

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Appeal of Collegium Charter :
School from the decision of the :
Chester County Board of Assessment :
Appeals for property located at 535 :
James Hance Court, West Whiteland :
Township, Chester County, :
Pennsylvania Tax Parcel No. :
41-04-0030.0000 :
: No. 2354 C.D. 2010
Appeal of: Collegium Charter School : Argued: June 9, 2011

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE BARRY F. FEUDALE, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: July 26, 2011

Collegium Charter School (Charter School) appeals from an order of the Court of Common Pleas of Chester County (trial court) finding that it is not exempt from payment of property taxes in 2009 because it is not a purely public charity. For the reasons that follow, we affirm the trial court's decision.

The Charter School is a non-profit corporation organized and existing under the Nonprofit Corporation Law of 1988¹ and a public charter school pursuant

¹ 15 Pa. C.S. §§5701-5709.

to the Charter School Law.² The Collegium Foundation (Foundation) was also a non-profit corporation incorporated under the Nonprofit Corporation Law of 1988 whose mission was to support the health, welfare and educational interests of the Charter School. On October 27, 2004, the Foundation purchased a piece of property in Chester County from the Chester County Intermediate Unit (CCIU) known as Tax Parcel No. 41-04-0030.000 located at 535 James Hance Court (Property). Funding for the purchase of the Property was through \$16,000,000 in revenue bonds issued by the Chester County Industrial Development Authority.

On October 15, 2004, the Foundation and the Charter School entered into a lease agreement with the Foundation as lessor and the Charter School as lessee stating the following:

WHEREAS, the School has requested the Foundation to undertake the financing of a project (the “2004 Project”) for the use and benefit of the School, which consists of: (i) the planning, designing, acquiring, constructing, furnishing and equipping of real estate (the “Demised Premises”) to be acquired by the Foundation of Chester County, Pennsylvania (the “Project Facilities”) to be leased pursuant to this Lease to the School for use and operation as a charter school; (ii) funding certain reserve funds established under the Trust Indenture (as hereinafter defined); and (iii) paying the costs and expenses of issuing and insuring the Bonds (as hereinafter defined).

² Act of March 10, 1949, P.L. 30, 24 P.S. §§17-1701-A – 17-1751-A, added by the Act of June 19, 1997, P.L. 225.

In consideration, the Charter School was to assign to the Foundation the school revenues which included all revenues, income and other monies received on behalf of the Charter School from any source, all gifts, grants, bequests, donations and contributions; it was to pay all rents, debt service (principal and interest), utilities, tax assessments, insurance and bonding requirements and any amounts necessary to comply with the loan agreement and the lease agreement.

On May 6, 2009, the Chester County Board of Assessment Appeals (Board) issued an assessment notice to the Foundation stating that the Property would be subject to real estate taxes effective July 1, 2009. The Foundation and the Charter School jointly filed an appeal arguing that an exemption applied because the Property was being used as a public charter school, a non-profit educational institution. After a hearing in which the West Chester Area School District intervened, the Board, on July 28, 2009, denied the exemption, and only the Charter School filed an appeal with the trial court from that denial.³ On August 26, 2009, the Foundation merged with the Charter School resulting in the Charter School being the surviving corporation.⁴

³ No issue was raised as to whether the proper party filed an appeal.

⁴ A second assessment notice was issued to the Foundation on January 15, 2010. Because the parties had merged, the deed had transferred and the Charter School was now the Property owner. The Board did not dispute that it was entitled to a tax exemption beginning with tax year 2011. On appeal, the trial court determined that the Charter School was entitled to a tax exemption for tax year 2010 as well and this is not an issue in this appeal.

Relying on the stipulated facts and briefs of the parties, the trial court determined that the Foundation, as owner of the Property in 2009, was not entitled to a tax exemption for tax year 2009 because “in order to qualify for a real estate tax exemption, the charitable activity of the entity must occur on the specific property for which the exemption is sought and the entity must be the owner and occupier of the property.” *Appeal of Northwestern Corp. from Dauphin County Board of Assessment Appeals*, 665 A.2d 856, 858 (Pa. Cmwlth. 1995). Because the Charter School and not the Foundation was the occupier of the Property in 2009, the tax exemption did not apply.

The trial court also addressed whether the Foundation qualified as an institution of purely public charity under the test set forth in *Hospital Utilization Project v. Commonwealth (HUP)*, 507 Pa. 1, 487 A.2d 1306 (1985), and the Institutions of Purely Public Charity Act (Act 55).⁵ Applying the five-part test set forth in *HUP*, the Foundation would have had to meet each of the five criteria to qualify as an institution of purely public charity: (1) advances a charitable purpose; (2) donates or renders gratuitously a substantial portion of its services; (3) benefits a substantial and indefinite class of persons who are legitimate subjects of charity; (4) relieves the government of some of its burden; and (5) operates entirely free from private profit motive. *HUP*, 507 Pa. at 22, 487 A.2d at 1317. The trial court determined that the Foundation was not an institution of purely public charity

⁵ Act of November 26, 1997, P.L. 508, 10 P.S. §375. That section provides that in order for an institution to qualify as a purely public charity, it must (1) advance a charitable purpose; (2) operate entirely free from private-profit motive; (3) donate or render gratuitously a substantial portion of its services; (4) benefit a substantial and indefinite class of persons who are legitimate subjects of charity; and (5) relieve the government of some of its burden.

because it did not meet at least two of the five *HUP* criteria. This appeal by the Charter School followed.⁶

On November 17, 2010, one month after the trial court entered its order, the General Assembly amended Section 20 of the Charter School Law (Act 104),⁷ 24 P.S. §17-1722-A, by adding, among other things, the following provisions:

(e)(1) Notwithstanding the provisions of section 204 of the act of May 22, 1933 (P.L. 853, No. 155), known as The General County Assessment Law, all school property, real and personal, owned by any charter school, cyber charter school or an associated nonprofit foundation, or owned by a nonprofit corporation or nonprofit foundation and leased to a charter school, cyber charter school or associated nonprofit foundation at or below fair market value, that is occupied and used by any charter school or cyber charter school for public school, recreation or any other purposes provided for by this act, shall be made exempt from every kind of State, county, city, borough, township or other real estate tax, including payments in lieu of taxes established through agreement with the Commonwealth or any local taxing authority, as well as from all costs or expenses for paving, curbing, sidewalks, sewers or other municipal improvements, Provided, That any charter school or cyber charter school or owner of property leased to a charter school or cyber charter school may make a municipal improvement in a

⁶ Our standard of review in a tax assessment appeal is whether the trial court abused its discretion, committed an error of law or rendered a decision unsupported by the evidence. *Church Street Associates v. County of Clinton*, 959 A.2d 490 (Pa. Cmwlth. 2008).

⁷ Act of November 17, 2010, P.L. 996, No. 104, §20, effective in 60 days [Jan. 18, 2011].

street on which its school property abuts or may contribute a sum toward the cost of the improvement.

(3) This subsection shall apply retroactively to all charter schools, cyber charter schools and associated nonprofit foundations that filed an appeal from an assessment, as provided in Article V of The General County Assessment Law, prior to the effective date of this subsection.

Act 104 became effective 60 days after its passage, i.e., January 18, 2011.

Even though the Act was enacted after the trial court issued its ruling, the Charter School contends that the trial court should be reversed because Act 104 retroactively grants a real estate tax exemption to school property owned by an associated non-profit foundation and leased to a charter school at or below market value that is occupied and used by a charter school for public school purposes. Because Act 104 applies retroactively to all charter school appeals from an assessment filed prior to its effective date of January 18, 2011, it claims that the Foundation was entitled to exemption from real estate taxes effective July 1, 2009. It argues that because it is undisputed that the Charter School paid market rents to the Foundation, the Property should be exempt under this provision.

I.

Whether Act 104 can apply to tax assessment cases where a final order has been entered can be applied after the trial court issued its decision,

Article I, §11 of the Pennsylvania Constitution provides that an individual is entitled to receive a remedy by “due course of law” for an injury:

All courts shall be open; and every man for an injury done him in his lands, goods, persons or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such case as the Legislature may by law.

Our Supreme Court has interpreted this provision of our Constitution to mean that the judiciary is directed to administer justice by due course of law and prohibits the legislature from intermeddling with those judicial functions. *Ieropoli v. AC&S Corporation*, 577 Pa. 138, 149, 842 A.2d 919, 925-26 (2004) (quoting *Menges v. Dentler*, 33 Pa. 495 (1859)). It continued to explain that the “guarantee of a ‘remedy by due course of law’ in Art. I, §11, means that a case cannot be altered, in its ‘substance,’ by subsequent law[.]” *Id.* Specifically, a case is altered in its “substance” once legislation affects a “cause of action” that has “accrued.” *Lewis v. Pennsylvania Railroad Co.*, 220 Pa. 317, 69 A. 821 (1908) (stating that “the law of the case at that time when it became complete is an inherent element in it; and, if changed or annulled, the law is annulled, justice denied, and the due course of law is violated.”) An “accrued” cause of action creates a vested right, the interference with which by the legislature is a violation of Art. 1, §11. *Gibson v. Commonwealth*, 490 Pa. 156, 415 A.2d 80 (1980) (quoting *Lewis*, 220 Pa. at 319, 69 A. at 823) (stating that “[t]here is a vested right in an accrued cause of action... A law can be repealed by the law giver; but the rights which have been acquired under it, while it was in force, do not thereby cease. It would be an absolute

injustice to abolish with the law all the effects it had produced. This is a principle of general jurisprudence; but a right to be within its protection must be a vested right.”) Obviously, once one receives a final judgment, the cause of action has accrued. Further, a vested right, which includes a tax lien, as in this case, would be impaired by the retroactive application of Act 104, and a vested right in a tax lien may only be applied prospectively. *Estate of Tracey*, 403 Pa. 373, 170 A.2d 93 (1961). See also *Jenkins v. Hospital of Medical College of Pennsylvania*, 535 Pa. 252, 634 A.2d 1099 (1993); *Gibson; Rebel v. Standard Sanitary Mfg. Co.*, 340 Pa. 313, 16 A.2d 534 (1940); *Stroback v. Camaioni*, 674 A.2d 257 (Pa. Super. 1996); and *Byard F. Brogan, Inc. v. Workmen’s Compensation Appeal Board*, 637 A.2d 689 (Pa. Cmwlth. 1994), all cases which prohibit the retroactivity of legislation to extinguish an accrued vested right.

Applying the above principles to this case, Act 104 violates Article I, §11 of the Pennsylvania Constitution. Once the tax lien was filed, there should have been no question that the Foundation was required to pay the 2009 tax bill because in order to qualify for a real estate tax exemption, the charitable activity of the entity had to be on the specific property for which the exemption was sought, and the entity had to be the owner and occupier of the property. Because Act 104 may not be applied retroactively but only prospectively as it will eliminate a tax lien, which is a vested right, it has no application to this case.⁸

⁸ The Board and the West Chester Area School District also argue that Act 104 is constitutionally infirm because it attempts to change the constitutionally-mandated provisions for granting an exemption and because the retroactive tax exemption provision of Act 104 violates the special legislation provisions of Art. III, §32 which states that “the General Assembly shall pass no local or special law in any case which has been or can be provided for by general law **(Footnote continued on next page...)**

II.

