BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund	)	D E T E R M I N A T I O N
	)	
	)	No. 98-099
	)	
. . .	)	Docket No. . . .
	)	Leasehold Excise Tax
	)	
	)	

[1] RCW 82.29A.020(1): LEASEHOLD EXCISE TAX. Permits and licenses which grant whitewater rafting services the use or possession of publicly owned land are subject to the Leasehold Excise Tax. Exclusive use or possession of the land is not required. *Rainier Mountaineering, Inc. v. Department of Revenue*, BTA Docket NO. 3706, 10 WTD 197 (1991); and *MAC Amusement Co. v. Department of Revenue*, 95 Wn2d 963, 971, 633 P.2d 68 (1981).

[2] RCW 82.29A.020(1): LEASEHOLD EXCISE TAX. The reference to "possession and use" in RCW 82.29A.020(1) means "occupancy and use."

[3] RCW 82.29A.020(1): LEASEHOLD EXCISE TAX. Federally owned lands are publicly owned lands. Licenses and permits for federally owned lands are 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.

NATURE OF ACTION:

Taxpayer petitions for a refund of leasehold excise tax arising out of its permits to use state and federal forest lands for its whitewater rafting business.[1]

FACTS:

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

Bianchi, A.L.J. -- In 1997, the Department of Revenue obtained a list of all persons with leases or permits to use or possess federal lands situated in Washington state. The Department subsequently sent letters to each of the lessees and permittees who had not paid leasehold excise tax requesting that they report and pay such tax for the tax period between 1993 to 1997.

The taxpayer operates a white water rafting service on three rivers in Washington State. The taxpayer has obtained two special-use permits from the U.S. Department of Agriculture (USDA) and a temporary permit from the Washington State Department of Fish and Wildlife (WDFW) to use portions of the land through which these rivers flow. The taxpayer received one of the letters from the Department described above. In November 1997, the taxpayer filed a return showing a leasehold excise tax obligation for 1993 through 1997 on the gross rent paid for such permits. The total assessment was $. . . for the . . . River and $. . . for the . . . Taxpayer paid the assessment and filed this appeal for a refund.

The taxpayer's use of the publicly owned property consists of driving over forest service roads on the property, use of trails on the property, parking vehicles on it, using sites along the river to launch and take out the rafts, as well as for rest stops and lunch breaks while floating on the river. On some occasions, it is necessary for the taxpayer to portage the rafts around falls. In some instances the trip may begin on National Forest Service land and end on WDFW land.

The Taxpayer's WDWF Permit states:

> The intent and purpose of this permit is to grant the Permittee the use of said land for the purpose of launching and retrieving rafts for commercial purposes.

One of its USDA Forest Service Permits states:

> This permit covers 7.7 miles and is described as . . . from . . . to . . . Lake as shown on the location map attached to and made a part of this permit, and is issued for the purpose of: Providing outfitting and guiding service for whitewater rafting.

(Emphasis added). A second USDA Forest Service Permit states:

> [Taxpayer] (hereinafter called Holder) is hereby authorized to use or occupy National Forest System lands, to [sic] use subject to the conditions set out below, on the . . . Forest, the . . . District unit of the National Forest System.
>
> This permit covers 5 acres and/or 20 miles, and is described ... as shown on the location map attached to and made a part of this permit, and is issued for the purpose of: White water rafting for 254 priority user days and 65 temporary user days for a total of 319 user days during peak weekends, and any additional days may be used on shoulder weekends and weekdays. The three peak weekends,

> begin on the weekend of September 10, (if September 10 is Saturday) or the first weekend after September 10. The above activity shall be performed according to this permit and the Operation Plan attached to and hereby made a part of this permit. [not attached]

The permits clarify that the taxpayer's use is not exclusive, and no permanent possessory right is granted thereby. The fee for the permit for takeout privileges from the . . . River on Washington State Fish and Wildlife land was $150.00 for 15 trips between August 30, 1997 and October 1, 1997. The fee to operate on . . . Forest land for launching on the . . . River and for operating along the . . . River through the . . ., both operated by the USDA, was a percentage of the adjusted annual customer revenue derived from the use authorized by the permit--or 3% of the annual adjusted gross revenue. The taxpayer additionally operates on the . . . River, but launches from his own property along that river and takes out at another property owned by the taxpayer in . . .. The taxpayer receives no permit for this use and pays no tax for it.

