BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203	Docket No.: 69880
Petitioner: **RARE AIR LIMITED LLC,** v. Respondent: **PROPERTY TAX ADMINISTRATOR.**	

ORDER

THIS MATTER was heard by the Board of Assessment Appeals on October 18, 2017, Amy J. Williams and Louesa Maricle presiding. Petitioner was represented by Kenneth K. Skogg, Esq. Respondent was represented by Robert H. Dodd, Esq. Petitioner is requesting an abatement/refund of taxes on the subject property for tax year 2015 and protesting the Property Tax Administrator's denial of an abatement that was previously granted by Douglas County for that tax year.

Petitioner indicated that it was not challenging the value assigned to the subject property, but rather, contesting the legality of taxation of the property.

Petitioner agreed to the admission of Respondent's Exhibits, which include A through H and Legal Authorities 1 through 8. Respondent agreed to the admission of Petitioner's Exhibits 1 through 37 during the course of the hearing.

Subject property is described as follows:

8481 Aviator Lane, Englewood, Colorado
Douglas County Schedule No. R0488147

Description of Improvements

The subject property is a corporate flight department facility that is located on land owned by the Arapahoe Airport Authority. This structure was built in 2012, and consists of a 30,000 square foot airplane hangar and 9,900 square feet of office and support area. The building includes executive offices, conference room, waiting lounge, customer offices, pilot support

areas, shop space, and an interior vehicle parking area. The hangar accommodates corporate jet aircraft and based on the evidence presented, appears to be finished with high quality materials and to be well maintained. The improvements are situated on land that is subject to a ground lease and sublease, discussed below.

Master Lease (Parcel 100)

The Arapahoe County Public Airport Authority (the "Authority") is a political subdivision of the State of Colorado and is therefore tax exempt. The Authority holds title to the Centennial Airport located in Arapahoe and Douglas Counties, Colorado (the "Airport") and has the power to approve fixed base operators at the Airport and to lease designated areas of the Airport to such operators.

A Master Lease was executed November 1, 2006, between the Authority and Denver jetCenter, Inc. ("DjC"), a private corporate entity that acts as a fixed based operator at the Airport. This lease covers approximately 70.315 acres of land. The base lease term is 40 years with three renewal options that would extend the lease to October 31, 2096. Fixed rent during the base term is $0.05 per square foot of land area.

The Master Lease requires the lessee to construct certain facilities and to provide certain services, all by specified dates. The lease provides that DjC may enter into a sublease with another entity, upon written approval from the Authority, to provide some of the required facilities and services. The lease specifically acknowledges that title to all buildings constructed on the leased premises are property of the lessee until termination of the lease, at which time title reverts to the Authority. The lease acknowledges the right of the lessee to mortgage their leasehold interest.

Through the Master Lease, DjC is the holder of a taxable possessory interest in certain Airport Authority property situated in Douglas County, Colorado. The parties agree that DjC holds a taxable possessory interest by operation of the Master Lease.

Rare Air Ground Lease (Sublease)

Petitioner entered into a sublease with DjC in 2011 (the "Ground Lease"). The Ground Lease, dated March 3, 2011, obligates taxpayer to construct the subject hangar facility on this property.

The subleased premises total 138,318 square feet of land within the Master Lease's 70.315 acres. The term is 25 years with one five-year renewal option. Land rent is $0.35 per square foot, adjusted every three years by CPI-U. Per the terms of the Ground Lease, Petitioner is to construct, at its cost, a minimum 25,000 square foot hangar plus office building. Petitioner owns title to all improvements during the lease term and is entitled to all depreciation and other tax advantages resulting from the ownership of such improvements; shall have an owner's policy of title insurance insuring its leasehold interest; and can mortgage the subleased premises.

At the end of the base lease term, title to all improvements will automatically transfer to DjC. At that time, if the five-year renewal option is exercised, land rent and rent for the improvements shall be the current fair market rate.

The subject improvements were subsequently constructed in 2012. The real property (including improvements) at issue in this matter is wholly within the boundaries of the Master Lease on Airport Authority-owned land.

