PROPERTY TAX

Stage Set for Pennsylvania Supreme Court to Step in to Correct Standard for Uniform Assessment

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While the taxpayer challenges were initiated in the wake of the Pennsylvania Supreme Court's July 2017 decision in Valley Forge Towers Apartments N., LP v. Upper Merion Area Sch. Dist.,163 A.3d 962 (Pa. 2017), which held that the government must select properties for appeal in a constitutionally uniform manner, the underpinnings of the taxpayers' arguments pre-date the Valley Forge decision. A common misconception and argument technique of government lawyers in Pennsylvania is to artificially limit taxpayer challenges as if they are grounded just in this one case and, secondly, to attempt to narrowly limit the Valley Forge holding to just the facts of that case and ignoring its broad policy-based pronouncements. The Pennsylvania Supreme Court has for more than 110 years consistently held that a government must assess its taxpayers in a uniform manner. During the years between Pennsylvania Supreme Court decisions, the lower courts in Pennsylvania tend to revert to the Pennsylvania statute that allows taxing districts to file increase assessment appeals and on a case-by-case basis, approve the school district's appeals. That is largely what has occurred in the lower courts post-Valley Forge, but with a series of seven recent decisions from Pennsylvania's intermediate appellate court, four of which have pending taxpayer requests to be heard at the Pennsylvania Supreme Court, the stage is set for the Pennsylvania Supreme Court to step in and correct the situation.

The Uniformity Clause of the Pennsylvania Constitution requires that every tax "operate alike on the classes of things or property subject to it." Commonwealth v. Overholt & Co., 200 A. 849, 853 (Pa. 1938). With respect to real property taxes, the Pennsylvania Supreme Court has made clear that "real property ***is*** the classification." Clifton v. Allegheny County, 969 A.2d 1197, 1212 (Pa. 2009) (*emphasis in original*); see also, In re Lower Merion Twp., 233 A.2d 273, 276 (Pa. 1967) ("real estate as a subject for taxation may not validly be divided into different classes"). Thus, all taxable real estate in a given jurisdiction must be treated as a "single class entitled to uniform treatment." Clifton, 969 A.2d at 1212; see Valley Forge Towers Apartments N, LP v. Upper Merion Area Sch. Dist. & Keystone Realty Advisors LLC, 163 A.3d 962, 972 (Pa. 2017).[1] "Each taxpayer, no matter how great or small, has a right to demand that his property shall be assessed upon the basis of a uniform valuation of other properties belonging to the same class and within the territorial limits of the authority levying the tax, and it is the duty of all the authorities dealing with this subject to administer the law in a spirit to produce as nearly as may be uniformity of

[1] The Court has reaffirmed this single-class principle repeatedly for more than a century. See, e.g., Deitch Co. v. Bd. of Prop. Assessment, Appeals & Review, 209 A.2d 397, 400 (Pa. 1965); McKnight Shopping Ctr., Inc. v. Bd. of Prop. Assessment, Appeals & Review, 209 A.2d 389, 391-92 (Pa. 1965); Westinghouse Elec. Corp. v. Bd. of Prop. Assessment, Appeals & Review, 652 A.2d 1306, 1314 (Pa. 1995).

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Continued on page 6

result." Delaware, L. & W. R. Co.'s Tax Assessment, 73 A. 429, 431, (Pa. 1909).

It is common in Pennsylvania for school districts to file increase assessment appeals. Selection schemes vary, but tend to fall into the following categories: 1) properties with a recent sale price; 2) properties where the school district stands to gain at least a certain dollar amount of additional taxes in a successful appeal; or 3) properties where the school posits that the properties selected are undervalued by a certain dollar fair market value threshold (e.g., $1 Million under-assessed). In these latter two schemes, some school districts consult with a New Jersey based contingent fee consultant called Keystone Realty Consultants ("Keystone"), some consult with a local appraiser and in others the school business manager picks using a "I-know-it-when-I-see-it" approach without any bright line standard. The Pennsylvania Commonwealth Court has found all of these schemes to meet constitutional muster. As applied, the vast majority of properties selected for appeal by these schemes are commercial properties.

Immediately following the Pennsylvania Supreme Court's Valley Forge decision, taxpayers targeted by school districts for increase appeals began to 1) serve discovery on school districts, 2) move to bifurcate the case into two phases, so that the constitutional issue was the threshold issue and the valuation case was reached only if the school district's scheme passed the constitutional test, and 3) move to dismiss school districts' selection schemes. Trial courts across the state initially split on these issues. In the early days following Valley Forge, the split of decisions on these procedural issues were favoring taxpayers. Not surprisingly, in courts where taxpayers were winning these arguments, school districts -- facing the real possibility or even likelihood of having their entire selection scheme dismissed and losing all of the potential revenue from all of their appeals -- generally settled. In courts where the trial court's procedural rulings favored the government, however, (no discovery, limited discovery, holding argument on motion to dismiss the same day as the valuation trial), government attorneys were bolder and less interested in settling. Accordingly, most of the first cases to go to trial and to reach the appellate court were cases where the trial court ruled in favor of the government. Five of the recent decisions from the Commonwealth Court had a posture where the trial court ruled that the school district's selection scheme was constitutional. These cases, summarized below, are: Martel, the two East Stroudsburg cases, Punxsutawney and Kennett. On appeal, the Commonwealth Court approved the school districts' selection schemes in all five of these cases.

