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An Exception to the Exemption

The Massachusetts Supreme Court issued an opinion on April 22, 2024, in *Outfront Media LLC v. Board of Assessors of Boston*, 493 Mass. 811 (2024), a case concerning the application of a real property tax exemption to private parties who have contracted with the government to manage and operate government property. In a rare twist, the Supreme Court, on its own motion, transferred the case from the Appeals Court to the Supreme Court before the Appeals Court could review the case. This is an unusual but technically proper occurrence, as the Supreme Court clerks monitor cases in the Appeals Court and, in some instances, will move the case directly to the Supreme Court prior to arguments or disposition by the Appeals Court when it is believed the case will eventually end up before the Supreme Court. The Massachusetts Supreme Court found that OUTFRONT was responsible to pay real property taxes on billboards owned by the Massachusetts Bay Transportation Authority (MBTA) that were managed and operated by OUTFRONT.

The case began when the city of Boston assessed \$198,254.49 in real property taxes on OUTFRONT against 14 parcels of land containing MBTA signs for fiscal year 2021. OUTFRONT pursued an appeal before the Appellate Tax Board, claiming the signs were exempt from taxation because government property is exempt from real property taxes under state statute. OUTFRONT lost its appeal before the Appellate Tax Board and appealed the decision to the Massachusetts Appeals Court. The case was then transferred to the Massachusetts Supreme Court on its own motion.

OAAA filed an amicus brief in December of 2023, and the Supreme Court rendered a decision on April 22, 2024. The city of Boston claimed that an exception to the exemption was the basis for the tax liability for OUTFRONT. This exception is due to a 2013 amendment to the statute exempting government property from tax liability, which provides that government property is not exempt from tax liability if it is “leased, used or occupied in connection with a business conducted for profit.” The amendment goes on to say that “such property is taxable to the lessee, user or occupant as if they were the owner in full of the property.” (Massachusetts General Laws chapter 161A, section 24) The Massachusetts Supreme Court found that the exemption did not apply to the MBTA signs that were operated and managed by OUTFRONT due to this exception and that OUTFRONT was liable for such property taxes.

The 30-page opinion issued by the Massachusetts Supreme Court provides an in-depth analysis of the application of the special state exception to the property tax exemption. The opinion first addresses the issue of who has the burden of proof, as OUTFRONT claimed the city should carry the burden to prove that OUTFRONT is subject to the tax whereas the city argued OUTFRONT had the burden to show it should be able to avail itself of the exemption. The Court concluded that OUTFRONT bore the burden of proof, as OUTFRONT was seeking the tax exemption, and controlling state law requires the taxpayer to show it is entitled to an exemption from paying a tax. The Court stated:

“Although Outfront is correct that tax statutes are strictly construed in favor of the taxpayer, this standard is applied when determining where a statute imposes a tax, rather than where, as here, the issue is where the taxpayer is entitled to an exemption.”

The next analysis by the Supreme Court was to examine the special state exception to the exemption contained in section 24. The Court focused on the meaning of “use” in the language of the exception, stating “we draw a statutory distinction between using public property to conduct a for-profit business, which would thereby provide the business with an advantage over a competitor operating on private property, and simply providing services to the public entity, such as janitorial or plumbing services.”

The Court further focused on the rights granted to OUTFRONT in the contract with MBTA, noting that OUTFRONT had a “significant degree of control over the property to conduct a for-profit business on it.” OUTFRONT’s contract granted it the exclusive right to advertise on the signs and to “install, license, operate and maintain telecommunications equipment” on the sign structures. The contract also granted OUTFRONT the right to set all rates charged to advertisers on the signs and to receive all revenue over the monthly amounts paid to MBTA. The Court took particular note of this, emphasizing that OUTFRONT was not capped on the amounts of revenue it could earn. OUTFRONT was responsible for all costs associated with the operations, obtaining all government permits, and keeping the signs maintained and in good repair. MBTA was to receive an upfront flat fee and a monthly percentage of the gross revenue. MBTA was entitled to sign display time at no cost and for emergency messages, where needed. MBTA was to pass on any tax exemptions applicable to the MBTA “[t]o the extent allowed by law”. Upon the end of the contract, OUTFRONT was to “handback” the signs to MBTA.

The Supreme Court acknowledged that prior to the 2013 amendment adding the exception, the tax exemption was “uniformly interpreted to encompass all the [MBTA’s] real and personal property including any property leased from the MBTA by a private commercial entity, regardless of the purpose for which that property was used.” However, the Court went on to note the impact of the 2013 amendment, stating one effect of the amendment was “to place businesses that use MBTA property to conduct a for-profit business in the same competitive position as businesses that operate on private property,” and focused on OUTFRONT’s control and uncapped revenue potential as the basis of OUTFRONT’s tax liability.

OUTFRONT's attorneys argued this case was like a previous case before the Appellate Tax Board, *Ogden Entertainment Servs. Vs. Assessors of Hadley*, App. Tax Bd. Nos. F238188, F242126, ATB 2000-978 (December 12, 2000). In *Ogden*, an entertainment services company contracted with the University of Massachusetts to manage and operate its events center. The Tax Board found that the tax exemption applied in that case because "Ogden fell on the service provider side of the line," but in distinguishing *Ogden*, the Court emphasized that the revenue arrangements in the *Ogden* contract significantly differed from the OUTFRONT contract. Pursuant to the contract, *Ogden* was to provide "management services in conjunction with the university's operation of the Mullins center," which was the university's event center. The activities in the center included "various university activities, including classes, sporting events, convocation ceremonies, theater productions and concerts. The Mullins Center also hosted non-university events such as professional concerts, magic shows, and wrestling matches." *Ogden* was to oversee all operations, including "event scheduling, custodial and cleaning services, ticket sales, insurance, and security." The Court noted *Ogden* had "some degree of control over the property." However, the Court advised the financial arrangement was the difference maker when compared to the OUTFRONT financial arrangement, as *Ogden* received a monthly flat management fee from the university and an "incentive fee equal to thirty percent of revenues over \$190,000 for non-university events." The Court also stated that the incentive fee was capped at 25% of gross revenue, and operational costs were borne by the university.

The cap on revenues received by *Ogden* and the lack of a cap on revenues received by OUTFRONT was, in the Court's words, "a key factual distinction" when comparing the two cases and the application of the tax exemption on the use of the government property by the private parties in each case. The Court also noted that *Ogden* passed on all costs to the university, OUTFRONT bears most of the costs associated with the MBTA signs. "[OUTFRONT] shares fully in both the upside and the downside of the MBTA signs in a way that *Ogden* never did with the Mullins Center, and [OUTFRONT] enjoys a significant level of control over the revenues to be derived from the property that *Ogden* did not possess."

OUTFRONT also argued that the taxes by the city may reduce the amount of revenue the MBTA will earn in violation of the essential government function doctrine, as MBTA is statutorily obligated to strive to obtain revenue from non-transportation services, where possible, to offset the cost of transportation to the public. The Court dismissed that argument, stating "the Legislature also certainly recognized that there might be some effect on the revenues that the MBTA will be able to generate" when comparing the essential government function statute with the exception to the exemption passed by the Legislature.

Of course, this Massachusetts Supreme Court opinion is not precedent in other states, but it can be persuasive authority. Clearly, the lynchpin of this case is the special exception to the exemption contained in the Massachusetts statute as well as the specific language in the OUTFRONT/MBTA contract governing revenue sharing and OUTFRONT's responsibility for certain costs. Although we have not researched all

state tax exemption statutes, a survey of a sample of major states revealed that statutes vary from no exception to the exemption to some form of an exception in specific cases. None of the exceptions reviewed are identical, so the bottom line is the outcome will vary from jurisdiction to jurisdiction based on the agreement between the private party and the government as well as the applicable language of the tax exemption laws in each jurisdiction.

This Legal Report is written by J. Allen Smith, OAAA Association Counsel.