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| <p>BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203</p> <hr/> <p>Petitioner:</p> <p>WESTERN AIR OF BOULDER,</p> <p>v.</p> <p>Respondent:</p> <p>BOULDER COUNTY BOARD OF EQUALIZATION.</p> |  |
| <p>Attorney or Party Without Attorney for the Petitioner:</p> <p>Name: Edward R. Byrne, Esq. Address: 2338 Broadway, Suite 300 Boulder, Colorado 80304-4107 Phone Number: (303) 447-2555 E-mail: Attorney Reg. No.: 11786</p> | <p>Docket Number: 39993</p> |
| <p>ORDER</p> | |

THIS MATTER was heard by the Board of Assessment Appeals on August 22, 2002, Judee Nuechter and Karen E. Hart presiding. Petitioner was represented by Edward R. Byrne, Esq. Respondent was represented by Robert Gunning, Esq.

PROPERTY DESCRIPTION:

Subject property is described as follows:

(Boulder County ID No. 0122999)

Petitioner is protesting the 2001 actual value of the subject property, a possessory interest in six aircraft hangars, 43 tie-downs, and a portion of the airport terminal building, all located at the Boulder Municipal Airport.

ISSUES:

Petitioner:

Petitioner contends that the subject properties have been overvalued. Respondent has failed to deduct certain expenses that relate to common areas. The lease with the City of Boulder was let prior to the taxability of possessory interest, which is why the lease does not delineate a specific amount for CAM expenses. However, 87.5% of the city's airport expenditures over a five-year period are for the upkeep of the airport. Therefore only 12.5% of the lease income should be used to value the property.

The Respondent believes that the rent being paid is entirely for the tenant's beneficial use. In the eyes of the property owner, the city, the tenant is paying for the cost of their facilities, but they are also paying for common area expenses. The tenant should not be penalized because the lease was let prior to the taxability of the possessory interest. They agree the lease is at market rent, but dispute the characterization of the lease as net; it is a gross lease.

Respondent:

Respondent contends that the subject property has been correctly valued using the income approach. Petitioner's requested expense deductions are not allowed under Colorado Revised Statutes or the Division of Property Taxation guidelines, which are binding on all assessors. Respondent does not believe any of the expenses should be deducted; the subject property lease is a net lease at market rates.

This is not a public/private partnership. The government leases to a private party. The assessor did not ignore readily available data. The ultimate test is whether the rent is market. When there is a net lease, no income exclusion is necessary. No income exclusion is required or appropriate in this case. The value of the possessory interest is what is important, not what the governmental entity does with the lease money.

FINDINGS OF FACT:

1. Petitioner's witness, Mr. Burton Lee, MAI, in a consultant capacity, from Bristol Realty Counselors, testified that the issue is regarding the components related to a part of the lease payment and whether it should be excluded. The assessor excluded expenses at one time but is now allowing no exclusion of expenses. Mr. Lee believes that a reasonable amount of exclusion is 87.5%.

2. Mr. Lee testified that the controlling information is the lease itself, and trying to determine what should be excluded, if anything. The airport operates at essentially a break-even point. He believes the leases are structured to cover the city's costs. On average, there are surplus revenues of 12.5% per year. He believes the city is using 87.5% of the lease revenues to maintain the airport.

3. Mr. Lee testified that Petitioner's Exhibit A is his spreadsheet for 1996 through 2000 of actual airport revenue received. 2001 is only budgeted information, which shows a substantial increase in income and expenses due to a major capital project at the airport. The lease rents and royalties minus public works, results with the airport losing money. Therefore, it needs the other revenues, such as interest, to support the operation. He believes the important numbers are the excess revenue percentages. The aggregate of the five years is 12.5% excess revenues.

4. Mr. Lee testified that he understands that all of the administrative costs were related to the airport operations. The leases associated with the Boulder airport are different than those at two other airports with which he is familiar. The majority of the buildings at the airport are owned by the city, including the subject. The buildings were built by the leaseholder, who was then required to turn the building over to the city.

5. Mr. Lee believes the assessor's methodology is correct except for the exclusion issue. The assessor has decided not to exclude any of the income, and Mr. Lee does not believe that is reasonable or reliable.

6. Under cross-examination, Mr. Lee clarified that he has not prepared an appraisal and has no opinion of value for the subject property. He admitted that in Exhibit A-1, the 2001 information is budget data, not actual expended figures. A portion of the revenue and expenses were for capital improvement, the majority of which came from the FAA. It is his opinion that the exclusion is more normalized and reasonable in a multi-year look rather than a single year. He believes 87.5% should be excluded from the revenue now, and that the amount would vary over years dependent upon the percent of revenue that should be excluded, including years where there would be a zero value for the possessory interest. He believes the issue is not whether the airport makes or loses money. There is a portion of the expenses that is for the airport manager's salary and other benefits, other services, etcetera. He understands that in some buildings, the city has the obligation to perform some maintenance functions, and admits that there could be expenses included that are for repairing these buildings, as well as buildings that are not leased.

7. Mr. Lee admitted that there was no provision in the Colorado Revised Statutes or the Division of Property Taxation ARL for a five-year rolling average. However, he feels such a methodology is reasonable.

8. Upon questioning from the Board, Mr. Lee testified that he is not tying the possessory interest to business value. He believes the subject property situation is unique due to the lease structure.

9. Petitioner's witness, Mr. Ray Grundy, Manager of the City of Boulder Municipal Airport, testified that he has been the airport manager for 15 years. The city owns all of the buildings at the airport with one exception (which is not involved in this appeal). Mr. Rex Walker, owner of Western Air of Boulder, negotiated a new lease with the city in 1991.

10. Mr. Grundy testified that in the past, the airport operated in the red. It now must operate on its own; all of the revenue must cover the expenses of the airport. He is the only regular city employee; ninety percent of his time has been spent in the operation and maintenance of the airport. There are cost allocations charged by the city for services they

provide to the airport, such as billing costs, legal fees, public works administration, and etcetera. The operating expenses are charged to the tenants by the city; in other words, the tenant reimburses the city for those costs. The substantial portion of the revenues is spent for the operations of the airport. The tenants have non-exclusive access to areas such as runways, taxiways, operating areas, park-like areas, and the general lobby area of the terminal. Tenants can assign their leases to others, with city approval.

11. Mr. Grundy testified that Mr. Walker also has a lease on the main lobby area in the terminal, which he must maintain at his own expense. The city would pay for major repairs, but cleaning and daily maintenance is Mr. Walker's expense.

12. Mr. Grundy testified that this year they used FAA grant monies to do electrical upkeep, such as the runway lighting. Past years' profits have been used to cover the city's share of matching funds, which is 10% of the grant.

13. Under cross-examination, Mr. Grundy testified that he negotiated the lease with Western Air. They tried to arrive at a fair value in order to receive substantial cash flows. Since 1986, substantial grounds improvements have been made and the level of service has increased greatly. Two-thirds of the budget goes to ongoing maintenance and operations. They tried to establish a fair square foot lease according to land areas, and to get a reasonable return on the structures. As of January 1, 2001, Petitioner was leasing six T-hangars, which hold ten aircraft each, a parcel that is part of the fuel farm, and a substantial portion of Building J, the terminal.

14. Petitioner has constructed improvements that are now owned by the city. The tenants with long-term leases have made major capital improvements that exceed \$250,000.00 in cost; they can get a 20-year lease to allow amortization of their costs. The long-term leases are limited in length to 20 years due to the city charter. Petitioner subleases to other parties, for example, subletting a portion of the terminal to another business that runs a flight school. Petitioner pays the expenses at the terminal except for major repairs.

15. In redirect, Mr. Grundy testified that the tenants pay rent for their building, as well as for use of the larger facilities. The lease requires that most of the maintenance costs are to be covered by the tenant.

16. Upon questioning from the Board, Mr. Grundy testified that the city does not separately bill the tenants for reimbursements; however, the revenues received from the tenants pay the expenses.

17. Petitioner is requesting a 2001 actual value of \$58,762.50 for the subject property, based on the income approach.

18. Respondent's witness, Mr. Alex Martinez, Appraisal Standards Manager with the Division of Property Taxation (DPT) testified that part of his responsibility is to develop and promulgate rules and procedures for county assessors' use in valuing property. Mr. Martinez was admitted as an expert in the field of Colorado property taxation.

19. Mr. Martinez testified that Exhibit 5 is part of the Assessor's Reference Library (ARL) and involves possessory interest taxation procedures. He supervised and was an active

participant in the development of the procedures. A Colorado Supreme Court case was issued in February of 2001, which allowed the taxation of possessory interests. The DPT then developed procedures by integrating the requirements established by the court, in statute, and also requirements under appraisal theory. The regulations are approved by the State Board of Equalization and are binding on all assessors in the state, to provide for uniformity and equity in the application of appraisal practice in developing taxable values in the state. The procedures for possessory interests are effective as of the 2001 tax year.

20. Mr. Martinez testified that Pages 7.87 and 7.88 of Exhibit 5 pertain to income exclusions. There is no provision to allow any income exclusion when there is a net payment. There is an underlying assumption that net payments reflect a net market rent.

21. Mr. Martinez testified that the statute contemplates several situations that would generate an exclusion: income attributable to the use of roads, rights of ways, easements, and common areas. The DPT has interpreted these exclusions to be that any item that is above and beyond what is determined as economic or market based rents may be considered income for something other than exclusive use and right of a particularly designated area which the holder of the possessory interest has control over.

22. Mr. Martinez testified that exclusions should be made when there is a CAM charge assessed that is above the stated lease rate, which is then passed on to the holder of the possessory interest.

23. Regarding the subject property lease as it refers to the northerly portion of the terminal building, Mr. Martinez testified that he would conclude that this charge may be excluded from the total rents if it is included as part of the total lease payment. If there is a base rent, and then there is an amount that is added for some expenses, that is what would be deducted from the total revenue that is generated. The exclusion is not made if the lease rent is net of expenses. The regulations provide that the costs be identified in the lease that grants the possessory interest.

24. Mr. Martinez testified that he did not believe there was enough information provided that would make it appear that the rents that are being paid for the use of the possessory interest may exceed what is supported by the market. The assessor is required to gauge the level of the income of the possessory interest against an economic or market based level, to provide for equity and uniformity in valuation across the state when compared to fee owned properties. The higher the rental payment, the greater the value of the possessory interest, provided that the rental payment is representative of market rent. He is not aware of any five-year rolling average provision in either the statute or the ARL.

25. Under cross-examination, Mr. Martinez testified that the regulations were not published until 2002. The SBOE allowed the counties to assess on back taxes based on the provisions outlined by the DPT for possessory interests. Some counties had already valued possessory interests based on the statute. The DPT took the statutory language and put it in a workable format. The statute does not say that the expenses must be separately stated. The statute also contemplates that the assessor look at the income side as well and must determine if the rents are market based rents or other rents.

26. Mr. Martinez testified that he has not reviewed the Western Air lease. It would be proper for the assessor to determine what expenses are valid for exclusion, if they do exist. Previous to 1996, there were provisions to tax possessory interests for properties on airports, which were effectively eliminated in 1996 with the implementation of the new statutory language that effectively exempted all possessory interest. He believes they have attempted to promote the fairness, equitability, and taxability of properties with their regulations.

27. He does not agree with Mr. Lee's interpretation of the statute or his methodology. The procedures are very specific in what should be excluded. Petitioner's amounts being excluded do not fit in the procedures as intended. There are certain costs and expenses that are incurred in the maintenance of a facility, especially one such as an airport. The way it is being handled does not conform with either the DPT's interpretations of the statute, nor with the procedures outlined in the ARL. The assessor's responsibility is to look at the lease payment of the subject and compare it to other lease payments that are being commanded in the neighborhood that can be deemed as comparable. If the lease payments are not supported by market and the analysis for that particular area, then the assessor can use market driven rates in order to generate a value on the possessory interest. He did not see any reference to relevant market rates in Respondent's appraisal report.

28. Mr. Martinez testified that the value of a possessory interest does not inure to the property itself because the property is owned by a tax-exempt entity. The theory behind valuation of possessory interest is that you value the beneficial use of that property. The statute contemplates determining a value calculated on a present worth of the lease based on the terms and length of the lease. As the holder of a possessory lease, what is the benefit to the lessee; a twenty-year lease is more valuable to the lessee for future business decisions as compared to short-term leases.

29. Mr. Martinez testified that there is no relevancy in terms of where the cash outlay of the tax-exempt entity goes. There is no connectivity that is relevant to the possessory value. The 87.5% expenditures in the city's budget are totally irrelevant, the assessor does not have to consider it, and there is not any authority for the assessor to exclude it.

30. It is appropriate for the assessor to look at the lease and compare it to market. The statute indicates that reliance should be given to the lease terms if and only if they are supported by market; the assessor can impute market-based rates on the possessory interest valuation. A lease that delineates base rent and CAM charges could lead to excludable income, when the CAM charges fall under the items that are excludable under the statute.

31. Based on what he has heard today regarding the subject property being valued at 100% of the rent payment without any cost exclusions, Mr. Martinez testified the assessor's methodology is in conformance with the DPT regulations.

32. Upon questioning by the Board, Mr. Martinez testified that the only difference between rent capitalization in a private airport and a possessory interest such as the subject property is the capitalization and discounting of the possessory lease according to the remaining lease term, rather than in perpetuity.

33. Respondent's witness, Mr. Samuel M. Forsyth, a Certified Residential Appraiser and Chief Deputy Assessor with the Boulder County Assessor's Office, presented the following indicator of value:

Income: \$471,000.00

34. Mr. Forsyth testified that he considered all three approaches to value. There was a lack of adequate information to determine a value via the market and cost approach.

35. Mr. Forsyth testified that the original value for the subject property was determined in May of 2001, which was prior to the issuance of the DPT guidelines. At that time they excluded 38% of the expenses. He now believes that it is not appropriate to exclude any portion of the expenses.

36. Mr. Forsyth testified that the income approach is the best methodology to use to value the subject property. There were 12 years remaining on the lease. He valued the property by calculating the present value of future benefits. He could not identify from the terms of the lease any expenses that qualified for deductions. The Petitioner is responsible for insurance and utility costs. He believes the lease is net. They looked for any payments that may be imbedded in the lease. The lease does not identify any costs that should be excluded. He has already reviewed over 200 possessory interest properties. The City of Boulder also has ten leases for parking garages. In those cases, it is clear in the lease that a specific amount of the payment is for common area maintenance (CAM). The lease rate on the garages and the airport are market leases.

37. In cross-examination, Mr. Forsyth described the subject property as including 43 tie downs, six hangars and the terminal. There were no DPT regulations in force at the time the value was assigned.

38. The CBOE value of \$322,900.00 listed on the notice of determination is in error. Respondent indicated that the assigned actual value listed on the taxroll was \$313,800.00 for the subject property for tax year 2001. The assigned value included a 38% reduction for excluded expenses, which Respondent now believes should not have been deducted. The correct value without exclusions should be \$471,000.00, which is the value of the subject property presented by Respondent in this hearing.

39. In rebuttal, Mr. Burton Lee presented an example of a possessory lease situation. Mr. Lee has tried to quantify what the common area maintenance (CAM) charges would have been, were they quantified in the lease rate. Mr. Lee is looking at the lease as 12.5% net and CAM at 87.5%.

CONCLUSIONS:

1. Respondent presented sufficient probative evidence and testimony to prove that the subject property was correctly valued for tax year 2001.

2. The Board was given three separate and diverse views of the subject property and its expense allocations. Mr. Grundy was of the opinion that all of the rent monies were to cover airport expenses. Mr. Forsythe testified that he believes the rent monies are net market rates. Respondent characterizes the lease as gross, and Mr. Lee believes 87.5% of the lease monies are expended by the City for excludable expenses.

3. Colorado Revised Statutes 39-1-103-(17)(II)(A) states in part "...The rents or fees used to determine the actual value of a possessory interest under the cost or income approach to appraisal shall be the actual contract rents or fees reasonably expected to be paid to the owner of the underlying real or personal property unless it is shown that the actual contract rents or fees to be paid for the possessory interest being valued are not representative of the market rents or fees paid for that type of real or personal property, in which case the market rents or fees shall be substituted for the actual contract rents or fees."

4. C.R.S. 39-1-103(17)(II)(B) states in part "...The rents or fees taken into account... shall exclude that portion of the rents and fees required to be paid for all rights other than the exclusive right to use and possess the land, improvements, or personal property. Such rents or fees to be excluded shall include, but shall not be limited to, any portion of such rents or fees attributable to any of the following: Nonexclusive rights to use and possess public property, such as roads, rights-of-way, easements, and common areas; ... and reimbursement to the owner of the underlying real or personal property of the reasonable costs of operating, maintaining, and repairing the land, improvements, or personal property to which the possessory interest pertain, regardless of whether such costs are separately stated, provided that the types of such costs can be identified with reasonable certainty from the documents granting the possessory interest..."

5. Accordingly, the Board believes there are two separate issues to be determined in this case:

- Is the lease rate for the subject property a market rent?
- Are costs included in the lease rate that are for the reimbursement of costs as defined in the above statute?

6. It is not disputed that the subject property lease rent is market rent. What is disputed is whether the lease rent is net or gross of expenses.

7. The Board has examined the lease and has determined that a portion of the terminal building is a common area, but only the northern portion of the terminal is included in the lease. The remainder of the terminal and other common areas are expressly excluded from the lease. Section 9 of the lease states: "The lobby area, the bathrooms adjacent to the lobby area and the flight planning areas in the Terminal Building are not part of the Premises and shall be open to the public during normal Airport business hours and shall be maintained by the City in a clean and safe condition."

8. The lease clearly states the lessee is responsible for all utility costs on the leased premises, with the exception of the terminal and northerly portion of Parcel 1, for which the lessee shall pay 75% of the utility costs. Section 22 states that the "Operator accepts responsibility for the maintenance and repair of all improvements located on the Premises with the singular exception of the Terminal Building." The section further states in paraphrase, the

City may correct unsatisfactory maintenance or repair items at the Operator's expense, which expenses will be reimbursed to the City.

9. Section 22 B, states in part "The City shall maintain all municipal utilities, roads, runways and major taxiways serving the Premises and the Airport." Section 22 C, states in part "The City shall maintain the northerly portion of the Terminal Building. Operator agrees to pay seventy-five percent (75%) of the janitorial service costs for the northerly portion of the Terminal Building." Section 28 states in part "If any real or personal property tax shall be assessed by any governmental agency against the property on the Premises, Operator shall be responsible for and promptly pay such tax."

10. After review of the lease and testimony presented, the Board determines that the provisions of the lease are typical of those found in net leases. According to the ARL Volume 3, Page 7.87, "When net payments and fees are made by the possessory interest holder, no income exclusion is necessary". The Board finds this directive to be consistent with the statute, and further finds that there was no evidence of qualifying reimbursable expenses paid by the Petitioner that should be excluded from the income analysis as performed by Respondent.

11. The Board was not persuaded that how the City spends the lease monies is relevant to the value of the subject property. The primary consideration is whether there are qualified reimbursable expenses, and the Board found no evidence to support any such expenses. In fact, the lease indicates that the City, not the Petitioner, is responsible for the expenses of the common areas, such as the remainder of the Terminal building, roads, runways and major taxiways serving the Premises and the Airport.

12. The Board affirms Respondent's valuation methodology as presented in this case. The Board further notes that the assigned value of \$313,800.00 is less than the corrected value presented by Respondent, due to Respondent's improper exclusion of 38% of the expenses as originally calculated at the beginning of the appeal process. However, the Board has no authority to order an increase in the assigned value to the correct value of \$471,000.00, which does not reflect deductions for exclusions.

ORDER:

The petition is denied.

APPEAL:

Petitioner may petition the Court of Appeals for judicial review within 45 days from the date of this decision.

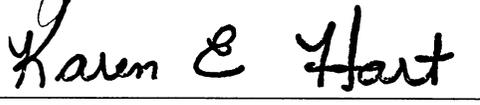
If Respondent alleges procedural errors or errors of law by this Board, Respondent may petition the Court of Appeals for judicial review within 30 days from the date of this decision.

DATED and MAILED this 16th day of September, 2002.

BOARD OF ASSESSMENT APPEALS



Judge Nuechter

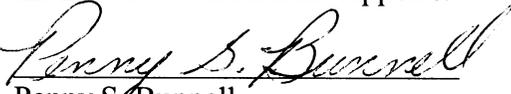


Karen E. Hart

This decision was put on the record

SEP 13 2002

I hereby certify that this is a true
and correct copy of the decision of
the Board of Assessment Appeals.



Penny S. Bunnell

