REPRESENTATIVE FOR PETITIONER:
Gary Oetting, General Partner, KEAG Family Limited Partnership

REPRESENTATIVES FOR RESPONDENTS:
John Rogers, Attorney at Law

BEFORE THE
INDIANA BOARD OF TAX REVIEW

KEAG FAMILY LIMITED PARTNERSHIP,	)	Petition Nos.: 02-049-00-3-5-00674
	)	02-074-01-3-4-00979
	)	02-074-00-3-5-00676
Petitioner,	)	02-074-01-3-4-00978
	)	02-074-00-3-5-00675
v.	)	02-074-01-3-4-00977
	)	
	)	County: Allen
	)	
ALLEN COUNTY PROPERTY TAX ASSESSMENT BOARD OF APPEALS,	)	Townships: Wayne & Lake[1]
	)	
	)	Parcel Nos.: 18-0009-0006
Respondent.	)	95-2564-0196
	)	95-2564-0186
	)	
	)	Assessment Years: 2000, 2001

Appeal from the Final Determination of
Allen County Property Tax Assessment Board of Appeals

January 8, 2004

FINAL DETERMINATION

The Indiana Board of Tax Review (Board) having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

[1] At the hearing, it was pointed out that incorrect notices were sent out listing all of the petitions as property in Wayne Township. Mr. Oetting testified that the parcel described on petitions 02-049-00-3-5-00674 and 02-074-01-3-5-00979 is actually in Lake Township and that he had sent a correction to the Board. (Tr. at 5.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Issues

1. The issues presented for consideration by the Board were:

   (a) Whether KEAG's parcels are exempt from property taxation because they are within the protection of federal land patents.

   (b) Whether KEAG's property tax liabilities are void because they were assessed and collected under a property tax system that has been declared unconstitutional by the Indiana courts.

Procedural History

2. Pursuant to Ind. Code § 6-1.1-15-12, KEAG filed six Form 133 Petitions for Correction of Error with the Allen County Auditor. The Allen County Property Tax Assessment Board of Appeals (PTABOA) denied the petitions on March 21, 2003, and July 31, 2003. KEAG timely petitioned the Board for review of the PTABOA decisions.

Hearing Facts and Other Matters of Record

3. Pursuant to Ind. Code §§ 6-1.1-15-4 and 6-1.5-5-2, a hearing was conducted on September 10, 2003, in Ft. Wayne, Indiana, before Annette Biesecker, Chairperson of the Board, who was appointed as the duly designated administrative law judge for this matter pursuant to Ind. Code § 6-1.5-3-3.

4. The following persons were present at the hearing:

   For the Petitioner: Gary Oetting, General Partner of KEAG
   Dan Harm, "legal researcher"

   For the Respondent: Pat Love, Allen County Assessor
   Jerry Zuber, Wayne Township Assessor
   John Rogers, Attorney for the PTABOA
   Kim Klerner, PTABOA Deputy

5. No one was sworn to present testimony under oath.

6. The Petitioner presented the following exhibits (as labeled by KEAG) at the hearing:

Petitioner's Exhibit A – Federal Land Patent and Ledger
Petitioner's Exhibit B – City of Ft. Wayne Utility Easement
Petitioner's Exhibit C – Article I, Section 10 of U.S. Constitution
Petitioner's Exhibit D – Chicago I. & L.R. Co. v. Hackett, 228 U.S. 559
Petitioner's Exhibit E – Re Sawyer, 124 U.S. 200, 31 L.Ed. 402
Petitioner's Exhibit F – Ft. Wayne Federal Courthouse Property Tax Bill
Petitioner's Exhibit G – Indiana Enabling Act, Northwest Territory Act, and the Articles of Confederation
Petitioner's Exhibit H – Federal and Supreme Court cases supporting Land Patent
Petitioner's Exhibit I – American Jurisprudence
Petitioner's Exhibit J – 42 U.S.C. 1983, 18 U.S.C. 242
Petitioner's Exhibit K – U.S. v. Beggerly, 97 U.S. 731
Petitioner's Exhibit L – U.S. v. Coronado Beach Co., 255 U.S. 427
Petitioner's Exhibit M – Summa v. California, 466 U.S. 198
Petitioner's Exhibit N – Klais v. Danowski, 373 Mich. (both cases)
Petitioner's Exhibit O – Fenn v. Holme, 21 Howard 481
Petitioner's Exhibit P – "S23"

7. The following additional items are officially recognized as part of the record of proceedings:

Board Exhibit A – Subject Form 133 Petitions with attachments.
Board Exhibit B – Subject Notices of Hearing on Petition (Form 117).

8. The Allen County PTABOA denied all relief requested in the petitions.

9. The subject properties are located at 2816 Lower Huntington Road and 7922 Felger Road in Ft. Wayne, Indiana.

Jurisdictional Framework

10. This matter is governed by the provisions of Ind. Code §§ 6-1.1, 6-1.5, and all other laws relevant and applicable to appeals initiated under those provisions, including all case law pertaining to property tax assessment or matters of administrative law and process.

11. The Board is authorized to issue this final determination, findings of fact and conclusions of law pursuant to Indiana Code § 6-1.5-5-5.

State Review and Petitioner's Burden

12. The Board does not undertake to reassess property, or to make the case for the petitioner. The Board bases its decision upon the evidence presented and the issues raised during the hearing. *See Whitley Products, Inc. v. State Bd. of Tax Comm'rs,* 704 N.E.2d 1113, 1118-1119 (Ind. Tax Ct. 1998).

13. The petitioner must submit 'probative evidence' that adequately demonstrates all alleged errors in the assessment. Mere allegations, unsupported by factual evidence, will not be considered sufficient to establish an alleged error. *See Whitley Products,* 704 N.E.2d at 1119; *Herb v. State Bd. of Tax Comm'rs,* 656 N.E.2d 890, 893 (Ind. Tax Ct. 1995). ['Probative evidence' is evidence that serves to prove or disprove a fact.]

14. The petitioner has a burden to present more than just 'de minimis' evidence in its effort to prove its position. *See Hoogenboom-Nofzinger v. State Bd. of Tax Comm'rs,* 715 N.E.2d 1018, 1024-1025 (Ind. Tax Ct. 1999). ['De minimis' means only a minimal amount.]

15. The petitioner must sufficiently explain the connection between the evidence and petitioner's assertions in order for it to be considered material to the facts. 'Conclusory statements' are of no value to the Board in its evaluation of the evidence. *See generally,*

Heart City Chrysler v. State Bd. of Tax Comm'rs, 714 N.E.2d 329, 333 (Ind. Tax Ct. 1999). ['Conclusory statements' are statements, allegations, or assertions that are unsupported by any detailed factual evidence.]

16. The Board will not change the determination of the County Property Tax Assessment Board of Appeals unless the petitioner has established a 'prima facie case' and, by a 'preponderance of the evidence' proven, both the alleged error(s) in the assessment, and specifically what assessment is correct. *See Clark v. State Bd. of Tax Comm'rs,* 694 N.E.2d 1230 (Ind. Tax Ct. 1998); *North Park Cinemas, Inc. v. State Bd. of Tax Comm'rs,* 689 N.E.2d 765 (Ind. Tax Ct. 1997). [A 'prima facie case' is established when the petitioner has presented enough probative and material (i.e. relevant) evidence for the Board (as the fact-finder) to conclude that the petitioner's position is correct. The petitioner has proven his position by a 'preponderance of the evidence' when the petitioner's evidence is sufficiently persuasive to convince the Board that it outweighs all evidence, and matters officially noticed in the proceeding, that is contrary to the petitioner's position.]

Discussion of the Issues

(a) Whether KEAG's parcels are exempt from property taxation because they are contained within a federal land patent.

17. The Petitioner contends that the subject property should be 100% exempt because it is "contained within Federal Land Patent #131, which is tax exempt." Petitioner claims "Land Patent #131 was issued June 25th, 1827, prior to the assent of Congress. Allen County has no legal authority to tax Federal Land Patents issued prior to January 26th, 1847." (Forms 133, § IV: Description of Error.)

18. The PTABOA denied the exemption, explaining "[p]roperty not entitled to exemption because federal government doesn't own it anymore." (Forms 133, § VII: County Property Tax Assessment Board of Appeals Determination.)

(b) Whether KEAG's property tax liabilities are void because they were assessed and collected under a property tax system that has been declared unconstitutional by the Indiana courts.

