NO. COA11-1592

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2012

IN THE MATTER OF:

APPEAL OF: NOVARTIS VACCINES and DIAGNOSTICS, INC. from Wake County Board of Commissioners' denial of property tax exemption for certain real and personal property for tax year 2010.

Property Tax Commission
Nos. 10 PTC 434
11 PTC 28

Appeal by Wake County from final decision entered 30 June 2011 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 6 June 2012.

Williams Mullen, by Brian C. Vick, Charles B. Neely, Jr., Nancy S. Rendleman, and Christopher G. Browning, Jr., for taxpayer-appellee.

Office of the County Attorney, by Scott W. Warren, Wake County Attorney, and Kenneth R. Murphy, III, Assistant County Attorney; and Shelley T. Eason, for appellant Wake County.

Office of the Holly Springs Town Attorney, by John Schifano, for Town of Holly Springs, amicus curiae.

GEER, Judge.

Taxpayer Novartis Vaccines and Diagnostics, Inc. ("Novartis") is jointly constructing with the United States government a vaccine manufacturing facility in Holly Springs, North Carolina. Appellant Wake County contends that the

Property Tax Commission erroneously concluded that for tax year 2010, the United States government owned 40% of the personal property and improvements to real property associated with that facility and, therefore, that portion of the property was not taxable pursuant to N.C. Gen. Stat. § 105-278.1 (2011). Based on our review of the contract entered into between Novartis and the United States, we agree with the Commission that in 2010 the United States owned 40% of the manufacturing facility, and, therefore, we affirm.

Facts

In 2006, Novartis signed an economic development agreement with the Town of Holly Springs pursuant to which the Town deeded Novartis approximately 161 acres of land and provided various improvements such as land-clearing, grading, and infrastructure improvements. On 13 January 2009, the United States Department of Health and Human Services ("HHS") awarded Novartis a contract relating to the construction, validation, and operation of a new cell-based influenza vaccine manufacturing facility in Holly Springs.

Under the contract, Novartis and HHS jointly agreed to fund the design, construction, and validation of the Holly Springs facility. HHS agreed to fund 40% of the projected cost of designing, constructing, and validating the Holly Springs

facility up to a maximum of $316,579,000, while Novartis agreed to fund the remaining 60% of the cost, projected to be $474,868,000. This portion of the contract was a cost-sharing or cost-reimbursement contract. Once the facility was completed and validated, the contract provided for a fixed price with respect to delivery of the flu vaccine.

The contract included a provision entitled "Ownership and Use of the Facility" that specified:

> [P]arties acknowledge that as they will be jointly funding facility construction, they will jointly own the facility in accordance with their respective shares of investment during [construction]. In consideration for the agreements and mutual benefits herein provided, upon completion of [construction], all rights and title to the facility shall pass to the Contractor, and the Government shall retain no right of ownership in the facility and related equipment to be funded under this contract.

The contract also incorporated 48 C.F.R. § 52.245-1, a regulation included within the Federal Acquisition Regulations governing HHS' contracting activities. That regulation provided:

> (i) Title to all property purchased by the Contractor for which the Contractor is entitled to be reimbursed as a direct item of cost under this contract shall pass to and vest in the Government upon the vendor's delivery of such property.
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> (ii) Title to all other property, the cost of which is reimbursable to the

> Contractor, shall pass to and vest in the Government upon --
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> (A) Issuance of the property for use in contract performance;
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> (B) Commencement of processing of the property for use in contract performance; or
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> (C) Reimbursement of the cost of the property by the Government, whichever occurs first.

48 C.F.R. § 52.245-1(e)(3)(i).

As of 31 December 2009, HHS and Novartis had invested a combined total of $473,942,526 on the development, construction, and validation of the Holly Springs facility pursuant to their contract. As of that date, HHS had either reimbursed or was contractually obligated to reimburse Novartis $189,577,010 -- an amount equal to 40% of the total amount spent on the development, construction, and validation of the facility. HHS continued to maintain a 40% level of investment in the development, construction, and validation of the facility throughout 2010. Further, as of 31 December 2010, Novartis had not yet completed the construction and validation tasks and, therefore, the fixed price portion of the contract had not commenced.

