Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

No. SJC-13489

OUTFRONT MEDIA LLC,
Plaintiff-Appellant

v.

BOARD OF ASSESSORS OF THE CITY OF BOSTON,
Defendant-Appellee

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

BRIEF OF AMICUS CURIAE, NEW ENGLAND LEGAL FOUNDATION, IN SUPPORT OF APPEAL OF APPELLANT, OUTFRONT MEDIA LLC

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The New England Legal Foundation ("NELF") submits this brief as amicus curiae concerning discrete aspects of the questions the court posed for amicus briefing. First, the relevant statutory language is clearly an exception to an existing exemption from taxation. Accordingly, the taxing authority should bear the burden to show the exception from that exemption applies and it has statutory authority to levy any tax. Second, a manager or agent for the Massachusetts Bay Transportation Authority (the "MBTA") utilizing real property of the MBTA should not be subject to local taxation regarding property that is exempt from taxation.[1]

THE INTEREST OF THE AMICUS CURIAE

NELF is a nonprofit, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. NELF's membership consists of corporations, law firms, individuals, and others who believe in its mission of promoting balanced and inclusive economic growth, protecting free enterprise, and defending economic rights throughout New England. NELF's more than 130 sponsors include a cross-section of large and small businesses and other organizations from Massachusetts and the other five New England states, as well as national public interest foundations. In fulfilling its mission, NELF has appeared as amicus curiae in federal and state

[1] NELF will not provide any discussion of the second amicus question the court asked. However, the record was not sufficiently developed for the Appellate Tax Board (the "ATB") to have considered the issues posed by the second question. Given its apparent importance to the court, a proper resolution would be to remand the case for further discovery and analysis of that issue.

courts throughout New England as well as in this court and in the U.S. Supreme Court.

Pursuant to Mass. R. App. Pro. 17(c)(1), NELF certifies that it has no parent corporation and that no corporation, whether publicly or privately held, owns any of its stock.

Pursuant to Mass. R. App. Pro. 17(c)(5), NELF certifies that it and its counsel authored this brief in whole, no party contributed money that was intended to fund the preparation or submission of the brief, and neither the amicus curiae nor its counsel has represented or currently represents any party to this appeal. NELF further certifies that Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., the law firm representing the appellant, OutFront Media LLC ("OutFront"), is a member of and contributor to NELF. However, neither it nor OutFront provided any funding for this brief, which a volunteer Legal Fellow of NELF drafted.

ARGUMENT

I. THE ASSESSORS SHOULD BEAR THE BURDEN OF PERSUASION HERE AS THEY INVOKE AN EXCEPTION TO A CLEAR AND LONG-STANDING EXEMPTION FROM TAXATION.

There is no question a statutory exemption from taxation exists. Indeed, the relevant language providing the exemption to the MBTA dates back decades before the Legislature charted the MBTA. *See Beacon South Station Associates LSE v. Board of Assessors of the City of Boston,* Appellate Tax Board 2013–209 at pp. 212-

13 (promulgated March 22, 2013), *aff'd,* 85 Mass. App. Ct. 301 (2014) (noting that the Legislature changed the existing statute allowing taxation precisely to facilitate funding for the MBTA). *See also, Board of Assessors of Newton v. Pickwick Ltd., Inc.*, 351 Mass. 621, 624 (1967) (discussing legislative history and purpose for the MBTA's and predecessor's exemption from local taxation). The Legislature in 1999 carried forward the MBTA's exemption from taxation in what is now the first paragraph of Section 24. *Beacon South Station, supra,* at p. 214. Accordingly, the Legislature has long recognized that providing the MBTA with an exemption from local taxation better allows it to fund and to perform its essential public services for all the citizens of the Commonwealth.

The real property at issue indisputably is exempt from taxation unless the exception to that exemption, added by the Legislature in 2013, applies. The language of the 2013 exception to the statute does not directly answer the question of who has the burden to show whether the exception applies, therefore authorizing the appellee Board of Assessors of the City of Boston (the "Assessors") to levy a tax on OutFront. However, the Legislature did not amend in any respect the long-standing paragraph that begins with "Notwithstanding any general or special law to the contrary.…" The Legislature accordingly did not redraft Section 24 to exempt real property of the MBTA from local taxation ***only if*** a business with which the MBTA contracts can prove the property is ***not*** "leased, used, or occupied in connection with a business

conducted for profit." The Legislature instead established, in an entirely separate paragraph, a narrow exception from a statute that on its face has long denied the Assessors or any other local taxing authority the power to tax real (and personal) property of the MBTA.

