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SUPREME COURT ISSUES DECISION IN CCRC REAL ESTATE TAX EXEMPTION CASE

By: DAVID C. MARSHALL, ESQ.

On April 17, 2007, the Pennsylvania Supreme Court issued its long-awaited decision in *Alliance Home of Carlisle, PA t/a Chapel Pointe v. Board of Assessment Appeals*. The Court’s decision, a victory for Chapel Pointe, will have a significant impact on the future taxability of continuing care retirement communities (“CCRCs”) in the Commonwealth.

Chapel Pointe was a traditional CCRC, operating independent living, assisted living, and nursing facility components to its campus. The organization’s assisted living and nursing facility components were exempt from real estate taxation. Chapel Pointe sought exemption for its independent living component. The lower courts denied the exemption on the basis that the independent living component of the campus did not satisfy the requirements for exemption as set forth in the case of *Hospital Utilization Project v. Commonwealth of Pennsylvania*, commonly referred to as the “HUP Test.”

On appeal to the Pennsylvania Supreme Court, Chapel Pointe argued that it was entitled to a rebuttable presumption of entitlement to exemption under Act 55, and that the Pennsylvania Constitution did not require Chapel Pointe to demonstrate that its independent living parcel individually satisfied the requirements of the HUP Test. Our Firm, serving as counsel to PANPHA, filed an Amicus Brief on behalf of PANPHA’s membership, arguing that prior court decisions and Act 55 require taxing authorities to view organizations seeking real estate tax exemption as a corporate whole, not their individual parts and parcels; that the unique nature of CCRCs warrants treatment as a corporate whole for such purposes; and that the proper test for real estate tax exemption for CCRCs is codified in Act 55, which supplants and replaces the HUP Test.

The Supreme Court’s analysis began with the important premise that Chapel Pointe, as a corporation, qualified as an institution of purely public charity under the HUP Test. This point had been conceded by all parties throughout the litigation. The Court did not question this premise, and instead moved on to the issue of whether Chapel Pointe was entitled to a rebuttable presumption of exemption under Act 55. The Court concluded that Act 55’s statutory presumption can be asserted in instances where the taxing authorities disputed the organization’s status as an institution of purely public charity. However, the Court found that the lower courts’ failure to recognize the importance of this rebuttable presumption was of no consequence, since neither the courts nor the taxing authorities disputed that Chapel Pointe was an institution of purely public charity.

The Court next turned to the question of whether it was appropriate to apply the HUP or Act 55 Tests to the individual independent living parcels. In response to this issue, the Supreme Court adopted Chapel Pointe’s and PANPHA’s argument that in reviewing a particular parcel of an institution of purely public charity for tax exemption, the only question is whether the actual and regular use of that parcel is consistent with the charitable purpose of the institution. In such cases, the taxing authorities cannot apply the HUP/Act 55 Tests to the specific parcel in question. Rather, the organization

REIMBURSEMENT RESOLUTION FOR TAX-EXEMPT BONDS

BY: DOUGLAS C. YOHE, ESQ.

Entities qualified as 501(c)(3) tax-exempt organizations that commence a project before finalization of tax-exempt financing may be able to replace general funds which were expended for the project with tax-exempt bond proceeds. If bond proceeds meet certain criteria and are used to reimburse project expenditures, the bond proceeds are treated as if they were directly spent on the reimbursed items. The benefit of this approach is that the reimbursed funds are not treated as bond proceeds, and therefore may be invested free of yield restrictions and rebate requirements imposed by the Internal Revenue Code.


In order for bond proceeds to be used to reimburse prior expenditures, the organization must take the following steps: (1) declare its intent to spend money on a project and to pay itself back with bond proceeds; (2) spend its own money on the project; (3) issue reimbursement bonds; and (4) allocate bond proceeds to pay back the expenditure on its books within certain time periods.

The declaration of intent requirement is satisfied by the organization adopting a resolution which states its intent to reimburse prior expenditures for a project with tax exempt bond proceeds. Any capital expenditures made within 60 days before the adoption of such a resolution can be reimbursed with bond proceeds. The resolution must describe the project and state the expected maximum size of the tax-exempt bonds to be issued. Also, the resolution should identify the fund or account (including a line of credit) from which the expenditures were paid.

A prior expenditure must be reimbursed from bond proceeds within 18 months after incurred or 18 months after the date the project is placed in service. The reimbursement period cannot exceed three years from the date of the expenditure.