For the 2010 tax year, Wake County sought to tax Novartis for 100% of the value of the real and personal property that made up the Holly Springs facility. Novartis sought from Wake

County a partial exemption as to the improvements on the real property and as to the personal property because HHS owned 40% of the facility. Novartis did not seek a partial exemption as to the land at the facility. Wake County denied Novartis' request for a partial tax exemption.

Novartis appealed the denial of a partial exemption to the Property Tax Commission. Novartis and Wake County filed cross-motions for summary judgment. The Commission entered its Final Decision on 30 June 2011, reversing the decisions of the Wake County Board of County Commissioners denying Novartis' applications for property tax exemptions for tax year 2010 for the improvements to real property and for the personal property.

The Commission first noted that the parties had not agreed on the precise issue presented to the Commission. The Commission, based on its review of the parties' materials, determined the issue to be: "Whether the real and personal property at issue in this appeal qualifies for partial exemption from *ad valorem* taxation pursuant to N.C. Gen. Stat. § 105-278.1, exemption of real and personal property owned by units of government." After setting out the facts that were "clearly established and [were] not in dispute" -- the facts recited above -- the Commission concluded as a matter of law that: (1) N.C. Gen. Stat. § 105-278.1 applied; (2) the federal government

owned 40% of the Holly Springs facility; (3) title had vested and passed to the federal government by operation of law based upon 48 C.F.R. § 45.402(b) (2011) and 48 C.F.R. § 52.245-1 (2011); and (4) Novartis had, therefore, met its burden of showing that 40% of the facility was exempt from taxation. Wake County timely appealed to this Court.

Discussion

Wake County first contends that the Commission lacked subject matter jurisdiction. According to Wake County, Novartis' appeal before the Commission argued only that Wake County was imposing an illegal tax since it was taxing Novartis for property that it did not own. Wake County then argues that the proper remedy for an illegal tax is a civil action in the state trial courts pursuant to N.C. Gen. Stat. § 105-381 (2011). We disagree.

Novartis sought a property tax exemption. N.C. Gen. Stat. § 105-282.1(b) (2011) provides: "If an assessor denies an application for exemption or exclusion, the assessor must notify the owner of the decision and the owner may appeal the decision to the board of equalization and review or the board of county commissioners, as appropriate, and from the county board to the Property Tax Commission." Novartis' appeal falls squarely

within this statute and, therefore, the Commission had jurisdiction.

Wake County next argues that Novartis lacks standing to assert the federal government's tax exemption. It argues that "[a] taxpayer has no right to assert a right to exemption at the Property Tax Commission for property it does not own." This appeal does not, however, involve a situation in which the party appealing to the Commission has no ownership interest in the property. To the contrary, Novartis claims a 60% ownership interest in the property subject to the claimed exemption. It is an owner of property that it claims is entitled to a partial exemption from taxation. *See* N.C. Gen. Stat. § 105-282.1(a) (providing that "[e]very *owner* of property claiming exemption or exclusion from property taxes . . . has the burden of establishing that the property is entitled to it" (emphasis added)). We hold, therefore, that Novartis had standing to appeal to the Commission.

Wake County also contends that the Commission lacks jurisdiction over any constitutional claims, such as Novartis' argument based on the Supremacy Clause of the United States Constitution. It is true that as an administrative agency created by the General Assembly, the Commission does not have jurisdiction to determine the constitutionality of legislative

enactments. *See State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n*, 336 N.C. 657, 673-74, 446 S.E.2d 332, 342 (1994) (holding that Utilities Commission did not have jurisdiction to determine constitutionality of legislative enactments); *In re Appeals of Timber Cos.*, 98 N.C. App. 412, 415, 391 S.E.2d 503, 505 (1990) ("The Property Tax Commission is without authority to rule on the constitutionality of [statutes].").

Here, however, Novartis is not arguing that any legislation is unconstitutional. Nor did the Commission address the constitutionality of any statute. Instead, as the Commission stated in its decision, it resolved the issue whether the "property at issue in this appeal qualifies for partial exemption from *ad valorem* taxation pursuant to N.C. Gen. Stat. § 105-278.1, exemption of real and personal property owned by units of government."

The applicability of the Supremacy Clause is implicit in N.C. Gen. Stat. § 105-278.1(a), which provides: "Real and personal property owned by the United States and, *by virtue of federal law*, not subject to State and local taxes shall be exempted from taxation." (Emphasis added.) The Commission considered the Supremacy Clause only as necessary to apply N.C. Gen. Stat. § 105-278.1(a). Nothing in the Commission's decision

violated the principle, cited by Wake County, that "[t]he question of constitutionality of a statute is for the judicial branch." *Great Am. Ins. Co. v. Gold*, 254 N.C. 168, 173, 118 S.E.2d 792, 796 (1961), *overruled on other grounds by Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

Turning to the substantive part of the County's appeal, under the standard of review applicable to an appeal from the Property Tax Commission, this Court

> may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
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> (1) In violation of constitutional provisions; or
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> (2) In excess of statutory authority or jurisdiction of the Commission; or
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> (3) Made upon unlawful proceedings; or
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> (4) Affected by other errors of law; or
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> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
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> (6) Arbitrary or capricious.

N.C. Gen. Stat. § 105-345.2(b) (2011).

"'Questions of law receive *de novo* review, while issues such as sufficiency of the evidence to support the Commission's decision are reviewed under the whole-record test.'" *In re Appeal of McLamb*, ___ N.C. App. ___, ___, 721 S.E.2d 285, 287 (quoting *In re Murray*, 179 N.C. App. 780, 783, 635 S.E.2d 477, 479 (2006)), *disc. review denied*, ___ N.C. ___, 731 S.E.2d 179 (2012). Since the Commission resolved the appeal on cross-motions for summary judgment because the facts were not in dispute, this appeal involves a question of law. *See Hamilton v. Travelers Indem. Co.*, 77 N.C. App. 318, 319, 335 S.E.2d 228, 229 (1985) ("The parties do not dispute the facts, only the interpretation of the policy and applicable statutory language. Since the case presents only questions of law, summary judgment was appropriate.").

Wake County acknowledges that property owned by the federal government cannot be taxed, but argues that Supremacy Clause precedent allows taxation when the federal government's interest in property is essentially a security interest similar to that of a mortgagee. In support of this argument, Wake County relies upon *S.R.A., Inc. v. Minnesota*, 327 U.S. 558, 90 L. Ed. 851, 66 S. Ct. 749 (1946). In *S.R.A.*, the taxpayer had purchased property from the federal government pursuant to a contract that granted the taxpayer immediate possession in exchange for an

initial cash payment followed by annual installment payments. *Id.* at 560, 90 L. Ed. at 854, 66 S. Ct. at 751. If the taxpayer did not comply with the terms of the contract, then the federal government could repossess the property. *Id.* If, on the other hand, the taxpayer made all required payments, then the contract required the federal government to execute and deliver a quit claim deed for the realty to the taxpayer. *Id.*, 90 L. Ed. at 855, 66 S. Ct. at 752. Not only did the Supreme Court conclude that "the United States retain[ed] only a legal title as security" and that "[i]n substance it [was] in the position of a mortgagee," *id.* at 565, 90 L. Ed. at 858, 66 S. Ct. at 754, but the Court also emphasized that "Minnesota took care to leave unassessed whatever interest the United States holds." *Id.*

This case, however, involves joint ownership by the federal government and Novartis and not a mortgagor/mortgagee type relationship, as indicated by the plain language of the contract. Moreover, Wake County, by taking the position that the federal government does not own any part of the facility, is, in effect, assessing the interest that the federal government holds.

Here, the contract specifically states that the parties "will jointly own the facility in accordance with their respective shares of investment" during the design,

construction, and validation phase of the contract. "Joint ownership," while not defined in the contract itself, is typically defined as "[u]ndivided ownership shared by two or more persons." *Black's Law Dictionary* 1215 (9th ed. 2009). "Ownership" is then further defined as "[t]he bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others. Ownership implies the right to possess a thing, regardless of any actual or constructive control." *Id.*

In addition, 48 C.F.R. § 45.402(b) demonstrates the parties' intent. 48 C.F.R. § 45.402(b) states: "Under cost type and time-and-material contracts, *the Government acquires title* to all property to which the contractor is entitled to reimbursement in accordance with paragraph (e)(3) of clause 52.245-1," a clause incorporated by reference into the contract. (Emphasis added.) Incorporation of this regulation, known as a title vesting clause, further confirms that the contract between Novartis and HHS resulted in HHS acquiring title to the 40% of the facility for which Novartis was reimbursed.

