STATE BOARD OF EQUALIZATION
STAFF LEGISLATIVE BILL ANALYSIS

Date Amended:	**08/02/10**	Bill No:	**AB 1341**
Tax:	**Property**	Author:	**Lowenthal**
Related Bills:			

BILL SUMMARY

This bill would provide that a project agreement between a nongovernmental entity and the Judicial Council to replace and operate the Long Beach Courthouse is not a taxable possessory interest because the nongovernmental entity's interest lacks the element of independence.

SUMMARY OF AMENDMENTS

The amendments since the previous analysis delete language stating that this bill is declaratory of existing law.

ANALYSIS

CURRENT LAW

Possessory Interests. 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."

Court Facility Development. Government Code Section 70391.5 (SB 82, Stats. 2007, Ch. 176) and Senate Bill 77 (Stats. 2007, Ch. 171) together set out a procedure by which the Judicial Council may evaluate and, if determined to be in the best interests of the State, enter into agreements for court facility development that include alternate methods of project delivery, including a public-private partnership component.

[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."

SB 77 authorized the Administrative Office of the Courts to gather information for a public-private partnership agreement for the delivery of the new Long Beach Courthouse and authorized the Judicial Council to enter into a multiyear agreement for delivery of the courthouse, provided the agreements meet “established performance expectations.”

Government Code Section 70391.5 requires the Judicial Council to “develop performance expectations for court facility proposals, including benchmark criteria for total project life-cycle costs, project cost comparisons to traditional delivery and financing options, project risk assessments and allocations, utility and energy conservation requirements that meet or exceed state standards, and court security operations cost controls and reduction goals.”

PROPOSED LAW

Independence. Related to a project agreement entered into by the Judicial Council with a nongovernmental entity in accordance with Government Code Section 70391.5 to replace the Long Beach Courthouse, this bill would add uncodified language to provide that for purposes of Section 107(a)(1), the nongovernment entity does not have independent possession or use of the Courthouse, if all of the following criteria are met:

- **Build and Operate.** The nongovernmental entity is required to design, build, finance, operate, and maintain the Courthouse.
- **Nongovernmental Entity Selection Process.** The Judicial Council establishes performance expectations and benchmark criteria for the court facility proposal in accordance with Government Code Section 70391.5 to select the nongovernmental entity.
- **Thirty Five Year Term.** The Judicial Council and other governmental entities have exclusive use and control of the Courthouse land and improvements for court and related activities for a term of 35 years.
- **Title.** The Judicial Council will hold title to the land and improvements of the Courthouse.
- **Ownership for Federal Income Tax Purposes, etc.** The nongovernmental entity is not treated as the owner of the improvements of the Courthouse for any purpose, including federal income tax purposes, and does not take as a deduction any depreciation on the improvements.
- **Security Transaction.** Any lease-leaseback of land and improvements of the Courthouse with the nongovernmental entity is solely for the purpose of providing security for the payment by the Judicial Council of the service fee for services provided by the nongovernmental entity in connection with a court facility.

Nongovernmental Uses. This bill provides that its provisions do not apply to any lease of, or improvements to, the Long Beach Courthouse by the Judicial Council with a nongovernmental entity to the extent the land or improvements are used by the nongovernmental entity as commercial office space, retail space, or paid parking spaces not designated for use for governmental purposes or court facilities.

Legislative Intent. The bill states 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 the Long Beach Courthouse.

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.

Section 107.6 requires that when the state or any local government enters into a written contract with a private party whereby a possessory interest subject to property taxation may be created, the private party must be notified in the contract of the potential property tax consequences. If this notification is not given in the contract, the party may recover damages from the contracting state or local government.

COMMENTS

1. **Sponsor and Purpose.** This bill is sponsored by the Judicial Council of California to provide legislative direction to Los Angeles County and to ensure that possessory interest taxes will not be levied on this particular project. The bill includes detailed Legislative findings and declarations as to its purpose.

2. **Amendments.** The **August 2, 2010** amendments delete language stating that the provisions of this bill are declaratory of existing law. The **June 28, 2010** amendments deleted the prior version of the bill related to the disabled veterans' exemption.

3. **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.]

COST ESTIMATE

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

REVENUE ESTIMATE

The Administrative Office the Courts estimates that if the proposed Long Beach Courthouse is subject to the property tax, the property tax revenue would be approximately $4 to $5 million.

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