Even if the retroactive application of Act 104 is not constitutionally infirm, the Charter School contends that the Foundation was entitled to a tax exemption for tax year 2009 because it was an institution of purely public charity. The Charter School first argues that the trial court erred by applying the *HUP* test rather than the test enunciated in the Institutions of Purely Public Charity Act (Charity Act) to determine whether the Property deserved an exemption. It explains that while the *HUP* test serves as the basis for most determinations of real estate tax exemptions, the various courts, including this one, have reached conflicting results, and the *HUP* test has proven to be far from uniform. It contends that “the Pennsylvania General Assembly, exercising its Constitutional Authority to define the term ‘institutions of public charity,’ passed Act 55,” (Charter School’s brief at 19), and Act 55 is the lawful exercise of the General Assembly’s authority to define the term “institution of purely public charity” contained in Art. VIII, Sec. 2(a)(v) of the Pennsylvania Constitution. Because Act 55 embodies the General Assembly’s view of how the Constitution is interpreted, it is the sole and exclusive test for determining whether entities seeking exemption qualify as institutions of purely public charity, replacing the judicially-created *HUP* test.

(continued...)

and specifically the General Assembly shall not pass any local or special law...exempting property from taxation.”

An entity seeking a statutory exemption for taxation under the General County Assessment Law must first establish that it is a purely public charity under Article VIII, Section 2(a)(v) of the Pennsylvania Constitution which provides, in relevant part:

(a) The General Assembly may by law exempt from taxation: ... (v) Institutions of purely public charity, but in the case of any real property tax exemptions only that portion of real property of such institution which is actually and regularly used for the purposes of the institution.

Under this provision of the Constitution, the General Assembly was given the authority to exempt but was not required to exempt institutions of public charity.

After the General Assembly enacted the Charity Act, our Supreme Court in *Community Options, Inc. v. Board of Property Assessment, Appeals and Review*, 571 Pa. 672, 676, 813 A.2d 680, 683 (2002), held that the constitutional requirement of being a purely public charity and whether the property was being used for a charitable purpose had to first be addressed before addressing Charity Act standards, stating:

An entity seeking a statutory exemption for taxation must first establish that it is a “purely public charity” under Article VIII, Section 2 of the Pennsylvania Constitution before the question of whether that entity meets the qualifications of a statutory exemption can be reached.

Contrary to the Charter School’s argument, the Constitution only permitted the General Assembly to exempt institutions of “purely public charity” and it is for the courts to determine whether an institution meets that standard, not the General Assembly. *See also National Church Residences of Mercer County v. Mercer County Bd. of Assessment Appeals*, 925 A.2d 220 (Pa. Cmwlth. 2007).

In *Hospital Utilization Project*, our Supreme Court set forth a five-part test for determining whether an entity qualifies as a “purely public charity” under the Pennsylvania Constitution. In applying the *Hospital Utilization Project* test, the trial court relied on the parties’ “Joint Stipulation of Fact and Admissibility of Evidence” and supporting briefs. The only evidence the Foundation provided to prove that it met the five criteria included:

- Exhibit M – the Articles of Incorporation for the Foundation;⁹
- Exhibit N – the Bylaws for the Foundation;
- Exhibit P – documents used for fundraising events;
- Exhibit Q – copy of IRS Form 990 for 2008; and

⁹ Exhibit M, the Articles of Incorporation for the Foundation, only provides the name of the corporation and states that it “does not *contemplate* pecuniary gain or profit, incidental or otherwise.” Exhibit N, the Bylaws of the Foundation, states that the purpose of the Charter School is “to provide quality public education for children without regard to race, color, ethnic origin, religion, disability, sex or sexual orientation and to advance the interests of public school students through the promotion and advocacy of community schools.” Exhibit P is documents showing fundraising events for January 2003, April 2003, April 2004, October 2005, April 2006 and May 2009, strictly for the Charter School and not the Foundation which owned the Property at relevant times. The last two Exhibits, Q and R, only show that the Foundation finished the years at a loss.

- Exhibit R – copy of IRS Form 990 for 2009.

