



(916) 324-6594

June 5, 1985

Attention:

Dear Mr.

This is in reply to your letter to Mr. James Delaney of April 19, 1985 in which you ask that we review a contract between the County of San Bernardino ("County") and R. E. Wolfe Enterprises of California Inc. ("Contractor") for the purpose of determining whether a taxable possessory interest has been created.

In general, the Contract requires Contractor, at its own cost and expense, to provide all the work and furnish all the materials (with specified exceptions), equipment and incidentals necessary to perform the landfill operations at five specifically described landfills in the county in a good, workmanlike and substantial manner to the satisfaction of County.

As you know, a "possessory interest" is "an interest in real property which exists as a result of possession, exclusive use, or a right to possession or exclusive use of land and/or improvements unaccompanied by the ownership of a fee simple or life estate in the property." (Property Tax Rule 21(a).) A "taxable possessory interest" is "a possessory interest in nontaxable publicly owned real property...." (Property Tax Rule 21(b).)

The rationale justifying taxation of possessory interests is that:

"These possessions,...are recognized as a species of property subsisting in the hands of the citizen. It is not the land itself, nor the title to the land... It is not the preemption right, but is

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the possession and valuable use of the land subsisting in the citizen. Why should it not contribute its proper share, according to the value of the interest,...of the taxes necessary to sustain the Government which recognizes and protects it?" (People v. Shearer 30 Cal. 645 (1866).)

In determining the existence of a taxable possessory interest, the situation must be measured by an objective standard rather than by accepting the literal language of the written instrument as controlling the nature of the relationship established. Because of the variety of interests that may be created by agreements, the question of whether a taxable possessory interest has been created must be decided on a case-by-case basis by weighing the factors of durability, exclusiveness, private benefit and independence. In each case, judgment is to be made by an examination of the agreement in its entirety. (Stadium Concessions, Inc. v. City of Los Angeles (1976) 60 Cal.App.3d 215; Wells National Services Corp. v. County of Santa Clara (1976) 54 Cal.App.3d 579; Mattson v. County of Contra Costa, 258 Cal.App.2d 205.) See also Property Tax Rule 21(a)(1). In order to determine whether a taxable possessory interest has been created in this case, it is necessary to analyze the Contract in light of the standard set forth above.

#### Independence and Private Benefit

"Although a possessory interest may be a leasehold or such lesser interest as an easement, there must be a right that is sufficiently exclusive, durable and independent of the public owner to constitute more than an agency...." (Pacific Grove-Asilomar Operating Corp. v. County of Monterey (1974) 43 Cal.App.3d 675, 684, quoting Ehrman and Flavin, Taxing California Property (1974 Supp.) section 50, pages 60-61.)

"In determining whether an agency relationship exists between parties to a business enterprise, which is the subject of an agreement between them, the right to control is an important factor. (Citations omitted.) If, in practical effect, one

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of the parties has the right to exercise complete control over the operation by the other, an agency relationship exists;...." (Nichols v. Arthur Murray, Inc. (1967) 248 Cal.App.2d 610, 613.)

Here the Contract provides that for all purposes arising out of the Contract, the Contractor is an independent contractor and not an employee of County. As indicated above, however, the literal language of the written instrument is not controlling. It is, therefore, necessary to examine the agreement in its entirety to determine whether an agency relationship in fact exists.

There is no question here that the Contract gives County a considerable amount of control. For example, County reserves the right to prepare plans and make alterations or deviations from the plans and specifications as County deems advisable for proper execution of the work by Contractor (Section A.7. of Special Provisions); County may establish reasonable regulations governing access to the landfill sites, the use thereof and operations by Contractor, collectors and public within the sites (Section A.8.a. of Special Provisions); County may order minor changes, deletions or additions in the work performed by Contractor (Section A.12. of Special Provisions); County may audit and inspect Contractor's records relating to its landfill activities (Section A.22. of Special Provisions); County will secure and maintain all required permits (Section A.23. of Special Provisions); Contractor may not change any conditions of operation without prior written approval of County (Section A.24. of Special Provisions); County sets the hours of operation for landfills, reserves the right to open and close the landfill gates and establishes and collects landfill tipping fees (Section B.1. of Special Provisions); County can request removal of any employee of the Contractor for cause (Section B.2. of Special Provisions); County is to prepare and provide all engineering for the landfill sites (Section B.3. of Special Provisions); Contractor must make the site accessible at all times to County, state and federal Officials for any purpose including inspection, official tours, administration of salvage or resource recovery contracts or any other activity County deems appropriate (Section B.4. of Special Provisions); County controls the placement, compaction, and cover of refuse by Contractor through detailed contract specifications (Sections B.10.-14. of Special Provisions); Contractor must maintain liability insurance and other insurance in accordance with the Contract (Section A.18. of Special

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Provisions); County retains the right to salvage operations, landfill gas recovery operations, and the right to use any inactive portions of the landfills for any purpose (Sections B.18., 19., D.8. of Special Provisions); County reserves the right to approve the location and design of service roads selected by Contractor and shall have the right to free use of Contractor's haul and service roads (Section C.1. of Special Provisions); County, through Contract provisions, requires Contractor to control dust; keep the sites free of litter and in a clean and sanitary condition; control insects and rodents; control erosion; maintain safe and clean access to tipping areas; maintain an even surface on completed landfill areas; provide and maintain signs displaying rules applicable to landfill sites (Sections C.2.-9. of Special Provisions); County has the right to terminate the Contract for the convenience of the County on 90 days notice (Section A.30. of Special Provisions). There are additional controls not listed here.

In effect, virtually every aspect of the landfill operation is controlled by County through Contract provisions.

On the other hand, the Contract provides that the Contractor is to have maximum flexibility in performing the landfill operations within the limits established by the Contract. (Section A.1. of Special Provisions.) Also the Contractor must indemnify and hold County harmless from various claims pursuant to Section A.16. of Special Provisions which is indicative of independent operation. Mattson, supra, at page 211.

Considering the Contract in its entirety, the controls in this case are comparable to those in Pacific Grove-Asilomar Operating Corp., supra. The management agreement in that case listed 25 specific state controls which led the court to conclude that an agency relationship existed. Many of the controls mentioned in Pacific Grove are present here. In addition there are controls here that were not present in Pacific Grove. On balance, it is our opinion that the operation of the Contractor is not sufficiently autonomous to satisfy the requirement of independence.

Moreover, viewed as whole, the Contract is similar in nature to a construction contract in that there is a contemplated period of time to complete the disposal operation (about five years) at which time County expects the land to be suitable for development for park and

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recreation uses or other open space uses. (Section A.1. of Special Provisions.) In this regard, the Contractor's right to the use of the property is not unlike that of the taxpayer in Douglas Aircraft Company v. Byram (1943) 57 Cal.App.2d 311. In that case, the taxpayer contracted with the War Department for the manufacture, sale and delivery of airplanes. As progress payments were made, title to property upon which partial payment was made vested in the government. At that time (1943), the taxability of a possessory interest in personal property was an open question. The court held that the taxpayer's right of possession to the government's property was not itself property because it was not a usufructuary right which the court defined as "the right of using and enjoying the profits of a thing belonging to another without impairing the substance." The court further stated at page 317:

"The use which the plaintiff was permitted to make of the partial planes and parts was entirely for the benefit of their owner, the federal government and not for the benefit of the plaintiff. The fact that the plaintiff was to be paid for fabricating a plane out of the government's material does not change its use of the material from a use of the government to a use for the plaintiff. Plaintiff's compensation becomes due because it makes use of the materials and partially completed planes, not for itself, but for the government."

We believe the rationale of the Douglas case is applicable here. Contractor is essentially "building" sanitary landfills in County real property out of materials which are or become the property of County. The Contractor has no other use of the property except that which is necessary to perform the work required under the Contract. It has no right to salvage or methane gas recovery, archaeological discoveries, or any other use of the land. Although the Contractor is paid by County \$3.40 per ton of refuse dumped at four of the sites and \$87,333.00 per year on the remaining site (all subject to adjustment), the Contractor's use of County land was not for its benefit but for the benefit of the County as was the case in Douglas. Thus, since it is County, rather than Contractor which is benefitted by the Contractor's use of the property, the element of

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private benefit is missing here. See United States of America v. County of Fresno (1975) 50 Cal.App.3d 633, 638. Accordingly, without considering whether Contractor's rights under the Contract are sufficiently durable or exclusive, we conclude that since Contractor's right to use County land is not sufficiently independent of County control and is for the benefit of County rather than Contractor, no possessory interest was created by the Contract.

Very truly yours,

Eric F. Eisenlauer  
Tax Counsel

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