

**BOARD OF ASSESSMENT APPEALS,
STATE OF COLORADO**

1313 Sherman Street, Room 315
Denver, Colorado 80203

**Docket Nos.: 47274,
47275, & 47276**

Petitioner:

TRUGOY, INC.,

v.

Respondent:

DENVER COUNTY BOARD OF COMMISSIONERS.

ORDER

THIS MATTER was heard by the Board of Assessment Appeals on July 8, 2008, Diane M. DeVries, Debra A. Baumbach, and MaryKay Kelley presiding. Petitioner was represented by Richard S. Strauss, Esq. Respondent was represented by Max Taylor, Esq. and Michelle Bush, Esq. Petitioner is requesting an abatement/refund of taxes on the subject properties for tax year 2004.

PROPERTY DESCRIPTION:

Subject properties are described as follows:

**Docket Number 47274 - Food Court Concourse C
(Denver County Schedule No. 12211-02-016-000)**

**Docket Number 47275 – Food Court Concourse B
(Denver County Schedule No. 12211-01-043-000)**

**Docket Number 47276 – Food Court Main Terminal
(Denver County Schedule No. 12281-01-026-000)**

Respondent filed a Motion for Order Precluding Trugoy from Re-litigating the Question of Taxability due to prior litigation concerning the subject properties for different tax years. The Board denied the motion; the taxability of the subject properties for tax year 2004 was not actually litigated in the previous cases since each tax year stands on its own.

Docket Nos. 47274, 47275, and 47276 have been consolidated for purposes of this hearing.

The subject properties are TCBY-franchised food courts located at Denver International Airport (DIA). Petitioner, dba TCBY Yogurt, entered into agreements with the City and County of Denver in 1993 for food courts in the three locations. Each location sells frozen yogurt, ice cream, muffins, cookies, and beverages to the general public and airport personnel. Petitioner's rent for the concession space and their portion of the food court common area is the greater of the following: \$50.00 per square foot or a percentage of gross revenue (15% in the main terminal and 12% on the concourses).

The parties are in agreement that the subject properties meet the definition of possessory interest as defined by the Division of Property Taxation: "A private property interest in an otherwise tax-exempt property or the right to the occupancy and use of any benefit in a tax-exempt property that has been granted under lease, permit, license, concession, contract, or other agreement." *3 Assessor's Reference Library: Land Valuation Manual 7.77 (2002)*.

Petitioner requests exemption from taxation, arguing that the subject properties did not meet the criteria for taxation of a possessory interest. For the subject properties to be subject to taxation they must exhibit significant incidents of private ownership, as set forth by the Colorado Supreme Court in *Board of County Commissioners, County of Eagle v. Vail Associates Inc.*, 19 P.3d 1263, 1279 (Colo. 2001): "(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; and (3) sufficient duration of the possessory interest to realize a private benefit therefrom."

Petitioner argues that the subject properties have limited revenue-generating capability due to expenses, taxes, and fees; restrictions on product pricing; airport closures; pedestrian traffic limitations on the concourses; and hiring restrictions. The Board is convinced that the existing lease signifies the capability for income and that the subject properties have revenue-generating capability.

Petitioner argues that it does not have exclusive use of its possessory interest and referenced Section 3.03 of its Agreement with the City: "City reserves the right to grant to other concessionaires the right to operate restaurants and sell food and beverages in other locations in the Airport, and Concessionaire understands and agrees that its right to sell food and beverages is not exclusive." Respondent argues that Petitioner has exclusive use of its three concessionaire spaces and that the Agreement does not apply to space elsewhere in the terminal or concourses. The Board agrees.

Petitioner questions whether a sufficient duration had existed to realize a private benefit. The Board is convinced, based on the leases and revenues, that the criteria have been met.

Respondent assigned the following actual values for tax year 2004:

Docket 47274 – Concourse C - \$136,800.00

Docket 47275 – Concourse B - \$107,600.00

Docket 47276 – Main Terminal - \$209,200.00

Based on the income approach, Respondent's witness used the following calculation: square footage times actual base rent of \$50.00 per square foot; application of 12.5% present worth factor; and application of a 98% state level of value adjustment factor. The calculation did not include percentage rents even if greater than base.

Respondent's witness applied actual rents in the calculation pursuant to C.R.S. § 39-1-103(17)(a)(I)(A) which states that contract rents are to be used unless it is shown that they "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." Because all food and beverage vendors at DIA were charged \$50.00 per square foot actual rent, Respondent's witness considered DIA to be its own marketplace. Confidential market data supports the subject's base rent: \$50.00 per square foot was paid by a food vendor in Denver's central business district (500 to 2,000 square feet); \$50.00 to \$55.00 per square foot was paid by a food vendor in Denver's central business district (400 to 800 square feet); and \$70.00 per square foot was paid by a food vendor in a Cherry Creek location (500 to 2,000 square feet).

Petitioner argues that a portion of his rents were collected for the operation and maintenance of the airport and should be deducted. The Board is convinced by testimony of the Senior Financial Management Analyst of DIA that the airlines, not the concessionaires, are charged for budgeted airport expenses.

Petitioner argues that exclusions should be taken from base rent pursuant to C.R.S. § 39-1-103(17)(a)(II)(B). According to the Assessor's Reference Library, "When net payments and fees are made by the possessory interest holder, no income exclusion is necessary." *Assessor's Reference Library* at 7.87. The subjects' leases identify expenses paid by the City, including utilities, trash disposal, cleaning, etc. The Board is not convinced that any other exclusions existed.

At the hearing, Petitioner made a motion to continue the hearing arguing that Petitioner did not have enough time to review Respondent's exhibits and that Petitioner did not receive specific information regarding the confidential market rents presented by Respondent. The Board denied the motion. Respondent exchanged exhibits according to the Board's Rule 11, and confidential market data provided sufficient information to support actual rent. Petitioner did not produce an independent appraisal.

Respondent presented sufficient probative evidence and testimony to prove that the subject properties were correctly valued as possessory interest properties for tax year 2004.

ORDER:

The petition is denied.

APPEAL:

If the decision of the Board is against Petitioner, Petitioner may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provisions of C.R.S. section 24-4-106(11) (commenced by the filing of a notice of appeal with the Court of Appeals within forty-five days after the date of the service of the final order entered).

If the decision of the Board is against Respondent, Respondent, upon the recommendation of the Board that it either is a matter of statewide concern or has resulted in a significant decrease in the total valuation for assessment of the county wherein the property is located, may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provision of C.R.S. section 24-4-106(11) (commenced by the filing of a notice of appeal with the Court of Appeals within forty-five days after the date of the service of the final order entered).

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

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, Respondent may petition the Court of Appeals for judicial review of such questions.

C.R.S. § 39-10-114.5(2) (2008).

DATED and MAILED this 7th day of August 2008.

BOARD OF ASSESSMENT APPEALS

Diane M. DeVries

Diane M. DeVries

Debra A. Baumbach

Debra A. Baumbach

MaryKay Kelley

MaryKay Kelley

This decision was put on the record

AUG 07 2008

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

Heather Heinlein

Heather Heinlein