The trial court did not believe that the Foundation met its burden to obtain the exemption explaining as follows:

There is no need to examine each of these criteria in depth as the qualification of the Foundation as an institution of purely public charity need not be reached given the lack of unity of ownership in and occupancy of Property. However, out of an abundance of caution, we note that we have considered this issue and concluded that the Foundation cannot meet the second and third criteria of the HUP test and withhold comment on the first, fourth and fifth criteria. Regardless of the Foundation's stated mission, the Foundation was nothing more than the owner of property leased to another organization. The Foundation charged the Charter School rent calculated to cover all debt service, taxes and the annual fees and expenses of the Foundation. Stated otherwise, the Charter School paid its own way to occupy the Property. The Foundation received the benefit of the depreciation of the assets that it held. At most, the Foundation performed minimal fundraising activities on behalf of the Charter School; however, such limited activity is not sufficient to alter our conclusion that the Foundation was not an institution of purely public charity. The charitable activities of the Foundation's tenant cannot be ascribed to the Foundation.

(Trial court's October 7, 2010 opinion at 6-7.) Based on our review of these same documents which the trial court reviewed, we agree that the Foundation did not prove that it donated or rendered gratuitously a substantial portion of its services and benefited a substantial and indefinite class of persons who were legitimate

subjects of charity, the Charter School's argument fails, and we need not review the other three criteria.¹⁰

III.

Finally, the Charter School argues that under Section 204(a)(4) of the General County Assessment Law,¹¹ exemptions from real estate are authorized. That section provides:

(4) All schoolhouses belonging to any county, borough or school district, with the ground thereto annexed and necessary for the occupancy and enjoyment of the same, except that there shall be no exemption for grading, paving, curbing, macadamizing, maintenance, or improvement of streets or roads and constructing sewers and sidewalks and other municipal improvements abutting land owned by a school district other than any school district of the first class or first class A or school district of the second, third or fourth class which is coterminous with a city, borough, town or township, except that any such school district of the second, third or fourth class coterminous with a city, borough, town or township may agree to pay all or part of any such assessments or charges. (Emphasis added.)

The Charter School argues that because it is a school house, there is no requirement that ownership and occupancy of the Property be vested in a single institution of purely public charity. What the Charter School ignores is that the

¹⁰ Because the *HUP* test was not met, we note that even if Act 104 applied, the Charter School would not be entitled to an exemption because it does not meet the constitutional standard for obtaining an exemption.

¹¹ Act of May 22, 1933, P.L. 853, *as amended*, 72 P.S. §5020-204.

exemption only applies when a “county, borough or school district” owns the property, not non-profits such as the Foundation or a charter school.

Accordingly, the order of the trial court is affirmed.

DAN PELLEGRINI, JUDGE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Appeal of Collegium Charter :
School from the decision of the :
Chester County Board of Assessment :
Appeals for property located at 535 :
James Hance Court, West Whiteland :
Township, Chester County, :
Pennsylvania Tax Parcel No. :
41-04-0030.0000 :
: No. 2354 C.D. 2010
Appeal of: Collegium Charter School :

ORDER

AND NOW, this 26th day of July, 2011, the order of the Court of
Common Pleas of Chester County, dated October 7, 2010, is affirmed.

DAN PELLEGRINI, JUDGE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Appeal of Collegium Charter :
School from the decision of the :
Chester County Board of Assessment :
Appeals for property located at 535 :
James Hance Court, West Whiteland : No. 2354 C.D. 2010
Township, Chester County, :
Pennsylvania Tax Parcel No. : Argued: June 9, 2011
41-04-0030.0000 :
:
:
Appeal of: Collegium Charter School :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE BARRY F. FEUDALE, Senior Judge

OPINION NOT REPORTED

**CONCURRING OPINION
BY JUDGE COHN JUBELIRER**

FILED: July 26, 2011

I agree with the majority that Collegium Charter School (Charter School) did not establish that the former Collegium Foundation (Foundation) was an institution of purely public charity in 2009 under either Hospital Utilization Project v. Commonwealth, 507 Pa. 1, 487 A.2d 1306 (1985) (the HUP test) or the Institutions of Purely Public Charity Act (Act 55).¹ However, because I believe that Foundation did not satisfy the criteria for retroactive exemption from taxation

¹ Act of November 26, 1997, P.L. 508, 10 P.S. § 375.

under Section 20 of the Charter School Law (Act 104),² I would not, as the majority does, reach the constitutional issues involved in this matter. In Re: Appeal of Collegium Charter School, No. 2354 C.D. 2010, slip op. at 7-9 (Pa. Cmwlth. July 26, 2011). Therefore, I concur only with the rationales set forth in Parts II and III, as well as with the result of the majority.

