Cite as Det. No. 13 WTD 108 (1993).

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

In the Matter of the Petition For Refund and Executive Level Reconsideration of	)	F I N A L D E T E R M I N A T I O N
	)	No. 92-213ER
. . .	)	Registration No. . . . . . ./Audit No. . . .

[1] RCW 82.32.300: VALIDITY OF RULES -- AUTHORITY TO ADOPT RULES. The Department will not entertain general challenges to its authority to adopt rules in accord with the Administrative Procedure Act; such rules have the force and effect of law unless overturned by a court of record. See RCW 82.32.300; Det. No. 88-260, 6 WTD 147 (1988); Det. No. 87-218, 3 WTD 295 (1987); Final Det. No. 86-66A, 1 WTD 55 (1986).

[2] RCW 82.04.290; RULE 118; RULE 256: SERVICE B&O TAX -- LEASE VERSUS LICENSE TO USE REAL ESTATE -- TRADE SHOW SPACE. Under Rule 256, effective March 5, 1990, income from trade show space is subject to service B&O tax where the trade show is open to the public. Under Rule 118, for periods prior to March 5, 1990, income from trade show space is subject to service B&O tax where the space is provided for a short period and the taxpayer retains control over the space.

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:

Trade show sponsor petitions for refund and executive level reconsideration of Det. No. 92-213, in which we held that taxpayer's income from providing trade show space to exhibitors is income from licenses and is subject to service B&O tax.

FACTS:

Eggen, A.L.J. -- Taxpayer was audited for the period January 1, 1986, through June 30, 1990. As the result of that audit and a post audit adjustment, taxpayer was assessed retail sales tax, retailing B&O tax, service B&O tax, and interest . . . .

Taxpayer petitioned for correction of assessment, contending that service B&O tax . . . was erroneously assessed against income received from its members for exhibit space at trade shows. Taxpayer also petitioned for refund . . . of service B&O tax paid on such income during 1986.

In Det. No. 92-213, we denied taxpayer's petitions and sustained the assessment in full. Taxpayer paid $ . . . in full payment of the assessment and extension interest. Taxpayer now petitions for refund and requests executive level reconsideration of Det. No. 92-213.

In Det. No. 92-213, we set forth the facts, as follows:

> The taxpayer produces or sponsors several trade shows in the northwest . . . . The taxpayer rents facilities . . . for periods of 10 to 14 days to allow its member exhibitors to promote their products to the public. The members apply to the taxpayer for exhibit space at these shows. The application and contract provide a rental rate of a certain number of dollars per square foot with a specified minimum charge. The contract also refers to an exhibitor's handbook which contains rules and regulations pertaining to the shows. Among other things, the exhibitors must be open during all hours of the show and must display only [industry]-oriented products.
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> The contract requires each exhibitor to obtain liability insurance and to assume all risk of loss to its exhibit. The contract prohibits an exhibitor from "subletting" its space without the approval of the taxpayer. Furthermore, the contract provides that if the exhibitor fails to comply with the terms of the agreement and the handbook, the taxpayer "shall have the right, without notice to the exhibitor, to remove the exhibit and to re-let said space or any part thereof."
>
> The auditors assessed service B&O tax because they determined the income was from licenses to use the real property rather than from exempt property leases.

> Audit cited WAC 458-20-118 (Rule 118) and WAC 458-20-200 (Rule 200). Audit believed the exhibit spaces were similar to the license example in Rule 118 of concessionaire space at fair grounds or parks. Such income is taxable under the service B&O classification. Audit rejected the argument that the income was from leased departments and exempt under Rule 200 because the rentals were for the short duration of 10-14 days.
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> . . .
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> The exhibit space charge includes an electrical outlet for lighting. All other special wiring is installed at the exhibitor's expense. Each exhibitor must carpet its exhibition space at its own expense. Likewise, each exhibitor must meet OSHA standards in building any platforms, stairs, guard rails, and electrical wiring and must pay for those items itself. Exhibitors must contract with a designated materials handler if one is needed to move into and out of the hall. Exhibitors are responsible for obtaining their own telephones and furnishings. If an exhibitor wishes to have on hand flammable liquids or items, it must apply for a permit from the Fire Department.

Taxpayer does not dispute these facts.