It is true that this court has held that a taxpayer generally has the burden to prove it is exempt from a tax. *See, e.g., Pickwick, supra,* 351 Mass. at 623 ("At the outset it should be noted that an exemption from taxation is a matter of legislative grace and may be recognized only when the taxpayer shows that he comes within either the express words *or the necessary implication of some statute conferring this privilege upon him*") (emphasis added); *New England Legal Foundation v. Boston,* 423 Mass. 602, 609 (1996) ("The burden of proving entitlement to the exemption lies with the taxpayer. 'Exemption from taxation is a matter of special favor or grace. It will be recognized only where the property falls clearly and unmistakably within the express words of a legislative command'") (*quoting Massachusetts Medical Soc'y v. Assessors of Boston,* 340 Mass. 327, 331 (1960) (sustaining, however, taxpayer's claim of an exemption from taxation as a charitable organization and rejecting assessors' argument that an exception to the charitable organization exemption should apply).

The fact the parties have stipulated the billboards are real property of the MBTA must satisfy OutFront's burden under this court's precedents. That real

property of the MBTA is at issue on its face indisputably triggers the exemption – the Legislature expressly exempted MBTA real property from local taxation. General Laws c. 59, §2, on which the Assessors rely, is the most general of tax statutes. It cannot support the Assessor's argument that the taxpayer continues to bear the burden of persuasion once a specific statute, granting an exemption, is triggered and therefore, without more, no authority to tax exists.[2]

"As [this] court stated in [Board of Assessors of Newton v.] Pickwick [Ltd., 351 Mass. 621 (1967)], the specific MBTA exemption statute controls over the general tax law." *Beacon South Station Associates, supra,* 85 Mass. App. Ct. 307. As the Appeals Court noted, the first phrase in Section 24 ("Notwithstanding any general or special law to the contrary") "trumped the effect of G.L. c. 59, §2B, the general tax statute." *Id.* at pp. 306 - 07. It is not logical that a taxpayer exempt from

[2] As this court has held, "'There is no power to tax unless such authority is expressly conferred by statute, for it does not arise by implication, and statutes granting the power are to be strictly construed.' *Reisman v. Commissioner of Corps. & Taxation*, 326 Mass. 574, 575 (1950). 'Taxing statutes are to be construed strictly against the taxing authority, and all doubts resolved in favor of the taxpayer.' *Dennis v. Commissioner of Corporations and Taxation*, 340 Mass. 629, 631 (1960)." *DiStefano v. Commissioner of Revenue*, 476 394 Mass. 315, 325 – 326 (1985). *Accord, Commissioner of Revenue v. Oliver*, 436 Mass. 467, 471 (2002) ("We adhere to the familiar principle that tax statutes are to be strictly construed; we will not read into a statute an authority to tax that it does not plainly confer…. Any ambiguity is resolved in the taxpayer's favor") (citations omitted). *See also, Horvitz v. Commissioner of Revenue*, 51 Mass. App. Ct. 386 (2001) (discussing that the burdens of proof and persuasion may be allocated to the taxing authorities in situations where, as here, a party would have the same burdens in a non-tax case).

taxation under a specific and long-standing statute must also disprove an exception from the already established exemption. The burden necessarily must fall on the party seeking the benefit of the exception; here, the Assessors, who seek to impose a tax that the Legislature concluded they could impose only if certain conditions are met.

The Legislature has several times reiterated the exemption (including when creating a limited exception) to avoid burdening the MBTA, directly or indirectly, with the cost of local taxation. No matter how addressed in an agreement between the MBTA and a third party, the fact of local taxation would inevitably impact the amount the MBTA would net from such third-party agreements. Taxes are a cost that any business must consider in calculating the price of any contract, no matter who pays the taxes in the first instance. If the contractor pays the taxes directly, it will simply agree to pay the MBTA less than if no taxes were due. Even the possibility of taxation likely would affect the willingness of a party to contract with the MBTA or the amount it would be willing to pay to the MBTA thus reducing the revenues available to it. The Legislature must have been aware of that essential point when it enacted an exception to the MBTA's tax exemption which, again, the Legislature enacted precisely to assist the MBTA financially in meeting its obligations to the citizens of the Commonwealth.

The Assessors here must bear the burden of proving they have the authority to tax OutFront. Put differently, the Assessors must bear the burden that the exception from such a long-standing exemption applies, in this or future such contracts, and accordingly the MBTA's available revenues will be reduced, directly or indirectly.

II. THE LEGISLATURE COULD NOT HAVE INTENDED THAT A MANAGER OF MBTA REAL PROPERTY, UNDER CONTRACT TO AND SUBJECT TO THE SUPERVISION OF THE MBTA, WOULD BE SUBJECT TO TAXES THE MBTA WOULD NOT PAY IF IT CONDUCTED THE SAME ACTIVITIES DIRECTLY.

We have found no legislative history that explains what the Legislature meant by the words "leased, used, or occupied in connection with a business conducted for profit…." The General Court incorporated that language, unaltered, into the omnibus transportation funding bill it was considering in 2013. In the *Beacon South Station case*, *supra*, the Appeals Court noted that the Legislature added the language following requests by the City of Boston to tax MBTA property. We assume the City of Boston's requests were triggered, at least in part, by the conveyance of a long-term lease by the MBTA to a private, for-profit entity for the entirety of the South Station headhouse.

The court's amicus question does not ask whether a conveyance of a well-recognized property interest such as was at issue in the *Beacon South Station* case would qualify as an exception to the general rule that the MBTA property is exempt

from local taxation. Nor is a lease at issue in this case. The question in this case revolves around the ATB's finding a contractor to the MBTA is subject to taxation locally because pursuant to the contract the MBTA allows the contractor to "use" or, perhaps, to "make use of" the MBTA's billboards.

That finding subsumes fundamentally difficult questions about taxation. Indeed, the Assessors baldly argue "If real property of the MBTA is used for profit, it is taxable." (Assessor's Brief at p. 24.) That deceptively simple but expansive argument demonstrates the difficulty of accepting the ATB's interpretation of the word "used." A for-profit business can "use" real property of the MBTA or other authorities for many purposes. The business could contract to park equipment or vehicles in an underutilized MBTA parking lot. It could operate a for-profit cafeteria or coffee shop at an MBTA (or other authority's) location. The Assessors' argument for what the word "use" must mean potentially subjects any number of ordinary and customary activities to some aspect of local taxation, thus defeating the essential purpose of the MBTA tax exemption in the first place.[3]

The case before this court is more analogous to what the ATB considered involving the "use" of the Mullins Center at UMass Amherst.[4] That is, where, as

[3] The facts of this case, which involve billboards, demonstrates that real property can be a very expansive concept. Many business activities touch real property or involve it in some respect.

[4] *Ogden v. Assessors of Hadley,* Mass. ATB Findings of Facts and Reports 2000 – 978.

here, the MBTA has not conveyed what typically would be considered a property or possessory interest such as a lease would imply, what must a local taxing authority show to demonstrate the nature of the "use" is such that the exemption from taxation intended to provide the maximum funding for the MBTA should be overridden to allow the local municipality to treat the property as if the MBTA had conveyed away its interests?

NELF believes the ATB made the correct decision in the *Ogden* case under a statute that is analogous to the statute at issue here. The public authority there maintained ownership of the property and, as here, substantial rights to control how the contractor made use of the property. Any for-profit contractor to a public authority expects to profit from the relationship. The mere fact the appellant here, like the private party in the *Ogden* case, intended to and did profit should not be determinative. That would allow the exception to swallow the general rule exempting MBTA real property from taxation.

Adopting the very broad definition of the word "used" that the ATB assumed should apply in this case, combined with the reality that any number of for-profit entities might "use" property of the MBTA to some degree to perform their profit-making activities, could subject far more businesses to taxation than the Legislature

could possibly have intended.[5] As this court posed the question, a "manager" is in reality an agent for a principal. An agent for a principal should not be subject to property taxes that its principal would not otherwise pay.

The more for-profit entities are at risk of being taxed because of direct or indirect "use" of MBTA real property, the less likely they will be to enter contracts with the MBTA. At minimum, the MBTA's counterparties will bid their contracts in such a way that the MBTA will bear the cost of most or all those taxes through lower payments or other terms less favorable to the MBTA. That would contravene why the Legislature created the exemption for the MBTA in the first place and has maintained it for decades thereafter.

CONCLUSION

The New England Legal Foundation, which files this brief purely as an amicus curiae, does not seek specific relief from the court.

Respectfully submitted,

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[5] The plethora of meanings – uses – of the word "used" that the appellant cites, and the ATB considered demonstrates a narrow interpretation is appropriate.

CERTIFICATE OF COMPLIANCE

I, Dustin F. Hecker, hereby certify pursuant to Mass. R. App. Pro. 17(c)(9) that this amicus brief complies with the requirements of Rules 16, 17 and Rule 20, as applicable to amicus briefs. The brief was prepared using Times New Roman font, 14-point type. The Microsoft Word program calculates the brief, including the cover page and these certificates, is fifteen pages long and contains 3037 words.

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CERTIFICATE OF SERVICE

Pursuant to Mass. R. App. Pro. 13(d), I hereby certify, under the penalties of perjury, that on December 18, 2023, I caused this brief to be served on counsel of record through the Tyler Host system.

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