19. On the petitions for the 2000 tax year, KEAG contends, "Indiana's property tax formula has been declared unconstitutional. Taxation based on an unconstitutional formula is illegal because computation results in mathematical error." (Forms 133 § IV, at 2.)

20. KEAG did not discuss this issue at the hearing, but the Board will nevertheless address it in this determination.

Analysis

(a) *Whether KEAG's parcels are exempt from property taxation because they are within the protection of federal land patents.*

(i) The Application of Res Judicata

21. The Respondent argues that the Tax Court's decision in *KEAG Family Ltd. Partnership v. State Bd. of Tax Comm'rs*, Cause No. 02T10-9906-TA-145, slip op. (Ind. Tax Ct. 2001), an unpublished decisions, is the law of the case, and that KEAG is precluded from collaterally attacking that decision by the doctrine of res judicata. (Tr. at 37-38.)

22. Indiana Tax Court Rule 17 states:

> All judgments shall be incorporated in written memorandum decisions by the court. Unless specifically designated "For Publication," such written memorandum decisions shall not be published and shall not be regarded as precedent nor cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case. Judgment shall be subject to review as prescribed by relevant Indiana rules and statutes.

Tax Ct. R. 17. As *KEAG Family Ltd. Partnership* involves the same taxpayer, the same parcels, and the same local assessing officials, citation to and reliance on that case is appropriate under the Tax Court Rules.

23. The Supreme Court has explained the law of the case doctrine: "[u]pon remand following an appellate decision, trial court consideration of an issue may be precluded by application of the law of the case doctrine which requires a trial court to "apply the law as laid down by the appellate court." *Riggs v. Burrell*, 619 N.E.2d 562, 564 (Ind. 1993) (*citing Dodge v. Gaylord*, 53 Ind. 365, 369 (1876)). The law of the case doctrine applies to remands and appeals within *the same case*,[2] whereas KEAG is asserting a new case based on a new tax year.

24. Res judicata, or "collateral estoppel," is applicable when an issue has been adjudicated but arises again in a separate, subsequent suit between the parties. *Glass Wholesalers, Inc. v. State Bd. of Tax Comm'rs*, 568 N.E.2d 1116, 1123 (Ind. Tax Ct. 1991). Principles of res judicata can be applied to certain administrative proceedings. *See South Bend Fed'n of Teachers v. Nat'l Ass'n of South Bend,* 389 N.E.2d 23, 33-34 (Ind. Ct. App. 1979).

25. "To determine whether an administrative decision should bar or estop a subsequent cause of action, the following factors should be considered:

> (1) the issues sought to be estopped are within the statutory jurisdiction of the agency;
> (2) the agency acts in a judicial capacity;
> (3) both parties have a fair opportunity to litigate the issues; and
> (4) the decision of the administrative tribunal could be appealed to a judicial tribunal."

Glass Wholesalers, 568 N.E.2d at 1123-24.

[2] *See also, Cutter v. State*, 725 N.E.2d 401, 405 (Ind. 2000).

26. With respect to the original administrative decision reviewed in *KEAG Family Ltd. Partnership,*[3] the *Glass Wholesalers* factors have been met. The State Board of Tax Commissioners possessed statutory jurisdiction to hear KEAG's appeal. *See* Ind. Code § 6-1.1-15-3 (1999). The State Board acted in a judicial capacity by providing notice to the parties, taking evidence and testimony, and rendering a decision. *See* Ind. Code § 6-1.1-15-4 (1999). Both KEAG and the local assessing official had an opportunity to present evidence to the State Board. *See id.* KEAG had an opportunity to, and did in fact, appeal the decision of the State Board. *See* Ind. Code §§ 6-1.1-15-5; 33-3-5-2 (1999).

27. The principles of res judicata hold that:

> Absent a change in conditions or circumstances, [an administrative body] should not indiscriminately or repeatedly consider the same evidence and announce a contrary finding. [Res judicata] seek[s] to guard parties against vexatious and repetitious litigation of issues which have been determined in a judicial or quasi-judicial proceeding.

Shortridge v. Review Bd. of Indiana Employment Sec. Div., 498 N.E.2d 82, 90 (Ind. Ct. App. 1986).

28. In this case, KEAG has already litigated these issues through the appellate court system. KEAG has not demonstrated any change in either the property or the law that warrants departure from the Tax Court's ruling. The Board will follow the Tax Court's decision in *KEAG Family Ltd. Partnership v. State Bd. of Tax Comm'rs*, Cause No. 02T10-9906-TA-145, slip op. (Ind. Tax Ct. 2001).

(ii) Taxability of Land Issued Pursuant to Federal Land Patents

29. The Indiana Tax Court reviewed Petitioner's claim in an unpublished decision, *KEAG Family Ltd. Partnership v. State Bd. of Tax Comm'rs*, Cause No. 02T10-9906-TA-145, slip op. (Ind. Tax Ct. 2001). In that case, the Tax Court affirmed the State Board's

[3] In that case, the Tax Court reviewed and affirmed six administrative determinations of the State Board of Tax Commissioners issued in April of 1999 that found KEAG owed property taxes for 1997 and 1998 for the parcels at issue in this case. *KEAG Family Ltd. Partnership v. State Bd. of Tax Comm'rs*, Cause No. 02T10-9906-TA-145, slip op. at 1-2 (Ind. Tax Ct. 2001).

determination on the issue of taxability of land issued pursuant to Federal Land Patents. *Id.* at 5.

30. KEAG rests its exemption claim on Ind. Code § 6-1.1-10-1, which states that "[t]he property of the United States and its agencies and instrumentalities is exempt from property taxation to the extent that this state is prohibited by law from taxing it." Essentially, KEAG claims that its land was exempt when held by the United States government in 1827, and that the immunity from taxation was transferred to it under Federal Land Patent #131.

31. In *KEAG Family Ltd. Partnership*, the Tax Court examined a body of case law from across the nation[4] in summarily rejecting KEAG's contentions. Those cases held that "the United States government cannot confer its privileges and immunities upon patent grantees," rather "the rights, privileges, and immunities recited in the patent are those appended to or attached to *the land, not those inherent in the federal government*." *KEAG Family Ltd. Partnership,* slip op. at 4.

32. The Tax Court held:

> [A]s a quitclaim deed, a land patent conveys whatever interest the government has in the soil and the land. KEAG is entitled to all rights, privileges, immunities that attach *to the land*; it is not entitled to all rights, privileges, and immunities that attach *to the federal government*. KEAG's property was originally tax-exempt because the federal government owned it. Once the government issued its patent, however, the title transferred ownership, free and clear, from the federal government to the assignee. KEAG, as the present assignee, is not a tax-exempt entity. Accordingly, this Court finds that the State Board did not err in determining that KEAG's parcels were taxable for the years 1997 and 1998.

Id. at 5.

[4] *See Smith v. Dep't of Revenue*, 998 P.2d 675, 677 (Or. 2000); *State v. Nichols*, 44 N.W.2d 49, 58 (Iowa 1950); *Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 115 (1998).

33. KEAG argues that the Tax Court was incorrect in its interpretation because it ignored superseding federal law and that the Court was not aware of Petitioner's Exhibit P, which Oetting refers to as S23. (Tr. at 20-21, 35-36.) Exhibit P is an excerpt from an Act of the United States Congress authorizing the States to impose taxes on land sold by the United States after the day of sale.

34. The Board has reviewed Exhibit P, and does not find it to be contradictory to the Tax Court decision. That document does not change the fact that the United States government cannot confer its privileges and immunities upon patent grantees. *See Smith v. Dep't of Revenue*, 998 P.2d 675, 677 (Or. 2000). The Board finds that S23 does not substantiate KEAG's previous claims.

35. As the Tax Court stated in *KEAG Family Ltd. Partnership,* the tax-exempt status of the federal government *does not* transfer to the assignee with the land. The Board hereby finds *KEAG Family Ltd. Partnership* to be controlling, and affirms the determinations of the PTABOA.

(b) Whether KEAG's property tax liabilities are void because they were assessed and collected under a property tax system that has been declared unconstitutional by the Indiana courts.

36. KEAG claims its property tax liabilities are void because they were assessed and collected under a property tax system that has been declared unconstitutional by the Indiana courts.

37. KEAG is correct in its assertion that the Indiana Supreme Court has declared that certain portions of the State Board of Tax Commissioners' assessment regulations violated the property taxation clause of the Indiana Constitution because the regulations lacked ascertainable standards. *State Bd. of Tax Comm'rs v. Town of St. John*, 702 N.E.2d 1034, 1043 (Ind. 1998).

38. However, KEAG's assertion that this fact alone renders its property tax liability null and void is incorrect. In 1998, the Indiana Tax Court declared that "[r]eal property must still be assessed, and, until the new regulations are in place, must be assessed under the present system." *Whitley Prods., Inc. v. State Bd. of Tax Comm'rs*, 704 N.E.2d 1113, 1121 (Ind. Tax Ct. 1998); *see also Town of St. John v. State Bd. of Tax Comm'rs*, 729 N.E.2d 242, 246 & 251 (Ind. Tax Ct. 2000) (ordering real property in Indiana to be reassessed under constitutional regulations as of March 1, 2002, and providing that until then, "real property tax assessments shall be made in accordance with the current system").

39. The Tax Court has decided not to accept further facial challenges to these provisions in order to prevent taxpayers from going into court, stating that the former system is facially unconstitutional due to a lack of ascertainable standards (as the court has already found) and thereby obtaining an assured reversal of the taxpayer's property assessment. *Dana Corp. v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1244, 1247 (Ind. Tax Ct. 1998).

40. In *Hay v. Ind. State Bd. of Tax Comm'rs*, 312 F.3d 876, 881-882 (7th Cir. 2002), the United States Court of Appeals examined the Tax Court's ruling and held:

> [t]his rule makes sense. * * * The refusal to hear facial challenges, however, does not bar taxpayers from launching constitutional challenges to their property assessments. The tax courts in Indiana have heard and will continue to hear "as applied" challenges to property tax assessments made under the old system. *Dana Corp.*, 694 N.E.2d at 1247; *see also Bishop v. State Bd. of Tax Comm'rs*, 743 N.E.2d 810, 813 (Ind. Tax Ct. 2001). As long as a taxpayer can present specific evidence that an assessment is unconstitutional as applied to her, she can obtain a reversal of her property tax assessment. *Dana Corp.*, 694 N.E.2d at 1247.

Hay, 312 F.3d 881-882.

41. At the hearing, KEAG did not present any evidence or argument on this point. KEAG did not offer anything to suggest that the law and regulations governing its assessment were applied in an unconstitutional manner.

42. As KEAG has failed to address this point, no prima facie case has been established on this issue. The Board hereby finds that KEAG is not entitled to relief on its constitutional claim.

Summary of Final Determination

(a) Whether KEAG's parcels are exempt from property taxation because they are within the protection of federal land patents.

43. In this case, KEAG has already litigated these issues through the appellate court system. KEAG has not demonstrated any change in either the property or the law that warrants departure from the Tax Court's ruling. The Board will follow the Tax Court's decision in *KEAG Family Ltd. Partnership v. State Bd. of Tax Comm'rs*, Cause No. 02T10-9906-TA-145, slip op. (Ind. Tax Ct. 2001). As the Tax Court stated in *KEAG Family Ltd. Partnership,* the tax-exempt status of the federal government *does not* transfer to the assignee with the land. The Board hereby finds *KEAG Family Ltd. Partnership* to be controlling, and affirms the determinations of the PTABOA.

(b) Whether KEAG's property tax liabilities are void because they were assessed and collected under a property tax system that has been declared unconstitutional by the Indiana courts.

44. KEAG failed to present a prima facie case that the law and regulations governing assessment have been applied in an unconstitutional manner. No change is made to the assessment.

This Final Determination of the above captioned matter is issued this by the Indiana Board of Tax Review on the date first written above.

_____

Commissioner, Indiana Board of Tax Review

Distribution:

KEAG Family Limited Partnership
C/o Gary L. Oetting
2816 Lower Huntington Road
Ft. Wayne, IN 46809

Allen County Property Tax Assessment Board of Appeals
c/o Allen County Assessor
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IMPORTANT NOTICE

- APPEAL RIGHTS -

You may petition for judicial review of this final determination pursuant to the provisions of Indiana Code § 6-1.1-15-5. The action shall be taken to the Indiana Tax Court under Indiana Code § 4-21.5-5. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice.