SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

ACS STATE AND LOCAL SOLUTIONS, INC. Petitioner	)
v.	) Tax Docket No. 8132-02
	) Judge José López
DISTRICT OF COLUMBIA Respondent	)

ORDER

This matter comes before the Court on Cross-Motions for Summary Judgment. Petitioner, ACS State and Local Solutions, Inc. ("ACS"), filed a Motion for Summary Judgment on March 24, 2004. On March 25, 2004, ACS filed a Notice of Filing Corrected Copy. Respondent, the District of Columbia ("District"), filed a Motion for Summary Judgment and an Opposition on April 28, 2004. ACS filed a Memorandum in Opposition to Respondent's Cross-Motion for Summary Judgment on May 12, 2004. The Court, after reviewing the pleadings, exhibits and the Joint Statement Of Material Facts As To Which There Is No Genuine Issue ("Joint Statement"), has determined, for the following reasons, that ACS' Motion for Summary Judgment is **GRANTED**.

ISSUE

Whether ACS is required to pay the personal property and use tax on parking meters that it was hired to purchase, install, manage, and service, where ACS must transfer the meters to the District after the seven-year servicing period.

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FACTS

On February 9, 1998, ACS (formerly, Lockheed Martin IMS Corporation)[1] entered into a contract for goods and/or services with the Department of Public Works, on behalf of the District (the "Contract"). The contract price was $24,991,000.00, which was based on estimated parking meter revenue projections. Contract, at 3-5, §3.1-3.5. The Contract term consisted of two consecutive periods: the first lasting seven months (the "Installation Period"), and the second lasting seven years (the "Management Period"). Contract, at 5, §4.1. ACS contracted to install approximately 15,000 new electronic parking meters during the Installation Period, and manage the meters during the Management Period. Id., at §4.2. ACS agreed to "furnish all management, supervision, personnel, equipment, materials and supplies to replace all existing designated parking meters and parking meter spaces with Duncan Industries, Eagle 2000 electronic parking meters." Contract, at 1. ACS would also "provide all preventative and corrective maintenance and collect, count and transport all parking meter revenue to all locations specified in the Request for Proposals (RFP)." Id. ACS was responsible for project management and coordination of activities, including planning and direction of all subcontractors and establishing and maintaining project schedules. Id. ACS was required to coordinate all tasks necessary to provide the services under the Contract. Id. The Contract was structured as a lease-purchase transaction, and after seven years, the District would own the meters outright. See Joint Statement, Ex."C", p. 1 and Ex. "A", part 3, Request for Proposals, §A.3.c. (offerors encouraged to provide innovative

[1] The name of the contractor as identified in the February 9, 1998 contract was Lockheed Martin IMS Corporation ("LM IMS"). On August 24, 2001, ACS acquired LM IMS. On August 31, 2001, LMS IMS changed its name to ACS State and Local Solutions, Inc.

financing and pricing proposals so long as title to meters and equipment did not vest in the District until final payment). Bidders were required to exclude Federal Excise Taxes and State and City taxes from their bids, as the District was exempt from such taxes.[2]

On June 8, 1998, ACS filed a District Sales and Use Tax Monthly Return for May 1998; the return identified a taxable amount of $3,201,747.61. Joint Statement, at 5. This figure represented the amount paid for the parking meter equipment ACS purchased from Duncan Industries. Id. at 5. ACS paid the tax owed in the amount of $184,100.49. Id. at 6. On October 26, 1998, ACS filed a District Personal Property Tax Return for 1999 identifying $5,032,110.00 as taxable tangible personal property. ACS paid $102,334.35 for the tax owed on this amount. A portion of this taxable amount, $1,505,528.00, related to the parking meter equipment. Id. On July 30, 1999, ACS filed a District Personal Property Tax Return for 2000, identifying $11,001,219.00 as taxable tangible personal property. ACS paid the tax owed, namely $247,297.76. $5,714,398.00 of the taxable amount is the portion related to the parking meter equipment. Id. at 6-7. The 1999 personal property tax was subsequently amended; ACS requested a $50,325.77 refund. Id. at 7. The 2000 personal property tax was amended as well; ACS requested a refund in the amount of $157,938.41. Id. On August 11, 2000, ACS submitted a claim for a refund of all of the referenced taxes. On November 17, 2000, the Audit Division of the Office of Tax and Revenue denied the claim for refund. ACS received notification of this denial by letter received February 1, 2001. ACS exhausted its administrative remedies. The Office of Tax Appeals denied the refund on April 2, 2002.

