COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2023-P-0080

OUTFRONT MEDIA LLC,

Appellant

V.

BOARD OF ASSESSORS OF BOSTON,

Appellee

On Appeal from a Decision of the Appellate Tax Board,
ATB Docket Nos. F343159, F343161, F343162, F343163,
F343164, F343165, F343166, F343168 & F343492

APPELLANT OUTFRONT MEDIA LLC'S BRIEF ON APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, Appellant OUTFRONT MEDIA LLC ("OUTFRONT"), by and through its undersigned counsel, makes the following disclosure:

OUTFRONT is a wholly-owned subsidiary of OUTFRONT MEDIA INC., a publicly traded company. There is no publicly-held corporation that owns more than 10% of the common stock of OUTFRONT MEDIA INC.

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INTRODUCTION

This appeal raises a novel question of statutory interpretation regarding the proper construction of language that was added to the Massachusetts Bay Transportation Authority's ("MBTA") Enabling Statute in 2013. For decades, all real and personal property of the MBTA enjoyed an unqualified exemption from taxation pursuant to the first paragraph of G. L. c. 161A, § 24. That changed in 2013, however, when the Legislature added new language to the second paragraph of G. L. c. 161A, § 24 that, in substance, grants municipalities the authority to assess taxes against MBTA real property if – **and only if** – it can be shown that the property is leased, used, or occupied in connection with a business conducted for profit.

In pertinent part, this new statutory language provides as follows:

> Real property of the authority shall, if leased, used, or occupied in connection with a business conducted for profit shall, for the privilege of such lease, use or occupancy be valued, classified, assessed and taxed annually as of January 1 to the lessee, user, or occupant in the same manner and to the same extent as if such lessee, user, or occupant were the owner thereof in full.

G. L. c. 161A, § 24.

Appellant, OUTFRONT Media LLC ("OUTFRONT"), respectfully asserts that this statutory language cannot be properly construed to confer upon the Appellee, the Board of Assessors of Boston ("Assessors"), the power to assess taxes against commercial advertising billboards that are owned by the MBTA and merely managed by OUTFRONT pursuant to the terms of a publicly-bid services contract that creates no possessory interest in MBTA real property and serves purposes that are statutorily integrated with the MBTA's essential function.

STATEMENT OF ISSUES

The following three issues are presented for review:

1. Whether the Appellate Tax Board ("ATB") erred in finding that OUTFRONT carries the burden of establishing that it is entitled to a tax exemption where the Assessors lack statutory authority to tax MBTA property unless it can be shown that the property is leased, used, or occupied in connection with a business for profit.
2. Whether the ATB erred in denying OUTFRONT's Motion for Summary Judgment where OUTFRONT holds

no possessory interest in MBTA property and merely manages MBTA-owned billboards pursuant to a publicly-bid services contract.

3. Whether the ATB erred in granting the Assessors' Motion for Partial Summary Judgment despite disputed factual questions regarding whether, and the extent to which, taxation of MBTA-owned billboards causes an unlawful interference with the MBTA's essential function.

STATEMENT OF THE CASE

On February 2, 2021, OUTFRONT filed applications for property tax abatements concerning fiscal year 2021 real estate taxes that the Assessors assessed against fourteen advertising structures (the "Signs") that are owned by the MBTA and managed by OUTFRONT pursuant to the terms of a publicly-bid services contract. See R.A. 273/Add.45, 124-204.[1/] The Assessors denied OUTFRONT's applications for abatements in March and April of 2021. R.A. 124-204, 275/Add.47.

In June 2021, Appellant, OUTFRONT, filed timely appeals with the ATB pursuant to G. L. c. 58A, § 7 and

[1/] Citations in the form "R.A.__" refer to the page number of the single volume Record Appendix filed concurrently with the brief. Citations in the form "Add.__" refer to documents included in the addendum to this brief.

G. L. c. 59, §§ 64 & 65, challenging the Assessors' denials of OUTFRONT's applications for real estate tax abatements. R.A. 124-204. In its appeal to the ATB, OUTFRONT alleged that Assessors had improperly assessed $198,257.49 in FY21 real estate taxes against fourteen Signs. R.A. 205, 273/Add.45.

On January 21, 2022, OUTFRONT moved for summary judgment on grounds that it does not lease, use, or occupy the Signs in connection with a business for profit as is necessary to confer upon the Assessors the authority to tax the Signs pursuant to G. L. c. 161A, § 24. R.A. 5, 205, 276/Add.48. On March 9, 2022, the Assessors filed a Motion for Partial Summary Judgment arguing that the word "use" in G. L. c. 161A, § 24 should be construed so broadly as to grant the Assessors unconstrained authority to impose taxes on any MBTA property that is "put into action or service," or made to "avail oneself of," or "employ[ed]" in connection with a business for profit. See R.A. 231, 276/Add.49. The Assessors further argued that OUTFRONT should carry the burden of showing that it is entitled to a tax exemption, even where the Assessors lack statutory authority to tax the Signs absent a showing that the Signs are leased, used, or

occupied in connection with a business for profit. See R.A. 227.

On June 3, 2022, the ATB issued an Order denying OUTFRONT's Motion for Summary Judgment and allowing the Assessor's Motion for Partial Summary Judgment. R.A. 5, 268, 276/Add.48. On July 11, 2022, OUTFRONT elected to withdraw its secondary and alternative challenge to the valuation of the nine Signs that are the subject of this appeal in order to ripen the issues presented for determination by this Court.[2/] R.A. 5, 269, 276/Add.48. On September 15, 2022, the ATB issued its Findings of Fact and Report articulating the grounds for its decision to deny OUTFRONT's Motion for Summary Judgment and grant the Assessors' Motion for Partial Summary Judgment in accordance with G. L. c. 58A, § 13 and 831 Code Mass. Regs. § 1.32. R.A. 5, 273, 295-296/Add.45,67-68.

OUTFRONT filed a timely notice of appeal on October 7, 2022, and this appeal is now properly before this Court. R.A. 247-249.

[2/] The abatement appeals for which OUTFRONT did not withdraw its valuation challenge (Docket Nos. F343167, F343160, F343157, F343491, F343158) remain pending before the ATB and are not at issue in this appeal.

STATEMENT OF THE FACTS

I. The MBTA Solicits Bids From Outdoor Advertising Contractors To Assist The MBTA In Fulfilling Its Essential Function

By statutory mandate, the MBTA is obligated to maximize its revenues generated from commercial advertising.[3/] Acting pursuant to that mandate, the MBTA endeavored in April 2019 to solicit bids from outdoor advertising companies that could help the MBTA manage and maximize revenues from its portfolio of commercial billboards. See R.A. 31, 277-278/Add.49-50. Accordingly, the MBTA generated a publicly-bid contract for "Outdoor Information Panel Services" pursuant to MBTA RFR # 77-19 (the "Services Contract") for the express purpose of "providing consistent revenue streams to support transportation programs as well as providing new opportunities to communicate vital travel information to current and potential customers." R.A. 26 (§ 1.2.1), R.A. 62, 277-278/Add. 49-50. The MBTA also desired for the Services Contract

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[3/] See MBTA v. City of Somerville, 451 Mass. 80, 86-87 (2008) (holding that commercial advertising revenues generated from MBTA billboards are "statutorily integrated with the MBTA's ability to provide mass transportation services, its essential function" and that the "MBTA is required by statute to maximize its revenues from commercial advertising").

to "allow additional investment in the underlying infrastructure, secure additional commercial revenues, and provide additional value to the MBTA to market and provide information about its services, benefiting MBTA ridership." R.A. 26 (§ 1.2.2).

In sum, the MBTA generated the Services Contract so that it could partner with an outdoor advertising company that would help the MBTA maximize commercial advertising revenues in accordance with the MBTA's statutory mandate. See R.A. 26-27. Effecting that goal, the Services Contract provides that the MBTA shall receive a specified percentage of advertising and other revenues generated from the Signs above the Contract's Minimum Annual Guarantee Payment. R.A. 86-87. This percentage revenue share payable to the MBTA under the Services Contract is "statutorily integrated" with the MBTA's essential function.[4/]

II. Terms By Which OUTFRONT Manages The Signs For the MBTA

The MBTA awarded the Services Contract to OUTFRONT in October 2019. R.A. 122-123, 277-278/Add.

[4/] See Somerville, 451 Mass. at 86-87 (holding that commercial advertising revenues generated from MBTA billboards are "statutorily integrated with the MBTA's ability to provide mass transportation services, its essential function").

49-50. Under its terms, OUTFRONT holds two primary and limited rights relative to the Signs: (1) Advertising Rights that give OUTFRONT "the exclusive right to advertise" on the Signs [R.A. 77 (§4.2.1)]; and (2) Telecommunications Rights that give OUTFRONT "the exclusive right to install, license, operate and maintain telecommunications equipment" on the Signs. R.A. 77 (§4.2.2). Though the Services Contract also grants OUTFRONT a corresponding right to access MBTA's property solely "for the purposes of performing the Work" called for under the Services Contract, OUTFRONT is expressly forbidden from accessing the MBTA's property "for any purpose other than exercising the rights granted to [OUTFRONT] under the Contract and for performing the Work." R.A. 79 (§4.3.3).

The Services Contract also places extensive constraints on OUTFRONT's rights relative to the Signs by, among other things:

(1) Prohibiting OUTFRONT from exercising its Rights in a way that would "interfere with or otherwise adversely affect the MBTA's operations" (R.A. 78 [§4.2.3]);

(2) Requiring that the MBTA "approve[] in advance" OUTFRONT's access to, and work done on MBTA property (R.A. 79 [§4.2.3]);

(3) Limiting access to MBTA property to only those OUTFRONT employees who have been issued an "MBTA Contractor Identification Card" (Id.);

(4) Requiring that all Outdoor Advertising Permits for the Signs be issued and remain in the MBTA's name during the Term of the Services Contract (R.A. 80 [§4.5.1]);

(5) Rendering OUTFRONT's "schedule, plans, drawings, and product information" for equipment installations subject to the MBTA's review and approval (R.A. 81-82 [§§4.6.2-4.6.4]);

(6) Requiring OUTFRONT to "submit all advertising content to the MBTA for the MBTA's review and approval prior to posting" (R.A. 83 [§4.7.1]);

(7) Providing that OUTFRONT must remove any advertising content that fails to comply with the MBTA Advertising Guidelines within 3 business days of written notice from the MBTA (R.A. 84 [§4.7.1]);

(8) Rendering OUTFRONT's proposed "rates and charges for the sale of all advertising space" on the

Signs "subject to the review and prior approval of the MBTA" (R.A. 84 [§4.7.2]); and

(9) Requiring OUTFRONT to provide up to 25% of digital display time to the MBTA and/or its Municipal Partners at no cost and to make additional display time available at no cost for emergency postings by the MBTA (R.A. 84-85 [§4.7.4]). Furthermore, the MBTA can unilaterally revoke all of OUTFRONT's limited and narrowly-defined rights under the Services Contract at any time during the term of the Services Contract. (R.A. 92-93 [§4.12.1]).

III. Extensive Rights Retained By The MBTA Under The Services Contract

In sum, the Services Contract narrowly defines OUTFRONT's limited role in assisting the MBTA to maximize revenues from the Signs, and it expressly provides that "[a]ny rights not expressly granted to [OUTFRONT] under the Contract shall be reserved to the MBTA. . . ." (R.A. 78 [§4.2.3]). These comprehensive rights reserved by the MBTA include:

(1) The right to maintain "sole title and ownership" of the Signs for the duration of the Term (R.A. 78 [§4.3.1]);

(2) The right to deny and/or condition OUTFRONT's access to MBTA property (R.A. 79 [§4.3.3]);

(3) The right to determine which, if any, equipment installations OUTFRONT may make pursuant to the Contract (R.A. 81-82 [§§ 4.6.2-4.6.4]);

(4) The right to reject any advertising content OUTFRONT plans and/or posts on the Signs (R.A. 84 [§4.7.1]);

(5) The right to reject any rates or charges that OUTFRONT proposes for the sale of advertising time on the Signs (id. [§4.7.2]); and

(6) The right to use at least 25% of the digital display time at no charge. (R.A. 84-85 [§4.7.4]).

In tandem with the MBTA's comprehensive reservation of rights, the Services Contract also provides that the MBTA shall retain all rights of possession and ownership over the signs. R.A. 78 (§4.2.3). Indeed, the Services Contract does not even grant OUTFRONT a temporary leasehold, right of use and occupancy, or other possessory interest in the Signs. See R.A. 62-121. Instead, the Services Contract specifies that upon expiration or early termination of its term, OUTFRONT must "immediately assign all

existing revenue-producing contracts" to the MBTA and immediately "hand back" the Signs to the MBTA in good working order. R.A. 94 (§§4.12.4-4.12.5). OUTFRONT must also provide the MBTA with a "Transition Out Plan" that describes "how the Work, the [Signs], contracts, permits, licenses and other deliverables required under the Contract will be transitioned in a timely and collaborative manner either to the MBTA or to a successor contractor for the MBTA" upon expiration or earlier termination of the Contract. R.A. 94 (§4.12.3).

Finally, the Services Contract also provides that OUTFRONT shall benefit from the MBTA's exemption from municipal property taxes. R.A. 97 (§4.13.5). The Services Contract memorializes that concept at Section 4.13.5, where it provides that "[t]o the extent allowed by law and applicable to the services provided under the Contract, the MBTA shall pass on to [OUTFRONT] tax exemptions applicable to the MBTA" and further provides that the Signs "constitute MBTA facilities and are real property." Id.

IV. The Assessors Impose Taxes Against The Signs Based Upon OUTFRONT's Performance Of Its Duties Under The Services Contract

In spite of these and other terms in the Services Contract that resemble nothing even close to a commercial lease or a use and occupancy agreement, the Assessors concluded that they have authority to assess taxes against the Signs pursuant to G. L. c. 161A § 24. R.A. 229-230. OUTFRONT is entitled to an abatement of those taxes for the reasons described below.

SUMMARY OF THE ARGUMENT

The Commonwealth's tax laws are to be strictly construed, and the right to tax must be plainly conferred by the statute (OUTFRONT Brief at 23). Here, G. L. c. 161A, § 24 confers authority for the Assessors to impose taxes against MBTA property only where it can be shown that the property is leased, used, or occupied in connection with a business for profit. Accordingly, the Assessors carry the burden of showing that the Services Contract rises to the level of a lease, use, or occupancy of MBTA property because, absent such a showing, the Assessors lack statutory authority to assess taxes against the Signs pursuant to G. L. c. 161A § 24. Id. On that question, all doubts are to be resolved in favor of OUTFRONT.

Under the Commonwealth's rules of statutory construction, words that have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such meaning (OUTFRONT Brief at 27). Here, the words "lease" "use" and "occupancy", as they relate to real property, have acquired a peculiar and appropriate meaning under Massachusetts common law that refers to a possessory interest in land. Thus, because the terms of the Services Contract make clear that OUTFRONT holds no possessory interest in the Signs, OUTFRONT cannot properly be deemed a lessee, user, or occupant of the Signs for the purposes of G. L. c. 161A, § 24. Id.

Moreover, the Commonwealth's rules of statutory construction also require that where the Legislature uses the same words in several sections which concern the same subject matter, the words must be presumed to have been used with the same meaning in each section (OUTFRONT Brief at 31). Massachusetts courts, and the ATB applying Massachusetts law, must presume the Legislature was aware of any relevant court and agency decisions, and that presumption forces the courts to conclude that the Legislature accepted and adopted an agency's prior interpretation of the same words in

several sections of the General Laws that concern the same subject matter. Here, the ATB issued a decision in 2000 that narrowly defined the word "use" when determining whether the Commonwealth's tax statutes authorize taxes against a private contractor that manages tax-exempt public property. See Ogden v. Assessors of Hadley, Mass. ATB Findings of Facts and Reports 2000-978 (Add.93). Consequently, the Commonwealth's courts (and the ATB) are constrained to presume that the Legislature intended to ascribe that same narrow meaning to the word "use" when the Legislature added that term to G. L. c. 161A, § 24 in 2013.

Finally, the Supreme Judicial Court has determined that revenues generated from the MBTA's billboards are statutorily integrated with the MBTA's it essential function (OUTFRONT Brief at 39). See Somerville, 451 Mass. at 86-87. For this reason, municipalities are forbidden from interfering with the MBTA's ability to raise revenue through commercial advertising because doing so interferes with the MBTA's essential function. Here, the Services Contract entitles the MBTA to receive commercial advertising revenue based upon a percentage of the total

advertising revenue that OUTFRONT generates under the Contract. R.A. 86-87. Thus, municipal taxation against the Signs is prohibited because the imposition of such taxes diverts and consumes resources that would otherwise be deployed to maximize the MBTA's revenue share under the Services Contract. At minimum, this presents a disputed question of material fact that warrants reversal of the ATB's decision.

ARGUMENT

I. Standard of Review

The Commonwealth's courts will "uphold findings of fact of the [ATB] that are supported by substantial evidence," but by contrast, appellate courts review the ATB's "conclusions of law, including questions of statutory construction, de novo." Shrine of Our Lady of La Salette Inc. v. Board of Assessors of Attleboro, 476 Mass. 690, 697 (2017). In doing so, a reviewing court will "give weight to the [ATB's] interpretation of tax statutes," but the court must also recognize that "principles of deference ... are not principles of abdication" and "[u]ltimately the interpretation of a statute is a matter for the courts" to decide. Id. (quotation omitted) (reversing decision of ATB based upon error of law relative to ATB's incorrect

interpretation of statutory language creating a tax exemption).

