STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
450 N STREET, SACRAMENTO, CALIFORNIA
(PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 445-6493 - MR. AUGUSTA
(916) 322-9569 - MS STUMPF

JOHAN KLEHS
First District, Hayward

DEAN F ANDAL
Second District, Stockton

ERNEST J DRONENBURG JR
Third District, San Diego

KATHLEEN CONNELL
Controller, Sacramento

JOHN CHIANG
Acting Member
Fourth District Los Angeles

E L SORENSEN, JR
Executive Director

May 8, 1997

TO COUNTY ASSESSORS,
COUNTY COUNSELS, AND
OTHER INTERESTED PARTIES:

No. 97/25

NOTICE OF PROPOSED REGULATORY ACTION
BY THE
STATE BOARD OF EQUALIZATION

ADOPT PROPERTY TAX RULE 20 - TAXABLE POSSESSORY INTERESTS
AMEND PROPERTY TAX RULE 21 - POSSESSORY INTEREST DEFINITIONS

PUBLIC HEARING Wednesday, June 25, 1997, AT 1.30 P M

NOTICE IS HEREBY GIVEN.

The State Board of Equalization, pursuant to the authority vested in the Board by Section 15606 (c) of the Government Code proposes to adopt and amend Regulations in Title 18, Division 1 of the California Code of Regulations A public hearing on the proposed regulations will be held in Room 121, 450 N Street, Sacramento, at 1:30 p.m , or as soon thereafter as the matter may be heard, on June 25, 1997 Any person interested may present statements or arguments orally at that time and place. Written statements or arguments will be considered by the Board if received by June 25, 1997.

INFORMATIVE DIGEST/PLAIN ENGLISH OVERVIEW

The State Board of Equalization proposes to adopt Property Tax Rule 20 (18 Calif. Code of Regs. § 20), Taxable Possessory Interests, and to adopt amendments to Property Tax Rule 21 (18 Calif. Code of Regs §21), Possessory Interest Definitions The proposed rule and amendments are intended to make more specific, interpret and clarify the taxation of taxable possessory interests in tax-exempt publicly owned property as set forth in recent amendments to Revenue and Taxation Code Section 107.

Senate Bill 657 (Maddy), Chapter 498, Statutes of 1995, amended Revenue and Taxation Code §107 to revise the definition of the term "possessory interest" in terms of three tests used by the courts to determine whether a possessory interests exists, namely, " independent," "durable" and "exclusive," and provide more precise definitions of those terms Existing Property Rule 21, defining "possessory interests," is in conflict with the definitions in §107 Proposed Rule 20 reflects the amended statute, and existing rule 21 is amended to remove conflicting language

The express terms of the proposed action, written in plain English, are available from the agency contact person named in this notice.

COST TO LOCAL AGENCIES AND SCHOOL DISTRICTS

The State Board of Equalization has determined that the proposed adoption of Rule 20 and the proposed amendments to Rule 21 do not impose a mandate on local agencies or school districts Further, the Board has determined that the proposed rule and the proposed amendments will result in no additional direct or indirect costs to any State agency, or to any local agency or school district which are required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code, and that there are no other non-discretionary costs or savings imposed on local agencies, or cost or savings in Federal funding to the State of California

EFFECT ON BUSINESS

Overall, the changes proposed by adoption of Rule 20 and the amendments to Rule 21 will have a positive effect on business because they may reduce litigation and controversy, and will clarify and make more specific the rules for determining what is a taxable possessory interest for purposes of property taxation There is no adverse economic impact on business

The adoption of the proposed Rule 20 and the amendments to Rule 21 may create jobs in the State of California, will not result in the elimination of existing business, and will clarify and make more specific the rules for determining what is a taxable possessory interest for purposes of property taxation Whether the adoption or amendment will create or expand business is unknown.

ADVERSE ECONOMIC IMPACT ON PRIVATE PERSONS/BUSINESSES

There will be no adverse economic impact on private businesses or persons from either the adoption of Rule 20 or the amendments to Rule 21

FEDERAL REGULATIONS

There are no Federal regulations comparable to either proposed Rule 20 or Rule 21

PLAIN ENGLISH STATEMENT

Preparation of the proposed Rule and proposed amendments included consideration of the plain English requirement.

AUTHORITY

Government Code Section 15606, subdivision (c)

REFERENCE

Revenue and Taxation Code Section 107.

CONTACT

Questions regarding the content of the proposed regulations should be directed to· Mr Larry Augusta at P O. Box 942879, 450 N Street, MIC:82, Sacramento, CA 94279-0082 Telephone: (916) 445-6493 FAX (916) 323-3387.

Written comments for the Board's consideration or requests to present testimony and bring witnesses to the public hearing should be directed to Ms Mary Ann Stumpf, Regulations Coordinator, (916) 322-9569, and P O Box 942879, 450 N Street, MIC 80, Sacramento, CA 94279-0080

ALTERNATIVES CONSIDERED

The Board must determine that no alternative considered would be more effective in carrying out the purpose for which this action is proposed or be as effective and less burdensome to affected private persons than the proposed action.

AVAILABILITY OF STATEMENT OF REASONS AND OF TEXT OF PROPOSED REGULATIONS

The Board has prepared a statement of reasons and underscored version (express terms) of the proposed regulations Both of the documents and all information on which the proposal is based are available to the public upon request The Rulemaking file is available for public inspection at 450 N Street, Sacramento, California Requests for copies should be addressed to Ms Mary Ann Stumpf, Regulations Coordinator, (916) 322-9569, at P O Box 942879, 450 N Street, MIC 80, Sacramento, CA 94279-0080.

ADDITIONAL COMMENTS

Following the hearing, the State Board of Equalization may adopt the proposed regulations if the text remains substantially the same as described in the text originally made available to the public The text of any modified regulation will be mailed to those interested parties who commented orally or in writing or who asked to be informed of such changes The modified regulation will be available to the public from Ms Stumpf The State Board of Equalization will consider written comments on the modified regulation until such time as the regulation is adopted.

Dated: April 16, 1997

STATE BOARD OF EQUALIZATION

E L Sorensen, Jr
Executive Director

ELS:ba
Distribution: 3C
rules\20\letter

Rule 20. TAXABLE POSSESSORY INTERESTS.

(a) Possessory Interests. "Possessory interests" are interests in real property that exist as a result of:

(1) A possession of 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; or

(2) A right to the possession of real property, or a claim to a right to the possession of 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; or

(3) Taxable improvements on tax-exempt land.

(b) Taxable Possessory Interests. "Taxable possessory interests" are possessory interests in: (i) nontaxable publicly-owned real property subject to the provisions of subdivisions (a) and (b) of section 3 of article XIII of the Constitution; and (ii) taxable publicly-owned real property subject to the provisions of section 11 of article XIII of the Constitution Excluded from the meaning of "taxable possessory interests", however, are any possessory interests in real property located within an area to which the United States has exclusive jurisdiction concerning taxation Such areas are commonly referred to as federal enclaves.

(c) Definitions. For purposes of this regulation:

(1) "Real property" is defined in section 104 of the Revenue and Taxation Code and includes public waters such as tidelands and navigable waters and waterways

(2) "Possession" of real property means actual physical occupation "Possession" requires more than incidental benefit from the public property, but requires actual physical occupation of the property pursuant to rights not granted to the general public; thus, the use of property such as hallways, common areas, and access roads at airports, stadiums, convention centers, or other public facilities by customers or employees of those who may lease other public property at the public facility of which they have exclusive use does not constitute "possession" of those hallways, common areas, or access roads by the lessee of the public property.

(3) A "right," or a "claim to a right," to the possession of real property means the right, or claim to a right, to actual physical occupation of real property. For purposes of this subdivision, a right, or a claim to a right, to the possession of real property may exist as a result of the possessor having or claiming to have: (i) a leasehold estate, an easement, a profit a prendre, or any other legal or equitable interest in real property of less than fee simple or life estate, regardless of how the interest may be identified in a deed, lease, or other document; or (ii) a use permit or agreement, such as a federal grazing permit, a permit to use a berth at a harbor, or a county use permit authorizing professional rafting outfitters to commercially operate on a river, that creates a legal or equitable interest in real property of less than fee simple or life estate

(4) "Possessor" means the party or parties who hold the possessory interest, and any successors or assigns to such party or parties

(5) "Independent" means the ability to exercise authority and exert control over the management or operation of the real property, separate and apart from the policies, statutes, ordinances, rules, and regulations of the public owner of the real property A possession, or a right or claim to possession, is independent if the possession or operation of the real property is sufficiently autonomous to constitute more than a mere agency

(6) "Durable" means for a determinable period with a reasonable certainty that the possession of the real property by the possessor, or the possessor's right or claim with respect to the possession of the real property, will continue for that period.

(7) "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.

(A) For purposes of this subdivision, "exclusive uses" include the following types of uses of real property, as well as rights and claims to such types of uses of real property

(1) The sole possession, occupancy, or use of real property,

(2) The possession, occupancy, or use of real property by co-tenants or co-owners as to leaseholds, easements, profits a prendre, or any other legal or equitable interests in real property of less than fee simple or life estate, where the uses constitute but a single use jointly enjoyed

(3) The concurrent use of real property, not amounting to co-tenancy or co-ownership under subdivision (A)(2) above, by a person who has a primary or prevailing right to use the real property and/or to have its designees use the real property For example, a public marina leases boat slips with a lease provision that allows the marina to rent a leased boat slip to a short-term user if the primary lessee is away; subject to the primary lessee's right to exclude the short-term user on the primary lessee's return Under these facts, the primary lessee has a primary and prevailing right to use the leased boat slip For purposes of this subdivision, concurrent use of real property demonstrating a primary or prevailing right also includes alternating uses of the same real property by more than one party, such as the 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

(4) Concurrent uses of real property, not amounting to co-tenancy or co-ownership under subdivision (A)(2) above, by persons making qualitatively different uses of the real property For purposes of this subdivision, qualitatively different uses of real property include (i) those by persons making different kinds of uses of the same real property, such as the case when one person is developing mineral resources on real property while others are concurrently enjoying recreational uses on the same real property; and (ii) those where different persons have the right to concurrently enter onto and take different things from the same real property

(5) Concurrent uses of real property, not amounting to co-tenancy or co-ownership under subdivision (A)(2) above, by persons engaged in qualitatively similar uses that diminish the quantity or quality of the real property. For purposes of this subdivision, uses that diminish the quantity and/or quality of the real property include. (i) grazing cattle, (ii) mining· (iii) the extraction of oil or gas; and (iv) the extraction of geothermal energy

(6) Concurrent uses of real property, not amounting to co-tenancy or co-ownership under subdivision (A)(2) above, by persons engaged in qualitatively similar uses that do not diminish the quantity or quality of the real property, provided that the number of concurrent use grants is restricted. For purposes of this subdivision: "concurrent use grants" includes grants, permits, deeds, agreements, and other documents providing rights to the concurrent use of real property, and the number of concurrent use grants is "restricted" when the number of concurrent use grants is restricted either by law or pursuant to the policies or management decisions of the public owner of the real property or other public agency.

Example 1· Commercial rafting outfitters have a county use permit to commercially operate on a river. While any private recreational user may raft on the river without limitation or regulation, only approximately 80 commercial rafting outfitters are presently allowed to operate under permit on the river. The commercial rafting outfitters' use of the river is exclusive for purposes of this regulation since the number of commercial use permits issued by the county to commercial rafting outfitters is restricted, regardless of whether or not the commercial rafting outfitters' use of the river diminishes its quantity or quality.

Example 2: "X," a commercial air passenger carrier, uses the common landing area at an airport owned by a tax-exempt government entity This common landing area is available for use by all aircraft, both commercial and private, limited only by Federal Aviation Administration regulations and local ordinances applicable to all planes Nevertheless, landing fees must be paid by every operator of an aircraft that lands for revenue-producing, air transportation purposes at the airport Since X has a landing permit, however, X need not pay in cash each time it lands a plane at the airport, but, instead, is permitted to pay accrued fees at regular intervals.

Neither the federal regulations, local ordinances, nor the policies or management decisions of the public owner of the airport restrict the number of landing permits that can be issued In addition, under the assumed facts of this hypothetical, X's use of the common landing area does not diminish the quantity or quality of the real property

Given that (i) aircraft owners who land their aircraft at an airport are making qualitatively similar uses of the common landing area, (ii) there are no facts indicating that the quantity or quality of the real property is being diminished, and (iii) the number of landing permits is not restricted, X's right to use the common landing area of the airport is not exclusive Therefore, X does not have a taxable possessory interest in the common landing area.

(B) A use of real property, or a right or claim to a use of real property, that does not contain one of the elements in subdivisions (A)(1) to (6) above, inclusive, shall be rebuttably presumed to be nonexclusive.

(C) In no event shall the presence of occasional trespassers or occasional interfering uses be sufficient in and of itself to make nonexclusive a use, or a right or claim to a use, that is otherwise exclusive for purposes of this regulation.

(8) "Private benefit" means that the possessor has the opportunity to make a profit, or to use or be provided an amenity, or to pursue a private purpose in conjunction with its use of the possessory interest. The use should be of some private or economic benefit to the possessor that is not shared by the general public The fact that a possession of real property is not for a business or commercial purpose or that the possessor is a non-profit corporation does not preclude the possessor from being found to have received a "private benefit" from that possession

Authority: Section 15606, subdivision (c), Government Code

Reference: Section 107, Revenue and Taxation Code

Rule 21. POSSESSORY INTEREST DEFINITIONS.

The following definitions govern the construction of ~~the~~ these words in the rules pertaining to possessory interests.

~~**(a)** "Possessory interest" means an interest in real property which exists as a result of possession, exclusive use, or a 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. Such an interest may exist as the result of:~~

~~(1) A grant of a leasehold estate, an easement, a profit a prendre, or any other legal or equitable interest of less than freehold, regardless of how the interest is identified in the document by which it was created, provided the grant confers a right of possession or exclusive use which is independent, durable, and exclusive of rights held by others in the property;~~

~~(2) Actual possession by one intending to use the property to the exclusion of any other interfering use, irrespective of any semblance of actual title or right.~~

~~**(b)** "Taxable possessory interest" means a possessory interest in nontaxable publicly owned real property, as such property is defined in section 104 of the Revenue and Taxation Code, and in taxable publicly owned real property subject to the provisions of sections 3(a), (b) and 11, Article XIII of the Constitution.~~

~~Excluded from the meaning of "taxable possessory interest" is any possessory interest in real property located within an area to which the United States has exclusive jurisdiction concerning taxation. Such areas are commonly referred to as federal enclaves.~~

~~**(c)** "Possession" means:~~

~~(1) Actual possession, constituting the occupation of land or improvements with the intent of excluding any occupation by others that interferes with the possessor's rights, or~~

~~(2) Constructive possession, which occurs when a person, although he is not in actual possession of land or improvements, has a right to possession and no person occupies the property in opposition to such right.~~

~~**(d)** "Possessor" means the party in possession or having exclusive use.~~

~~**(e)** "Exclusive use" means the enjoyment of a beneficial use of land or improvements, together with the ability to exclude from occupancy by means of legal process others who interfere with that enjoyment. Co-tenants may each make such use of land or improvements without impairing the other's right to use the property, as this constitutes but a single use jointly enjoyed. Exclusive use is not destroyed by one or more of the following:~~

~~(1) Multiple use by persons making different uses of the same property in such a manner that they do not prevent the enjoyment of co-existing rights held by others, as, for example, the development of mineral resources by one person and the enjoyment of recreational uses by others;~~

~~(2) Concurrent 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,~~

~~(3) Alternating use when the duration of each party's use is limited, as, for example, the use of premises by a professional basketball team on certain days of each week and by a professional hockey team on certain other days,~~

~~(4) Persons lawfully passing over or taking things from the land,~~

~~(5) The existence of noninterfering easements, covenant rights, or servitudes in other persons or attached to other lands;~~

~~(6) Occasional trespassers.~~

~~(f)~~ **(a)** "Contract rent" means payments in money or in kind for the right to use real property as required by the terms of the possessory interest agreement It includes royalty payments and other rights to share in production, the value that the public owner is expected to realize from improvements erected at the expense of the possessor which will remain when the possessory interest terminates, and any other form of compensation paid or payable for the right to occupy the property It does not, however, include payments for services such as utilities and janitorial labor or for the use of property not subject to the possessory interest

~~(g)~~ **(b)** "Economic rent" means the amount that would be paid in money or kind for the right to use real property if (1) the contract rent were currently negotiated under the conditions which exist in a free and competitive market and (2) the fee owner paid property taxes on the value of the fee

~~(h)~~ **(c)** "Extended or renewed" means the lengthening of the term of possession of an agreement by mutual consent or by the exercise of an option by either party to the agreement

~~(i)~~ **(d)** "Created" includes (1) the addition of land or improvements not previously subject to the agreement and (2) the addition of valuable permitted uses not previously permitted

Authority: Section 15606, subdivision (c), Government Code

Reference: Sections 107, 107 1, ~~107 4,~~ Revenue and Taxation Code