

**NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION**

In the Matter of the Petition : **DETERMINATION**
:
: **of** : **TAT (H) 09-40 (GC)**
:
: **ALANTE SECURITY GROUP, INC.** :
:
:

Murphy, A.L.J.:

Alante Security Group, Inc. filed a Petition with the New York City ("City") Tax Appeals Tribunal ("Tribunal"), on December 9, 2009. The Petition protested a September 11, 2009 Conciliation Decision issued by the City Department of Finance ("Respondent") Conciliation Bureau ("Bureau") with respect to an October 20, 2008 Notice of Determination ("Notice") of a deficiency of City General Corporation Tax ("GCT") issued by Respondent for the period ended December 31, 1997 through the period ended December 31, 2005. (The "Tax Years.") The Decision sustained the Notice and discontinued the conciliation proceedings.

A Hearing was held on April 27, 2011, where exhibits were submitted. Petitioner was represented by Joseph G. Gonzal, CPA. The Commissioner of Finance ("Commissioner") was represented by Joshua M. Wolf, Esq. and Andrew G. Lipkin, Esq., Assistant Corporation Counsels.

Mr. Gonzal offered Petitioner's written Statement of Position at Hearing. He submitted additional amended returns

following hearing, on May 12, 2011, and Respondent objected in writing to this submission on May 18, 2011. Respondent filed a Brief in Opposition to the Petition, on July 11, 2011. The record was closed on August 11, 2011.

ISSUE

Whether income Petitioner earned from the provision of security guard services to United States government agencies at offices located in the City is exempt from GCT. If that income is not exempt, may Petitioner allocate its City entire net income ("ENI") in the same manner as Petitioner allocated sales for purposes of New York State ("State") Sales and Use Tax.

FINDINGS OF FACT

Alante Security Group Inc., is a New York corporation with offices in Westbury, NY. Petitioner provides armed and unarmed security guard services to corporations and entities, including Federal agencies which have offices in the City.

Petitioner contracted with the Federal Small Business Administration Minority Enterprise Development District Office to provide guard services during the Tax Years. A copy of a 2001 contract between Alante and the Federal General Services Administration for services provided at Federal facilities located in Queens, New York ("Contract"), was admitted into evidence as a representative agreement. Contract Section 52.229-3 provides that the contract price includes ". . . all taxes and duties in effect on the contract date, *that the [Federal, State*

and local] taxing authority is imposing and collecting on the transaction or property covered by this contract." [Emphasis supplied.]

Petitioner did not properly file City GCT returns for the 1997 through 2002 Tax Years, and for the 2005 Tax Year. Petitioner filed State Sales and Use Tax returns encompassing the same period and paid State Sales and Use Taxes on allocated receipts from its provision of security services, on a quarterly basis.

In 2003, the City Department of Finance ("Respondent") established a Temporary Amnesty Program ("Program") with respect to liability for certain City business and excise taxes, including the GCT, for all tax periods ending on or before December 31, 2001. City Administrative Code ("Code") §11-127.¹ The Program granted taxpayers who paid outstanding tax liability amnesty from penalties imposed for late-filing of tax returns and late-payment of taxes, and a reduction in the rate of interest charged. Code §11-127(b), (c). Program applicants were required to file any previously unfiled returns or reports, and pay the tax due in full, plus interest at the reduced rate. Code §11-127(b); 19 RCNY §1-20(a). Taxpayers filing under the Program

¹ The Temporary Amnesty Program Section added chap 63/2003 § F1 eff. May 19, 2003. The Program applied to the following taxes: Banking Corporation, Cigarette, Commercial Motor Vehicle, Commercial Rent or Occupancy, General Corporation, Horse Race Admissions, Hotel Room Occupancy, Real Property Transfer, Coin Operated Amusement Devices, Retail Licensees of the State Liquor Authority, Transfers of Taxicab Licenses, Foreign and Alien Insurers, Unincorporated Business, Utility and Vault Charge. 19 RCNY §1-19. For most business taxes, the applicable period ended December 31, 2002. *Id.* See, generally, 19 RCNY §§1-19 through 1-26, Subchapter C: "2003 General Amnesty Program."

remained subject to subsequent audit examination, and to the assessment of additional taxes and appropriate penalties asserted as a result of that audit. Code §11-127(h); 19 RCNY §1-20(b).

