

Cite as Det. No. 09-0041, 29 WTD 1 (2010)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON¹

In the Matter of the Petition For Correction of) D E T E R M I N A T I O N
Assessment of)
) No. 09-0041
...)
) Registration No.
) Document No. Audit No.
) Docket No.
)

WAC 458-29A-100(2)(f); RCW 82.29A.020: LEASEHOLD EXCISE TAX – DEFINITION OF “LEASEHOLD INTEREST.” The taxpayer created a taxable leasehold interest under RCW 82.29A.020(1) when it leased a portion of real property to a private party for use as storage and parking. The taxpayer gave the private party sufficient dominion and control over the real property to make the lease subject to the leasehold excise tax.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

Jensen, A.L.J. – A special purpose district purchased . . . acres of industrial property, and, as part of the consideration, agreed to allow the seller to use vehicle parking and storage on the property for up to . . . years. The Department of Revenue's (Department's) Special Programs Division (Special Programs) assessed leasehold excise tax on the value assigned to the above consideration. The taxpayer appeals this assessment claiming . . . that the arrangement is not a lease subject to the leasehold excise tax . . .

ISSUE

Whether the seller's use of vehicle parking and storage on the [real] property purchased by the taxpayer is a taxable leasehold interest under RCW 82.29A.020?

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¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410. Nonprecedential portions of this determination have been deleted.

FINDINGS OF FACT

[Taxpayer] is a special purpose district of the State of Washington. [In] 2004, . . . Taxpayer acquired . . . acres of industrial property from [a seller]. As part of the consideration for this purchase, Taxpayer agreed to allow Seller to use . . . acres of the property for up to . . . years for vehicle parking and storage.

In January of 2008, Special Programs conducted an examination of Taxpayer's records. This examination covered the period of January 1, 2004, through September 30, 2007. Special Programs concluded that the above "leaseback" was a taxable leasehold interest for purposes of the leasehold excise tax. . . . Special Programs issued an assessment against Taxpayer in the amount of \$. . . .

On appeal, Taxpayer submits a copy of its purchase and sale agreement for its purchase of the real property in question. The agreement provides a provision entitled "lease backs." This provision provides, in part:

[Taxpayer] will lease back to [Seller], at no additional charge:

- (a) a [portion] of the existing warehouse building at a location of which is depicted in an exhibit on the attached **Exhibit C**;
- ...
- (c) . . . acres of the Property with access thereto, which may be utilized for vehicle and related rolling stock storage

The term of the leasebacks will be The form of the leasebacks is substantially in the form set forth in the attached **Exhibit C**. . . .

Taxpayer also submits a copy of the Exhibit C referred to in the purchase and sale agreement. The Exhibit contains a provision for rent, which provides:

The consideration for this lease is for the mutual benefit of the parties and a portion of the consideration given by [Taxpayer] in connection with the purchase of certain real property. [Seller] will not be required to pay [Taxpayer] rental for the Premises, except as set forth in Section 5 herein.

Exhibit C then goes on to explain the terms of the "leaseback" given to the Seller. Section 5 of Exhibit C also provides that Seller is responsible for utilities applicable to the portion of the property covered by the leaseback.

Taxpayer claims that the above transaction is not a leaseback, but a license to use real property. Taxpayer claims that it called the transaction a "lease" because this is the form of documentation used by the Taxpayer.

ANALYSIS

Washington imposes the leasehold excise tax “on the privilege of occupying or using publicly owned real or personal property through a leasehold interest...at a rate of twelve percent of taxable rent . . .” RCW 82.29A.030(1). The intent of this tax “is to ensure that lessees of property owned by public entities bear their fair share of the cost of government services when the property is rented to someone who would be subject to property taxes if the lessee were the owner of the property.” WAC 458-29A-100(1). Public lessors are required to collect the leasehold excise tax from their private lessees, and remit the tax to the Department. RCW 82.29A.050(2); WAC 458-29A-500(2).²

A “leasehold interest,” for purposes of the leasehold excise tax, is defined in RCW 82.29A.020(1) as follows:

[A]n interest in publicly owned real or personal property which exists by virtue of any lease, permit, license, or any other agreement, written or verbal, between the public owner of the property and a person who would not be exempt from property taxes if that person owned the property in fee, granting possession and use, to a degree less than fee simple ownership. . .³

Taxpayer first claims that its alleged “leaseback” of . . . acres of the property for vehicle parking and storage is not a “leasehold interest” with the meaning of the above statute. WAC 458-29A-100 provides further clarification on when a transaction creates a taxable leasehold interest. It explains that a “leasehold interest” is “an interest granting the right to possession and use of publicly owned real or personal property as a result of any form of agreement . . . without regard to whether the agreement is labeled a lease, license, or permit.” WAC 458-29A-100(2)(f). The rule goes on to provide:

- (i) Regardless of what term is used to label an agreement providing for the use and possession of public property by a private party, *it is necessary to look to the actual substantive arrangement between the parties in order to determine whether a leasehold interest has been created.*
- (ii) *Both possession and use are required to create a leasehold interest, and the lessee must have some identifiable dominion and control over a defined area to satisfy the possession element.* The defined area does not have to be specified in the agreement but

² [² WAC 458-29A-500 specifies situations in which public lessors are responsible for paying leasehold excise tax. The examples in that rule clarify that public lessors who fail to collect and remit leasehold excise tax because of a lack of knowledge of their responsibility are nevertheless liable for the tax. WAC 458-29A-500(3)(a), (c).]

³ In Det. No. 92-316, 12 WTD 477 (1992), the Department explained that this very broad definition of “leasehold interest” encompasses more than just traditional leases of real property.

can be determined by the practice of the parties. This requirement distinguishes a taxable leasehold interest from a mere franchise, license, or permit.

For example, Sam sells hot dogs from his own trailer at varying sites within a county fairgrounds during events. Sam is not assigned a particular place to set up his trailer nor does he store his trailer on the fairground between events. Sam's right to sell and his use of the property is considered a franchise and not a leasehold interest. The necessary element of possession, involving a greater degree of dominion and control over a more defined area, is lacking.

Id. (Emphasis added). . . .

In this case, the "leaseback" agreement between Taxpayer and Seller does create a leasehold interest in the . . . acres used by Seller for storage and vehicle parking. The written agreement, and accompanying exhibits, evidence that Seller has a sufficient degree of dominion and control over a specifically defined area within the property sold to Taxpayer. The agreement and supporting documents specifically identify the portion of the property that Seller can use for storage and parking. Taxpayer gives Seller the right to use the specified premises for the period of the leaseback

. . .

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 18th day of February 2009.