Wake County argues that whatever interest HHS does have, it does not rise to the level of ownership. "A contract term is ambiguous only when, 'in the opinion of the court, the language of the [contract] is fairly and reasonably susceptible to either

of the constructions for which the parties contend.'" *State v. Philip Morris USA Inc.*, 363 N.C. 623, 641, 685 S.E.2d 85, 96 (2009) (quoting *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970)). The contract phrase "jointly own" is not reasonably susceptible to the County's construction, especially given 48 C.F.R. § 45.402(b). The phrase is unambiguous. *See Philip Morris*, 363 N.C. at 636, 685 S.E.2d at 93 ("Since the plain language of the [contract] provision, after examining the [contract] as a whole, is clear and unambiguous, it does not permit construction and our inquiry ends here.").

Wake County, however, urges this Court to adopt the reasoning of *Marine Midland Bank v. United States*, 687 F.2d 395 (Ct. Cl. 1982). In *Marine Midland Bank*, the court held that a federal government title vesting clause did not actually grant title to the government, but rather was "an interest in the nature of a lien." *Id.* at 403. The Court concluded that "the progress payments in this case were loans from the government to [the contractor], to be repaid by withholding an appropriate amount of the contract price ultimately owing on full performance. In the interim, the government took an interest in [the contractor's] inventory as security, as defined by the

title vesting clause. This interest was far less than full ownership." *Id.* at 398.

Here, payments by HHS were not progress payments, but rather amounted to joint funding of the facility either by cost-sharing or cost-reimbursement. Regardless, the *Marine Midland Bank* reasoning has been repeatedly rejected by other courts. *See, e.g., Motorola, Inc. v. Arizona Dep't of Revenue*, 196 Ariz. 137, 144, 993 P.2d 1101, 1108 (1999) ("We also reject DOR's argument that the 'title-passing' provisions merely create a security interest. DOR's position is the minority view in the federal courts."); *Northrop Grumman Corp. v. Cnty. of Los Angeles*, 134 Cal. App. 4th 424, 433, 36 Cal. Rptr. 3d 71, 77 (2005) ("We shall not follow *Marine Midland*, and instead follow the majority rule that the United States takes title to all property used in the performance of federal defense contracts under the title-vesting clause."); *McDonnell Douglas Corp. v. Dir. of Revenue*, 945 S.W.2d 437, 441 (Mo. 1997) (en banc) ("Because the security interest theory of *Marine Midland* has yet to be adopted as a majority view by the federal courts, there is no compulsion at this time to ignore the plain meaning of the title vesting provisions included in the federal contracts at issue in this case.").

We join the en banc Missouri Supreme Court in declining to ignore the plain meaning of the contract in this case and the plain language of the title vesting regulation incorporated by reference in that contract. The Commission, therefore, did not err in concluding that HHS owned 40% of the improvements to real property and 40% of the personal property, and, therefore, that portion of the property could not be taxed under N.C. Gen. Stat. § 105-278.1.

Finally, Wake County argues that the value of HHS' interest was zero, citing first this Court's holding in *In re Appeal of Parsons*, 123 N.C. App. 32, 41, 472 S.E.2d 182, 188 (1996), that "[t]he fair market value of real property for tax purposes is the same as that for condemnation purposes." The County then points to our Supreme Court's condemnation case, *City of Charlotte v. Charlotte Parks & Recreation Comm'n*, 278 N.C. 26, 178 S.E.2d 601 (1971). In *City of Charlotte*, the City, when condemning a piece of land, had taken both the fee simple determinable estate held by the Parks and Recreation Commission so long as it used the land as a park and the possibility of reverter held by others in the event the Commission ceased to use the land as a park. *Id.* at 32, 178 S.E.2d at 605.

We fail to see the relevance of *City of Charlotte* to this case. That decision determined whether the holders of the

reversionary interest were entitled to any damages from the condemnation. Because the event that would trigger reversion was not a probability at the time of the taking, the value of the reversionary interest at that time was deemed to be zero. *Id.* at 33, 178 S.E.2d at 606.

Here, HHS does not have a mere future possibility of regaining property. In tax year 2010, it owned 40% of the property. That property -- including improvements to real property and personal property -- had a total value that Wake County had calculated in making its assessment. HHS' ownership interest was 40% of that total value, as the Property Tax Commission determined. Accordingly, we affirm.

Affirmed.

Judges ROBERT C. HUNTER and BEASLEY concur.

Report per Rule 30(e).

Judge BEASLEY concurred prior to 18 December 2012.