Further, the handbook provides that exhibitors must move their exhibits in and out of the trade show space at times specified by taxpayer. The handbook also provides that exhibitors who move in late may lose their exhibit space at the trade show. Exhibitors who move out early are also penalized.

The handbook also places numerous restrictions on the activities of exhibitors during the trade show. For example, all employees working in the exhibitors' spaces must wear name tags. Taxpayer requires that these name tags be worn only by employees "who actually participate in the staffing of [the] exhibit space" because, according to taxpayer, the staffing of trade show exhibits "is not intended to be an employee benefit." Taxpayer "establishe[d] a guideline" for the number of employees permitted in each exhibit based on the square footage of the exhibit space.

Additional requirements and restrictions include:

> The exhibitor space must be identified with a company sign. Additional signs, banners, or posters which detract from the quality of the show may not be allowed.

> Illuminated signs, flashing lights, and large banners, which in the opinion of show management detract from the show, will not be allowed.
>
> No cooking will be permitted.
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> No balloons, bags, yardsticks, sacks, or any other type of container shall be distributed to the general public. [Taxpayer], at its discretion, may allow the distribution of giveaways and other promotional items which promote the [trade show] in its entirety.
> Exhibit space must be used for the best utilization of space possible.
>
> Only products of the assigned exhibitor may be exhibited within the allocated space.
>
> Cleaning must be complete, and crews out of exhibit areas prior to show opening.

Further, only current models are allowed to be displayed, and no used products are allowed. Taxpayer requires that price signs be no larger than a specified size and that prices displayed on certain products be quoted "FOB" at points specified by taxpayer.

In addition to requiring exhibitors to comply with fire department and OSHA regulations, the handbook sets forth other "safety" requirements. For example, "Lightweight portable stands that have a tendency to move easily are not acceptable because they are not safe." The handbook further requires that carpets be taped down and that only certain types of extension cords be used.

Taxpayer has a committee "canvassing" the trade show to ensure that its standards are met. The committee has the authority to insist that all exhibitors meet taxpayer's requirements and to close an exhibit if taxpayer's requirements are not met.

In taxpayer's petition for executive level reconsideration, it contends that Rules 118 and 200 are invalid and that the Administrative Law Judge misapplied those rules in taxpayer's case.

ISSUES:

1. Whether Rules 118 and 200 are invalid.

2. Whether the Administrative Law Judge misapplied Rules 118 and 200 in concluding that taxpayer's income from providing

space to trade show exhibitors is income from licenses, which is subject to service B&O tax.

DISCUSSION:

[1] Taxpayer, citing Lone Star Indus. v. Department of Rev., 97 Wn.2d 630 (1982), first argues that Rules 118 and 200 tax beyond the scope intended by statute and are, therefore, invalid. Specifically, taxpayer argues, "Washington statutory law prohibits imposing excise taxes on the leasing of real estate (RCW 82.04.050)."

The Department will not entertain general challenges to its authority to adopt rules in accord with the Administrative Procedure Act; such rules, including Rules 118 and 200, have the force and effect of law unless overturned by a court of record. See RCW 82.32.300; Det. No. 88-260, 6 WTD 147 (1988); Det. No. 87-218, 3 WTD 295 (1987); Final Det. No. 86-66A, 1 WTD 55 (1986).

RCW 82.32.300 provides:

> The administration of this and chapters 82.04 through 82.27 RCW of this title is vested in the department of revenue which shall prescribe forms and rules of procedure for the determination of the taxable status of any person, for the making of returns and for the ascertainment, assessment and collection of taxes and penalties imposed thereunder.
>
> The department of revenue shall make and publish rules and regulations, not inconsistent therewith, necessary to enforce their provisions, which shall have the same force and effect as if specifically included therein, unless declared invalid by the judgment of a court of record not appealed from.

The appropriate forums for taxpayer's arguments are before the State Legislature and at the public hearings regarding Excise Tax Rules. In short, the Department, as a Washington administrative agency, must presume the validity and legality of the rules "unless declared invalid by the judgment of a court of record not appealed from." RCW 82.32.300. Accordingly, this Final Determination is limited to an analysis of whether the Administrative Law Judge properly applied the rules and other authority to the facts of this case.

