A Look at Charitable Tax Exemptions in Pennsylvania, Part Two.

This will continue my discussion of *Mesivtah Eitz Chaim of Bobov, Inc. v. Pike County Board of Assessment Appeals,* No 16 MAP 2011, (Pa. Apr. 25, 2012), in which a divided Supreme Court held that a camp affiliated with an Orthodox Jewish congregation did not qualify as a "purely public charity" under the Pennsylvania Constitution because it did not meet the definition of that term under the *HUP* test that the Court adopted in *Hospital Utilization Project v. Commonwealth,* 487 A.2d 1306 (Pa. 1985).

The Pennsylvania Constitution specifically requires that all taxes "be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax . . . ." Pa. Const. Art. VIII, § 1. The Constitution then authorizes the legislature to adopt exemptions for several categories of institutions, including "[a]ctual places of regularly stated religious worship," and "[i]nstitutions of purely public charity." Pa. Const. Art. VIII, § 2(a)(i), (v).

In *Alliance Home of Carlisle, PA v. Board of Assessment Appeals,* 919 A.2d 206 (Pa. 2007), the Supreme Court recounted the background to these two provisions, noting first that the exemption provision for charities allowed "for a legislatively-approved exception to the general rule that all real estate in Pennsylvania be taxed uniformly upon the same class of subjects." *Id.* at 214. The Court then noted that uniformity clause had been included in the Pennsylvania Constitution in response to prior legislative abuse of statutory exemptions by the legislature. *Id.* at 215. And in discussing the impact of Act 55, the Court observed that "fundamental and foundational questions could arise" in cases where Act 55 provided an exemption to an institution that did not satisfy the *HUP* test. *Id.* at 223. While noting that the case before it did not present that problem, the Supreme Court broadly hinted at what the likely outcome would be, noting that "this Court is not obliged to defer to the legislative judgment concerning the proper interpretation of constitutional terms." *Id.* at 223 n.9 (citations omitted).

In *Mesivtah Eitz Chaim of Bobov, Inc. v. Pike County Board of Assessment Appeals,* the majority opinion follows a path that flows from the language of *Alliance Home*; the Court started by framing the question as "whether the General Assembly may, by statute, influence the definition of the constitutional phrase 'purely public charity,'" and then noted that the judiciary was not bound by the legislature's interpretation of the constitution. *Mesivtah Eitz Chaim of Bobov, Inc. v. Pike County Board of Assessment Appeals*, No 16 MAP 2011, slip op. at 6 (Pa. Apr. 25, 2012). After reviewing the background to the uniformity clause and the exemption of "institutions of purely public charity" under the Constitution, the majority concluded that "Article VIII, § 2 was designed not to grant, but limit, legislative authority to create tax exemptions." *Id.* at 7. Consequently, the majority concluded that the *HUP* test had to be controlling if the legislature was to be constrained. *Id.* at 7-8.

In contrast, the dissent took a different tack: while agreeing with the majority's conclusion that Act 55 was at odds with the *HUP* test and accepting its premise that the judiciary had the primary power to interpret the constitution, the dissent nonetheless concluded the Court should defer to the legislature's policy decision in Act 55 to include a broader definition of how an entity can relieve governmental burdens. *Mesivtah Eitz Chaim of Bobov, Inc. v. Pike County Board of Assessment Appeals,* No 16 MAP 2011, dissenting slip op. at 2-3 (Pa. Apr. 25, 2012). The dissenters noted that the *HUP* test was subject to change, but that change could only come if the legislature enacted a statute that would test the boundaries of the existing test. *Id.* at 3.

Who has the better side of the argument? Frankly, there are merits to both: the majority's premise that the General Assembly should not be free to revamp a constitutional provision designed to constrain its power certainly resonates, while the dissenters are correct to note that if the constitutional test is designed to evolve, only the legislature can drive that change. On balance, I think the majority's approach is sounder; it does not preclude change in the *HUP* test that is driven by consideration of future legislation, it merely indicates that legislation that tests the boundaries of the definition of a "purely public charity" will not be accorded deferential treatment.

There are two things that the Court did not do that struck me. First, I was surprised that neither opinion mentions Article VIII, § 2(a)(i), which authorizes the General Assembly to exempt "[a]ctual places of regularly stated religious worship." The fact that the constitution contains a separate provision for the exemption of houses of worship appears to bolster the majority's conclusion that the General Assembly overreached in Act 55 by providing that the promotion of religion lifted a governmental burden.

Second, I was troubled by the Court's failure to grant review on a related question: when assessing whether an entity relieves a governmental burden, where do the beneficiaries have to reside? Both the Court of Common Pleas and the Commonwealth Court posited that the governmental burden that was being relieved had to be local. The majority opinion suggests that this is not correct but did not address the issue as it was outside the scope of its grant of review. *Mesivtah Eitz Chaim of Bobov, Inc. v. Pike County Board of Assessment Appeals,* No 16 MAP 2011, slip op. at 3 n.1 (Pa. Apr. 25, 2012) (citing *West Indies Mission Appeal*, 128 A.2d 773, 781 (Pa. 1957)). As it appears that the Court announced a sound principle but reached the wrong result, I will expand on this issue in a future post.

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