



\*660.0171\*

## STATE BOARD OF EQUALIZATION

1020 N STREET, SACRAMENTO, CALIFORNIA  
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)

(New file)

CONWAY H. COLLIS

Second District, Los Angeles

ERNEST J. DRONENBURG, JR.  
Third District, San Diego

PAUL CARPENTER  
Fourth District, Los Angeles

GRAY DAVIS  
Controller, Sacramento

CINDY RAMBO  
Executive Director

(916) 323-7713

June 11, 1991

RECEIVED

JUN 13 1991

Division of Assessment Standards  
SACRAMENTO

Mr. Gary W. Lunter, Counsel  
DEPARTMENT OF THE NAVY  
Office of General Counsel  
Naval Facilities Engineering Command  
Naval Construction Battalion Center  
Port Hueneme, CA 93043-5000

Re: Construction of 300 Military Residential  
Housing Units: Possessory Interest Tax

Dear Mr. Lunter:

This is in response to your letter dated March 31, 1991. You ask whether a possessory interest tax would be levied upon the contractor who constructs 300 military residential housing units for rent to military personnel on land furnished by the Navy at Port Hueneme, California.

I have reviewed the material you sent and discussed this question with you by telephone. This question was also asked by James E. Dodd, Assessor Tax Specialist with the Ventura County Assessor's Office. I will reply to Mr. Dodd by way of a copy of this letter to him.

As I will explain below, I have concluded that the contractor furnishing military housing as you described, would be subject to a possessory interest tax on the land used for the living units and would be subject to a property tax on the buildings and appurtenances to the buildings constructed and leased to the Navy.

Facts

We understand the facts to be as follows:

1. The Navy will lease land as a building site to a contractor for 42 years for the purpose of constructing 300 military residential housing units on the Naval Construction Battalion Center at Port Hueneme, California.

June 11, 1991

2. For the first 20 years, the contractor must agree to lease the housing units to the government at a fixed cost cap not to exceed \$786 per unit per month.
3. After 20 years, the contractor has the right to lease the housing units to members of the general public of the contractor's own choosing; however, the contractor must lease the land from the government at full market value as is determined by the government, and pay all maintenance costs of the units.
4. Title to all major improvements built under the contract shall be in the name of the contractor.
5. The Navy will operate and maintain these housing units for the first 20 years. The contractor will not have use, possession or control of the housing. The contractor collects rents from the Navy as a lump sum payment for all 300 units of housing.
6. The Navy provides all utility services to these units, for the first 20 years of the lease. After 20 years the contractor must pay market value for the utilities.

#### Law and Analysis

A taxable possessory interest ("PI") is a possessory interest in non-taxable, publicly-owned real property (Cal. Code of Regs., Title 18, section 21(b); U.S. v. County of Fresno (1975) 50 Cal. App. 3d 633, p.638). A PI in government property arises when the user has sufficient rights or interest in the use, possession and enjoyment of the property to elevate that interest to property rights subject to assessment. Each case is decided on a case by case basis (Pacific Grove Asilomar Operating Corporation v. County of Monterey, (1974) 43 Cal. App. 3d 675, p.692), but the general guiding rule in deciding whether a PI becomes taxable is to weigh the factors of exclusiveness, independence, durability and private benefit of the possessory rights against relative impermanence, subjection to control and public participation (Wells National Services Corporation v. County of Santa Clara (1976) 54 Cal. App. 3d 579; Pacific Grove Asilomar Operating Corporation v. County of Monterey, supra; Mattson v. County of Contra Costa (1968) 258 Cal. App. 2d 205). "But not all occupancies or uses of tax exempt government-owned lands or improvements by private individuals are taxable as possessory interests. To give rise to a taxable possessory interest, the right of possession or occupancy must be more than a naked possession or use; it must carry with it either by express agreement or tacit

understanding of the parties, the degree of exclusiveness necessary to give the occupier or user something more than a right in common with others, or in the case of employment, something more than the means for performing his employer's purpose, so that it can be said, realistically, that the occupancy or use substantially serves an independent, private interest of the user or occupier." (United States of America v. County of Fresno (1975) 50 Cal. App. 3d 633, p.638.)

One of the questions here is whether the agreement with the contractor by the Navy is simply a financing arrangement for the Navy. I conclude it is not. If the contractor was merely a source of financing for the construction of the 300 housing units, then the contract would be structured entirely differently. A financing arrangement would not give the contractor any rights whatever in the property other than the bare legal title. The contractor's rights in the property would be expressed the same, or similarly as a lender's rights are expressed in a trust deed or mortgage instrument. Generally, a deed of trust conveys a legal title to the trustee only so far as may be necessary to the execution of a trust with none of the incidents of ownership of property other than the right to convey it on default. Lupertino v. Carbahal, (1973) 35 Cal. App. 3d 742. There is nothing in the contract documents that would indicate the Navy's agreement with contractor is merely a financial arrangement. There is no mention whatsoever of security for the monies owed the contractor for the construction of the 300 residential units. The contract is entirely structured as a lease by the government from the contractor. The government furnishes the land and the contractor constructs the buildings thereon. The title to those buildings is held by the contractor. The obtaining of the funds to construct the buildings is entirely the responsibility of the contractor. Presumably, the funds for construction will be borrowed by the contractor and the security for a lender of such funds will be the rental contract the contractor has with the Navy to rent the living units from the contractor. Therefore, it can be seen that such an arrangement between the Navy and the contractor is one of a business relationship and not one of the contractor lending the Navy funds for construction.

Another question is whether the contractor is an agent of the Navy or whether the contractor is an independent operator of the property. An agent or representative is liable for the property taxes assessed him only in his representative capacity. Property exempt in the hands of a principal remains exempt in hands of the agent. A principal and agent relationship between government and the operator is established by evidence that a management agreement between the parties

June 11, 1991

sets forth sufficient specific controls by the principal (government), such that the agent is said not to have independent usufructuary use of the property (Pacific Grove Asilomar Operating Corporation v. County of Monterey, supra). If the operator has usufructuary use of the property, as evidenced by sufficient operational independence, then the operator can be said to have a taxable possessory interest in the property. Factually, the contractor operates entirely independent of the Navy. The contractor furnishes 300 living units to the Navy, built upon Navy land at the contractor's expense, and in return the contractor receives rental payments. This enterprise relationship of the contractor with the Navy clearly is a usufructuary use of the Navy land. That usufructuary use, along with the forty-some years of exclusive, independent, durable, and private benefit to the contractor in his use of Navy land, measured against any relative impermanence, control by the Navy or interfering public participation would clearly indicate the contractor has a taxable possessory interest in the Navy land.

An additional question is whether the contractor is responsible for taxes on the living units he constructs. We conclude such units are entirely taxable to the contractor. The title to such units will be in the contractor's name. Even though the units will be located on Navy land, the contractor nevertheless owns them. All property in California is assessable (California Constitution, Article XIII, section 1(a)), unless owned by state or local government (California Constitution, Article XIII, section 3), or owned by the federal government (McCulloch v. Maryland (1819) 4 Wheat 316, 4 L.ed. 579, 609). We see, then, that since the contractor owns the buildings, that he is subject to property taxes assessed for such ownership.

In summary, we conclude that if a contractor were to construct the 300 residential units upon Navy land as proposed, then the contractor would be subject to a possessory interest tax on the land used for the living units and would be subject to a property tax on the buildings and appurtenances to the buildings constructed and leased to the Navy.

Having said that the land and buildings are subject to property tax, we must add that such assessment of the lands and building are subject to assessment restriction under Revenue and Taxation Code section 402.1. Section 402.1 provides that in the assessment of land, the assessor shall consider the effect upon the value of any enforceable restrictions to which the use of the land may be subjected. These restrictions shall include, but are not limited to zoning, recorded contracts with governmental agencies such as yours, and with other state and

Mr. Gary Lunter

June 11, 1991

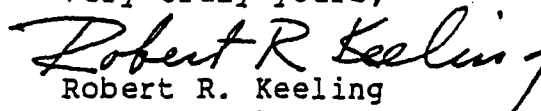
local governmental agencies not relevant here. Therefore, the contractual arrangement between the Navy and the contractor must be considered by the assessor in valuing the land and buildings which we have concluded are assessable to the contractor. The taxable value to the contractor will be restricted or not depending upon the assessor's consideration of the enforceable restrictions placed upon the contractor by the Navy. For example, if the contractor were under no restrictions whatsoever and were free to use the land and buildings here at issue, as would any other entrepreneur in the free enterprise system, then there would be no assessment restrictions. However, that is not the case. The Navy will restrict the contractor's use and possession of the land and buildings and will restrict the contractor's right to set rental fees on the land and the buildings. The property tax assessment to the contractor may be great or little depending upon the county assessor's conclusion as to the extent of the Navy's restriction of the contractor under the construction contract.

And lastly, the question arises as to whether any private land rights or other private real property located on the base is exempt from county property taxes because the land is a federal enclave. On lands where federal jurisdiction is exclusive, possessory interests or other real property owned by private parties located thereon are not subject to local property tax. Generally speaking, lands acquired after September 19, 1939 by the federal government are not enclaves. Mr. Dodd tells us that the land here at issue was acquired in 1942 and after, and that it is not a federal enclave. Thus, the possessory interest and the buildings will not be exempt from such taxes because the land is a federal enclave.

The views expressed in this letter are, of course, advisory only and are not binding upon the assessor of any county. You may wish to consult the Ventura County Assessor in order to confirm that the subject property will be assessed in a manner consistent with the conclusions stated above.

Our intention is to provide timely, courteous and helpful responses to inquiries such as yours. Suggestions that help us to accomplish this goal are appreciated.

Very truly yours,

  
Robert R. Keeling  
Tax Counsel

RRK:ta/3306D

cc: Mr. James E. Dodd

Assessor's Tax Specialist  
Ventura County Assessor's Office  
Mr. John W. Hagerty

Mr. Verne Walton