ALERT
JANUARY 27, 2010

TAX
News Concerning Recent Tax Issues

COZEN O'CONNOR
www.cozen.com

## YMCA EXEMPT CHARITY

Joseph C. Bright • 215.665.2053 • *jbright@cozen.com*

In the third appellate decision in ten years of litigation, a commercial fitness center failed in a claim that the operation of a fitness center by a YMCA violated the prohibition against subsidizing a commercial business unrelated to the YMCA's charitable purpose. *Selfspot, Inc. v. Butler County Family YMCA*, No. 1308 D.C. 2008 (Pa. Cmwlth. Jan. 5, 2010) (en banc). The appellate court agreed with the conclusion of the trial court after five days of hearings that the YMCA's fitness center was not operated as a commercial business and was indeed related to the YMCA's charitable purpose to promote the health and welfare of the community. In a thorough opinion, the Commonwealth Court reviewed the extensive evidence and testimony that the YMCA's fitness center was not operated as a separate facility but was one of a number of facilities available to any member of the YMCA. The YMCA subsidized some memberships for persons of limited means and made the facilities available, essentially for free, to a substantial number of community groups. Therefore, the commercial fitness center failed to prove that the YMCA's fitness center served only dues-paying members, in violation of the statutory provision in 10 P.S. § 378. The court summarized applicable case law by stating that no Pennsylvania case has ever held that a charitable purpose can only be advanced by giving something away. Rather, a charitable purpose can be fulfilled by making a gift to the general public which extends to the rich as well as the poor and is not vitiated if the charity receives some payment for its services. If the public generally is benefited, the charitable purpose is fulfilled.

## FOUNDATION NOT ENTITLED TO CHARITABLE EXEMPTION

Joseph C. Bright • 215.665.2053 • *jbright@cozen.com*

In an unreported opinion, the Commonwealth Court held that a nonprofit corporation with the sole purpose to support the educational mission of a charter school was not entitled to an exemption for real estate that it leased to the school. *In re Appeal of Friends of Pennsylvania Leadership Charter School*, No. 808 C.D. 2009 (Pa. Cmwlth. Jan. 7, 2010) (unreported). While the decision is consistent with a statutory provision, it avoids the difficult issue presented.

The statute provides:

> (b) Except as otherwise provided in clauses (11) and (13) of this section [relating to libraries and fire and rescue stations], all property real or personal, other than that which is actually and regularly used and occupied for the purposes specified in this section, and all such property from which any income or revenue is derived, other than from recipients of the bounty of the institution or charity, shall be subject to taxation, except where exempted by law for State purposes, and nothing herein contained shall exempt same therefrom.

72 P.S. § 5020-204(b). The statute requires that the institution occupy the real estate, but the Commonwealth Court has stretched the meaning of that requirement in sympathetic cases. For example, in *Borough of Homestead v. St. Mary Magdalen Church*, 798 A.2d 823 (Pa. Cmwlth. 2002), the court permitted an exemption for property owned by the Diocese of Pittsburgh that was used by both nonprofit and profit entities that provided services to persons displaced by the closing of a nearby steel mill. The court permitted the exemption because the users were licensees, not tenants, and

the diocese continued to have active control of the premises and maintained the interior and exterior. The distinctions are not convincing. A lessor frequently will maintain the premises to a greater or lesser degree, depending on the terms of the lease, and will often maintain the structure. The result in *St. Mary Magdalen* seems instinctively correct, because the reality was that the property was used for charitable purposes. However, the same is true with respect to the nonprofit that provided real estate to the charter school. A key piece of information is missing from the opinion. It does not state whether the lease was for $1, market rates, or something in between. If the lease was for below-market or de minimis rentals, the court should have explored the application of *St. Mary Magdalen* to the appeal.

The real solution lies with the General Assembly. It makes no tax policy sense to deprive a property of an exemption if it is owned by a charity and leased to another charity, not for profit purposes, but in order to support the other charity. The statute should say so.