Where, as here, a case is submitted to the ATB on a statement of agreed upon material facts upon which the rights of the parties are to be determined in accordance with law [R.A. 277/Add.49], any "inferences drawn by the [ATB] from the facts stated are not binding upon [the reviewing court], and questions of fact as well as questions of law are open for review on appeal." Middlesex Ret. Sys., LLC v. Board of Assessors, 453 Mass. 495, 499 (2009) (quoting Somerville, 451 Mass. at 84).

II. The ATB Erred In Placing The Burden On OUTFRONT To Demonstrate That The Signs Are Exempt From Taxation Pursuant To G. L. C. 161A, § 24

The Supreme Judicial Court has long recognized that "tax laws are to be strictly construed" and the "right to tax must be plainly conferred by the statute. It is not to be implied" and "[d]oubts are resolved in favor of the taxpayer." Squantum Gardens, Inc. v. Assessors of Quincy, 335 Mass. 440, 447-448 (1957) (holding that municipality lacked statutory authority to assess taxes to sublessor of exempt public property because no Massachusetts statute plainly confers a right tax a "reversionary interest

following the subleases"); First Main St. Corp. v. Board of Assessors of Acton, 49 Mass. App. Ct. 25, 28 (2000)(affirming Board's abatement of taxes assessed against condominium development right because the "status of the development right as a present interest within the meaning of G. L. c. 59, § 11 is doubtful and, to that degree, runs up against the well-worn principle . . . that [t]he right to tax must be plainly conferred by the statute") (quotation omitted).

Here, the parties agree that the Signs are MBTA real property and are exempt from taxation absent a showing that the Signs are "leased, used, or occupied in connection with a business for profit." G. L. c. 161A § 24. R.A. 277/Add.49. Yet still, the Assessors contend that they do not carry the burden of establishing that G. L. c. 161A § 24 plainly confers upon them the authority to tax whatever rights OUTFRONT holds under the Services Contract. Instead, the Assessors claimed that because they have labeled those rights as a "use" of MBTA property, that means OUTFRONT must carry the "grave burden" of showing that the Assessors are wrong. R.A. 227.

The Assessors' position is untenable and must be rejected under principles of black letter law. In truth, the Assessors are statutorily prohibited from taxing the Signs unless they demonstrate that G. L. c. 161A, § 24 plainly confers upon them the authority to tax OUTFRONT's rights under the Services Contract as a purported "use" of MBTA real property. See Squantum Gardens, 335 Mass. at 447-448 ("The right to tax must be plainly conferred by the statute"). The Assessors cannot circumvent that burden by simply labeling OUTFRONT's rights as a "use" because the Assessors' right to tax the Signs "is not to be implied," and all doubts about whether or not OUTFRONT's rights under the Services Contract rise to the level of a "use" for the purposes of G. L. c. 161A § 24 "are resolved in favor of the taxpayer." Id.; see also First Main, 49 Mass. App. Ct. at 28 (holding that taxpayer's right to develop property was not among the specified property interests that assessors are authorized to tax under G. L. c. 59 § 11).

For this reason, the ATB's decision should be reversed because the ATB incorrectly accepted the Assessors' untenable contention that OUTFRONT carries the burden of showing that it is entitled to an

exemption under G. L. c. 161A § 24. R.A. 287-288/Add.59-60.

III. The ATB Erred In Denying OUTFRONT's Motion for Summary Judgment

As grounds for denying OUTFRONT's Motion for Summary Judgment, the ATB concluded that the words "leased, used, or occupied" in G. L. c. 161A, § 24 should be interpreted as "yielding three separate and broad categorizations" of property interests that the Assessors are authorized to tax. R.A. 289/Add.61. With respect to the word "use" specifically, the ATB concluded that this term should be construed as having one (or possibly more) of five alternative meanings: either "to put into action or service," or to "avail oneself of," or to "employ," or to possess "the privilege or benefit of using something," or to possess "the legal enjoyment of property that consists of its employment, occupation, exercise, or practice." R.A. 290/Add.62. Tellingly, the ATB did not specify which of these five limitlessly-broad definitions it selected when construing G. L. c. 161A, § 24 to authorize taxation of the Signs based upon OUTFRONT's performance of its duties under the Services Contract.

The ATB's decision to deny OUTFRONT's Motion for Summary Judgment should be reversed because it is premised upon an untenable interpretation of G. L. c. 161A, § 24 that conflicts with the Commonwealth's black letter rules of statutory construction.

1. The Services Contract Does Not Create a Lease, Use, or Occupancy of the Signs for the Purposes of G. L. c. 161A, § 24

Under the Commonwealth's rules of statutory construction, words that have "acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning." See G. L. c. 4, § 6 (defining "Rules for construction of statutes" and providing that "technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning"); see also Commonwealth v. Wyton W., 459 Mass. 745, 747 (2011) ("Where the Legislature does not define a term, we presume that its intent is to incorporate the common-law definition of that term, unless the intent to alter it is clearly expressed") (quotation omitted). This mandatory rule of statutory construction applies to the Commonwealth's tax statutes, including those statutes that specify certain types of property interests that

are subject to taxation. See Charlesbank Homes v. Boston, 218 Mass. 14, 16 (1914)(rejecting taxpayer's proposed definition of "occupied" as appearing in tax statute based upon finding that "[i]t would be hard . . . to alter the meaning of this word, in view of the rule of construction laid down in [G. L. c. 4, § 6]").

Here, the words "lease," "use," and "occupy" have acquired a specific meaning under Massachusetts common law. That common law meaning refers to "a possessory interest in land." See McCarthy v. Hurley, 24 Mass. App. Ct. 533, 535 (1983) (recognizing that "the phrase 'use and occupation'[is] a legal term of art in a number of different contexts" and refers to "a possessory interest in land"); Humphrey v. Byron, 447 Mass. 332, 326 (2006) (stating Massachusetts courts must "regard leases . . . as contracts for the possession of property").

The Services Contract falls woefully short of creating a lease, use, or occupancy under those terms' common law definition. The Services Contract does not grant OUTFRONT a possessory interest in the Signs. See R.A. 77-78. To the contrary, the express terms of the Service Contract make clear that the MBTA retains all rights of possession over the Signs and all other MBTA

real property throughout the Contract's Term. R.A. 78 (§4.2.3) ("Any rights not expressly granted to [OUTFRONT] under the Contract shall be reserved to the MBTA. . ."). The ATB's decision to deny OUTFRONT's Motion for Summary Judgment should be reversed for this reason, standing alone, because it is premised on a definition of the word "use" that conflicts with the established definition of that term under Massachusetts common law. See Wyton W., 459 Mass. at 747; R.A. 295-296/Add.67-68.

Moreover, the Supreme Judicial Court has repeatedly rejected the notion that maintaining signage on another's property for advertising purposes creates a lease, use, or occupation of real property. See, e.g., Baseball Publishing Co. v. Bruton, 302 Mass. 54, 55 (1938)(holding that a written contract "giving the plaintiff the exclusive right and privilege to maintain an advertising sign on [the] wall [of a] building but leaving the wall in possession of the owner with the right to use it for all other purposes . . . is not a lease")(quotation omitted); Gaertner v. Donnelly, 296 Mass. 260, 262 (1936)(holding that a property owner "cannot recover on a declaration asserting a right to recover for use

and occupation" where "the only use of the roof given to the defendant was to maintain and use the sign and that the plaintiff had the use of the roof for every other purpose"); Jones v. Donnelly, 221 Mass. 213, 216-218 (1915)(affirming dismissal of property owner's claim to collect payment "for the use and occupation of a roof used for advertising purposes" because contractual right "to go upon the roof and construct the fence or sign to be used for advertising Purposes . . . conveyed no title or interest in the building or any part of it" and "[t]he dominion, control and possession of the estate were not given up by the land owner").

Here, the Services Contract similarly confers to OUTFRONT only a limited, conditional, and revocable right to install and maintain advertising signage on MBTA property. See R.A. 77-78 (§§4.2.1-4.2.2). And like the contracts in Baseball Publishing, Gaertner, and Jones, the Services Contract leaves possession of the Signs and the right to use them for all other purposes with the MBTA. R.A. 78 (§4.2.3) ("Any rights not expressly granted to [OUTFRONT] under the Contract shall be reserved to the MBTA. . .").

For this reason, the ATB erred in denying OUTFRONT's Motion for Summary Judgment because binding precedent from the Supreme Judicial Court requires a finding that OUTFRONT's performance of its contractual duty to maintain the Signs does not constitute a "lease, use, or occupancy" of MBTA real property. See Baseball Publishing, 302 Mass. at 55; Gaertner, 296 Mass. at 262; Jones, 221 Mass. at 217-218; R.A. 295-296/Add.67-68.

2. The Legislature Must be Presumed to Have Rejected the Overbroad Meaning Ascribed to the Word "Use" in the ATB's Decision

Massachusetts courts recognize that "[w]here the Legislature uses the same words in several sections which concern the same subject matter, the words must be presumed to have been used with the same meaning in each section." Insurance Rating Bd. v. Commissioner of Ins., 356 Mass. 184, 188-189 (1969) (citation omitted). Under this rule, the Supreme Judicial Court has made clear that "[w]hen interpreting a statute, we presume that the Legislature was aware of any relevant court and agency decisions, and we must employ that presumption even where the legislative history contains no specific indication of the Legislature's awareness of any particular decision." McCarthy's

Case, 445 Mass. 361, 379-380 (2005) (citation omitted) ("Resolution of the ambiguous wording of the exception must honor the presumption of the Legislature's awareness of the reviewing board's prior interpretation, and that presumption forces me to conclude that the Legislature accepted and adopted the reviewing board's interpretation").

Here, the words "lease," "use," and "occupancy" were added to G. L. c. 161A, § 24 through an amendment made by the Legislature in 2013. See Beacon South Station Associates LSE v. Board of Assessors of Boston, 85 Mass. App. Ct. 301, 307 (2014) (noting "that the Legislature, in 2013, expressly amended the MBTA exemption statue . . . adding language specifically excluding lessees from the scope of the MBTA exemption if the property is 'leased, used, or occupied in connection with a business for profit'"). For this reason, it must be presumed that the Legislature accepted and adopted prior ATB decisions interpreting the meaning of the words "lease," "use," and "occupancy" as they appear in the Commonwealth's tax statutes. See McCarthy's Case, 445 Mass. at 379; Insurance Rating Bd., 356 Mass. at 188-189.

Of those prior decisions, the most instructive is Ogden v. Assessors of Hadley ("Ogden"). See Mass. ATB Findings of Facts and Reports 2000-978 (Add.93). In Ogden, the University of Massachusetts engaged a for-profit company as an independent contractor to provide facility-management services for the University's tax-exempt convention center. Id. at *1. The contractor provided those management services for two types of events:

(1) University-sponsored classes, programs, ceremonies, and productions for which the contractor received a monthly management fee of $12,000 (see id. at *3-5); and

(2) Commercial events such as World Wrestling Federation matches, David Copperfield magic shows, and rock-and-roll concerts for which the contractor received a revenue-share equal to "30% of the excess amount of event revenues over $190,000.00" generated from such commercial events. Id. at *3-6.

The contract in Ogden also made clear that all rights not expressly granted to the contractor were reserved to the University, including the right of physical possession of the center and "the right to

approve the events held at the [center], the prices for tickets, prices of items sold and other charges to the [center], [and] the right to approve the [contractor's] Annual Budget." Id. at *5.

Faced with the question of whether this contractual arrangement in Ogden rose to the level of a lease, use, or occupancy that is taxable pursuant to G. L. c. 59A, § 2B, "[t]he Board found that G.L. ch. 59A § 2B did not apply to the [contractor] because [it] did not 'use', 'lease', or 'occupy' the [center]." Id. at *8. Instead, the Board concluded that the contract merely required the contractor to provide the University "with management services for the use and occupancy of the [center] by the University." Id. In reaching this conclusion, the Board specifically noted that the contract "specifies that the University . . . retain[s] ultimate control over the use of the [center]" based upon the broad control rights granted to, and reserved by, the University under the contract. Id. at *9. As such, the ATB found the contractor's rights under the contract "to be like that of a janitor, plumber, food concessionaire or other independent contractor," none of which "should be assessed a real estate tax based

on the fact that it 'uses' the facility to make a profit." Id. at *11.

Here, OUTFRONT performs property management services for the MBTA that are nearly identical to the contracted services at issue in Ogden. Such similarities include, among other things:

- That OUTFRONT, like the contractor in Ogden, is a for-profit company that was engaged as an independent contractor to provide management services for tax-exempt public property (see R.A. 80-81, 95 [§§4.6.1, 4.13.1]);
- That the Services Contract, like the contract in Ogden, provides that all "rights not expressly granted to [OUTFRONT] under the Contract shall be reserved to the MBTA" (R.A. 78 [§4.2.3]);
- That the MBTA, like the University in Ogden, holds "sole title and ownership" of the Signs and declined to convey a leasehold or other possessory interest in the Signs to OUTFRONT (R.A. 78-79, 94 [§§4.3.1, 4.12.3-4.12.5]); and
- That the MBTA, like the University in Ogden, retains ultimate control over the use of the Signs by, among other things, determining which advertising content may be posted on the Signs

(R.A. 83-84 [§4.7.1]), determining the rates charged for advertising time on the Signs (id. [§4.7.2]), and determining which, if any, equipment installations may be made on the Signs (R.A. 81-82 [§§4.6.2-4.6.4]).

Indeed, where the terms of the Services Contract differ from the contract in Ogden, those differences provide the MBTA even greater control over the Signs than the University's "ultimate control" that the ATB deemed as the dispositive factor in Ogden. For instance, the Services Contract provides that the MBTA may restrict OUTFRONT's access and work on the Signs to only pre-approved time periods and only specific OUTFRONT personnel to whom the MBTA has issued a "MBTA Contractor Identification Card." R.A. 79 (§4.3.3.). Moreover, the MBTA may consume up to 25% of the Signs' digital display time to "market the services or promote the image of the MBTA" without paying any fee to OUTFRONT (R.A. 84-85 [§4.7.4]), whereas the University in Ogden had to pay a $12,000.00 monthly management fee to host University-sponsored events at the convention center. Ogden at *5. Finally, the Services Contract grants the MBTA a unilateral option to terminate the Contract, or any rights conferred to

OUTFRONT thereunder, at any time during the Term of the Contract. R.A. 92-93 (§4.12.1) (providing that "[t]he MBTA may, in its sole discretion, terminate the Contract or any rights granted under the Contract, in whole or in part, at any time for its convenience").

Here, the ATB perplexingly elected to abandon the constrained interpretation of the word "use" that it established in Ogden. In doing so, the ATB committed reversible error because the reviewing court must presume that the Legislature was aware of the ATB's prior decision in Ogden when the Legislature added the word "use" to G. L. c. 161A, § 24 in 2013. See McCarthy's Case, 445 Mass. at 380 ("Resolution of the ambiguous wording of the exception must honor the presumption of the Legislature's awareness of the reviewing board's prior interpretation, and that presumption forces me to conclude that the Legislature accepted and adopted the reviewing board's interpretation"). And because the terms of the Services Contract do not rise to the level of a "use" as that term was defined in Ogden, summary judgment must enter in favor of OUTFRONT.

IV. The ATB Erred In Awarding Partial Summary Judgment Where OUTFRONT Raises Disputed Factual Questions On Whether Taxation Of The Signs Will Interfere With The MBTA's Essential Function

In Massachusetts, the "doctrine of essential governmental functions prohibits municipalities from regulating entities or agencies created by the Legislature in a manner that interferes with their legislatively mandated purpose or otherwise hinders the accomplishment of the statutory mandate." Martha's Vineyard Land Bank Comm'n v. Board of Assessors, 62 Mass. App. Ct. 25, 31 (2004) (alteration included). "The scope of the immunity provided by that doctrine is broad, and extends to agency actions that are reasonably related to fulfilling its essential governmental function" and municipal actions that "have more than a negligent impact on its operations." Id. (alterations included). Under these principles, this Court has acknowledged that "a statute conferring on [the MBTA] a tax exemption that primarily benefits the public by improving the [MBTA's] finances" should be "liberally read" so as to avoid dissipation of MBTA revenues because the MBTA's "public purpose is of controlling significance in construing the express

exemption from taxation." Id. at 32 (citation and quotation omitted).

Moreover, the Supreme Judicial Court has already answered the question of whether this doctrine forbids municipal actions that interfere with the MBTA's ability to generate revenue from the Signs. It does. "The Supreme Judicial Court has determined that any interference with the MBTA's ability to raise revenue through commercial advertising on its property would interfere with action that is related to the MBTA's essential function." MBTA v. Clear Channel Outdoor, Inc., 2018 Mass. Super. LEXIS 34 (Mass Super. Feb. 23, 2018) (Salinger, J.) (citing Somerville, 451 Mass. at 87) (quotation omitted) (Add.81). This rule exists because "income that the MBTA generates, directly or indirectly, from commercial advertising in and on MBTA facilities and properties . . . is used by the MBTA to help defray the costs of its transportation operations." Somerville, 451 Mass. at 86-87. For this reason, commercial advertising revenues are "statutorily integrated with the MBTA's ability to provide mass transportation services, its essential function." Id.

