



April 10, 2014

Hon. Jerome Horton, Chair  
Board of Equalization  
450 N Street, MIC:72  
Sacramento, CA 95814

SUPPORT: Letter to Assessors “Guidance Regarding Taxable Possessory Interests Property Tax Rule 21(d), *Term of Possession for Valuation Purposes*” (April 22-23, 2014 Meeting)

Dear Chairman Horton:

On behalf of the Pacific Merchant Shipping Association (PMSA) and its member companies, we are pleased to support the adoption of the draft LTA on “Guidance Regarding Taxable Possessory Interests Property Tax Rule 21(d), *Term of Possession for Valuation Purposes*” at the Board’s meeting on April 22-23, 2014. We agree that a clarifying LTA is in order to properly reflect the recent decision in *CalSTRS v. Co. of Los Angeles*, (2013) 216 Cal.App.4th 41 and to remedy the documented inconsistent applications of Rule 21 and AH 510.

Our member marine terminal operators and ocean carriers conduct business at California’s public seaports, and as port tenants make lease payments to public ports approaching \$900 million per year. Our members view their long-term lease and concession agreements with public port authorities as a partnership in which both the public and private sectors work together to grow and expand maritime commerce and international trade in California.

These investments are integral to port operations, improving the state’s economy, creating jobs, and funding our industry’s commitments to public infrastructure finance and improving the state’s environment. As representative of these significant possessory interest taxpayers, PMSA appreciates the continued work by the BOE on this issue.

This proposed LTA restates and clarifies existing law under Rule 21 and AH 510 whereby possessory interest liabilities exist only on those private rights which actually exist in publicly-owned property. Such clarifications assure PI taxpayers of consistent application of the law and thus encourage continued investments in public property at the most robust levels possible.

**Pacific Merchant Shipping Association**

250 Montgomery St., Suite 700, San Francisco, CA 94104

(415) 352-0710

fax (415) 352-0717

The LTA confirms the unequivocal proposition that public agency owners of tax-exempt real property must be protected against the imposition of property taxes on their reversionary interests. *CalSTRS* protects the public owner's tax-free interest in real property by resting its holding on the basic proposition of "hornbook law that a 'lessee has a present possessory interest in the premises, [while] the lessor has a future reversionary interest and retains fee title.'"

This is perfectly complementary to the holding in *American Airlines Inc. v. Co. of Los Angeles*, (1976) 65 Cal.App.2d 325. *American Airlines* held that a taxpayer cannot be "taxed on something they do not have, namely possessory interests extending beyond the terms of their leases." See *Silveira v. Co. of Alameda*, (2006) 139 Cal.App.4<sup>th</sup> 989, 995. This holding is required by the conclusion that an interest in publicly-owned real property is taxable only if it is itself a right in real property – in this case as an estate for years held by a private party. See *San Pedro, etc. R.R. Co. v. City of Los Angeles*, (1919) 180 Cal. 18 (a leasehold interest in state tidelands was an "estate for years" and therefore taxable property); *Forster Shipbuilding Co. v. Co. of Los Angeles*, (1960) 54 Cal.2d 450, 455 (PIs are "real property for purposes of taxation.")

Likewise, we agree with the principle that "[u]nless allowed by the statutory scheme, the reasonably anticipated term of possession may never exceed a limit placed on the occupancy of public land by the Legislature." This is of specific importance to the tenants of California's public seaports because, as noted by the LTA, the state tidelands upon which most of our seaports reside are subject to specifically limited terms of occupancy by statute.

PMSA is also appreciative of the provisions of this LTA, and the comments by the Chairman at the Board hearing on March 25<sup>th</sup> in San Francisco, which properly isolate *Charter Communications Properties LLC v. Co. of San Luis Obispo*, (2011) 198 Cal.App.4<sup>th</sup> 1089. By its own admission, *Charter* is inconsistent with the holding of *American Airlines*, finding the case "inapposite" to its interpretation of Rule 21. This LTA provides the guidance necessary to taxpayers and assessors alike if presented with potential questions of inconsistent application of Rule 21 because of the *Charter* decision.

We sincerely hope that this LTA will finally put to rest any notions or claims that any private party might have a "virtual perpetual possessory interest" in publicly-owned property – a proposition which is inconsistent with the Civil Code, has never been given any credence by this Board, and which is impossible to assert under the holdings of *CalSTRS* and *American Airlines*.<sup>1</sup>

---

<sup>1</sup> If any party seeks to implement any policy which is a deviation from the consistent application of Rule 21, its interpretation as expressed in *CalSTRS*, any interpretation contrary to the holding of *American Airlines* upon which the Board relied when adopting Rule 21, or even any position contrary to the foundational cases of *Forster Shipbuilding* or *San Pedro R.R. Co.* upon which the Court in *American Airlines* relied, then it would not only risk the illegal imposition of taxes on tax-exempt public property, but it would also require a rulemaking process by the Board under Govt Code § 15606(g). See LTA 2014/021 ("When a project involves the adoption, amendment, or repeal of a Property Tax Rule, generally the project will go through two processes...").

Finally, this proposed LTA should be adopted if for no other reason than because it would restate and clarify existing law regarding Rule 21 and its application to the existing real property and contractual rights of both tax-exempt public agency lessors and private taxpayer lessees. In the face of the inconsistent application of these provisions, the Board must exercise both its authority and its responsibility to defend the integrity of property tax rules.<sup>2</sup> As it clearly states itself, this is meant as guidance on how to apply these existing laws consistently with the “Board’s longstanding formal interpretation of its self-promulgated Rule” and to clarify that this interpretation of Rule 21 is “consistent with *CalSTRS*.” This will both ensure that appropriate deference is paid to the Board’s Rule and that it is consistently applied and interpreted by Courts, Assessors, AABs and taxpayers.

PMSA respectfully requests that the Board move forward with the issuance of this LTA. It very succinctly clarifies the application of Rule 21 and AH 510, based on *CalSTRS* and *American Airlines*, and restates that only legally cognizable estates for years which establish rights to possess publicly-owned real property are subject to possessory interest taxation.

Sincerely,



Mike Jacob  
Vice President & General Counsel

cc: Members, Board of Equalization  
Joann Richmond, Board Proceedings Division  
David Gau, Property and Special Taxes Department  
Randy Ferris, Chief Counsel

---

<sup>2</sup> An LTA is an appropriate mechanism for a clarification of existing law since it is the Board’s obligation to “instruct, advise, and direct assessors as to their duties under the laws.” Govt. Code §15608.