TAX ANALYSTS, et al., v. DISTRICT OF COLUMBIA, et al.,

2020 CA 001999 B

Attachment to Declaration of Bazil Facchina

OTR Private Ruling dated February 11, 2016

Revised Redacted Pages 3 and 4

III. LAW & ANALYSIS

A. Law and Legislative History

To qualify as a QHTC in the District under D.C. Code Ann. §47-1817.01(5)(A), a taxpayer must be (i) **an individual or entity organized for profit and leasing or owning an office in the District of Columbia**; (ii) have two or more qualified employees in the District; and (iii) derive at least 51% of its gross revenues earned in the District from QHTC activities. Previously, D.C. Code §47-1817.01(5)(i) allowed for QHTC status where an individual or entity simply maintained an office, headquarters or base of operations in the District.

A lease is defined in the dictionary as "a contract by which one conveys land, tenements, or hereditaments for life, for a term of years or at will or for any less interest than that of the lessor, usually for a specified rent or compensation." Webster's Third International Dictionary. *See Columbia Plaza Tenants Association v. Columbia Plaza Limited Partnership*, S. Ct. D.C., No. 02ca10226, 2003 WL 25279036 (April 28, 2003).

A review of the legislative history of the QHTC statute provides that there was a dual focus on job creation and inducing businesses to locate in the District. Some of the legislative materials focus on job creation for District of Columbia residents. It was noted in the Council report on the bill, B13-752, that the "attraction and creation of new high technology-based businesses represents an important source for new jobs and public revenue for the District of Columbia." The legislative history also focuses on the importance of inducing businesses to locate within the District of Columbia. For example, the legislation is generally described as consisting of "a series of tax incentives to encourage high technology companies to locate to the District of Columbia." Section 201 of the legislation, which provides a tax credit for companies who relocate job opportunities to the District of Columbia, is explained as "provid[ing] a tangible incentive which will spur relocation" and encourage more high-technology companies to "locate in the District." Additionally, there are other tax incentives in the legislation (e.g., D.C. Code § 47-811.03 (2001)) directly targeted at inducing companies to buy or lease real property to conduct their operations.

Based on the change in the statute and the legislative history of the initial QHTC law, the purpose of the statute was to provide tax incentives to those businesses which have some intention to have an ongoing business operation in the District.

B. Application to

The recent legislative change eliminating the "base of operations in the District" language and replacing it with the requirement that a QHTC lease or own an office in the District signals an intent to require a more enduring connection to the District than previously needed.

The definition of "lease" for District purposes contemplates a conveyance of land or tenements for a period of time. Webster's Third International Dictionary. *See Columbia Plaza Tenants Association v. Columbia Plaza Limited Partnership*, S. Ct. D.C., No. 02ca10226, 2003 WL 25279036 (April 28, 2003). This definition indicates that "lease" signifies much more than a right to use office space on a limited or constrained basis. This is also echoed in the legislative history of the QHTC statute, which contemplates the meaning of "lease" as the operation of an ongoing business in the District.

C. Combined Returns

However, under D.C. Code Ann. §47-1805.02a a QHTC cannot be a member of a combined filing group.

IV. CONCLUSION

This letter is limited to the facts that were provided in your request. The tax treatment may be affected if additional or different material facts are presented. No opinion is expressed or implied concerning the tax treatment of any item discussed in this letter except as expressly stated herein. The analysis set forth herein is based on the law and regulations currently in effect and may be affected by future changes in those authorities. This letter does not have the force and effect of law and can be relied on only by the taxpayer who requested it.

Please contact this office if you have further questions.

Sincerely,

Assistant General Counsel
Office of Tax and Revenue

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Attachment to Declaration of Bazil Facchina

OTR Private Ruling dated May 10, 2018

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III. LAW

The District of Columbia ("District") imposes a gross receipts tax on:

> each company that sells or charges for cable television service, satellite relay television service, and any and all other distribution of television, video, or radio service with or without the use of wires provided to subscribers or paying customers, whether for basic service, ancillary service, or other special service, and any other charges related to providing the services within the District of Columbia, including, but not limited to, rental of signal receiving equipment [...]. D.C. Code Ann. § 47-2501.01(a).

This tax applies only to sales or charges for "cable television service, satellite relay television service, and any and all other distribution of television, video, or radio service". Services that fall outside of this definition are not subject to the gross receipts tax (however, other taxes, including the sales tax, may apply).

TAX ANALYSTS, et al., v. DISTRICT OF COLUMBIA, et al.,
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OTR Private Ruling dated December 7, 2018
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III. LAW & ANALYSIS

An estate tax is imposed under D.C. Code §47-3703, on the transfer of every nonresident's taxable estate having its taxable situs in the District. A nonresident is "a decedent who was domiciled outside of the District at his death." D.C. Code §47-3701(8).

The taxable situs of tangible personal property is the place where the property is customarily located at the time of the decedent's death. D.C. Code §47-3701(12A)(B). The regulations expand on this definition and state, "[t]he taxable situs of tangible personal property which, by its nature, is readily movable shall be determined by the Director from the facts of each case." D.C. Mun. Regs. 9 §3703.7.

The Supreme Court of the United States has addressed the question of situs of artwork on loan to a museum in *City Bank Farmers' Trust Co. v. Schnader*, 293 U.S. 112 (1934). In this case, the Pennsylvania inheritance law imposed a tax upon the transfer by will or intestate laws of personal property within the commonwealth when the decedent is a nonresident at the time of his death. *Id.* at 116. Thomas B. Clarke, a resident of New York, loaned paintings to a museum in Pennsylvania and died testate while they were on exhibition there. *Id.* at 116. His will was admitted to probate in New York, and letters testamentary issued to appellant to which, as trustee, the residuary clause transferred the pictures. *Id.* at 116.

The Court examined if the paintings had a taxable situs in Pennsylvania at the time of Mr. Clarke's death or whether situs remained in New York because the paintings resided only temporarily in Pennsylvania. The Court concluded, "[by] sending them into Pennsylvania and by his omission to have them returned to New York and his lack of definite intention ever so to do, Clarke failed to maintain an actual situs in New York and created one for them in Pennsylvania." *Id.* at 121.

As the Court in *Schnader* opined "[m]ere floating intention that some time in the future the pictures would be returned to New York was not sufficient to retain them with the jurisdiction of that state and to keep them without the jurisdiction of Pennsylvania." *Id.* at 119.

The Supreme Court has held:

> But we do not find it necessary to discuss the issue thus raised, for it has been repeatedly held by this Court that the power of testamentary disposition and the privilege of inheritance are subject to state taxation and state regulation and that regulatory taxing provisions, even though they produce inequalities in taxation, do not effect an unconstitutional taking of property, unless as was said in *Dane v. Jackson*, 256 U. S. 589, 599 (1921) the taxing statute 'results in such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation[...]'
> *Stebbins v. Riley*, 268 U.S. 137, 140-141 (1925).

IV. CONCLUSION

The fact that other jurisdictions exempt does not compel the District to grant such an exemption. "A nation within whose territory any personal property is actually situate has as entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there. It may regulate its transfer, and subject it to process and execution[.]" *Frick v. Pennsylvania, 268 U.S.* 492. Therefore, the District has the authority to regulate and tax property that is physically within its borders. Any attempt to tax by another jurisdiction would contradict the principles set forth in *Frick* and would violate the due process clause of the Fourteenth Amendment.

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OTR Private Ruling dated April 12, 2019

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1. Whether the Government Created the Organization

[23] *See Kentucky River Cmty. Care, Inc. v. N.L.R.B.*, 193 F.3d 444, 449-52 (6th Cir. 1999) (individual or entity directly filing articles of incorporation is the relevant entity for determining the instrumentality or political subdivision statute of a corporation; held private citizen to be creator of the nonprofit corporation instead of the Kentucky state government because the Kentucky employee filing the articles of incorporation only did so in his capacity as a private citizen).

Rev. Rul. 57-128, 1957-1 C.B. 311; *Kentucky Emps. Ret. Sys. v. Seven Ctys. Servs., Inc.*, 901 F.3d 718, 726-30 (6th Cir. 2018) (cites to the six-factor test in Rev. Rul. 57-128, but also applies modifications to the six-factor test to determine instrumentality and cites to other court cases where modifications were made to the six-factor test).

3. Whether an Enabling Statute Guides or Otherwise Circumscribes the Entity's Actions

If a statute prescribes guidelines for the entity's actions, this factor is met.[38]

. In *Kentucky Emps. Ret. Sys. v. Seven Ctys. Servs., Inc.*, the Kentucky state government imposed licensing and state oversight requirements on the health center in exchange for state funding.[39]

4. Whether the Government Appoints the Entity's Leadership

The

[38] *Dep't of Emp't v. United States*, 385 U.S. 355 (1966) (holding that Red Cross met this factor of the instrumentality test because there was a congressional statute enabling the Red Cross' action).

[40] *Kentucky Emps. Ret. Sys. v. Seven Ctys. Servs., Inc.*, 901 F.3d 718, 726-30 (6th Cir. 2018).

[42] *Kentucky Emps. Ret. Sys. v. Seven Ctys. Servs., Inc.*, 901 F.3d 718, 726-30 (6th Cir. 2018).

[48] *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 394-99 (1995); 49 U.S.C. § 24302.

majority of Amtrak's board members are nominated by and selected by the President of the United States, in consultation with majority and minority leaders of the House and Senate.[49] In *Lebron*, the court held that this appointment process for Amtrak's board was ultimately controlled by the government because nominations and consultation occurred wholly between government entities.[50]

5. Whether Control and Supervision of the Organization is Vested in Public Authority

[49] *See id.*; 9 U.S.C. § 24302(a).
[50] *Lebron*, at 394-99.

[52] *Kentucky Emps. Ret. Sys. v. Seven Ctys. Servs., Inc.*, 901 F.3d 718, 726-30 (6th Cir. 2018).
[53] *Id.*

[55] *Kentucky Emps. Ret. Sys. v. Seven Ctys. Servs., Inc.*, 901 F.3d 718, 726-30 (6th Cir. 2018).

Employees.[59] In *Kentucky Employees*, the Kentucky state government issued regulations on the procedures that the private health center must follow with regards to a business plan and budget and conditioned receipt of state funds on compliance with these state regulations.[60] Even so, the court found that heavy regulation of an entity and conditioning receipt of government funding on compliance does not constitute control.[61]

6. The degree of financial autonomy and the source of its operating expenses.

[59] *Kentucky Emps. Ret. Sys. v. Seven Ctys. Servs., Inc.*, 901 F.3d 718, 726-30 (6th Cir. 2018).
[60] *Id.*
[61] *See id.*, at 728 (quoting *In re Las Vegas Monorail Co.*, 429 B.R. 785 (Bankr. D. Nevada 2010), "regulation or oversight does not, by itself, make an entity a public agency" or instrumentality).
[62] *See id.*, at 729 (power to dissolve supports evidence of control, but mere ability to impair the entity's ability to function does not constitute control).

The District exempts from sales tax sales of tangible personal property in which the purchaser intends at the time of purchase to resell the property as is or intends at the time of purchase to incorporate the property into another product for sale.[66] There are three circumstances in which a purchase of tangible personal property or taxable services is for resale: (1) the purpose is to resell or rent the property in the same form; (2) the purpose is to incorporate or attach the property into another property for sale; and (3) the purchase is to use or incorporate taxable services into another service for sale.[67] The District defines "sale" as a transfer of title or possession for consideration.[68]

ACS State and Local Solutions v. DC, which held that the resale exemption applies when the entity: (1) intends to resell the goods at the time it purchased them; (2) lacks sufficient power over the goods to be said to "use" them; and (3) is not the end user of the good.[69]

However, as stated by the DC Circuit in *United States v. DC*, the critical question is not who holds title to the property as between the contractor and the United States, but whose credit is used in the purchase.[70]

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[66] D.C. Code Ann. § 47-2001 (2015).
[67] D.C. Mun. Regs. tit. 9, § 414.5 (2017).
[68] D.C. Code Ann. § 47-2001 (2015).
[69] *ACS State and Local Solutions, Inc. v. District of Columbia*, No. 1832-02 (D.C. Super. Tax. 2005).
[70] "These two cases make it clear that it is not critical who holds title to the purchased items as between the United States and its contractor. Nor is the degree of control over the contractor that the United States exercises with respect to the purchases critical. The key factor is whose credit, between the United States and the contractor, is bound by the purchasing agreement with the seller." *United States v. D.C.*, 669 F.2d 738, 743 (D.C. Cir. 1981) (citing to *United States v. Forst*, 442 F.Supp. 920, 924 (W.D.VA. 1977)).
[71] *Id.*

However, in the *ACS* case, ACS had virtually no control over how the meters were used. ACS was not to commence "any aspect of the scope of work" until it had received approval from the District; ACS had no authority to alter or establish parking meters without the District's approval.

According to *New Mexico*, federal purchasing agents are those who lack an independent role in the purchase so as to make the sale "in both a real and symbolic sense, a sale to the United states."[74] Similarly in *Kern-Limerick v. Scurlock*, the Supreme Court determined that the contractors were purchasing agents for the government because the contract specified the purchase was made by the government, and that title would directly transfer to the government rather than to the contractor.[75]

[73] *United States v. New Mexico*, 455 U.S. 720 (1982).

[74] *Id.* at 742.

[75] *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 119-20 (1954).

Under *Aerospace v. State Bd. of Equalization*, indirect materials a contractor procures to provide services to the government are exempt from sales and use tax after the property purchased is resold to the government with title vesting in the government.[78]

[78] *Aerospace Corp. v. State Bd. of Equalization*, 218 Cal. App.3d 1300, 1311-12 (1990).

[81] Federal Acquisition Regulations (FAR) are a set of federal rules that govern the government procurement process in the United States. Under contracts with FAR title passage clauses, title vests in the government for all property acquired or fabricated by the contractor. 48 C.F.R. §45.402.

However, under these cases, the title of the purchased property all transferred from the contractor to the government, either under an FAR title passage clause or with similar title transfer provisions.[82] Specifically, under *Day & Zimmerman*, although the contract did not explicitly contain an FAR title passage clause, the Texas Supreme Court noted that the key inquiry for the exemption was "whether there was a transference of title or possession from [the contractor] to the United States."[83]

V. Conclusion

This letter is limited to the facts that were provided in your request. The tax treatment of the products may be affected if additional or different material facts are presented. No opinion is expressed or implied concerning the tax treatment of any item discussed in this letter except as expressly stated herein. The analysis set forth herein is based on the law and regulations currently in effect and may be affected by future changes in those authorities. This letter does not have the force and effect of law and can be relied on only by the taxpayer who requested it.

[82] For example, in *Aerospace*, the California Court of Appeal specified that the contractor is exempt from sales and use tax because title of the purchased property passed to the government pursuant to an FAR title passage clause. Similarly in *Strayhorn v. Raytheon E-Systems*, the Texas Court of Appeals discussed whether the FAR title passage clause in the contract was sufficient to meet with the FAR standards in order to qualify the contractor for sales and use tax exemption. Finally, in *McDonnell Douglas* the Missouri Supreme Court determined that title passed to the government with FAR title passage clauses in the contract. *See Aerospace* at 1113-14; *Strayhorn v. Raytheon E-Systems, Inc*, 101 S.W.3d 558, 565-66 (Tex. App. 2003); *McDonnell Douglas Corp. v. Director of Revenue*, 945 S.W.2d 437, 441 (Mo. 1997).

[83] *Day & Zimmerman, Inc. v. Comptroller*, 519 S.W.2d 106, 110 (Tex. 1975).

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OTR Private Ruling dated July 11, 2019

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When a refund application is made by a vendor who has collected reimbursement of sales tax, no actual refund of moneys shall be made to such vendor, until he shall first establish that the vendor has repaid to the purchaser the amount for which the application for refund is made.

IV. APPLICATION AND CONCLUSIONS

Under District law, hotel rooms rented for a period of longer than 90 days are exempt from taxation. See D.C. Code § 47-2001(n)(1)(C); D.C. Code § 47-2001(v-1); D.C. Mun. Regs. tit. 9 § 446.1. Charges for rooms contracted for 91 or more continuous days are not subject to the District sales tax from the first day of the contract. Rooms not covered by the contract are subject to District sales tax. *See* OTR's Position for Sales Tax Concerning Hotels, 11/01/2002.

Under *Square 345 Ltd. P'ship v. District of Columbia*, a person does not have to actually occupy a room in order for a stay to qualify as continuous under D.C. Code § 47-2001(v-1).