**Taxation—Utility Taxes**

Disparate Treatment of Utility Assessment

By City OK Under Equal Protection Clause

By J.P. Finet and Bernard J. Pazanowski

Indianapolis's forgiveness of the sewer assessments of property owners who chose to pay through an installment plan—without offering refunds to those who made a lump-sum payment—did not violate the Equal Protection Clause, the U.S. Supreme Court decided June 4 in a 6–3 opinion (Armour v. Indianapolis, U.S., No. 11-161, 6/4/12).

"We hold that the City had a rational basis for distinguishing between those lot owners who had already paid their share of project costs and those who had not," Justice Stephen G. Breyer wrote for the court. "And we conclude that there is no equal protection violation."

The dissenting justices found Indianapolis's stated reasons for treating the taxpayers differently—avoiding an administrative hassle and the fiscal challenges of refunding the money—did not "pass constitutional muster," even under rational basis review.

Chief Justice John G. Roberts Jr., who was joined by Justices Samuel A. Alito Jr. and Antonin Scalia, noted that the court had never before held that administrative burdens justify grossly disparate tax treatment of those who should be treated alike. Because some property owners ended up paying assessments that were 30 times more than their neighbors, the equal protection violation is plain, he said.

**Deferential Rational Basis Standard 'Solidified.'**

Ruthann Robson, a constitutional law professor at City University of New York School of Law BNA June 4 that the opinion solidifies the extremely deferential rational basis standard for tax assessments that may seem "unequal," even in cases in which there is a high level of inequality. However, she did not think it changes equal protection jurisprudence.

"The case is important because it once again allows the government's 'administrative costs' to be the rationale for resulting inequality," Robson said. "In this way, an inequality claim cannot survive if the government argues (and demonstrates) it would cost the government money to achieve equality. In this way, the government's costs trump the costs paid by individual taxpayers."

Robson said it was interesting that the dissenting justices in Amour are those who are generally less inclined to be rigorous about demands for governments to achieve equality, even in the economic and tax realms.

"These dissenting Justices also tend to promote deference to government and criticize judicial activism," she said.

Quin Sorenson, who authored the amicus brief for International Municipal Lawyers Association supporting Indianapolis, said his organization is delighted by the court's decision. Sorenson is a partner with Sidley Austin LLP in Washington, D.C.

"It holds, as the International Municipal Lawyers Association argued in its brief, that the Equal Protection Clause does not withdraw from municipalities their traditional authority to craft and manage their individual tax policies in light of changing economic conditions and legitimate administrative concerns," he said. "Such
decisions are quintessentially legislative in nature and, as today's decision recognizes, should be resolved through the political process, not litigation.”

Lisa Soronen, executive director of the State and Local Legal Center, which filed an amicus brief in the case also supporting Indianapolis, told BNA June 4 that “it is important for state and local governments to be able to consider administrative efficiency in making tax forgiveness decisions and moving on from one program” to the next. She also said that the opinion “seems to marginalize” the Supreme Court's opinion in Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty., 488 U.S. 336 (1989).

Alexander Will, Indianapolis's chief litigation counsel, told BNA June 4 that the city believes the Supreme Court's opinion is simply an affirmation of existing equal protection jurisprudence.

**Will Taxpayers Lose Rights?**

The Supreme Court's decision in Armour is important not just because the property owners in the case stand to lose thousands of dollars, Robert McNamara told BNA in a June 4 email. McNamara, who was counsel of record for an amicus brief submitted by the Institute for Justice on behalf of the taxpayers, said the rest of the taxpayers also stand to lose their constitutional rights.

"Most equal-protection cases are decided under rational-basis review, the standard the Court used in this case, and all too often, 'rational-basis review' is taken by courts to mean simply 'the government always wins,'” he said.

However, McNamara said that courts should do what Roberts did in his Armour dissent: engage with the facts to determine what is really going on in a given case.

"Doing anything less simply strips the Constitution of its meaning, changing (as the Chief aptly put it) the Equal Protection guarantee into a guarantee of equal protection 'unless its too much of a bother,'” he said.

McNamara added that it was significant that none of the justices adopted the reasoning of the Indiana Supreme Court—that it was “conceivable” that the people paying on the installment plan were poorer than the people who had paid up front.

**Improvements Funded Under Barrett Law**

Indiana's Barrett Law permits cities to pay for public improvements, such as sewer projects, by apportioning the costs of the project among abutting properties. The law permits lot owners to pay the assessment in either a single lump sum or through installment payments. While Indianapolis abandoned Barrett Law financing in 2005 for its septic tank elimination program, several Barrett Law projects remained open.

The Brisbane/Manning Project began in 2001 and connected 180 homes to the city's sewer system. A 2004 notice provided property owners with the option of either paying the entire $9,278 assessment in one lump sum, or through installments over as long a period as 30 years. Thirty-eight homeowners chose to pay up front, with the remainder opting for some type of installment plan.

In October 2005, Indianapolis enacted an ordinance implementing a new method of financing through which it would charge a property owner a flat fee to connect to the sewer system and floated bonds to pay the remainder of the project's cost. While those who were paying for the Brisbane/Manning project through installment agreements no longer had to make payments, the city refused refunds to those who made the lump-sum payment.

The 31 property owners who sued the city won at the trial court level, but the Indiana Supreme Court found that the city's distinction between those who already paid their Barrett Law assessments and those who had not was rationally related to its legitimate interests in reducing its administrative costs, providing relief to property owners experiencing financial hardship, establishing a transition to the new funding system, and preserving the city's limited resources.

**No Fundamental Right, Suspect Classification**

The Supreme Court noted that it has long held that a classification which neither involves fundamental rights nor proceeds along suspect lines cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and a legitimate governmental purpose.

“Indianapolis' classification involves neither a 'fundamental right' nor a 'suspect' classification,” the court said.
“Its subject matter is local, economic, social, and commercial. It is a tax classification. And no one here claims that Indianapolis has discriminated against out-of-state commerce or new residents,” it said.

The case falls directly within the scope of precedent holding that a law is constitutionally valid if there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may be considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated to render the distinction arbitrary or irrational, the court said.

“In our view, Indianapolis’ classification has a rational basis,” the court said. “Ordinarily, administrative considerations can justify a tax-related distinction. ... And the City’s decision to stop collecting outstanding Barrett Law debars finds rational support in related administrative concerns.”

Financial Hardship Not an Issue

The court noted that the state court listed financial hardship as one factor supporting rationality. It refused, however, to address that issue. Instead, it said that “the administrative considerations we have mentioned are sufficient to show a rational basis for the City’s distinction.”

The court also said that “even if the petitioners have found a superior system” for handling their assessments, “the Constitution does not require the City to draw the perfect line nor even to draw a line superior to some other line it might have drawn. It requires only that the line actually drawn be a rational line.” The line drawn by Indianapolis meets that requirement, it said.

The petitioner argued that under Allegheny, Indianapolis's treatment of their assessments is not rationally based, because state law requires taxpayers to be treated equally. The court, however, said that Allegheny "involved a clear state law requirement clearly and dramatically violated. Indeed, we have described Allegheny as 'the rare case where the facts precluded' any alternative reading of state law and thus any alternative rational basis.”

In this case, however, "the City followed state law by apportioning the cost of its Barrett Law projects equally. State law says noting about forgiveness, how to design a forgiveness program, or whether or when rational distinctions in doing so are permitted,” the court said. “To adopt petitioners' view would risk transforming ordinary violations of ordinary state tax law into violations of the Federal Constitution,” it said.

"The Court reminds us that Allegheny Pittsburgh is a 'rare case,' ” Roberts said in his dissent. "It is and should be; we give great leeway to taxing authorities in this area, for good and sufficient reasons. But every generation or so a case comes along when this Court needs to say enough is enough, if the Equal Protection Clause is to retain any force in this context. Allegheny Pittsburgh was such a case; so is this one.”


For More Information