ILLINOIS INDEPENDENT

TAX TRIBUNAL

WATER'S EDGE GOLF MANAGEMENT LLC, Petitioner,	)	
v.	)	17 TT 13
	)	Judge Brian F. Barov
ILLINOIS DEPARTMENT OF REVENUE, Respondent.	)	

SUMMARY DISPOSITION ORDER

The Village of Worth ("the Village"), a municipal government body, owns a golf club ("the Club"), consisting of an 18-hole golf-course, a club house and a driving range. The Petitioner, Water's Edge Golf Management, LLC ("Water's Edge), operates the Club under a management agreement with the with the Village. The Illinois Department of Revenue issued a Notice of Tax Liability assessing unpaid use tax, interest and penalties on supplies and equipment that Water's Edge purchased in operating the Club under its management agreement for the July 1, 2012 to December 31, 2014 tax reporting periods.

Water's Edge challenged this assessment, alleging that its purchases were tax exempt because they qualified as purchases by a governmental body under section 130.2076 of the Department's regulations, 86 Ill. Admn. Code § 130.2076. The Department disagreed with that conclusion but agrees that the only issue in this case is whether the governmental body exception applies. The parties have provided stipulated facts and moved for summary

disposition on whether the purchases in question qualified for the governmental exemption from use tax. For the following reasons, I find that Water's Edge is entitled to section 130.2076's governmental body exemption for the tax periods in question.

Facts

Water's Edge is a single member limited-liability company organized by Billy Casper Golf, LLC (BCG), and its primary business is golf course management. Agreed Stipulation of Material Facts ("Stip.)[1] at ¶¶ 1-2. Water's Edge and the Village entered into a management agreement under which Water's Edge would supervise and manage the Club's "golf operations, golf maintenance operations, golf pro shop, annual pass sales efforts, practice facilities, food and beverage services and other services at the Club." Stip. at ¶ 6. Water's Edge was paid a base management fee for its services plus an incentive fee when revenues exceeded certain limits. *Id.* at ¶¶ 4-6.

The management agreement's pertinent portions are set out in full, with portions highlighted.

> 3. BILLY CASPER GOLF, LLC SERVICES. Services rendered by BCG to Village shall be as follows: Subject to the terms of this Agreement, BCG, as an independent contractor, shall have the sole and exclusive right to operate and manage the Club Village and BCG agree that they shall cooperate reasonably with each other to permit BCG to carry out its duties under this Agreement. BCG shall have the responsibility of providing, and the authority to provide, general operational management services for the Club, including, without limitation, the following services:
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> * * * *
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> B Inventory - Merchandise and Items for Re-sale BCG shall, at the expense of the Club, **obtain merchandise for the pro shop at the Club and food and beverage items. all in accordance with the Annual Budget and Program**.

[1] The facts are drawn from the parties' agreed stipulation of facts and accompanying exhibits.

* ***

D. Equipment. Except as set forth in Paragraph 12, BCG shall, pursuant to its preparation of Annual Budget and Program as set forth in Paragraph 3H, develop a list of required equipment and a purchase/lease schedule and maintain in good working condition and order the physical plant and equipment at the Club, including the golf course and all physical structures which are part of the Club, and all vehicles and other maintenance equipment necessary to the maintenance and operation of the Club in the normal course of business.

* * * *

E. Purchasing and Procurement. With respect to the duties and responsibilities of BCG as set forth in Paragraph 3 hereof, **BCG shall arrange for the procurement, as an operating expense of the Club, all operating supplies, operating equipment, inventories and services as are deemed necessary to the normal and ordinary course of operation of the Club and to operate the Club in accordance with the Annual Budget and Program. In purchasing operating supplies, operating equipment, inventories (including merchandise to be sold in the golf shop) and services for the Club, BCG may utilize its purchasing procurement services and/or other group buying techniques involving other affiliated clubs managed by BCG, provided that the cost thereof shall be competitive with that which would be charged by non-affiliated third party vendors in an arms-length transaction.** In such event, BCG may receive and retain a minor fee or other compensation from vendors and service providers in exchange for BCG's services in making the benefit of volume purchases available to the Club or negotiating and implementing the arrangements with such vendors or providers, provided that the cost shall be competitive as aforesaid and such fees or compensation so retained are used for training or educational programming.

* * * *

H. Accounting. BCG shall timely pay all vendors of the Club (subject to the availability of funds in accordance with the terms of the Agreement). BCG shall provide separate budgeting, bookkeeping and reporting services to Village for the Club **(it being understood that copies of all books and records shall be kept at the Club and that all books, records, software, data, programs. manuals and the like shall remain the property of**

Village):

* * * *

L Assignment of Operations BCG shall operate the Club via its single-purpose entity, Waters Edge Golf Management LLC ("WEGM") whose sole member shall be BCG. **Upon a termination of this Agreement, WEGM shall assign to Village's designee all operating accounts, vendor accounts, inventory, accounts receivable, and accounts payable; which transfer shall be completed upon BCG and/or WEGM receiving all fees due pursuant to this Agreement.** BCG and WEGM shall, without additional payment by the Village, cooperate beyond termination with Village and any replacement manager for a reasonable period after termination (and not less than two (2) weeks) to facilitate the orderly transition of the management of the Club

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* * * *

7. CAPITAL EXPENDITURES. Capital improvements shall be deemed to include any item purchased in connection with the operation of the Club which:

A. has an economic useful life in excess of one (1) year, and

[B]. has a cost in excess of Twenty-Five Hundred Dollars ($2,500). All costs for capital improvements shall be the responsibility of Village and all decisions as to whether or not to undertake any capital improvements projects or otherwise in respect of any capital improvements shall be made by Village in consultation with BCG.

15. GENERAL PROVISIONS.

* * * *

O No Partnership. Nothing in this Agreement shall be construed to create a partnership or joint venture between the parties. The parties acknowledge that the relationship of BCG to Village is that of an independent contractor.

Stip. Ex. A (emphasis added).

Under the management agreement, Water's Edge had no obligation to purchase property insurance. Stip. Ex. A, First Amendment to Management Agreement. Although the Village could secure such insurance through BCG, it was liable for the premiums. *Id.* Further, the Village was required to maintain a certain balance in the Club's operating account to pay Club expenses. Stip. at ¶¶ 10-12. In addition to the Village's funds, fees generated by the Club were placed in a separate deposit account, and the amounts are transferred to the operating account to pay expenses as needed. *Id.* at ¶ 12.

Some of the invoices submitted by Water's Edge indicate that it made purchases in its own name only, other invoices indicate that purchases were made in the name of the Village. *See id.* at ¶ 17; *see also* Stip. Ex. F.

In March of 2015, the Department initiated an audit of the Petitioner for the tax periods from July 2012 to December 2014. During the audit, the Village generated a letter stating, in pertinent part:

> 4. The Village authorizes BCG and Waters Edge Golf Management, LLC, jointly and severally, to act as its purchasing agent ("Agent") to acquire materials, equipment, inventory and such other items necessary to manage and operate the Club pursuant to the Agreement. Agent her[e]by accepts this appointment.
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> 5 Title to materials, equipment, inventory and such other items purchased by Agent for the Club shall immediately pass to the Village at the time of purchase
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> 6. Purchases made for the Club by Agent shall be deemed to be made by the Village and as such should enjoy the benefit of the Village's tax-exempt status.
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> 7. Any sales, use, local tax, interest or penalty liabilities that arise from this Village-Agent relationship shall be the sole financial responsibility of the Village and the Agent shall be held harmless.
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> Stip. Ex. B.