History of the Case

On April 4, 2016, Petitioner requested an abatement from Douglas County of property taxes for the 2015 tax year. Taxpayer claimed the taxable value of the subject was -0- and that the entire tax amount of $109,842.99 should be refunded. The Douglas County Board of Commissioners approved this abatement in full on October 11, 2016. According to Colorado law, because the amount of property taxes to be refunded was greater than $10,000, this abatement petition was submitted to the Property Tax Administrator ("PTA") for review. *See* §§ 39-1-113, C.R.S (2017), and 39-2-116, C.R.S. (2017) (the Property Tax Administrator is required to review the abatement of property taxes in excess of $10,000).

On November 21, 2016, the Property Tax Administrator sent a letter to Petitioner denying this abatement. On December 19, 2016, Petitioner appealed the Property Tax Administrator's decision to the Board of Assessment Appeals (the "Board" or "BAA").

At issue before the Board is whether Douglas County correctly assessed to Petitioner the value of improvements constructed and owned by Petitioner on land owned by the Airport Authority. The $2,871,708 value of these improvements is not at issue. The parties have stipulated to this value. Rather, the issues are whether the improvements are taxable and whether the value of the improvements was correctly assessed to Petitioner.

Petitioner's Claims

Petitioner presents two arguments as to why the Property Tax Administrator's denial of the abatement for tax year 2015 should be reversed:

- Petitioner argues that a stipulated dismissal of an appeal to the Board regarding an abatement for the 2014 tax year compels the Board to find in Petitioner's favor in this matter; and
- Petitioner argues that the real property at issue here is tax exempt and that there is no statutory basis for assessment of taxes on improvements constructed on tax exempt land, where a separate entity (*i.e.*, DjC) holds a possessory interest in the land.

Evidence Presented Before the Board

Petitioner presented Barton S. Brundage as witness. Mr. Brundage is employed by Jet Center, Inc., the parent company of DjC. The witness testified the company is a fixed-base operator in the business of providing fueling, hangar space, and potentially other services for general aviation. DjC is a fixed base operator at the Airport.

The witness described the terms of the Master Lease and the purpose of the lease to construct aviation hangar space. As permitted by the Master Lease, DjC opted to enter into a 25-year sublease (the Ground Lease) with Rare Air (Petitioner) to construct the subject improvements on a portion of the Master Lease land. Under the terms of the lease, Rare Air pays $0.35 per square foot annually, which is tied to the consumer price index, and currently amounts to approximately $48,000 per year. The lease term is 25 years, with a renewal option. If the lease is renewed, the rent for the renewal term would be market rate and would include both the land and the improvements. Rare Air has the right to and does carry title insurance, and also has the right to mortgage the improvements. Mr. Brundage also confirmed that DjC has no rights of ownership as it relates to Rare Air's hangar facility.

Rare Air is a third-party company providing hangar space and buys fuel from DjC. The witness outlined his understanding of the methodology used to calculate the possessory interest value for assessment and the resulting possessory interest tax under the Master Lease. Douglas County established a property tax account for DjC's possessory interest in the land and a separate account for the real property improvements constructed and owned by Petitioner. Because possessory interest tax is based on rent, the witness opined that separate taxation of improvements is double taxation.

Petitioner next presented Darek Gibbons, of Mantucket Capital, who testified regarding the sublease Rare Air operates under, Rare Air's operations at Centennial Airport and Rare Air's abatement petitions for tax year 2014 and 2015. Mantucket Capital has a services agreement to provide tax, accounting, and legal services for Rare Air, which itself has no employees. Mr. Gibbons testified that Rare Air had constructed improvements in conformity with the Ground Lease, subject to the approval of DjC and the Airport Authority.

Mr. Gibbons also testified regarding Petitioner's request for abatement for the same property for the 2014 tax year. Because Douglas County initially did not agree to abate the 2014 tax, Petitioner appealed that decision to the Board in August 2015. In February 2016, Douglas County changed its position and notified Petitioner that it agreed that its improvements were not subject to separate taxation. On March 9, 2016, Petitioner and Douglas County filed a stipulated dismissal with the Board, and on March 16, 2016, the Board entered an order approving that dismissal.