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[2] Contract, Attachment "A" (Standard Contract Provisions For Use With District of Columbia Government Supply & Services Contracts, at 4).

ANALYSIS

SUMMARY JUDGMENT

Summary judgment is proper "[i]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Super. Ct. Civ. R. 56(c). The moving party has the burden of demonstrating both the absence of a genuine issue of material fact and that they are entitled to judgment as a matter of law. Griva v. Davison, 637 A.2d 830, 836 (D.C. 1994) (citing Holland v. Hannan, 456 A.2d 807, 815 (D.C. 1983)). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. Vessels v. District of Columbia, 531 A.2d 1016, 1019, n. 9 (D.C. 1987) (comparing, Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)). Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Id.

To overcome summary judgment, the opposing party must offer "competent evidence admissible at trial showing that there is a genuine issue as to a material fact." Nader v. de Toledano, 408 A.2d 31, 48 (D.C. 1979), cert. denied, 444 U.S. 1078 (1979). "In practical effect, this rule requires more of the opposing party than mere demonstration of disputed factual issues." Id. (citing Bushie v. Stenocord Corp., 460 F.2d 116, 119 (9th Cir. 1972)).

STANDARD OF REVIEW

The Tax Division of the Superior Court of the District of Columbia has the authority to review decisions appealed from the Office of Tax Appeals. Washington Post v. District of Columbia, 596 A.2d 517, 521 n.2 (D.C. 1991). Appeals to this Court are subject to *de novo* evaluation. Id. (quoting Rock Creek Plaza Woodner Ltd. Partnership v. District of Columbia, 466 A.2d 857, 859 n.1 (D.C. 1983)). The Court has the discretion to review "the whole case, both [as to] facts and law" and it has authority to "affirm, cancel, reduce or increase the assessment." Washington Post at 521, n.2 (quoting, in part District of Columbia v. Burlington Apartment House Co., 375 A.2d 1052, 1057 (D.C. 1977) (en banc).

ARGUMENT

ACS argues that it is entitled to a refund for the payment of personal property tax under both federal and state law because its contract with the District is essentially a conditional sales contract or a capital lease purchase transaction. Pet'r Mem. P. & A. Supp. Mot. Summ. J., at 4. ACS asserts that a capital lease exists when ownership of the personal property is transferred to the lessee, at, or before, the end of the lease term. When such a transfer occurs, the lessee, as the equitable owner, has the obligation to pay the personal property tax. Id. at 6-7.

ACS also states that it is entitled to a refund of the use tax on the parking meters because it purchased the meters for the sole purpose of reselling them to the District. Id. at 11. ACS believes that the meters are not considered a retail sale because it is not using, storing or consuming the parking meters within the meaning of the use tax statute. Id.

The District states that the agreement between ACS and the District is a contract, and cannot be characterized as a lease transaction. Resp't Mem. P.& A. Supp. Mot. Summ. J., at 4. The District also states that ACS purchased the parking meters, held legal title, used the parking meters to perform services for the District, and received compensation for the services it provided. Id. at 2.

Regarding the use tax, the District argues that ACS does not qualify for the resale exemption because the exemption only applies when the purchaser intends to resell the goods. Id. at 3. The District states that the exemption does not apply here because the ACS is the end user of the product, and an end user cannot qualify for the resale exemption. Id. at 3. The District argues that ACS is responsible for the personal property tax because ACS owns and uses the parking meters in its business operations and in the performance of its contractual obligations. Id. at 3-4.

Personal Property Tax

The Court must decide whether the Contract, in substance, provides ACS with a security interest in the property, making the District owner of the tangible personal property. The Court is guided by D.C. Code §47-1522(a) (2001 ed.), which states that "[e]ach year the district shall levy a tax against every person on the tangible personal property *owned* or held in trust in that person's trade or business in the District." (emphasis added). The Court of Appeals affirmed the ownership burden in District of Columbia v. Powers Gallery, Inc., 335 A.2d 244, 247 (D.C. 1975) by stating that "[t]he burden of paying personal property tax falls upon the owner of such property." The plain language of the statute requires an assessment of a personal property tax on the owner(s) of personal property within the District. The Court notes that there is no statutory

requirement that a personal property tax be levied on the holders of title to property, legal, beneficial or otherwise.

