

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
)  
Ingenieria y Constructora Washington, S.A. ) ASBCA No. 54561  
)  
Under Contract No. 527-LE-93-61 )

APPEARANCES FOR THE APPELLANT: Richard J. Webber, Esq.  
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Washington, DC

OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD  
ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Appellant, Ingenieria y Constructora Washington, S.A. (Constructora), lessor of office space in Lima, Peru, filed a motion for summary judgment with respect to liability (mot.). Respondent, United States Agency for International Development (AID or government), opposed Constructora's motion and filed a cross-motion for summary judgment (cross-mot.). Constructora replied to the government's opposition and opposed the government's cross-motion (app. reply). Finally, the government submitted a response to Constructora's reply (gov't reply). The government agrees with appellant that there is no dispute over the material facts of the case, but merely disagreement over the legal effect of the lease agreement and did not take issue with appellant's statement of undisputed facts (cross-mot. at 1).

STATEMENT OF FACTS FOR PURPOSE OF THE MOTIONS

1. In early 1992, AID entered into negotiations with Constructora to lease office space in Lima, Peru (R4, tab 40). During the course of negotiations, the applicability of the Peruvian sales tax, Impuesto General a Las Ventas (IGV or General Sales Tax) to the lease was discussed. AID contended at that time, in a letter to Constructora dated 3 February 1992, that pursuant to the "Regulations for Diplomatic Immunity and Privileges, D.S. 007-82-RE, Title IV, Article 31, clause a and under the Strictest

Reciprocity, Title 1, Article 5, as in the Vienna Convention, it [was] exempt from all existing and future tax obligations and, consequently, the General Sales Tax” (R4, tab 3).

2. On 8 June 1992, Constructora wrote AID with respect to the General Sales Tax. Constructora noted that under Peruvian law, individuals who provide lease services are subject to the General Sales Tax and lessees must accept transfer of the tax. Further, Constructora stated:

In your previous letter dated February 3, 1992, you once again ratified and confirmed that you are exempt from the referenced tax pursuant to the Vienna Convention; and on a previous occasion, you also noted D.S. 007-82-RE, Title IV, Article 31, Clause A, Title 1, Article 5 as the reason why you will not accept transfer of the total IGV assessed.

In the event that the Peruvian authorities do not share your opinion and demand payment for the taxes, you will have to provide the necessary funds to meet this obligation; as private individuals, we are not responsible for the different interpretations of states.

(R4, tab 4)

3. The parties had one or more discussions over the months and Constructora requested certain modifications to the lease agreement which still was not executed. On 12 February 1993, Lawrence Foley, Executive Officer of AID wrote to Constructora and advised that AID was “able to make almost all the changes that [Constructora] requested.” With respect to taxes, AID said in that letter:

We will state that TENANT taxes are our responsibility to have exonerated or to pay.

A draft lease was said to be enclosed which purportedly included the modifications AID agreed to, including the language quoted above. (R4, tab 5) However, the draft agreement is not in this record. Mr. Foley was assassinated in Amman, Jordan on 28 October 2002 (R4, tab 2).

4. On 29 March 1993, Constructora as landlord and AID as lessee entered into Lease Agreement No. 527-LE-93-61 (the lease) for “98,442 sq. ft. of gross office space plus approximately 31,415 sq. ft. of gross basement/parking area in the entire nine story building and grounds located at Larrabure & Unanue N° 110, Lima Peru” (R4, tab 1 at 1). The lease was for a period of four years and nine months from 1 April 1993 through

31 December 1997 at an annual rental rate of \$1,100,000. Clause 5 of the lease provided as follows:

The LANDLORD accepts full and sole responsibility for the payment of all taxes and for any other charge of a public nature which is or may be assessed against the property covered by the Lease except those that might specifically be assessed to the TENANT by law, such as IGV (IGV means Impuesto General a las Ventas).

(R4, tab 1 at 2)

5. The lease defined the term “TENANT” to mean the “Agency for International Development (an Agency of the U. S. Government)” (*id.* at 1).

6. The IGV is a general sales tax administered by the Peruvian tax authority, Superintendencia Nacional de Administracion Tributaria<sup>1</sup> (the “SUNAT”). Under Peruvian law at that time and currently, the IGV was applicable to the rental payments under a lease. The landlord was required to collect the IGV from the tenant and make payment to the SUNAT, and a tenant was required to accept the transfer of the IGV tax assessed on the rental amounts – that is, to pay the landlord, in addition to the rental amount, the appropriate IGV amount on that rental. (R4, tab 40, ¶ 3, tab 41, ¶ 4) Thus the tenant bears the burden of the assessment; the landlord’s obligation is to collect that assessment from the tenant and pay it to the SUNAT (R4, tab 41, ¶ 5).

7. Shortly after execution of the lease, AID occupied the building and remained until June 1998 (cross-mot. ¶ 6, app. reply at 4).

8. While the lease provided for annual payments, under Peruvian law Constructora was required to prepare a monthly invoice (known as a “Factura”). Constructora prepared each month’s factura showing the rental amount on a monthly basis and added a note at the bottom that AID was exempt from the IGV tax. In the early months of the lease, Constructora submitted the facturas to AID but was told it had no need for monthly invoices. (R4 Supp, tab 40) Peruvian law also required Constructora to submit monthly tax returns (Declaracion Pago de Tributos) to SUNAT. Said tax returns were filed on a monthly basis with SUNAT reflecting the amount of the invoice as income exempt from IGV tax (*id.*).

9. On 10 November 1997 the SUNAT initiated collection of the IGV in connection with the lease payments previously made (R4, tab 21; R4 Supp, tabs 25, 41).

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<sup>1</sup> Superintendent of the National Tax Administration.

Constructora responded through counsel on 21 November 1997 stating that AID as a part of the United States embassy was exempt from the IGV tax. Nevertheless, on 12 December 1997, SUNAT issued a demand for the payment of the IGV tax plus interest and penalties for the entire period of the lease. (R4 Supp, tabs 25, 40-41).

10. In a meeting between AID and Constructora and then by letter dated 27 January 1998, from Constructora to AID, appellant requested that AID comply with its obligations under the lease and take responsibility for the IGV tax. The letter stated:

[W]e ... request that you comply with the obligations you assumed under the agreement and that you provide us the necessary funds to pay said debt or that you obtain a declaration from the Supreme Government stating that this tax does not apply and that SUNAT should abandon the collection initiated against our company.

(R4, tab 28)

11. Jay L. Knott, Regional Legal Advisor to AID Peru responded to the 27 January 1998 letter on 6 February 1998 in part as follows:

Third, we arrive at the lease contract signed between Constructora Washington and USAID/Peru on 29 March 1993. In your letter, you refer to clause no. 5 of that contract. Clause no. 5 states essentially that Constructora Washington accepted "full and sole responsibility" for all taxes except those which might be transferred to USAID/Peru, such as IGV.

The clause does not state specifically that USAID/Peru accepted any responsibility for IGV, only that IGV was a type of tax for which Constructora Washington would not accept "full and sole responsibility". It appears to me that SUNAT and Peruvian law have already determined which entity is responsible for the payment of IGV in this instance.

I am aware of the provision in Peruvian law which requires the users of leasing services (lessees) to accept the transfer of IGV from the service provider (lessor). I also understand that Peruvian law and the normal conduct of commercial transactions in Peru require that IGV be included by the service provider in the total price paid for the service as

documented by a valid invoice. Certainly neither clause no. 5, nor any other provision of the lease contract signed in 1993 provide for a payment process separate from that under which Constructora Washington duly received full payment of the price agreed upon for the use of the building.

(R4, tab 9)

12. Thereafter, AID and Constructora exchanged several more letters in which AID denied responsibility for payment of the IGV and Constructora reiterated that AID was obligated to pay for the IGV (R4, tab 40, ¶ 10).

13. Earlier, Constructora and AID had negotiated concerning a possible extension of the lease. On 17 November 1997, AID sent Constructora a letter with proposed terms for such an extension. AID stated in the letter that the AID final offer for the annual rent included an “allocation for the IGV taxes (in the event USAID is not exempted by the Peruvian Government).” (R4, tab 6)

14. While the initial term of the lease expired at the end of December 1997 (R4, tab 1, ¶ 7(b)), AID remained as a tenant beyond the initial term. On 21 May 1998, AID sent a letter to Constructora providing notice of its intent to vacate the premises on 30 June 1998. In that letter AID confirmed a prior discussion with Constructora wherein AID agreed to pay Constructora \$413,000 for the six month period 1 January 1998 to 30 June 1998 which amount included an allocation for IGV tax. (R4, tab 31)

15. On 15 November 2000, Constructora notified AID that the Peruvian government had issued a special payment plan for taxes, which gave taxpayers with outstanding tax debts the opportunity to restructure the debt very favorably. AID did not respond to Constructora’s 15 November 2000 letter. Constructora participated in the special tax payment plan which essentially waived all fines and interest on the fine that had been initially assessed. On 26 January 2001, Constructora reached agreement with the SUNAT to pay a much-reduced amount of approximately \$800,000 plus interest over 120 monthly installments. (R4, tab 40, ¶ 13)

16. Constructora made its first payment of the IGV tax in January 2001 and has continued to make monthly payments since that time and has continued to demand that AID honor its commitment to pay the IGV taxes (R4, tab 40, ¶¶ 14, 15).

17. By letter of 13 January 2003, counsel for Constructora sought the assistance of the United States Department of State (State) in obtaining payment by AID of the IGV (R4, tab 17). State forwarded the letter to AID for response. AID responded by rejecting responsibility for the IGV and stating:

The plain language of this clause states that the Landlord (Constructora) is solely responsible for all taxes assessed against property covered by the Lease except for those that are specifically assessed to the tenant (USAID) by (Peruvian) law. IGV taxes are mentioned as an example of a type of tax for which Constructora would not accept “full and sole responsibility” if such a tax were specifically assessed to USAID by law. The clause does not state that USAID would accept responsibility for IGV taxes that were not assessed to it by law.

(R4, tab 18)

18. Constructora submitted a request for a final decision of the contracting officer on 12 December 2003 (R4, tab 19). No final decision was issued and, on 14 April 2004, Constructora filed a notice of appeal from the deemed denial of its claim. The appeal was docketed on 14 April 2004 as ASBCA No. 54561.

19. Appellant submitted a declaration from Humberto Medrano, a Peruvian attorney,<sup>2</sup> as follows:

1. I am a licensed attorney in the country of Peru. I practice law as a senior partner with the Firm of Rodrigo, Elias & Medrano in Lima, Peru, and I have been associated with that Firm since 1966.

2. I received my law degree from the Pontificia Universidad Catolica del Peru in 1965. My legal practice includes advising clients on tax and corporate laws and transactions consistent with those laws.

3. I am familiar with Peru’s sales tax law, the Impuesto General alas Ventas (“IGV”). This tax is administered by the Peruvian tax authority, Superintendencia Nacional de Administracion Tributaria (“SUNAT”).

4. The IGV statute is found at Decreto Ley N° 25748, Decreto Legislativo N° 775 and Decreto Legislativo N° 821. Under the IGV regime, sellers of goods or services are

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<sup>2</sup> Several findings in this opinion are based on this declaration.

required to collect the IGV tax from buyers and to pay the tax amount to the SUNAT. According to the referred regime, the buyers of the goods or services, including specifically tenants leasing office space, are required to accept the transfer of the tax – that is, to pay to the landlord, in addition to the rental amount, the appropriate IGV amount on that rental.

5. I am familiar also with the “Agreement Between Constructora Washington S.A. and Agency for International Development,” Lease No. 527-LE-93-61, executed on March 29, 1993. Paragraph 5 of that Lease contains the phrase: “ ... except those [taxes] that might specifically be assessed to the TENANT by law, such as IGV (IGV means Impuesto General a las Ventas).” I know of no legal basis that the IGV tax cannot be considered as “assessed to the TENANT by law.” A tenant bears the burden of the assessment; the landlord’s obligation is to collect that assessment and pay it to the SUNAT.

6. I would also point out that in Peru, in accordance with Article 1362 of the Civil Code, contracts “are interpreted according to the rules of good faith and common intent of the parties.”

7. I am aware of a contention by USAID that Constructora “never billed USAID according to the requirements of Peruvian law.” That is an untrue allegation. I have seen the Factura and the Declaration Pago De Tributos prepared monthly by Constructora for this Lease. They are fully in accord with Peruvian law. Constructora emitted monthly invoices (Facturas) according to the law. USAID did not take receipt of the invoices and did not request them, advising Constructora that they had no need for the Facturas.

8. Finally, I note that in response to the SUNAT’s demand on November 10, 1997, for payment of the IGV, I wrote a letter dated November 21, 1997 to the SUNAT arguing USAID’s position that it was exempt from IGV taxes for the lease. The SUNAT rejected that position, finding no exemption for USAID from payment of the IGV tax on the Lease based on diplomatic immunities or privileges.

