11-2167
TAX TYPE: PROPERTY TAX-LOCALLY ASSESSED
TAX YEAR: 2010
DATE SIGNED: 2-6-2013
COMMISSIONERS: B. JOHNSON, D. DIXON, M. CRAGUN
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

GOVERNMENT ENTITY C/O TAXPAYER, Petitioner, vs. BOARD OF EQUALIZATION OF SALT LAKE COUNTY, STATE OF UTAH, Respondent.	**INITIAL HEARING ORDER** Appeal No. 11-2167 Parcel No. ##### Tax Type: Property Tax/Locally Assessed Tax Year: 2010 Judge: Marshall

Presiding:
Jan Marshall, Administrative Law Judge

Appearances:
For Petitioner: REPRESENTATIVE FOR GOVERNMENT ENTITY, Assistant City Attorney
For Respondent: RESPONDENT-1, Special Counsel for District Attorney
RESPONDENT-2, Appraiser for Salt Lake County

STATEMENT OF THE CASE

Petitioner ("Taxpayer") brings this appeal from the decision of the Salt Lake County Board of Equalization ("the County"). This matter was argued in an Initial Hearing on March 29, 2012 in accordance with Utah Code Ann. §59-1-502.5. The Taxpayer is appealing the assessment of the privilege tax under Utah Code Ann. §59-4-101.

APPLICABLE LAW

Utah Code Ann. §59-4-101 imposes a privilege tax, as follows:

(1) (a) Except as provided in Subsections(1)(b) and (c), a tax is imposed on the possession or other beneficial use enjoyed by any person of any real or personal property which for any reason is exempt from taxation, if that property is used in connection with a business conducted for profit…
(2) The tax imposed under this chapter is the same amount that the ad valorem property tax would be if the possessor or user were the owner of the property. The amount of any payments which are made in lieu of taxes is credited

against the tax imposed on the beneficial use of property owned by the federal government.

(3) A tax is not imposed under this chapter on the following:

(e) The use or possession of any lease, permit, or easement unless the lease, permit, or easement entitles the lessee or permittee to exclusive possession of the premises to which the lease, permit, or easement relates. Every lessee, permittee, or other holder of a right to remove or extract the mineral covered by the holder's lease, right, permit or easement except from brines of the Great Sale Lake, is considered to be in possession of the premises, not withstanding the fact that other parties may have a similar right to remove or extract another mineral from the same lands or estates…

(4) A tax imposed under this chapter is assessed to the possessors or users of the property on the same forms, and collected and distributed at the same time and in the same manner, as taxes assessed owners, possessors, or other claimants or property which is subject to ad valorem property taxation. The tax is not a lien against the property, and no tax-exempt property may be attached, encumbered, sold, or otherwise affected for the collection of the tax.

DISCUSSION

The subject property is parcel no. #####, located at ADDRESS in CITY, known as "THE PROPERTY." At issue are those areas inside of the PROPERTY which are designated as "(X) Exclusive Areas" in the PROPERTY License Agreement. The exclusive areas (HEREFORTH KNOWN AS "THE AREA"), (PART OF SENTENCE REMOVED).

The Taxpayer's representative argued the Taxpayer is exempt from the privilege tax under Utah Code Ann. §59-4-101(3)(e) because their License Agreement does not grant the TAXPAYER exclusive possession, nor do the TAXPAYER have exclusive possession as a practical matter. In support of its position, the Taxpayer's representative cited to the recently published Utah Supreme Court decision, *Alliant Techsystems, Inc. v. Salt Lake Board of Equalization, et.al.*, 700 Adv. Rep. 89 (Utah 2012). The Court in *Alliant Techsystems* held, "…under the Privilege Tax Statute, 'exclusive possession' means exclusive as to all parties, including the property owner. Thus, exclusive possession exists when an entity has the present right to occupy and control property akin to that of an owner or TAXPAYER." The Taxpayer's representative stated that *Alliant Techsystems* requires possession to be exclusive against all third parties and the owners itself, and while the TAXPAYER may be able to exclude third parties, they cannot exclude the owner of the property. He stated that the Taxpayer is required to provide the city with access to the property for inspection and repair. He further contends that the standard set forth in *Alliant Techsystems* also require control over improvements to the property.

He stated that the TAXPAYER cannot make improvements to the property without the permission of the City. The Taxpayer's representative argued that in practice, the Taxpayer does not have control over the subject property.

In addition, the Taxpayer's representative argued that the privilege tax doesn't apply when the tax burden is put upon the general public. The GOVERNMENT ENTITY has a 40% ownership interest in the TAXPAYER, and shares in the profits and losses of the Taxpayer. He argued that the tax burden is directly shifted to the residents of GOVERNMENT ENTITY. The Taxpayer relies upon *Interwest Aviation v. County Bd. of Equalization of Salt Lake County,* 743 P.2d 1222 (Utah 1987), which held that privilege tax does not apply when a unit of government would need to levy taxes in order to pay that tax.

The County's representative argued that the burden of proof is on the Taxpayer, and that exemptions from taxation are to be narrowly construed. She cited to *Utah County Bd. of Equalization v. Intermountain Health Care*, 709 P.2d 265, 268 (Utah 1985). She stated that the Taxpayer has the burden of proof as to the whether they qualify for exemption, and it is not the County's obligation or burden to prove that the Taxpayer is not entitled to the exemption.

The County's representative stated that the only area that is subject to the privilege tax is the "(X) Exclusive Area", and provided a copy of Exhibit B to the PROPERTY License Agreement, noting that the shaded portion is the area subject to the privilege tax. The County's representative noted that Section 2.O. of the PROPERTY License Agreement describes the (X) Exclusive Area as, "Generally including THE AREA, (MOST OF SENTENCE REMOVED).

The County's representative stated that it is important to carefully look at the agreement because some of the representations made by the Taxpayer's representative apply to the entire PROPERTY or the event areas, and not the exclusive (X) area. She stated that it is not just about control, but control and occupancy. She stated that *Alliant Techsystems* also provides that if a party has a definite and defined space set forth in the agreement with a set period of time in which to occupy, then they have exclusive possession. She argued that the Taxpayer has a #####-year lease of the premises for the duration of the (X) season; therefore the city has no right to occupy that area. The County's representative stated that the City has the right to inspect and make alterations to the property and argued that is not considered to be "occupying" the property and that the right to make alterations and improvements is not considered "control." She stated that under the agreement, the City is providing substantial services to the Taxpayer. The Taxpayer is the primary tenant of the PROPERTY, and the City is doing everything they can to make sure the Taxpayer can use the PROPERTY; including maintenance and keeping up the sanitary conditions

of the building. She stated that even though the Taxpayer asserts they have very little control over SCHEDULING EVENTS, that are conducted in the event area and has nothing to do with whether the City has any use or control over the (X) exclusive area. She stated that the City gives the Taxpayer a certain number of days that the event area can be used, and then the Taxpayer works in coordination with the (Y) to select dates, and those are not made available to any other party until the Taxpayer relinquishes those dates. The County's representative stated that in reviewing the Alliant Techsystems case, when determining whether there is an exemption from the privilege tax, one must look at whether there is an exclusive right to occupy, as well as the owners retained rights to occupy and control. She stated that there is no evidence or indication in the agreement that suggests the City, as landlord, has retained the right to occupy the "(X) Exclusive Area". She stated that as landlord, the City has certain obligations to maintain the property.

The County's representative argued that the Commission should give little weight to the Taxpayer's argument that the privilege tax shifts the burden to taxpayers because the City is not a majority owner, and has only a minority interest. She stated that it was in the interest of both the City and the Taxpayer to enter into a for-profit arrangement, and if the City determines it wants to engage in a for-profit business, it is not exempt from taxation. She stated that the Commission should not look at the City as an exempt entity when looking at its ownership interest. She argued that the Taxpayer has not cited to any case law to support the contention that the property should be exempt because the City owns an interest, and stated that if the Commission adopts that position, it would require them to adopt an expansive position that goes beyond the Utah Constitution.

In rebuttal, the Taxpayer's representative acknowledged that the Taxpayer does have the burden of proof; but objects to the County's characterization that if the Commission has any doubt, they should not grant the exemption. He stated that the burden is not "beyond a reasonable doubt" and it is not a heightened burden; he maintains the Taxpayer just has to meet a burden that is strictly construed. He argued that there are events that do impact the operations in the "(X) Exclusive Area". The Taxpayer's representative stated that those restrictions that apply to the PROPERTY also apply to the "(X) Exclusive Area" and THE AREA. He stated that being able to have advertisements in THE AREA when interviews occur is a valuable commodity. He stated that the County's argument that the Taxpayer occupies a defined space for a defined time is not sufficient, but rather, the Commission should look at what use is allowed of that space during the defined time. The Taxpayer's representative acknowledged that the City does provide a number

of services; however, he argued that the motivation for the access is irrelevant. He further pointed out that Section 23.A. of the agreement refers to access to the PROPERTY, including the exclusive areas, and that it is not limited for the purpose of repair and maintenance. The Taxpayer's representative further argued that a good portion of the year is not (X) season, and the Taxpayer cannot have control if they only have exclusive use during the (X) season.

The subject property would generally be exempt under Utah Code Ann. §59-2-1101(3)(a) as it is owned by GOVERNMENT ENTITY. However, Utah Code Ann. §59-4-101 imposes a tax on the "possession or other beneficial use enjoyed by any person of any real or personal property which for any reason is exempt from taxation, if that property is used in connection with a business conducted for profit." The tax is imposed at "the same amount that the ad valorem property tax would be if the possessor or user were the owner of the property." Utah Code Ann. §59-4-101(2). The Taxpayer maintains it is exempt from the privilege tax under Utah Code Ann. §59-4-101(3)(e), arguing that they do not have "exclusive possession". The Utah Supreme Court has addressed this exemption recently in *Alliant Techsystems, Inc. v. Salt Lake Board of Equalization, et al.*, 2012 UT 4. The Court held, "under the Nonexclusive Possession Exemption, courts must examine whether the user or possessor has a present right to occupy and control the exempt property akin to that of an owner or lessee. This determination requires the court to examine the owner's retained right to occupy and control the property."

The City has granted an "exclusive license" to the Taxpayer for the exclusive use and occupancy of the "(X) Exclusive Area" for a period of NUMBER OF SEASONS. (Sections 3 and 4 of the PROPERTY License Agreement). Section 2.L. of the agreement defines the "(X) Exclusive Area", and provides that with the exception of THE AREA, those areas were provided to the Taxpayer as shell space only, to be finished by the Taxpayer. However, Section 26 of the agreement provides that prior to the Taxpayer making any improvements, additions, or alterations to the "(X) Exclusive Area", they "shall submit to the City, for approval, schematic designs, design development drawings, and final working drawings and specifications for the undertaking of any and all demolition, construction, improvement, alteration, or addition in or on the (X) Exclusive Areas or any portion thereof". Additionally, if any such work has a cost in excess of $$$$$, the Taxpayer may not begin until after they have received written approval of the City. And all such improvements, additions, and alterations made to the "(X) Exclusive Area" become property of the City upon expiration or termination of the agreement. Further, the Taxpayer is required to maintain certain insurance coverage for any such work with a cost of $$$$$ or more.

Under Section 27, the City provides for the maintenance and janitorial services of the PROPERTY, including the "(X) Exclusive Areas".

Section 23 of the agreement provides that the Taxpayer and the City shall provide each other with access to the PROPERTY, specifically including the "(X) Exclusive Area". Additionally, each party is required to deliver keys "as are necessary to enable the other party, at any time, to unlock any door in and to the PROPERTY, including the (X) Exclusive Area…"

Section 29 of the agreement prohibits the Taxpayer from conducting environmental testing without the City's written consent. However, the Taxpayer is required, with 48 hours notice, to provide the City with access to the (X) Exclusive Area for such environmental testing.

Under the Court's analysis in *Alliant Techsystems, Inc.*, the Taxpayer would not be considered to have "exclusive possession" because the City, with regard to the "(X) Exclusive Area" has reserved the rights to have access at any time; requires keys to the area; must give approval for any improvements, alterations, or additions; requires certain insurance coverage for any such improvements; and provides the maintenance and janitorial services.[1]

_____

Jan Marshall
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission finds the (X) Exclusive Area is not subject to the privilege tax. It is so ordered.

This Decision does not limit a party's right to a Formal Hearing. Any party to this case may file a written request within thirty (30) days of the date of this decision to proceed to a Formal Hearing. Such a request shall be mailed to the address listed below and must include the Petitioner's name, address, and appeal number:

[1] The Supreme Court in *Alliant Techsystems, Inc.* remanded the issue to the Third District Court because there was a factual dispute as to the right to control the property. Judge Dever, under the directive of the Supreme Court's decision found that the rights retained by the Navy precluded Alliant Techsystems from having exclusive possession of the property. In reviewing the remanded decision, it does not change the Commission's analysis in this matter.

Utah State Tax Commission
Appeals Division
210 North 1950 West
Salt Lake City, Utah 84134

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this _____day of _____, 2013.

R. Bruce Johnson
Commission Chair

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner