GSA Claims for Reimbursement of "Special Assessment" Real Estate Taxes

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As discussed in a prior article entitled "GSA Assertions of Setoff against Rents for a Real Estate Tax Reconciliations," the General Services Administration ("GSA") has begun utilizing real estate tax consultants to find instances of real estate tax savings in its leased portfolio. These tax consultants review the Tax Adjustment clause in GSA leases and determine whether any portion of real estate taxes reimbursed by GSA can be recast as special assessments or charges for services billed by the local taxing authority in order to exclude the charges from the definition of a real estate tax. The goal of the GSA and its tax consultants is to find an opportunity to recoup any mistakenly paid reimbursement of real estate taxes reimbursed by GSA in prior years.

GSA's recasting of past charges imposed by local taxing authorities concerns what is and is not properly defined as a real estate tax adjustment under GSA leases. Specifically, GSA examines whether these charges imposed by the local taxing authority are real estate taxes requiring reimbursement under the GSA Lease Tax Adjustment clause or are "special assessments" that are not reimbursed by GSA. A sample Tax Adjustment clause under a GSA Solicitation (September 2000 version) defines "real estate taxes" as "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." In addition, "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."

Based on its plain language, the clause clearly distinguishes "real estate taxes" from "special assessments" and "business improvement district assessments." The clause also distinguishes "real estate taxes" from "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." Note that older Tax Adjustment clauses define "general real estate taxes," as opposed to "real estate taxes." In *City Crescent Limited Partnership v. U.S., 71 Fed.Cl. 797, 805 (2006)*, the Court of Federal Claims found that "real estate taxes" is a broader, more inclusive term than "general real estate taxes."

The key question in examining charges imposed by the local taxing authority is whether they are "real estate taxes" assessed on real property for the purpose of funding general Government services. Case law, including *City Crescent*, describes factors used to determine what constitutes "real estate taxes" reimbursed by GSA under GSA leases. In *City Crescent*, the Court of Federal Claims considered whether the supplemental annual property tax imposed by the City of Baltimore in a central business and tourism district known as the "Downtown Management District" constituted a "real estate tax" for purposes of the GSA's Tax Adjustment clause. The Court looked beyond the name of the City's tax and considered specific characteristics of the tax. The characteristics included that the tax was an ad valorem real estate tax assessed, collected, and enforced in the same manner as other Baltimore real estate taxes. The tax was not for a single fixed amount and was not intended to expire after a fixed number of years. The tax was assessed every year with an indefinite duration. The "clean and safe services" funded by the tax

were fundamentally governmental in nature and predominantly benefitted the general public rather than any specific property owners. The tax was used to augment the level of traditional governmental services required to keep the downtown Baltimore area clean and safe for the general public. The Court also considered that there were no capital improvement projects being funded by the tax. Based upon these characteristics, the Court found the tax to fall within the plain meaning of "real estate tax" for purposes of the GSA's Tax Adjustment clause. The Tax Adjustment clause reviewed in City Crescent was GSAR §552.270-24 (June 1985), but other Tax Adjustment clauses used in GSA leases are generally comparable and similar to this clause.

The Court in *Wright Runstad Properties Limited Partnership v. U.S., 40 Fed. Cl. 820 (1998)* considered factors for what constitutes a special assessment in finding that the City of Seattle's one-time tax to help finance the construction of a downtown bus tunnel was a special assessment. The lease under review also used the Tax Adjustment clause provided under GSAR §552.270-24 (June 1985). The Court found that the assessment was a one-time charge. The assessment was levied against only properties specially and specifically benefitted by the tunnel. In addition, the purpose of the assessment was to pay for the tunnel rather than general government services previously funded by ad valorem real estate taxes. The Court of Federal Claims found that this special assessment was not reimbursable to the lessor under the GSA Tax Adjustment Clause incorporated into the operative Government Lease, and thus was solely the financial responsibility of the property's owner and not reimbursable by the Government.

Although the factors provided in *City Crescent* and *Wright Runstad* provide some assistance, a representational case demonstrates the difficulty of determining whether charges imposed by the local taxing authority are "real estate taxes" or fall under one of the carve outs set forth in the Tax Adjustment clause. In a recent instance, GSA asserted that it erroneously paid charges for special transportation projects and stormwater fees, which GSA recast as special assessments. The transportation tax, under the local county code, subjects commercial and industrial real property to a real property tax based on a millage rate on taxable real property for transportation purposes that benefit the county. The tax allows the county board to establish a capital fund to make major ongoing investments in multimodal transportation infrastructure that support the function, competitive position, and ongoing development of the county's commercial and mixed use districts. Commercial and industrial real property excludes residential uses, including apartments.

In evaluating the transportation tax in light of *City Crescent* and *Wright Runstad*, the transportation tax , on its face, applies to real property without regard to benefit to the property. In considering the factors delineated by case law, the transportation tax is properly categorized as an ad valorem real estate tax assessed, collected, and enforced in the same manner as other county real estate taxes, although it only applies to commercial and industrial real property. The tax is not a one-time charge, or in any specifically assessed amount. The tax does not apply to construction or improvement of a specific project and serves a fundamental government function – public transportation. The transportation infrastructure funded by the tax predominantly benefits the general public. However, the tax could be argued to disproportionately benefit commercial and mixed use districts, as in a very broad sense, this charge specifically benefits commercial use property owners who arguably derive the majority of benefit from improved transportation in the county. The important question is whether a capital fund for transportation infrastructure that supports commercial and mixed use districts falls under general Government services. The fact that the tax applies only to commercial and industrial real property and primarily benefits commercial and mixed use districts could be argued to suggest that the

transportation tax is not a "real estate tax." The tax in part is similar to the tax reviewed in *Wright Runstad*, as it is levied only against commercial property, which the Government may allege are specially or disproportionally benefitted by the transportation infrastructure.

The stormwater tax, under the local county code, is a sanitary district tax based on a millage rate imposed upon taxable real estate to fund operating and capital expenses necessary to expand and upgrade the storm drainage system. The stormwater tax is a county-wide tax based on real property values as opposed to impervious surface calculations located at a particular property. In evaluating the stormwater tax in light of the factors enumerated in *City Crescent* and *Wright Runstad*, on its face, this tax applies to real property without regard to benefit to the property. The stormwater tax is an ad valorem real estate tax assessed, collected, and enforced in the same manner as other county real estate taxes. The tax is neither a one-time charge, nor in a specifically assessed amount related to benefit derived. The tax does not apply to a specific project. The tax, in part, funds operating the storm drainage system, which predominantly benefits the general public and not any specific property owners, as this serves the traditional government function of water treatment and provision of clean, quality water resources. It benefits all of the county. The important question again is whether funding the operating and capital expenses necessary to expand and upgrade the storm drainage system falls under general Government services. Since the stormwater tax applies to and benefits all properties, and cannot be argued by the Government to inordinately benefit commercial and industrial properties, it is highly likely to be considered a "real estate tax" by any reviewing Court of Board.

As demonstrated, the case law does not provide a crystalline answer regarding whether the transportation and stormwater taxes are real estate taxes requiring reimbursement under the GSA Lease Tax Adjustment clause or are “special assessments” that are not reimbursed under the standard GSA lease. Both taxes clearly are ad valorem real estate taxes assessed, collected, and enforced in the same manner as other county real estate taxes. The transportation tax differs in that it applies only to commercial and industrial real property, and therefore is not applied equally to all real estate within the county. Neither of these charges can be described as one-time charges for a specific project or improvement. Both taxes predominantly benefit the general public and not any specific property owners, although the transportation tax could possibly be argued to primarily benefit commercial and mixed use districts. The GSA or Government, under a standard Tax Adjustment clause, could argue the transportation tax exhibits characteristics of both a "real estate tax" and a "special assessment." Specifically, the transportation tax applies only to commercial and industrial real property within the county and might be argued to primarily benefit commercial and mixed use districts.

GSA’s vigorous use of offset is certain to result in additional case law concerning what is and is not properly defined as a real estate tax adjustment under GSA leases. GSA lessors should contact an experienced attorney to analyze any GSA alleged mistake concerning the definition of a real estate tax, as this analysis of what is properly cast as a “real estate tax” turns on a case-by-case basis and should be subject to careful analysis that is not always performed by leasing Contracting Officers or others performing the lease reviews or audits behind this recent GSA effort to recapture and recast prior reimbursements paid to Government lessors as "special assessments" then recaptured and offset from rent paid by the Government.

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