10-1092
LOCALLY ASSESSED PROPERTY
TAX YEAR: 2009
SIGNED: 11-06-2012
COMMISSIONERS: M. JOHNSON, D. DIXON, M. CRAGUN
EXCUSED: R. JOHNSON

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, vs. BOARD OF EQUALIZATION FOR COUNTY, UTAH, Respondent.	**INITIAL HEARING ORDER** Appeal No. 10-1092 Parcel No. #####-1 Tax Type: Property Tax/Locally Assessed Tax Year: 2009 Judge: Marshall

Presiding:
Jan Marshall, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER REP. 1, Esq.
PETITIONER REP. 2
PETITIONER REP. 3
PETITIONER REP. 4
PETITIONER REP. 5
For Respondent: RESPONDENT REP. 1, Appraisal Supervisor for COUNTY
RESPONDENT REP. 2, Appraiser for COUNTY

STATEMENT OF THE CASE

Taxpayer brings this appeal from the decision of the COUNTY Board of Equalization ("the County"). This matter was argued in an Initial Hearing on July 20, 2010. The subject property was assessed at $$$$$ as of the January 1, 2009 lien date. The Board of Equalization reduced the value to $$$$$. The County is asking the Commission to sustain the Board of Equalization value and uphold the assessment of the privilege tax. The PETITIONER ("Taxpayer") is appealing the assessment of the privilege tax under Utah Code Ann. §59-4-101 on the land value of $$$$$.

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.

Utah Code Ann. §59-2-103 provides for the assessment of property, as follows:

> (1) All tangible taxable property located within the state shall be assessed and taxed at a uniform and equal rate on the basis of its fair market value, as valued on January 1, unless otherwise provided by law.

For property tax purposes, "fair market value" is defined in Utah Code Ann. §59-2-102(12), as follows:

> "Fair market value" means the amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts. For purposes of taxation, "fair market value" shall be determined using the current zoning laws applicable to the property in question, except in cases where there is a reasonable probability of a change in the zoning laws affecting that property in the tax year in question and the change would have an appreciable influence upon the value.

A person may appeal a decision of a county board of equalization, as provided in Utah Code Ann. §59-2-1006, in pertinent part below:

> (1) Any person dissatisfied with the decision of the county board of equalization concerning the assessment and equalization of any property, or the determination of any exemption in which the person has an interest, may

> appeal that decision to the commission by filing a notice of appeal specifying the grounds for the appeal with the county auditor within 30 days after the final action of the county board.

Any party requesting a value different from the value established by the County Board of Equalization has the burden to establish that the market value of the subject property is other than the value determined by the County Board of Equalization. To prevail, a party must: 1) demonstrate that the value established by the County Board of Equalization contains error; and 2) provide the Commission with a sound evidentiary basis for changing the value established by the County Board of Equalization to the amount proposed by the party. The Commission relies in part on *Nelson v. Bd. of Equalization of Salt Lake County*, 943 P.2d 1354 (Utah 1997); *Utah Power & Light Co. v. Utah State Tax Comm'n*, 590 P.2d 332, 335 (Utah 1979); *Beaver County v. Utah State Tax Comm'n*, 916 P.2d 344 (Utah 1996) and *Utah Railway Co. v. Utah State Tax Comm'n*, 5 P.3d 652 (Utah 2000).

Certain corporations are exempt from income tax, as provided in I.R.C. §501, as follows in pertinent part:

> (a) An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle, unless such exemption is denied under section 502 or 503.
> (c) The following organizations are referred to in subsection (a):
> (7) Clubs organized for pleasure, recreation, and other nonprofitable purposes, substantially all of the activities of which are for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

Treasury Regulation Sec. 1.501(c)(7)-1 provides additional guidance on whether a club is being operated exclusively for pleasure recreation, or social purposes, as set forth below:

> (a) The exemption provided by section 501(a) for organizations described in section 501(c)(7) applies only to clubs which are organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, but does not apply to any club if any part of its net earnings inures to the benefit of any private shareholder. In general, this exemption extends to social and recreation clubs which are supported solely by membership fees, dues, and assessments. However, a club otherwise entitled to exemption will not be disqualified because it raises revenue from members through the use of club facilities or in connection with club activities.
> (b) A club which engages in business, such as making its social and recreational facilities available to the general public or by selling real estate, timber, or other products, is not organized and operated exclusively for the pleasure, recreation, and other nonprofitable purposes, and is not exempt under section 501(a). Solicitation by advertisement or otherwise for public patronage of its facilities is prima facie evidence that the club is engaging in business and is not being operated exclusively for pleasure, recreation, or social purposes.

> However, an incidental sale of property will not deprive a club of its exemption.

DISCUSSION

The subject property is parcel no. #####-1, located at the LAKE off of HIGHWAY 1 in CITY 1. It is a 10.46-acre parcel of National Forest Service land that is occupied and used by Taxpayer. Taxpayer has a "Special Use Permit" for the subject property. The current permit was issued on July 1, 2005 and is set to expire December 31, 2015, but is renewable. The Taxpayer has improved the land with a recently constructed clubhouse, (#) trailer pads and (#) boat slips. The acreage is fenced and has an access gate with signage that reads, "(WORDS REMOVED)" and "(WORDS REMOVED)" At issue is the assessment of the privilege tax on the use of the Forest Service Land.

Taxpayer is a non-profit corporation organized as a social and/or recreational club under I.R.C. §501(c)(7). As of the hearing date, there were (#) members. Members pay an initial membership fee of $$$$$, and are assessed annual dues of $$$$$. If there are budget shortfalls, a capital call is made to members. Members cannot sell their membership to private individuals, it can only be sold back to the club for 75% of the membership fee.

It is the Taxpayer's position that the privilege tax assessed under Utah Code Ann. §59-4-101(1)(a) is not applicable, as the Taxpayer is not a "business conducted for profit". Taxpayer's representative argued that Taxpayer is not conducting a "business" because the terms of its "Special Use Permit" does not allow for any type of commercial sales on the property. Members have use of the clubhouse, can rent trailer pads for $$$$$ per year, and can rent boat slips for $$$$$ per year. In addition, the club sells fuel to its members. The Taxpayer's representative stated that the Taxpayer's activities are limited to interactions between and among its members, and that the club does not engage in the provision of goods or services to the public. The Taxpayer's representative stated that having surplus revenue alone is not determinative, and that whether a business is "conducted for profit" is determined by whether the surplus may be distributed for the personal use of owners. The Taxpayer's representative argued that because the Taxpayer is not engaged in the provision of goods or services to the public for compensation, but rather provides limited services to its members, and that revenue is only used to continue providing those services to its members, it is not a "business conducted for profit". He also noted that because Taxpayer is not competing with any other entity in the marketplace, the use of Forest Service land does not put other entities at a competitive disadvantage.

Taxpayer's representative argued, in the alternative, that if the Commission determines Taxpayer is a "business conducted for profit" that it is exempt from the privilege tax under Utah Code Ann. §59-4-101(3)(e). That code section provides that the privilege tax is not imposed on "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…" The Taxpayer's representative stated that the Taxpayer does not have exclusive possession of the land under their permit. He specifically pointed to Section I.F. of the Taxpayer's permit, which reads,

> I.F. Nonexclusive Use and Public Access. Unless expressly provided for in additional terms, use of the permit area is not exclusive. The Forest Service reserves the right to use or allow others to use any part of the permit area, including roads for any purpose, provided, such use does not materially interfere with the holder's authorized use. A final determination of conflicting uses in reserved to the Forest Service.

The Taxpayer's representative argued that although the general public is excluded from the subject property, it is irrelevant because exclusive possession is determined by the permit. He argued that under the plain language of the statute, the permit must "entitle" the permittee to exclusive possession, thus, whether the permittee effectively has exclusive possession is immaterial.

The Taxpayer's representative also argued that the County's application of the privilege tax to Taxpayer is a violation of Utah's uniform operation of laws provision and the United States equal protection clause. He cited *ABCO Enters. v. Ut. St. Tax Comm'n*, 2009 UT 36, noting, "persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same." The Taxpayer's representative stated that the purpose of the privilege tax is to avoid a gap in the tax laws that would otherwise occur when a for-profit business is able to use otherwise exempt property to achieve its profit motive. He argued that assessing the privilege tax places the Taxpayer in a classification that bears no relationship to the objective of the privilege tax; creating a classification of users of otherwise exempt property that are using the property for purposes other than to generate a profit.

The County's representative explained that when the building permit was issued to build the new clubhouse on the subject property, the County was told that there was a federal land lease in place. Because they were told there was a federal land lease, they did further research and determined that the Taxpayer should be subject to the privilege tax due to the Taxpayer's control of the property. The County's representative asked the Commission to consider the Board of Equalization hearing officer's decision, which determined that though the Taxpayer is a nonprofit organization, it is not a charitable organization and operates a commercial-type activity.

The County's representative argued a nonprofit organization may also be a "business conducted for profit", and thus the privilege tax under Utah Code Ann. §59-4-101(1)(a) is applicable. It is the County's position that even though the club is a non-profit corporation, they are not a charitable organization and operate a commercial type activity. The County points out that tax-exempt nonprofit corporations maintain bank accounts; own productive assets; receive income from other forms of activity, including grants and donations; make and hold passive investments; employ staff; and enter into contracts. It is the County's position that "nonprofit" refers to a business that is organized under rules that forbids the distribution of profits to owners, but that a "business conducted for profit" is related to the accounting idea of a surplus of revenues over expenditures. The County's representative noted that the Taxpayer's 990-EZ returns for the 2005 through 2009 tax years show that revenue exceeded expenses in four of those five years. He stated that the Taxpayer earns profit when it buys back memberships at 75% of the value for which they sell them. Additionally, he pointed out that the classified ads section of the Taxpayer's website shows boat slips for sale and rent, as well as several boats for sale.

The County acknowledges that on its face the Taxpayer has a "special use permit"; but argued that it is effectively a lease, with members of the club having exclusive use of the subject property. The County provided photographs showing that the property is fenced with a locked gate. There is signage on the fence that reads, "(WORDS REMOVED)" and a second sign that reads, "(WORDS REMOVED)". The County pointed out that the boat slips, fuel, trailer pads, boat launching facilities, restrooms, club house, showers, parking, and road access are limited to use by members, and the general public is excluded from the use of the property. The County's representative stated that under the "special use permit" the Forest Service, the owner of the property, is allowed entrance to the property to ensure compliance with laws, regulations, and ordinances. The County argued that to take the position that the Forest Service "non-exclusive" clause in the permit allows anyone other than members of the club access to the property is incorrect. They argued that the non-exclusive clause was in place in order for the Forest Service to retain traditional levels of management and access the property when necessary.

The subject property would generally be exempt under Utah Code Ann. §59-2-1101(3)(a) as National Forest Service land. 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).

It is not disputed that Taxpayer was organized as a non-profit corporation, and has been granted tax exempt status by the IRS as a social club under I.R.C. §501(c)(7). However, the parties disagree as to the meaning of "profit". The County argued that a business for profit is related to the accounting idea of a surplus of revenues over expenditures. The Taxpayer's representative argued that surplus revenue alone is not determinative, and that whether a business is "conducted for profit" is determined by whether the surplus may be distributed for the personal use of owners. The Commission first looks to the plain language of the relevant provision, which imposes the privilege tax if the property in question is being used in connection with a "business conducted for profit".[1]

The meaning of "business conducted for profit" is not defined in the statute, and has not been interpreted by the Utah Courts. However, the Michigan Court of Appeals has addressed this issue in *Nomads, Inc. v. City of Romulus and County of Wayne*, 397 N.W.2d 210 (Mich. App. 1986). As noted by the Utah Supreme Court in *ABCO Enterprises v. Utah State Tax Comm'n,* 211 P.3d 382, 389 (Utah 2009), citing *Thiokol Chemical Corp. v. Peterson,* the privilege tax statute closely resembles the Michigan statute for a similar purpose, of closing the gaps in the tax laws. The Court in *Nomads* found that the petitioner, a travel club organized as a nonprofit corporation that owned and operated an aircraft allowing members to organize trips to places not served by regular commercial flights at reduced or nominal airfare, was not a "business conducted for profit" though the savings and benefits inured to the benefit of the members of the travel club. *See* 397 N.W.2d at 214. The Court reasoned that under principles of statutory construction, an imposition statute is to be liberally construed in favor of a taxpayer, and that the language of the Michigan statute was not an exemption, but rather it defined the taxpayers on whom the tax was imposed.

Like the Michigan Courts, Utah also construes imposition statutes in favor of the Taxpayer. In *Board of Equalization of Wasatch County v. Tax Commission and Strawberry Water Users Association*, 944 P.2d 370, 374 (Utah 1997), the Utah Supreme Court held, "our practice is to construe taxation statutes liberally in favor of the taxpayer, leaving it to the legislature to

[1] "When interpreting statutes, our primary goal is to evince the true intent and purpose of the Legislature." The first step of statutory interpretation is to evaluate the best evidence of legislative intent: "the plain language of the statute itself." *Id.* "When examining the statutory language we assume the legislature used each term advisedly and in accordance with its ordinary meaning." *Id. In the Interest of Z.C., a person under eighteen years of age*, 165 P.3d 1206 (Utah 2007) quoting *State v. Martinez*, 2002 UT 80, P 8, 52 P.3d 1276.

clarify an intent to be more restrictive is such intent exists." See also *Airport Hilton Ventures, Ltd., v. Utah State Tax Comm'n*, 976 P.2d 1197 (Utah 1999); and *Parsons Asphalt Products, Inc. v. Utah State Tax Comm'n*, 617 P.2d 397, 398 (Utah 1980). Utah Code Ann. §59-4-101(1)(a) is an imposition statute, imposing the tax when the property otherwise exempt from taxation is "used in connection with a business conducted for profit". Thus, the "business conducted for profit" defines who is subject to the privilege tax. It is not an exemption, which are provided for in Subsection (3) of Utah Code Ann. §59-4-101. Thus, the statute must be interpreted in a light favorable to the Taxpayer.

There is no question that the Taxpayer would be subject to ad valorem property tax on the subject property if it were the owner, rather than had use of the property under the Special Use Permit from the National Forest Service. By including the phrase "business conducted for profit", the Legislature must have intended not to tax a class of persons who would normally be subject to the tax if they were the owners of the property, but who are not taxed because their activities are not in connection with a business for profit. "When examining the statutory language we assume the legislature used each term advisedly and in accordance with its ordinary meaning." *Id. In the Interest of Z.C., a person under eighteen years of age*, 165 P.3d 1206 (Utah 2007) quoting *State v. Martinez*, 2002 UT 80, P 8, 52 P.3d 1276. Thus, to conclude that the Taxpayer, a social club organized as a non-profit corporation, is a "business conducted for profit" is to give no effect to that phrase in the statute.

The Taxpayer's representative also argued that even if the Commission determined that the Taxpayer was a "business conducted for profit", that it is exempt from the privilege tax under Utah Code Ann. §59-4-101(3)(e) because they do not have exclusive possession of the property. Since the hearing in this matter the Utah Supreme Court has specifically addressed this exemption in determining what "exclusive possession" means. The Court in *Alliant Techsystems, Inc. v. Salt Lake Board of Equalization, et al.*, 2012 UT 4, held, "[w]e are convinced that the legislature intended the phrase 'exclusive possession' to mean exclusive as against *all* parties, including the property owner." Under the Court's analysis in *Alliant Techsystems, Inc.*, the Taxpayer would not be considered to have "exclusive possession" because the Forest Service reserved the right to use, or allow others to use, any part of the permit area.

The privilege tax should not be imposed with regard to the Forest Service Land.

The Taxpayer also argued that the privilege tax is in violation of the Equal Protection Clause of the Fourteenth Amendment. The Commission does not agree with Taxpayer on this point, but notes it does not have the authority to find a statute unconstitutional.

_____
Jan Marshall
Administrative Law Judge

DECISION AND ORDER

On the basis of the foregoing, the Commission finds the Taxpayer was not a "business conducted for profit" and 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:

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 _____, 2012.

R. Bruce Johnson
Commission Chair

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner