



JAN 02 2013

SALT LAKE COUNTY

By

Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT, SALT LAKE COUNTY
STATE OF UTAH

ALLIANT TECHSYSTEMS, INC.

Petitioner,

vs.

SALT LAKE COUNTY BOARD OF
EQUALIZATION, UTAH STATE TAX
COMMISSION, and GRANITE SCHOOL
DISTRICT,

Respondents

ORDER

Case No. 030917933

Judge: L.A. DEVER

The above entitled action is before the Court on Cross-Motions for Summary Judgment. The petitioner was represented by David Crapo, Douglas Smith and Pamela Hunsaker. Salt Lake County was represented by Kelly Wright, Bradley Johnson and Mary Ellen Sloan. Utah State Tax Commission was represented by John McCarrey and Laron Lind. Granite School District was represented by John Robson and Robert Crockett.

BACKGROUND

This case was originally tried before the Honorable Judge Jon Memmott, Utah State Tax Court Judge and appealed to the Utah Supreme Court. The Supreme Court issued a decision, found at 2012 UT 4, 270 P.3d 441.

The Supreme Court was asked to interpret section 59-4-101 of the Utah Code, specifically that portion dealing with the term “exclusive possession.” The Tax Court had ruled that “exclusive possession” meant exclusive of third parties but not exclusive against the property owner. The Supreme Court determined that “under the Privilege Tax Statute, ‘exclusive possession’ means exclusive as to all parties, including the property owner.” *Id.* at ¶ 4. The matter was remanded to the Tax Court for the parties to develop and present facts that would be material under this new definition of “exclusive possession” and to address the issue of the petitioner’s authority to control the government property, referred to in the pleadings as NIROP.

The parties have complied with the directive and have stipulated that there are no material disputed facts that would prevent the Tax Court from determining whether or not Alliant Techsystems (ATK) has exclusive possession of the NIROP property.

UNDISPUTED FACTS

1. NIROP is comprised of six parcels, comprising approximately 528 acres and 181 improvements. The United States Navy owns all the real property and all the buildings.
2. NIROP is physically separated from the surrounding properties by a chain link fence that identifies the NIROP property as U.S. government property, warns trespassers to keep out and excludes the public.
3. ATK uses the NIROP property pursuant to a Facilities Use Agreement.

4. The Facilities Use Agreement requires ATK to give first priority of use for the NIROP facilities to work performed on behalf of the Navy.
5. ATK must get permission from the Navy, in writing, to use the property in a manner outside that contemplated in the facilities use agreement.
6. The Navy has the right to deny cross utilization requests. A cross utilization request is the form used to ask permission to use the Navy's property for non-Navy purposes.
7. The Navy has denied a cross utilization request made by ATK.
8. The unauthorized use of government property can subject a person to fines, imprisonment or both.
9. The Navy can terminate ATK's right to use NIROP at any time and for any reason.
10. For the years in question, the Navy maintained an office staffed with approximately fourteen Navy personnel. That office was designated as the on-site representative of the Navy dealing with programmatic and technical requirements of the site.
11. The Navy's administrative offices are in ATK administrative offices at Plant One. When a guest enters facilities at NIROP, such guests must sign in and receive a badge.

12. ATK must give first priority of use of the facilities for work on behalf of the Navy. The Use Agreement requires ATK to obtain permission from the Navy to use the facilities in a different manner.
13. ATK must notify the Navy whenever any item of the facilities is no longer needed or usable for performing existing related contracts that authorize such use.
14. Pursuant to the Facilities Use Contract, the Navy authorizes ATK to use certain enumerated NIROP facilities. The Navy retains the right to change or terminate at any time the list of facilities ATK may use.

DISCUSSION OF SUPREME COURT DECISION

15. ATK argues that what it possesses is a permit and under Utah law a permit does not carry with it any possessory interest in property. It argues that this Court should sustain the previous finding that ATK held a permit and not a lease and since a permit has no possessory interest it could not have exclusive possession. The Supreme Court addressed this issue when it decided that the terms “exclusive” and “possession” should be read according to their ordinary and accepted meanings. The Supreme Court decided that because the key to the statute’s interpretation was “exclusive possession” against all parties that it was immaterial what the parties labeled the instrument conveying the property. *Id.* ¶ 24. Under the Supreme Court decision, ATK’s position of permit versus lease has no viability in the analysis of “exclusive possession” in this case.

