

Home Care Association of New Hampshire

v.

City of Concord

Docket No.: 22995-06EX

ORDER

On April 3, 2009 the board issued a “Decision” in the above-referenced case. The City of Concord (“City”) filed a Motion for Reconsideration on May 15, 2009 which the board denied on June 15, 2009. The City timely appealed the board’s Decision to the New Hampshire Supreme Court (the “Court”). On January 13, 2011 the Court issued an opinion, Appeal of City of Concord 161 N.H., 344 (2011) (“Concord”), vacating and remanding the Decision and directing the board to make further findings consistent with its opinion on two (2) issues.

First, whether Home Care Association of New Hampshire’s (“Home Care” or the “Taxpayer”) services, which they contend benefit the general public, are “merely incidental to a dominant or primary purpose ... of benefiting HCA’s members, or whether these benefits to the public are slight, negligible or insignificant when compared to the benefit derived by HCA’s members”. Id. at 352-353. Further, and on a related issue, the Court directed the board to specifically determine “whether [Home Care] is, in fact, in the manner in which it is operated, more akin to a trade or professional association”. Id. at 353.

Second, the Court directed the board to determine whether the activities of the Taxpayer's wholly-owned subsidiary, the Granite State Home Health Association (the "GSHHA"), necessitate an allocation between the exempt and non-exempt use of that portion of the Property owned, used and occupied by Home Care.

Overview

After Concord was issued, the board ordered the parties to submit briefs on the application of Concord to the existing record in this case. As the Taxpayer noted in its brief, the Court did not disturb or overturn any of the board's factual findings or rulings of law found in the Decision and such findings are deemed *prima facie* lawful. Therefore, the board will only address the two questions specified by the Court on remand. We will address each of these individually.

Question I.

Whether the benefits to the general public are merely incidental to a dominant or primary purpose of benefiting Home Care's members, or whether these benefits to the public are slight, negligible or insignificant when compared to the benefit derived by Home Care's members, and whether Home Care is operated in a manner more akin to a trade or professional association.

The board finds a review and comparison of the Taxpayer's Articles of Agreement and Mission Statement to its actual practices is appropriate and informative.

In particular, Article II of the Articles of Agreement states "[t]he objectives for which this corporation is established are:

- (1) To promote not-for-profit home health care and related services.
- (2) To promote programs and services directed toward the prevention of illness, the encouragement of good health practices and the overall protection of the public's health.

- (3) To work with other groups, associations, agencies and individuals toward coordination, increased effectiveness and availability of human services for all residents of the State of New Hampshire.”

Further, the Taxpayer’s “Mission Statement” states: “[t]he Home Care Association of New Hampshire is a membership organization which enhances the ability of agencies providing home health care to deliver quality services to New Hampshire residents. The Association carries out this mission through education, networking, research, leadership, and public policy advocacy.”

Board’s Rulings on Question I.

The board finds the activities of Home Care comport with its Articles of Agreement and Mission Statement and its primary or dominant purpose is to “promote not-for-profit home health care...” through its educational services to its member organizations and “through... networking, research, leadership and public policy advocacy” (Taxpayer’s mission statement, Municipality Exhibit A at Tab A) (see also e.g., Municipality Exhibit A at Tabs M and N). We further find Home Care provides a benefit to the general public which is not “slight, negligible or insignificant.”

In their briefs, both parties relied on the Court’s review of a case decided by the Massachusetts Supreme Judicial Court in the matter of the Massachusetts Medical Society v. Assessors of Boston, 164 N.E. 2d 325 (Mass. 1960) to support their positions.

The City contends Home Care is similar to the Massachusetts Medical Society (the “Society”) in that both organizations are administered and operated primarily for the benefit of their members and, therefore, Home Care can not qualify for a charitable exemption. The board disagrees. The Court found instructive the Massachusetts court’s statement that:

“[w]hether an institution in its character is literary, benevolent, charitable or scientific will depend upon the declared purposes and actual work performed. An institution will be classed as charitable if the dominant purpose of its work is for the public good and the work done for its members is but the means adopted for this purpose. But if the dominant purpose of its work is to benefit its members or a limited class of persons it will not be so classed, even though the public will derive an incidental benefit from such work.”

Id. at 328 (citations omitted). Applying this principle to the instant case, we find significant dissimilarities which distinguish the organization and operation of Home Care from that of the Society.

In the case of the Society, membership is restricted and new members applying are required to meet certain, specific qualifying factors and criteria. For instance, an applicant for membership in the Society must have received a license to practice medicine in the United States, appear before the censors and pass an examination. Home Care does not have such a narrowly restricted membership requirement. Home Care has three categories of memberships available. While Home Care does limit membership in the first two categories to licensed home health care providers and services, the third category, in contrast to the Society, includes individual memberships, without any licensing or testing requirements, available to anyone with the only stipulation being that they subscribe to the stated purpose and objectives of Home Care. The board finds these are significant differences between the Taxpayer and the Society. Further, the board finds these dissimilarities highlight who are the primary beneficiaries of each organization’s activities. The Society’s organization and practice was found by the Massachusetts court to primarily be confined to promoting the common interests of a limited group of persons, its members, with the general public being only an incidental beneficiary. Therefore, the Society could not qualify for a charitable exemption because it is more akin to a trade organization in its formation and operation.

Further, and as the board noted in the Decision, the fact Home Care works through its members to accomplish the objectives outlined in its Mission Statement and Articles of Agreement does not preclude it from qualifying for a charitable exemption. As was the case in Appeal of City of Laconia, 146 N.H. 725, 729 (2001), membership fees here are similar to the “cost shifting” to the residential housing units at Taylor Home and provide “one of the main ‘money engines’ generating funds necessary...” to carry out Home Care’s charitable purpose. It is important to remember that Home Care’s objectives are not to provide home health care directly but “[t]o work with other groups, associations, agencies and individuals...”. While this interaction with its members does benefit them as well as the general public, the board finds this interaction is necessary to effectively and efficiently accomplish the Taxpayer’s mission which is to enhance “the ability of agencies providing home health care to deliver quality services to New Hampshire residents” (emphasis added). The phrase “to New Hampshire residents” further demonstrates the Taxpayer’s mission is primarily to benefit the general public rather than members of its organization and is further evidence Home Care is not operated in the same manner as a trade organization.

Because the board has determined Home Care’s charitable mission is its dominant or primary purpose, it reasonably follows the benefits to the public are not “slight, negligible or insignificant” compared to the benefit derived by Home Care’s members. The board finds Home Care’s practice and administration to be significantly different from that of the Nature Conservancy (see Nature Conservancy v. Nelson, 107 N.H. 316 (1966)) where the Court found that the use of the Nature Conservancy’s property in Nelson, in performing its charitable purpose, was slight, negligible and insignificant compared to its other non-charitable

uses. In Nature Conservancy, the Court found the use by the taxpayer in that case over the course of a five (5) year period was so limited that it did not qualify for an exemption.

Further, Home Care's practice and administration in compliance with its mission statement, demonstrates that its practice is not "indefinite and prospective" nor does it depend on some future action by others. See cases cited in Concord at 351. It is the mission of Home Care to provide to anyone interested an opportunity to obtain and provide coordinated, efficient, educated home health care to the general public.

Question II.

Does the use of the Property by GSHHA impact the amount of exemption, if any, to which Home Care may be entitled.

Upon further review and as the Taxpayer's brief conceded, the board determines the activities of GSHHA do not qualify it for a charitable exemption and an allocation of value is appropriate for that portion of the Property for which Home Care is seeking exemption and which GSHHA "uses." The Taxpayer submitted a method to approximate a reduction in the exemption allowance if the board were to find that a reduction was appropriate. The board finds the Taxpayer's suggested methodology to be reasonable and has applied it in this order. Comparing the gross receipts of GSHHA to the gross receipts of Home Care over a two year period (2005-2006) indicates a reduction of approximately 8% to the 50% exemption requested by Home Care is reasonable. The City did not submit for consideration any alternative methodology for determining what allocation may be appropriate. Therefore, the board finds the Taxpayer is entitled to an exemption equal to 46% [$50\% - (8\% \text{ of } 50\% \text{ or } 4\%) = 46\%$] of the total assessed value for that portion of the property owned, used and occupied by Home Care. While the board recognizes this metric may vary as the GSHHA lobbying efforts vary from year

to year, the resultant 8% is proportional to the general magnitude testified to of Home Care's staff involvement in GSHHA affairs versus Home Care's educational and other functions.

If the taxes have been paid for that portion of the property determined to be exempt, they shall be refunded with interest at six percent per annum from date paid to refund date.

