

Memorandum

To: Mr. Gene Palmer, MIC: 62
Principal Property Appraiser

DATE: January 31, 2001

From: Robert W. Lambert
Senior Tax Counsel

Subject: *Taxable Possessory Interests for Physicians within Tax-Exempt Hospitals in County*

This is in response to your memorandum dated September 19, 2000 in which you request our opinion regarding the existence of taxable possessory interests for physicians' offices in certain tax-exempt hospitals in County. As stated in your memo:

Various tax-exempt hospitals within County have contracted with individual doctors or groups of doctors for the right to practice their fields of medicine within the different hospitals. The county assessor enrolled a value as if the uses were taxable possessory interests. The County Counsel issued an opinion that the contracts do not constitute a taxable possessory interest because the agreements do not meet the tests of durability or exclusivity. Therefore, the assessor canceled the assessments.

Your request to the legal staff is that we review the documents and render an opinion as to the "taxability of the contracted possession of hospital property within County."

For the reasons explained below, we agree with the opinion expressed in your memo that the possessory rights granted to the staff physicians pursuant to the independent contractor agreement are both durable and exclusive – at least as to the provided medical office space. Nevertheless, the county counsel's ultimate conclusion that there is no taxable possessory interest in the hospital is correct because the agreement makes the physician the hospital's agent within the meaning of section 107 and Rule 20. If the possessor is the agent of the governmental owner, the possession lacks the necessary quality of independence. Accordingly, County's decision to cancel the taxable possessory interest assessments against the staff physicians was appropriate.¹

¹ Of course, the existence of an agency relationship is a question of fact, and the legal staff's opinion on factual issues certainly is not conclusive. These types of factual questions typically are thought to come within the discretion of the county assessor.

Background Information

Attached to your memo was a copy of an "Independent Contractor Agreement" between the District Hospital and a physician (the agreement.) The relevant terms of this agreement are summarized below:

1. Purpose. To "facilitate the recruitment of Physician to the practice of medicine in the Quincy, California area."
2. Term. Twenty-four months, subject to termination with or without cause upon 90 days written notice by either party.
3. Compensation. "Physician will be entitled to all receipts from patients for the provision of his professional services, less the Hospital's costs of staff, equipment and supplies for Physician's practice. However, in no event shall Physician's compensation be less than the annual gross amount of One Hundred Ten Thousand Dollars (\$110,000.00). Accordingly, Hospital will provide to Physician the sum of Nine Thousand One Hundred and Sixty-six Dollars (\$9166.00) per month." At the end of each twelve-month period, the hospital's auditor will determine the physician's net of revenues over expenses and pay such balance to the physician. The totaled expenses, however, will not include any charges for rent or utilities relating to the "Physician's use of space in Hospital's Medical Office Building."
4. Recruitment bonus. \$10,000.
5. Relocation bonus. \$5,000.
6. Medical insurance. "Hospital will provide health insurance coverage for Physician and his immediate family in the same program, and at the same rate paid for Hospital employees."
7. Family health care expenses. \$5,000 in unreimbursed medical expenses.
8. Medical office space. "Hospital agrees to provide to Physician office space in its new medical office building, along with necessary staff, equipment, and supplies such that Physician may practice family medicine in a conventional and reasonable manner. In addition, Hospital will provide to Physician billing services for the billing of patients treated by Physician. During the term of this Agreement, Physician will be allowed to use said medical office space without charge or rent. In addition, Hospital will assume responsibility for, and will pay, all gas, electric and telephone or telecommunication expenses associated with Physician's use of said medical office building during the term of this Agreement." [¶] Hospital further agrees to, following conclusion of this Agreement, rent medical office space to Physician at a rate equal to that being paid at the time by other physicians renting space in the medical office building."
9. Staff employees. The physician is entitled to assist in the hiring and firing of those hospital employees who will be working on the physician's medical office staff.
10. Physician's work schedule. The physician is obligated to treat and see patients in his designated medical office not less than three days per week.

In addition, the physician must share on-call duty equally with other family physicians providing care at the hospital. If the physician's average number of patients per 3-day week is less than 35, then the physician must either (1) see additional patients at the Pumas Clinic, (2) work in the emergency room (ER), or (3) work an extra day at his medical office practice in the hospital – without compensation.

11. Emergency room coverage. The physician agrees to work an average of not less than one 24-hour shift in the hospital's emergency room each week without additional compensation.
12. Procedures. Elective procedures and such procedures as sonography and exercise treadmills are to be done during the ER shift provided that backup is available and that ER patients will not suffer any delay in treatment.
13. Time off. Six weeks per year.
14. Physician's professional conduct. The physician will treat the maximum number of patients that he can without compromising his ability to provide quality medical care.
15. Licensure. The physician must maintain his license to practice medicine in the State of California.
16. Residence proximity. The physician must reside within 20 minutes of the hospital.
17. Independent contractor relationship. The relationship between the hospital and the physician is that of independent contractor, not employer-employee.
18. Professional liability insurance. The physician must maintain, at his sole expense, professional liability insurance with prescribed minimum coverage.