Respondent presented testimony from Curt Settle, Deputy Director for the Division of Property Taxation. Mr. Settle testified regarding the Division's review of the County's approval of the abatement and the rationale behind its decision to deny Douglas County's abatement. The Division reasoned that the interest held by Petitioner is a leasehold interest that is separate and distinct from the possessory interest held by DjC, and therefore must be subject to taxation, and that the abatement impermissibly resulted in an interest in real property not being taxed. The Division considered the Ground Lease sublease to be lease of land only, though if renewed at the end of its term, the shift to a market rent at that time would convert it to a lease of both the land and improvements. Because it is a land lease only, the Division reasoned, the rents paid to DjC do not reflect the full value of Petitioner's interest, and the assessment of DjC's interest cannot reflect the value of the improvements because DjC has no current ownership interest in the improvements. The Division contends that the sublease is not structured to include rent for both land and improvements, and the approximately $2.9m improvements are therefore not taxed in

the tax assessed to DjC. Finally, the Division did not believe that the unit assessment rule barred taxation of the leasehold because it was inapplicable to this set of facts.

Applicable Law

"The Colorado Constitution directs that all real and personal property, as defined by the legislature, must be taxed unless it is exempted in accordance with law." *Bd. Of Cnty. Comm'rs v. Vail Assocs., Inc.*, 19 P.3d 1263, 1275 (Colo. 2001). Article X, Section 4, of the Constitution is one such exemption, and it exempts public property from property taxation. *See Denver Beechcraft, Inc. v. Bd. of Assessment Appeals*, 681 P.2d 945 (Colo. 1984). A public airport authority, as a political subdivision of the state, is exempt from property taxation. *Id.*

A possessory interest is "[t]he present right to control property, including the right to exclude others, by a person who is not necessarily the owner." Black's Law Dictionary 1353 (10th ed. 2014). A possessory interest in public property is a "private property interest in government-owned property or the right to the occupancy and use of any benefit in government-owned property that has been granted under lease, permit, license, concession, contract, or other agreement." Assessor's Reference Library, Vol. 3, § 7.10. A leasehold interest is a type of possessory interest. *See, e.g., DR/CR Family, LLLP v. Burger*, 80 P.3d 948, 952 (Colo. App. 2003) (observing that "a leasehold is a possessory interest in real property"); *Guest Mansions, Inc. v. Arapahoe Cty. Bd. of Equalization*, 899 P.2d 944, 945 (Colo. App. 1995) (characterizing interest in hotel and real property at Centennial Airport as "the leasehold, or possessory, interest of Guest Mansions as lessee of the hotel and associated real property"). The category of "[l]and, improvements, and personal property at a tax-exempt airport" is listed as one of seven examples of taxable possessory interests in the Assessor's Reference Library. Assessor's Reference Library, Vol. 3, §7.73.

"Because possessory interests fall within the statutory definition of 'real property' in section 39-1-102(14)(a), they qualify as 'taxable property' under section 39–1–102(16)." *Vail Assocs., Inc.*, 19 P.3d at 1275. So long as a possessory interest "exhibit[s] significant incidents of private ownership that distinguish it from the underlying tax-exempt ownership," it is taxable under Colorado statutes and Article X. *Id.* at 1279. The three factors that demonstrate ownership 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; and (3) sufficient duration of the possessory interest to realize a private benefit therefrom." *Id.*

"Article X is not self-executing," and "[i]ts implementation depends on exercise of the General Assembly's legislative authority." *City & Cty. of Denver v. Bd. of Assessment Appeals*, 30 P.3d 177, 180 (Colo. 2001) (citing *Vail Assoc.*, 19 P.3d at 1275-76). As the Supreme Court explained in *Vail Associates*, however, because section 39-1-102(16) "states that all interests in real property must be taxed unless exempted," so long as the interest to be taxed is an interest in real property, "no special authorization by the General Assembly is required to subject those rights to taxation." *Vill. at Treehouse, Inc. v Prop. Tax Adm'r*, 321 P.3d 624, 628-29 (Colo. App. 2014).

The unit assessment rule "requires that all estates in a unit of real property be assessed together, and the real estate as an entirety be assessed to the owner of the fee free of the

ownerships of lesser estates such as leasehold interests." *City and Cnty. Of Denver v. Bd. Of Assessment Appeals*, 848 P.2d 355, 358 (Colo. 1993) (internal quotations and citations omitted). The statutory basis for the unit assessment rule is section 39-1-106, C.R.S., which directs that "it shall make no difference that the use, possession, or ownership of any taxable property is qualified, limited, not the subject of alienation, or the subject of levy or distrain separately from the particular tax derivable therefrom." *See City and Cnty. Of Denver*, 848 P.2d at 359.

The unit assessment rule "typically operates to tax land and improvements together, without additional separate taxation of lesser interests therein, such as leaseholds, because taxation of the whole is presumed to include taxation of derivative parts." *Vail Assoc.*, 19 P.3d at 1278. However, the Supreme Court also cautioned that "[t]he rule does not serve as an exemption from taxation." *Id.* at 1272 n. 12. The Supreme Court noted that the unit assessment rule cannot "limit the operation of Article X," and that "[a] fundamental purpose of the rule is to implement Article X by achieving the constitutional mandate of uniformity by assuring horizontal equity between comparable parcels of property." *Id.* at 1279 n. 20 (citing *City and County of Denver*, 848 P.2d at 359) (internal quotation marks omitted).

The Board's Findings and Conclusions of Law

The Board finds Mr. Settle's testimony most credible. Based on a review of the exhibits and testimony, the Board finds that DjC has no ownership interest in Petitioner's improvements. The Board also finds that Petitioner's lease payments to DjC were for the land lease only, and the value of Petitioner's improvements was not included in the rents Petitioner paid to DjC. The Board believes that the Ground Lease was not structured to include rent for both the land and the improvements. The Board finds that the $2,871,708 value of Petitioner's improvements was not assessed to DjC, but was assessed to Petitioner based on what Douglas County believed was the value of the improvements. Finally, the Board finds that the Assessors' Reference Library provides for the assessment of improvements located on exempt property, such as public airport authority land.

Based on a review of the exhibits and testimony, the Board's conclusions are as follows:

We first dispense with the argument that the Board is constrained by its previous approval of a stipulated dismissal in 2016 relating to an appeal for tax year 2014. Petitioner points to no authority, and the Board is aware of none, that would compel such a conclusion.

The Board recognizes that collateral estoppel may apply in administrative proceedings. *See, e.g., Industrial Commission v. Moffat County School District RE No. 1*, 732 P.2d 616, 620 (Colo.1987) ("The doctrines of res judicata and collateral estoppel were developed in the context of judicial proceedings, but may be applied to administrative actions as well."). However, it may be invoked only where: (1) the issue precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom estoppel is asserted has been a party to or in privity with a party in the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; (4) the party against whom the doctrine is asserted has had a full and fair opportunity to litigate the issue in the prior proceeding. *Maryland Casualty Co. v. Messina*, 874 P.2d 1058, 1061 (Colo. 1994). "The findings of fact and conclusions of law of an administrative agency, acting in a judicial capacity, may be binding on the parties in a subsequent proceeding if the

agency resolved disputed issues of fact which the parties had an adequate opportunity to litigate." *Id.* (citing *Moffat County Sch. Dist.*, 732 P.2d 616).

Here, the Board merely approved a stipulated dismissal, entered into by Petitioner and Douglas County, of an appeal for the 2014 tax year. Therefore, none of the four factors required to invoke collateral estoppel are satisfied. The issue in this appeal is the propriety of ad valorem taxation for the 2015 tax year, and it is therefore not identical to the issue in the previous matter. The Property Tax Administrator was not a party to, or in privity with any party to, the previous proceeding. There was no final judgment on the merits. And, finally, the Property Tax Administrator did not have a full and fair opportunity to litigate the issue in the prior proceeding. Indeed, as Petitioner acknowledged at the hearing, because the matter was dismissed by stipulation, no one at all litigated the issue of the 2014 abatement.

For these reasons, we conclude that collateral estoppel does not bind the Property Tax Administrator with respect to property tax exemptions for tax year 2015, nor is the Board bound in this appeal by a stipulated dismissal entered into by different parties to a different appeal. *Cf. Von Hagen v. Bd. of Equalization of San Miguel Cty.*, 948 P.2d 92, 95 (Colo. App. 1997) ("We recognize that any hearing before the BAA is de novo. And, a decision with respect to a previous tax year is not binding with respect to the issues presented in a protest of the assessment for a later year.") (internal citations omitted).

Turning to the merits of the dispute, the Board concludes that Petitioner's interest in the improvements located on the subject property is subject to taxation. The Ground Lease confers significant incidents of private ownership in the improvements, including exclusive title to all improvements during the lease term, the right to all depreciation and tax advantages, and the right to encumber the property. Petitioner owns a significant interest in the Airport Authority's property from which it derives revenue for private benefit; it can exclude others from using the Airport Authority's property it occupies for the same use and its interest extends for a significant period of time for realizing its private benefit. Where a party has the right to possession, use, enjoyment, and profits of the property, that party should not be permitted to use the bare legal title of the Government to avoid its fair and just share of state taxation. Petitioner's interest is an interest in real property, and therefore must be taxed under Sections 39-1-102(16) and 39-1-102(14).

Petitioner argues that, because there is no express statutory authorization for the taxation of possessory interests in improvements *only*, its interest may not be taxed. The Board recognizes that "Article X is not self-executing" and that "[i]ts implementation depends on exercise of the General Assembly's legislative authority." *City & Cty. of Denver v. Bd. of Assessment Appeals*, 30 P.3d 177, 180 (Colo. 2001) (citing *Vail Assoc.*, 19 P.3d at 1275-76). Nonetheless, the Board concludes that legislative authority for the taxation of Petitioner's possessory interest does exist and has been conclusively decided by our Supreme Court in *Vail Associates*, 19 P.3d at 1274 ("even in the absence of a specific authorization directing the taxation of possessory interests, Colorado's statutory and constitutional law nevertheless provide[s] for their taxation," because (1) section 39-1-102(16) defines "taxable property" to include "all property, real and personal, not expressly exempted by law"; (2) section 39-1-111(1) provides that each county "shall...levy against the valuation for assessment of all taxable property located in the county on the assessment date...the requisite property taxes required by law"; and (3) section 39-1-102(14) provides that "real property" means all lands or interests in

lands.). The Board also notes that "improvements" are included in the definition of "real property" in Section 39-1-102(14)(c), and Section 39-1-102(6.3) defines "improvements" as all structures and buildings erected upon or affixed to land, whether or not title to such land has been acquired. Therefore, Petitioner's interest in the improvements is taxable property, and it does not require additional express statutory authorization in order to be taxable.

We also conclude that the unit assessment rule does not bar separate taxation of Petitioner's interest in real property. Section 39-1-106, C.R.S. is the statutory provision underlying the unit assessment rule. The function of the rule is to tax the greater ownership interest in lands and improvements. The rule most often applies in the assessment and levying of taxes on private fee ownership interests, where the rule typically operates to tax land and improvements to the private fee owner, without the additional separate taxation of a leasehold interest granted by the private fee owner to a tenant. This is not the fact pattern in this appeal.

Here, the land owner is a tax-exempt entity. When the fee owner is tax-exempt, the unit assessment rule typically operates to tax the private ownership interest in the land and the private ownership interest in the improvements constructed for private benefit together to the holder of the possessory interest granted by the tax-exempt entity. The rule looks to the principal owner of the taxable real property interest for the payment of taxes due. In a typical fact pattern involving a tax-exempt entity, the tax-exempt entity grants a possessory interest to a private entity that constructs and owns improvements on the tax-exempt land for private benefit use. In this typical scenario, the unit assessment rule operates to tax the private ownership interest in the tax-exempt land and the private ownership interest in the improvements together – allowing the assessor to reach the entire value of the taxable property in one assessment that is issued to the owner of the possessory interest that was granted by the tax-exempt entity. However, this typical fact pattern is not present in this appeal.

In this appeal, the Airport Authority granted a possessory interest to DjC. The Airport Authority also agreed to allow DjC to sublease part of the land covered by DjC's possessory interest to Petitioner. DjC did not construct and does not own the improvements located on the subleased land. Rather, the improvements were constructed and are owned by Petitioner.

Based on the facts of this appeal, the Board does not believe that the unit assessment rule requires the value of the improvements to be assessed to DcJ, who has no ownership interest in the improvements. The Board believes that the value of Petitioner's improvements must be assessed to Petitioner. The unit assessment rule should not be applied in a manner that limits the operation of Article X of the Constitution, and the rule should not serve as an exemption from taxation. Based on the exhibits and testimony presented, the Board concludes that Douglas County correctly assessed Petitioner for the value of Petitioner's improvements. To hold otherwise would allow the rule to "limit the operation of Article X" by not subjecting taxable property to taxation.

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 Section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals within forty-nine 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 Section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals within forty-nine 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.

Section 39-10-114.5(2), C.R.S.

DATED and MAILED this 31st day of January 2018.

BOARD OF ASSESSMENT APPEALS

Amy J. Williams

Louesa Maricle

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

Milla Lishchuk