Generally, the "owner of any tangible personal property is the holder of the legal title." D.C. Mun. Regs. tit. 9 §704.5 (1988). There are two (2) exceptions to this rule: (a) when title passes on July 1st, only the person last obtaining title on that date is deemed to have title on July 1st; or (b) when tangible personal property is used as security for a debt and the debtor is in possession of the property, the debtor shall be deemed to be the owner of the property. Id.

For the first exception to apply, the title, either legal or beneficial, would have had to pass to the District on or before July 1st. Id. However, the title to the parking meters has yet to pass to the District, rendering this exception to be inapplicable.

For the second exception to apply, (1) the property must be used as security for a debt, and (2) the debtor must be in possession of the property. Id. The District and ACS created a contract in which the parking meters are used as security for a debt based on the substance of the contract between the parties. When the seller in a contract for the purchase of property *reserves title until payment is secured*, the seller is reserving a security interest in the property and the parties have created a security agreement. See D.C. Code §28: 1-201(37) (2001 ed.) (emphasis added) ("A security interest means an interest in personal property or fixtures that secures payment or performance of an obligation. The retention or reservation of title by the seller of goods notwithstanding shipment or delivery to the buyer (under D.C. Code § 28:2-401) is limited in effect to a reservation of a security interest.").

The Court of Appeals for the District of Columbia has answered the question of whether a contract is a security agreement or a lease. To determine whether a contract is a true lease or security agreement, the trial court must look to the facts of each case and determine whether the parties intended to create a security agreement. Fleming v. Carroll Pub. Co., 581 A.2d 1219, 1222 (D.C. 1990). See Alban Tractor Co., Inc. v. State Tax Comm'r., 150 A.2d 456 (Md. 1959) (A contract in which the seller delivers property to the buyer but retains legal title until full payment is made is a security agreement and the buyer is considered the owner for personal property taxation purposes); see also, Tighlman Hardware, Inc. v. Larrimore, 628 A.2d 215 (Md. 1993) (Security interest created because the language of the agreement referred to delivery of possession to the buyer with the seller retaining title under the seller secured payment of the deferred purchase price).

Here, the Contract is considered a security agreement because ACS is holding the meters as security for a debt owed. ACS has delivered the meters to the District, but is reserving title until it receives full payment for the meters. Thus, the District has possession of the property. See D.C. Mun. Regs. tit. 9 §704.5 (1988) (Placing ownership on the debtor when the personal property is used as security for a debt and the debtor possesses the property).

ACS argues that the transaction is a capital lease, under state law, or conditional sales contract, under federal law. A "lease means a transfer of the right to possession and use of goods *for a term* in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease." D.C. Code §28:2A-103 (10) (2001 ed.) (emphasis added). Although likely that ACS

could meet the use requirements of the regulation, it would be difficult to qualify the contract as a lease, because the contract does not contemplate leaving the meters in the possession of the District for a term. The meters are expected to become permanent fixtures in the District, for a lifespan of at least 30 years. Joint Statement, Ex. "C", p. 7. Neither party anticipates the District returning the parking meters to ACS. In fact, the contract contemplates that District will keep the meters in its possession.

A capital lease exists if "ownership of the tangible personal property is transferred to the lessee at, or before, the end of the lease term." D.C. Mun. Regs. tit. 9 701.4. Yet, ownership had already passed to the District upon ACS' delivery of the meters. See D.C. Code §28:2A-103 (10) (2001) ed.) (lease means a transfer of the right to possession and use of goods for a term in return for consideration).

Another basis concluding that ACS is not obligated to pay the personal property tax is that the District controls the meters. In a contract involving the transfer of legal title to the property, the party who controls the property is generally deemed to own the property for taxation purposes. See Corliss v. Bowers, 281 U.S. 376, 378 (1930) ("Taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed -- the actual benefit for which the tax is paid."); see also Frank Lyon Co. v. United States, 435 U.S. 561, 572 (1978) (noting that in a number of cases, including Comm. V. Sunnen, 333 U.S. 591 (1948) and Helvering v. Clifford, 309 U.S. 331 (1940), the Supreme Court has not allowed the transfer of formal legal title to shift the incidence of taxation attributable to ownership where the transferor continues to retain significant control).

District of Columbia Courts will consider the ability to control property in deciding whether an entity lacking legal title may be the owner of personal property and therefore, responsible for personal property tax. In District of Columbia v. King & Bartz, 243 F.2d 248 (D.C. Cir. 1957), the Court of Appeals for the District of Columbia Circuit reviewed a written agreement in which a supplier consigned property to taxpayers and determined that although the supplier held legal title of the property, it was part of the "stock in trade" of the taxpayers and subject to taxation because they treated it as their own and were able to transfer legal title to customers without seeking permission from the actual bearers of legal title.

Here, the District maintains control over the parking meters because it determines how the meters are managed, serviced and maintained. ACS services the meters, but the personal property tax should not be assessed against ACS unless it also owns the meters. See Tumulty v. District of Columbia, 102 F.2d 254, 261 (D.C. Cir. 1939) (personal property tax should not be assessed against the one managing the property but against the owner of the property). The Court notes that although the District states it is exempt from D.C. Sales and Use Tax, it does not claim an exemption from the payment of personal property tax nor does it state that, as a bidder, ACS is responsible for the payment of such tax. Joint Statement, Ex. "A", Relevant District of Columbia Standard Contract Provisions, p. 4, §12.

ACS also references a 1979 memorandum relevant to whether an entity that retains a "bare legal interest" in the personal property is responsible for the payment of that tax as an owner of the property. The District's Acting Corporation Counsel[3] sent a

[3] The Office of Corporation Counsel has changed its name to the Office of the Attorney General.

memorandum to the Dept. of Finance & Revenue in 1979, asking whether personal property tax could be assessed against transferors retaining a bare legal interest in the property, ostensibly, for security purposes. Mem. Acting D.C. Corp. Counsel at 1. The Memorandum notes that the District's practice has been to follow the administratively convenient practice of assessing property taxes against the holder of legal title, bare or otherwise. However, the memorandum indicates that when personal property is conveyed through a conditional sales lease in which the seller retains only bare legal title as security for payment of the purchase price, the holder of legal title should not be taxed as the owner. Corp. Counsel Mem. at 2.

Corporation Counsel describes a conditional sales contract as one in which the seller retains bare legal title as security for payment of the purchase price. This is the same description of a security agreement discussed previously. Here, there is no other reasonable purpose for ACS' reservation of title other than to guarantee payment of amount owed. Therefore, this Court holds that ACS should not be taxed as the owner of the property if it only retains title for security purposes.

ACS also argues that federal law supports its claim that the transaction is either a capital lease or a conditional sales contract. The issue of personal property taxes is the province of state law and because there is sufficient state law to make the determination, there is no need to examine the federal laws governing the issue.

In summary, the Court finds that the District is the owner of the parking meters based on the Contract between it and ACS. Therefore, ACS is not liable for the payment of the personal property tax corresponding to the parking meters.

Sales & Use Tax

ACS is entitled to the resale exemption under D.C. Code §47-2002 because (1) it intended to resell the meters at the time of their initial purchase, (2) it is not the end user of the parking meters, and (3) it lacks sufficient power over the meters to be categorized as a user within the meaning of the use statute.

The District contends that the purpose of the resale exclusion is to exempt retail goods that are not in the possession of the end user. Resp't Mot. for Summ. J. at 3. The District further contends that ACS is not entitled to this exemption because ACS's use of the goods (parking meters) in its business makes it the end user. Id. at 3-4. This argument finds support in the characterization of certain statutory limitations on local sales and use taxes as being in place to ensure exclusive taxation of the end transaction, and no intermediate ones. Hotels Statler Co. v. District of Columbia, 199 F.2d 172, 173-174 (D.C. Cir. 1952) (holding that china, table linens, towels, light bulbs, etc., are accessories used in the service of meals, and provision of rooms to hotel guests, and, not part of the meals or rooms themselves). The District also contends that ACS is not entitled to a resale exemption until the end of the Contract period because only then will title pass to the Government and the actual act of resale will have occurred. Mem. of P & A. in Supp. of Resp't Mot. for Summ. J. at 2.

Corporations may become entitled to the resale exemption by virtue of merchandise being acquired for the *purpose* of resale. District of Columbia v. Seven-Up Washington, Inc., 214 F.2d 197 (D.C. Cir. 1954) (emphasis added). In Seven-Up, the Court of Appeals held that a use tax was properly imposed on Seven-Up where it bought back bottles and cases to be reused in the distribution of its beverages and where such

reuse was financially necessary for the company's continued business operations. Id. at 201. The Court found reusing the bottles and cases to be the dominant purpose, and that this use overshadowed the resale aspect of Seven-Up's buying back the materials. Id. at 201.

The purchase or use of personal property is itself a taxable event. John McShain, Inc. v. District of Columbia, 205 F.2d 882 (D.C. 1953). The plain meaning of the word "exempt," suggests that, in granting an *exemption*, the event which gives rise to the exemption must occur at or before the time of the event which gives rise to the tax. Thus, the District cannot claim that ACS is not entitled to the resale exemption because the time for resale has not yet accrued. If entitled to the resale exemption, ACS must acquire this status no later than the time that it purchased the parking meters from Duncan Industries (the occurrence of the taxable event). Were the exemption dependent upon a later act. such as resale, the statute would operate in an unintended manner, creating a reimbursement upon passage of title rather than an exemption for intent to resell.

The terms of the Contract do not give ACS sufficient power over the parking meters such that ACS can be said to "use" the meters within the meaning of D.C. Code §47-2201. ACS is to furnish all of the District's requirements in terms of personnel, materials, equipment, etc. Contract at 1. ACS is also responsible for project management, quality control and similar matters, however, final approval must be obtained from the District for virtually all aspects of the contract. Id. Specifically, ACS is not to commence "any aspect of the scope of work" without prior receipt of a Notice to Proceed from the District. Id. at 2, 6. ACS is required to submit monthly invoice, inventory and revenue reports according to the District's specifications. Id. at 7. ACS is

required to keep records for inspection by the District of all work performed under the contract. Id. at 9. ACS' activities are supervised by the District or any contractor thereof, who, under such circumstances, shall become the District's Agent. Id. at 10. The District retains ownership of and controls disposal of the old meters. Id. ACS has no authority to establish or alter either the location or time and rate structures of the parking meters. Joint Statement at 3. These contract terms do not support an inference that ACS enjoys a beneficial use of the meters because ACS appears to have virtually no control over how the meters are used. The Contract further provides that, should the District decide to terminate the Contract, title to all work in progress and completed work vests immediately in the District. Id. at 3. Any control granted to ACS under the Contract appears to be illusory because, even if the District fails to give ACS full consideration for the goods and services provided, the terms of the contract provide that title to the meters shall vest in the District. Therefore, according to the terms of the Contract, ACS has little power, and even less authority to exercise the power it possesses.

ACS qualifies for the resale exemption because it is not the end user of the property. The parking meters have an estimated useful life of at least 30 years. Joint Statement, Ex. "C", p. 7. Legal title to the parking meters will transfer to the District in September 2005, at which time the meters may still have more than 75% of their useful life remaining. It is too uncertain to designate ACS as the end user of the product, particularly based on the nature of the goods involved here. The District is more likely to be deemed the end user as it has the right should it choose to end the Contract before its scheduled time, and it is the owner of the personal property as it received possession of the parking meters in 1998, around the time of installation.

Based on the substance of the Contract between ACS and the District, and a review of the statutes and an interpretation of case law, ACS is not responsible for the payment of the personal property tax, as ACS has reserved a security interest in the property. ACS is also not responsible for the use tax, because ACS meets the requirements of the resale exemption.

CONCLUSION

For the above-mentioned reasons, it is hereby **ORDERED** that Petitioner's Motion for Summary Judgment is **GRANTED** and the Petitioner be refunded the total amount in controversy ($392,364.67); which includes payment of the 1998 Sale and Use Tax ($184,100.49) as well as overpayment of the 1999 ($50,325.77) and 2000 ($157,938.41) personal property tax, plus interest.

So **ORDERED** this 31 day of January, 2005.

José M. López, Judge
(signed in chambers)

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