916) 324-6594

August 23, 1985

Mr. R. Gordon Young
San Bernardino County Assessor
Hall of Records
172 W. 3rd Street
San Bernardino, CA 92415-0310

Attention: Mr. Adolfo Porras
Chief Appraiser

Dear Mr. Porras:

_____ Inc. License Agreement

This letter is in reply to your letter to Mr. James Delaney of June 10, 1985 in which you ask whether a taxable possessory interest was created by the agreement between the City of Los Angeles ("City") and Paul's , Inc. ("Paul's") covering limousine and taxi service at Ontario International Airport.

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 (1968) 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 Agreement in light of the standard set forth above.

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Durability

To satisfy the requirement of durability, the agreement must confer use for a determinable period and the use has to be reasonably certain to last for that period. (Kaiser v. Reid (1947) 30 Cal.2d 160.) If the agreement provides for cancellation on short notice as the Agreement in this case does (Sec. 3, 12), the past history of dealings between the parties may supply sufficient durability. (Freeman v. County of Fresno (1981) 126 Cal.App.3d 459 at p. 463.)

Here, the Agreement provides for a five year term commencing March 1, 1981 and ending February 26, 1986 (Sec. 3). The Agreement, however, indicates at pages 1 and 2 thereof that it is for the purpose of continuing Paul's operations at the Airport under prior agreements with City. It therefore appears that Paul's has been operating at Ontario Airport well in excess of five years, which term is of sufficient duration to satisfy the factor of durability. (Mattson v. County of Contra Costa, supra, at p. 211.)

Exclusiveness

The test for exclusiveness is not exclusive possession against all the world including the owner. (Wells Nat. Services Corp. v. County of Santa Clara (1976) 54 Cal.App.3d 579, 584.) The right of use, however, must carry with it the degree of exclusiveness necessary to give the user something more than a right in common with others. (United States of America v. County of Fresno (1975) 50 Cal.App.3d 633, 638.) To be exclusive, such use "must not be one shared by the general public and, at least until cancelled, must be enforceable against the public entity which permits the use." (Freeman v. County of Fresno, supra, at pp. 463, 565; see also Property Tax Rule 21(e).)

The Agreement here in question is entitled "Non-Exclusive License Agreement." As indicated above, however, the literal language used does not control the nature of the relationship established or whether the factor of exclusiveness is present. The apparent basis for characterizing the rights given Paul's under the Agreement as nonexclusive is that the City reserves the right to grant equal privileges to other taxicab and/or limousine operators (Sec. 2). With respect to that provision, Property Tax Rule 21(e)(2) provides that "exclusive use is not destroyed by...[c]oncurrent use when the extent of each party's use is limited by the other party's right to use the property at the same time, as, for example, when two or more parties each have the independent right to graze cattle on the same land." Thus, even were

the City to grant equal privileges to other operators, exclusiveness would not necessarily be destroyed. Sharing of the use does not go to determining whether the interest is possessory, but merely to valuation. (Lucas v. Monterey County (1971) 65 Cal.App.3d 947.)

Under the Agreement, Paul's is given the right to transport passengers by taxicab or limousine upon the private roads and ways into, out of, and within the Airport including the right to pick up and discharge passengers at the passenger terminal buildings (Sec. 2, 5). This right is subject to certain limitations under Section 6 of the Agreement. For example, "[d]rivers shall not stand their vehicle while awaiting employment at any location on Airport property other than at an authorized zone or holding area, except in accordance with General Manager directives. Drivers shall not leave their vehicle parked at a street stand or zone unattended for more than three minutes.

"Passenger pickups shall take place only (a) in designated areas; (b) after using any authorized holding area(s) and procedure(s), when and if in operation; and (c) in the case of taxicab operations, after drivers have moved to first position in line at the taxicab stand. The first taxicab in line shall be the first out." For this right, Paul's pays the City $125 annually per vehcile for hire in its fleet (Sec. 4). While it is not entirely clear from the Agreement, we assume that the foregoing right given Paul's to use Airport property is something more than a right in common with or shared by the general public. If it were not, it is doubtful that Paul's would agree to pay for the right. Moreover, Section 13(b) of the Agreement supports this conclusion in that it provides that in the event of the breach of certain non-discrimination covenants, "City shall have the right to terminate this License and to reenter and repossess said land...." (Emphasis added.) Such a provision would be meaningless if Paul's had not received something more than a right in common with the general public under the Agreement. Further, the Agreement contains a covenant against assignment without written consent (Sec. 9) which, although not conclusive, "is frequently characteristic of leases and is inconsistent with mere license." (Mattson v. County of Contra Costa, supra, at p. 211.) Also, there is nothing in the Agreement to indicate that Paul's could not legally enforce its right to use City property against City, if necessary. Accordingly, we believe it is reasonable to conclude that Paul's right to use City land is sufficiently exclusive to satisfy the factor of exclusiveness.

Private Benefit

The requirement of private benefit is met if there is an opportunity for the holder of the interest to make a profit. (Wells Nat. Services Corp. v. County of Santa Clara, supra, at p. 585.) Paul's clearly has an opportunity to make a profit through its use of City property under the Agreement in this case. The private benefit requirement is therefore clearly satisfied.

Independence

To qualify as a possessory interest, the right to use property must be 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.) "If, in practical effect, one of the parties has the right to exercise complete control over the operation, an agency relationship exists;..." (Nichols v. Arthur Murray, Inc. (1967) 248 Cal.App.2d 610, 613.) As a general proposition, if exclusiveness and private benefit are present, the other requirements (durability and independence) are usually found to exist as well. (See Freeman v. County of Fresno, supra, at p. 463.)

Here, although not necessarily controlling, Section 14 of the Agreement provides that Paul's "is an independent contractor and not an employee, servant or agent of the City." Other provisions of the Agreement support this characterization notwithstanding the fact that City does exert certain controls over Paul's operation. For example, Paul's must hold City harmless from various claims (Sec. 10) which is indicative of independent operation. (Mattson v. County of Contra Costa, supra, at p. 210.) Accordingly, we believe that Paul's use of City property is sufficiently free of public control to satisfy the requirement of independence. Moreover, even if Paul's independence were questionable here, there is recent authority to the effect that independence from public control is not necessary for taxability. (Freeman v. County of Fresno, supra, at p. 465.)

In summary, it appears that Paul's right to use City property under the Agreement meets the requirements of durability, exclusiveness, private benefit and independence. Accordingly, it can reasonably be concluded that Paul's contract might is a taxable possessory interest.

Very truly yours,

Eric F. Eisenlauer
Tax Counsel