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