



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS FOR SUMMARY JUDGMENT GRANTED: November 10, 2022

CBCA 7359, 7360, 7361, 7362, 7363, 7364

CESC MALL, LLC,

Appellant in CBCA 7359,

and

BNA WASHINGTON INC.,

Appellant in CBCA 7360,

and

CESC CRYSTAL/ROSSLY II, L.L.C.,

Appellant in CBCA 7361,

and

CESC SQUARE LLC,

Appellant in CBCA 7362,

and

FOURTH CRYSTAL PARK ASSOCIATES LP,

Appellant in CBCA 7363,

and

CESC GATEWAY SQUARE L.L.C.,

Appellant in CBCA 7364,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Stuart W. Turner and Amanda J. Sherwood of Arnold & Porter Kaye Scholer LLP, Washington, DC, counsel for Appellant.

James F. H. Scott and Jessica Gunzel, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **VERGILIO**, and **DRUMMOND**.

BEARDSLEY, Board Judge.

These consolidated appeals involve a dispute over reimbursement of taxes under six leases in Arlington County, Virginia, between appellants and respondent, the General Services Administration (GSA). Appellants appealed GSA's denial of claims for reimbursement of the Transportation Tax and the Sanitary District Tax pursuant to the Tax Adjustment clauses in the leases. The Board finds that both taxes fall under the leases' definition of real estate taxes, for which GSA is financially responsible. We therefore grant the appeals.

Findings

A. The Leases

GSA holds six leases with appellants to rent properties located in Arlington County, Virginia. Amended Joint Statement of Stipulated Facts (Joint Stipulation) at 1. The leases state that GSA is responsible for real estate taxes for the property it occupies. *Id.* Each lease provides one of three similar definitions for real estate taxes in its Tax Adjustment clause.

Leases GS-11B-01873 (CBCA 7359) and GS-11B-02085 (CBCA 7363) include the following definition:

Real Estate taxes, as referred to in this paragraph, are only those taxes which are assessed against the building and/or the land upon which the building is located, without regard to benefit to the property, for the purpose of funding general Government services. Real Estate taxes shall not include, without limitation, general and/or special assessments, business improvement district assessments, or any other present or future taxes or governmental charges that are imposed upon the Lessor or assessed against the building and/or the land upon which the building is located.

Exhibit 2, Solicitation for Offers at 17, para. 3.4A; Exhibit 3, Solicitation for Offers at 16, para. 3.5A.¹

Lease GS-11B-80614 (CBCA 7364) includes the following substantially similar definition:

For purposes of this clause, “real estate taxes” means those taxes that are assessed on an ad valorem basis against the Building and/or the land upon which the Building is located, without regard to any benefit to the property, for the purpose of funding general government services. Real estate taxes shall not include, without limitation, any other general and/or special assessments, service or user charges, licenses, fees, taxes on related personal property, taxes on excess land, or any other present or future taxes or governmental charges that are imposed upon Lessor or assessed against the Building and/or the land upon which the Building is located.

Exhibit 1, Solicitation for Offers at 11, para. 2.4(c).

Leases GS-11B-02289 (CBCA 7360), GS-11P-12679 (CBCA 7361), and GS-11B-12534 (CBCA 7362) include the following definition:

Real Estate Taxes are those taxes that are levied upon the owners of real property by a Taxing Authority (as hereinafter defined) of a state or local Government on an ad valorem basis to raise general revenue for funding the provision of government services. The term excludes, without limitation, special assessments . . . for specific purposes . . . and/or community development assessments.

¹ All exhibits are found in the appeal file, unless otherwise noted.

Exhibit 5, Solicitation for Offers at 18, para. 4.2B.2; Exhibit 8, Lease at 8, para. 2.07B; Exhibit 7, Lease at 10, para. 2.06B.

Lease GS-11B-02289 (CBCA 7360) also says, “Real Estate Taxes are only those taxes which are assessed against the building and/or the land upon which the building is located.” Exhibit 5 at 18. The definition in lease GS-11P-12679 (CBCA 7361) states that the term real estate taxes excludes “special assessments, not imposed on an ad valorem basis.”

B. The Taxes

Two taxes are at issue in these appeals: the Transportation Tax and the Sanitary District Tax. The Transportation Tax allows counties and cities within the Northern Virginia Transportation Authority (NVTA) to implement taxes to fund construction of roads and public transportation. Va. Code § 58.1-3221.3. The tax is an “additional real estate tax” to be “levied, administered, enforced, and collected in the same manner as set forth . . . for the levy, administration, enforcement, and collection of local taxes.” *Id.* § 58.1-3221.3(C)(2). The tax “shall be used exclusively for transportation purposes that benefit Arlington County.” Arlington County Code § 20-6(C)(3); *see* Joint Stipulation at 5. The Transportation Tax is assessed on all commercial and industrial properties within Arlington County on an ad valorem basis. Arlington County Code § 20-6(C)(1), (5).