The nature of expenditure requirement generally limits the use of proceeds to reimburse capital expenditures. The purpose of this requirement is to keep the proceeds from being used for working capital or cover the operating costs of a project, which are impermissible uses of bond proceeds. However, the organization may reimburse certain preliminary expenditures up to 20 percent of the bond proceeds without regard to when the expenditures were incurred or whether a reimbursement resolution was adopted by the organization. These may include architectural, engineering, surveying, soil testing, reimbursement of bond issuance costs, and similar costs incurred prior to the commencement of acquisition, construction, or rehabilitation of the project. Land acquisition, site preparation, and similar costs are not included in the preliminary expenditure exception. Accordingly, reimbursement of these latter expenditures requires that the organization must adopt a reimbursement resolution and

the expenditures reimbursed within the above-mentioned time periods.


Any organization that is contemplating a project or the refinancing of its tax-exempt debt should adopt a reimbursement resolution. In such a case, expenditures for the project or other capital expenditures incurred prior to the issuance of the tax-exempt bonds can be reimbursed to the organization. For additional information on reimbursement resolutions, please contact Doug Yohe. 

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need only show that the use of the parcel in question is consistent with its charitable purpose. Consistent with PANPHA's arguments concerning the nature of CCRCs, the Court concluded that Chapel Pointe's independent living units clearly advanced the organization's charitable purpose, and as such, were entitled to exemption like the rest of the organization.

The Court left open the question of whether Act 55 supplants or trumps the HUP Test. The Act 55 statutory tests provide clearer, more objective standards for determining qualification for exemption, and are more favorable to entities seeking exemption than the judicial HUP test. Unfortunately, the Court deferred the "theoretical complexities that might arise where the HUP Test and the Act 55 Test would lead to different conclusions concerning a taxpayer's qualification as an institution of purely public charity," because that scenario was not present in the *Chapel Pointe* case.

It appears that the Court's language leaves enough room for taxing authorities and their solicitors to continue to argue that a CCRC or other entity seeking exemption must first prove compliance with the HUP Test and then prove compliance with Act 55 in order to secure an exemption. Going forward, the taxing authorities and their solicitors may not be willing to concede compliance with the HUP Test, as was the case in *Chapel Pointe*. However, based on the Court's decision, to the extent that the HUP Test must be met, the taxing authorities must evaluate the entire organization as a corporate whole under the HUP standards and cannot focus that review solely on the component parcels/operations of the entity. This represents a major and beneficial change in the evaluation of tax exemptions for CCRCs and may provide greater leverage to obtain tax exemption for an entire campus. Note that an entity seeking exemption would still have to demonstrate its overall compliance with the HUP/Act 55 five-pronged test. Simply being a non-profit 501(c)(3) CCRC provider is not a guarantee of exemption.

If you have any questions regarding the *Chapel Pointe* case and how it may affect your organization, please do not hesitate to contact Kimber Latsha or David Marshall at (717) 620-2424. 

UNEMPLOYMENT COMPENSATION PROCEDURE – HARKNESS ON THE EDGE OF TOWN

By: ANGELA L. THOMAS, ESQ.

After several years of controversy, the issue of employer representation at unemployment compensation hearings appears to be settled. Recently, the Pennsylvania Supreme Court handed down a ruling that seems to be the final word on the issue.

The controversy originally erupted when the Commonwealth Court of Pennsylvania decided the case of *Harkness v. Unemployment Compensation Board of Review* in February 2005. In that case, the Commonwealth Court ruled that employer representation of an employer by a non-lawyer agent constituted the unauthorized practice of law. The Court reasoned that the Unemployment Compensation Law (“UCL”) only permits an individual to be represented by a non-lawyer. As a result, non-lawyers were no longer able to represent employers at unemployment compensation hearings. The Unemployment Compensation Board of Review (“Board”) appealed the *Harkness* decision to the Pennsylvania Supreme Court.


In the interim, the Pennsylvania General Assembly passed Act 3 in June of 2005 to combat the effects of the *Harkness* ruling. The Act purported to reinforce the legislature’s “original intent” to allow non-lawyer agents to represent both employers and employees at unemployment compensation hearings. The Board dropped its appeal to the Supreme Court considering the issue moot as a result of Act 3.

Despite the withdrawal of the Board’s appeal, on April 17, 2007, the Pennsylvania Supreme Court issued a ruling in *Harkness* addressing two specific issues. First, the Court ruled that employers may be represented by a non-lawyer agent at an unemployment compensation hearing, and that the representation does not constitute the unauthorized practice

of law. The purpose of the prohibition against the unauthorized practice of law, according to the Supreme Court, is to protect public interest and maintain the integrity of the judicial system. However, given the informal nature of the unemployment compensation proceedings, the character of the activities performed by the agents, and the long history of participation by non-lawyer representatives, the Court felt that the public interest is not threatened by non-lawyers representing employers at these hearings. In contrast, the Court found that the public would be harmed by an unnecessary burden on a process meant to be expedient and efficient.

The Supreme Court next turned to the question of whether the UCL permits non-lawyer representation. The Supreme Court rejected the Commonwealth Court’s analysis, finding that the UCL clearly and explicitly permits representation by a non-lawyer in unemployment compensation proceedings.

The Court’s decision in *Harkness* finally resolves the issue of whether representation of an employer by a non-attorney constitutes unauthorized practice of the law. As a result, employers may be represented by non-attorneys at unemployment compensation hearings. Latsha Davis Yohe & McKenna encourages you to consult with counsel on the merits, evidence, and procedure of your case before appearing on your own behalf or with counsel. Understanding the issues and legal principles involved in the case will provide you with a better position to be a successful advocate.

Glenn Davis or Angela Thomas is available to discuss any questions you may have regarding unemployment compensation benefits. 

LDY&M Inside
the Firm

The LDYM Healthcare Practice Group will be holding a 1/2 day seminar on September 11, 2007, entitled *Understanding Certain Pieces of the Health Care Industry: Regulatory Reporting Obligations and Arbitration Clauses in Admission Agreements*. The speakers will review various scenarios that require notification to federal and state agencies and provide an overview of the alternative dispute process. Contact Julie Harpster at (717) 620-2424 for additional information.



2007 SEMINARS

Council on Education in Management	July 27, 2007	"Recruiting in a Tight Employment Market: Innovative & Aggressive Staffing Strategies That Are Both Successful & Legal"	Angela L. Thomas, Esq.
LDY&M Health Care Practice Group	September 11, 2007	"Understanding Certain Pieces of the Health Care Industry: Regulatory Reporting Obligations and Arbitration Clauses in Admission Agreements"	Kimber L. Latsha, Esq., David C. Marshall, Esq. and Dayna E. Mancuso, Esq.
County Commissioners Association of Pennsylvania	September 11, 20 & 25, 2007	"Avoiding Personnel Pitfalls"	Glenn R. Davis, Esq. and Angela L. Thomas, Esq.
PHCA Annual Meeting	September 17, 2007	"Who, What, When & Where (Effective Workplace Investigations)"	Glenn R. Davis, Esq. and Andrea E. Dean, Esq.
PHCA Annual Meeting	September 18, 2007	"Provision of Hospice Care in Nursing Facilities"	David C. Marshall
PHCA Annual Meeting	September 18, 2007	"Act 169: What You Need to Know About End of Life Issues"	Kimber L. Latsha, Esq. and Tanya Daniels Harris, Esq.
PHCA Annual Meeting	September 18, 2007	"Negotiating Managed Care Contracts"	Kimber L. Latsha, Esq.
AOPHA	September 27, 2007	"Avoiding Department of Justice Enforcement Actions in CCRC and Senior Housing"	Kimber L. Latsha, Esq.
AAHSA Annual Meeting	October 21, 2007	"Conducting Effective Workplace Investigations"	Glenn R. Davis, Esq. and Angela L. Thomas, Esq.
AAHSA Annual Meetig	October 22, 2007	"Assisted Living Issues Forum"	Kimber L. Latsha, Esq.
AAHSA Annual Meeting	October 22, 2007	"Legal Update III – Fair Housing"	Kimber L. Latsha, Esq.
AAHSA Annual Meeting	October 23, 2007	"Drafting a CCRC Admission Agreement"	Kimber L. Latsha, Esq.
AAHSA Annual Meeting	October 23, 2007	"Non-Compliance Nightmare: Are You Prepared?"	David C. Marshall, Esq.; Sophie Campbell, Manager/ Healthcare Consultant; and Diane Martinez, Manager/Senior Healthcare Consultant, Parente Randolph