



Memorandum

To : Mr. Glenn L. Rigby

Date : January 21, 1983

From : Peter Brautigam

Subject: Possessory Interest of Permit Allowing Houseboat Lease

Mrs. Loftus writes for our opinion whether the right to operate 70 houseboats on Shasta Lake is a taxable possessory interest. The grant is the result of a "term-special use permit" given the U.S. Forest Service. The holder of the permit, Bantry Bay Inc., argues the right to lease the houseboats is a mere license. It should be noted that the permits are worth \$20,000 - \$25,000; (the issue of value is not addressed in this memo.)

Conclusion: The State Board of Equalization disagrees with both of these interpretations. It is our conclusion that the right to lease houseboats is an incidental use of a possessory interest in federal lands granted to Bantry Bay, Inc. through the special use permit.

Analysis: The California Constitution, at Article XIII, §1 declares that all property is subject to taxation. The term "property" as used in the Constitution is comprehensive enough to include any usufructuary or possessory interest. 51 Cal.Jur. 3d Property Taxes, §9. The Revenue and Taxation Code, §107 allows for the taxation of such interests. Further, the United States Supreme Court held that a state may raise revenue on the basis of property owned by the United States as long as that property is being used by private citizens or a corporation and as long as it is in the possession of the one being taxed. U.S. v. County of Fresno, 50 Cal.App. 3d 633, 123 Cal.Rptr. 548, 429 U.S. 452. Therefore, it is clear the state can tax possessory interests.

The California Administrative Code Title 18 Section 21(a) defines "possessory interest" as

[A]n interest in real property which exists as a result of possession, exclusive use, or 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. (See attached).

In interpreting what constitutes a possessory interest, current case law states that a possessory interest in federally owned property is itself a species of taxable property. Kaiser v. Reed, 30 Cal. 2d 610. In interpreting this, Dressler v. County of Alpine, 64 Cal.App. 3d 557, 134 Cal.Rptr. 554, noted that private and governmental contracts and general permits create such a variety of interests that the boundaries of possessory interest definition cannot be precisely fixed; and therefore, the court concluded that such determination of possessory interests should be made on a case-by-case basis. The Dressler court followed the four factors followed in past cases: (1) independence; (2) durability; (3) benefit; (4) exclusiveness. Pacific Grove v. County of Monterey, 43 Cal.App. 3d 675, 117 Cal.Rptr. 874; Mattson v. County of Contra Costa, 258 Cal.App. 2d 205; Board of Supervisors v. Archer, 18 Cal.App. 3d 717. See also California Administrative Code Title 18 §21(a).

The requirement that Bantry Bay Inc., (hereafter cited as Bantry), the permit holders, be independent from the control of a governmental entity, is not an absolute requirement of independence. This concept was laid out in Mattson v. County of Contra Costa, supra, and in Pacific Grove v. Monterey, supra.

Both of these cases, analyzed the facts to determine whether there was sufficient independence. In Mattson, even though the concessionaire was required to open certain hours and the city could review his prices, the court held there was sufficient independence from the governing body. The court stated the city had a right to review the prices, but not fix the prices he was to charge.

In Pacific Grove, however, the court concluded that the governing entity exerted a significant amount of control to no "independence." The court specifically pointed to a list of 25 items of control, (page 688-9).

Given the factors relied upon in these two cases, and the paragraphs of the special use permit, it would be reasonable to conclude that Bantry is sufficiently independent from any governing body. Therefore, the requirement of independence, laid down in Archer, supra, and prior cases, is adequately met.

The second factor for the determination of a possessory interest is that it be "durable."

The special use permit grants Bantry the area described for a period of 22 years, subject to certain conditions set out in the permit. In reviewing those conditions, they seem to be of a very general nature. For example the permittee must pay his fees, keep adequate records and receipts, file reports, perform general maintenance and allow the Forest Service to inspect the facilities. See generally ¶33 - 81. An important point, is that very few of these "conditions" relate to the operation and maintenance of leasing houseboats.

Nevertheless, it is arguable that if the permittee fails to fulfill the conditions, the Forest Service can terminate the permit, and therefore, his possessory interest in the federal land. This, however, would not be sufficient to destroy the requirement of "durability." In McCaslin v. DeCamp, 248 Cal. App. 2d 13, the court held that there was a possessory interest despite the fact that the interest could be terminated at will.

Because the permittee was granted a 22-year term and given the generalness of the conditions, Bantry permit is durable enough to be a possessory interest.

The third factor that must be considered in finding a possessory interest is the extent of benefit to the holder of the permit. Many cases feel this is the key point in finding a possessory interest and ultimately taxing it. As Board of Supervisors, v. Archer, supra, stated "...it is not the land nor the title...rather it is the possession and value of land...why should it [the holder] not contribute its proper share, according to the value of the interest, whatever it may be, of the taxes necessary to sustain the government which recognizes and protects it." Citing: Kaiser v. Reed, 30 Cal. 2d 610, quoting People v. Shearer, 30 Cal. 645. The Archer court, therefore, held that a possessory interest exists when the permit creates a private benefit by way of profit.

This idea of "benefit," laid out in Archer, would also be consistent with the general definition of possessory interests, which includes the concept of usufructuary right. A usufructuary interest exists when there is a right of enjoyment to property vested in another, with the right to draw all profits from the use without destroying the property. 51 Cal.Jur. 3d Property Taxes §9.

It was because of this benefit that the court held in Kaiser, supra, that because Kaiser had exclusive and valuable use of the property, including usufructuary rights, that resulted in independent profit earning, there resulted a taxable interest under California law, (at page 621-22). See also Pacific Grove, supra, where the court found no possessory interest because, along with other factors, there was no private benefit.

Above all, the court in Stadium Concessions Inc. v. City of Los Angeles 60 Cal.App. 3d 215, held that the legislative intent behind Revenue and Taxation Code §107 is to protect public domain from private profit operations without tax liability.

We do not need to look at the benefit derived from the leasing of the houseboats, because we do not feel that that is the benefit at issue. It is our interpretation that the right to lease houseboats, a usufructuary right, is part of the possessory interest conferred on Bantry by the special use permit. The point is that there is some benefit derived from the possessory interest, and that the right to lease houseboats is part of that interest. Because Bantry receives some economic benefit from the overall operations, the requirement of "benefit" is conclusively met.

The last factor to be analyzed is the exclusiveness of the permittee interest. Generally, for there to exist a possessory interest, there must be the right to exclusive control. The California Administrative Code Title 18, Section 21(e) defines "exclusive use" as the enjoyment of a beneficial use of land with the ability to exclude others who interfere with that interest by legal process, (see attached.) Further, the code goes on to state that such exclusive use is not destroyed by concurrent uses, (citing Archer, supra.)

The Administrative Code defines concurrent use as when the extent of each use is limited by the others use at the same time. This is consistent with the provision in the special use permit at paragraph 59. There the U.S. Forest Service reserves the right to grant any third party the use of the area, provided such third party use does not interfere with the rights and privileges authorized within the permit.

Bantry holds a permit that gives it exclusive use of federal lands, subject to paragraph 59 in that permit. Because of this, and judicial decision, Bantry's interest is sufficiently exclusive to meet the requirement.

Conclusion: The special use permit grants a possessory interest in federal land adjacent to Shasta Lake. Incidental to that use is the right to lease houseboats and, therefore, that right is taxable.

(916) 445-4583

January 24, 1983

Mrs. Virginia A. Loftus
Shasta County Assessor
Courthouse, Room 115
Redding, CA 96001

Dear Mrs. Loftus:

Enclosed is an analysis prepared by Peter Brautigam, a legal intern in our office, on the problem you raised in your letter of October 28, 1982.

We are in agreement with the conclusions reached in his memorandum.

Very truly yours,

Glenn L. Rigby
Assistant Chief Counsel

GLR:fr

Enclosure

bc: Mr. Gordon P. Adelman w/att.
Mr. Robert H. Gustafson w/att.
Legal Section w/att.