a gift
8 or giving." *SW Oregon Pub. Def. Services*, 312 Ore. at 89; *see also Dove Lewis*, 301 Or at 428
9 (in determining whether an organization is, by its conduct, charitable, the crucial consideration is
10 the element of a gift or giving). "Gift and giving is giving something of value to a recipient with
11 no expectation of compensation or remuneration." OAR 150-307.130(3)(d). "The element of
12 giving must be viewed from the perspective of the recipient * * *." *Goodwill Industries of the*
13 *Columbia Willamette, Inc. v. Benton County Assessor*, 2007 Ore. Tax LEXIS 60 (Apr 18, 2007).
14

15 The fact that Plaintiff charges a fee for its exhibits and other events does not
16 necessarily invalidate "gift and giving." It is a factor to be considered in the context
17 of the Plaintiff's manner of operation. In determining whether a fee-charging
18 operation is charitable, it is relevant to consider the following:
19

20 "(1) Whether the receipts are applied to the upkeep, maintenance and
21 equipment of the institution or are otherwise employed;

22 "(2) Whether patients or patrons receive the same treatment
23 irrespective of their ability to pay;

24 "(3) Whether the doors are open to rich and poor alike and without
25 discrimination as to race, color or creed; and

"(4) Whether charges are made to all and, if made, are lesser charges made to the poor or are any charges made to the indigent."

SW Oregon Pub. Def. Services, 312 Or at 87 (quoting Oregon Administrative Rule (OAR)150-307.130-A(4)(d)(C)).

Plaintiff's doors do not seem to be open to rich and poor alike, nor do patrons receive the same treatment irrespective of their ability to pay. The Assessor believes that the evidence presented at trial will indicate that:

- A number of Plaintiff's offerings require payment of an entry fee, registration fee or facilities use fee.
- Plaintiff does not offer scholarships or other charitable contributions to the public at large.
- Members receive different services and access to special services vis-à-vis non-members, based on their level of membership. Highest tiered members received additional benefits such as keycard access to the building and are invited to Board Meetings, receive discounts on event rentals (depending on tier of membership contribution), free tickets to exhibits, and other perks. (Intervenor's Exhibit 36).

These facts do not lend themselves to the conclusion that Plaintiff's primary activities are charitable.

E. The Property is not Actually and Exclusively Used for Charitable Purposes

Only such property that is *actually and exclusively* used for charitable work is eligible for exemption. It is the exclusivity component that is important to consider in this case.

The *Mazamas* case is instructive on the subject of actual and exclusive use. *See Mazamas v.*

Dept. of Rev., 12 OTR 414 (1993). The property in *Mazamas* was a lodge on Forest Service

Land. The lodge housed eight to ten thousand people during overnight stays each calendar year.

1 About half of those stays were by members of the organization. There was no evidence that the
2 half of non-member stays were charitable in nature. The court held that "while there may be
3 some charitable use of the lodge, the property was not 'exclusively occupied or used' for
4 charitable purposes." *Mazamas* 12 OTR at 417. Rather, "the primary use of the property was for
5 benefit of the members [and] was only incidentally used for charitable purposes." *Id.*

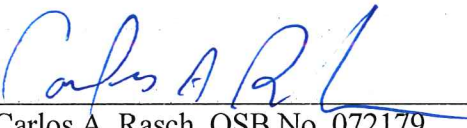
6
7 Even assuming that Plaintiff is a charitable institution, it is the Assessor's position that
8 the evidence will show that Plaintiff's use of the property is not *exclusive* to charitable activity.

9 **CONCLUSION**

10 Plaintiff will not be able to demonstrate, by the preponderance of the evidence, that the
11 subject property is used as an art museum or for charitable purposes. The Assessor will be
12 asking for a judgment sustaining its denial of the exemption and dismissing Plaintiff's appeal.

13 DATED this 1st day of April, 2016.

14 JENNY M. MADKOUR, COUNTY ATTORNEY
15 MULTNOMAH COUNTY, OREGON

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18 _____

19 Carlos A. Rasch, OSB No. 072179

20 Assistant County Attorney

21 *Attorney for Multnomah County Assessor*

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2016, I served the foregoing DEFENDANT-
INTERVENOR MULTNOMAH COUNTY ASSESSOR'S PRETRIAL MEMORANDUM on:

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by the following method or methods as indicated:

- ☒ by **mailing** to said person(s) a true copy thereof, said copy placed in a sealed envelope, postage prepaid and addressed to said person(s) at the last known address for said person(s) as shown above, and deposited in the post office at Portland, Oregon, on the date set forth above.
- ☐ by causing a true copy thereof to be **hand delivered** to said person(s) at the last known address for said person(s) as shown above, on the date set forth above.
- ☐ by mailing via **certified mail, return receipt requested**, to said person(s) a true copy thereof, said copy placed in a sealed envelope, postage prepaid and addressed to said person(s) at the last known address for said person(s) as shown above, and deposited in the post office at Portland, Oregon, on the date set forth above.
- ☐ by **facsimile** to said person(s) a true copy thereof at the facsimile number shown above, which is the last known facsimile number for said person(s) on the date set forth above. A copy of the confirmation report is attached hereto.
- ☒ by **emailing** to said person(s) a true copy thereof at the email address shown above, which is the last known email address for said person(s) on the date set forth above.



Amy Goodale
Paralegal to Carlos A. Rasch