Here, the factual record demonstrates that the Assessors are barred from taxing the Signs due to the impact of such taxes on the MBTA's income under the Services Contract with OUTFRONT. The Services Contract entitles the MBTA to receive a specified percentage of the advertising revenues generated from the Signs above the Contract's Minimum Annual Guarantee Payment. See R.A. 86-87 (§4.8.3). Given this revenue-sharing arrangement, any municipal action that interferes with OUTFRONT's ability to generate revenue from the Signs also interferes with the MBTA's essential government function because it decreases the amount – or the likelihood – of income that the MBTA is entitled to receive under the revenue share provisions of the Services Contract. Thus, the ATB erred in concluding that the Assessors may impose a $198,257.49 annual tax obligation on OUTFRONT based upon its performance under the Services Contract because such taxes divert and consume scarce financial resources that OUTFRONT could otherwise deploy towards increasing the amount – or the likelihood – of income owed to the MBTA under the revenue share provisions of the Services Contract. R.A. 295-296/Add.67-68.

Remarkably, the ATB expressly acknowledged within its decision that this, at minimum, presents a disputed factual question, but nevertheless, the ATB summarily concluded without supporting evidence that it would be "speculative" to presume that OUTFRONT might generate more revenue from the Signs if it had an additional $198,257.49 each year to deploy towards its performance under the Services Contract. R.A. 295/Add.67. The existence of that disputed factual question, standing alone, warrants reversal of the ATB's decision to enter partial summary judgment in favor of the Assessors. See Middlesex Ret. Sys., 453 Mass. at 499 ("inferences drawn by the [ATB] from the facts stated are not binding on [the reviewing court], and questions of fact as well as questions of law are open for review on appeal").

Moreover, the ATB also erred in concluding that the taxes' impact on MBTA's revenue is "irrelevant" because the "MBTA Exemption Statute does not require any weighing of hypothetical or actual consequences before taxation is imposed for use of MBTA property." R.A. 295/Add.67. This conclusion by the ATB is untenable for at least two reasons. First, the ATB misstates the law because G. L. c. 161A, § 24 must be

"liberally read" so as to avoid dissipation of MBTA revenues because the MBTA's "public purpose is of controlling significance in construing the express exemption from taxation." See Martha's Vineyard, 62 Mass. App. Ct. at 31. Additionally, the doctrine of essential government functions most certainly does require "weighing of hypothetical or actual consequences" of municipal actions that might interfere with the MBTA's ability to generate revenue from commercial advertising. Id. at 30; Somerville, 451 Mass. at 86-87 (holding that commercial advertising revenues are "statutorily integrated with the MBTA's ability to provide mass transportation services, its essential function"). The ATB's decision should be reversed for this reason as well.

CONCLUSION

For the foregoing reasons, the ATB's decision to deny OUTFRONT's Motion for Summary Judgment and grant the Assessors' Motion for Partial Summary Judgment should be reversed, and judgment should enter in favor of OUTFRONT and against the Assessors. In the alternative, the ATB's decision should be reversed and remanded to the ATB for further proceedings on the disputed factual question of whether, and the extent

to which, the Assessors' imposition of taxes against the Signs creates an improper interference with the MBTA's essential function.

Respectfully submitted,

OUTFRONT MEDIA, LLC

By its attorneys

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Dated: April 20, 2023

ADDENDUM

Addendum Table of Contents

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

OUTFRONT MEDIA LLC **v.** **BOARD OF ASSESSORS OF THE CITY OF BOSTON**

Docket Nos.
F343159, F343161, F343162,
F343163, F343164, F343165,
F343166, F343168, F343492

Promulgated:
September 15, 2022

These are appeals filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65 ("appeals at issue") from the refusal of the City of Boston ("assessors" or "appellee") to abate real property taxes on certain outdoor advertising structures ("Signs") located in the City of Boston, owned by the Massachusetts Bay Transportation Authority ("MBTA") and assessed to OUTFRONT Media LLC ("appellant" or "OUTFRONT"). The appeals at issue concern whether the Signs were properly assessed to OUTFRONT pursuant to G.L. c. 161A, § 24 (as amended by St. 2013, c. 46, § 50) ("MBTA Exemption Statute") for fiscal year 2021 ("fiscal year at issue").

Chairman DeFrancisco ("Presiding Commissioner") issued a single-member decision for the appellee under G.L. c. 58A, § 1A and 831 CMR 1.20, based upon the Order of the Appellate Tax Board ("Board") relating to the appellant's Motion for Summary Judgment and the appellee's Motion for Partial Summary Judgment,

as well as the appellant's withdrawal of its valuation challenge for the appeals at issue.

These findings of fact and report are promulgated pursuant to a request by the appellee under G.L. c. 58A, § 13 and 831 CMR 1.32.

Kelly L. Frey, Esq. for the appellant.

Anthony M. Ambriano, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

The appeals at issue were presented through pleadings, the appellant's Motion for Summary Judgment, the appellee's Motion for Partial Summary Judgment, and accompanying memoranda and documents filed with the Board. Based on the foregoing, the Board made the following findings of fact.

I. Jurisdiction

On January 1, 2020, the relevant date of valuation for the fiscal year at issue, the MBTA was the owner of fourteen Signs located in Boston. The following table details the location of the fourteen Signs and their associated docket numbers for their appeals before the Board:

F343159	Cambridge Street
F343161	Southampton Street
F343162	1081A Bennington Street
F343163	Morrissey Boulevard
F343164	Main Street
F343165	Sprague Street
F343166	10 Milton Street
F343168	Hyde Park Avenue
F343492	Southampton Street
F343167	320 Spring Street
F343160	675 Dorchester Avenue
F343157	Massachusetts Avenue
F343491	Moore Street
F343158	Tenean Street

The appellee assessed OUTFRONT on the Signs for the fiscal year at issue. OUTFRONT paid the tax due in accordance with G.L. c. 59, § 64. Relevant information follows in the table below:

Docket No.	Assessed Value	Tax Rate Per $1,000	Total Assessment	Abatement Application Filed	Denial	Petition Filed[1]
F343159	$108,000	$24.55	$2,653.36	2/2/21	3/26/21	6/22/21
F343161	$108,000	$24.55	$2,653.36	2/2/21	3/25/21	6/22/21
F343162	$108,000	$24.55	$2,653.36	2/2/21	3/26/21	6/22/21
F343163	$54,000	$24.55	$1,325.70	2/2/21	3/25/21	6/22/21
F343164	$54,000	$24.55	$1,325.70	2/2/21	3/26/21	6/22/21
F343165	$54,000	$24.55	$1,325.70	2/2/21	3/23/21	6/22/21
F343166	$162,000	$24.55	$3,992.32	2/2/21	3/24/21	6/22/21
F343168	$162,000	$24.55	$3,992.32	2/2/21	3/23/21	6/22/21
F343492	$108,000	$24.55	$2,653.36	2/2/21	4/30/21	7/7/21
F343167	$333,500	$24.55	$8,244.75	2/2/21	3/24/21	6/22/21
F343160	$518,800	$24.55	$12,839.36	2/2/21	3/25/21	6/22/21
F343157	$4,392,600	$24.55	$108,892.16	2/2/21	3/26/21	6/22/21
F343491	$821,600	$24.55	$20,347.43	2/2/21	4/30/21	7/2/21
F343158	$1,023,700	$24.55	$25,358.61	2/2/21	3/25/21	6/22/21

[1] For all entries in this column with a petition filed date of June 22, 2021, this date is the postmark date. *See* G.L. c. 59, § 64.

On January 21, 2022, the appellant filed its Motion for Summary Judgment on the fourteen docket numbers, and on March 9, 2022, the appellee filed its Motion for Partial Summary Judgment on the fourteen docket numbers. These motions concerned the issue of whether the fourteen Signs were exempt or taxable under the MBTA Exemption Statute.

On June 3, 2022, the Board issued an Order denying the appellant's Motion for Summary Judgment and allowing the Appellee's Motion for Partial Summary Judgment. In the Order, the Board indicated that a status conference would be held to establish discovery and hearing dates for the valuation phase of the appeals relating to the fourteen docket numbers.

On July 11, 2022, the appellant filed a withdrawal of the valuation challenge for the appeals at issue (Docket Nos. F343159, F343161, F343162, F343163, F343164, F343165, F343166, F343168, and F343492), and requested a final decision based on the Board's June 3, 2022 Order. The Presiding Commissioner subsequently issued the final decision for the appellee in the appeals at issue. Docket Nos. F343167, F343160, F343157, F343491, and F343158 are still pending at the Board ("pending appeals"), and the parties are proceeding with discovery and awaiting a hearing on the valuation challenge after appellate review of the appeals at issue is complete.

Based upon the above, the Board found that it had jurisdiction to hear and rule upon the parties' motions in the appeals at issue and the pending appeals, and for the Presiding Commissioner to issue a final decision concerning the appeals at issue.

II. Background

While generally exempt from taxation, real property of the MBTA

> if leased, used, or occupied in connection with a business conducted for profit shall, for the privilege of such lease, use or occupancy be valued, classified, assessed and taxed annually as of January 1 to the lessee, user, or occupant in the same manner and to the same extent as if such lessee, user, or occupant were the owner thereof in full.

G.L. c. 161A, § 24 (as amended by St. 2013, c. 46, § 50).

The parties do not dispute that as of January 1, 2020, the appellant had an interest in the Signs. The disagreement between the parties concerns whether OUTFRONT "used" the Signs "in connection with a business conducted for profit" under the MBTA Exemption Statute.

III. Relevant documents

OUTFRONT's and the MBTA's rights and responsibilities concerning the Signs and other outdoor advertising structures (inclusively "Outdoor Advertising Structures") originated with a publicly bid contract – RFR No. 77-19: Outdoor Information Panels ("RFR No. 77-19") – that was awarded to OUTFRONT and

memorialized by a Memorandum of Agreement ("Agreement") signed by representatives of OUTFRONT and the MBTA on October 8, 2019, and October 3, 2019, respectively. The Agreement is in effect until June 30, 2034. RFR No. 77-19 itself – "including all certifications, statements, schedules, exhibits and addenda" – is incorporated as part of the "contract documents" pursuant to the Agreement, and it and any other "contract documents" listed in the Agreement are collectively embodied in and interchangeable herein with any references to "Agreement."

The objectives of the contract procurement were to select an entity that would assume various responsibilities for the Outdoor Advertising Structures, including operations and maintenance; maximizing revenue from commercial sources; converting certain structures from static to digital Outdoor Advertising Structures; and development of new digital Outdoor Advertising Structures. The entity had to be "duly incorporated" and have "full corporate power to own, lease, and operate its properties and assets, to conduct its business as such business is currently being conducted."

The Agreement itemizes the rights and responsibilities of the parties. The MBTA retains ownership of the Outdoor Advertising Structures, and all advertising content and rates and charges for the sale of advertising space are subject to the MBTA's review and approval. But the Agreement delegates to

OUTFRONT significant rights and responsibilities relating to the Outdoor Advertising Structures. OUTFRONT has the exclusive right to advertise on the Outdoor Advertising Structures and the exclusive right to install, license, operate, and maintain telecommunications equipment on the Outdoor Advertising Structures. OUTFRONT is responsible for all costs and expenses relating to the Outdoor Advertising Structures, including but not limited to obtaining insurance; design, installation, operation, maintenance, and repairs; all permits, licenses, and government approvals; development and implementation of a sales and marketing plan; negotiations, implementation, and managing of all advertising and telecommunications contracts; and all utilities.

RFR No. 77-19 requires that the MBTA be "appropriately remunerated . . . for the use of the [Outdoor Advertising Structures]," with the MBTA valuing "regular, consistent revenue" and "a preference for receiving a higher Minimum Annual Guaranteed ('MAG') revenue compared to a higher share of gross revenues." For each fiscal year during the term of the Agreement, OUTFRONT agrees to a MAG payment of initially $3,366,000,[2] a collective amount based upon the display type -

[2] This amount is "Index Linked" pursuant to the Agreement, meaning that the amount is adjusted each July by "multiplying the amount by the Inflation Index for the immediately preceding June" and then "dividing the multiplied amount by the Inflation Index for May 2019."

$205,000 each for certain digital Outdoor Advertising Structures down to $2,000 each for certain static Outdoor Advertising Structures. OUTFRONT also agrees to pay a gross revenue share in addition to the MAG payment, based upon display type. For instance, one component of the gross revenue share comprises 55.5 percent of advertising revenue and other revenue derived from certain Outdoor Advertising Structures in excess of the monthly MAG paid for such display type.

Documents entitled Advertiser Agreement and OUTFRONT Media Terms and Conditions of Advertising Service (collectively "Advertiser Agreement") detail the process whereby OUTFRONT contracts with advertisers to display their advertising copy on designated advertising displays. The advertiser provides the copy in the form and type designated by OUTFRONT, along with all necessary posting instructions. Notably, the documents do not indicate that the advertiser itself has the right to post the copy on the display. OUTFRONT retains the right to approve (along with the "location owner, transit company or third party/authority controlling the location") the character, design, text, and illustrations on the copy. The advertiser must inspect displays within three days after installation or posting. Unless the advertiser gives OUTFRONT written notice, OUTFRONT can presume that the advertiser has inspected and approved the display.

OUTFRONT is required to provide and keep in effect for the duration of the Agreement term an irrevocable letter of credit in the initial amount of $3,702,600 to ensure the faithful performance of its obligations under the Agreement. The MBTA has the right to draw upon the performance security if OUTFRONT fails to perform its obligations under the Agreement.

The MBTA and OUTFRONT contemplate that the Agreement could lead to tax consequences for OUTFRONT by the inclusion of terms stating that OUTFRONT is "responsible for paying all taxes, assessments and other fees applicable to services performed by, or the rights and interests granted to, the Contractor under the Contract" and that "[t]he parties agree and acknowledge that any [Outdoor Advertising Structures] on MBTA property constitute MBTA facilities and are real property." The MBTA may permit OUTFRONT to sell at a discounted rate or donate advertising space, conditional on the payment of additional advertising revenue to the MBTA for its share in any tax benefits that may accrue to OUTFRONT.

IV. The parties' contentions

A. The appellant

OUTFRONT sets forth four main contentions: (1) that it has limited, conditional, and revocable rights pursuant to the Agreement that fall short of the requirements under common law to create a possessory interest, specifically relying upon cases

from the early 1900s; (2) that the words lease, use, and occupancy were added to the MBTA Exemption Statute through an amendment in 2013 and so the Legislature accepted and adopted the Board's earlier findings that these words do not apply to publicly contracted service providers, specifically relying upon the case of ***Ogden Entertainment Services v. Assessors of Hadley***, Mass. ATB Findings of Fact and Reports 2009-978; (3) that the taxes assessed by the appellee impermissibly interfere with the MBTA's essential function for reasons articulated in ***Massachusetts Bay Transportation Authority v. City of Somerville***, 451 Mass. 80 (2008), specifically that the taxes imposed by the assessors indirectly decrease the amount of revenue share that the MBTA receives under the Agreement; and (4) that the advertisers are the real users of the Signs, not OUTFRONT.

B. The appellee

The assessors contend that the MBTA Exemption Statute neither requires a weighing of whether or not the levy of taxes on OUTFRONT impacts MBTA nor requires that a use be unlimited, unencumbered, perpetual, irrevocable, possessory, or absolute. They stress that there are elements of possession regardless, including the exclusive rights to advertise and the responsibility for designing, installing, operating, and maintaining the Signs.

They also contend that the Legislature could have required something restrictive in the term "used" in the MBTA Exemption Statute, but the lack thereof reflects an intention for the term to be broadly construed, and that OUTFRONT offers no alternative definition of the term, instead relying on property rights cases immaterial to the MBTA Exemption Statute.

V. The Board's findings

The Board found that the rights and responsibilities outlined in the Agreement establish that OUTFRONT uses the Signs in connection with a business conducted for profit within the meaning of the MBTA Exemption Statute. The monetary maximization of the Signs is entirely due to OUTFRONT and its expertise. OUTFRONT puts the Signs into action or service in furtherance of generating revenue - for both itself and the MBTA - through an advertising business. Installation, licensing, operation, maintenance, permitting, sales and marketing, and advertising contracts, amongst other benefits and burdens of the Signs, are all within OUTFRONT's province until 2034.

OUTFRONT's contention that the MBTA is remunerated by OUTFRONT for the use of the Signs without OUTFRONT itself actually using the Signs - *i.e.*, the advertisers use the Signs because it is their copy posted on the Signs and not OUTFRONT's copy - is unsupported by the facts. The relevant use of the Signs in these appeals and for purposes of the MBTA Exemption

Statute is their use by OUTFRONT in an advertising business for profit. The advertisers have no substantive rights or responsibilities in the Signs. They do not put the Signs into action or service. They do not have the right to enter onto MBTA property and post the advertising copy onto the Signs. The payments due the MBTA under the terms of the Agreement are derived from OUTFRONT's use of the Signs in a business conducted by OUTFRONT for profit. The Agreement is a business arrangement between OUTFRONT and the MBTA.

The MBTA sought a "duly incorporated" entity with specific corporate powers and business acumen, not an advertiser merely wishing to have its copy posted on a display. The MBTA could have directly contracted with advertisers, but instead it chose - via the RFR process - to take a relatively passive stance, allowing OUTFRONT to use the Outdoor Advertising Structures in its business and requiring OUTFRONT to create more digital Outdoor Advertising Structures to generate additional revenue. The MBTA sought - and found in OUTFRONT - an entity with the particular expertise to maximize profits on the Outdoor Advertising Structures to such an extent that the entity would be willing to provide guaranteed revenues for the MBTA, while simultaneously taking on all the associated risks of the Outdoor Advertising Structures.

OUTFRONT's contention, citing ***Massachusetts Bay Transportation Authority v. City of Somerville***, 451 Mass. 80 (2008), that the assessments erroneously and indirectly impact the MBTA's revenue shares under the Agreement is also unsupported. This is a revenue-positive arrangement for the MBTA. The MBTA divests itself of the financial burdens of the Signs and reaps a MAG and gross revenue shares from OUTFRONT. Gross revenue is not revenue net of any taxes paid by OUTFRONT. Further, if the MBTA permits OUTFRONT to sell advertising at a discounted rate or to donate advertising space, that permission may be made conditional on the payment of additional advertising revenue to the MBTA for its share in any tax benefits that may accrue to OUTFRONT. The Agreement contemplates that OUTFRONT can be taxed based on the services it performs and the rights and interests granted to it under the Agreement, and OUTFRONT is required to maintain the Signs and fulfill other obligations regardless of its tax obligations. The $3,702,600 irrevocable letter of credit further insulates the MBTA from financial risk should OUTFRONT fail to perform its obligations.

As discussed in greater detail in the Opinion below, the plain terms of the MBTA Exemption Statute contradict OUTFRONT's dependence on the import of common law possessory interests articulated in early 20th century case law. Similarly, the appellant's reliance on ***Ogden Entertainment Services v.***

Assessors of Hadley, Mass. ATB Findings of Fact and Reports 2009-978 for its position that OUTFRONT is a publicly contracted service provider is ineffable, given that the facts in that case are distinguishable from the facts in the appeals at issue.

Based upon the above, the Board found and ruled that OUTFRONT uses the Signs in connection with a business conducted for profit within the meaning of the MBTA Exemption Statute, and did so as of January 1, 2020. Consequently, the assessors properly assessed OUTFRONT on the Signs under the MBTA Exemption Statute for the fiscal year at issue and the Presiding Commissioner accordingly – taking into account the appellant's withdrawal of any valuation challenge - issued a decision for the appellee in the appeals at issue.

OPINION

I. Summary judgment standard

Pursuant to Rule 22 of the Board's Rules of Practice and Procedure, "[i]ssues sufficient in themselves to determine the decision of the Board or to narrow the scope of the hearing may be separately heard and disposed of in the discretion of the Board." 831 CMR 1.22. Having considered the appellant's Motion for Summary Judgment and the appellee's Motion for Partial Summary Judgment, the Board found and ruled that the appeals at issue presented no genuine issues of material fact and that

disposition of the appeals at issue – as they related to the question of taxability of the Signs – by summary judgment was appropriate pursuant to 831 CMR 1.22. *See* ***Correllas v. Viveiros,*** 410 Mass. 314, 316 (1991) ("The purpose of summary judgment is to decide cases where there are no issues of material fact without the needless expense and delay of a trial followed by a directed verdict.").

II. Burden of proof and the MBTA Exemption Statute

The parties disagree as to whether the appellant or the appellee has the burden of proof in cases concerning the MBTA Exemption Statute. Though MBTA property is generally exempt from taxation, the entity seeking an exemption bears the burden of establishing that it comes within that general exemption. *See* ***Willowdale LLC v. Assessors of Topfield***, 78 Mass. App. Ct. 767, 769 (2011) ("As the party seeking exemption, Willowdale bears the burden of establishing its entitlement."); ***New Habitat, Inc. v. Tax Collector of Cambridge***, 452 Mass. 729, 731 (2008). An exception to the general exemption does not flip the burden of proof. *See* ***Beacon South Station Associates LSE v. Assessors of Boston***, Mass. ATB Findings of Fact and Reports 2013-209, 223 (in a case involving G.L. c. 161A, § 24 prior to its 2013 amendment, the Board held that "[a]ny doubt must operate against the one claiming tax exemption, because the burden of proof is upon the one claiming an exemption from taxation to show clearly and

unequivocally that he comes within the terms of the exemption"), *aff'd*, 85 Mass. App. Ct. 301 (2014). The starting point is not that OUTFRONT is entitled to an exemption from taxation. The starting point is that OUTFRONT is seeking an exemption from taxation.

III. The MBTA Exemption Statute

The version of the MBTA Exemption Statute in effect for the fiscal year at issue was amended by St. 2013, c. 46, § 50, which added the language relevant in these matters, highlighted below:

> Notwithstanding any general or special law to the contrary, the authority and all its real and personal property shall be exempt from taxation and from betterments and special assessments; and the authority shall not be required to pay any tax, excise or assessment to or for the commonwealth or any of its political subdivisions; . . . .
>
> ***Real property of the authority shall, if leased, used, or occupied in connection with a business conducted for profit shall, for the privilege of such lease, use or occupancy be valued, classified, assessed and taxed annually as of January 1 to the lessee, user, or occupant in the same manner and to the same extent as if such lessee, user, or occupant were the owner thereof in full. . . . .***

G.L. c. 161A, § 24 (as amended by St. 2013, c. 46, § 50) (emphasis added). This amendment was added after the Board's decision in ***Beacon South Station Associates, LSE v. Assessors of Boston***, Mass. ATB Findings of Fact and Reports 2013-209, a case involving the leasing of MBTA property, and prior to the Appeals

Court decision in ***Beacon South Station Associates, LSE v. Assessors of Boston***, 85 Mass. App. Ct. 301 (2014). The Appeals Court noted that "the Legislature, in 2013, expressly amended the MBTA exemption statute as part of a comprehensive transportation funding overhaul, adding language specifically excluding lessees from the scope of the MBTA exemption if the property is 'leased, used, or occupied in connection with a business conducted for profit'" and that "[t]his change, explicitly narrowing the exemption, reinforces the conclusion that there was a preexisting exemption from taxation for lessees for prior tax years." ***Id.*** at 307-08. This narrowing of the exemption, and a referencing of impacted activities in the disjunctive, likewise establish that the Legislature, through the amendment, intended to exclude tax exemption not only when MBTA property is "leased," as in ***Beacon***, but also when MBTA property is "used, or occupied," yielding three separate and broad categorizations.

To seek the exemption, OUTFRONT had to establish that it had not "leased, used, or occupied [the Signs] in connection with a business conducted for profit"[3] as of January 1, 2020. If it had leased, used, or occupied the Signs as of this date, then

[3] Though the allegation in these matters was that the appellant "used" the Signs "in connection with a business conducted for profit," the Board made no findings or rulings as to whether the appellant also leased or occupied the Signs.

"for the privilege of such lease, use or occupancy [the Signs were to] be valued, classified, assessed and taxed . . . as of January 1," 2020 to OUTFRONT "in the same manner and to the same extent as if" OUTFRONT were the owner. G.L. c. 161A, § 24 (as amended by St. 2013, c. 46, § 50).

The MBTA Exemption Statute does not define the terms "leased, used, or occupied" or "lease, use or occupancy." Focusing in these matters specifically on the "used" and "use" by OUTFRONT, the Board follows "[t]he general rule of construction . . . that where the language of the statute is plain, it is to be interpreted in accordance with the usual and natural meaning of its words." *See* ***Household Retail Services, Inc. v. Commissioner of Revenue***, 448 Mass. 226, 230 (2007) ("[T]his rule has particular force in interpreting tax statutes."). *See also* ***Doherty v. Planning Board of Scituate***, 467 Mass. 560, 569 (2014) ("When a statute does not define its words, we give them their usual and accepted meanings, as long as these meanings are consistent with the statutory purpose.") (citation omitted).

In contexts relevant to the MBTA Exemption Statute, Merriam-Webster defines "use" as "to put into action or service: avail oneself of: employ"; "the privilege or benefit of using something"; and "the legal enjoyment of property that consists in its employment, occupation, exercise, or practice." *Use*,

https://www.merriam-webster.com/dictionary/use (last visited August 9, 2022). Merriam-Webster defines "used" as "employed in accomplishing something." *Used*, https://www.merriam-webster.com/dictionary/used (last visited August 9, 2022).

Also, critically under the statute, the use must be in connection with a business conducted for profit. *See* G.L. c. 161A, § 24. As detailed in the Board's findings, the appellant holds significant privileges and benefits, as well as burdens, in the Signs, and it puts the Signs into action or service in furtherance of generating profits through an advertising business. *See* ***Thayer v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 2014-1184, 1204 ("An activity is considered to be for-profit when the individual is engaged in the activity with 'the actual and honest objective of making a profit.'") (citation omitted). The MBTA would never receive any gross revenue shares to which it is entitled under the Agreement if OUTFRONT were not employing the Signs in a profit-making enterprise.

In its interpretation of the MBTA Exemption Statute, the Board was not persuaded by the appellant's citation to early 20th century case law for the notion that OUTFRONT lacked specific possessory interests in the Signs. The plain terms of the MBTA Exemption Statute as amended in 2013 reflect the Legislature's intent to exclude exemption for broad and disjunctive

categories, contradicting the appellant's effort to read a requisite of common law property rights into the provisions of a tax statute. For instance, the appellant cited to ***Gaertner v. Donnelly***, 296 Mass. 260 (1936) and ***Jones v. Donnelly***, 221 Mass. 213 (1915), which addressed private rights of recovery for failure to compensate a property owner for the use of a roof. In both the ***Gaertner*** and ***Jones*** cases, the Supreme Judicial Court recognized that the person who had the right to occupy a roof was a *user* – but not a lessee. The form of pleading in those cases (a suit for recovery for "use and occupation") required a showing of something in the nature of a "demise" or some evidence to establish a landlord/tenant relationship. That not being present, recovery was denied. While those cases might be said to equate the terms "lease," "use," and "occupation," the same cannot be said to the deliberately disjunctive incorporation of these terms in the MBTA Exemption Statute.

The cases of ***Ogden Entertainment Services v. Assessors of Hadley***, Mass. ATB Findings of Fact and Reports 2000-978 and ***Massachusetts Bay Transportation Authority v. City of Somerville***, 451 Mass. 80 (2008) also fail to advance OUTFRONT's position.

Ogden Entertainment Services concerned the assessment of taxes on the Mullins Center, which was owned by the University of Massachusetts Building Authority and operated by the

University of Massachusetts, Amherst under a Contract for Financial Assistance. ***Id.*** at 2000-979. The University entered into a Management Agreement with Ogden Entertainment Services to provide management services in conjunction with the University's operation of the Mullins Center. ***Id.*** at 2000-979-80. The Board found that Ogden was not using the property under G.L. c. 59, § 2B. ***Id.*** at 2000-984. The Board cited both to the University's and the Authority's control over the Mullins Center, and to the University's right to profits and responsibility for losses. ***Id.*** at 2000-986. Ogden was not liable for any losses and was not charged a user fee for its management activities. ***Id.*** The Board also noted that Ogden received a flat management fee with an annual increase akin to a cost of living increase, and an incentive fee that was capped, indicating that Ogden's compensation was not directly tied to profits and losses, unlike that of a true owner or user for profit. ***Id.*** at 2000-986-87. The Board viewed Ogden's relationship to the Mullins Center to be more akin to that of a janitor, plumber, food concessionaire, or other independent contractor, and not an entity using public property for private enterprise. ***Id.*** at 2000-987-88.

The facts of ***Ogden*** are distinct from the facts here. OUTFRONT bears all responsibility, including the expenses of maintaining the Signs. The Management Agreement in ***Ogden*** stipulated that any tax liability imposed on Ogden would flow to

the University, while the Agreement specifically acknowledges that OUTFRONT may be liable for tax responsibilities as a result of its interest in the Signs. The MBTA does not pay OUTFRONT, but instead receives payment from OUTFRONT, with guaranteed MAG payments plus a percentage of gross revenues. There is no cap on the profit that OUTFRONT can generate from the Signs, and, conversely, regardless of any losses, OUTFRONT still must remit guaranteed payments to the MBTA. These characteristics of the Agreement diverge with the rights and responsibilities of a janitor, plumber, food concessionaire, or other independent contractor.

The appellant's reliance on ***Somerville*** is also misplaced. ***Somerville*** concerned whether the cities of Melrose and Somerville could regulate – through their zoning ordinances – billboards and signs for commercial advertising in and on the facilities of the MBTA. ***Id.*** at 451 Mass. 81. The parties agreed that the billboards and signs, if subjected to the zoning ordinances, would not comply with them and that the attempts to compel compliance would adversely affect and frustrate the MBTA's ability to generate revenue from the billboards and signs. ***Id.*** at 451 Mass. 82-84. The crucial difference between ***Somerville*** and the appeals at issue is that, in ***Somerville***, forcing the MBTA to comply with the zoning ordinances would have impeded the earning of any revenue from the billboards and signs

because the zoning ordinances would have prevented their actual use. ***Id***. Here, taxation does not impede OUTFRONT's performance under the Agreement and, conversely, taxation is contemplated by OUTFRONT and the MBTA in the Agreement's terms. The MBTA is guaranteed MAG payments and revenue shares based on gross revenues, not revenues net of any taxes. The appellant's contention that the assessments lessen the amount that OUTFRONT spends on the Signs and consequently lessen any associated revenue flowing to the MBTA is not only speculative, but irrelevant. The MBTA Exemption Statute does not require any weighing of hypothetical or actual consequences before taxation is imposed for use of MBTA property.

Finally, notwithstanding the appellant's assertion that the actual users of the Signs were the advertisers, the relevant use of the Signs in these appeals and for purposes of the MBTA Exemption Statute is their use by OUTFRONT in an advertising business for profit.

CONCLUSION

Based upon the above, the Board found and ruled that OUTFRONT uses the Signs in connection with a business conducted for profit within the meaning of the MBTA Exemption Statute, and that it did so as of January 1, 2020. Consequently, for the privilege of such use by OUTFRONT, the Signs should be valued,

classified, assessed, and taxed as of January 1, 2020 to OUTFRONT in the same manner and extent as if it were the owner pursuant to the provisions of G.L. c. 161A, § 24 for the fiscal year at issue. Accordingly, the Board allowed the appellee's Motion for Partial Summary Judgment and, in light of the appellant's withdrawal of any valuation challenge, the Presiding Commissioner issued a decision for the appellee in the appeals at issue.

THE APPELLATE TAX BOARD

By: /S/ Mark J. DeFrancisco
Mark J. DeFrancisco, Chairman

A true copy,
Attest: /S/ William J. Doherty
Clerk of the Board

THE COMMONWEALTH OF MASSACHUSETTS
Appellate Tax Board
100 Cambridge Street
Suite 200
Boston, Massachusetts 02114

Docket Nos. F343157 – F343168,
F343491 – F343492

OUTFRONT MEDIA LLC,
Appellant.

BOARD OF ASSESSORS OF THE CITY OF BOSTON,
Appellee.

ORDER

After consideration of the appellant's Motion for Summary Judgment, the appellee's Motion for Partial Summary Judgment, and the arguments advanced at the November 21, 2022 hearing of the Motions, the Board orders the following:

- The Appellant's Motion for Summary Judgement is denied;
- The Appellee's Motion for Partial Summary Judgment is allowed;
- A status conference will be held via Zoom on Friday June 24, 2022 at 10 a.m. to establish discovery and hearing dates for the valuation phase of these appeals.

ORDERED ACCORDINGLY.

APPELLATE TAX BOARD

/s/ Patricia M. Good Commissioner

/s/ Steven G. Elliott Commissioner

/s/ Patricia Ann Metzer Commissioner

/s/ Mark J. DeFrancisco Commissioner

Attest: /s/ William J. Doherty
Clerk of the Board
Date: June 3, 2022

ALM GL ch. 4, § 6

Current through Chapter 4 of the 2023 Legislative Session of the 193rd General Court

Annotated Laws of Massachusetts > PART I ADMINISTRATION OF THE GOVERNMENT (Chs. 1 - 182) > TITLE I JURISDICTION AND EMBLEMS OF THE COMMONWEALTH, THE GENERAL COURT, STATUTES AND PUBLIC DOCUMENTS (Chs. 1 - 5) > TITLE I JURISDICTION AND EMBLEMS OF THE COMMONWEALTH, THE GENERAL COURT, STATUTES AND PUBLIC DOCUMENTS (Chs. 1 — 5) > Chapter 4 Statutes (§§ 1 — 13)

§ 6. Rules for Construing Statutes.

In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute:

First, The repeal of a statute shall not revive any previous statute, except in case of the repeal of a statute, after it has become law, by vote of the people upon its submission by referendum petition.

Second, The repeal of a statute shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, prosecution or proceeding pending at the time of the repeal for an offence committed, or for the recovery of a penalty or forfeiture incurred, under the statute repealed.

Third, Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning.

Fourth, Words importing the singular number may extend and be applied to several persons or things, words importing the plural number may include the singular, and words of one gender may be construed to include the other gender and the neuter.

Fifth, Words purporting to give a joint authority to, or to direct any act by, three or more public officers or other persons shall be construed as giving such authority to, or directing such act by, a majority of such officers or persons.

Sixth, Wherever any writing is required to be sworn to or acknowledged, such oath or acknowledgment shall be taken before a justice of the peace or notary public, or such oath may be dispensed with if the writing required to be sworn to contains or is verified by a written declaration under the provisions of section one A of chapter two hundred and sixty-eight.

Seventh, Wherever action by more than a majority of a city council is required, action by the designated proportion of the members of each branch thereof, present and voting thereon, in a city in which the city council consists of two branches, or action by

the designated proportion of the members thereof, present and voting thereon, in a city having a single legislative board, shall be a compliance with such requirement.

Eighth, Wherever publication is required in a newspaper published in a city or town, it shall be sufficient, when there is no newspaper published therein, if the publication is made in a newspaper with general circulation in such city or town. If a newspaper is not published in such city or town and there is no newspaper with general circulation in such city or town, it shall be sufficient if the publication is made in a newspaper published in the county where such city or town is situated. A newspaper which by its title page purports to be printed or published in such city, town or county, and which has a circulation therein, shall be deemed to have been published therein.

Ninth, Wherever a penalty or forfeiture is provided for a violation of law, it shall be for each such violation.

Tenth, Words purporting to give three or more public officers or other persons authority to adopt, amend or repeal rules and regulations for the regulation, government, management, control or administration of the affairs of a public or other body, board, commission or agency shall not be construed as authorizing the adoption of a rule or regulation relative to a quorum which would conflict with the provisions of clause Fifth in the absence of express and specific mention therein to that effect.

Eleventh, The provisions of any statute shall be deemed severable, and if any part of any statute shall be adjudged unconstitutional or invalid, such judgment shall not affect other valid parts thereof.

History

RS 1836, 2, § 6, cls. 1-3; GS 1860, 3, § 7, cls. 1-3; 1869, 410; PS 1882, 3, § 3, cls. 1-5; RL 1902, 8, § 4, cls. 1-5; 1912, 360; 1919, 301, § 1; 1926, 187, § 2; 1931, 394, § 183; 1967, 867, § 1; 1983, 210; 1989, 216; 1998, 170.

End of Document

ALM GL ch. 58A, § 7

Current through Chapter 4 of the 2023 Legislative Session of the 193rd General Court

Annotated Laws of Massachusetts > PART I ADMINISTRATION OF THE GOVERNMENT (Chs. 1 - 182) > TITLE IX TAXATION (Chs. 58 - 65C) > TITLE IX TAXATION (Chs. 58 — 65C) > Chapter 58A Appellate Tax Board (§§ 1 — 14)

§ 7. Appeals to Board.

Any party taking an appeal to the board, hereinafter called the appellant, from a decision or determination of the commissioner or of a board of assessors, hereinafter referred to as the appellee, shall file a petition with the clerk of the appellate tax board and serve upon said appellee a copy thereof in the manner provided in section 9. No petition shall relate to an assessment on more than one parcel of real estate, except where the board shall specifically permit otherwise. Upon such appeal, the petition shall set forth specifically the facts upon which the party taking an appeal, hereinafter called the appellant, relies, together with a statement of the contentions of law which the appellant desires to raise. The appellant shall state upon the petition the address at which service of any pleading, motion, order, notice or process in connection with the appeal can be made upon him. Within such time as the board by its rules may prescribe, the appellee shall file with the board an answer denying or admitting each and every allegation of fact contained in the petition; except that, in an appeal under section 64 or 65 of chapter 59, if the appellee desires to raise no issue other than the question whether there has been an overvaluation or improper classification of the property on which the tax appealed from was assessed, no answer need be filed. If no answer is filed in such a case, the allegation of overvaluation or improper classification of such property shall be held to be denied and all other material facts alleged in the petition admitted. If an answer is filed, a copy shall be served upon the appellant, in the manner provided in section 9. The party taking the appeal shall at the time of filing the petition pay to the clerk an entry fee for each appeal from a decision of the commissioner, or, in the case of an appeal from a decision of a board of assessors, an entry fee where the assessed fair cash valuation of the real property, or personal property, or both, the tax on which is sought to be abated, is $50,000 or less; or an entry fee where such assessed fair cash valuation is in excess of $50,000. The commissioner of administration shall annually determine the amounts of such entry fees under the provisions of section 3B of chapter 7. Except as provided in section 12C of this chapter, the board shall not consider, unless equity and good conscience so require, any issue of fact or contention of law not specifically set out in the petition upon appeal or raised in the answer. At any time before the decision upon the appeal by the board or by the appeals court under section 13, the appellee may abate the tax appealed from, in whole or in part, or change its determination subject to the provisions of section 7A or 37C of chapter 62C.

If any petition, including any petition, statement or appeal filed under this section or section 7A or 7B, is, after the period allowed for filing appeals with the board, delivered by United States mail, or by such alternative private delivery service as the board may by rule permit, to the board, the date of the United States postmark, or other substantiating mark permitted by rule of the board, affixed on the envelope or other appropriate wrapper in which such petition is mailed or delivered shall be deemed to be the date of delivery, if such petition was mailed in the United States in an envelope or other appropriate wrapper, first class postage prepaid, or delivered to such alternative private delivery service, properly addressed to the board. As used in this section, “United States postmark” shall mean only a postmark made by the United States post office.

In the case of an appeal relating to property classified as either residential greater than eight units, or commercial or industrial, and which is assessed for more than $200,000 in the previous fiscal year, upon the written request of the appellee, the appellant shall file with the board an income and expense statement for the most recent year preceding the valuation date at issue in the appeal, completed under oath, within 40 days of such request.

History

1930, 416, § 1; 1933, 321, § 2; 1939, 451, § 18; 1945, 621, § 2; 1952, 502; 1953, 654, § 25; 1972, 684, § 2; 1978, 514, § 70; 1978, 580, § 11; 1979, 383, § 2; 1980, 572, § 12; 1986, 385, § 2; 1989, 341, § 33; 1998, 485, § 2; 2000, 324, § 1.

End of Document

ALM GL ch. 58A, § 13

Current through Chapter 4 of the 2023 Legislative Session of the 193rd General Court

Annotated Laws of Massachusetts > PART I ADMINISTRATION OF THE GOVERNMENT (Chs. 1 - 182) > TITLE IX TAXATION (Chs. 58 - 65C) > TITLE IX TAXATION (Chs. 58 — 65C) > Chapter 58A Appellate Tax Board (§§ 1 — 14)

§ 13. Findings; Decisions; Opinions; Reports; Appeals.

The board, or a single member of the board acting pursuant to the authority outlined in section 1A shall make a decision in each appeal heard by it within three months from the close of the record including submission of briefs and may make findings of fact and report thereon in writing. In any appeal in which the hearing is officially recorded pursuant to section 10, or in any appeal from the commissioner of revenue other than cases heard under the small claims procedure pursuant to section 7B, the member may take an additional three months to issue a decision. In every decision granting an abatement without findings of fact and report which relates to a tax on land with one or more buildings thereon, the board shall, if so requested by the appellee in writing at the commencement of the hearing, state separately the value of the land and of each building.

Except in cases heard under the informal procedure authorized by section 7A, or under the small–claims procedure authorized under 7B, the board shall make such findings and report thereon if so requested by either party within ten days of a decision without findings of fact and shall issue said findings within three months of the request, provided, however, the board, in its discretion, may extend the time for issuing said findings and report for an additional period not to exceed three months, upon written notice to both parties setting forth the reason for the extension. In extraordinary circumstances or with consent of all parties to the proceeding, the board may have whatever additional time is necessary for issuance of such findings of fact and report. Such report may, in the discretion of the board, contain an opinion in writing, in addition to the findings of fact and decision. If no party requests such findings and report, all parties shall be deemed to have waived all rights of appeal to the appeals court upon questions as to the admission or exclusion of evidence, or as to whether a finding was warranted by the evidence. All reports, findings and opinions of the board and all evidence received by the board, including a transcript of any official report of the proceedings, all pleadings, briefs and other documents filed by the parties, shall be open to the inspection of the public; except that the originals of books, documents, records, models, diagrams and other exhibits introduced in evidence before the board may be withdrawn from the custody of the board in such manner and upon such terms as the board may in its discretion prescribe. The decision of the board shall be final as to findings of fact. Failure to comply with the time limits, as outlined above, shall not affect the validity of the board’s decision.

From any final decision of the board except with respect to decisions of the board under sections 25 and 26 of chapter 65, an appeal as to matters of law may be taken to the appeals court by either party to the proceedings before the board so long as that party has not waived such right of appeal. A claim of appeal shall be filed with the clerk of the board in accordance with the Massachusetts Rules of Appellate Procedure which rules shall govern such appeal. The court shall not consider any issue of law which does not appear to have been raised in the proceedings before the board.

If the order grants an abatement of a tax assessed by the commissioner and the tax has been paid, the amount abated with interest computed in accordance with section 40 of chapter 62C, and if costs are ordered against the commissioner, the amount thereof, shall be paid to the taxpayer by the state treasurer. If the order grants an abatement of a tax assessed by the board of assessors of a town and the tax has been paid, the amount abated with interest at the rate of 8 per cent per annum from the time when the tax was paid, and if costs are ordered against a board of assessors, the amount thereof, shall be paid to the taxpayer by the town treasurer, and, if unpaid, execution therefor may issue against the town as in actions at law. If coats are ordered against a taxpayer execution shall issue therefor. The appeal to the appeals court under this section shall be the exclusive method of reviewing any action of the board, except action under sections 25 and 26 of chapter 65. For want of prosecution of an appeal in accordance with the provisions of this section the board, or, if the appeal has been entered in the appeals court, a justice of that court, may dismiss the appeal. Upon dismissal of an appeal, the decision of the board shall thereupon have full force and effect.

History

1930, 416, § 1; 1931, 218, §§ 1, 2; 1933, 325, § 7; 1933, 350, § 8; 1935, 218, § 1; 1939, 366, § 1; 1953, 654, § 27; 1954, 681, § 5; 1956, 630; 1957, 522; 1965, 597, § 3A; 1968, 120, §§ 2–4; 1969, 692; 1973, 1114, § 5; 1976, 415, § 3; 1978, 514, § 72; 1978, 580, §§ 13, 15; 1979, 527, § 2; 1983, 72, § 2; 1985, 314, § 1; 1998, 485, § 2.

End of Document

ALM GL ch. 59, § 11

Current through Chapter 4 of the 2023 Legislative Session of the 193rd General Court

Annotated Laws of Massachusetts > PART I ADMINISTRATION OF THE GOVERNMENT (Chs. 1 - 182) > TITLE IX TAXATION (Chs. 58 - 65C) > TITLE IX TAXATION (Chs. 58 — 65C) > Chapter 59 Assessment of Local Taxes (§§ 1 — 94)

§ 11. Land, Where and to Whom Assessed.

Taxes on real estate shall be assessed, in the town where it lies, to the person who is the owner on January 1, and the person appearing of record, in the records of the county, or of the district, if such county is divided into districts, where the estate lies, as owner on January 1, even though deceased, shall be held to be the true owner thereof; provided, that whenever the assessors deem it proper, they may assess taxes upon real estate to the person who is in possession thereof on January 1, and such person shall thereupon be held to be the true owner thereof for the purposes of this section; provided, further, that whenever the assessors deem it proper, they may assess taxes upon any present interest in real estate to the owner of such interest on January 1; and provided, further, that in cluster developments or planned unit developments, as defined in section 9 of chapter 40A, the assessment of taxes on the common land, so called, including cluster development common land held under a conservation restriction pursuant to section 31 of chapter 184, the beneficial interest in which is owned by the owners of lots or residential units within the plot, may be included as an additional assessment to each individual lot owner in the cluster development. Real estate held by a religious society as a ministerial fund shall be assessed to its treasurer in the town where the land lies. Buildings erected on land leased by the commonwealth under section twenty-six of chapter seventy-five shall be assessed to the lessees, or their assignees, at the value of said buildings. Except as provided in the three following sections, mortgagors of real estate shall for the purpose of taxation be deemed the owners until the mortgagee takes possession, after which the mortgagee shall be deemed the owner.

Whenever the assessors of any town assess a tax on real estate to a person other than the person appearing of record, in the records of the county, or of the district, if such county is divided into districts, where the estate lies, as owner on January first, such assessors shall, if the tax is a lien upon such real estate under section thirty-seven of chapter sixty, unless the assessors by reasonable diligence cannot ascertain the name of the person so appearing of record, include in such assessment the name of the person so appearing of record without imposing upon him personal liability for the tax.

Whenever assessors cannot by reasonable diligence ascertain the name of the person appearing of record, the assessors may assess taxes upon real property to persons unknown.

Real estate permanently restricted under section seventeen B of chapter twenty-one, section one hundred and five of chapter one hundred and thirty and section forty A of

chapter one hundred and thirty-one shall be assessed as a separate parcel of real estate and real estate under a conservation restriction in perpetuity under section thirty-one of chapter one hundred and eighty-four subject to a written agreement with a city or town shall be assessed as a separate parcel and the city or town acting through its assessor shall be bound by the terms of the written agreement until its expiration. The initial assessment as a separate parcel shall be made on January first of the year next following the conveyance of such permanent restriction.

History

1780, 43; 1830, 151, § 3; RS 7, §§ 7, 10, cl 8; GS 11, §§ 8, 13; 1881, 304, § 3; PS 11, §§ 13, 22; 1889, 84; RL 12, §§ 15, 25; 1902, 113; 1909, 440, § 2; 1909, 490, I, §§ 15, 25; 1911, 409; 1914, 198, § 2; 1915, 237, § 23; 1933, 254, § 29; 1936, 92; 1939, 175; 1956, 308; 1956, 690, § 2; 1957, 418; 1958, 549, § 2; 1971, 286; 1972, 719, § 1; 1977, 422; 1978, 62; 1989, 585; 2016, 218, §§ 128-130, effective January 1, 2017.

End of Document

ALM GL ch. 161A, § 24

Current through Chapter 4 of the 2023 Legislative Session of the 193rd General Court

Annotated Laws of Massachusetts > PART I ADMINISTRATION OF THE GOVERNMENT (Chs. 1 - 182) > TITLE XXII CORPORATIONS (Chs. 155 - 182) > TITLE XXII CORPORATIONS (Chs. 155 — 182) > Chapter 161A Massachusetts Bay Transportation Authority (§§ 1 — 52)

§ 24. Exemption from Taxation and from Betterments and Special Assessments.

Notwithstanding any general or special law to the contrary, the authority and all its real and personal property shall be exempt from taxation and from betterments and special assessments; and the authority shall not be required to pay any tax, excise or assessment to or for the commonwealth or any of its political subdivisions; nor shall the authority be required to pay any fee or charge for any permit or license, nor any compliance fee, issued to it by the commonwealth, by any department, board or officer thereof, or by any political subdivision of the commonwealth, or by any department, board or officer of such political subdivision, or by any department; and, so far as constitutionally permissible, the authority shall be exempt from tolls for the use of highways, bridges and tunnels. Bonds and notes issued by the authority, their transfer and the income therefrom, including any profit made on the sale thereof, shall at all times be free from taxation within the commonwealth.

Notwithstanding section 168 of chapter 175 or any other general or special law to the contrary, the authority shall be exempt from any fees or taxes associated with surplus lines insurance; provided, however, that the exemption shall extend to any insurance broker for any insurance premium tax or surplus lines tax being incurred or having been incurred by the insurance broker as a result of the insurance having been procured, placed, negotiated, continued or renewed for or on behalf of the authority. Real property of the authority shall, if leased, used, or occupied in connection with a business conducted for profit shall, for the privilege of such lease, use or occupancy be valued, classified, assessed and taxed annually as of January 1 to the lessee, user, or occupant in the same manner and to the same extent as if such lessee, user, or occupant were the owner thereof in full. No tax assessed under this section shall be a lien upon the real estate with respect to which it is assessed; nor shall any tax be enforced by any sale or taking of such real estate; but the interest of any lessee therein may be sold or taken by the collector of the town in which the real estate lies for the nonpayment of such taxes in the manner provided by law for the sale or taking of real estate for nonpayment of annual taxes. Notwithstanding the previous sentence, such collector may utilize all other remedies provided by chapter 60 for the collection of annual taxes upon real estate and for the collection of taxes assessed under this section.

History

1964, 563, § 18; 1999, 127, § 151; 2008, 303, § 29; 2013, 46, § 50.

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831 CMR 1.32

The Massachusetts Administrative Code titles are current through Register No. 1492, dated March 31, 2023

MA - Code of Massachusetts Regulations > TITLE 831: APPELLATE TAX BOARD > CHAPTER 1.00: APPELLATE TAX BOARD RULES OF PRACTICE AND PROCEDURE

1.32: 1.32: Request for Report

After the promulgation of a decision under the formal procedure without findings of fact, the Board will make such findings and report thereon when a request therefor is filed by either party with the clerk within ten days of the date of the decision as prescribed by M.G.L. c. 58A, § 13. The requesting party shall send a copy of the request to the adverse party.

Statutory Authority

REGULATORY AUTHORITY

831 CMR 1.00: M.G.L. c. 58A, § 8.

CODE OF MASSACHUSETTS REGULATIONS

End of Document

Mass. Bay Transp. Auth. v. Clear Channel Outdoor, Inc.

Superior Court of Massachusetts, At Suffolk

February 23, 2018, Decided; February 26, 2018, Filed

Opinion No.: 139489, Docket Number: 1884 CV 00268-BLS2

Reporter
2018 Mass. Super. LEXIS 34 *; 2018 WL 1866173

Massachusetts Bay Transportation Authority v. Clear Channel Outdoor, Inc.

Prior History: Mass. Bay Transp. Auth. v. Clear Channel Outdoor, Inc., 2018 Mass. Super. LEXIS 11 (Mass. Super. Ct., Jan. 31, 2018)

Judges: [*1] Kenneth W. Salinger, Justice of the Superior Court.

Opinion by: Kenneth W. Salinger

Opinion

MEMORANDUM AND ORDER ON CROSS MOTIONS FOR PRELIMINARY INJUNCTION

This lawsuit arises from the imminent expiration of a 15-year license agreement under which Clear Channel Outdoor, Inc., has been operating billboards on property owned by the Massachusetts Bay Transportation Authority. The MBTA recently issued a request for responses by parties willing to enter into a six-month license to operate the same billboards after the current license expires. The MBTA received bids from Outfront Media, LLC, which agreed to enter into a six-month license, and Clear Channel, which refused to accept a term that short. The MBTA disqualified Clear Channel. It then awarded a six-month license to Outfront Media.

The MBTA brought this suit seeking declarations that its request for responses was lawful, Clear Channel is not entitled to enforce its right of first refusal, and Clear Channel is contractually obligated to transfer the disputed billboards as well as whatever permits are needed to operate the billboards to the MBTA.

Clear Channel has asserted counterclaims alleging that the MBTA breached the existing contract by offering a new **[*2]** license on terms that are not commercially reasonable and by not allowing Clear Channel to exercise its contractual right of first refusal, and that Clear Channel therefore has no contractual obligation to transfer the billboard structures to the MBTA at the end of the current license term.

The MBTA now seeks a preliminary injunction that would bar Clear Channel from interfering with any use of the billboards on MBTA property, or terminating or otherwise disposing of its existing permits for billboards on MBTA property. Clear Channel seeks a preliminary injunction that would bar the MBTA from proceeding with the new license it has issued to Outfront Media or otherwise interfering with Clear Channel's ownership of billboard structures and associated permits. The Court will ALLOW the MBTA's motion and DENY Clear Channel's motion.

1. Legal Background

1.1. The Public Interest in MBTA Advertising Revenues

The MBTA is a governmental entity,

established by the Legislature as a "political subdivision of the commonwealth" that consists of 65 cities and towns within the MBTA's service area. G.L.c. 161A, §2 (political subdivision) & §1 (defining the cities and towns within the "area constituting the authority"). **[*3]** The MBTA is now governed by the board of directors of the Massachusetts Department of Transportation. *Id.*, §3.

"The MBTA's essential function is to provide mass transportation services" in the greater Boston metropolitan area. See *Massachusetts Bay Transp. Auth. v. City of Somerville*, 451 Mass. 80, 86, 883 N.E.2d 933 (2008).

The MBTA obtains most of its operating funds from taxes collected by the Commonwealth, fares paid by people who use the MBTA's services, and assessments on cities and towns. See *Boston Globe Media Partners, LLC v. Retirement Bd. of Mass. Bay Transp. Auth. Ret. Fund*, Suffolk Sup.Ct. no. 1484CV01624, 33 Mass. L. Rptr. 374, 2016 Mass. Super. LEXIS 21, 2016 WL 915300, at *9 (Mass.Super.Ct. 2016) (Salinger, J.); G.L.c. 10, §35T (requiring portion of state sales tax revenue, plus assessments on cities and towns within the MBTA, to be deposited in Massachusetts Bay Transportation Authority State and Local Contribution Fund and disbursed to MBTA); G.L.c. 161A, §9 (providing for assessments on cities and towns within the MBTA).

In addition, the Legislature has directed the MBTA to "establish and implement policies that provide for the maximization of nontransportation revenues from all sources." G.L.c. 161A, §11. For example, the Legislature has authorized the MBTA "[t]o sell, lease or otherwise contract for advertising in or on the facilities of the authority." *Id.*, §3(n).

The MBTA is therefore "required by statute **[*4]** to maximize its revenues from commercial advertising," including outdoor advertising on billboards and similar structures. *MBTA v. Somerville*, 451 Mass. at 86-87. This is because the "income that the MBTA generates, directly or indirectly, from commercial advertising in and on MBTA facilities and properties . . . is used by the MBTA to help defray the costs of its transportation operations." *Id.* at 86. "These revenues also affect the fares charged by the MBTA, for the MBTA is generally to take 'all necessary steps to maximize nontransportation revenues . . . before implementing fare increases.'" *Id.* at 87, quoting G.L.c. 161A, §11. In sum, "[r]evenue raised through advertisements is statutorily integrated with the MBTA's ability to provide mass transportation services, its essential function." *Id.* at 87.

The Supreme Judicial Court has determined that any interference with the MBTA's "ability to raise revenue" through commercial advertising on its property "would interfere with action that is related to the MBTA's essential function." *Id.*

1.2. Standards for Granting Preliminary Injunctive Relief

The MBTA and Clear Channel are seeking preliminary injunctions to enforce contractual rights allegedly established their 2003 license agreement regarding the use of billboard **[*5]** structures located on MBTA property. The parties' current dispute arises from the MBTA's solicitation of bids for and awarding of a new license. The MBTA contends that the bid process and award will help achieve the statutorily-mandated policy of maximizing non-transportation revenues discussed above. See G.L.c. 161A, §11.

Under these circumstances, to obtain preliminary injunctive relief the moving party must prove that (1) it is likely to succeed on

the merits of its claims, and (2) the requested relief will promote or at least will not adversely affect the public interest. See *LeClair v. Town of Norwell*, 430 Mass. 328, 331-32, 719 N.E.2d 464 (1999).

Unlike in lawsuits involving purely private interests, "a showing of irreparable harm is not required" because the MBTA is seeking "to enforce a statute or a declared policy of the Legislature." *Id.* at 331 (designer selection statute); accord *Fordyce v. Town of Hanover*, 457 Mass. 248, 255 n.10, 929 N.E.2d 929 (2010) (public bidding statutes); *Edwards v. City of Boston*, 408 Mass. 643, 646-47, 562 N.E.2d 834 (1990) (uniform procurement act); *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 89, 466 N.E.2d 792 (1984) (enforcement of bottle bill).

2. Findings of Fact

The Court makes the following findings based on the portions of the affidavits submitted by the parties that it finds credible, and on reasonable inferences it has drawn from those facts.

The Court does not credit Clear Channel's affidavits to the extent they contain opinions regarding the commercial **[*6]** reasonableness of the MBTA's recent request for responses for a new billboard license, or to the extent that they contain any other statements or opinions that are inconsistent with any of the findings or analysis in this decision. In deciding a motion supported by sworn affidavits, "the weight and credibility to be accorded those affidavits are within the judge's discretion" and "[t]he judge need not believe such affidavits even if they are undisputed." *Commonwealth v. Furr*, 454 Mass. 101, 106, 907 N.E.2d 664 (2009). An affidavit "is a form of sworn testimony the credibility of which is to be determined by the judge." *Psy-Ed Corp. v. Klein*, 62 Mass.App.Ct. 110, 114, 815 N.E.2d 247, rev. denied, 442 Mass. 1114, 818 N.E.2d 1068 (2004).

2.1. The Existing License

In 2003 the MBTA granted Clear Channel a 15-year license to operate billboards on MBTA property. That license will expire on March 3, 2018.[1] The written license agreement also includes the following provisions, among others.

Clear Channel agreed to pay the MBTA 20 percent of the gross revenues that Clear Channel receives in exchange for providing outdoor advertising on most of the licensed billboards, and to pay 40 percent of gross revenues for a few other billboards, all subject to certain minimum guarantees. In practice, over the 15-year life of this contract Clear Channel has paid the MBTA **[*7]** roughly 34 percent of the gross revenue generated by these billboards, because the minimum annual guarantee has exceeded 20 percent of revenue each year.

The 2003 license provides (in ¶10) that if Clear Channel wanted to continue to use the billboard structures after the 15-year license term ended, and the MBTA "at its discretion" agreed, then Clear Channel would continue to have a license to use the billboards on a month-to-month basis. That month-to-month use could be terminated by either party at any time on sixty days advance written notice. And the terms of the continuing month-to-month license would otherwise be the same as the 2003 license, except that the guaranteed minimum fee would increase by the same percentage increase in the specified consumer price index.

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[1] The parties previously submitted two different versions of their license, one stating that it after March 3, and the other saying March 5. At oral argument the MBTA represented that the parties have now agreed that the existing license term ends on March 3, 2018.

Clear Channel agreed (in ¶4.1 of the contract) that at the end of its license term it would transfer ownership of all of its structures located on the property to the MBTA. This obligation was subject to the condition that Clear Channel had "secure[d] the full and complete enjoyment of all rights granted by this License" for the original 15-year contract term. The contract provided that if the contract were terminated **[*8]** early, then Clear Channel would remove its structures from MBTA property.

The parties also agreed (in ¶4.2) what would happen if the MBTA opted not to extend the existing license. The contract provides that the MBTA may solicit bids or offers for a license of the billboard structures that are the subject of Clear Channel's existing license. It specifies that the MBTA retains full discretion to solicit such bids or offers "under such terms and conditions" that the MBTA decides are "in the best interests of the MBTA."

And the parties agreed that Clear Channel would have a right of first refusal as part of any bidding process for a successor license to use the billboard structures. The contract specifies that Clear Channel's "right of first refusal is expressly conditioned on" Clear Channel "making an initial bid or offer in response to the MBTA's solicitation and/or request for offers." If Clear Channel satisfies this condition precedent, then before awarding any bid, or accepting any proposal to license the billboard structures, the MBTA must provide notice to Clear Channel "of all material terms and conditions offered by any such third person's bid or proposal." Clear Channel would then **[*9]** have three days "to notify the MBTA that it accepts each and every term and condition offered by such third person." If Clear Channel were to do so, then the 2003 contract requires that Clear Channel "shall be awarded and be bound by a license with the same terms and conditions" offered by the other bidder.

Clear Channel has obtained from the Massachusetts Office of Outdoor Advertising all permits necessary to operate the MBTA billboards that are covered by the 2003 license. Some of these permits are for so-called "non-conforming" but "grandfathered" billboards that do not comply with current state or federal regulations but may nonetheless be permitted because they have been "continuously permitted . . . and utilized since their erection." See 700 C.M.R. §3.01 (definition of non-conforming and/or grandfathered sign).

2.2. The RFR Process

The MBTA retained a consultant in 2017 to help analyze how the MBTA could best maximize the revenues it earns from its billboard assets. The consultant advised that Clear Channel's current license fee is "among the lowest in revenue return in the public sector." It also told the MBTA that other public sector entities with similar billboard license arrangements "have **[*10]** minimum revenue share thresholds of 50% of gross revenues with some being as high as 70%."

The MBTA decided that it did not want to extend Clear Channel's existing license because the license fee was far too low. It also decided that it did not want to enter into a long-term license at this time, because it first wanted to evaluate the feasibility of converting existing static billboards to digital billboards.

The MBTA decided to seek proposals for a six-month contract, that the MBTA could extend in its discretion, in order to give it time to study the feasibility of digital billboards and to issue a new request for proposals for a digital contract if the MBTA decided that would be the best way to maximize its non-transportation revenues.

On November 29, 2017, the MBTA released Request for Response No. 150-17 (the "RFR"), which sought proposals to license and operate static billboards on MBTA properties.

The RFR specifies various terms for the new license. It proposes a license that would last for six months,[2] with additional three-month terms available at the MBTA's discretion. It explicitly requires that the new licensee must agree that, at the end of the license term, it will transfer **[*11]** all then-existing permits, advertising contracts, and related agreements for the billboards to the MBTA or its designee. The RFR also requires bidders to offer to pay the MBTA at least fifty percent of gross billboard revenues, and includes detailed requirements for information-sharing and reporting.

When the MBTA issued this RFR it reasonably anticipated that, if the new license were awarded to a company other than Clear Channel, the new licensee would be able to procure all necessary new permits from the Massachusetts Office of Outdoor Advertising to operate the licensed billboards either before the new license takes effect or shortly thereafter. The Court credits the testimony by the MBTA's Deputy Director of Advertising that the MBTA understands and anticipates that a new licensee would be able to obtain permits for all of the licensed billboard sites even if they are non-conforming but grandfathered sites.[3]

The MBTA received two bids, one from Outfront Media, LLC and one from Clear Channel.

Outfront agreed to accept all material terms set forth in the RFR. It offered to pay the MBTA 52.5 percent of gross billboard revenues during the contract term.

Clear Channel did not agree to the **[*12]** MBTA's terms. To the contrary, Clear Channel indicated that it would not sign any new license with a six-month term and that it would not agree to transfer billboard permits to the MBTA or its designee at the end of the new license terms. Instead, Clear Channel proposed negotiating a longer term and proposed that it would transfer only new permits that it acquired during the term of the new license.

The MBTA informed Clear Channel that its proposal was not responsive because Clear Channel did not agree to comply with all terms and conditions specified in the RFR. The MBTA gave Clear Channel an opportunity to amend its bid to accept the six-month and permit-turnover requirements. Clear Channel declined to do so.

The MBTA then disqualified Clear Channel's bid for failure to comply with material requirements.

On January 26, 2018, the MBTA awarded a new six-month license to Outfront Media. This license will take effect on March 4, 2018, immediately after Clear Channel's existing license ends. The Court finds that both the MBTA and Outfront Media anticipate that whenever the new license terminates, Outfront Media will have obtained and thus will have to transfer to the MBTA or its designee **[*13]** permits to operate all of the licensed billboards.

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[2] In its counterclaim, Clear Channel expressly alleges that "the RFR proposes a license term of six months." By law, Clear Channel is bound by its own factual allegations. See G.L.c. 231, §87 (allegations "[i]n any civil action pleadings . . . shall bind the party marking them"). This statute provides that "facts admitted in pleadings" are "conclusive upon" the party making them. *Adiletto v. Brockton Cut Sole Corp.*, 322 Mass. 110, 112, 75 N.E.2d 926 (1947).

[3] See Declaration of Yanni Poulakis, ¶¶37-41. Clear Channel's assertion during oral argument that the MBTA presented no evidence on this point is incorrect.

The MBTA never gave Clear Channel any opportunity to exercise its right of first refusal. On the other hand, Clear Channel had already made clear that it would not accept the six-month and permit-transfer terms of Outfront's proposal.

3. Likelihood of Success on the Merits

The Court concludes that: (i) the MBTA is likely to succeed on its claim that its request for responses was lawful, and Clear Channel is unlikely to succeed on its counterclaim that the RFR was commercially unreasonable and breached the implied covenant of good faith and fair dealing; (ii) the MBTA is likely to succeed on its claim that Clear Channel did not satisfy a condition precedent to the exercise of its right of first refusal, and Clear Channel is unlikely to succeed on its claim that the MBTA has committed a breach of contract by not giving Clear Channel the opportunity to exercise that right of first refusal; and (iii) the MBTA is likely to succeed on its claim that Clear Channel must comply with its contractual obligation to transfer the billboard structures to the MBTA.

3.1. Commercial Reasonableness of the Request for Responses

Clear Channel asserts that the **[*14]** MBTA violated its implied covenant of good faith and fair dealing by issuing a Request for Responses that included commercially unreasonable terms in a bad faith attempt to deprive Clear Channel of any meaningful opportunity to exercise its contractual right of first refusal. The Court is not convinced that Clear Channel has any likelihood of succeeding on this claim. To the contrary, the MBTA is likely to succeed in winning a declaration that its RFR is and was lawful.

3.1.1. The MBTA's Duty to Offer Reasonable Terms

Like all contracts in Massachusetts, the parties' 2003 license agreement includes an implied covenant of good faith and fair dealing. See, e.g., *Weiler v. PortfolioScope, Inc.*, 469 Mass. 75, 82, 12 N.E.3d 354 (2014). This implied covenant provides "that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract . . ." *Id.*, quoting *Druker v. Roland Wm. Jutras Assocs., Inc.*, 370 Mass. 383, 385, 348 N.E.2d 763 (1976).

The MBTA has an obligation under the implied covenant to protect Clear Channel's "ability to exercise its Right of First Refusal in an effective manner." *Uno Restaurants, Inc. v. Boston Kenmore Realty Corp.*, 441 Mass. 376, 381, 805 N.E.2d 957 (2004). In other words, the MBTA "was prohibited from obstructing" Clear Channel's right of first refusal. *Id.* at 384. For example, the MBTA would violate the implied covenant of good **[*15]** faith if it solicited offers that include a "poison pill" provision designed solely to discourage Clear Channel from exercising its right of first refusal. See, e.g., *Beckett v. Jewish Cemetery Ass'n of Mass.*, Middlesex Sup.Ct. Civ. no. 2007-1670-A, 28 Mass. L. Rptr. 100, 2011 Mass. Super. LEXIS 28, 2011 WL 831676, * 5-*6 (Mass.Sup.Ct. 2011) (Wilkins, J.); *David A. Bramble, Inc. v. Thomas*, 396 Md. 443, 914 A.2d 136, 149 (Md. 2007); *Kennedy v. Dawson*, 1999 MT 265, 296 Mont. 430, 989 P.2d 390, 396-97 (Mont. 1999).

This does not mean that the MBTA was required to solicit offers on terms to which Clear Channel was willing to agree. To the contrary, the license agreement between Clear Channel and the MBTA specifies, in the same right-of-first-refusal provision upon which Clear Channel relies, that the MBTA could "publish a solicitation of bids" to license the billboards after Clear Channel's contract expires "under

such terms and conditions deemed to be in the best interests of the MBTA."

This express contractual term is consistent with the common-law rules that govern rights of first refusal. As courts in other jurisdictions have explained, "the owner of property subject to a right of first refusal remains master of the conditions under which he will relinquish his interest, as long as those conditions are commercially reasonable, imposed in good faith, and not specifically designed to defeat the preemptive rights." *Roeland v. Trucano*, 214 P.3d 343, 350 (Alaska 2009), quoting *West Texas Transmission, LP v. Enron Corp.*, 907 F.2d 1554, 1563 (5th Cir. 1990) (applying **[*16]** Texas law).

Clear Channel's assertion that two particular terms of the RFR were not commercially reasonable, were not imposed in good faith, and thus must have been designed to defeat Clear Channel's right of first refusal is not convincing.

3.1.2. The Six-Month Term

To begin with, Clear Channel complains that the MBTA proposed a new license with a six-month term, rather than a license with a much longer duration. Clear Channel asserts that a six-month term is not commercially reasonable because a new licensee would not have sufficient time to obtain permits for the signs or to market and sign contracts for advertising on the signs, and could not secure more valuable, longer term contracts for the signs.

If these criticisms were true, they would merely suggest that Clear Channel would have an unfair advantage in performing under a six-month extension—not an unfair disadvantage—because it already has permits for the signs, and (according to Clear Channel) it has already entered into long-term contracts that extend beyond the termination of its existing license agreement.

In any case, Outfront Media has agreed to a six-month license. It will therefore be hard for Clear Channel to establish **[*17]** that the MBTA's request for responses was a charade, rather than a good faith effort to enter into a short, six-month lease of the billboards for reasons that make sense to the MBTA and Outfront even if they make no sense to Clear Channel. Clear Channel is unlikely to be able to show that terms that a competitor has agreed to accept are commercially unreasonable.

Furthermore, Clear Channel previously agreed, in the 2003 license, that come March 2018 Clear Channel could continue to operate under the existing license on a month-to-month basis if both side agreed. Given that Clear Channel previously agreed to potential month-to-month extensions, it is unlikely to succeed in proving that a six-month extension is designed solely to frustrate Clear Channel's ability to exercise its right of first refusal.

The Court concludes that the MBTA is likely to succeed in proving that it acted in good faith to impose the six-month term, because it expects to need a relatively short amount of time to evaluate whether to seek to convert any existing billboard structures to electronic, digital displays. Clear Channel is therefore unlikely to succeed in showing that this provision was included in the RFR **[*18]** in bad faith, as a poison pill designed only to convince Clear Channel not to bid and therefore not to exercise its right of first refusal.

3.1.3. The Permit Transfer Provision

In addition, Clear Channel argues that it was unfair for the MBTA to require that any company wishing to bid on a new license must agree that, at the end of the license term, it will transfer to the MBTA all permits to operate billboard or sign structures on MBTA property.

Clear Channel reasons that because it holds permits for all the existing MBTA structures, including some that are non-conforming but grandfathered, and a new licensee would necessarily start out with no permits for these structures, it necessarily follows that this requirement would unfairly force Clear Channel to relinquish something of great value that a new licensee does not have and cannot transfer. Once again, the Court is not persuaded.

As the Court found above, when it issued the RFR the MBTA reasonably anticipated and expected that any new licensee would be able to procure all necessary new permits to operate the licensed billboards, even with respect to structures that are non-conforming but grandfathered.

Thus, Clear Channel is unlikely **[*19]** to succeed in proving that the MBTA intended to unfairly disadvantage Clear Channel by including the permit-transfer condition in the RFR. To the contrary, it appears that the MBTA reasonably expects that by the end of the six-month term any new licensee would be in the same position as Clear Channel would be, i.e. holding permits to operate all of the billboard structures (including the non-conforming, grandfathered ones) that it would have to transfer to the MBTA or its designee at the conclusion of the new license term, as an agreed-upon condition of the license. The mere fact that Clear Channel has permits in place today, and Outfront does not, does not show that the permit-transfer condition is a bad faith attempt to disadvantage Clear Channel.

3.2. Clear Channel's Right of First Refusal

The MBTA is likely to succeed on its claim that Clear Channel is not entitled to enforce its contractual right of first refusal because it did not satisfy a contractual condition precedent.

The 2003 license agreement provides that Clear Channel's "right of first refusal is expressly conditioned on [Clear Channel] making an initial bid or offer in response to the MBTA's solicitation and/or request **[*20]** for offers."

The Court concludes that this provision unambiguously established a condition precedent to the exercise of Clear Channel's right of first approval, the meaning of which is a question of law for the Court to decide. See generally *Seaco Ins. Co. v. Barbosa*, 435 Mass. 772, 779, 761 N.E.2d 946 (2002) ("If a contract . . . is unambiguous, its interpretation is a question of law that is appropriate for a judge to decide on summary judgment"); *Eigerman v. Putnam Investments, Inc.*, 450 Mass. 281, 287, 877 N.E.2d 1258 (2007) ("Whether a contract is ambiguous is also a question of law"); *Indus Partners, LLC v. Intelligroup, Inc.*, 77 Mass.App.Ct. 793, 795, 934 N.E.2d 264 (2010) ("ambiguity is not created simply because a controversy exists between parties, each favoring an interpretation contrary to the other's") (Quoting *Jefferson Ins. Co. v. Holyoke*, 23 Mass.App.Ct. 472, 475, 503 N.E.2d 474 (1987)).

3.2.1. The Condition Requires a Responsive Bid

The Court construes this provision to mean that Clear Channel was required, as a condition of being able to exercise its right of first refusal, to submit a bid that was responsive to the MBTA's RFR, in the sense that Clear Channel made a bid in which it agreed to accept all material terms and conditions set forth in the RFR.

Under Massachusetts law any government entity that undertakes a public bidding process must "consider only those bids that conform to the specifications issued," even if the bidding process is not required or governed by statute. **[*21]** *Cataldo Ambulance Service, Inc.*

v. Chelsea, 426 Mass. 383, 388, 688 N.E.2d 959 (1998) (imposing such a condition as a matter of common law "in the interest of fairness," even though the Uniform Procurement Act exempts contracts for ambulance service from the statute's requirements; see *id.* at 384 n.3, G.L.c. 30B, §1(b)(24)). After all, the whole point of a competitive bidding process "is 'to establish genuine and open competition after due public advertisement in the letting of contracts for . . . (public) work, to prevent favoritism in awarding such contracts and to secure honest methods of letting contracts in the public interests.'" *Datatrol, Inc. v. State Purchasing Agent*, 379 Mass. 679, 696, 400 N.E.2d 1218 (1980), quoting *Morse v. Boston*, 253 Mass. 247, 252, 148 N.E. 813 (1925).

It would make little business sense for the parties to have agreed in their 2003 license agreement that Clear Channel must participate in the bid process as a condition for exercising its right of first refusal, but that a non-responsive bid in which Clear Channel rejects material terms of the RFR would count as participation. And the Court must construe this contract in manner that gives it "effect as . . . rational business instrument[s]" and that "will carry out the intent of the parties." *Robert and Ardis James Foundation v. Meyers*, 474 Mass. 181, 188, 48 N.E.3d 442 (2016)) (quoting *Starr v. Fordham*, 420 Mass. 178, 192, 648 N.E.2d 1261 (1995)).

Furthermore, "[t]o allow a bidder to furnish his own specifications for any material part of the contract in question would destroy genuine and fair competition **[*22]** and be subversive of the public interests." *Datatrol*, 379 Mass. at 697, quoting *Sweezy v. City of Malden*, 273 Mass. 536, 542, 174 N.E. 269 (1931). Thus, reading this provision in the manner advocated by Clear Channel would violate the principle that the Court must construe the parties' contract in a manner that would promote and be consistent with the public interest, not in a way that subverts the public interest. See *Department of Revenue v. Estate of Shea*, 71 Mass.App.Ct. 696, 702, 885 N.E.2d 866, rev. denied, 451 Mass. 1109, 889 N.E.2d 435 (2008); Restatement (Second) of Contracts §207 (1981).

3.2.2. Clear Channel's Bid Was Not Responsive

Although Clear Channel submitted a bid in response to the MBTA's recent RFR, Clear Channel expressly stated that it would not agree to a six-month license term and would not agree to transfer to the MBTA or its designee at the end of the license term any then-existing permits to operate the billboard structures. The terms that Clear Channel refused to accept were both material.

The MBTA gave Clear Channel a second chance to submit a responsive bid that would accept all of the material terms established in the RFR. Clear Channel refused to do so.

As a result, Clear Channel forfeited its right of first refusal. The submission of a responsive bid accepting all material terms of the MBTA's RFR was a contractual condition precedent to the exercise of that right. The condition was not satisfied. **[*23]**

Clear Channel argues that "even if the 2003 License silently demanded a fully acquiescent response, Clear Channel was still within its rights to take the exceptions it did" because the terms it declined to accept were commercially unreasonable and designed in bad faith to keep Clear Channel from exercising its right of first refusal. This argument fails for the reasons discussed above. The MBTA is likely to succeed in showing that the six-month term and the permit-transfer requirement were commercially reasonable and not unfair to Clear Channel.

3.3. Clear Channel's Obligation to Transfer the Billboards

The MBTA is likely to succeed on its claim to enforce Clear Channel's contractual obligation to transfer the existing billboard structures to the MBTA at the end of the current license term. Conversely, Clear Channel is unlikely to succeed on its counterclaim that this contract provision is unenforceable.

Clear Channel correctly notes that, under ¶4.1(a) of the 2003 license agreement, its obligation to transfer the billboard structures is only triggered "in the event that" Clear Channel "secures the full and complete enjoyment of all rights granted by this License" for the full fifteen-year **[*24]** contract term.

Based on this language, Clear Channel then argues that it never enjoyed all rights granted by this License because the MBTA never gave Clear Channel an opportunity to exercise its contractual right of first refusal.

Clear Channel is unlikely to prevail on this issue. Clear Channel never had any right under the 2003 license agreement to exercise a right of first refusal without first submitting a fully responsive bid, which never occurred. As explained above, the right of first refusal was subject to a condition precedent, that Clear Channel submit a bid in which it agreed to accept all material terms and conditions set forth in the MBTA's request for responses. Clear Channel never satisfied that condition. As a result, the first refusal provision never ripened into a right that Clear Channel was entitled to exercise. Cf. *Louis M. Herman Co. v. Gallagher Elec. Co.*, 334 Mass. 652, 654, 138 N.E.2d 120 (1956) (where approval of architect and engineer was condition precedent to order becoming a contract, lack of such approval meant that order never ripened into a contract).

Since it appears likely that the MBTA will succeed in enforcing Clear Channel's contractual obligation to transfer the billboard structures, it follows that the MBTA could likely show that **[*25]** any deliberate attempt by Clear Channel to interfere with the continued use of those structures by the MBTA's new licensee for outdoor advertising—either by dismantling, removing, or otherwise disposing of the structures themselves, or by terminating Clear Channel's existing permits to use those structures for outdoor advertising before the MBTA or its new license have a reasonable opportunity to seek and obtain new permits—would violate the implied covenant of good faith and fair dealing.

4. Public Interest

The MBTA has demonstrated that the preliminary injunctive relief that it seeks would promote the public interest, and that the preliminary relief sought by Clear Channel would adversely affect the public interest.

The MBTA determined that the public interest is best served by soliciting proposals for, awarding, and implementing a six-month license to use billboard structures on its property, because doing so is the best way for the MBTA to comply with its statutory mandate to maximize the revenues generated from outdoor advertising. The Court finds that this determination had a reasonable basis in fact, was neither arbitrary nor capricious, and does not appear to be the result of **[*26]** any unlawful action.

Such a determination by a government entity "that the public interest is better served" by the action that some other party seeks to enjoin "should not be second guessed by a court," except where that other party can shows that the determination was the result of "illegal or arbitrary action." *Siemens Bldg. Technologies, Inc. v. Division of Capital Asset Management*,

439 Mass. 759, 765, 791 N.E.2d 340 (2003) (affirming denial of injunction sought by disappointed bidder because injunction barring contract award would adversely affect the public interest).

Since Clear Channel "has not overcome the substantial public interest that would be adversely affected" if the MBTA's request for a preliminary injunction were denied or Clear Channel's motion were granted, the Court "need not address at length the likelihood of irreparable harm" to either party. *Id.* Indeed, as explained above, in a case like this the issuance of a preliminary injunction turns on the parties' likelihood of success and what furthers the public interest, without considering claims of irreparable harm. See, e.g., *Fordyce v. Town of Hanover*, 457 Mass. 248, 255 n.10, 929 N.E.2d 929 (2010); *LeClair v. Town of Norwell*, 430 Mass. 328, 331-32, 719 N.E.2d 464 (1999).

5. Summary as to Appropriate Relief

For the reasons discussed above, the Court concludes in the exercise of its discretion that it will deny Clear Channel's motion for a preliminary injunction but allow **[*27]** the preliminary relief sought by the MBTA. Cf. *Lightlab Imaging, Inc. v. Axsun Technologies, Inc.*, 469 Mass. 181, 194, 13 N.E.3d 604 (2014) ("Trial judges have broad discretion to grant or deny injunctive relief").

Clear Channel is not entitled to a preliminary injunction because it is unlikely to succeed on the merits of its counterclaims. See *Fordyce*, 457 Mass. at 266-67 (vacating preliminary injunction because plaintiffs were "unlikely to succeed on the merits").

Conversely, the MBTA is likely to succeed on its claims and the limited relief it seeks by way of preliminary injunction would be in the public interest because it would allow the MBTA and Outfront Media to implement their new license agreement, including by seeking new permits to use the billboard structures on MBTA property for outdoor advertising.

Since the MBTA is likely to succeed on its claim that Clear Channel is obligated to transfer the billboard structures to the MBTA as of March 4, it makes sense to enjoin Clear Channel from dismantling, removing, disposing of, or interfering with any use of those structures.

At oral argument Clear Channel made clear that it does not oppose the other relief sought by the MBTA in its preliminary injunction motion, because it agrees that both the public interest and the interests of all parties are **[*28]** best served by Clear Channel keeping its current permits for using the disputed structures in place. If Clear Channel were ultimately to prevail on its counterclaims, it would all of its existing permits still to be in place. The Court concludes that it is in the public interest that Clear Channel be enjoined from doing anything to terminate or dispose of those permits, in part so that the MBTA and its new licensee will have a reasonable opportunity to seek new permits before the existing ones lapse or are revoked by the permitting authority.

The MBTA need not post any bond, since "[n]o such security shall be required . . . of a political subdivision of the Commonwealth." Mass.R.Civ.P. 65(c).

ORDER

The motion for preliminary injunction filed by the Massachusetts Bay Transportation Authority is ALLOWED. The preliminary injunction motion filed by Clear Channel Outdoor, Inc. is DENIED.

Kenneth W. Salinger

Justice of the Superior Court

Dated: February 23, 2018

End of Document

2000 Mass. Tax LEXIS 73

Commonwealth of Massachusetts - Appellate Tax Board

December 12, 2000

Docket Nos. F238188, F242126

Massachusetts Appellate Tax Board ***Decisions***

Reporter
2000 Mass. Tax LEXIS 73 *

OGDEN ENTERTAINMENT SERVICES v. BOARD OF ASSESSORS OF THE TOWN OF HADLEY

Core Terms

was, assessors, management agreement, exempt, real estate tax, public purpose, tax year, diversity, entity, lease, management services, concert, user, public service, occupy

Counsel

[*1]
R. David Back, Esq. for the appellant.

Patrick J. Costello, Esq. for the appellee.

Opinion By: BURNS

Opinion

These are appeals under the formal procedure pursuant to G.L. c. 59, §§ 64 and 65, from the refusal of the appellee to abate taxes assessed on certain property, located in the Town of Hadley, owned by the Commonwealth of Massachusetts and assessed to the appellant under G.L. c. 59, § 2B, for fiscal years 1996 and 1997.

Former Chairman Gurge heard the appeal and was joined in the decision for the appellant by Chairman Burns, Commissioners Scharaffa and Gorton and former Commissioner Lomans.

These findings of fact and report are made at the request of the appellee pursuant to G.L. c. 58A, § 13 and 831 CMR 1.32.

FINDINGS OF FACT AND REPORT

The issue in this appeal is whether the assessors of the Town of Hadley ("the assessors") properly assessed real estate taxes for tax years 1996 and 1997 on certain property owned by the University of Massachusetts, Amherst, but operated and managed by a private, for-profit entity. On the basis of testimony and exhibits introduced at the hearing on the cross motions for summary judgment in these appeals, the Appellate Tax Board ("Board") made the following **[*2]** findings of fact.

The William D. Mullins Memorial Center (the "Mullins Center") is a multi-purpose arena and convocation center located partially in the Town of Hadley and partially in the Town of Amherst. The Mullins Center is owned by the University of Massachusetts Building Authority (the "Authority") and operated by the University of Massachusetts, Amherst (the "University") under a Contract for Financial Assistance dated October 1, 1988. The Mullins Center is part of the campus of the University.

The University entered into a Management Agreement dated September 28, 1992 [1] with appellant, Ogden Entertainment Services ("Ogden") for Ogden's provision of management services in conjunction with the University's operation of the Mullins Center. Ogden is a private entity engaged in the business of managing public entertainment facilities. Under the terms of the Management Agreement, Ogden performs various management services, including event scheduling to ensure "that appropriate concerts, conventions, shows and other programs are booked in to the Center and that suitable press coverage is obtained"; performs marketing and promotional services and "staging" (setting up and tearing **[*3]** down) for each event; provides insurance for the Center; and provides all aspects of maintenance, such as custodial and cleaning services, pest control, trash removal, staffing, concessions services, ticket sales, security and licensing for the operation of the Mullins Center. The Management Agreement specifies that Ogden's relationship with the University is that of an independent contractor.

The University uses the Mullins Center for various activities, including physical education programs and classes, sporting events, convocation ceremonies, theater productions, concerts and other University events. In addition to University events, other appropriate events which are open to the public, such as concerts, shows and convocations, are booked into the Mullins Center. Some of the events previously scheduled have included a diverse variety of productions, such as the World Wrestling Federation matches, David Copperfield magic shows, craft shows and food fairs, concerts by a wide variety of artists including the Boston Pops, Aerosmith, Primus and Barry Manilow, sports events and theatrical **[*4]** shows such as The Wizard of Oz and Jesus Christ Superstar. Under the terms of the Management Agreement, these events may not conflict with any scheduled University Fine Arts productions or University basketball or hockey games, and final approval of all such events rests with the University.

Also under the terms of the Management Agreement, Ogden must establish a separate operating account, the Ogden Operating Fund, from which it is required to pay all direct costs of operating the Mullins Center. The University is required to deposit into this Ogden Operating Fund, before the commencement of each fiscal quarter, sufficient funds to cover the amount by which anticipated expenses are projected to exceed anticipated revenues. Thus, while Ogden

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[1] This management agreement was subsequently amended on January 12, 1995 and June 4, 1997.

acts as the administrator for the payment of direct operating costs, the University and the Authority are the parties responsible for making the deposits into the Ogden Operating Fund and, therefore, bear the financial responsibility of paying operating expenses. Accordingly, all direct operating costs connected with the Mullins Center, including any taxes, also flow through to the University and the Authority.

The University does not charge Ogden **[*5]** any type of user fee. Ogden is paid a flat management fee of $ 12,000.00 per month for its services, with an allowance for a 5% annual increase. Ogden is also entitled to an "incentive fee" of 30% of the excess amount of event revenues over $ 190,000.00 for events held at the Mullins Center which do not involve the University. However, this "incentive fee" is capped such that it never exceeds 25% of gross revenue in excess of direct operating costs. All profits and losses from the operation of the Mullins Center flow through to the University and the Authority.

The University and the Authority retained title and physical possession of the Mullins Center. There was never a lease between the University and Ogden, and Ogden received no ownership rights to the Mullins Center under the terms of the Management Agreement. Under the terms of the Management Agreement, the University reserved the right to approve the events held at the Mullins Center, the prices for tickets, prices of items sold and other charges to Mullins Center users, the right to approve Ogden's Annual Budget, and all other rights not expressly granted to Ogden.

The University is a public institution of the Commonwealth. **[*6]** The Legislature expressly exempted the Authority and all property owned by the Authority from Massachusetts taxation in St. 1960, c. 773, § 15, as amended.

The assessors issued tax assessments to Ogden for tax years 1996 and 1997 for that portion of the Mullins Center located within the Town of Hadley as a result of Ogden's operation of the Mullins Center. For tax year 1996, the assessors valued the property at $ 1,594,359.00 and assessed a tax of $ 20,025.15 to the appellant. The assessors issued a preliminary tax bill to Ogden on June 30, 1995, and then issued the tax bill on December 29, 1995. On January 26, 1996, Ogden paid the balance of the assessed real estate taxes and timely filed an application for abatement with the assessors. The assessors did not send written notice of their decision to Ogden and, therefore, the application was deemed denied on April 26, 1996. On July 26, 1996, Ogden timely filed its appeal with this Board for tax year 1996.

For tax year 1997, the assessors valued the property at $ 1,500,569.67 and assessed a tax of $ 19,597.44 to the appellant. The assessors issued the tax bill to Ogden on December 31, 1996. On January 17, 1997, Ogden paid the assessed **[*7]** real estate taxes and timely filed an application for abatement with the assessors. Ogden received a written notice, dated April 22, 1997, that the application had been deemed denied on April 17, 1997. On June 11, 1997, Ogden timely filed its appeal with this Board for tax year 1997. On the basis of the foregoing, the Board found it had jurisdiction to hear these appeals involving tax years 1996 and 1997.

For the reasons stated in the Opinion which follows, the Board found that Ogden was not subject to real estate tax under G.L. c. 59, § 2B, because the property was owned by the Commonwealth, and Ogden neither "used" the Mullins Center in connection with the operation

of a business nor "leased or occupied" it for "other than public purposes." Rather, Ogden merely operated the property on behalf of the University and Authority. Accordingly, the Board issued a decision for the appellant in these appeals and granted abatements of tax in the amounts of $ 20,025.00 for fiscal year 1996 and $ 19,597.44 for fiscal year 1997.

OPINION

The issue in this appeal is whether the Mullins Center is "used in connection with a business conducted for profit or leased or occupied for other than public **[*8]** purposes" by Ogden, such that the appellee properly assessed real estate taxes to Ogden. G.L. c. 59, § 2B provides in pertinent part that:

> . . . Real estate owned in fee or otherwise or held in trust for the benefit of the United States, the commonwealth, or a county, city or town, or any instrumentality thereof, if **used in connection with a business conducted for profit or leased or occupied for other than public purposes,** shall for the privilege of such use, lease or occupancy, be valued, classified, assessed and taxed annually . . . in the same manner and to the same extent as if such **user, lessee or occupant** were the owner thereof in fee . . . . (Emphasis added).

The Board found that G.L. c. 59A, § 2B did not apply to Ogden, because Ogden did not "use", "lease" or "occupy" the Mullins Center. As stated in the Management Agreement, Ogden was not "using" the property at all, but merely contracting to supply the University and Authority with management services for the use and occupancy of the Mullins Center by the University and the Authority. The appellee cites as the legislative intent behind the enactment of § 2B the need to close a "loophole" whereby for-profit **[*9]** businesses operating on public property would avoid paying local taxes, thus securing an unfair advantage vis-a-vis competing businesses operating on private property. The Board agrees that the statute "shows an intent that municipalities have for their purposes real estate tax revenue from land devoted by occupants to the uses of their businesses, even though owned by the Commonwealth." Atlantic Refining Co. v. Assessors of Newton, 342 Mass. 200, 206-07 (1961). However, the Board found that the specific situation presented in these appeals did not fall within the rubric of the legislative intent even as characterized by the appellee. Here, Ogden is merely providing contractual management services for a property that is both owned and controlled by the Authority and the University. As described in the Findings above, the Management Agreement specifies that the University and Authority retain ultimate control over the use of the Mullins Center, from the approval of all events scheduled, ticket prices and all other prices paid by customers and Ogden's Annual Operations Budget, to payment of all operating expenses and deficiencies, including taxes.

Moreover, all profits and losses **[*10]** flow through to the University. Ogden was not liable for losses and was not charged a user fee for its management activities at the Center. Ogden merely received a flat management fee for its services. The 5% annual increase provided for in the management fee was akin to a cost-of-living increase, and did not reflect any share in profits or losses through the operation of the Mullins Center. Even the "incentive" fee it received was capped, indicating that Ogden's compensation, unlike that of a true owner or user for profit, was not directly tied to the profits and losses of the Mullins Center. Rather, as an independent contractor, its compensation was tied to its performance of services. The Board thus found that

the flow-through of profits and liabilities to the University and the Authority, together with their retention of control over the use of the Mullins Center, indicated that it was the University and the Authority which "used" or "occupied" the Mullins Center.

Furthermore, Ogden's performance of certain ministerial services did not result in the use of public property for private enterprise, but rather furthered the legitimate use for which the Mullins Center was established. **[*11]** Ogden was engaged by the Authority, the owner of the property, to perform certain managerial and administrative functions which the University would otherwise need to perform itself. In this respect, the Board found Ogden's relationship to the Mullins Center to be like that of a janitor, plumber, food concessionaire or other independent contractor. Surely, it could not reasonably be argued that a service provider such as a janitor, plumber or consessionaire should be assessed a real estate tax based on the fact that it "uses" the facility to make a profit. Similarly, Ogden, by taking on these service obligations and others, did not thereby become a "user" subject to real estate taxes when the governmental owner, in an effort to maximize the use of its facility for the public good, hired Ogden to perform these services subject to the owner's ultimate approval and control. *See* Miller v. Commissioner of the Department of Environmental Management, 23 Mass.App.Ct. 968, 969-70 (1987) (where a ski facility owned by the Commonwealth but operated by for-profit entity serves a public purpose, even though "the arrangement is a commercial one," because "[a] private entity experienced **[*12]** in making artificial snow and managing cross country skiing facilities is an appropriate party to operate such a facility. Such an entity would not be expected to undertake the responsibility without an arrangement for fees and some expectation of exclusivity").

Moreover, as the Board recently found in ***MCC Management v. Board of Assessors for the City of New Bedford,*** the engagement of an independent for-profit entity to perform contractual services may actually be necessary to serve a public purpose. *See* ***Id.*** at 903, *citing Miller, supra.*

While it is not dispositive, the Board found persuasive the Internal Revenue Service's treatment of management service contracts such as Ogden's as not resulting in a private business use of the property. *See* ***Rev. Proc. 97-13,*** I.R.B. 1997-5 (management service contracts will not result in private business use under Internal Revenue Code § 141(b) where contract is "for services that are solely incidental to the primary government function" including "contracts for janitorial, office equipment repair, hospital billing or similar services" and compensation not based on share of net profits from operation of facility).

In **[*13]** addition, the Board also found that the Mullins Center was not properly assessed by the appellee, because the Legislature had expressly exempted the Authority and its property from taxation via St. 1960, c. 773, § 15. That provision, entitled "Exemption from Taxation," provides in relevant part:

> The exercise of the powers granted by this act will be in all respects **for the benefit of the people of the commonwealth,** and for the **promotion and improvement of public education in the commonwealth,** and as the construction, operation and maintenance of projects by the Authority will **constitute the performance of essential governmental functions,** the Authority shall not be required to pay any taxes or assessments upon any

> property acquired or used by the Authority under the provisions of this act or upon the income therefrom . . . . (Emphasis added).

Accordingly, the explicit language of the exemption requires that the construction, operation and maintenance of Authority projects, which would include the Authority's construction, operation and maintenance of the Mullins Center, will "in all respects" be "for the benefit of the people of the commonwealth," particularly **[*14]** in "the promotion and improvement of public education in the commonwealth." The Board found, and the assessors did not dispute, that the use of the Mullins Center for University-sponsored events, such as use by the athletic teams and other University programs, was activity within the intended scope of the exemption in § 15. The issue raised by the assessors, however, is whether use of the Mullins Center for activities sponsored by outside parties, such as World Wrestling Federation and Aerosmith performances, fell outside the scope of the public purpose for which the Authority was created.

The Board found that the various uses of the Mullins Center did not fall outside the scope of the public purpose for which the Authority was created. As the Supreme Judicial Court has long recognized, "education is a broad and comprehensive term." Mount Hermon Boys' School v. Inhabitants of Gill, 145 Mass. 139, 146 (1887). In recognition of the "broad and comprehensive" nature of education, the Legislature has specifically provided with respect to the University that "the major purpose of the university shall be to provide, without discrimination, **public service,** research, and educational **[*15]** programs, including continuing education services, in the liberal arts and sciences and in the professions . . . ." G.L. c. 75, § 2. The Board of Trustees of the University has determined that the Mullins Center fulfills the University's public service role:

> "public service" encompass the provision of educational and cultural programs to the public at large and the **enhancement of opportunities within the geographic areas served by the University for members of the public and students of the University to attend, at reasonable prices,** lectures, concerts, festivals, exhibitions, **immense diversity of ideas and concepts,** artistic creativity, performance techniques and musical and other artistic styles in the United States and throughout the world, thereby **increasing awareness and appreciation** both of the diversity of our cultural heritages and our common ties as men and women devoted to the enrichment of our lives and the affirmation of understanding and good will among cultures and people throughout the world . . . .
>
> *Resolution of the Board of Trustees,* February 3, 1993 (Emphasis added).

The University Board of Trustees, in implementing the Legislature's statutory **[*16]** directive regarding the purpose of the University, has chosen to define its "public service" mandate by offering both students and the public at large an opportunity to attend a variety of events that promote an "immense diversity of ideas and concepts" and "thereby increasing awareness and appreciation" of the diversity of the culture in which the University is a part.

It is a well-established principle that an agency of government is to be given discretion in the implementation of a general and broad statutory directive. *See, e.g.,* L.G.G. v. Department of Social Services, 429 Mass. 1008 (1999) ("Where the means of fulfilling [a legal] obligation is within the discretion of a public agency, the courts normally have no right to tell that agency how to fulfil its obligation"), *quoting* Matter of McKnight, 406 Mass. 787 (1990). While the assessors

argued that World Wrestling Federation and Aerosmith concerts fall outside the scope of "education," the Board found that the Board of Trustees' determination that the diverse range of activities offered by the University at the Mullins Center carried out its "public service" role, in a manner that was "without discrimination" **[*17]** and consistent with the performance of its governmental function for the public benefit and improvement of public education in the Commonwealth under G.L. c. 75, § 2. "There may be an honest difference of opinion among persons of good judgment, as to whether it is wise to use real estate in a particular way for its direct effect in promoting the purposes for which an educational corporation was established. In such cases the managing directors have the responsibility and duty of deciding . . . . [A] decision within the limits of reasonable determination should be given effect." Emerson v. Trustees of Milton Academy, 185 Mass. 414, 415 (1904). *See also,* Cummington School of the Arts, Inc. v. Bd. Of Assessors of Cummington, 373 Mass. 597, 603 (1977) (Supreme Judicial Court "recognized an institution's entitlement to exemption even where its educational goals were not within traditional areas of education"), *citing, inter alia,* Newton Centre Woman's Club, Inc. v. Newton, 258 Mass. 326, 330-31 (1927) (affirming public support for numerous civic activities, including a music school and free art exhibitions).

Furthermore, the fact that an admission fee is charged **[*18]** to patrons of events does not negate the public purpose of the Mullins Center. For example, the United States District Court for the Eastern District of Pennsylvania found that the publicly-owned skating rink where the Philadelphia Flyers play hockey served a public use of the property, even though the facility charged admission fees: "By providing the public with amusement, pleasure, and entertainment, the municipally owned Spectrum clearly is public property used for public purposes." In re Spectrum Arena, Inc., 330 F.Supp. 125, 127 (E.D.Pa. 1971). Here, too, while the Mullins Center charges admission for its events, the "reasonable prices" do not negate the public purpose served by the use of the property in bringing diverse cultural events to students and the community surrounding the University.

Finally, under the terms of the Management Agreement, any tax liability imposed on Ogden would flow through to the University and the Authority. Thus, a tax liability assessed to Ogden would result in a tax imposed on the University and the Authority, in contravention of the clear Legislative intent to exempt from taxation the property of the Authority and University. Because **[*19]** the Legislature intended to exempt the Mullins Center from taxation, the Board found that this exemption was also intended to extend to an entity such as Ogden which provided services on behalf of the Authority's ownership and the University's operation of the Mullins Center; otherwise, the exemption would not achieve its intended purpose. See Board of Assessors of Newton v. Pickwick Ltd., Inc., 351 Mass. 621, 625 (1967) ("The authority, by indemnifying the leaseholder by statutory fiat or by the terms of a lease, would, in effect, be paying taxes on its property. Such a construction would completely negate the Legislature's intent to exempt all of the authority's property from taxation . . . and is to be avoided").

Based on the foregoing, the Board ruled that Ogden was not subject to real estate tax under G.L. c. 59, § 2B. Accordingly, the Board issued a decision for the appellant in these appeals.

APPELLATE TAX BOARD

By: Abigail A. Burns, Chairman

Massachusetts Appellate Tax Board Decisions

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure

I, Kelly L. Frey, hereby certify that the foregoing brief and appendix complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);
Mass. R. A. P. 16 (e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the monospaced font Courier New at size 12, 10.5 characters per inch, and contains 37, total non-excluded pages.

/s/ Kelly L. Frey
Kelly L. Frey (BBO #676234)

CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on April 20, 2023 I have made service of this Brief and Record Appendix upon the attorney of record for each party, by the Court's Electronic Filing System on:

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