After the audit, the Department determined that Water's Edge should be subject to use tax on purchases of personal property acquired in connection with the management and operation of the Club. Stip. at ¶¶ 20-21. It issued a Notice of Tax Liability in the amount of $37,914.23 in tax, interest and penalties. *Id.* at ¶ 21; Stip. Ex. G.

Analysis

The parties have sought to resolve this dispute through what they have termed cross-motions for summary disposition. The procedure is derived from the Federal Tax Court Rule 122, which allows submission without trial on stipulated facts but "does not alter the burden of proof." Fed. Tax Court Rule 122, 26 U.S.C.A., I.R.C. Rule 122(b) (West). In this regard, a summary disposition proceeding is no different than proceeding on cross-motions for summary judgment, where "the parties agree that the case involves a question of law and . . . they invite the court to decide the issues based on the record," *Shared Imaging, LLC v. Hamer*, 2017 IL App (1st) 152817, ¶ 13; *see Messina v. Comm'r*, T.C. Memo 2017-213, 2017 WL 4973291, *9 (2017) (noting that "under Rule 122, there are no outstanding factual issues relevant to ascertaining petitioners' tax liability—the only issues that remain are legal ones."), *appeal docketed*, No. 18-70187 (9th Cir. Jan. 22, 2018), and this proceeding will be treated accordingly.

The parties dispute whether Water's Edge's purchases for the Club qualified as "[p]ersonal property purchased by a governmental body," under section 3-5 of the Use Tax Act, 35 ILCS 105/3-5(4). Section 3-5 does not define the meaning of the term "governmental body" nor does it provide any reference to an exemption available for government contractors, such as Water's Edge.

Section 130.2076 of the Department's regulations, however, provides the applicable language at issue in this case:

> a) Generally, a government contractor who purchases items to fulfill his obligations under a contract with a governmental unit purchases

> those items for use. See, U.S. v. New Mexico, 455 U.S. 720, 102 S.Ct. 1373 (1982). However, if the contract with the governmental unit explicitly requires the contractor to sell those items to the governmental unit, the purchase of those items by the contractor can be structured as purchases for the purpose of resale to the governmental unit. Sales of tangible personal property to the contractor in this situation are exempt from Retailers' Occupation Tax as sales for resale if the following conditions are met:
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> 1) There is a contract between the purchaser and the governmental body that requires the purchaser to provide tangible personal property to the governmental body.
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> 2) The contract is specific in documenting a sale of tangible personal property from the purchaser to the governmental body. The contract must specify that the tangible personal property is transferred to the governmental body. However, the contract does not have to be item specific. For example, a statement that title to all of the tangible personal property that is purchased shall pass to the governmental body is sufficient. The transfer may be immediate or subsequent to the completion of the contract.
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> b) The exemption in subsection (a) above applies to tangible personal property that is used or consumed in the performance of a contract with a governmental body and to which title passes to the governmental body under the terms of the contract. For example, the exemption applies to consumable supplies, such as fuel, that a purchaser uses to fulfill the contract with the governmental body so long as the conditions set forth in subsection (a) are met.
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> c) A supplier claiming exemption shall have among his records a Certificate of Resale from the purchasing government contractor that conforms to the requirements set forth in Section 130.1405.
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> 86 Ill. Admn. Code § 130.2076.

This regulation has the force of law and its language is construed in the same manner as a statute. *See CBS Outdoor, Inc. v. Dep't of Transp.*, 2012 IL App (1st) 111387, ¶ 27. The primary rule of construction is to apply the plain regulatory language of the statute in order to give effect to the agency's intent. *See Biekert v. Maram*, 388 Ill. App. 3d 1114, 1119 (5th Dist. 2009). Tax exemptions, however, are "strictly construed." *Shared Imaging, LLC*, 2017 IL App (1st) 152817, ¶ 25.

The first two sentences of section 130.2076 are unclear as to whether they are meant to adopt the test for a governmental body set forth by the Supreme Court in *United States v. New Mexico*, 455 U.S. 720 (1982), or to disavow that standard in favor of a contractual standard. The Department argues that the regulation creates two legal tests: one based on the *New Mexico* holding and the second based on whether the parties' have contracted for the exemption. Water's Edge, for its part, argues that the *New Mexico* standard is inapplicable because that case applied federal supremacy principles, not present here, and that it is entitled to the exemption as an agent of the Village. As the *New Mexico* decision figures heavily in both the parties' arguments, it warrants an extended discussion.

In *New Mexico*, the taxpayers were private companies that contracted with the federal government to build, maintain and manage federally-owned facilities. *Id.* at 723-26. Under the contracts, title to all personal property passed directly to the government. *Id.* at 724. The contractors were also able to use advance funding provisions under which they could draw directly on federal monies to pay venders and employees. *Id.* at 725-26. The federal government claimed that its contractors were immune from state sales and use tax on their purchases of supplies and equipment under federal supremacy principles. *Id.* at 728.

The Supreme Court held that federal immunity from state taxation applied only where the tax "falls on the United States itself, or an agency or instrumentality so closely connected to the Government that the two cannot be realistically viewed as separate entities." *See id.* at 735. The Court did not define the point at which a contractor became an instrumentality of the government, but the facts of that case did not support a holding that the contractors there were federal instrumentalities.

The Court found that the fact that title to goods purchased by the contractors passed to the government was insufficient to create tax immunity. *Id.* at 743. Rather, it stressed the fact that the contractors made

purchases in their own names, and did so with considerable independence, to find that the identify of interest between the contractors and the federal government was insufficient to warrant federal immunity from state taxation. *Id.*

The Department contends that Water's Edge is not a government instrumentality under the *New Mexico* test, *see* Dep't Br. at 4-6, and the stipulated facts support that conclusion. Water's Edge had considerable discretion in purchasing property, *see* Stip. Ex. A at ¶ 3E, and much of the property was purchased in the name Water's Edge, not the Village, *see* Stip. Ex. F. The question of who owned the property, under the *New Mexico* instrumentality test, is insignificant, if not irrelevant. *See* 455 U.S. at 736.

Water's Edge's objection to the *New Mexico* decision–that it is inapplicable because it on involved a federal supremacy question, not present here, *see* Pet'r Br. at 8, Pet'r Reply at 1-2–is unavailing. The Department may adopt the instrumentality test as the regulatory standard, assuming it is otherwise consistent with the language of the statutory exemption. *See Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 364-66 (2009). Further, Water's Edge has not provided any authority to support its argument that its entitlement to the tax exemption is contingent on its status as an agent of the Village in purchasing property for the Club. In fact, the *New Mexico* Court rejected "traditional agency notions" as a basis for immunity from state taxation. *See* 455 U.S. at 736.

Section 130.2076's second sentence, on which Water's Edge also relies, *see* Pet'r Br. at 5-8, however, adopts a contractual standard for the governmental body exemption that does not just create an alternative to the *New Mexico* instrumentality test, but directly contradicts that test. Unlike the instrumentality test, which considers transfer of property to the governmental body insignificant, under section 130.2076, transfer of title is critical to the exemption. Under section 130.2076, the exemption applies "if

the contract with the governmental unit explicitly requires the contractor to sell those items to the governmental unit." 86 Ill. Admn. Code § 130.2076(a).

This requirement can be met if (1) the "contract between the purchaser and the governmental body requires the purchaser to provide tangible personal property to the governmental body," and (2) the contract specifies that "the tangible personal property is transferred to the governmental body." *Id.* The contract terms transferring the property to the governmental body, do "not have to be item specific." *Id.* In fact, the transfer may be made "immediate or subsequent to the completion of the contract." *Id.*

Here, under the management agreement, Water's Edge was required to purchase property for the Village. Section 3E states that Water's Edge "shall arrange for the procurement, . . . [of] all operating supplies, operating equipment, inventories and services as are deemed necessary to the normal and ordinary course of operation of the Club. Stip. Ex. A at ¶ 3E. The first prong of the contract test is met.

In arguing that the transfer of property meets the contractual test's second prong–the transfer of property to the Village–Water's Edge stresses the management agreement's language requiring that all property be purchased for the Club from Village funds. Pet'r Br. at 5-8; *see* Stip. Ex. at ¶ 3I. More compelling though is section 3L of the management agreement, which states, "[u]pon a termination of this Agreement, WEGM shall assign to Village's designee all . . . inventory." Stip. Ex. A at ¶ 3L. This language meets section 130.2076(a)(2) s condition that the exemption can apply where "title to all of the tangible personal property that is purchased" passes to the Village after "the completion of the contract." 86 Ill. Admn. Code § 130.2076(a)(2).

There is additional language in the management agreement that further supports the conclusion that the parties intended for all purchases to become property of the Village during the course of the contract. For example, under section 3B of the management agreement Water's Edge was

required to obtain merchandise "for the pro shop at the Club." Stip. Ex. A at ¶ 3B. All procurement for the Club was considered "an operating expense of "the Club." Stip. Ex. A at ¶3E. All capital expenditures, i.e., costs of above $2500 were "the responsibility of the Village." *Id.* at ¶ 7B. Water's Edge was not required to obtain property insurance for Club property, any property insurance and the payment of premiums on property insurance were the Village's obligation. *Id.*, First Amendment to Management Agreement. Finally, under the management agreement "all books, records, software, data, programs, manuals and the like shall remain the property of the Village." *Id.* at ¶ 3H. Thus, either during course of the management agreement, or at its end, all property purchased was transferred to the Village.

In arguing that the contractual test is not met, the Department focuses on language which permitted Water's Edge to utilize "group buying techniques," with other golf clubs that it manages. Dep't Br. at 6, *see* Stip. Ex. A at ¶ 3E. According to the Department, because Water's Edge could engage in shared purchases and distribute such property to any golf club managed by BCG, the regulatory requirement of property transfer was not met. Dep't Br. at 6. But even considering the possibility of shared purchases does not detract from the fact that under the management agreement, at some point, either during or at the end of the contract, any property distributed to the Club became property of the Village, which is all that section 130.2076 requires.

In short, the management agreement is sufficiently specific in indicating that personal property purchased by Water's Edge in the course of operating the Club was transferred to the Village. Under the plain language of section 130.2076, Water's Edge was entitled to the governmental body exemption and was not liable for use tax on its purchases for the Club for the tax periods in issue. *See Biekert*, 388 Ill. App. 3d at 1126-27 (applying plain language of regulations over agency's limiting interpretation).

Finally, the decision that Water's Edge is entitled to the governmental body exemption is not reliant on Stipulated Exhibit B. Exhibit B is the letter generated by the Village during the audit, which stated that the Village authorized Water's Edge as it's agent and that title to items purchased by Water's Edge for the Club passed to the Village. The parties disputed only Exhibit B's effect on the agency relationship between Water's Edge and the Village, *see* Pet'r Br. at 9, Dep't Resp. Br at 2, a matter that has no bearing on this case. Neither party presented any argument as to whether Exhibit B is admissible for contract construction, or how it should be construed. Therefore, Stipulation Exhibit B was not considered in deciding this case.

Conclusion

Summary disposition or judgment is granted in favor of Petitioner and against the Department. The Notice of Tax liability issued by the Department is cancelled, vacated and penalties are abated. This is a final order subject to appeal under section 3-113 of the Administrative Review Law, and service by email is service under section 3-113(a). *See* 35 ILCS 1010/1-90; 86 Ill. Admn. Code § 5000.330. The Tribunal is a necessary party to this appeal.

s/ *Brian Barov*
BRIAN F. BAROV
Administrative Law Judge

Date: October 25, 2018