16. The Supreme Court found that “exclusive possession” must mean the same present right to occupy and control property that would exist for a fee simple owner of that property. Id. ¶ 25. “To have the same right to occupy or control as an owner or lessee, an entity must have the power to exclude the property owner from occupying the property, the authority to make broad use of the property. . . , and power over a definite space for a definite time.” Id. ¶ 33.
17. The Supreme Court also noted that “a determination of exclusive possession requires the court to examine the extent of the property owner’s retained right to control the property.” Id. ¶ 32

APPLICATION OF SUPREME COURT DECISION

1. It is undisputed that the Navy, as the owner, has fenced the property and posted it with signs that state the property belongs to the U.S. Government and prohibits entrance except for authorized individuals. Also, the Agreement states that the unauthorized use of government property can subject a person to fines, imprisonment or both. Postings that state that the owner may prosecute individuals entering the property conflict with the claim that the property is under the exclusive possession of ATK.
2. The Navy can terminate ATK’s right to use NIROP at any time and for any reason. This provision impacts the claim of the respondents that the agreement

is for a definite time, one of the requirements for exclusive possession outlined by the Supreme Court in its decision.

3. For the years in question, the Navy maintained an office staffed with approximately fourteen Navy personnel. That office was designated as the on-site representative of the Navy dealing with programmatic and technical requirements of the site. These offices are in the ATK administrative offices at Plant One. When a guest enters facilities at NIROP, such guests must sign in and receive a badge. The monitoring of the programmatic and technical requirements of the site can only be viewed as a form of retained right of control that impacts the "exclusive possession" that respondent's claim rests with the petitioner.
4. The respondents argue that the fact that ATK must give first priority of use of the facilities for work on behalf of the Navy is nothing more than a contract provision and should not be viewed as impacting exclusive possession. If it was simply a contract provision that provided for priority of use, the respondents might have a valid position. The fact that the Use Agreement talks in terms of obtaining permission from the Navy to use the facilities in a different manner shows that the Navy has a retained right of control which contradicts exclusive possession.
5. Additionally, under the Facilities Use Contract, the Navy authorizes ATK to use

certain enumerated NIROP facilities, but, retains the right to change or terminate the list of facilities that ATK may use at any time. This provision conflicts with the requirement that ATK have exclusive control over a definite space for a definite time.

CONCLUSION

1. The Utah Supreme Court determined that “. . . ‘exclusive possession’ means having the present right to occupy and control property akin to that of an owner or consistent with a lessee. To qualify as exclusive possession, the user or possessor must have this right over a definite space for a definite time.”

Ibid. Id. ¶ 28. The Supreme Court also noted that this right to occupy and control by the “lessee” must be viewed in conjunction with the owner’s retained right to control.
2. The undisputed facts of this case establish that the Navy has retained control over the available area and the use of the property. The Navy has the right to terminate use at any time and to change which facilities ATK may use at any time; it has fenced the property and given notice it is the Navy’s property and trespassers are subject to prosecution; it monitors the programmatic and technical requirements of the site, and visitors enter through the administrative offices staffed by navy personnel to receive a badge to enter the facility.

27. The directive of the Supreme Court applied to these undisputed facts establishes as a matter of law that ATK does not have possession of the NIROP property to the exclusion of all others. The rights retained by the Navy establish that the possession of the property is shared and therefore ATK does not have "exclusive possession" as that term has been defined by the Supreme Court.

JUDGMENT

THEREFORE, Summary Judgment is granted to the petitioner. Summary Judgment for the respondents is denied.

ORDER

Counsel for the petitioner is to prepare the appropriate judgment in this matter. The Court directs that Counsel is to include in the judgment the appropriate citation to the facilities agreement and record for each of undisputed facts noted above.

Dated this 1st day of January, 2013.

BY THE COURT



L. A. DEVER
TAX COURT JUDGE

The signature is a large, stylized cursive script that overlaps the circular seal of the court. The seal features an eagle with wings spread, perched on a shield, surrounded by the text "STATE OF COLORADO" and "SALT DISTRICT".

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was mailed this 2nd

day of January, 2013, to the following:

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