RSA 76:17-a. RSA 76:17-c, I and II.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Michele E. LeBrun, Member

Douglas S. Ricard, Member

SPECIAL CONCURRENCE

In Concord, the Court found that either the benefits provided by Home Care had a "dominant or primary purpose" of benefiting the public rather than Home Care's members or the "benefits to the public are slight, negligible or insignificant when compared to the benefit derived by HCA's members." While I concur, on balance, with the conclusion of the majority, the evidence in this case contains enough contradictions that an indisputable resolution does not fit neatly in the square boxes envisioned by the Court in Concord.

On one hand, I agree with my colleagues that the "membership" format is a reasonable mechanism or "money engine" to raise revenue and provide a vehicle for the educational purposes of Home Care and its implementation and introduction of new technologies to "agencies providing home health care to deliver quality services to New Hampshire residents." ("Mission Statement" at Municipality Exhibit A, Tab A). Because the population of home care

providers is large and varied, such a mechanism (membership organization) is a feasible and efficient way to promote and improve home health care to New Hampshire residents.

On the other hand, however, evidence was submitted to support the City's argument that Home Care's focus is as a membership organization. An example is the fact Home Care lists on its website only members of the association rather than all New Hampshire licensed home care providers. Further, certain information Home Care gathers and disseminates is only available to its members and not the entirety of the licensed home health care provider population. I recognize that membership in Home Care is available and open to all entities or individuals for a fee and, thus, arguably all have the potential access to the referral, research and other benefits commensurate with membership. However, it does beg the question that if the "dominant or primary purpose" of Home Care is to improve the home health care to citizens, why are not all qualified and licensed providers referenced on the Home Care website (perhaps with a notation or qualification of membership status)?

Such inconsistencies highlight the difficulty of definitively finding on one hand the benefits to the general public are the dominant or primary purpose while at the same time inversely finding the benefit to Home Care members is "slight, negligible or insignificant." It just isn't that simple or definitive.

To be clear, this special concurrence is not intended to criticize the Concord decision, Home Care's membership structure or the City's questioning of a long-standing exemption. Rather, it is intended to note that all too frequently there are conflicting facts presented in such exemption cases, especially as the complexity of our society evolves and spawns the creation of specialized, not for profit organizations to provide niche services to the general public (See e.g. Appeal of Town of Wolfeboro, 152 N.H. (2005); Appeal of City of Concord, 146, N.H. 725

(2001). It is also intended to suggest that in such situations where it is difficult to neatly categorize the benefits and purposes of the organizations into the legal boxes that the statute and case law create, it might be appropriate for both parties (taxing jurisdictions and entities seeking exemption) to explore resolution through the RSA 72:23-n (voluntary payment in lieu of tax statute) rather than engage in full-throttled litigation such as has ensued in this appeal. When enacted in 1996, RSA 72:23-n was the sole amendment to the statutes that came out of a several year legislative committee set up to study payment in lieu of tax payments by governmental, religious, educational and charitable institutions. (Chapter 18, Laws of 1993). I would suggest and encourage the parties, even at this stage of the appeal, to consider this voluntary statutory option. This voluntary payment in lieu of tax statute can perhaps better foster an equitable resolution of the several meritorious, yet conflicting, arguments presented in this appeal than attempting to reconcile the unique facts through litigation and the “dominant/incidental” standards set out in Concord. I recognize this process would involve setting aside entrenched convictions and the willingness, particularly on the part of the City, to depart from the grant or deny mandates of RSA 72:23 and to be comfortable with the potential risk (actual or perceived) of precedence that such voluntary arrangements may entail. However, it may arrive at a more equitable solution, foster good community relations and be a more efficient investment of both parties’ limited resources.

Paul B. Franklin, Chairman

Certification

I hereby certify a copy of the foregoing Order has this date been mailed, postage prepaid, to: Christopher J. Sullivan, Esq., Rath, Young & Pignatelli, P.C., One Capital Plaza - PO Box 1500, Concord, NH 03302, counsel for the Taxpayer; James W. Kennedy, Esq., Deputy City Solicitor, 41 Green Street, Concord, NH 03301, counsel for the City; and Chairman, Board of Assessors, City of Concord, 41 Green Street, Concord, NH 03301.

Date: July 15, 2011

Anne M. Stelmach, Clerk