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DIVISION OF LOCAL SERVICES
MA DEPARTMENT OF REVENUE

Geoffrey E. Snyder
Commissioner of Revenue

Sean R. Cronin
Senior Deputy Commissioner

Local Finance Opinion

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Topic: Exemption Eligibility for Electric Generating Systems When Situated on Property Owned by A Governmental Entity

Issues: Determination of the Allowable Scale of Leaseholder's Electric Generating System for Exemption Consideration and Whether the Value of the Land Can Be Included in a Tax Agreement

1. **What is the general rule concerning the taxable status of a leaseholder of municipally owned land and specifically a leaseholder who installs an electric generation system?**

Property owned by a city, town, district or other governmental entity is ordinarily exempt from local property taxes, either by common law or statute. ***Tax Collector of North Reading v. Town of Reading***, 366 Mass. 438,441-442 (1974) (Municipal property held for a public purpose in another municipality is exempt as a matter of common law). *See also* G.L. c. 59, § 5 (1) and (2) (Property owned by the United States and the Commonwealth is exempt). The common law exemption for municipally owned property applies to property held and used for municipal or other governmental or public purposes. However, publicly owned real property "used in connection with a business conducted for profit... shall for the privilege of such use ..., be valued, classified, assessed and taxed annually as of January first to the user ... in the same manner and to the same extent as if such user ... were the owner thereof in fee, whether or not there is any agreement by such user ... to pay taxes assessed under this section ..." G.L. c. 59, § 2B.

In the case of real property owned by a city or town being leased to and used by a private party in connection with a business conducted for its profit, e.g., its generation of electricity for profit, under G.L. c. 59, § 2B, the private party is subject to taxation for the leased site in the same manner as if it were the fee owner. Where a private party owns the land on which the equipment is situated, the parcel and electric generating equipment as "things thereon or affixed thereto" are subject to real estate tax. G.L. c. 59, § 2A. See ***Franklin v. Metcalfe***, 307 Mass. 386, 388-9 (1940) (lunch cart owned by business operator/lessee situated on real estate of the lessor/owner was subject to a real estate tax assessed to the fee owner of the land). Under G.L. c. 59, § 2B, the lessee is likewise subject to real estate tax on land and improvements. See ***Sisk v. Essex Assessors***, 426 Mass. 651, 654 (1998). Given that the ownership of the electric generating equipment is separate from that of the governmentally owned real estate, the private party can be assessed real estate taxes for the leased site and improvements, including property taxes for the electric generation system. ***Board of Assessors of Wilmington v. Avco Corporation***, 357 Mass. 704, 705-6 (1970) (lessee of public property subject to real estate tax for use of land and equipment for private profit). Alternatively, the separately owned generating equipment could be assessed as personal property absent an applicable exemption. See ***Boston Edison Co. v. Boston Assessors***, 402 Mass. 1, 11 (1988). See also G. L c. 59, §§ 5 and 16(1) or (2).

2. **Generally, what criteria would an electric generation system need to meet to qualify for an exemption and how is the capacity of an electric generation system measured when located on leased municipally owned property?**

In general, the Clause Forty-fifth exemption applies to electric generation systems that are capable of producing not more than 125 per cent of the annual electricity needs of the real property upon which they are located. The same exemption applies for certain verified energy systems and systems that have entered into an agreement for payments in lieu of taxes (PILOT) with the municipality. Chapter 8, Section 61 of the Acts of 2021 ("Amended Clause Forty-fifth") significantly amended the tax exemption extended to the personal property of electric generation systems. Repealed was the sweeping, near universal exemption recognized by the Appellate Tax Board ("ATB") for residential, commercial, and industrial generators of renewable energy in ***KTT, LLC v. Swansea Assessors***, Mass. ATB Findings and Report 2016-426.

As noted above, under the Amended Clause Forty-fifth, a system may be exempt depending, in part, upon the scale of the generating system in relation to the power needs of the real property upon which it is located. See generally G.L. c. 59, § 5, Clause Forty-fifth, *as amended by* Chapter 8, § 61 of the Acts of 2021. As such, a leaseholder of municipally owned property that has installed an electric generation system on that property may be granted an exemption for such a system if the capacity of that system is capable of producing not more than 125 per cent of the annual electricity needs of the real, municipally owned property where it sits.