(R4, tab 41)

20. On 28 October 2004, the United States Government sent a formal diplomatic note to the Peruvian Ministry of Foreign Affairs which brought the substance of Constructora's claim to the attention of the Ministry and requested assistance in obtaining reimbursement for IGV (cross-mot. and app. reply, ¶¶ 12; Note attached to cross motion; Decl. of Joakim Parker, ¶ 3 (attached to cross motion)). This diplomatic note states:

The claim seeks reimbursement of Impuesto General a las Ventas (IGV) collected by the Superintendencia Nacional de Administracion Tributaria (SUNAT) against the lease for USAID's former office space. Under international law and the terms of the bilateral agreement on United States assistance, the lease for USAID's operations was exempt from IGV. USAID/Peru provided written confirmation of this fact at the time it executed the lease. However, the lessor, Ingenieria y Constructora Washington, S.A., claims that SUNAT has collected the equivalent of at least \$322,000 and expects further payment of as much as \$500,000.

The Embassy has two significant concerns regarding this matter. First, if the lessor's claim is successful, the United States Government would be exposed to a potentially large judgment for recovery of tax payments that should never have been collected. Second, this situation may complicate the United States Government's relations with its current vendors, who rely on its diplomatic status and privileges in their dealings with it.

The Embassy respectfully notes that the complications of court proceedings on the lessor's claim can be avoided if the SUNAT reimburses any amounts paid by the lessor and withdraws any claim for any outstanding IGV on the USAID lease. The Embassy, through USAID officials, is available to coordinate with SUNAT towards this end, and looks forward to speedy resolution of the matter.

(App. reply at 6)

21. The Ministry replied in Diplomatic Note No. 6-3/13 which represented the official response of the Government of Peru to AID's inquiry regarding the dispute with Constructora over the IGV. In pertinent part the Note stated:

[W]e wish [to] point out the following: Article 23(1) of the Vienna Convention on Diplomatic Relations indicates that the sending State and the head of the mission shall be exempt from all national, regional, or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered. Article 23(2), however, adds that the tax exemption to which Article 23(1) refers **shall not apply to dues or taxes** which, under the law of the receiving State, **are payable by persons contracting with the sending State** or with the head of the mission.

Article 35(b) of the Peruvian Regulations on [Diplomatic] Privileges and Immunities, approved by Supreme Decree No. 0007-82-RE, establishes that the diplomatic exemptions to which Article 31 of said Regulations refers **shall not be applicable** when the taxes in question are of the type that under Peruvian law **are payable by legal or natural persons contracting with the sending State**, with a head of mission, or with a duly accredited diplomatic agent. Accordingly, the tax-related privileges granted under the Vienna Convention on Diplomatic Relations, as well as under the Regulations on Diplomatic Privileges and Immunities, **do not extend to those taxes payable by the person or entity having the status of taxpayer [contribuyente] with respect to the tax**, which is indeed the status held by **Ingenieria y Constructora Washington S.A.** in this case. It should be noted that in accordance with the Consolidated Amended Version of the Law on the General Sales Tax (IGV) and Selective Consumer Tax, approved by Supreme Decree No. 055-099-EF, taxpayer status with respect to the IGV is held by the lessor of the property and not the lessee. That fact that the lessee, in this case the United States Government, is the party bearing the monetary burden of the IGV **does not give it taxpayer status.**

. . . . As has already been indicated in earlier paragraphs, the law provides that IGV taxpayer liability with respect to real-property leasing is incurred by the lessor and not the lessee.

Furthermore, I must point out that the tax benefits granted to USAID may not be claimed by or on behalf of that agency except when USAID holds taxpayer status [*contribuyente*] and that such benefits are not transferable to a third party, since, as the Embassy knows, tax exemptions and benefits are always expressly established and specific to the person or entity granted them.

(Cross-mot., attach., as translated by the Department of State)

### DISCUSSION

Summary judgment is appropriate where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387 (Fed. Cir. 1987). A material fact is one which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Where both parties move for summary judgment, we must evaluate each party's motion on its own merits. *McKay v. United States*, 199 F.3d 1376, 1380 (Fed. Cir. 1999).

In this case, each party asks that we grant summary judgment in accordance with their respective interpretations of a contract provision. Contract interpretation is a question of law that may be resolved by summary judgment. *P.J. Maffei Building Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984)<sup>3</sup>

In *Rio Construction Corp.*, ASBCA No. 54273, 04-1 BCA ¶ 32,534 at 160,911, we stated:

We are to read the contract as a whole and give reasonable meaning to all of its provisions. *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972 (Ct. Cl. 1965). A contract term is unambiguous if there is only one reasonable interpretation. *C. Sanchez and Son, Inc. v. United States*, 6 F.3d 1539, 1544 (Fed. Cir. 1993). Conversely, a contract is ambiguous if it is susceptible to two different, yet reasonable interpretations, each of which is consistent with the contract terms and conditions. *See Lockheed Martin IR Imaging Systems, Inc. v. West*, 108 F.3d 319, 322 (Fed. Cir. 1997).

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<sup>3</sup>Appellant asserts and the government does not dispute that Peruvian principles of contract interpretation are not substantively different than those under federal law (app. supp. mot. at 4, gov't letter dated 31 Jan. 2006 at 3).

In *Greco v. Department of the Army*, 852 F.2d 558, 560 (Fed. Cir. 1988), the Court stated:

In construing a contract, we look first to the terms of the agreement itself. Our task is to determine the intent of the parties at the time they contracted, as evidenced by the contract itself. Only if there is ambiguity should parol evidence be considered.

The dispute concerns clause 5 of the lease which is repeated below:

The LANDLORD accepts full and sole responsibility for the payment of all taxes and for any other charge of a public nature which is or may be assessed against the property covered by the Lease **except those that might specifically be assessed to the TENANT by law, such as IGV (IGV means Impuesto General a las Ventas)**. [Emphasis added]

Appellant argues that the plain language of clause 5 unambiguously exempts Constructora from paying IGV and that:

The IGV is expressly identified as a tax assessed to the tenant. Thus, by its plain terms, the Lease identifies IGV as a tax for which the tenant (USAID) will be responsible.

(Mot. at 10)

The government, on the other hand, contends that:

The plain meaning of the negotiated terms is that Constructora would pay for all taxes not specifically assessed to the tenant by law. IGV is a landlord tax not assessed to tenants, as confirmed in a diplomatic note expressing the official position of the Peruvian government. The negotiated terms of the contract reflected some uncertainty on the part of the parties as to how to classify IGV, describing IGV as a tax which “might” be specifically assessed to tenant, providing alternative obligations depending upon the classification. Now the Peruvian government has resolved all uncertainty; IGV is not a tenant tax and therefore falls under the first clause of paragraph five. Constructora must accept “full and sole responsibility for [] payment” of the IGV.

(Cross-mot. at 4-5)

In our view, appellant's is the only reasonable interpretation. The government's interpretation fails to give meaning to the final phrase "such as IGV" in clause 5 of the lease. Furthermore, when we examine the intent of the parties as evidenced by their pre-contract discussions, we observe that the point of those discussions concerned whether AID was exempt from the tax as a matter of diplomatic immunity under the Vienna Convention as determined by the Peruvian Government, not whether the tax was a tenant or a landlord tax. As a practical matter, under Peruvian law, the tenant would always bear the burden of the tax no matter who the taxing authority considers to be the taxpayer.

The question of diplomatic immunity was resolved both when the taxing authority billed for the taxes and when the Government of Peru decided this issue in Diplomatic Note No. 6-3/13 where it stated that the immunity did not apply because AID did not have the status of "taxpayer" since the taxpayer was Constructora. AID admits, in its diplomatic note to the Government of Peru dated 28 October 2004, that the pre-contract issue concerned whether or not AID was diplomatically immune from the IGV when it makes clear that the parties excluded IGV from the lease amounts because of the belief that diplomatic immunity applied. Constructora, however, was always skeptical that the immunity would be honored by its government. The language of clause 5 was designed to provide for the eventuality that IGV might not be subject to diplomatic immunity. It was not.

### CONCLUSION

Appellant's motion for summary judgment as to liability is granted. Respondent's cross motion is denied. The appeal is sustained. The matter is remanded to the parties to resolve quantum.

Dated: 10 August 2006

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RICHARD SHACKLEFORD  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

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EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 54561, Ingenieria y Constructora Washington, S.A., rendered in conformance with the Board's Charter.

Dated:

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CATHERINE A. STANTON  
Recorder, Armed Services  
Board of Contract Appeals