

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

In The Matter of the Petition     )     D E T E R M I N A T I O N  
For Correction of Assessment     )  
of     )     No. 88-427  
  )  
  )     Registration No.     .     .     .  
)     .     .     /Audit No.     .     .     .  
  )

**RULE 118:** RENTAL OF OR LICENSE TO USE REAL ESTATE -  
-EXCLUSIVE POSSESSION AND CONTROL -- REQUIREMENTS.  
An arrangement whereby an associate rents a single  
office in an office suite from the taxpayer, where  
the associate has a separately defined office space,  
is not dependent on the taxpayer for access to the  
space, and has a locking door to its office, meets  
the requirements for exclusive possession and  
control necessary to find a rental of real estate.  
Tacoma v. Smith, 50 Wn. App. 717 (Div. II, 1988),  
Ross v. Washington, Docket No. 80-26 (BTA 1981).

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 correction of part of an assessment  
assessing service b&o tax on amounts received for office space  
from an engineer.

FACTS AND ISSUES:

Hesselholt, A.L.J. -- Taxpayer protests the assessment of  
service b&o on amounts received from the rental of office  
space to an associate consultant. Taxpayer argues that this  
agreement constitutes a rental of real estate for the  
following reasons:

1. The associate who rented during the period . . . had exclusive control of an office with a door which could be locked, [although other interior doors have no locks]

2 During the . . . history of [the] rental arrangement the exclusivity of the associates' control of space has always been respected and maintained;

3. Although access to the office is through the suite's exterior door - the associate had his own key and complete freedom of access;

4. A written rental agreement formalizes this relationship;

5. The invoice history clearly documents that "rent" was charged.

The auditor believed that the rental was a license to use real estate, and therefore assessed service b&o on the amounts received.

#### DISCUSSION:

WAC 458-20-118 (Rule 118) provides, in part, that

Amounts derived from the sale and rental of real estate are exempt from taxation under the business and occupation tax. However, there is no exemption of amounts derived from engaging in any business wherein a mere license to use or enjoy real property is granted.

. . .

LEASE OR RENTAL OF REAL ESTATE. 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 unless a relationship of "landlord and tenant" is created thereby.

. . .

LICENSE TO USE REAL ESTATE. 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.

In Tacoma v. Smith, 50 Wn. App 717 (Div. II, 1988), the court stated that

a lease is created if a tenant is granted exclusive possession or control of the parcel or a portion thereof . . . This is true even if the tenant's possession of the real estate is restricted by reservations. . . Such reservations can include the right to sell the leased property before the lease is over. . . and to designate from time to time the place on the premises to be occupied by the tenant. . . On the other hand, a license exists if a person is granted only the authority to do a particular act upon the owner's land. (citations omitted)

In this case, the associate has the use of an office in the taxpayer's office suite. Taxpayer argues that this arrangement is a rental of real estate and therefore not subject to tax. In Ross v. Washington, Docket No. 80-26, (Board of Tax Appeals, 1981), the Board issued the following Conclusions of Law:

2. The critical question in determining the existence of a landlord/tenant relationship is whether exclusive control of the premises is passed to the tenant. A lease conveys to the tenant a present interest and estate in the property subject to the lease for the period specified. A lease (sic) [lessee] receives exclusive possession of the property and may assert that possession against anyone, including the lessor.

3. A license is an authority to do a particular act or series of acts upon another's property without possessing any estate in the property. The essential element in the creation of a license is the permission or consent of the licensor. The license may be given in writing or orally and it may be with or without consideration.

5. WAC 458-20-118 sets forth the guidelines appropriate to distinguishing a lease or rental of real estate from a license to use real estate. Under Rule 118, a license grants merely a right to use the real property of another but does not confer exclusive control or dominion over the same.

While the facts in this case are not the same as those in the BTA case, above, the principles remain the same. The taxpayer here has granted an associate the exclusive control of a separate office within its office suite. The associate can lock his door and can exercise exclusive possession and control over the space. Therefore the lease requirement of exclusive possession and control is met.

DECISION AND DISPOSITION:

Taxpayer's petition is granted. The amounts representing the rental income shall be deleted from the assessment.

DATED this 17th day of November 1988.