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BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund of Assessment of	)	D E T E R M I N A T I O N
	)	No. 07-0051
. . .	)	
	)	Registration No. . . .
	)	. . .
	)	Docket No. . . .
	)	

WAC 458-29A-400; RCW 82.29A.130: LEASEHOLD EXCISE TAX – PUBLIC WORKS CONTRACTS EXEMPTION – REQUIREMENT THAT LEASEHOLD ARISE SOLELY BY VIRTUE OF A PUBLIC IMPROVEMENTS CONTRACT BETWEEN PUBLIC LESSOR AND LESSEE. The Leasehold Excise Tax exemption in RCW 82.29A.130 for leasehold interests in publicly owned property applies only when the leasehold interest arises solely by virtue of a public improvements contract between the lessor and the lessee. It does not apply when the lessor is a public owner and the lessee uses the property only for performing work under public improvements contracts, but the leasehold interest did not arise solely by virtue of a public improvements contract between the lessor and the lessee.

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.

Prusia, A.L.J. – A contractor that leased space from a public entity, where it stored materials for contract and subcontract work that it performed for many different public entities, appeals the denial of its request for refund of the leasehold excise tax (LET) it paid on the leasehold interest, contending the leasehold interest was exempt from LET because the leased unit was used only for storing materials for use on public works projects. We conclude that the leasehold interest was not exempt from LET, and deny the petition.[1]

ISSUE

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

To be exempt from LET under the public works contract exemption in RCW 82.29A.130, must a leasehold interest in publicly owned real property arise solely by virtue of a public improvements contract between the lessor and a contractor? Or, is a leasehold interest exempt from the leasehold excise tax (LET) when the lessor is a public owner and the lessee uses the property only for performing work under public improvements contracts, regardless of whether the lease arises by virtue of a public works contract with the lessor?

FINDINGS OF FACT

[Taxpayer] is [a] systems contractor headquartered in . . . Washington. It performs . . . systems installation on private and public contracts.

Taxpayer leases a unit in a [Washington location] building from the federal government (General Services Administration, or "GSA"). It has leased the space since . . . , 2002. The contract was renewed or amended in . . . 2002 (amendment), . . . 2003 (renewal), . . . 2004 (renewal and amendment), . . . 2004 (amendment), . . . 2005 (amendment), . . . 2005 (renewal and amendment), and . . . 2006 (amendment). The lease restricts the type of materials that may be stored at the facility, but does not restrict its use to the storage of materials for a GSA project or projects. Taxpayer leased the space from GSA after seeing a large sign at the location advertising space for lease. The lease did not arise by virtue of a contract for public improvement or work executed under public works statutes between GSA and Taxpayer. Rather, Taxpayer entered into, and has renewed, the lease because it needs a large storage space for the materials and supplies it uses on its installation projects for various public entities.

During the period 2002 through 2004, Taxpayer stored materials in the leased unit for use on public works contract and subcontract work it performed on contracts with public entities that included [various institutions in Washington].

Taxpayer filed leasehold excise tax ("LET") returns for 2002 through 2004 for the unit it leased from GSA, and paid LET in the total amount of . . . .

In the Spring of 2005, Taxpayer requested a refund of LET paid for 2002 through 2004, asserting that its leasehold interest in the unit it leased from GSA was exempt from LET because Taxpayer used the unit solely for public works construction purposes.

In considering the refund request, the Special Programs Division of the Department of Revenue ("Special Programs") requested documentation on the public works contracts on which Taxpayer was listed as a contractor for the period 2001 to 2005. Taxpayer provided copies of public works contracts on which Taxpayer was a contractor or subcontractor. GSA was not listed as a contracting party on any of the contracts Taxpayer submitted at that time.[2]

[2] On appeal, Taxpayer submitted additional contracts and orders for services, one of which was an order by GSA.

By letter dated . . . 2005, Special Programs denied the request. The letter set out WAC 458-29A-400(12) and stated that Taxpayer's leasehold with GSA did not qualify for the exemption from LET because "The public owner of the property (GSA) is not one of the contracting parties."

Taxpayer interpreted [that] letter as assuming that only the prime contractor can claim the exemption, and only then if the prime contractor actually performed the work. Taxpayer submitted a letter by its attorney, which contended that a lease with a subcontractor also could be exempt.

On . . . , 2005, the Special Programs Division of the Department of Revenue again denied the request for refund. The denial letter stated that Special Programs had presented Taxpayer's situation to Project Counsel at the Department's Interpretation and Technical Advice section (ITA), and the decision was as follows (quoting from the ITA decision):

> The exemption from leasehold excise tax for leasehold interests arising solely by virtue of a public works contract is available to both prime contractors and subcontractors. However, to qualify for the exemption, the contractor or subcontractor must use the space exclusively for a purpose related to work performed for the public lessor. For example, if the leasehold interest is with GSA, the subcontractor must be using the space exclusively for work performed for GSA. Storage of materials used for other public agencies' public works products [sic] is not a qualified use. In other words, the subcontractor does not qualify for the exemption if his leasehold interest with GSA is used for storage of materials used in public works projects for [other public entities].

Taxpayer appeals the denial of the refund request.

ANALYSIS

Properties of the [United States,] State of Washington, counties, school districts, and other municipal corporations are exempted from property tax obligations by Article 7, section 1 of the state constitution. Chapter 82.29A RCW establishes a Leasehold Excise Tax (LET) on the act or privilege of occupying or using publicly owned real or personal property through a leasehold interest. The intent of the chapter is to ensure that lessees of property owned by public entities bear their fair share of the cost of governmental services when the property is rented to a lessee who would be subject to property taxes if the lessee were the owner of the property. WAC 458-29A-100. The lessor is liable for collection and remittance of the LET. RCW 82.29A.050.

RCW 82.29A.130 sets out a number of exemptions to the LET. The one relevant to this appeal, RCW 82.29A.130(11), states that the following leasehold interests are exempt:

> All leasehold interests in any publicly owned real or personal property to the extent such leasehold interests arises solely by virtue of a contract for public improvements or work executed under the public works statutes of this state or of the United States between the public owner of the property and a contractor.

WAC 458-29A-400 is the Department rule that explains the exemptions set out in RCW 82.29A.130. That rule stated as follows, in relevant part:

> **WAC 458-29A-400 Leasehold excise tax--Exemptions.** (1) **Introduction.** This rule explains the exemptions from leasehold excise tax provided by RCW 82.29A.130, 82.29A.132, 82.29A.134, and 82.29A.136. To be exempt from the leasehold excise tax, the property subject to the leasehold interest must be used exclusively for the purposes for which the exemption is granted. . . .
>
> (12) **Public works contracts.** Leasehold interests in publicly owned real or personal property held by a contractor solely for the purpose of a public improvements contract or work to be executed under the public works statutes of Washington state or the United States are exempt from leasehold excise tax. To receive this exemption, the contracting parties must be the public owner of the property and the contractor that performs the work under the public works statutes.
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> For example, during construction of a second deck on the Nisqually Bridge pursuant to a public works contract between the state of Washington and Tinker Construction, any leasehold interest in real or personal property created for Tinker solely for the purpose of performing the work necessary under the terms of the contract is exempt from leasehold excise tax.

The statute says the leasehold interest must arise "solely by virtue of a contract for public improvements or work executed under the public works statutes . . . between the public owner of the property and a contractor." "By virtue of" means "through the force of **:** by authority of,"[3] or "on the grounds or basis of **:** by reason of."[4] We read the statutory language as meaning the lessor must create the leasehold for the lessee, or the lessee must enter into the lease, solely because the lessee is performing or obligated to perform work for the lessor. If the lease contract is entered into for reasons unrelated to a contract for public improvements for the lessor, or public works to be performed by the lessee for the lessor, the leasehold is not exempt under the statute.

In Taxpayer's case, the facts show Taxpayer and GSA entered into the lease for reasons that had nothing to do with any work Taxpayer was to perform for GSA. Taxpayer entered into the lease because it needed space to store materials and supplies for many projects for many entities, and GSA had space available that met Taxpayer's needs. GSA was offering the space to anyone, and did not create the lease because Taxpayer was performing, or had contracted to perform, work for GSA. Taxpayer performed some work on a GSA project in the following year, but there is no evidence that entering into the leasehold contract had anything to do with that work. We find that the leasehold interest did not arise solely by virtue of a contract for public improvements or

[3] Webster's Third New International Dictionary, pg. 2556.
[4] Webster's II New College Dictionary, pg. 1234 (1955).

work executed under the public works statutes between the public owner of the property and a contractor, and therefore conclude that the leasehold interest is not exempt from LET under RCW 82.29A.130(11).

In claiming its leasehold interest was exempt for the years in question, Taxpayer urges a different interpretation, based on language in the rule. It argues the leasehold is exempt so long as the lessor is a public owner, and the lessee holds the lease only for working on public works projects, both of which were the situation here. Taxpayer focuses on the word "purposes" in the last sentence in the rule's introductory language in WAC 458-29A-400(1), set out above. It argues (emphasis is Taxpayer's):[5]

> WAC 458-29A-400 provides that so long as the leasehold interest is exclusively used for "the **purposes** for which the exemption is granted," then you are entitled to the exemption. You are not required to use it for a single exempt purpose, but rather, you may use if for multiple purposes, so long as all **purposes** are exempt **purposes**.
>
> The introduction to WAC 458-29A-400 makes it clear that you can use the property for multiple exempt purposes, so long as the leasehold is used exclusively for exempt purposes. The introduction says:
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> > This rule explains the exemptions from leasehold excise tax provided by RCW 82.29A.130 [etc.]. To be exempt from the leasehold excise tax, the property subject to the leasehold interest must be used exclusively for the **purposes** for which the exemption is granted.
>
> Notice that the sentence uses the plural "purposes," as opposed to the singular "purpose." That distinction is important. That means that so long as the leasehold interest is used exclusively for one or more exempt "**purposes** for which the exemption is granted," then you are entitled to the exemption, so long as all "purposes" are subject to the exemption.
>
> Here, you have a leasehold interest for the property used solely for the creation of products used by prime contractor for public owners. Since the "purposes" of the leasehold are "exclusively" for public works projects, all of them subject to WAC 458-29A-400, the exemption applies.

The language on which Taxpayer builds its argument speaks of "the purposes **for which the exemption is granted**" (emphasis added). Taxpayer gets off track by focusing on the purposes for which Taxpayer uses the leasehold, which is not the same thing as the purpose for which the

[5] We quote from Taxpayer's representative's . . . , 2006 letter to the Special Programs Division, which Taxpayer incorporates by reference in its petition for review.

exemption is granted.[6] The requirements for the exemption set out in the statute indicate the exemption's purpose is to exempt a leasehold interest that arises solely by virtue of a public works contract with the public lessor. Section (1) of the rule then would require that the leasehold be used exclusively for performing work for the lessor, as ITA stated in its response to Special Programs.

Taxpayer also ascribes a significance to rule section (1)'s use of the plural "purposes," rather than the singular "purpose," that we believe is not warranted. The section is introductory language that applies to nearly twenty different exemptions. The rule's use of the plural "purposes" is simply general language that covers exemptions that may have more than one purpose. It is a general rule of construction that "[c]ommon usage in the English language does not scrupulously observe a difference between singular and plural word forms. This is especially true when speaking in the abstract, as in legislation prescribing a general rule for future application." 2A Norman Singer, Sutherland Statutory Construction § 47.34 (5th ed. 1992). WAC 458-29A-400(12) has one purpose, and that is the "purposes" to which section (1) refers for purposes of that exemption.

Having concluded Taxpayer's leasehold interest in the GSA property was not exempt from the LET, we deny the petition for refund of LET paid for 2002 through 2004.

DECISION AND DISPOSITION

Taxpayer's petition for refund is denied.

Dated this 28th day of February, 2007.

[6] Section (1) does not say the leasehold is exempt so long as it is used only for purposes of performing public improvement work. We find nothing in the statute that suggests the purpose of the exemption is to exempt all leasehold interests in publicly owned property held by a contractor who holds the interest for the purpose of performing public works contracts for multiple public entities.