Cite as Det. No. 91-126, 11 WTD 319 (1992).

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 91-126
. . .	)	Registration No. . . .
	)	. . ./Audit No. . . .

[1] **RULE 105, RCW 82.04.360**: B & O Tax -- INDEPENDENT CONTRACTOR OR EMPLOYEE -- TAXABLE OR EXEMPT -- CRITERIA. Where the taxpayer meets the rule's elements of a person engaging in business and the principal does not have the right to control the details and means of the work to be accomplished by the performing party, such party is an independent contractor. The retention of the right to inspect and supervise to insure the proper completion of a contract does not vitiate the independent contractor relationship. ACCORD: Epperly v. Seattle, 65 Wn.2d 777, 785 (1965), Seattle Aerie No. 1 v. Commissioner Etc., 23 Wn.2d 167, 172 (1945), Chapman v. Black, 49 Wn.App. 94, 99 (1987).

[2] **RCW 82.29A.010-.030 :** LEASEHOLD EXCISE TAX -- PURPOSE -- MANAGEMENT CONTRACT -- GOLF PROFESSIONALS. The purpose of leasehold excise tax is to assess tax upon use and possession of public property by private lessees. Golf professional found to have a leasehold interest in city-owned golf course pro shop and restaurant, therefore leasehold tax applies. Accord: Det. No. 86-311, 2 WTD 101 (1986). **Det. No. 87-111, 3 WTD 29 (1987) IS OVERRULED IN PART.**

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.

TAXPAYER REPRESENTED BY: . . .

NATURE OF ACTION:

The taxpayer petitions to correct a leasehold excise tax assessment for his interest in a pro shop and a restaurant at a city-owned golf course.

FACTS:

De Luca, A.L.J. -- The Department audited the taxpayer for the period January 1, 1986 through June 30, 1990. The auditor assessed him $ . . . in leasehold excise taxes plus $ . . . in interest, totalling $ . . . . The amount remains unpaid.

The taxpayer is a professional golfer. He and [the city] agreed in successive contracts dated [December 1984] and [January 1988] for him to provide golf professional services at the city-owned [golf course]. They agreed he would operate the clubhouse facilities, restaurant and coffee shop, the pro shop and the practice range. The agreements contain the nature of services he is to provide, their duties to each other, compensation paid to the parties, etc. The leasehold interests at issue are the pro shop and the restaurant/coffee shop.

The agreements expressly provide the taxpayer is an independent contractor. He is required to provide insurance and a bond at his expense for the benefit of the city. He is also required to indemnify the city for his errors and omissions. He has the power to hire and fire employees. He is responsible for paying any local, state or federal taxes with respect to his agents and employees as well as any taxes applicable to his business activities at the golf course. The taxpayer also must pay worker's compensation insurance and employer's liability insurance for all of his employees.

The fees and charges collected by the taxpayer for the various activities or sales at the golf course are either kept by the taxpayer in whole, or split with the city, or transferred in total to the city depending on the activity or sale. The contracts specify which party receives what percentage of income from which activity.

The taxpayer exclusively operates, manages and supervises both the pro shop and dining areas. He is responsible for buying and selling the products at these places. Under the first agreement the taxpayer kept 99% of the gross receipts from the pro shop and 90% from all food and beverages sold while the city received the rest from the sales of services and goods at those places. Section 7 of the second agreement provides that the taxpayer pay the city 1% of gross receipts of the pro shop sales and $10,000 per year in rent to use the restaurant facilities.

ISSUES

Is the taxpayer an independent contractor or an employee of the city?

Whether the taxpayer's payments to the city for the pro shop and restaurant/coffee shop are subject to the leasehold excise tax?

DISCUSSION:

[1] WAC 458-20-105 (Rule 105, . . .) contains criteria which distinguish employees from persons engaged in business. See also 82.04.360. A review of the facts in light of Rule 105 reveals the taxpayer is an independent contractor rather than an employee. For example, the taxpayer is entitled to receive the gross income of his business. He is liable for the expenses of conducting his business and any losses he may incur. He has the right to employ others and to supervise and control them. He also is liable for their pay.

There are no deductions for federal and state employment taxes from the amounts he receives. In fact, he is responsible for paying any local, state, or federal taxes or fees with respect to his agents and employees, including worker's compensation insurance and employer's liability insurance. The taxpayer is responsible for paying any taxes or licenses applicable to his business activity at the golf course.[1]

He also has agreed to indemnify the city for any liability for injury or damage caused by him, his employees or agents. Accordingly, he is required to maintain insurance to protect the city against such liability. Finally, the agreement expressly states he is an independent contractor.

Moreover, the city does not employ the taxpayer subject to its right of control. There are necessarily some requirements placed on him to render the services contained in the agreement. They exist due to the nature of the work involved. Naturally, the

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[1]Washington's business and occupation (B&O) tax is imposed on every person for the act or privilege of engaging in business activities in this state. The tax is measured by the application of rates against the value of products, gross proceeds of sales, or gross income of the business. RCW 82.04.220. Moreover, there is a requirement for persons engaged in any business for which a tax is imposed under the Revenue Act to register with the Department of Revenue. WAC 458-20-101. If the taxpayer were an employee of the city, he would not be subject to the tax. However, because we have decided he is an independent contractor, he is liable for it and from now on must report it. RCW 82.04.360.

city wants the public to have a safe and well-kept golf course with amenable services readily available. Likewise, the city is rightfully concerned with strict accountability of the collected monies belonging to it.

Such requirements by themselves do not prove the city has the right to control the taxpayer. For example, the agreement allows him to determine when and how many golf lessons to schedule and what
product lines to sell from the pro shop and restaurant. Although the contract requires him to be at the golf course on a regular basis sufficient to meet the reasonable demands of the public and supervisory staff, he is permitted to set his own schedule within such limits. Furthermore, he chooses the people he employs. These facts do not demonstrate a control by the city over the details and means used by the taxpayer to fulfill the agreement. The Washington Supreme Court has stated:

> The retention of the right to inspect and supervise to insure the proper completion of the contract does not vitiate the independent contractor relationship.

Epperly v. Seattle, 65 Wn.2d 777, 785 (1965). See also Seattle Aerie No. 1 v. Commissioner Etc., 23 Wn.2d 167, 172 (1945), and Chapman v. Black, 49 Wn.App. 94, 99 (1987).

The next issue is whether leasehold excise tax is owing. The Department contends the taxpayer's use and occupancy of the golf course restaurant and pro shop creates a leasehold interest. The golf professional owns the food and drink served in the restaurant and the merchandise sold at the pro shop. The auditor found the arrangement to be a leasehold subject to leasehold excise tax based on the percentage payments to the city from the restaurant and pro shop income.

The legislature's intent in enacting the leasehold excise tax law is expressed as follows:

> **RCW 82.29A.010 Legislative findings and recognition.** The legislature hereby recognizes that properties of the state of Washington, counties, school districts, and other municipal corporations are exempted by Article 7, section 1 of the state Constitution from property tax obligations, but that private lessees of such public properties receive substantial benefits from governmental services provided by units of government.

> The legislature further recognizes that a uniform method of taxation should apply to such leasehold interests in publicly owned property.
>
> The legislature finds that lessees of publicly owned property are entitled to those same governmental services and does hereby provide for a leasehold excise tax to fairly compensate governmental units for services rendered to such lessees of publicly owned property.

Leasehold excise tax is imposed by RCW 82.29A.030(1):

> There is hereby levied and shall be collected a leasehold excise tax on the act or privilege of occupying or using publicly owned real or personal property through a leasehold interest ... at a rate of twelve percent of taxable rent...

As indicated, the tax is imposed on those persons holding property through a "leasehold interest". RCW 82.29A.020(1) states:

> "Leasehold interest" shall mean an 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 . . . (underlining added).

"Taxable rent" is the measure of the leasehold excise tax. RCW 82.29A.030. A percentage figure is applied to the "taxable rent" to determine the amount of tax. "Taxable rent" is defined at RCW 82.29A.020(2) as meaning:

> ... contract rent as defined in subsection (a) of this subsection in all cases where the lease or agreement has been established or renegotiated through competitive bidding, or negotiated or renegotiated in accordance with statutory requirements regarding the rent payable, or negotiated or renegotiated under circumstances, established by public record, clearly showing that the contract rent was the maximum attainable by the lessor: . . .

"Contract rent" is defined in subsection (a) in pertinent part as "the amount of consideration due as payment for a leasehold interest . . ." Thus, in this case, leasehold tax is imposed on

and measured by the rent paid to the public owner of the property.

[2] We hold the leasehold tax applies to this situation. Our position is contrary to Det. No. 87-111, 3 WTD 29 (1987), which had nearly identical facts and held the tax was not due. However, we find the reasoning in Det. No. 86-311, 2 WTD 101 (1986) more persuasive than that in 3 WTD 29.

RCW 82.29A.020(1) provides a leasehold interest is one which grants "possession and use" of public property. Possession is not defined by the statute, but must have a meaning beyond that of mere use. Words in a statute are given their ordinary and common meaning absent a contrary statutory definition. John H. Sellen Construction Co. v. Department of Rev., 87 Wn.2d 878, 882 (1976). "Possess" means "to occupy in person; to have in one's actual physical control; to have exclusive detention and control of". Black's Law Dictionary 1046 (5th ed. 1979).

RCW 82.29A.010 taxes private users of public property for private purposes. 2 WTD 101. Even 3 WTD 29 recognizes this taxpayer uses public property. Admittedly, there is no right of possession when the taxpayer is not charged for use and occupancy and he is rendering services solely to the public owner. 2 WTD 101.

Here, though, the taxpayer pays for use and occupancy of public property.[2] Moreover, he does not render his services solely to the city/public owner. He also serves individual customers who pay for his services and goods. Therefore, the taxpayer's activities in the pro shop and restaurant amount to possession as well as use. 2 WTD 101.

We agree there is some public benefit involved when the taxpayer operates a city-owned golf course, i.e. the city's residents can play golf there. However, that fact alone is not the standard to determine whether or not the tax applies because there is also private use and possession of public property for private gain. A quote from 2 WTD 101 is on point:

> Perhaps the clearest way of explaining the distinction between a private and public purpose is to illustrate

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[2]The contracts' Section 7 requires the taxpayer to pay the city for operating the pro shop and restaurant. Indeed, Section 7.2 of the second contract specifies one of the payments as "Rent for Cafe Facilities". Obviously, the taxpayer is paying rent for the exclusive use and possession of these areas for his private purpose.

> it with an example. One contractor operates a snack bar at the base where food and beverages are sold to all comers, and the contractor derives a profit from the proceeds of such sales. Another contractor, like the taxpayer in this case, operates a mess hall where food is delivered at no charge to persons with appropriate I.D., and the taxpayer is reimbursed on a cost-plus basis. The former is engaged in a business enterprise the same as any other restaurateur. The latter is merely providing a service to [Department of] ... personnel that the [Department of] ... would otherwise have to provide. The former is using public property for a private purpose, while the latter is using public property for a public purpose.

The taxpayer here is like the contractor example in the quote who sells his items to all comers and derives his own profit or losses from such sales. Therefore he is subject to the leasehold excise tax on his payments to the city for his use and possession of public property, in this case the pro shop and restaurant shop.

From now on, the Department will follow the golf course portion of the decision in 3 WTD 29 only in limited situations. The facts must show the golf professional actually is an employee or agent of the public owner who merely manages the premises without a leasehold interest in them, such as the situation in 2 WTD 101. Otherwise, that portion of 3 WTD 29 is overruled because we cannot distinguish the facts in that matter from those before us. We believe in both instances the taxpayers have leasehold interests.

The taxpayer's business activities are also subject to B&O tax and must be reported. Likewise, he must collect and remit retail sales tax if due when filing his excise tax returns.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 20th day of May 1991.