

Memorandum

To: Mr. David Gau, Chief MIC:64
Policy, Planning and Evaluation

Date: August 23, 2001

From: Ms. Susan Scott
Tax Counsel

Subject: *Request for Review of Welfare Exemption Claim for Delay in Construction Start*

Your request for review of the _____ welfare exemption claim has been assigned to me for response. We are recommending that you issue a second notice denying the exemption for tax year 2000-2001, because the facility was vacant unused and not “in the course of construction” for purposes of section 214, 214.1 and 214.2 by the lien date of January 1, 2000. Based on the evidence submitted, there was no “definite onsite physical activity connected with construction or rehabilitation of a new or existing building or improvement, that results in changes visible to any person inspecting the site...”

FACTS

The property was acquired in July 1999 by the (presumably) qualifying entity, the _____ Ministry Services Corporation, with the intention of immediately remodeling the property for its intended use as transitional housing, job training, and education for single mothers and their children.

As of March 28, 2001, the claimant had not yet received a building permit due at least partially to delays occasioned by the discretionary review of the City Planning Commission caused by a neighbor’s appeal. It is unclear when the neighbor's appeal was filed or when the permit request was submitted to the Planning Commission. There is no evidence in the file indicating when, if ever, a construction contract was signed. Further, none of the financial statements submitted indicate any expenses for construction or rehabilitation of that property.

We are being asked to assume that both the claimant and the intended use for the property are qualifying¹ and the only issue under review is whether the facility can be deemed to have been “in the course of construction” by the lien date of January 1, 2000.

LAW AND ANALYSIS

A fundamental requirement for exemption under section 214 of the Revenue and Taxation Code² is that the property must be used exclusively for exempt purposes, and be in such use on the January 1 lien date. As amended in 1953, Section 214, subdivision (a)(3), added the requirement that property must be used for the actual operation of an exempt activity.³ Thus, vacant, unused property generally is not eligible for exemption. Actual use, not intention to use and not future use, is required.

Section 5 of Article XIII of the California Constitution was enacted in recognition of the fact that the welfare exemption authorized under section 4(b) does not apply to vacant, unused property held for future qualifying use. Section 5 extends the welfare exemption to “*buildings under construction*, land required for their convenient use, and equipment in them if the intended use would qualify the property for exemption.” (Emphasis added.)

Section 5 is implemented by sections 214.1 and 214.2. Section 214.1 states that “‘property used exclusively for religious, hospital or charitable purposes’ *shall include* facilities in the course of construction,...together with the land on which the facilities are located as may be required for their convenient use and occupation, to be used exclusively for religious, hospital or charitable purposes.” (Emphasis added.)

The Court of Appeal in *National Charity League, Inc. v. Los Angeles County*, (1958) 164 Cal.App.2d 241, 24, followed the rule of strict, but reasonable legal construction, to construe what is meant by the term, “in the course of construction,” as used in Section 214.1. The Court found that the phrase ‘in the course of construction’ “refers to that period of time between the *commencement* and completion of the building.” Although holding that evidence that trenches ultimately used for a foundation had been dug on the premises was not, as a matter of law, insufficient to prove construction had commenced, the court did not attempt to define the exact parameters of activities that could be considered “commencement of construction.” It did, however, indicate in its discussion of the evidence that having a building permit was not enough, and some physical activity was required.

¹ We note that, in Section B of the Claim, the applicant denied that any portion of the property is used for living quarters for any person.

² All section references herein are to the Revenue and Taxation Code unless otherwise indicated.

³ Section 214, subd. (a)(3) is formerly section 214(3).

A subsequent Attorney General Opinion, written in 1968, regards *National Charity League* as “ establish[ing] a test requiring some physical activity connected with the construction of the building in order to qualify for the welfare exemption”⁴ and states that “[m]ere evidence of plans, blueprints and specifications relating to land which is vacant or is being put to some other use on the lien date is insufficient to constitute ... facilities in the course of construction for the welfare exemption.” (51 Ops. Atty. Gen (1968).)

The Legislature has further fleshed out the definition of "facilities in the course of construction" in section 214.2. Demolition was specifically added in 1959, and in 1991, subdivision (b) was added to provide that "facilities in the course of construction" also “ shall include definite, onsite *physical* activity connected with the construction or rehabilitation of a new or existing building or improvement, that results in changes visible to any person inspecting the site, where the building or improvement is to be used exclusively for religious, hospital or charitable purposes.” (Emphasis added) The 1991 amendments further provided that, “[qualifying physical activity], *having been commenced* and not yet finished, unless abandoned, shall establish that a building or improvement is ‘under construction’” ... but that “[c]onstruction shall not be considered abandoned if delayed due to reasonable causes and circumstances beyond the assessee’s control...” (Section 214.2, subd. (b). emphasis added).⁵

The statutory language allows a property to qualify for the exemption in a situation where construction has commenced and then has halted, provided that the claimant submits evidence that reasonable causes or circumstances beyond the its control prevented the continuation of construction. (Prior to the 1991 amendments, the exemption had been suspended regardless of the claimant's reason for discontinuing construction.) There is in the new subsection, however, no specific provision for a situation, such as this one, in which circumstances beyond the claimant’s control cause a delay in commencing the physical onsite activity. Construction must have “commenced” for the reasonable abandonment provision to take effect.

A cardinal rule of statutory construction is that a statute should be construed, if possible, so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. (*Rodriguez v. Superior Court*, (1993) 18 Cal.Rptr.2d 120, 14 C.A.4th 1260, 1269, as modified.) To construe section 214.2 as allowing the exemption for cases of reasonable delay *before* the commencement of construction disregards the specific language “having been commenced” and renders it meaningless.

⁵ Chapter 897, Statutes of 1991, Senate Bill 997, effective January 1, 1992.

Similarly, to view the term “include” as used in section 214.1 (“shall include facilities in the course of construction”) and section 214.2 (“shall include definite onsite physical activity”) in section 214.2, subdivision (b), as an optional “inclusive” provision rather than a requirement would be to ignore the mandatory modifier “shall.”

Clearly, the term “construction” has a broader meaning today than it did at the time of the *National Charity* case and the Attorney General’s Opinion. “Construction” could today reasonably be deemed to commence when for example, a construction contract is signed and groundbreaking occurred -- or when a construction permit application is filed with the county planning department and acted upon. In our view, the language in section 214.2, subdivision (b) does not give us the discretion to interpret the term “construction” without including some type of physical activity visible to site inspection.

The claimant cites to the language in Assessor’s Handbook 267 for support for its contention that delays in construction, as long as reasonable and caused by circumstances beyond the assessee’s control, do not disqualify a claim. The Handbook discussion on page 27, however, related to section 214.2 which allows reasonable delays during construction where construction has already commenced. (See Assessors Handbook 267, pp. 22-27.)

As discussed above, the explicit statutory requirement that construction include “definite onsite physical activity” and the provision clearly limiting the defense of reasonable delay to construction which *has already been commenced* leaves us no choice but to deny this application.

Given our conclusion regarding eligibility for the exemption, the late filing issue is moot and we will not address it here.

We are returning the exemption file with this memo.

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Cc: Mr. Richard Johnson, MIC:63
Mr. Dean Kinnee, MIC:64
Ms. Hadley Alger, MIC:64
Ms. Lois Adams, MIC:64