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October 4, 2002

VIA Facsimile, Original to Follow

JAMES E. SPEED
Executive Director

The Honorable Gregory B. Hardcastle
Tulare County Assessor
Tulare County Civic Center
221 S. Mooney Blvd., Room 102-E
Visalia, CA 93291-4593

Attention: Mr. _____, Chief Appraiser

Re: Legal Opinion as to whether Fountain and Vending Agreement between the Unified School District and _____ Bottling Group Constitutes a Taxable Possessory Interest.

Dear Mr. Hardcastle:

This letter is in response to your letter of September 18, 2002, to Kristine Cazadd, in which you requested that we review an agreement between the _____ Bottling Group (Group) and the _____ Unified School District to determine if it gives rise to a taxable possessory interest.

As hereinafter explained, the agreement creates a possessory interest, as defined in Section 107 of the Revenue and Taxation Code¹ and Property Tax Rule 20; however, the possessory interest is exempt as property used exclusively for public schools. (Article XIII, Section 3(d) of the California Constitution, Section 202(a)(3).)

I. The agreement between the school district and Group creates a possessory interest.

Section 107 and Property Tax Rule 20 define the criteria that constitute a taxable possessory interest. The private possession of publicly-owned real property is taxable only if the possessor physically occupies, or holds either the right to physically occupy, or the claim to the right to physically occupy the subject real property; and (2) such occupation, right to occupation, or claim to the right of such occupation is independent, durable, exclusive and confers a private benefit upon the possessor.

¹ All section references are to the Revenue and Taxation Code, unless otherwise specified.

A. School district property, including property used for public schools is publicly owned real property.

The California Constitution provides that school districts are included in the public school system (Art. IX, § 14). Since the state discharges some of its governmental functions relating to education through school districts, such districts are state agencies. They are agencies of the state for the local operation of the state school system. The beneficial ownership of the fee title to school district property; therefore, is in the state, and the districts hold legal title as trustees. (56 Cal Jur 3d, §§ 57, 58, and 61.)

Section 3(a) of Article XIII exempts all property owned by the state. The state property exemption extends to the property of public school districts. Section 3(d) of Article XIII exempts property used exclusively for public schools. Thus, school district property is exempt from property tax under Article XIII, section 3(a) and section 202(a)(4), as property owned by the State of California and under Article XIII, section 3(d) and section 202(a)(3), as property used exclusively for public schools.

B. Definition of Possessory Interest

1. Right to actual physical occupation of the public schools.

Rule 20 defines possession as meaning actual physical occupation. Currently, Group's vending machines and other equipment actually occupy space in the schools, and Group has the right to come onto the premises regularly to service its vending equipment. The agreement provides Group with full physical access to the schools for purposes of installing, repairing, cleaning, maintaining and removing the vending equipment. (Agreement, paragraph no. 3) Thus, the requirement of possession as defined by Rule 20, is met. However, Rule 20 and section 107, subd. (a), also provide that "a claim to, or right to the possession of land or improvements" is sufficient to meet the possession requirement. The agreement provides in relevant part that:

"Products may be sold through Group identified soft drink vending machines, visa coolers, postmix fountain beverage dispensers and any other normal means utilized by the Customer in the Customer's current schools consisting of the twenty-seven (27) schools set forth in the attached list of Customer locations, ...and such other schools as Customer may own and/or operate during the Term. The Customer agrees ...to help Group identify locations for and permit placement of a minimum number of automatic vending machines to equal one vendor per every one hundred students at each of the high schools, continuation school, adult school and middle school outlets, and a minimum of one vendor at each of the elementary school outlets." (paragraph no. 2)

Thus, this provision indicates that Group has a claim to, or right to occupy space in the district's schools for purposes of placement of their vending machines, as specified. Accordingly, the possession requirement for a possessory interest to exist is satisfied, since Group's vending equipment actually occupies space in the district's schools, and the agreement also provides Group with a claim to, or right to actual physical occupation of the public schools.

2. Independence

A right to possession is independent if it is sufficiently autonomous as to constitute more than a mere agency. The possessor must have the right and ability to exercise significant authority and control over the management or operation of the real property to constitute more than a mere agency. Independence may be measured by the amount of routine control and supervision enjoyed by the possessor, recognizing that the government necessarily retains ultimate control. In this case, Group will install a minimum of one hundred machines on the premises of the school buildings, and the number shall not go below one hundred. In addition, the school district is prohibited from repairing, replacing, relocating, moving or removing any of Group's vending equipment and from allowing any other party to do any of these acts. Group has the exclusive right to repair, replace, move or remove any and all vending equipment in the schools. (Agreement, paragraph no. 3) Group's access to the public schools and control over the school property occupied by its equipment is subject to a contractual requirement to obtain insurance coverage (Agreement, Exhibit F) and Education Code requirements that fingerprints of Group employees or agents must be provided for review by the Justice Department.

The fact that the school district has placed certain provisions in the agreement to safeguard the students and the use of public property does not deprive Group's possession of the requisite independence. Per *Stadium Concessions, Inc. v. City of Los Angeles*, (1976) 60 Cal.App. 3d 215, the city would be "remiss if it did not retain ultimate control over such use, by grantees as well as by the public." Thus, we conclude that the agreement between the school district and Group accords sufficient control to Group to meet the criterion of independent possession as set forth in Rule 20.

3. Durability

A taxable possessory interest must have a determinable or ascertainable period of possession or anticipated possession. The term of the agreement is five years, from September 1, 1999 through August 31, 2004. Thus, this criterion is satisfied. Either party may terminate the agreement upon a material breach by the other party of the terms or conditions thereof. The fact that the agreement is terminable is only relevant to the issue of valuation, and is not relevant to whether the right constitutes a possessory interest.

4. Exclusivity

Exclusive of rights held by others in the real property means the enjoyment of an exclusive use of real property, or a right or claim to the enjoyment of an exclusive use together with the ability to exclude from possession by means of legal process others who may interfere with that enjoyment. Case law has held that exclusivity is not limited to possession or a single

person or entity against the entire world. (*Scott-Free River Expeditions v. El Dorado County* (1988) 203 Cal.App.3d 896) Thus, a possession that is concurrent with that of another party may still be exclusive. (Rule 20, subsection (c)(7).)

In this case, the agreement provides certain exclusive rights with respect to the sale of Group-branded products to be sold or otherwise served on the schools' premises. (Agreement, paragraph no. 2) The agreement states that existing contracts with competitors will be allowed to run their normal term, four agreements concluded in 2000, one concluded in 2002, and two will conclude in 2003. The agreement provides that upon termination of such agreements, Group will then become the exclusive beverage supplier to that school. The fact that prior to 2003, other companies may occupy some of the schools for the same purpose does not preclude a finding of exclusivity, but merely affects the valuation. (*Scott-Free River Expeditions v. El Dorado County, supra*). Based on the foregoing, the exclusivity criterion is satisfied.

5. Private benefit

Private benefit means that the possessor has the opportunity to make a profit or to use or be provided an amenity. (Property Tax Rule 20, subsection (c)(8).) The use should be of some private or economic benefit to the possessor that is not shared by the general public. The purpose of this agreement is to generate revenues for Group from the sale of its products at schools. The agreement provides Group with an opportunity to make a profit with provisions that: (1) grant the company exclusive rights to sell its products; (2) require at minimum, one hundred vending machines to be located at every school in the district; and, (3) require the district to purchase Group products and supplies at specified prices that are subject to change and competitive with average market prices. (Agreement, paragraph no.9).

II. The possessory interest is exempt as property used exclusively for public schools.

Section 3 of article XIII of the California Constitution authorizes a property tax exemption for (d)...property used exclusively for public schools, community colleges, state colleges and state universities. The courts have held that the term, "used exclusively" does not mean that the property exempted must be used solely for the purposes stated, to the exclusion of any other use and may include certain types of incidental use as well. (*Cedars of Lebanon v. County of Los Angeles* (1950) 35 Cal.2d 729; *Honeywell Information Systems v. County of Sonoma* (1974) 44 Cal.App.3d 23). However, the courts have concluded that "such incidental use must be directly connected with, essential to and in furtherance of the primary use". (*Cedars of Lebanon, supra*; *Honeywell Information Systems, supra*).

In *Honeywell*, the court denied the public school exemption for a computer system leased to a public school, which was used primarily for public schools, but subleased three percent of the time to parochial schools and .56 percent of the time to private businesses. The court held that this incidental use of the property was not reasonably necessary to further the primary purpose of the public schools, but was merely a revenue-generating device. (*Honeywell, supra* at page 29). Moreover, the school, in leasing computer time to others, was viewed as directly

competing in the “common business with the property of other owners; therefore, “it must bear the tax as much as theirs bears.” (*Honeywell*, supra at page 30)

Honeywell's definition of exclusive use raises the question of whether vending machines located on school grounds may be exempted as incidental use that is directly connected with, essential to and in furtherance of the public school purpose. Per the Unified School District's agreement with Group, the school district receives a share of the receipts, which could be characterized as revenue generating. However, at least one court case has held that providing food to students in the secondary schools is an educational activity within the terms of the Education Code. (*California School Employees Assoc. v. Sequoia Etc. School District* (1969) 272 Cal.App.2d 98. The rationale of this case is that the Education Code authorizes school districts to furnish food service; therefore, vending machines dispensing food items are a service that is directly related to and in furtherance of a public school purpose. (Section 39871 of the Education Code, formerly numbered as sections 17001 et al.) Assuming that the beverages dispensed in the vending machines can be classified as a food product,² the school district's agreement with Group permits an incidental use of school property that, in our opinion, is in furtherance of the primary purpose of the school district, based on the Education Code's authorization to school districts to sell food on school grounds. (*Honeywell*, supra; *California School Employees Assoc.*, supra) Staff concludes, therefore, that the possessory interest, which arises from this agreement, is exempt as property used exclusively for public school purposes. (Section 3(d) of Article XIII, and section 202(a)(3); *California School Employees Assoc.*, supra.).

III. The vending machines may also qualify for the public schools' exemption.

The specific language in section 3(d) of Article XIII and section 202(a)(3) establishes that the sole requirement for the public schools' exemption is that the property be used in the manner specified. As use of the property is the criteria, the ownership of the property is immaterial. Thus, any property used exclusively for public schools purposes, becomes exempt (*Ross v. City of Long Beach* (1944) 24 Cal.2d 758). In *Ross v. City of Long Beach*, the plaintiffs had leased land and a building thereon to the Long Beach City High School District for use exclusively as and for a public school and they sued to recover taxes levied upon the property. Since the property had been used exclusively for public school purposes, it was held exempt from property taxation. As to the agreement between the district and Group, the fact that the vending equipment is owned by a for-profit firm, is not disqualifying for purposes of the public school exemption. Consistent with the specific language of section 3(d) of Article XIII, section 202(a)(3), and the *Ross* judicial precedent, Group's vending machines located on school property may also qualify for the public schools exemption. (See also LTA No. 80/48, Possessory Interests, attached)

² Soda pop is defined as a beverage consisting of soda water, flavoring, and a sweet syrup. (Merriam Webster's Collegiate Dictionary, 10th Ed., page 1115)

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The views expressed in this letter are only advisory in nature. They represent the analysis of the legal staff of the Board based on present law and the facts set forth herein. Therefore, they are not binding on any person or public entity.

Sincerely,

/s/ Mary Ann Alonzo

Mary Ann Alonzo
Senior Tax Counsel

Attachment

MAA:eb

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cc: Ms. Sher Kellinger
Deputy County Counsel
Tulare County

Mr. David Gau, MIC:63
Chief-PPSD, MIC:64
Ms. Lisa Thompson, MIC:64
Mr. Gordon Ferguson, MIC:64
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Ms. Kristine Cazadd