In contrast, in the two cases where the trial court declared the school districts' schemes to be unconstitutional – Philadelphia and Bethlehem – the Commonwealth Court reversed and remanded the cases back to the trial courts to take more evidence.

Ordered chronologically by the date of the Commonwealth Court decisions, the seven cases are summarized as follows:

- Martel v. Allegheny County, 216 A.3d 1165 (Pa. Commw. Ct. Aug. 14, 2019), appeal den., 222 A.3d 1128 (Pa. Jan. 7, 2020). Taxpayer challenged the City of Pittsburgh School District's selection scheme based on properties that recently sold. Unlike all of the other cases, the City of Pittsburgh School District's scheme did include residential taxpayers such as plaintiff. Taxpayer brought a class action in equity challenging the selection scheme on the basis that it violated the local administrative board's rules. The trial court dismissed taxpayer's case. In affirming the dismissal, the Commonwealth Court ruled that taxpayer failed to exhaust its administrative remedies. Taxpayer filed a petition for allowance of appeal with the Pennsylvania Supreme Court, but in a one-sentence ruling on January 7, 2020, the Court declined to hear the appeal. This case is of little precedential import – class actions are disfavored in Pennsylvania assessment law, the framing of the issue based on a local board rule was weak, the taxpayer ignored strong law directly on point, and the exhaustion of remedies rationale is directly contrary to the express holding of the Supreme Court in Valley Forge.

- School District of Philadelphia v. Board of Revision of Taxes and Federal Realty Management, 217 A.3d 472 (Aug. 22, 2019). On the recommendation of contingent fee consultant Keystone, the City of Philadelphia School District appealed 105 properties within the City, which the School District believed would yield at least $7,500 in additional taxes. All 105 appeals were of commercial properties. Most of the taxpayers filed challenges to the School District's selection scheme and filed motions to quash. At the consolidated argument on the motions to quash, the court accepted the School attorney's oral admission as to the $7,500 monetary threshold and took judicial notice that there were residential properties within the City that would have met that threshold. On that basis, the trial court dismissed all 105 appeals citing the Valley Forge precedent. On August 22, 2019, the Commonwealth Court vacated the trial court's order and remanded all appeals to the trial court with a direction to hold

Continued on page 7

an evidentiary hearing on the School District's selection scheme. The cases are now pending before the trial court and the evidentiary hearing is scheduled for June 12, 2020.

- Paired cases East Stroudsburg Area School District v. Meadow Lake Plaza, LLC, 2019 Pa. Commw. Unpub. LEXIS 569, 219 A.3d 724 (Pa. Commw. Ct. October 17, 2019, unreported), petition for allowance of appeal filed with Pennsylvania Supreme Court at 723 MAL 2019 and East Stroudsburg Area School District v. Dallan Acquisitions, LLC, 2019 Pa. Commw. Unpub. LEXIS 568, 219 A.3d 725 (Pa. Commw. Ct. October 17, 2019, unreported). The East Stroudsburg Area School District consulted with contingent fee consultant Keystone to select properties for appeal using a threshold of $10,000 in additional taxes. Two sets of taxpayers challenged the School District's selection scheme and adduced slightly different evidence in two separate evidentiary trials on two different days before the same trial judge. The trial judge completed the evidentiary hearing on the Meadow Lake case first, then incorporated that decision months later when it issued is decision in Dallan. The evidence was that the School District's scheme was not in writing, was not passed by a resolution of the School Board, and that no calculations were done – whether by Keystone or by the School District - to ensure that the properties selected for appeal actually met the $10,000 threshold. The school selected 46 properties for appeal – all commercial. Using recent sale prices as a measure, Taxpayer's expert produced evidence that had the School District applied its $10,000 threshold uniformly, there were 20 commercial properties and 10 residential properties that fit the $10,000 threshold, but which the School District did not appeal. The School Business Manager had no answer as to how these 30 properties were missed. The trial court ruled that the School District's selection scheme was constitutional. While the two cases were not consolidated at the Commonwealth Court, they were scheduled back-to-back for argument and the Commonwealth Court's decisions in each issued the same day. The Commonwealth Court affirmed the school's selection scheme as constitutional. Of note, the court criticized the taxpayer's expert's reference to recent sale prices to test whether the School District uniformly applied its scheme as improper because the taxpayer's expert "merely uses each property's sale price as a "stand –in" for market value." The Meadow Lake taxpayer filed a petition for allowance of appeal with the Pennsylvania Supreme Court; the Supreme Court has not yet ruled on the petition. The Dallan case was remanded to the trial court, where it is pending.