[2] Taxpayer next argues that the Administrative Law Judge misapplied the rules in concluding that taxpayer's income was subject to service B&O tax as income from licenses to use real

estate. Taxpayer argues that its income was from leases of real estate, which is not subject to B&O tax.

Although certain aspects of taxpayer's relationship with the exhibitors are consistent with a lease, we find that the Administrative Law Judge properly applied Rule 118 in concluding that this relationship is properly characterized as a license. In addition, effective March 5, 1990, WAC 458-20-256 (Rule 256) specifically provides that the provision of trade show space, under facts such as these, is subject to service B&O tax. Rule 256 provides:

> When a trade show . . . is sponsored and held by a nonprofit trade . . . organization for a group other than the general public, the sponsoring organization may deduct from its business and occupation tax measure all "attendance" or "space" charges it collects for such an event, per RCW 82.04.4282. Nonqualifying organizations, and qualifying organizations sponsoring nonqualifying events, must include "attendance" and "space" charges in their tax measure for purposes of computing service and other activity business and occupation tax thereon.

Assuming taxpayer is a "qualifying organization," as that term is defined in Rule 256, taxpayer's income from exhibit space does not qualify for exemption because the trade shows it sponsors are "nonqualifying." To qualify for exemption, the trade shows must not be open to the general public. Under Rule 256, this means that attendance must be "limited to members of the sponsoring organization and to specific invited guests of the sponsoring organization." Thus, for the period after March 5, 1990, taxpayer's income from exhibit space is subject to service B&O tax under Rule 256.

While Rule 256 was effective only during approximately the last six months at issue, the result is consistent with our holding for the balance of the audit period, i.e., taxpayer's income derived from licenses and is subject to service B&O tax. In fact, Rule 256 specifically refers to the provision of trade show space as a license.

However, because Rule 256 was effective only for part of the audit period, we must analyze taxpayer's situation under Rule 118, which addresses the distinction between rentals of real estate and mere licenses to use real estate. During the period at issue, it provided:

> A lease or rental of real property conveys an estate or interest in a certain designated area of real property

> with an exclusive right in the lessee of continuous possession against the world, including the owner, and grants to the lessee the absolute right of control and occupancy during the term of the lease or rental agreement. An agreement will not be construed as a lease of real estate unless a relationship of "landlord and tenant" is created thereby. It is presumed that the sale of lodging by a hotel, motel, tourist court, etc., for a continuous period of thirty days or more is a rental of real estate. It is further presumed that all rentals of apartments and leased departments constitute rentals of real estate.
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> . . . A license grants merely a right to use the real property of another but does not confer exclusive control or dominion over the same. Usually, where the grant conveys only a license to use, the owner controls such things as lighting, heating, cleaning, repairing and opening and closing the premises.
> It will be presumed that license to use or enjoy real property is granted in the rental of the following:
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> (1) Hotel rooms (for periods of less than 30 continuous days; see WAC 458-20-166).
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> (2) Motels, tourist courts and trailer parks (for periods of less than 30 continuous days; see WAC 458-20-166).
>
> . . .
>
> (6) Space within [a] park or fair grounds to a concessionaire.

Term of Occupancy. In concluding that taxpayer derived its income from licenses, rather than leases, both the Audit Division and Det. No. 92-213 relied on the fact that the exhibitors occupied their spaces for only ten to fourteen days. Taxpayer argues that there is no presumption under law that any arbitrary period, 30 days or otherwise, is necessarily indicative of a real estate lease. We disagree.

Rule 118 provides that where hotels and similar facilities are occupied for continuous periods of less than 30 days, a license is presumed. Similarly, Det. No. 90-252, 10 WTD 41 (1990), and Det. No. 90-297, 10 WTD 87 (1990), considered the thirty day period in determining whether congregate care facilities received income from leases or licenses when providing rooms to clients.

In addition, RCW 82.04.050(2)(f) provides:

> The term . . . "retail sale" shall include the . . . charge made for . . . the furnishing of lodging and all other services by a hotel, rooming house, tourist court, motel, trailer camp, and the granting of any similar license to use real property, as distinguished from the renting or leasing of real property, and it shall be presumed that the occupancy of real property for a continuous period of one month or more constitutes a rental or lease of real property and not a mere license to use or enjoy the same . . . .

In Diamond Parking, Inc. v. Department of Revenue, BTA Docket No. 5149 (1973), the BTA held that the taxpayer's income from the rental of space for signs was income from a license, subject to service B&O tax, even though the taxpayer could not terminate the agreement without giving thirty days notice. In arguing that the Department erred in classifying its license income under the service, rather than the retailing, B&O tax classification, the taxpayer cited RCW 82.04.050(e). At that time, that statute was very similar to subsection (f), quoted above. The BTA stated:

> [The language regarding the thirty day presumption] refers only to the occupancy of lodging in a "hotel, roominghouse, tourist court, motel, trailer camp" and similar accommodations. This section of the statute, read in the proper context, is not intended as a general requirement that all rentals of property for continuous periods of one month or more may be deemed the rental or lease of realty. It refers only to the renting of lodging and any similar license to use real property (for example; the rental by a hotel of a ballroom, trade show space, or convention facilities). The rental of space for signboards is not similar to rentals of lodging and is not within the purview of this language.

(Emphasis original.) The BTA was addressing a situation in which the term of occupancy was for thirty days or more; the BTA reasoned that simply because the occupancy was for such period, a lease was not necessarily created. Although the BTA appears to limit the thirty day presumption to lodging and similar facilities, it did include the provision of trade show space, albeit by a hotel, in its example of facilities covered by the presumption.

While it is unclear whether the BTA in Diamond Parking construed the thirty day statutory presumption to apply to trade show space other than in a hotel, the Department has subsequently applied the thirty day presumption in other situations. For example, ETB 232.08.118 considered the thirty day period in determining

whether income from parking fees was from a lease or license. Similarly, in Det. No. 89-398, 8 WTD 149 (1989), we stated:

> [S]ervice tax . . . is applicable if it is determined that designated parking spaces have not been rented for a continuous period of one month or more. In such a case there has been a license to use, and not the rental of real estate.

Taxpayer notes that an apartment may be rented for a week and still constitute a lease. We find this argument unpersuasive. First, the relationship between an apartment landlord and tenant is significantly different from the relationship between taxpayer and the exhibitors, as will be evident from our discussion below. Second, Rule 118 specifically provides that rentals of apartments are presumed to be rentals of real estate; the rule contains no such presumption with respect to trade shows.

Taxpayer further argues that it has a long-term relationship with the exhibitors because the trade shows have been conducted for years. However, all of the authorities cited above require that the term of occupancy be for a continuous period of one month (or thirty days) or more.

Because the exhibitors occupied their spaces for only ten to fourteen days, Det. No. 92-213 properly presumed that taxpayer's income derived from licenses, rather than leases. However, taxpayer argues that "the Department may not rest exclusively on the presumptions" in determining whether the arrangement between taxpayer and exhibitors is a lease or a license; the Department must present evidence supporting the presumptions. Tacoma v. Smith, 50 Wn. App. 717, 721-22 (1988). As will be discussed below, Det. No. 92-213 relied on substantial evidence in support of its conclusions: numerous examples were provided that show that the exhibitors did not receive the absolute right of control over exhibit space.

Restrictions on Exhibitors' Right of Control. In its petition for reconsideration, taxpayer repeatedly argued that the test to determine whether an occupant has a lease, rather than a license, is whether the occupant is granted the rights of exclusive possession and control over the property. Taxpayer further argued that the exhibitors received such rights. While we agree that this is a proper test, we do not agree that the exhibitors received such rights with respect to the exhibit space.

a. Restrictions on Exhibitors' Control of Displays. Taxpayer controls the physical layout of the exhibits. For example, taxpayer requires that only certain sizes of signs be used, imposes numerous "safety" requirements (in addition to

those imposed by OSHA and fire regulations), requires that the displays be carpeted, and requires that space "be used for the best utilization of space possible."

b. Restrictions on Exhibitors' Control of Activities. Taxpayer controls what exhibitors can and cannot give away. Taxpayer prohibits cleaning crews from being present in the exhibit areas during the show. Taxpayer dictates when exhibitors may move in and out of their exhibit areas.

c. Restrictions on Exhibitors' Control of Displayed Products. Taxpayer controls the types of products displayed by exhibitors. The products must be industry-related, current models, and of a type generally sold by that exhibitor. Exhibitors may not display used products. In addition, taxpayer controls the pricing terms of certain products: the products must be priced FOB at points specified by taxpayer.

d. Restrictions on Exhibitor's Control of Lighting and Heating. As noted in Det. No. 92-213, exhibitors do not control such things as lighting and heating. Rule 118 provides that usually "where the grant conveys only a license to use, the owner controls such things as lighting [and] heating."

Taxpayer argues that exhibitors control the lighting and heating of their individual exhibits, but they cannot control the lighting and heating for the overall facility. Apparently, taxpayer is suggesting that exhibitors may use lamps and space heaters to supplement the lighting and heating provided by the facility. Because most any occupant could use these supplemental measures in any lease or license situation and because the facility owner retains ultimate control over lighting and heating, we find taxpayer's argument to be unpersuasive.

Taxpayer also cites Gottlieb Bros., Inc. v. Culbertson's, 152 Wn. 205 (1929), in which the court found a lease existed where the landlord furnished, and presumably controlled, lighting, heating, and janitorial services. However, in Gottlieb, these were the only items the court specifically addressed as being controlled by the owner. In contrast, taxpayer exercised numerous other controls over the exhibit spaces, which diminished the control exhibitors were able to exercise over their spaces. Further, the tenant in Gottlieb occupied the premises for approximately three years. Here, the exhibitors occupy their spaces for only ten to fourteen days. In short, Gottlieb is distinguishable from the facts here.

e. Restrictions on Exhibitors' Access. As noted in Det. No. 92-213, the hours exhibitors have access to their spaces are limited, and exhibitors are required to be open during certain

hours. Rule 118 specifically provides that where the owner controls the opening and closing of the premises, usually the grant conveys only a license.

Taxpayer argues that these restrictions are similar to those imposed on stores in shopping malls. However, in contrast to occupants of stores in shopping malls, the exhibitors only occupy their spaces for ten to fourteen days. Further, the restrictions on opening and closing the trade shows are only two of many restrictions on the exhibitors' control of their spaces.

Taxpayer further argues that access is controlled by the owners of the facilities, not taxpayer, for security and maintenance purposes. The fact that there may be valid reasons for the controls and that the restrictions are imposed by the owner of the facility, rather than taxpayer, do not diminish the fact that these controls significantly diminish the control the exhibitors exercise over their spaces.

f. Restrictions on Exhibitors' Employees. Taxpayer "establishe[d] a guideline" for the number of employees permitted in the exhibit areas, requires that employees wear badges, and regulates their functions in the exhibit area (only employees "who actually participate in the staffing of [the] exhibit space" are permitted).

Taxpayer urges that the limitations on number of employees is crucial to a professionally operated trade show, safety, and security. Again, these restrictions significantly diminish the control the exhibitors are able to exercise over their spaces, and the fact that taxpayer may have valid reasons for the restrictions does not lessen their impact.

In short, we find that exhibitors did not receive "absolute right of control" over the exhibit spaces. Det. No. 92-213 properly concluded that the exhibitors were granted licenses to use the exhibit space. Taxpayer merely granted the exhibitors the right to display certain products at certain times and under certain conditions. Taxpayer's income from such licenses is subject to service B&O tax.

Because we have found that taxpayer did not lease exhibit spaces to exhibitors, we need not address taxpayer's argument that the exhibit spaces were "leased departments": a lease is an essential element of a "leased department." Rule 200.

Finally, although we have considered the remaining issues taxpayer raised, we need not address them here because we have found that the term of occupancy was for a short duration and the exhibitors did not receive sufficient right of control.

DECISION AND DISPOSITION:

Taxpayer's petition for refund is denied. These issues have been given thorough treatment and full review at the executive level of the Department, as evidenced by the signature of the Assistant Director as the Director's executive designee. This determination constitutes the final action by the Department of Revenue. However, taxpayer may petition for a refund in Thurston County Superior Court in accordance with RCW 82.32.180. The Thurston County Superior Court is the only court in the state that has original jurisdiction to hear excise tax matters and where venue is proper. In the alternative, appeal may be taken to the Board of Tax Appeals (PO Box 40915, Olympia, WA 98504-0915) pursuant to RCW 82.03.190. The petition must be filed with the Board within thirty days of this denial.

DATED this 13th day of August 1993.