However, real property, for the purposes of Amended Clause Forty-Fifth, includes both contiguous and non-contiguous real property within the same municipality in which there is a "common ownership interest." Given that directly or indirectly owned real estate with power needs in the city or town affects the allowable scale of the facility sought for exemption, the meaning of the term "ownership" is relevant to qualification. It is a variable pivotal in calculations according to the statutory formula. The more electricity-consuming real estate "owned" in the city or town, the greater the allowable scale of the exempt system.

As further explained below, this Local Finance Opinion concludes that there is no "common ownership interest" between the leaseholder of municipally owned property and the municipally owned property itself. Therefore, the capacity of the electric generation system for the purposes of the Amended Clause Forty-Fifth exemption is limited to the energy needs of the property where the electric generation system sits, or the aggregate of the energy needs of such property combined with leaseholder's other owned real property within the municipality. 830 CMR 62C.3.1(8). See also G.L. c. 58, § 1A ("the opinion of the commissioner or the opinion of the attorney general, if any, shall be binding.")

The relevant question concerns the scope of "ownership" as it affects property holdings eligible to have their energy needs considered in determining applicability of the exemption. The opinion of the Appellate Tax Board in ***Forrestall Enterprises, Inc. v. Westborough Assessors*****,** Mass. ATB Findings and Reports 2014-1025, though decided under the prior version of Clause Forty-fifth, offers guidance on the definition of "common ownership interest" in the renewable energy context. The Board considered the property holdings of the principal, including property owned through closely-held corporations, in its conclusion that the Westborough properties directly and indirectly owned by Mr. Forrestall "effectively … used the equivalent of 100 percent of the energy produced by the Solar PV System." See Mass. ATB Findings and Reports 2014-1029-30.

Accordingly, property of a closely-held corporation owned by the taxpayer, along with property owned outright, appear to have a "common ownership interest" as that phrase is used in Amended Clause Forty-fifth. Such property must be "within the same municipality" to have its power needs counted. See G.L. c. 59, § 5, Amended Clause Forty-fifth.

In general terms, the meaning of words like "ownership" used in the statute "must be ascertained from [their] words, interpreted according to the common and approved usage of the language, regard being given to the nature of the property involved, to the practical administration of tax laws and to the operation of the statute as a workable piece of legislation." ***Veolia Energy Boston, Inc. v. Boston Assessors,*** 483 Mass. 108, 114 (2019). Because legislative intent controls interpretation of statutes, "[w]e derive the words' usual and accepted meaning from sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions." ***Commonwealth v. Vigiani,*** 488 Mass. 34, 36 (2021).

At the same time, the courts "ascribe to technical, legal terms in statutes their technical meaning. G.L. c. 4, § 6 Third (1988 ed.). We therefore construe the term 'inherit' in § 7 in its technical sense." ***Lockwood v. Adamson,*** 409 Mass. 325, 331-332 (1991). See also ***Watson v. Goldthwaite,*** 345 Mass. 29, 33 (1962). "'In construing statutes, we interpret a legal term of art in accordance with the term's traditional legal meaning, unless the statute contains a persuasive indication that Congress intended otherwise." See ***Ajemian v. Yahoo, Inc.,*** 478 Mass. 169, 176 (2017) (Cite omitted).

The United States Supreme Court in ***Cedar Point Nursery v. Hassid,*** 141 S.Ct. 2063, 2072 (2021) quoted Blackstone to explain ownership rights: "[T] he very idea of property entails 'that sole and despotic dominion which one [person] claims and exercises over the external things of this world, in total exclusion of the right of any other individual in the universe.'" (Cites omitted.) See also ***Chevron Mining, Inc. v. United States,*** 863 F.3d 1261, 1273 (10th Cir. 2017), (*quoting* Black's Law Dictionary (5th Ed. 1979) defining "owner" as "'[h]e who has dominion of a thing, . . . which he has a right to enjoy and do with as he pleases, even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right.'" (Cite omitted.)

In ***Commonwealth v. One 1986 Volkswagen GTI Automobile***, 417 Mass. 369, 374 (1994) the explanation of ownership, though in a different legal context, is instructive: "In determining whether such an ownership interest exists, the '[c]ourts generally look to indicia of dominion and control such as possession, title and financial stake." (Cite omitted.)[1] See also ***Cooper Indus., Ltd. v. National Fire Insurance Co.,*** 876 F.3d 119, 129-30 (5th Circuit 2017). ("Own[ership] can vary with context …'); ***Muni Tech, Inc. v. Henry,*** 2011 Mass. App. Unpublished LEXIS 588 (Memorandum and Order Pursuant to Rule 1.28, May 4, 2011). (Discussion of ownership in the context of vicarious liability for automobile accident.) With respect to land, "fee simple ownership is the most comprehensive bundle of rights and includes the right to convey property." ***UTE Mesa Lot 1, LLC v. First Citizens Bank & Trust Co.***, 736 F.3d 947, 951 (10th Circuit 2013). Accord ***Winsor v. Mills,*** 157 Mass. 362, 363-64 (1892). See generally ***Eaton v. Federal National Mortgage Ass'n,*** 462 Mass. 569, 575-76 (2012).

The leaseholder or occupant of public land used for private purposes is liable "*as if* such user, lessee or occupant were the owner thereof in fee…." G.L. c. 59, § 2B (Emphasis added.) The Merriam-Webster Online Dictionary defines "as if", a conjunction, thus: "—used to say that something is not true, not possible, will not happen, etc.", *available at* https://www.merriam-webster.com/dictionary/as if. The occupants, lessees, or users of public land for private profit don't "own" it, despite the fact that they are taxed "as if" they did.

It is significant that a beneficial owner is not considered to be an "owner" for purposes of claiming tax exemptions. See ***Kirby v. Medford Assessors,*** 350 Mass. 386, 390 (1966). The Court in ***Kirby*** stressed that "[t]he language of the exemption clause leads us to follow the indications of the cases under [G.L. c. 59] § 5, [Clause] Third, and to apply the principle of strict construction of exemption provisions." *Id.* at 390-91. Accord ***Asst. Recorder of N. Registry Dist. V. Spinelli,*** 38 Mass. App. Ct. 655, 658-60 (1995). Ownership of real estate is synonymous with holding legal title over property. *See* ***Kirby,*** 350 Mass. at 390-91. *See also*

[1] In ***One Volkswagen GTI Automobile,*** the Supreme Judicial Court looked to definitions of "ownership" in federal case law. *See* 417 Mass. at 374 (1994).

Guilfoil v. Sec'y of Health and Human Services, 486 Mass. 788, 797 (2021).

In sum, the leaseholder, occupant, or user taxed "as if …owner" does not have an ownership interest or title cognizable in the context of property tax exemptions for electric generation systems. Ownership of government property is exclusive to the relevant federal, state, or local agency in which title, dominion, and alienability are vested.

For detailed information as to the exemption qualifications for electric generation systems under G.L c. 59, § 5, Clause Forty-fifth, please see Informational Guideline Release (IGR) 2021-24.

3. **Without common ownership, can the value of the land be included in a payment in lieu of taxes (PILOT) agreement?**

No. A PILOT tax agreement under the Amended Clause Forty-Fifth includes all personal property taxes regarding the system and any real property taxes attributable to the land on which the system is located provided the land and the system are in common ownership. If the land on which the system is located is not owned by the same person or entity that owns the qualifying system, the taxes on the land cannot be included in the PILOT agreement. Instead, a separate assessment and tax bill regarding the real property taxes must be issued. As noted above, there is no "common ownership interest" between the leaseholder of municipally owned property and the municipally owned property itself. Therefore, in such situations, the value of the land cannot be included in a PILOT tax agreement under the Amended Clause Forty-Fifth.

Kenneth M. Woodland

Kenneth M. Woodland, Chief
Bureau of Municipal Finance Law

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