- Punxsutawney Area School District v. Broadwing Timber, LLC, 2019 Pa. Commw. Unpub. LEXIS 593, ___ A.3d ___ (Pa. Commw. Ct. October 29, 2019 unreported). Punxsutawney Area School District had neither written policy nor any set monetary threshold for selecting properties for appeal. Rather, the School Business Manager "looked only for a sales price that could indicate an under-assessed property and a potential increase in tax revenue." In operation, the School District filed only a few appeals – all on commercial properties. The trial court found the School District's scheme to be constitutional. The Commonwealth Court affirmed, ruling that for the School District's selection scheme to be uniform, the School was not required to have a formal policy, was not required to have specific criteria, and was not required to have a specific monetary threshold. Moreover, unlike in its Dallan decision issued less than two weeks early, the Commonwealth Court found no fault in the School Business Manager's use of recent sale price as a stand-in for market value to indicate underassessment. Taxpayer filed a petition for allowance of appeal with the Pennsylvania Supreme Court; the Supreme Court has not yet ruled on the petition.

- Bethlehem Area School District v. The Board of Revenue Appeals of Northampton County, 2020 Pa. Commw. LEXIS 71, ___ A.3d ___ (Pa. Commw. Ct. January 16, 2020). Since 2012, Bethlehem Area School District, in consultation with contingent fee consultant, selected properties for appeal using a threshold of $10,000 of additional taxes. In operation and effect, applying this scheme the School District never appealed any residential properties. Taxpayer challenged the School District's selection scheme as unconstitutional. Because the facts set forth above were all admitted, there were no disputed issues of material fact and, thus, rather than hold an evidentiary hearing, the trial court took briefs and argument on summary judgment. After consideration, the trial court dismissed the School District's appeals on the basis that its "nominally-neutral" scheme in operation and effect violated constitutional uniformity. On appeal, the Commonwealth Court reversed and

Continued on page 8

remanded, determining that statements made in School meeting minutes were subject to varying interpretations, thus material issues of fact existed, and the trial court should have held an evidentiary hearing. The taxpayer filed a petition for allowance of appeal to the Pennsylvania Supreme Court at 67 MAL 2020; the Supreme Court has not yet ruled on the petition.

- Kennett Consolidated School District v. Chester County Board of Assessment, 2020 Pa. Commw. LEXIS 194, ___ A.3d ___ (Pa. Commw. Ct. Feb. 28, 2020). Kennett Consolidated School District delegated to a commercial appraiser to develop a threshold and recommend properties for appeal. The appraiser recommended appeals on properties which he believed to be under-assessed by at least $1 Million fair market value. The appraiser recommended 13 properties for appeal – all commercial; the School District appealed 12 of the properties (one had been recently litigated). Taxpayer challenged the School District's selection scheme as unconstitutional and moved to bifurcate the constitutionality issue so that issue could be fully litigated before forcing the taxpayer to defend on valuation. The trial court denied the motion to bifurcate, which meant that taxpayer's motion to quash was argued in the opening moments of the day reserved for the valuation trial. The trial court took argument from the taxpayer and denied the motion to quash without even taking argument from the School attorney. Of note, the School District utilized as its expert witness the same appraiser who had selected the properties for appeal; his final valuation opinion in the subject appeal was that the property was under-assessed by approximately $900,000 – in other words, it did not meet his own selection criteria. Taxpayer appealed to the Commonwealth Court – the case was argued November 12, 2019, two weeks after the Commonwealth Court's decision in Punxsutawney. After reviewing its decisions in the East Stroudsburg Punxsutawney cases, the court held the School District's selection scheme to be constitutional. The taxpayer filed a petition for allowance of appeal to the Pennsylvania Supreme Court at 150 MAL 2020; the Supreme Court has not yet ruled on the petition.

Four taxpayer challenges are now pending before the Pennsylvania Supreme Court requesting that the Court agree to hear the appeals. The synthesized holdings of the seven back-to-back Commonwealth Court decisions favoring the government stand for the proposition that so long as a school district's selection scheme – written or not, formal or not, applied consistently or not – is stated in facially neutral language, the school selection scheme will stand as constitutional. Under this standard, short of a taxpayer producing a smoking gun admission that the school district intentionally targeted commercial properties only for appeal, the school selection scheme will always be allowed to stand. It is hoped that the Supreme Court will recognize that the Commonwealth Court's standard does not comport with the Court's precedent that requires a government's selection scheme to be not just facially neutral, but also uniform in its operation and effect.

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Continued on page 9