The Office of the County Counsel of County reviewed this agreement and concluded that no taxable possessory interest was thereby created in favor of the physician. The county counsel's reasoning was as follows: (1) "Under Section 4 B of the Agreement, either the Hospital or the Group of doctors may, without cause, terminate the agreement upon three months prior written notice. This essentially makes the contract a three-months contract, which does not meet the test of durability." (Letter dated March 21, 1997.); (2) "The doctors are not granted exclusive use of certain hospital space (*Ibid.*);" and (3) The physician's occupancy of hospital space is not independent because "... under the hospital contract, the doctors as occupiers of space are partially agents of the hospital, and are integrated into the staffing and operations of the hospital." (Letter dated April 8, 1997.)

The Board Property Tax staff also reviewed the agreement, but - contrary to the County Counsel's Office - concluded that the agreement did, in fact, create a taxable possessory interest in favor of the physician. It is unclear as to what specific portion of the hospital this taxable possessory interest was opined to envelope, but it appears that it was limited to the medical office space of which the physician presumably has exclusive occupation on his required three days of hospital patient care.

Law and Analysis

In general, a taxable possessory interest is an interest in real property that exists as a result of a possession or right to possession of publicly-owned real property that is “independent, durable, and exclusive of rights held by others in the real property, and that provides a private benefit to the possessor, except when coupled with ownership of a fee simple or life estate in the real property in the same person.” (Board Property Tax Rule 20(a); see also Rev. & Tax. Code §107.) In support of his conclusion that the agreement does not create a taxable possessory interest in the hospital, the County Counsel focused on the three fundamental requirements of section 107; namely, durability, exclusivity, and independence. The following discussion separately addresses each of these discrete requirements.

Durability

There is no legal authority that supports the county counsel’s conclusion that the 90-day revocation provision robs the physician’s possession of the medical office space of the required element of durability. In fact, there is no support in either the statute, regulation, or case law for a required minimum time period for a taxable possessory interest; only that there be a “determinable period.” Furthermore, numerous cases hold that the fact that a property right in publicly owned real property is either revocable or terminable at the will of the government does not go to “determining whether the interest is possessory, but merely to valuation.” (*Lucas v. County of Monterey* (1977) 65 Cal.App.3d 947, 956; *Board of Supervisors* (1971) 18 Cal.App.3d 717; *United States of America v. County of Fresno* (1975) 50 Cal.App.3d 633.)

Exclusivity

Turning to the county counsel’s conclusion that the physician’s rights in the hospital are lacking in exclusivity, the only space specifically noted in the agreement is the medical office space. While the agreement is not perfectly clear, it appears that the physician has exclusive occupancy rights as to this office space – at least during the three days per week that he is required to practice medicine there. If this is true, then the physician’s occupation of the space is exclusive within the meaning of Rule 20(c)(7) under either of the following rationales: (1) If the physician has exclusive use of the office space on each day of the week (whether or not he is present) during the entire term of the agreement, then the use is exclusive under Rule 20(c)(7)(A)(1); or (2) If the physician has exclusive use of the office space only during the three days per week of required medical practice from that location, then the use nonetheless is exclusive as a concurrent use by a person who has a primary or prevailing right to use the real property under Rule 20(c)(7)(A)(3).²

² This subdivision of the rule expressly includes the following analogous case: “when certain premises are used by a professional basketball team on certain days of each week while a professional hockey team uses the same premises on certain other days.”

The physician's right to occupy the hospital space is, in fact, exclusive even if the physician must share the office space with one or two other physicians. Under Rule 20 (c)(7)(A)(6), the concurrent use of real property by "persons engaged in qualitatively similar uses that do not diminish the quantity or quality of the real property" is deemed exclusive for taxable possessory interest purposes where the "number of concurrent use grants is restricted ... pursuant to the policies or management decisions of the public owner of the real property or other public agency." In this case, the publicly owned hospital presumably would not try to fit more than one or two doctors into a single office. Based upon this assumption, even a shared use of the specified medical office premises would be exclusive for purposes of section 107 and Rule 20.

But this reasoning only applies to the medical office space. There are no facts indicating any right to possession of any other part or portion of the hospital premises.

Independence

An issue remains, however, as to whether or not the physician's occupation of the medical office space is independent within the meaning of section 107 and Rule 20. Pursuant to Rule 20, an independent possession of real property is one that is "sufficiently autonomous to constitute more than a mere agency." (Rule 20(c)(7)(A)(5).) Consequently, the final question to be answered is whether or not the contracting physician can be said to be a "mere agent" of the hospital. If the answer is yes, then the physician cannot be said to have a taxable possessory interest in the medical office space.

In his letter dated April 8, 1997, the County Counsel states in passing that "Doctors cannot be employed under California law, so they can be no one's agent with respect to administering treatment." This is not accurate. In California, it is well established that a "nurse or physician may be the servant of a hospital, ... even though they are performing professional acts." (*Rice v. The California Lutheran Hospital* (1945) 27 Cal.2d 296, 304; see also *Brown v. La Societe Francaise* (1903f) 138 Cal. 475.) For this reason, the California courts have held that a "hospital may be held liable for the negligence of a physician who is the agent, servant, or employee of the hospital under the general rule that an employer or principal may be held liable for the tortious conduct of an agent, servant, or employee." (Annotation: Liability of Hospital or Sanitarium for Negligence of Physician or Surgeon, 51 A.L.R.4th 235 (2000) citing *Rice v. California Lutheran Hospital*, *supra*, *Brown v. La Societe Francaise*, *supra*, and numerous other California decisions.)

In this case, the physician signed an agreement with the hospital that provides that the physician is an independent contractor and not an employee. Such a contractual designation, of course, is not determinative of the employment, contractor, or agency status of the physician for property tax purposes. Furthermore, agent and independent contractor are not mutually exclusive legal categories. As stated in Witkin 2 Summary of California Law 9th Ed., "Agency and Employment," §13 (Bancroft-Whitney Co., 1987) at page 29, "one who contracts to act on behalf of another and subject to the other's control

except as to physical conduct, is both an agent and an independent contractor. (*Los Angeles v. Meyers Bros. Parking System* (1975) 54 Cal.App.3d 135, 138.)”

In the instant case, there are a number of factors that tend to indicate that the physician is the agent of the hospital, including the following:

1. The hospital supplies the workplace, equipment, and staff for the physician’s office.
2. Both the hospital and the physician are in the same business.
3. The hospital guarantees the physician a minimum monthly compensation amount.
4. The hospital does the billing and accounting for the physician.
5. The hospital pays the bills for the physician.
6. There is a recruitment bonus, relocation bonus, family health care expenses, and medical insurance benefits.
7. The physician does not pay rent on his medical office space.
8. While the hospital is the employer of the physician’s staff, the physician assists in the hiring and firing.
9. The hospital prescribes with exactitude the physician’s weekly work schedule, as well as the various locations where his medical services must be rendered.
10. The physician is on the hospital staff and must be on-call at prescribed times.
11. The physician must perform both emergency room and clinic work for the hospital.
12. The hospital dictates the physician’s vacation schedule.
13. The physician is required to treat the maximum number of patients consistent with the provision of quality care.
14. The hospital dictates where the physician can live vis-à-vis the hospital.

While the question of the existence of agency is a factual one, these are the types of factors that tend to indicate the presence of an agency relationship. (See Witkin, *supra* at §§ 12, 14, 24, 29 & 30.) Under the facts of *Seneris v. Haas* (1955) 45 Cal.2d 811, an anesthesiologist (i) was a member of the hospital staff, (ii) was on call, (iii) billed the patients, (iv) was provided by the hospital with all medications, white clothing, and nursing services, and (v) had no separate office outside the hospital. Under these circumstances, the court held that there were sufficient facts indicating the presence of an agency relationship for the question to go to a jury.

In *Quintal v. Laurel Grove Hospital* (1964) 62 Cal.2d 154, a doctor was a member of a group of anesthesiologists who were on a hospital’s staff. When the doctor performed a procedure at the hospital, the hospital furnished the staff, the rooms, the equipment, and the supplies, including the anesthetic. As in *Seneris v. Haas, supra*, the appellate court

found that these circumstances presented enough of a factual showing of agency that the question should be decided by a jury.

Based on the above facts and authorities, a physician operating under the agreement would most likely be found to be an agent of the hospital. Given this agency relationship, the physician's occupation of a medical office at the hospital under the agreement would not be sufficiently independent to qualify as a taxable possessory interest under section 107. This reasoning, however, would not apply in the more typical case of a physician renting office space in a medical office building that is owned by and located adjacent to a hospital complex. In this case, the medical office is being furnished to the physician (along with staff, medicines, equipment, and supplies) as part and parcel of his agency-related duties to the hospital.

Nevertheless, agency is a question of fact that typically comes within the discretion of the local assessor. Thus, as indicated above, the legal staff's opinion is not conclusive.

Conclusion

As indicated above, although we agree with the opinion expressed in your memo that the possessory rights granted to the staff physician in the agreement are both durable and exclusive, the county counsel's ultimate conclusion that there is no taxable possessory interest in the hospital is correct. Under the stated facts and authorities, the agreement makes the physician the hospital's agent within the meaning of section 107 and Rule 20. If the staff physician is the hospital's agent, the possession lacks the necessary independence to constitute a taxable possessory interest. Accordingly, County's decision to cancel the taxable possessory interest assessments against the staff physicians was appropriate.

If you have any additional questions, please call me at (916) 324-6593.

RWL: eb
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