STATE BOARD OF EQUALIZATION
STAFF LEGISLATIVE BILL ANALYSIS

Date Amended:	**06/16/10**	Bill No:	**AB 1178**
Tax:	**Property**	Author:	**Torres**
Related Bills:			

BILL SUMMARY

This bill would expressly provide that a low-income tenant that resides in publicly owned low-income housing does not have a taxable possessory interest because the interest lacks the element of independence.

ANALYSIS

CURRENT LAW

Revenue and Taxation Code Section 107 sets forth the three essential elements that must exist to find that a person's use of publicly-owned tax-exempt property rises to a level of a taxable possessory interest. Those elements are independence, durability, and exclusivity.

With respect to the element of independence, Section 107(a)(1) defines "independent" to mean "the ability to exercise authority and exert control over the management or operation of the property or improvements, separate and apart from the policies, statutes, ordinances, rules, and regulations of the public owner of the property or improvements. A possession or use is independent if the possession or operation of the property is sufficiently autonomous[1] to constitute more than a mere agency."

Relevant case law and Property Tax Rule 20, a regulation, additionally require that a possessor derive "private benefit." "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."

Health and Safety Code Section 50079.5 defines "lower income households" as "persons and families whose income does not exceed the qualifying limits for lower income families as established and amended from time to time pursuant to Section 8 of the United States Housing Act of 1937."

PROPOSED LAW

Low-Income Tenants. This bill would add Section 107.10 to the Revenue and Taxation Code to provide that a low-income tenant that resides in a publicly owned low-income housing property does not have a use that is "independent." Thus, the tenant would not have a taxable possessory interest in his or her rental unit.

[1]Property Tax Rule 20 specifies that "[t]o be sufficiently autonomous 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, separate and apart from the policies, statutes, ordinances, rules, and regulations of the public owner of the real property."

This staff analysis is provided to address various administrative, cost, revenue and policy issues; it is not to be construed to reflect or suggest the Board's formal position.

"Low-income tenant" is defined to have the same meaning as "lower income households" as defined by Health and Safety Code Section 50079.5.

Legislative Findings and Declarations. The bill includes detailed findings and declarations:

(a) The provision of housing is of vital statewide importance to the health, safety, and welfare of the residents of this state and the basic housing goal of the state is to provide a decent home and suitable living environment for every California family.

(b) There is an urgent and continuing need to provide affordable housing to meet the increasingly unfulfilled housing needs of the state.

(c) Private enterprise and investment cannot economically achieve the needed construction of decent, safe, and sanitary housing at rents or purchase prices which persons and families of lower income can afford.

(d) State law establishes in every city and county a housing authority with the responsibility of addressing the lack of adequate housing for persons of lower income.

(e) It is the policy of the state that each housing authority manage and operate its housing projects in an efficient manner so as to enable it to fix the rentals for dwelling accommodations at the lowest possible rates consistent with it providing decent, safe, and sanitary dwelling accommodations, and that no housing authority shall construct or operate any such project for profit, or as a source of revenue to the city or the county.

(f) The purpose behind the taxation of possessory interests is to protect the public domain from private profit without tax liability.

(g) The use of public housing by low-income persons is an essential public use of publicly owned property that serves only to benefit the government and is necessary to further a statewide public purpose, which can be distinguished from those types of private uses with a profit motive for which the possessory interest tax was intended to apply.

Legislative Intent. The bill provides that it is the intent of the Legislature in enacting this act to provide legislative direction to county assessors, the Board, the courts, and other involved parties regarding the interpretation of the term "independent" as it relates to publicly owned low-income housing.

Declaratory of Existing Law. The bill provides that Section 107.10 is declaratory of existing law.

IN GENERAL

Possessory Interests. In certain instances a property tax assessment may be levied when a person or entity uses publicly-owned real property that, with respect to its public owner, is either immune or exempt from property taxation. These uses are commonly referred to as "possessory interests" and are typically found where an individual or entity leases, rents, or uses federal, state or local government facilities and/or land.

Revenue and Taxation Code Section 107 establishes parameters within which assessors and judicial authorities determine the existence of taxable possessory interests. Generally, those determinations are made according to the facts and circumstances in each individual case.

Low Value Ordinances. Section 1(a) of Article XIII of the California Constitution provides that all property is taxable unless otherwise provided by that constitution or the laws of the United States. Section 7 of Article XIII provides that "[t]he Legislature, two thirds of the membership of each house concurring, may authorize county boards of supervisors to exempt real property having a full value so low that, if not exempt, the total taxes and applicable subventions on the property would amount to less than the cost of assessing and collecting them."

Revenue and Taxation Code Section 155.20 provides the statutory implementation for this constitutional authorization. It provides that counties may exempt from property tax all real property with a base year value and all personal property with a full value so low that, if not exempt, the taxes and special assessments on the property would amount to less than the cost of assessing and collecting them. Except for certain kinds of possessory interests, the maximum value of property that may be exempted is $10,000. With respect to possessory interests in convention or cultural facilities and fairgrounds and fairground facilities, a board of supervisors has the authority to exempt interests that have a value of $50,000 or less.

COMMENTS

1. **Sponsor and Purpose.** This bill is sponsored by the author to ensure that low income tenants are not billed for possessory interest taxes related to the occupancy of publicly owned low income housing. The author states that assessing a property tax on these tenants effectively frustrates the state's interest in providing safe and sanitary housing for those who cannot otherwise afford it.

2. **The Board has consistently opined that possessory interest assessments should not be made against the occupants of low income housing, since to do so would defeat the purpose of public housing to provide affordable low-cost housing.** In one of the earliest cases involving low cost housing projects, *The Housing Authority of the County of Los Angeles* v. *Dockweiler*, 14 Cal. 2d 437 (1939), the California Supreme Court dismissed a challenge to the constitutionality of statutes creating and empowering local housing authorities to own and operate local housing projects specifically for the purpose of slum clearance and providing safe and sanitary low-rent dwellings for persons of low income. The Court concluded, inter alia, that public housing projects for low income families are public uses and purposes. Based on this premise, the Board has been of the opinion that possessory interest assessments should not be made against these tenants. Decisions in subsequent cases involving properties qualifying for the welfare exemption from property taxation and possessory interest assessments have been in accord with the Board opinion. *English* v. *County of Alameda* (1971), et al., First Appellate District, Division One, Case No. 29963, *John Tenant Memorial Homes, Inc.* v. *City of Pacific Grove*, 27 Cal. App.3d 372 (1972), *English* v. *County of Alameda*, et. al. (1977), 70 Cal. App.3d 226.

3. **While past, albeit limited, case authority tends to support a conclusion that no taxable possessory interests exist in the use of government-owned housing by low income persons residing therein, to date neither the courts nor the Legislature have directly addressed the issue.** If it is contended that taxable possessory interests do exist in such circumstances, then absent this bill, the issue will have to be ultimately resolved in the courts.

4. **Constitutional Considerations.** Legislation to exempt various possessory interests by statute has been often argued to be an "unconstitutional" exemption of real property. It is claimed that the appropriate course of action is to instead seek the approval of the voters of California by proposing a constitutional amendment to exempt the particular class of real property from property taxation. Therefore, some may argue that this legislation, if enacted, would similarly constitute an "unconstitutional" exemption of real property. However, in *City of San Jose v. Carlson (1997) 57 Cal.App. 4th 1348,* the court acknowledged the appropriateness of legislative action to set parameters on the element of durability. A similar rationale could be made for this bill, with respect to the element of independence. The Sixth District Court of Appeals in *City of San Jose* invited the Legislature to establish some statutory standards in measuring durability. The court stated:

   > Although we agree that the element of durability seems to have been 'diluted to a degree of almost nonexistence' (*United Airlines, Inc.* v. *County of San Diego* (1991) [cite omitted]), the Legislature has not seen fit to reverse the growing trend toward finding taxable possessory interests in short-term uses, even in its most recent amendments to Section 107. If there is a sound basis for distinguishing between a second time user and a third time user of government-owned property for purposes of identifying a taxable possessory interest, **it is within the province of the Legislature to clarify the parameters of that interest** in terms of frequency, duration, and length of time between uses. [Emphasis added.]

5. **Refunds and cancellations**. This bill expressly provides that its provisions are declaratory of existing law. This would in essence require refunds and cancellations subject to the statute of limitations provisions. However, the author may wish to amend the bill to expressly require cancellations and refunds to the low-income tenants, to ensure that funds paid are returned and to stop ongoing collection actions against those tenants that have not paid these assessments.

COST ESTIMATE

The Board would incur insignificant costs (less than $10,000) to inform and advise county assessors, the public, and Board staff of the change in law.

REVENUE ESTIMATE

This bill has a minimal revenue impact. It appears that only one county is currently levying such possessory interest assessments to low income occupants. Those assessments appear to be limited to single family residences rented by public housing authorities.

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