The Sanitary District Tax is to be used “for operating and capital expenses necessary to expand and upgrade the storm drainage (storm sewer) system.” Arlington County Code, § 26-13(A); *see* Joint Stipulation at 5. Virginia statute allows counties to establish sanitary districts which implement taxes of this nature to build and maintain water, sewage, and drainage systems. Va. Code § 21-118. The tax is to be “payable at the same time and in the same manner as real estate taxes are paid.” Arlington County Code § 26-13(A). The Sanitary District Tax is assessed on “all taxable real estate” within Arlington County on an ad valorem basis. *Id.*; *see* Joint Stipulation at 5.

C. The Appeals

GSA paid for its proportionate share of the taxes until 2014. Joint Stipulation at 6. In 2014, GSA issued a policy letter stating its position that the taxes were not real estate taxes under the Tax Adjustment clauses of the leases but, rather, were special assessments for which GSA was not responsible. *Id.* GSA refused to pay the taxes going forward, demanded repayment of taxes previously paid, and clawed back a portion of previously paid taxes from lease payments. *Id.* In January 2022, believing the taxes to be real estate taxes under the leases, appellants submitted claims to GSA for payment of the taxes. *Id.* at 8. In March

2022, GSA issued contracting officer's final decisions, restating its position that it would not pay the taxes under any of the leases because the taxes constituted special assessments. *Id.* Appellants timely filed the instant appeals seeking payments for the taxes.

Discussion

The issue before the Board is whether the Transportation Tax and Sanitary District Tax are real estate taxes under the leases. This is a matter of contract interpretation, which is “a question of law generally amenable to summary judgment.” *Varilease Technology Group, Inc. v. United States*, 289 F.3d 795, 798 (Fed. Cir. 2002). Because there are no genuine disputes of material fact, and we agree that appellants are entitled to judgment as a matter of law, we grant the motions and find that the taxes are properly categorized as real estate taxes. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986) (“Summary judgment is appropriate when there is no genuine dispute of material fact, and the moving party is entitled to judgment as a matter of law.”).

“Contract interpretation begins with the language of the written agreement.” *NVT Techs., Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004). “In contract interpretation, the plain and unambiguous meaning of a written agreement controls.” *Hercules Inc. v. United States*, 292 F.3d 1378, 1380–81 (Fed. Cir. 2002) (quoting *Craft Mach. Works, Inc. v. United States*, 926 F.2d 1110, 1113 (Fed. Cir. 1991)). We must interpret a contract “in a manner that gives meaning to all of its provisions and makes sense,” *Langkamp v. United States*, 943 F.3d 1346, 1353 (Fed. Cir. 2019) (quoting *McAbee Constr., Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996)), and we seek to “avoid[] conflict or surplusage of [the contract’s] provisions,” *United Int’l Investigative Servs. v. United States*, 109 F.3d 734, 737 (Fed. Cir. 1997) (quoting *Granite Constr. Co. v. United States*, 962 F.2d 998, 1003 (Fed. Cir. 1992)). *See also NVT Techs.*, 370 F.3d at 1159 (explaining that interpretations should “harmonize and give reasonable meaning” to all parts of the contract, rather than “leave[] a portion of the contract useless, inexplicable, void, or superfluous”). Contract provisions should not “be construed as being in conflict with [one] another unless no other reasonable interpretation is possible.” *Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965).

NOAA Maryland, LLC v. Administrator of the General Services Administration, 997 F.3d 1159, 1165–66 (Fed. Cir. 2021). “The Lease, in short, requires GSA to reimburse [the lessor] for all taxes (in excess of the agreed-on base amount) that meet the three-part definition of a real estate tax.” *Id.* at 1165. The Transportation Tax and Sanitary District Tax

meet the “three expressly stated criteria” for being a real estate tax found in each of the six leases.

Leases GS-11B-01873, GS-11B-02085, and GS-11B-80614

Leases GS-11B-01873, GS-11B-02085, and GS-11B-80614 define real estate taxes as taxes that are “[1] assessed against the building and/or land upon which the building is located, [2] without regard to benefit to the property, [3] for the purpose of funding general Government services.” Per this three-prong definition, the Transportation Tax and Sanitary District Tax are real estate taxes. *See NOAA Maryland v. General Services Administration*, CBCA 5269, 19-1 BCA ¶ 37,458 (finding that stormwater and transportation ad valorem taxes constituted real estate taxes under this same definition), *rev’d on other grounds*, 997 F.3d 1159 (Fed. Cir. 2021). Both taxes are assessed against the building and/or land and are based on the assessed value of the property (an ad valorem tax). The taxes are not assessed against specific property owners to fund services or improvements specific to those properties but are assessed against all non-exempt property and used to fund general government services which benefit the County as a whole. GSA offers no argument or evidence that property owners benefit from the Transportation Tax or Sanitary District Tax more so than other property owners, and we find none in the statutes.

