TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00726-CV

The GEO Group, Inc., Appellant

v.

Glenn Hegar, Comptroller of Public Accounts of the State of Texas; and Ken Paxton, Attorney General of the State of Texas, Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 126TH JUDICIAL DISTRICT NO. D-1-GN-09-002855, HONORABLE LORA J. LIVINGSTON, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

The GEO Group, Inc. (GEO) sued Glenn Hegar, Comptroller of Public Accounts of the State of Texas, and Ken Paxton, Attorney General of the State of Texas, (collectively, the Comptroller) seeking a refund of sales tax imposed on GEO's use of gas and electricity in detention facilities. GEO asserted that it was entitled to the sales tax exemption for residential use under Section 151.317 of the Tax Code. After both parties filed for summary judgment on this issue, the trial court granted summary judgment in favor of the Comptroller. On appeal, GEO asserts that the trial court misconstrued the statutory exemption for the purchase of natural gas and electricity sold for residential use. For the following reasons, we will affirm.

BACKGROUND

Purchases of gas and electricity are generally subject to sales and use tax. *See* Tex. Tax Code § 151.051(a). The Tax Code exempts from taxation gas and electricity sold for "residential use." *Id.* § 151.317(a)(1). "Residential use" is defined in the statute and in Comptroller Rule 3.295, but during the relevant tax period, neither provision explicitly addressed whether detention facilities were eligible under that definition. *See id.* § 151.317(c); 34 Tex. Admin. Code § 3.295 (2005) (Comptroller of Pub. Accounts, Natural Gas and Electricity).[1]

Appellant GEO is a private company that operates facilities that house government detainees.[2] During the time period at issue, GEO operated two types of facilities under service agreements with governmental entities: (1) those owned by the governmental entities; and (2) those owned by GEO or its affiliates. Following an audit, the Comptroller assessed additional sales and use tax against GEO for the period May 1, 2001, through April 30, 2005, disagreeing with GEO's position that it qualified for the residential-use exemption for taxes imposed on gas and electricity purchases under Tax Code Section 151.317(a) and Rule 3.295. GEO paid the assessment under protest. GEO also identified additional gas and electricity purchases on which it had paid sales and use tax during the audit period, and it sought a refund of those amounts, again contending that it was exempt because the gas and electricity were sold for residential use. The Comptroller denied GEO's

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[1] Rule 3.295 was amended effective April 13, 2005, 30 Tex. Reg. 2082, and again effective March 7, 2017, 42 Tex. Reg. 1034. The April 2005 amendment contained no provision relevant to this matter. All references to the rule in this opinion are to the versions in effect for the tax period at issue (2001-2005).

[2] The parties use the terms "government detainees" and "prisoners," which, according to contracts in the record before us, include sentenced felons, federal prisoners, and county inmates.

requests for redetermination and for rehearing. GEO filed suit in district court under Tax Code Sections 112.052 (taxpayer suit after payment under protest) and 112.151 (suit for refund), protesting the assessment and seeking the requested refund. GEO sought a total amount of $1,367,377.14 plus interest. GEO and the Comptroller filed cross-motions for summary judgment on the issue of whether the residential-use exemption applies to GEO's purchase of gas and electricity. The trial court granted the Comptroller's motion and denied GEO's. This appeal followed.

ANALYSIS

Appellant GEO raises a single issue on appeal: the trial court erred in determining that gas and electricity used at detention facilities for government prisoners did not qualify for the sales-tax exemption for residential use. It argues that the trial court misconstrued the statutory definition of "residential use."

Applicable standards of review

The resolution of this case depends on statutory construction, which we review de novo. *Hallmark Mktg. Co. v. Hegar*, 488 S.W.3d 795, 797 (Tex. 2016). Valid agency rules and regulations, promulgated within the agency's authority, have the force and effect of law and are generally construed in the same manner as statutes. *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011). Our primary goal in construing a statute is to give effect to the legislature's intent, as indicated by the plain meaning of the text of the statute. *Hebner v. Reddy*, 498 S.W.3d 37, 41 (Tex. 2016). Texas law recognizes that "an agency's construction of a statute may be taken into consideration by courts when interpreting statutes," and deference to an agency's

construction is appropriate when the statutory language is ambiguous, so long as the agency's construction is reasonable and not inconsistent with the text of the statute. *Southwest Royalties, Inc. v. Hegar*, 500 S.W.3d 400, 405 (Tex. 2016); *Railroad Comm'n v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 625 (Tex. 2011)).