Historically, this Court will not reach the issue of constitutionality if we can decide a case on other, non-constitutional grounds. “While it is the duty of the courts to uphold the Constitution, it is likewise their duty not to declare an act unconstitutional unless it is imperatively necessary to do so.” Kelley v. Earle, 325 Pa. 337, 345, 190 A. 140, 144 (1937) (declining to overturn the General State Authority Act for empowering state officers to enter into long-term leases). “It is a fundamental rule that a court will never pass on the constitutionality of a statute, unless it is absolutely necessary to do so in order to decide the cause before it.” Altieri v. Allentown Officers’ and Employees’ Retirement Board, 368 Pa. 176, 180, 81 A.2d 884, 886 (1951) (quoting Commonwealth to Use of Dollar Savings & Trust v. Picard, 296 Pa. 120, 124, 145 A. 794, 796 (1929)).

Charter School argues that Foundation qualified for a tax exemption in 2009 as a purely public charity under the HUP test and Act 55, and also qualified for a tax exemption under Act 104. In Part II of the majority opinion, in which I concur, the majority agrees with the trial court’s determination that Foundation failed to qualify for tax exempt status as a purely public charity in 2009. In Re: Collegium,

² Act 104, Act of November 17, 2010, P.L. 996, No. 104, effective January 18, 2011, amended the Charter School Law, Act of March 10, 1949, P.L. 30, added by Section 1 of the Act of June 19, 1997, P.L. 225, as amended, 24 P.S. § 17-1722-A.

slip op. at 9-13. Criteria for determining whether an entity is a purely public charity are set forth in the HUP test and in Act 55. The HUP test was not superseded by Act 55. The two tests coincide and reinforce each other. Although the Charter School asserts that the Legislature replaced the HUP test with Act 55, (Charter School’s Br. at 10, 16), our Supreme Court held in Community Options, Inc. v. Board of Property Assessment, Appeals and Review, 571 Pa. 672, 676, 813 A.2d 680, 683 (2002), that an entity must *first* establish that it is a purely public charity under the Pennsylvania Constitution, i.e., the HUP test, *before* a court considers whether the entity meets the statutory requirements. In Re: Collegium, slip op. at 10. If an entity cannot qualify as a purely public charity under the HUP test, it likely will not qualify under the more precise and detailed Act 55.³ Thus, I agree with the majority that the trial court was correct in this regard.

Charter School next argues that Foundation qualified for tax exempt status under Act 104. In order for Act 104 to apply to Foundation’s 2009 tax liability, Foundation must satisfy Section 1722-A(e)(3), which authorizes retroactive tax

³ Our Supreme Court has suggested that the HUP test is a threshold for qualifying for tax exemption under Act 55. “An entity seeking a statutory exemption [from] taxation must first establish that it is a ‘purely public charity’ under Article VIII, Section 2 of the Pennsylvania Constitution before the question of whether that entity meets the qualifications of a statutory exemption can be reached. The constitutional test is the five-part standard set out in HUP.” Alliance Home of Carlisle, PA v. Board of Assessment Appeals, 591 Pa. 436, 463, 919 A.2d 206, 222 (2007) (quoting Community Options, 571 Pa. at 676, 813 A.2d at 683). The Supreme Court, thus, adopted the shorthand designation, HUP/Act 55 test. Alliance Home, 591 Pa. at 464-65, 919 A.2d at 223. Nevertheless, “this Court is not obliged to defer to the legislative judgment concerning the proper interpretation of constitutional terms. See Stilp v. Commonwealth, 588 Pa. 539, 905 A.2d 918, 948 (2006) (‘the ultimate power and authority to interpret the Pennsylvania Constitution rests with the Judiciary, and in particular with this Court. . . .’).” Alliance Home, 591 Pa. at 464 n.9, 919 A.2d at 223 n.9.

exemption only for “charter schools, cyber charter schools and *associated nonprofit foundations* that filed an appeal from an assessment.” 24 P.S. § 17-1722-A(e)(3) (emphasis added). Charter School argues that Foundation was an “associated nonprofit foundation.” (Charter School’s Reply Br. at 1.) However, I agree with the West Chester Area School District that Foundation was not a “foundation” for the purposes of Act 104. Although Act 104 does not define the term “foundation,” Black’s Law Dictionary defines “foundation” as “[a] fund established for charitable, educational, religious, research, or other benevolent purposes; an endowment,” and “private foundation” as “[a] charitable organization that is funded by a single source, derives its income from investments rather than contributions, and makes grants to other charitable organizations.” Black’s Law Dictionary 727 (9th ed. 2009). That term also is discussed in Section 2 of the Charitable Instruments Act of 1971, 10 P.S. § 202,⁴ which refers to the term “private foundation” in relation to how that term is used in the Internal Revenue Code of 1986.⁵ *Id.* According to the Internal Revenue Service, most private foundations “have as their primary activity the making of grants to other charitable organizations and to individuals, rather than the direct operation of charitable programs.” Internal Revenue Service, IRS Publication 4221-PF, Compliance Guide for 501(c)(3) Private Foundations, available at <http://www.irs.gov/pub/irs-pdf/p4221pf.pdf>, (IRS Compliance Guide) at 2. Thus, under these definitions, the primary feature of a “foundation” is that it gives money away. However, as the majority opinion points out, funds flowed from Charter School to Foundation, not from Foundation to Charter School. *In Re: Collegium*, slip op. at 3.

⁴ Act of June 17, 1971, P.L. 181, as amended.

⁵ 26 U.S.C. § 4947.

Moreover, Foundation did not regard itself as a “foundation” for federal tax purposes. Foundation filed federal tax returns for 2007 and 2008 as a charitable organization. (Form 990 and Schedule A for 2007 and Form 990 for 2008, R.R. at 785a, 794a, 805a.) IRS Form 990, which Foundation filed, states on its face that it is not to be used by a “private foundation.” (Form 990 and Schedule A for 2007 and Form 990 for 2008, R.R. at 785a, 794a, 805a.) A private foundation would file IRS Form 990-PF. IRS Compliance Guide at 8. This self-identification by Foundation overrides any inference from the statutes under whose provisions the entity was originally created, contrary to Charter School’s contention. (Charter School’s Reply Br. at 1.) I note that, pursuant to Section 1928 of the Statutory Construction Act of 1972, “provisions imposing taxes” and “retroactive provisions” must be strictly construed. 1 Pa. C.S. § 1928(b)(2)-(3); Lehigh Valley Cooperative Farmers v. Bureau of Employment Security, 498 Pa. 521, 525, 447 A.2d 948, 950 (1982) (“A required rule of statutory construction provides that a statute exempting persons or property from taxation must be strictly construed.”)

Finally, Act 104 itself distinguishes between a “nonprofit corporation” and a “nonprofit foundation.” While the Legislature granted both entities tax exemption in subsection (e)(1) of Act 104, along with charter schools and cyber charter schools, 24 P.S. § 17-1722-A(e)(1), the Legislature made the exemption retroactive only for charter and cyber charter schools and for “nonprofit foundations” in subsection (e)(3), 24 P.S. § 17-1722-A(e)(3). There is no retroactive provision for nonprofit corporations. Thus, for the foregoing reasons, I would conclude that Charter School failed to prove that Foundation qualified for the retroactive provision of Act 104.

This Court should affirm the trial court's order because Charter School did not prove that Foundation qualified for tax exemption as a purely public charity under the HUP test or Act 55, or that it was entitled to retroactive application of Act 104 pursuant to Section 1722-A(e)(3) of Act 104. Accordingly, I believe that it is not necessary for our Court to address the constitutionality of Act 104 at this time.

RENÉE COHN JUBELIRER, JUDGE