GSA, instead, has taken a position that is contrary to the language in the leases and the case law, asserting that the taxes at issue here are assessed for the purpose of funding specific, not general, government services and therefore do not meet criterion 3 (“for the purpose of funding general government services”) of the leases’ definition of a real estate tax. In *NOAA Maryland*, however, GSA did not even dispute that public transportation and stormwater management are “within the scope of general government services provided by the county” but instead put forth the argument, which the Board rejected, that the Tax Adjustment clause limited real estate taxes to those going into the county’s general fund.²

² On appeal, GSA did not challenge the Board’s rejection of GSA’s argument that the “purpose of funding general Government services” criterion requires that the money collected go into the government’s (here, county’s) general fund” or conclusion that “public transportation and stormwater management are within the scope of general government services.” *NOAA Maryland*, 997 F.3d at 1164. At oral argument at the Federal Circuit, GSA acknowledged that it did not challenge “those conclusions, stating: ‘At the Board, GSA argued that the two taxes that are at issue here were not for purposes of funding general government services. The Board rejected that position and we, the Department of Justice, did not seek the Solicitor General’s concurrence to cross-appeal on that issue, so we are not arguing that here, Judge.’” *Id.* at 1171-72.

NOAA Maryland, 19-1 BCA at 181,997. The Board found that the county stormwater and transportation taxes (taxes similar to those at issue here) funded general government services by generating revenue for initiatives that provided “public benefits county-wide, not for specific property owners or properties.” *Id.* That analysis applies here as well. “General” refers to government services, like stormwater and transportation services, that benefit the County in general, as opposed to benefitting any specific property owner. *See, e.g., FFW Enterprises v. Fairfax County*, 280 Va. 583, 596 (2010) (discussing the broad impact and general benefits of a county transportation tax).

This application of the word “general” is evident in the lease clauses, which each explicitly distinguish real estate taxes from special assessments. *NOAA Maryland*, 19-1 BCA at 181,997 (finding that the taxes collected in support of stormwater management and public transportation services are not special assessments); *Real Estate Law* 465 (6th ed. 1974) (“An assessment differs from a general tax in that an assessment is levied only on property in the immediate vicinity of some local municipal improvement and is valid only where the property assessed receives some special benefit differing from the benefit that the general public enjoys.”). The second sentence of the Tax Adjustment clause in the leases clarifies “what is not sufficient to meet [the] definition” of real estate taxes in the first sentence of the lease clause.” *NOAA Maryland*, 997 F.3d at 1167. The mention of “special assessments” in the second sentence “refers to impositions that fail to satisfy at least either condition [2] (‘without regard to benefit to the property’) or condition [3] (‘for the purpose of funding general Government services’).” *Id.* The taxes at issue here are not special assessments because they satisfy conditions 2 and 3. “Taxes are used for the benefits of government that all citizens receive, while assessments are used, in part, for the benefit of the person whose land abuts the improvement that is financed with the assessment.” *Woodbridge Construction Corp. v. General Services Administration*, GSBGA 14200, 98-1 BCA ¶ 29, 345, at 145,907.

GSA argues that the taxes are specific, not general, taxes because to implement the taxes required “highly specific enabling legislation.” Tax revenue received by the County is earmarked, through its budget, for a specific purpose. The leases, however, do not limit real estate taxes to those taxes that are earmarked by the budgeting process, instead of by statute, and the tax-creating legislation does not factor into whether the taxes fund general government services.

Leases GS-11B-02289, GS-11P-12679, and GS-11B-12534

The other three leases (GS-11B-02289, GS-11P-12679, and GS-11B-12534) define real estate taxes as “those taxes that are [1] levied upon the owners of real property by a Taxing Authority . . . of a state or local Government [2] on an ad valorem basis [3] to raise general revenue for funding the provision of government services.” The Transportation Tax

and Sanitary District Tax meet this three-part definition of a real estate tax. Satisfying criteria 1 and 2, both taxes are levied upon the owners of real property on an ad valorem basis. GSA asserts, however, that the taxes raise “revenue” but not “general revenue” to fund government services because the tax revenue may be expended only for specific purposes—transportation initiatives or stormwater infrastructure—and “general revenue” could be used to fund any government services.

GSA reads the phrase “general revenue” as excluding revenue earmarked for a particular grouping of government services. The plain text, however, does not support GSA’s reading. “General revenue” refers not to an uncommitted pool of money to fund government services but rather to revenue collected to fund government services that benefit the whole county, which these taxes do. Taxes to fund government services that directly impact the general welfare of the county’s citizens “are no less general revenue raising levies simply because they are dedicated to a particular aspect of the” county. *Wright v. McClain*, 835 F.2d 143, 145 (6th Cir. 1987) (discussing taxes to fund monitoring and supervising the behavior of convicted offenders). The Transportation and Sanitary District Taxes both raise general revenue to fund government services and therefore satisfy the criteria for “real estate taxes.”

We conclude that GSA is responsible to pay both the Transportation and Sanitary District Taxes as real estate taxes under all six leases.

Decision

The Board **GRANTS** appellants’ motions for summary judgment. Appellants are due reimbursement for the Sanitary District and Transportation Taxes under all six leases.

Erica S. Beardsley

ERICA S. BEARDSLEY

Board Judge

We concur:

Joseph A. Vergilio

JOSEPH A. VERGILIO

Board Judge

Jerome M. Drummond

JEROME M. DRUMMOND

Board Judge