On December 26, 2003, Alante Security Group, Inc. applied for the Program with respect to its 1992-2001 GCT liability. Respondent accepted Petitioner's GCT returns for the 1992-1996 periods and they are not addressed in this proceeding. Petitioner submitted GCT returns dated December 30, 2003, for the 1997-2001 Tax Years, and paid \$26,647.18 representing its calculation of taxes and interest due.² Petitioner subsequently filed GCT returns for the 2002 Tax Year on March 17, 2004, for the 2003 and 2004 Tax Years on or about the due date for each return, and for the 2005 Tax Year on July 19, 2006. On GCT returns filed for the Tax Years, Petitioner reported the following business allocation percentages ("BAP"): 1997: 36.02%; 1998: 38.96%; 1999: 10.47%; 2000: 6.07%; 2001: 1.86%; 2002: 3.04%; 2003: 39.76%; 2004: 5.09%; 2005: 6.03%.

Respondent initiated an audit examination of the books and records of Petitioner for the Tax Years in October 2006. Respondent's auditor requested that Petitioner provide: (i) a description of its business activities; (ii) completed Schedules H of GCT Returns Form NYC 3L (reporting the computed BAP percentage) and (iii) a copy of the Federal Form 1120 filed for the 2004 tax year. Petitioner complied with these requests.

² Petitioner's payment includes the following base tax amounts for the noted Tax Years: 1992: \$300; 1993: \$300; 1994: \$905; 1995: \$300; 1996: \$300; 1997: \$4,907; 1998: \$4,718; 1999: \$1,057; 2000: \$7,621; 2001: \$750. Reduced interest of \$5489.18 was computed for the period. The total GCT and interest due were \$26,647.12. Note: documents in the record indicate that the 2000 GCT Return was filed on December 29, 2003.

In November 2006, Petitioner's representative informed Respondent that there were no records to support the 1997 and 1998 payroll factors reported. The representative agreed to use the reported receipts factor percentage to compute the payroll factor for those tax periods, and also agreed to certain adjustments to the property factor for owned/rented tangible personal property.

Respondent received amended GCT returns (Forms NYC 3L) for Alante Security Group, Inc. for the 1997-2002, and 2004 periods, in August 2007. ("Amended Returns"). The Amended Returns were dated May 18, 2007, and reflected revised BAPs and revised allocated income amounts, as well as Petitioner's recomputation of overpayments and payments due.³ The revised BAPs were: 1997: 22.23%; 1998: 21.97%; 1999: 16.98%; 2000: 15.45%; 2001: 20.65%; 2002: 14.39%; 2004: 17.81%. Petitioner requested refunds for the 1997 Tax Year of (\$1,873), and for the 1998 Tax Year of (\$2,048); Petitioner reported balances due for the following Tax Years in the following amounts: 1999: \$647; 2000: \$11,828; 2001:

³ During pre-hearing proceedings, Mr. Gonzal indicated that Petitioner had filed another set of amended returns for the period 1999-2005 with Respondent, dated February 6, 2010. These returns were not offered into the record. Respondent's representative took the position that as they were filed after the Petition, they were a "nullity pursuant to law" (Tr.38) and would not be offered by Respondent. However, that representative introduced the Amended Returns (Respondent's Ex.E) as the "first" amended returns." Tr. 60. (See also similar reference at Tr.40). On May 12, 2011, following the Hearing, Petitioner offered further amended GCT returns for the 1999-2005 Tax Years to support its proposed application of a State Sales and Use Tax allocation percentage to an unsubstantiated entire net income amount; e.g., for 1999, the Amended Returns report an ENI of \$113,378 (Respondent's Ex. E), while the subsequent amended returns report an ENI of 13,378 (Petitioner's Ex. 5); this amount does not equal the total Sales Tax taxable sales of \$381,965. (Petitioner's Ex. 2). Respondent's objections are noted, but overruled and the May 12, 2011 amended returns have been admitted as Petitioner's Ex. 5. It is noted that the parties agree that the GCT asserted due is as computed on the summary sheet attached to Respondent's Ex. G.

