

AG Opinion Number 92-01a

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Re: Amended Opinion 92-01A Application of the Privilege Tax

ATTORNEY GENERAL OPINION 92-01A

APPLICATION OF PRIVILEGE TAX

This amended opinion recalls Opinion 92-01, previously issued on September 9, 1992.

ISSUE

Is the use of federal property that is held under a terminable permit for service in federal government contracting work subject to Utah's privilege tax when the property is used by an independent contractor in connection with a business conducted for profit?

SHORT ANSWER

Yes. An independent contractor is liable for the privilege tax for the use of federal property in connection with a business conducted for profit.

ANALYSIS

Federal property is exempt from general state property taxes by reason of Utah Const. Art. XIII, § 2 and Utah Code Ann. § 59-2-1101(2)(a)(1992). However, the use of federal property by an independent contractor in connection with a business conducted for profit is subject to the privilege tax even though the federal property is itself exempt from general state property taxes. Utah Code Ann. § 59-4-101(1) (1992) provides:

(1) A tax is imposed on the possession or other beneficial use enjoyed by any person or 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.

More simply, in determining when to apply the privilege tax to the use of federal property by independent contractors, Utah Code Ann. § 59-4-101 (1992) requires that (1) the property in question be exempt from general state property taxes, (2) the property be possessed or beneficially used by any person, and (3) the property be used in connection with a business conducted for profit.

In *Thiokol Chem. Corp. v. Peterson*, 393 P.2d 391 (Utah 1964), the Utah Supreme Court affirmed Box Elder County's assessment of a privilege tax against Thiokol Chemical Corporation ("Thiokol") for its use of federal property in

connection with a business conducted for profit. The property in question was a military installation used for the production of Minute Man Missiles.

The court in Thiokol addressed the issue of whether the federal property was used in connection with a business conducted for profit. In resolving this issue, the court found that Thiokol had generated a profit in excess of four million dollars during the tax year involved. The court states:

[w]hile we do not desire to disparage Thiokol's motives in rendering this important Government service, the fact that it used the property in a business for profit is not to be gainsaid. For the tax year involved, 1961, the profit to Thiokol was in excess of four million dollars. In addition to this substantial profit, Thiokol also benefits in carrying on this project by having the opportunity of maintaining a position of industrial leadership in the competitive field of producing and manufacturing missiles and their components and propellants.

Id. at 395.

Based on these findings, the court affirmed the privilege tax assessment against Thiokol. In discussing the purpose of the privilege tax, the court states:

It will be noted that in this attempt to close gaps in the tax structure by placing a tax upon the privilege of possessing and using in a business for profit any property which is otherwise exempt, no exception whatsoever is made. Section 59-13-73 [predecessor to Utah Code Ann. § 59-4-101 (1992)] clearly and unequivocally applies the use tax to all property exempt for any reason. This includes property theretofore exempt by Section 59-2-2 [predecessor of Utah Code Ann. § 59-2-1101 (1992)] if that property is used in a business for profit.

Id. (emphasis in original).

The court further asserted that Utah's privilege tax was "grounded on the proposition that a private contractor's right to use property in a business for profit may be made subject to a nondiscriminatory tax based on its value, even though title to the property may be in the United States." Id. At 393-94 (relying on *United States v. City of Detroit*, 355 U.S. 466, 473 (1958) (holding that Michigan privilege tax measured and used by the taxpayer for private gain did not violate the constitutional immunity of the federal government from state taxation)).

Two other cases have also been cited as general authority for the assessment of privilege tax on the use of federal property in connection with conducting a business for profit. These two cases are: *Great Salt Lake Minerals and Chem. Corp. v. State Tax Comm'n*, 573 P.2d 337 (Utah 1977) and *Interwest Aviation v. County Bd. Of Equalization of Salt Lake County*, 743 P.2d 1222 (Utah 1987). These two cases, however, are distinguishable from Thiokol and plainly

inapplicable to determining the issue at hand. Both Great Salt Lake Minerals and Interwest Aviation deal primarily with the question of whether the property at issue constitutes government-owned property which is otherwise exempt from general state property tax assessment. In the present situation and in the Thiokol case, the parties concede that the property involved is federal property which is exempt from general state property taxes. The primary issue addressed in this opinion and the Thiokol case is whether an independent contractor is subject to the privilege tax for its use of federal property in connection with a business conducted for profit, not whether the property is government-owned.

In *Great Salt Lake Minerals and Chem. Corp. v. State Tax Comm'n*, 573 P.2d 337 (Utah 1977), the Utah Supreme Court upheld a decision of the Utah State Tax Commission to assess state property taxes against improvements made by Great Salt Lake Minerals and Chemicals Corporation ("GSL") on state-owned land. The issue was whether GSL could claim an exemption from state property tax assessments for improvements affixed to land owned by the state of Utah. The test set out by the court in this case is applicable only to determining legal ownership for purposes of assessing general property taxes. The court discussed the application of the general property tax at length but, as an aside, the court merely acknowledged the application of the privilege tax against GSL if the property were determined to be exempt from general state property taxes. *Id.* at 339-40.

In *Interwest Aviation v. County Bd. Of Equalization of Salt Lake County*, 743 P.2d 1222 (Utah 1987), the Utah Supreme Court upheld the Salt Lake County Assessor's assessment of general property taxes against improvements titled in the name of Salt Lake City but used by Interwest Aviation ("Interwest"), a business conducted for profit. The court determined that Interwest held greater legal incidents of ownership to the improvements. *Id.* at 1226. The issue addressed was whether Interwest could claim an exemption from state property taxes where the property was titled in the name of Salt Lake City, a municipality. *Interwest Aviation*, however, does not address the proper application of the privilege tax against independent contractor's use of federal land in connection with a business.

CONCLUSION

Under *Thiokol* and pursuant to Utah Code Ann. § 59-4-101(1)(1992), an independent contractor is liable for the privilege tax when it uses improvements made on federal property in connection with a business conducted for profit.

Sincerely,

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