IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mesivtah Eitz Chaim of Bobov, Inc., Appellant	:	
v.	:	No. 2343 C.D. 2008
	:	Argued: November 9, 2009
Pike County Board of Assessment Appeals, Delaware Valley School District and Delaware Township	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** December 29, 2009

Appellant, Mesivtah Eitz Chaim of Bobov (Mesivtah), appeals the order of the Court of Common Pleas of Pike County denying Mesivtah's petition from tax exemption. Common pleas determined that Mesivtah was not a "purely public charity" and, therefore, not entitled to exemption from all county, township and school taxes.

Mesivtah is a non-profit religious entity pursuant to Section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3), that operates an Orthodox Jewish summer camp, Camp Mesivtah, on a 60-acre parcel of land located in Delaware Township, Pike County, Pennsylvania. In 1997, Mesivtah filed an

appeal with common pleas challenging the decision of the Pike County Assessment Board denying its request for property tax exemption based upon the charitable status and nature of the camp. Mesivtah has contested its real estate taxes since 1997. From 1997 through 2004, Mesivtah paid approximately $50,000 per year. Currently, Mesivtah owes unpaid real estate taxes for the year 2005 through 2008, totaling nearly $200,000.

On August 28, 2008, common pleas held a *de novo* hearing at which Mesivtah presented evidence in support of its claim for tax exemption. Mesivtah presented the testimony of Rabbi Baruch Horowitz, dean of the Bobov rabbinical college and a member of the Mesivtah Chaim congregation, Rabbi Moreechai Geller, director of the camp, and Israel Licht, assistant executive director of the camp.

Mesivtah operates the camp for eight weeks yearly from June through August. The camp curriculum primarily consists of classes and lectures on the Orthodox Jewish religion with some time set aside for recreational activities. The camp is primarily designed as an educational institution as opposed to recreational camp. The camp is related to the Bobov Orthodox Jewish community of Brooklyn, New York. Students come from the rabbinical college in New York City, Israel, Canada, England, Long Island, New York, and upstate New York.

The camp is operated through a combination of donated funds, tuition paid by parents, and rent received from a Brooklyn building owned by the camp. Rabbi Geller testified that the cost per camper exceeded the maximum tuition rate. Mesivtah also presented evidence that the camp's expenses exceeded the amount received in tuition. In 2005, Mesivtah provided 79% of campers with some financial assistance to cover tuition. Mesivtah does not have a formal procedure to

determine how much financial assistance each camper requires. Rabbi Geller testified that financial need determinations are based upon parents' tax returns, the Bobov community rabbis' knowledge that some of the families sending students received food stamps, and the Bobov community rabbis' general knowledge of financial conditions of families within the Bobov community.

Mesivtah also presented evidence that it maintained a food program for campers and that the camp's dining and recreational facilities were open to general public. However, camp representatives were unaware of any Pike County residents who had ever taken advantage of the dining facilities.

On September 11, 2008, common pleas ruled that Mesivtah did not qualify as a "purely public charity" under Article VIII, § 2 of the Pennsylvania Constitution and, thus, was not entitled to a real estate exemption. Common pleas found that pursuant to *Hospital Utilization Project v. Commonwealth*, 507 Pa. 1, 487 A.2d 1306 (1985), Mesivtah failed to satisfy two of the five criteria necessary to qualify as a purely public charity under Article VIII, § 2 of the Pennsylvania Constitution. This appeal followed.

An entity seeking a real estate tax exemption bears a heavy burden and must first prove that it is a "purely public charity" pursuant to Article VIII, § 2 of the Pennsylvania Constitution. *Community Options Inc. v. Bd. of Prop. Assessment, Appeals and Reviews*, 571 Pa. 672, 676-77, 813 A.2d 680, 683 (2002); *Lock Haven Univ. Found. v. Clinton County Bd. of Assessment Appeals and Revision of Taxes*, 920 A.2d 207, 210 (Pa. Cmwlth. 2007). In *Hospital Utilization Project*, the Supreme Court of Pennsylvania set forth a five part test (the *HUP* test) for determining whether an entity qualifies as a purely public charity under the

Pennsylvania Constitution. An entity qualifies as a purely public charity if it possesses the following characteristics:

> (a) Advances a charitable purpose;
> (b) Donates or renders gratuitously a substantial portion of its services;
> (c) Benefits a substantial and indefinite class of persons who are legitimate subjects of charity;
> (d) Relieves the government of some of its burden; and
> (e) Operates entirely free from private profit motive.

Hosp. Utilization Project, 507 Pa. at 21-22, 487 A.2d at 1317.

After an entity has satisfied the constitutional criteria, it must then prove it satisfies the statutory qualifications established by the Institutions of Purely Public Charity Act[1] (Charity Act). *Community Options Inc.*, 571 Pa. at 680-81, 813 A.2d at 685; *Lock Haven Univ. Found.*, 920 A.2d at 912. Section 5(a) of the Act, 10 P.S. § 375(a), provides that an entity must meet the criteria set forth in subsections (b), (c), (d), (e) and (f) to qualify for a statutory tax exemption. The language of these five subsections tracks the language of the five prongs of the *HUP* test.

Mesivtah challenges common pleas' finding that it failed to establish that the organization benefits a substantial and indefinite class of persons who are legitimate subjects of charity; and that the organization relieves the government of some of its burden. Mesivtah also argues that common pleas erred in suggesting that because no Pike County or Pennsylvania residents attend the camp the government was not relieved of its burden and therefore, common pleas' ruling

[1] Act of November 26, 1997, P.L. 571, *as amended*, 10 P.S. §§ 371-385.

was discriminatory. Finally, Mesivtah asserts that the Charity Act test should supersede the *HUP* Test.

First, Mesivtah asserts that common pleas abused its discretion or committed an error of law in concluding that it did not benefit a substantial and indefinite class of persons who are the legitimate subjects of charity. In support of this assertion, Mesivtah relies upon *Mars Area School District v. United Presbyterian Women's Association of North America*, 693 A.2d 1002 (Pa. Cmwlth. 1997) for the proposition that to qualify as a substantial and indefinite class of persons, the beneficiaries of the charity must be the public. In addition, the scope of recipients could be limited to a particular group of the public, as long as the group is a legitimate subject of charity. *Id.* at 1007 [citing 61 Pa. Code § 32.1(C)].

Common pleas determined that Mesivtah did not benefit a substantial and indefinite class of persons because Mesivtah demonstrated only that certain of its campers may be poor or lower income and entitled to food stamps; Mesivtah failed to provide specific testimony to show those who might be legitimate subjects of charity; and Mesivtah's lack of specific criteria for determining which campers qualified for discounted tuition created a "test" that was subjective and was based upon factors that may be unrelated to "legitimate subjects of charity." *See* Common Pleas Opinion at 4-5.

In *City of Washington v. Board of Assessment Appeals*, 550 Pa. 175, 704 A.2d 120, (1997), our Supreme Court stated:

> There is no requirement, however, that all of the benefits bestowed by a purely public charity go *only* to the financially needy. *See Price v. Maxwell*, 28 Pa. [23] at 34 ("Nor has it ever been supposed in this country, that an institution established for the purposes of education is not a charity within the meaning of the law, because it sheds

> its blessings, like the dews of Heaven, upon the rich as well as the poor.") *See also Presbyterian Homes Tax Exemption Case*, 428 Pa. [145] at 152, 236 A.2d [776] at 779-80 (charity can benefit both rich and poor); *Donohugh's Appeal*, 86 Pa. 306 (1878) (library constituted a charity that benefited all persons without regard to economic status).

550 Pa. at 185, 704 A.2d at 125 (emphasis in original). In *City of Washington*, the charitable status of a private college was upheld notwithstanding the fact that beneficiaries of its aid programs included many students who were not incapacitated or destitute. 550 Pa. at 185, 704 A.2d at 124-25. A significant factor was that, in the absence of the institution's benevolence, the fees that would prevail for users of the institution's services might exceed levels that would be affordable. 550 Pa. at 184-85, 704 A.2d at 124. The Supreme Court further found that where an entity advances a charitable purpose by providing youths with education, it follows that youths seeking education can qualify as legitimate subjects of charity. 550 Pa. at 184, 704 A.2d at 124.

Common pleas' conclusion that Mesivtah does not benefit a substantial and indefinite class of persons who are the legitimate subjects of charity is error. The evidence Mesivtah presented regarding the camp's financial workings was not exactly comprehensive as Mesivtah was unable to present profit and loss statements for the years 1998 through 2004 because the organization's computer system became obsolete and Mesivtah no longer had the records. However, Mesivtah did present profit and loss statements for the years 2005 through 2007. In 2005, Mesivtah provided 79% of campers with financial assistance. Financial assistance ranged from $300 to $1800 (full tuition). Although camp Mesivtah apparently educates a small sect of Jewish boys from the Bobov community in Brooklyn, there has been no allegation that Mesivtah

discriminates on the basis of race, sex, national origin, or religion or restricts admission in any way. Mesivtah was not required to show that all of the campers were needy because students are legitimate subjects of charity. Further, Mesivtah provides financial assistance to many campers and does not restrict admission. Thus, we conclude that the camp benefits a substantial and indefinite class of persons who are the legitimate subjects of charity.

Second, Mesivtah asserts that common pleas erred in determining that the camp does not relieve the government of some of its burden. Common pleas found that although Mesivtah presented evidence of how it operated its summer programs, it did not present any evidence of the government burden it was relieving. Further, common pleas determined that Mesivtah did not demonstrate that the government was required to provide any of the social, educational or recreational activities available at the camp. Common Pleas Opinion at 5. Mesivtah asserts that the Supreme Court has recognized that the government has affirmatively chosen to provide recreational opportunities to the public through such facilities as public pools and state parks, and, thus, recreational opportunities that the camp provides relieve the government of some of its burden. Mesivtah also relies upon the criteria set forth in Section 5(f)(2)-(5) of the Charity Act, 10 P.S. §§ 375(f)(2)-(5), to bolster its claim that the camp relieves some of the government's burden.[2]

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[2] Section 5(f) of the Charity Act provides in relevant part:

> (f) GOVERNMENT SERVICE. -- The institution must relieve the government of some of its burden. This criterion is satisfied if the institution meets any one of the following:
> ***

(Footnote continued on next page…)

In determining whether an entity seeking a statutory exemption for taxation is a "purely public charity," the test is whether the institution bears a substantial burden that would otherwise fall to the government. *Community Options, Inc.*, 571 Pa. at 677-78, 813 A.2d at 683-84 (2002).

Mesivtah relies upon *Unionville-Chadds Ford School District v. Chester Count Board of Assessment and Appeals*, 552 Pa. 212, 714 A.2d 397 (1998) and *In re Sewickley Valley YMCA Decision of Board of Property Assessment*, 774 A.2d 1 (Pa. Cmwlth. 2001) to support its contention that the recreational activities and food facilities provided by the camp relieve the government of its burden. *Unionville-Chadds Ford* concerned Longwood Gardens, a world-renowned public garden, which includes an arboretum, conservatory and greenhouse complex, architectural displays, water gardens, fountains, an open air theatre, meadow and forest land, wildlife habitats, walking

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(continued…)

> (2) Provides services in furtherance of its charitable purpose which are either the responsibility of the government by law or which historically have been assumed or offered or funded by the government.
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> (3) Receives on a regular basis payments for services rendered under a government program if the payments are less than the full costs incurred by the institution, as determined by generally accepted accounting principles.
>
> (4) Provides a service to the public which directly or indirectly reduces dependence on government programs or relieves or lessens the burden borne by government for the advancement of social, moral, educational or physical objectives.
>
> (5) Advances or promotes religion and is owned and operated by a corporation or other entity as a religious ministry and otherwise satisfies the criteria set forth in section 5.
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10 P.S. § 375(f)(2)-(5).

trails, picnic areas and a variety of educational and research facilities. 552 Pa. at 215, 714 A.2d at 398. Longwood Gardens hosts hundreds of performing arts events a year, conducts workshops and lectures and has donated $2 million dollars to the surrounding community for local road improvement and additional money to schools and the local fire and rescue squads. In *Unionville-Chadds Ford*, our Supreme Court found that although the government did not have a constitutional or statutory obligation to provide public gardens, this is not determinative as to whether an entity relieves the government of some of its burden. 552 Pa. at 220, 714 A.2d at 401. Our Supreme Court concluded that:

> the government has long provided support for public parks and recreation areas as well as for cultural institutions, including museums, libraries, etc. Longwood's public park and cultural facilities fall clearly within the scope of burdens that are routinely shouldered by government. Hence, this element of the *HUP* test was properly found to be met.

552 Pa. at 221-22, 714 A.2d at 401. In *In re Sewickley*, this court held that a YMCA relieved some of the government's burden because it gratuitously allowed school districts to use its swimming pool and athletic fields, therefore, relieving the school districts of their burden to provide the necessary facilities for their extra-curricular activities. 774 A.2d at 12.