\$9021; 2002: \$7732; 2004: \$3567. Petitioner did not make any payments with the Amended Returns.

Respondent's auditor reviewed the filed returns (original and initial amended) and other information, and determined that Petitioner was liable for additional GCT for the Tax Years. The deficiency was principally based on the auditor's adjustments to the receipts, payroll and property factors of Petitioner's reported BAP, applied to reported entire net income, for each of the Tax Years. For 2001, the auditor also added back State taxes which Petitioner deducted on its Federal Income Tax Form 1120 to reported income.

On October 30, 2008, Respondent issued Alante Security Group, Inc. a Notice of Determination of City General Corporation Tax Due ("Notice") in the base tax due amount of \$104,221.00⁴, with interest of \$81,308.72 calculated to November 21, 2008. Late filing penalties of \$24,400.45 were imposed.

⁴The base tax amounts reflected in the Notice generally represent GCT reported due less some amounts of GCT paid. See, e.g. Respondent's Ex G, schedules for the 1997 Tax Year: reported ENI is listed as \$154,220, allocated ENI is calculated as \$94,161, a "Tax Due" on that ENI is \$8,333, less an original "Tax Paid" of \$3,034, for an original "Additional Tax Due" of \$5,229. This amount, \$5,229, corresponds to the Notice's asserted 1997 "Principal" liability. However, the parties agree that additional payments have been made. Respondent's Ex. G; see, e.g., handwritten corrections of "Tax Paid" for each Tax Year. The schedule appended to Respondent's Ex. G, reflects application of all payments made to an initial "Adjusted Tax Due" amount, for each year; the Adjusted Tax Due is the same as the Schedule G Total Tax Due unadjusted by any payments (i.e., for 1997, \$8,333); this amount is then reduced by "Payment In Acc't" for each Tax Year, representing all payments made. It is noted that the "Total Adjusted Tax Due" amount on the appended schedule is greater than the "Total Tax Due" asserted in the Notice.

A Conference in this matter was held before the City Department of Finance Conciliation Bureau on May 18, 2009.⁵ Respondent issued a Conciliation Decision discontinuing the proceeding and sustaining the Notice in full on September 11, 2009.

At Hearing, Respondent submitted a schedule reflecting all payments made by Petitioner against GCT liabilities, in the total amount of \$77,898.18. The parties agree that the outstanding GCT deficiency which remains in controversy is \$75,408.82 in base tax due, with interest and applicable late filing penalties.

STATEMENT OF POSITIONS

Petitioner asserts that it is not liable for GCT on income earned from guard services provided to federal agencies. Petitioner argues that the income is tax-exempt as the services were provided to a government instrumentality. Petitioner further argues that contracting with federal agencies establishes federal and not City jurisdiction, and therefore Petitioner is not doing business in the City and the Department lacks "nexus" to tax Petitioner's income.

In the alternative, Petitioner requests that the GCT liability be adjusted to reflect a BAP which is the same percentage as the percentage of City sales reported in filed State Sales and Use Tax Returns for the Tax Years.

⁵ Petitioner's request for conciliation conference is not in the record. However, the Proposed Resolution dated May 27, 2009, and related correspondence, the Conciliation Decision and attachments, and Respondent's Answer refer to the request as Case No. 011748152S, received on or about November 7, 2008.

Respondent argues that Petitioner is not exempt from payment of GCT. Respondent asserts that Petitioner, a private non-governmental entity, provided guard services to federal facilities located in the City and therefore its entire net income from the provision of such services is subject to the GCT. Respondent further argues that Petitioner's State Sales and Use Tax computations are irrelevant as they are computed for a tax which is distinct in imposition and computation from the GCT, subject to separate tax reporting and accounting provisions.

CONCLUSIONS OF LAW

A franchise tax is imposed on the allocated entire net income of a corporation doing business in the City (Code §11-603(1)). GCT liability is computed by application of a BAP, comprised of the percentage of property, receipts and wages attributable to the entity's City activity, to the taxpayer's net income. Code §11-604(3)(a). Receipts from services performed within the City are included in the BAP computation. Code §11-604(3)(a)(2)(B).

Petitioner's income during the Tax Years was earned from the provision of guard services. The proportion of those receipts attributable to services provided to federal agencies located in the City is appropriately included in the receipts factor of the BAP, and the BAP is applied to Petitioner's entire net income to determine its GCT liability.

Petitioner appears to generally argue that the doctrine of intergovernmental immunity applies to exempt from imposition of

the GCT, income it received from the provision of services to federal agencies. Petitioner asserts that since the services were provided to Federal agencies located in Federal buildings, the City lacks jurisdiction to impose a tax on the income Petitioner earned.

Article VI, Section 2 of the United States Constitution, the supremacy clause, provides that the federal government and its instrumentalities are immune from direct state and local taxation, where the "legal incidence" of the tax falls on the federal government or its instrumentalities. *McCulloch v. Maryland*, 4 Wheat 316 (1819). See, also, *United States v. Boyd*, 378 U.S. 39 (1964); *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939). Congress has the authority to define the extent of the immunity implied in the Constitutional provision. *Director of Revenue v. CoBank ACB*, 531 U.S. 316 (2001).⁶

While federal instrumentalities are immune from direct imposition of the GCT, this immunity does not extend to corporations which do business with the government agency. *Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 386 (1938). The Fifth Circuit Court of Appeals noted, in *Fullilove v. U.S.*, 71 F.2d 852 (1934):

governmental immunity from taxation does not extend to private persons or corporations having business connection with it where the burden of the tax, if any, upon the

⁶See, generally, Jerome R. Hellerstein and Walter Hellerstein, *State Taxation II Sales and Use, Personal Income, and Death and Gift Taxes, and Intergovernmental Immunities* (3rd ed. 2011), Chapter 22. Immunity of the Federal Government and Its Instrumentalities from State Taxation.

government is not immediate and direct, but is only consequential and remote. at 853-4.

Petitioner asserts that the contracts for the services which were initiated and signed within the federal jurisdiction, were with the federal government, and therefore come under federal jurisdiction. (Statement of Opinion, Petitioner's Ex. 4). Petitioner is essentially positing that the services were exempt as they were provided to a federal agency in a "federal enclave"⁷ where the City had no jurisdiction.

Congress has acted to permit the imposition of the GCT in this instance. 4 USC §106. Petitioner is not an instrumentality of the federal government, but a private corporation; therefore, there is no "intergovernmental" immunity between Petitioner and Respondent. Congress has specifically waived immunity from state and local taxation of income from activities between a private corporation and federal agencies which transpire in a federal 'enclave.'

The Buck Act of 1940 (4 USC §§ 105-110) provides that

[n]o person shall be relieved from liability for any income tax levied by any state, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his . . . receiving income from transactions occurring or services performed in such area. 4 USC §106 (a).

⁷ See, *Taylor v. Lockheed Martin Corp.*, 78 Cal.App.4th 472, 92 Cal.Reptr.2d 873 (2000). The Court defined "federal enclave" as "land over which the federal government exercises legislative jurisdiction." *Id.* at 478. The authority for federal enclaves is found in Article I, section 8, clause 17 of the U.S. Constitution.

The Act defines an "income tax" as a "tax levied on, with respect to, or measured by net income, gross income or gross receipts." 4 USC §110(c). The GCT, a franchise tax which is measured by income, is an income tax under the Act. *Howard v. Commissioners of Sinking Fund of City of Louisville et al.*, 344 U.S. 624 (1953). See, also, *General Dynamic Corp. v. Bullock*, 547 S.E.2d 255, 529 (Supreme Ct. Texas, 1976), cert. denied, 434 U.S. 1009 (1978). Notwithstanding a taxable transaction occurs in whole or in part within a "federal area," the particular state where the transaction takes place has jurisdiction to levy and collect taxes "as though it were not a federal area." *Hill v. Joseph*, 205 Misc. 441 (Spec Term NY Cty 1954).