Furthermore, as recognized by the Texas Supreme Court, exemptions from tax are strictly construed against the taxpayer because "they undermine equality and uniformity by placing a greater burden on some taxpaying businesses and individuals rather than placing the burden on all taxpayers equally." *North Alamo Water Supply Corp. v. Willacy Cty. Appraisal Dist.*, 804 S.W.2d 894, 899 (Tex. 1991); *Bullock v. National Bancshares Corp.*, 584 S.W.2d 268, 271-72 (Tex. 1979). Accordingly, the taxpayer carries the burden to establish that an exemption applies. *Texas Student Hous. Auth. v. Brazos Cty. Appraisal Dist.*, 460 S.W.3d 137, 140-41 (Tex. 2015). Specifically, the taxpayer must clearly show that it meets the requirements for an exemption from tax. *Id.* The exemption must affirmatively appear in the statute, and all doubts are resolved in favor of the taxing authority. *Id.*; *see National Bancshares*, 584 S.W.2d at 272; *Upjohn Co. v. Rylander*, 38 S.W.3d 600, 606 (Tex. App.—Austin 2000, pet. denied).

The statutory-construction issues raised in this appeal arise in the context of cross-motions for summary judgment based on materially undisputed facts. We review the trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005) (citing *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003)). Where, as here, both parties move for summary judgment and the trial court grants one motion and denies the other, "we determine all issues presented and render the judgment the trial court should

have rendered." *Colorado Cty. v. Staff*, 510 S.W.3d 435, 444 (Tex. 2017) (citing *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013)); *BCCA Appeal Grp., Inc. v. City of Hous.*, 496 S.W.3d 1, 7 (Tex. 2016) (citing *Southern Crushed Concrete, LLC v. City of Hous.*, 398 S.W.3d 676, 678 (Tex. 2013)).

While GEO moved for summary judgment solely on traditional grounds, the Comptroller's motion presented both no-evidence and traditional grounds. In this situation, we typically first review the propriety of the summary judgment under the no-evidence standards in rule 166a(i). *See Merriman*, 407 S.W.3d at 248. However, in the interest of efficiency, we may review a summary judgment under the traditional standard of rule 166a(c) first where, as here, the application of that standard would be dispositive. *See Farkas v. Wells Fargo Bank, N.A.*, No. 03-14-00716-CV, 2016 WL 7187476, at *6 (Tex. App.—Austin Dec. 8, 2016, no pet.) (mem. op.); *Melendez v. Citimortgage, Inc.*, No. 03-14-00029-CV, 2015 WL 5781103, at *3 (Tex. App.—Austin Oct. 2, 2015, pet. denied) (mem. op.); *see also* Tex. R. App. P. 47.1 (providing that appellate courts address "every issue raised and necessary to final disposition of appeal"). In order to prevail on traditional summary-judgment grounds, the movant must show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c).

Tax Code Section 151.317

The Tax Code exempts gas and electricity from sales and use taxes imposed in chapter 151 when sold for "residential use." *See* Tex. Tax Code § 151.317(a)(1). The statute defines "residential use" to mean use:

> (1) in a family dwelling or in a multifamily apartment or housing complex or building or in a part of a building occupied as a home or residence when the use is by the owner of the dwelling, apartment, complex, or building or part of the building occupied; or
>
> (2) in a dwelling, apartment, house, or building or part of a building occupied as a home or residence when the use is by a tenant who occupies the dwelling, apartment, house, or building or part of a building under a contract for an express initial term for longer than 29 consecutive days.

Id. § 151.317(c). To aid in enforcing Section 151.317, the Comptroller adopted Rule 3.295, the pertinent language of which generally tracked that of the statute. *See* 34 Tex. Admin. Code § 3.295.

The parties agree that no tenancy exists in this situation, so the focus of our analysis is Subsection (c)(1). In order to qualify for the residential-use exemption under Subsection (c)(1), the use of gas and electricity in the detention facilities must have been in a structure occupied as a home or residence, and the use must have been by the owner of the occupied structure. GEO argues that because prisoners resided in the detention facilities, the facilities were being occupied as a residence, fulfilling the first element. It further argues that the owner of each facility—GEO, an affiliate, or a governmental body—used the gas or electricity to house government prisoners, satisfying the second element. The Comptroller disagrees, insisting that the facilities were not occupied as a home or residence because the term "occupied" requires more active control of the space than the prisoners exercised, and because the prisoners enjoyed none of the rights that generally accompany the occupation of a home or residence. The Comptroller further argues that the use of the gas and electricity was by the prisoners, who were not the owners, so the "by the owner" element is not satisfied and the exemption does not apply.

Occupied as a home or residence

First, we do not read "when the use is by the owner" to be a statutory element separate from and unrelated to "occupied as a home or residence." We must interpret the language of the statute as a whole, in a manner that harmonizes and effectuates all provisions such that none are rendered meaningless. *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001). Accordingly, we interpret the two together to determine that the use by the owner must be related to the occupation as a home or residence. *See In re Office of the Att'y Gen.*, 456 S.W.3d 153, 155 (Tex. 2015) ("We construe the words of a statute according to their plain meaning . . . and in the context of the statute's surrounding provisions.") (internal citations omitted)). The Comptroller argues that a prison cannot be occupied as a home or residence because while a home is one's castle, a prison is a cage. The Comptroller also asserts that because the prisoners have none of the fundamental rights or attributes that non-prisoners have in their homes, they do not occupy the facilities "as a home or residence." We agree that there is a qualitative difference between occupying a private dwelling, such as a home or residence, and occupying a detention facility.

Because the statute does not specifically define the terms "home" or "residence," we must give these words their common, ordinary meaning unless the statute clearly indicates a different result. *See Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 563 (Tex. 2014); Tex. Gov't Code § 311.011(a) ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage."). "Home" is commonly defined as "one's principal place of residence" or "a private dwelling." *Webster's Third New Int'l Dictionary* 1082 (2002); *see also Black's Law Dictionary* (10th ed. 2014) (defining "home" as "a dwelling place"). A "dwelling" is

defined to mean "a building or construction used for residence." *Webster's* at 706. The facilities at issue here, in contrast, are buildings used for confinement and detention, with housing being a necessary component of that detention. For example, in GEO's contract with the State's Lockhart Correctional Facility, GEO agrees, in part, to "do all things necessary for, or incidental to, the management of [State programs] for the detention, training, education, rehabilitation, reformation, on-site employment of sentenced felons." In this context, detention is primary and housing is a component of the confinement of detainees. Thus, under a commonly understood meaning of the words, the facilities are not occupied as a "home."

GEO argues that because the detainees reside in the facilities, the facilities are "occupied as a residence." However, while "residence" commonly refers to "the place where one actually lives or has his home," the term "detention" refers to "a holding in custody." *Webster's* at 616, 1931; *see also Black's Law Dictionary* (defining "residence" as "the place one actually lives," and "detention" as "the act or fact of holding a person in custody"). The facilities at issue here, in contrast, are best described as the place where prisoners are held in custody for a period of time. Therefore, the common definitions of the words used in the statute tend to support the Comptroller's argument that the detention facilities are not "occupied as a home or residence." Accordingly, we conclude that the detention facilities at issue in this case are not occupied as a home or residence for purposes of this tax exemption.

Use by the owner

Even if the detention facilities at issue were occupied as a home or residence, in order to qualify for the residential-use exemption, the gas and electricity use within the facilities also must

be "by the owner." *See* Tex. Tax Code § 151.317(c)(1). GEO argues that the use of gas and electricity does not have to be by the occupant of the structure. Here, it argues, the owners of the facilities—GEO, its affiliates, or governmental entities—used the gas and electricity to house prisoners, thereby satisfying the requirement that "use is by the owner." The Comptroller counters that the user of the gas or electricity must be the person living in the occupied space. The Comptroller also contends that in this case, the prisoners used the gas and electricity for ordinary day-to-day tasks, including "lighting, heating, food preparation, recreation, and other activities related to living in the housing units," consistent with an ordinary understanding of the "use" of gas and electricity.

As discussed above, GEO operated facilities owned by GEO or its affiliates and facilities owned by governmental entities. In the facilities owned by GEO or its affiliates, GEO asserts that it used the gas and electricity to house prisoners. The record clearly indicates that GEO paid for the gas and electricity. However, to the extent that GEO or its affiliates, as owners, used the gas and electricity, they did so as part of a commercial venture and as part of the service GEO provided to the government pursuant to contract, not in a residential manner. In one of the contracts included in the record, for example, GEO was obligated to:

> provide all necessary personnel, equipment, materials, supplies, and services . . . and otherwise do all things necessary for, or incidental to, the management of the 1,000 bed Secure Work Program Facility with associated programs within the State of Texas for the detention, training, education, rehabilitation, reformation, on-site employment of sentenced felons, and any expansion that may be subsequently authorized . . . .

Similarly, GEO asserts that where it provided services within facilities owned by government entities, those entities, as the owners, used the gas and electricity to house prisoners. Again, such use by governmental entities was in service of a regulatory duty to detain certain persons and was not residential, as that term is commonly understood. Consistent with our determination that the use by the owner must be related to the occupation of the structure as a home or residence, we conclude that the statute does not support an interpretation that such use fits the definition of "residential use."

GEO argues that an owner can use a building by authorizing another person to reside there. It uses two examples to illustrate its point: the purchase of a condominium by a parent to house a child attending college; and the purchase of a second home on a lake in which the owner allows friends to stay. The Comptroller counters, and we agree, that the plain language of the statute indicates that the pertinent use at issue is the use of gas and electricity, rather than the use of the structure. *Id.* § 151.317(a) ("[G]as and electricity are exempted from the taxes imposed by this chapter when sold for: (1) residential use"). Even if GEO's argument is recast to suggest that an owner can use electricity by authorizing another person to light and heat a structure with it, GEO's examples are distinguishable because neither the parent nor the lakehouse owner is running a business or performing a governmental function that includes authorizing the use of gas and electricity by others. Furthermore, the Comptroller points out that Section 151.317 was amended in 1995 to add the requirement that the use must be "by the owner," or "by the tenant . . . under a contract for an express initial term for longer than 29 consecutive days." Act of June 17, 1995, 74th Leg., R.S., ch. 1000, § 16, 1995 Tex. Gen. Laws 5009, 5014 (codified at Tex. Tax Code § 151.317(c)). The parties agree that the primary effect of this change was to except hotels from the

residential-use exemption. GEO's argument that a business owner can qualify for the exemption by authorizing someone else's use of gas and electricity would negate this effect, potentially allowing hotels to claim the exemption under (c)(1) and thereby turning (c)(2) into surplusage. Such an interpretation would be inconsistent with our "duty of statutory interpretation to 'give effect to all the words of a statute and not treat any statutory language as surplusage if possible.'" *Kallinen v. City of Hous.*, 462 S.W.3d 25, 28 (Tex. 2015) (quoting *Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316 (Tex. 1987)).

Lastly, GEO points to the Comptroller's Rule 3.295, which expressly lists nursing homes as structures that may claim the residential-use exemption. *See* 34 Tex. Admin. Code § 3.295. GEO asserts that by extension, detention facilities should also qualify for the exemption because they are in some ways similar to nursing homes. First, we note that nursing homes do not automatically qualify but are subject to the same statutory elements for the exemption as are other structures.[3] *Id.* (defining Residential use to include: "Use in a family dwelling or . . . nursing home . . . when the use is by the owner of the dwelling . . ."); *see* Tex. Tax Code § 151.317(c). Furthermore, the Rule only mentions nursing homes, and its plain language does not indicate that entities similar to nursing homes also qualify. Thus, this argument does not remedy GEO's inability to meet the statutory requirements of Section 151.317(c).

For the reasons above, we conclude that GEO did not meet its burden to clearly show that the use of gas and electricity at the subject detention facilities was in a structure occupied as a

[3] The Comptroller argues that, in practice, when a nursing home was deemed eligible under the rule in effect at the time, it was under (c)(2), which concerns residential use by a tenant. Because application of the exemption to a nursing home is not before us, we need not examine this argument.

home or residence and by the owner. Therefore, GEO did not establish that it was entitled to the residential-use exemption from sales and use tax. On this basis, the Comptroller was entitled to judgment as a matter of law, and the trial court did not err in granting the Comptroller's motion for summary judgment and denying GEO's. We overrule GEO's single issue.

CONCLUSION

Having overruled GEO's issue presented on appeal, we affirm the judgment of the trial court.

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Cindy Olson Bourland, Justice

Before Chief Justice Rose, Justices Pemberton and Bourland

Affirmed

Filed: August 10, 2017