At the hearing before common pleas, Mesivtah provided evidence that it offers recreational opportunities to its campers and children of staff, that the camp's food facility is open to the public, that the facilities are available to the public upon request and that the camp's soccer field, which is outside the camp gates, is used on occasion by the public. Israel Licht, assistant executive director

of the camp, testified that he was unaware of any member of the general public using the food facilities. There was no testimony regarding whether a member of general public has ever requested use of the camp's recreational facilities. Mesivtah's brief compares its recreational facilities to Philadelphia public pools, State parks and Longwood Gardens. However, Mesivtah did not present any evidence that the camp's recreational and food facilities alleviate any local community burdens in Pike County like the Sewickley Valley YMCA. In addition, although the food facilities are open to the public, the general public does not use the camp's facilities. Further, in *Unionville-Chadds Ford*, one of the primary factors in the Supreme Court's decision was that Longwood Gardens was a unique facility that provided opportunities and facilities far beyond the reach of the majority of the population. 552 Pa. at 219, 714 A.2d at 400. There is no evidence that the camp's facilities provide opportunities that are beyond the reach of the Pike County community, nor even any evidence that members of the public have used the recreational facilities other than occasional use of the soccer field outside the camp's gates. Such *de minimis* public use of the camp is clearly insufficient to relieve the government of a burden.

Mesivtah also asserts that because it satisfies four of the six criteria set forth in Section 5(f) of the Charity Act, 10 P.S. §375(f), the camp relieves the government of some of its burden. Although the constitutional test for determining whether an entity qualifies as a purely public charity and the statutory test as set forth in the Charity Act are very similar, our Supreme Court has not held that the two tests are the same. Rather the Supreme Court has stated that an entity must first satisfy the constitutional test set forth in *HUP*, prior to satisfying the mandates set forth in Section 5 of the Charity Act, 10 P.S. § 375. *See Alliance Home of*

Carlisle, Pa. v. Bd. of Assessment Appeals, 591 Pa. 436, 463, 919 A.2d 206, 222 (2007); *Community Options, Inc.*, 571 Pa. at 680, 813 A.2d at 685.[3]

Mesivtah also contends that common pleas' ruling is in error because it suggests that a charity that primarily benefits those who ordinarily reside outside of the locality where the charity's operations are based cannot relieve the government of its burden because the government would have no burden to those people were it not for the charity's presence in the locality. Mesivtah relies upon *Wert v. Commonwealth, Department of Transportation*, 821 A.2d 182 (Pa. Cmwlth. 2003), which recognizes a constitutional right to travel.

Nonetheless, there remains a lack of evidence regarding whether the local government's burden was relieved. For instance, Mesivtah did not present any evidence that the campers would have utilized Pike County recreational facilities if the camp did not have such facilities given that the primary purpose of the camp is intensive study of Judaism and that recreation was purely ancillary. Thus, we find that that the common pleas did not err in concluding that Mesivtah failed to prove that it relieves the government of some of its burden.

Finally, Mesivtah contends that in order to qualify as a purely public charity an entity should need only to satisfy the requirements of the Charity Act. Mesivtah argues that the General Assembly enacted the Charity Act in order to clarify the criteria that an entity needed to satisfy in order to qualify as a purely

[3] Further, our Supreme Court is not obligated to defer to the General Assembly's judgment concerning the proper interpretation of constitutional terms as the "ultimate power and authority to interpret the Pennsylvania Constitution rests with the Judiciary…." *Alliance Home*, 591 Pa. at 464 n. 9, 919 A.2d at 223 n. 9 [quoting *Stilp v. Commonwealth*, 558 Pa. 539, 905 A.2d 918 (Pa. 2006)].

public charity because of inconsistent application of eligibility standards by the judiciary.

As discussed above, our Supreme Court has stated that an entity must first satisfy the constitutional test set forth in *HUP*, prior to satisfying the mandates set forth in Section 5 of the Charity Act, 10 P.S. § 375. *See Alliance Home of Carlisle, Pa.*, 591 Pa. at 463, 919 A.2d at 222; *Community Options, Inc.*, 571 Pa. at 680, 813 A.2d at 685. Mesivtah cites *In re City of Pittsburgh*, 977 A.2d 71 (Pa. Cmwlth. 2009) for the proposition that this court has recognized that the Charity Act may be considered in determining whether an entity satisfies the *HUP* test. *Id.* at 74-75. Mesivtah's reliance on *In re City of Pittsburgh* is misplaced. In that case, the Pittsburgh Trust for Cultural Resources (the Trust) sought a tax exemption for two vacant properties it owned. There was no dispute that the Trust was a purely public charity. Thus, this court was not required to perform the *HUP* analysis, but rather was permitted to proceed directly to the Charity Act test in order to determine if the individual properties qualified for tax exemption. In the case at hand, the central question is whether Mesivtah qualifies as purely public charity. Accordingly, this court is required to perform the *HUP* analysis before proceeding to the Charity Act test.

For all of the foregoing reasons, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

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O R D E R

AND NOW, this 29th day of December, 2009, the order of the Court of Common Pleas of Pike County in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge