

**BOARD OF ASSESSMENT APPEALS,
STATE OF COLORADO**
1313 Sherman Street, Room 315
Denver, Colorado 80203

Petitioner:

TRUGOY, INC., DBA TCBY YOGURT,

v.

Respondent:

DENVER COUNTY BOARD OF COMMISSIONERS.

Attorney or Party Without Attorney for the Petitioner:

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**Docket Number:
41193, 41194, 41195**

ORDER

THIS MATTER was heard by the Board of Assessment Appeals on December 5, 2003, Debra A. Baumbach, MaryKay Kelley, and Diane M. DeVries presiding. Petitioner was represented by Richard S. Strauss, Esq. Respondent was represented by Maria Kayser, Esq.

PROPERTY DESCRIPTION:

Subject property is described as follows:

**Docket Number 41193 (Denver County Schedule #12211-01-043-000) Food Court
Concourse B**

**Docket Number 41194 (Denver County Schedule #12211-02-016-000) Food Court
Concourse C**

Docket Number 41195 (Denver County Schedule #12211-01-026-000) Main Terminal

Petitioner is requesting an abatement/refund of taxes on the subject property for tax year 2001 and 2002. The subject property consists of three locations within Denver International Airport (DIA): one location in the main terminal, one in the Food Court on Concourse B and one in the Food Court on Concourse C.

The parties agreed that Docket Numbers 41193, 41194, and 41195 would be consolidated for hearing.

ISSUES:

Petitioner:

Petitioner contends that the subject property is not taxable as a possessory interest. The Petitioner contends that the subject property does not have significant incidents of private ownership to be taxable. In *Board of County Commissioners, County Eagle, State of Colorado v. Vail Associates Inc. et al and the Board of Assessment Appeals and Allen S. Black et al, v. Colorado State Board of Equalization* 19 P. 3d 1263 (Colo. 2001) the Colorado Supreme Court held that there are three factors for determining whether significant incidents of private ownership exist. These three factors are: 1) an interest that provides a revenue-generating capability to the private owner independent of the government property owner; 2) the ability of the possessory interest owner to exclude others from making the same use of the interest; 3) sufficient duration of the possessory interest to realize a private benefit therefrom.

Respondent:

Respondent contends that the Board of Assessment Appeals does not have jurisdiction in Docket Numbers 41193 and 41194 for tax year 2002 since the Petitioner failed to exhaust its administrative remedies during the protest period for tax year 2002 as set forth in CRS 39-5-122. The Petitioner appealed to the Assessor and received a Notice of Determination, but did not perfect the appeal to the County Board of Equalization for tax year 2002. The Board allowed the parties to submit legal arguments on this issue within 10 days from the date of this hearing and then for the Petitioner to respond within five days.

Respondent contends that the Petitioner is possessory interest and does have significant incidents of private ownership that distinguish it from the underlying tax-exempt ownership. The subject property has been valued and taxed as set forth by Colorado Revised Statutes and in accordance with the Property Tax Administrator's Assessor's Reference Library.

FINDINGS OF FACT:

1. Petitioner's witness, Gregory A. Forst, partial owner of Trugoy, Inc. and Corporate Secretary, testified that he is responsible for the day-to-day operations of its three locations at Denver International Airport (DIA).

2. Mr. Forst testified that Trugoy, Inc. used the trade name of TCBY, a franchise. Its purpose is to sell food and beverages in three locations at DIA: one at the south end of the main terminal with 1,800 square feet, one in the Concourse B Food Court with 608 square feet and one in the Concourse C Food Court with 785 square feet. Each location sells frozen yogurt, ice cream, muffins, cookies and beverages to the general public and airport personnel.

3. Mr. Forst testified that he entered into three agreements between the City and County of Denver and Trugoy, Inc., dba TCBY Yogurt. He stated that he entered into the first agreement with the City and County of Denver. The Food Court agreements are dated April 14, 1993 and the Terminal agreement was dated May 19, 1993.

4. The witness testified that the agreement states that the Petitioner is not exclusive. The Petitioner has no right to exclude a competitor from the Food Court.

5. Mr. Forst testified that they have built improvements. The City and County of Denver owns those improvements. The City sets the prices that can be charged. The Petitioner has no ability to pass any additional tax onto its customers.

6. Mr. Forst testified that the City has an impact on hiring of personnel. All personnel must pass security. No person that has been convicted of a felony can be hired at DIA locations.

7. Mr. Forst testified that his agreement states that he must be open a minimum of 16 hours per day, seven days per week. The Petitioner does benefit from some 39 million passengers per year. He stated that if he sells product, he pays rent to the City on top of the base rent. Base rent is based on square footage in the unit. No revenue is earned when DIA is closed. Due to September 11, the airport was shut down for three days. It has been closed at various times due to blizzards and when the roof caved in at the main terminal. It has also been shut down during security breaches.

8. Mr. Forst testified that in 2001, the Respondent began imposing a possessory interest on the subject property. Docket Numbers 41193 and 41194 have two years left on their agreements and Docket Number 41195 has five years left since he had just renewed it.

9. On cross-examination, Mr. Forst testified that he has been with Trugoy, Inc. since 1986 in the Denver metropolitan area. There are four other TCBY outlets in Denver. He stated that he is just involved with the three locations at DIA.

10. Mr. Forst testified that he was aware of Respondent's Exhibit 2 for Docket Number 41193, Section 3.01, Concession Rights Granted, which states "...Consistent with and subject to all terms and provisions of this Agreement, City grants to Concessionaire the right to occupy, improve and use the Concession Space, and the right to use the Commons Area in common with the other

Food Court concessionaires..."

11. Further, Mr. Forst testified that he agreed to Section 6.01-B.2 which states "... Without exception, prices shall not be greater than 110% of "street prices" charged in non-airport restaurants offering similar food and service in the Denver metropolitan area, and shall be subject to the approval of the Manager or his authorized representative."

12. He further testified that Section 8.05 states that "... Concessionaire agrees to promptly pay all taxes, excises, license fees and permit fees of whatever nature applicable to its operations hereunder and to take out and keep current all municipal, state or federal licenses required for the conduct of its business at and upon the Concession space and further agrees not to permit any of said taxes, excises, license fees or permit fees to become delinquent..." Mr. Forst stated that what that means to him is that when taxes are due, pay the taxes: sales tax, payroll tax, Denver occupational tax, income tax, and property tax on personal property.

13. Mr. Forst testified that the original agreement was extended first in 1994 since DIA did not open until 1995. Respondent's Exhibit 2 for Docket Number 41195, page 49, extended the original contract up to four years, and the second extension (page 54) was entered into on April 13, 1995.

14. Mr. Forst testified that TCBY is a franchise and under his franchise agreements, he agrees to sell approved TCBY products and adhere to health regulations. He is not required to sell a certain amount of TCBY product each year.

15. Mr. Forst testified that DIA prohibits him from hiring ex-felons. There are about 60 offenses that disqualify potential employees. The impact has been that anywhere from 25-50% of potential employees have been disqualified due to FBI investigations. In the past few years, this has not been such a problem.

16. Mr. Forst testified that in October 2001, DIA offered concessionaires a four-point relief program giving the concessionaires an option to terminate their agreements with DIA, three days free rent, as well as a loan program that was made available. TCBY did not take advantage of the loan program.

17. Mr. Forst understood at the time of the Agreement that under Respondent's Exhibit 2 for Docket Number 41195, page 29, Section 11.05, "... Concessionaire agrees not to assign, pledge, transfer or sublet its rights in this Agreement in whole or in part, nor grant any license or concession hereunder, except as otherwise provided herein, without the prior written consent of the Manager..."

18. Under redirect, Mr. Forst testified that when the extension was offered in 2001, he had not been advised by the Respondent that they would impose a possessory interest property tax. Further, he stated that had he terminated his agreement in 2001, it would have put him out of business.

19. Petitioner is requesting that the subject property be exempt from possessory interest taxation for tax years 2001 and 2002.

20. Respondent's witness, Ron Benko, Property Tax Specialist with the Division of Property Taxation, was accepted by the Board as an expert witness in real property assessment including possessory interest taxation.

21. Mr. Benko testified that TCBY does have the exclusive use of its possessory interest, in that no other entity can occupy any of the three concessions per agreements with the City and County of Denver. Exclusivity is addressed in *Vail Associates* and in the Assessor's Reference Library, Volume 3, Section 7, page 80. The Board accepted Respondent's Exhibit 4.

22. Mr. Benko testified that, in his opinion, sufficient duration could be any amount of time. The amount of space is not one of the points of consideration.

23. Mr. Benko testified that possessory interest must be taxed as real property as set forth in the Colorado Revised Statutes. He stated that possessory interest is different from a management contract. A management contract has a seven-point test as set forth in the Assessor's Reference Library in Volume 3, 7.81. If an agreement had one or two elements of a management contract, it is still possessory interest. To be a management contract, it must meet all seven points.

24. Under re-cross examination, Mr. Benko testified that in the three factors of possessory interest, sufficient duration is met if the other two factors are met, no matter how long it takes to "realize a private benefit." The Petitioner controls its own space even though it cannot exclude any competitor in the Food Court.

25. For tax years 2001 and 2002, Respondent assigned a total actual value of \$24,500.00 to Docket Number 41193, \$31,400.00 to Docket Number 41194, and \$282,600.00 to Docket Number 41195.

CONCLUSIONS:

1. Respondent presented sufficient probative evidence and testimony to prove that the subject property was correctly valued as possessory interest property for tax years 2001 and 2002.

2. The Board asked the parties to submit briefs regarding the Motions to Dismiss submitted by the Respondent on Docket Numbers 41193 and 41194 for tax year 2002 since the Petitioner filed a protest with the Assessor as set forth in CRS 39-5-122. The Board received the Respondent's Supplemental Authority and the Petitioner's Response to Supplemental Authority. After review, the Board accepts jurisdiction in Docket Numbers 41193 and 41194 for tax year 2002 since the Petitioner is alleging grounds that the subject tax is illegal or erroneous, based on *Boulder Country Club v. Boulder County Board of Commissioners*.

3. The parties stipulated that valuation is not at issue. The Board is to determine whether the subject properties are taxable as possessory interest. As set forth by the Colorado Supreme Court in *Board of County Commissioners, County Eagle, State of Colorado v. Vail Associates Inc. et al and the Board of Assessment Appeals and Allen S. Black et al, v. Colorado State Board of Equalization* 19 P. 3d 1263 (Colo. 2001) the three-prong test for determining whether significant incidents of private ownership exist are: 1) an interest that provides a revenue-generating capability to the private owner independent of the government property owner; 2) the ability of the possessory interest owner to exclude others from making the same use of the interest; 3) sufficient duration of the possessory interest to realize a private benefit therefrom. The Board believes that the subject properties provide revenue-generating capability from the some 39 million DIA passengers per year. The occasional airport closures are an inherent risk of business and do not negate Petitioner's ability to generate revenue. The Petitioner does have the exclusive right to use the three locations at DIA. The Petitioner does have some degree of control and some degree of exclusivity. The Board believes that neither absolute control nor absolute exclusivity is required. Lastly, the Petitioner has sufficient duration to realize a private benefit from the locations. Therefore, the Board believes that the Respondent properly valued the subject properties for tax years 2001 and 2002 as a possessory interest.

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.

In addition, if the decision of the Board is against the Respondent, the Respondent may petition the Court of Appeals for judicial review of alleged procedural errors or errors of law when the Respondent alleges procedural errors or errors of law by the Board of Assessment Appeals.

If the Board recommends that this decision is a matter of statewide concern, or if it results in a significant decrease in the total valuation of the county, Respondent may petition the Court of Appeals for judicial review within 45 days from the date of this decision.

If the Board does not recommend its decision to be a matter of statewide concern or to have resulted in a significant decrease in the total valuation for assessment of the county in which the property is located, the Respondent may petition the Court of Appeals for judicial review of such questions with 45 days from the date of this decision.

DATED and MAILED this 14th day of January, 2004.

BOARD OF ASSESSMENT APPEALS

Debra A. Baumbach

Debra A. Baumbach

MaryKay Kelley

MaryKay Kelley

Diane M. DeVries

Diane M. DeVries

This decision was put on the record

JAN 13 2004

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

Penny S. Lowenthal

Penny S. Lowenthal