Taxpayer's objections to the assessment of leasehold excise tax for its use of state and federal forest lands are fourfold. First, taxpayer contends that neither the USDA nor the WDFW provides any services to the taxpayer. The Taxpayer provides its own water, sani-cans, and refuse containers. Second, taxpayer alleges its use of the access and the river is not exclusive. Taxpayer shares the launch, take out and rest areas, and the rivers with boaters, fisherman, and other rafters. Third, taxpayer points out that no such charge is collected for his use of the Deschutes River in Oregon even though the permitting authority is the U.S. Department of the Interior. He questions whether the leasehold excise tax applies to federal lands. Fourth, the taxpayer contends that other guides providing similar services with similar permits have been exempt from this tax.

ISSUES

1. Is a taxpayer relieved of the obligation to pay leasehold excise tax because the governmental entities provide few services for the taxpayer in relation to the leasehold?

2. Must the taxpayer have exclusive possession of the publicly owned property for leasehold excise tax to apply?

3. Does the leasehold excise tax apply to permits on federally owned properties?

DISCUSSION:

1. Services are provided by governmental entities to the taxpayer.

The leasehold excise tax applies to leases, permits and licenses to possess and use publicly owned properties. The purpose of the tax is set out in RCW 82.29A.010:

> [P]rivate lessees of such public properties receive substantial benefits from governmental services provided by units of government...
>
> . . .
>
> 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.

Had the taxpayer owned the land in question, it would have paid property tax which would have helped to pay for the benefits it receives from governmental services. The legislature passed the leasehold excise tax so that private lessors of publicly owned lands would pay their fair share of the benefits they receive from government's maintenance of those lands. "The tax is intended to defray some of the governmental expense of maintaining areas from which private lessees benefit." *MAC Amusement Co., v. Department of Revenue*, 95 Wn.2d 963, 971, 633 P.2d 68 (1981).

The taxpayer contends that it receives no services because it has to provide its own sani-cans and refuse containers. But the government does provide substantial services in the form of roads, trails, and parking areas. It maintains the riverbank, affording the launch, take-out, and rest stop areas. In *MAC Amusement*, 95 Wn.2d at 971, the Washington Supreme Court pointed out that the city was responsible for maintaining walkways in the Seattle Center which were leased to the plaintiff. Those walkways constituted a part of the leased premises and were a valuable service to the taxpayer. In the same way the maintenance of roads, trails, and the riverbank by the several governmental units involved constitutes substantial services to the taxpayer.

2. The leasehold excise tax statute does not require the taxpayer to have exclusive use of the property.

Despite its name, the leasehold excise tax applies to far more than leases. It applies to any lease, permit, license, or other agreement granting possession and use of the publicly owned property. RCW 82.29A.020(1). This taxpayer has permits from the public owner of the national forestlands which grants it use of the properties. The taxpayer argues that it has only use of the property, it does not have possession. The permits received by the taxpayer specifically state that the permittee receives no permanent possessory interests.

At first glance, the statute appears to contain an internal conflict in that it: (1) applies to an interest in publicly owned land; (2) existing by virtue of a lease, permit, or license, or other written or oral agreement; and (3) entitling one to use and possession of land, to a degree less than fee simple. The permit granted to the taxpayer in this case is a license. Under traditional property law a license does not confer a possessory estate. It grants use, but not the right to

exclude the owner of the land, either wholly or partially, from possession of the estate. *Bakke v. Columbia Valley Lumber Co., Inc*., 49 Wn.2d 165, 170, 298 P.2d 849 (1956).

In harmonizing any statute, however, more general terms are interpreted in a manner consistent with the more specific terms. *State v. Roadhs*, 71 Wn.2d 705, 708, 430 P.2d 586 (1967). Thus the term "possession" must be construed in terms of the meaning of a "license." As used in this statute, the term possession does not mean the right to exclude others, but merely the right to occupy. This construction is buttressed by the fact that two provisions of the same section of the statute define leasehold interests as the right to "use or occupancy." 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: PROVIDED, That no interest in personal property (excluding land or buildings) which is owned by the United States, whether or not as trustee, or by any foreign government shall constitute a leasehold interest hereunder when the right to use such property is granted pursuant to a contract solely for the manufacture or production of articles for sale to the United States or any foreign government. The term "leasehold interest" shall include the rights of use or occupancy by others of property which is owned in fee or held in trust by a public corporation, commission, or authority created under RCW 35.21.730 or 35.21.660 if the property is listed on or is within a district listed on any federal or state register of historical sites. The term "leasehold interest" shall not include road or utility easements or rights of access, occupancy or use granted solely for the purpose of removing materials or products purchased from a public owner or the lessee of a public owner.

(Emphasis added). There would be no need to exclude mere "occupancy for the purpose of removing materials" from the definition of leasehold interest if the main section of the statute already required exclusive possession.

Prior judicial construction of this statute also defines "possession" as nonexclusive. In *Rainier Mountaineering, Inc. v. Department of Revenue*, BTA Docket No. 3706, 10 WTD 197 (1991), the Board of Tax Appeals (BTA) rejected the taxpayer's contention that its taxable leasehold interest extended only to the area of Mt. Rainier over which it had exclusive possession--the buildings and guide shack. Instead, the BTA held that Rainier Mountaineering's contract gave it the right to both "possession and use" of the alpine area of the mountain despite the public's right to use the same area, citing *MAC Amusement*, 95 Wn.2d at 970-71.

> By definition, the taxable rent is that rent paid for a "leasehold interest," which is defined as not only including leases, but also permits and licenses. RCW

> 82.29A.020(l). The taxable rent additionally includes those sums paid for the *use* as well as the possession of public property. RCW 82.29A.030. From these provisions, it would appear the legislature intended to tax those areas the use of which was bargained for. Those provisions, by including uses and permits, give "leasehold" a meaning not ordinarily contemplated by that term.
>
> Taxing the use as well as possession of property is consistent with the purpose of the tax.

Permissive occupancy and possession are synonymous under this statute. The use does not have to be exclusive to the permittee.

3. The leasehold excise tax applies to non-exempt, federally-owned lands.

The taxpayer questions whether he owes leasehold excise tax for permits on federal properties. He points out that he pays no leasehold excise tax on the permits he has receives from the U.S. Department of the Interior for his operations on the Deschutes River in Oregon.

Whether or not Oregon has a leasehold excise tax, or applies it to this taxpayer's operations in Oregon, is not dispositive here. The leasehold excise tax is a Washington State tax that applies to all "publicly owned properties" not just ones owned by the state or local jurisdictions. RCW 82.29A.010. If federal lands were not included within the definition of publicly owned lands, there would be no need for the many exemptions for federal properties contained in the act. Specifically, such exempt federal properties include: subsidized housing (RCA 82.29A.130(3), enrolled Indian or trust land, (RCW 82.29A.130(6) and (7)), leaseholds arising out of a contract for public improvements with the federal government (RCW 82.29A.130(11), and federal properties leased for the manufacture or production of articles of sale to the United States government (RCW 82.29A.020(1)). Had the legislature intended to exempt federal lands, it would have done so. For example, the forest excise tax on publicly owned lands specifically exclude lands held by federal government. RCW 84.33.078. Statutes are to be construed so that no portion is superfluous, void, or insignificant. *United Parcel Service, Inc. v. Department of Revenue*, 102 Wn.2d 355, 361-62, 687 P.2d 186 (1984). Permits to use federal forest service lands for commercial whitewater rafting purposes are not specifically exempt.

Thus, permits for the temporary use and possession of nonexempt state and federal lands are subject to the leasehold excise tax.

Finally, whether or not other taxpayers similarly situated have not been required to pay this tax cannot constitute grounds for non-payment of a tax validly assessed against the taxpayer. In *Frame Factory v. Department of Ecology*, 21 Wn.App. 50, 57, 583 P.2d 660 (1978) the Court of Appeals rejected an allegation of selective enforcement in the absence of a claim that the person was selected for enforcement on a prohibited basis such as race or religion. The taxpayer makes no such claim here. Further, the Secrecy Clause, RCW 82.32.330, strongly prohibits the

Department from discussing the particulars of one taxpayer's situation with another taxpayer. See Det. 92-004,11 WTD 551, 563 (1992).

DECISION AND DISPOSITION:

The petition for refund is denied.

Dated this 29th day of May 1998.