The Buck Act applies in this matter as the GCT asserted against Petitioner's ENI is imposed on income received from the provision of services in the City. *Hill, supra* at 446. Petitioner is not immune from the City GCT simply because it provided its guard services to federal agencies at City locations otherwise within the federal jurisdiction.

Further, Petitioner's argument directly conflicts with its practice with respect to other local tax impositions. Alante Security Group, Inc. does not dispute liability for State Sales and Use Taxes computed on receipts from the same provision of guard services to Federal agencies at Federal locations. (Tr. 53-4). Petitioner's contract with the SBA specifically requires payment of these taxes. Petitioner's Ex. 1. Petitioner filed State Sales and Use Tax Returns and paid State Sales and Use Taxes for the period in issue, pursuant to the terms of those contracts. Petitioner's Ex. 2. These facts mitigate against

Petitioner's exemption argument. It is impossible to conclude that Petitioner had "nexus" for State sales tax purposes, but not for City GCT purposes.

Exemptions from taxation are construed in favor of the taxing authority. *Matter of Mobil Oil Corp. v. Finance Admin'r of City of N.Y.*, 58 N.Y.2d 95 (1983). Whether and to what extent a taxpayer is entitled to a deduction from taxation is a matter of legislative grace (*Matter of Royal Indemnity Company v. Tax Appeals Tribunal*, 75 N.Y.2d 75 (1989)), and a taxpayer bears the burden of establishing that it is entitled to the deduction. *Matter of Grace v. New York State Tax Commission*, 37 N.Y.2d 193 (1975). Similarly, a taxpayer must prove entitlement to a tax exemption. *Matter of Citrin Cooperman & Co., LLP v. Tax Appeals Tribunal of the City of New York*, 52 A.D. 2d 228 (1st Dept 2008). See, *Astoria Federal Savings & Loan Association v. State of New York, City of New York Intervenor*, 222 A.D. 2d 36 (1996), where the Appellate Division stated:

The taxpayer claiming an exemption bears the heavy burden of establishing that clear and unambiguous statutory language creates such an entitlement.

There is no express statutory provision exempting Petitioner from GCT liability with respect to income received from services provided to Federal agencies at locations in the City. Petitioner is subject to the GCT.

Petitioner's GCT liability must be computed by application of a BAP to entire net income which takes into account the proportion of its property, receipts, and payroll attributable to

the City. Code §11-604. Application of a State Sales and Use Tax percentage to receipts from the sale of guard services, is not an appropriate method for calculating Petitioner's entire net income, as it only accounts for sales receipts within and without the State (or in this case, as computed on Petitioner's Ex. 5, the proffered returns, within and without the City.) The GCT is not a tax imposed only on receipts from specific transactions, but is a tax asserted for the privilege of exercising a corporate franchise within the City. *See, generally,* Code §11-603(1). Allocated receipts are only one of three components of the BAP which is applied to ENI to calculate a taxpayer's City GCT liability. Code §11-604. There is no authority to set aside the GCT methodology which takes into account a taxpayer's City property and City payroll in addition to allocated business receipts.

Petitioner is not a Federal instrumentality, but is simply a private company that contracted with a Federal agency to provide services in the City. Congress has determined that the immunity to which the Federal government is entitled does not flow to taxpayers such as Petitioner. Nor is there a specific Code provision exempting Petitioner from the GCT. Alante Security Group, Inc. is liable for GCT due on allocated income it received from the sales of guard services to federal agencies. Finally, there is no basis in the record to abate the penalties asserted.

ACCORDINGLY, IT IS CONCLUDED THAT Petitioner is liable for GCT on allocated entire net income received from the provision of security guard services to federal agencies located in the City. This income is not exempt from imposition of the GCT. ENI is

allocated by using a City BAP, and Petitioner may not allocate its income in the same manner that it allocates receipts for purposes of the State Sales and Use Tax. The Notice of Determination, as adjusted by agreement to reflect the application of payments in the amount of \$77,898.18, for a base GCT due of \$75,408.82, with interest and penalties thereon, is sustained.

DATED: February 10, 2012
New York, New York

ANNE W. MURPHY
Administrative Law Judge