Cite as Det No. 08-0076, 28 WTD 55 (2009)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund of	)	D E T E R M I N A T I O N
	)	
	)	No. 08-0076
	)	
. . .	)	Registration No. . . .
	)	Petition for Refund
	)	Docket No. . . .
	)	

WAC 458-29A-100; RCW 82.29A.020: LEASEHOLD EXCISE TAX ("LET") – LEASEHOLD INTEREST – POSSESSION AND USE. Both possession and use are required to create a leasehold interest, and the lessee must have some identifiable dominion and control over a defined area to satisfy the possession element. A permit granting use of public lands for the purpose of constructing and operating a ski resort was subject to LET. The resort operator had a sufficient degree of dominion and control over the permit area to satisfy the possession element of the test, and constitute a taxable leasehold interest.

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.

Chartoff, A.L.J. – An owner of a ski resort operating on public land pursuant to a US Forest Service permit requests a refund of leasehold excise tax (LET) paid with respect to its use and occupancy of public land, contending, *inter alia*, it does not have a taxable leasehold interest under Ch 82.29A RCW. We deny the petition.[1]

ISSUE

Whether the taxpayer is liable for leasehold excise tax on a permit granted by the US Forest Service to operate a ski resort on National Forest Service land.

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

FINDINGS OF FACT

The taxpayer is the owner and operator of [a] ski resort located [on National Forest Service land in Washington]. The taxpayer operates [the resort] under a permit with the U.S. Forest Service, authorized under Title 16, United States Code, Section 497b, and Title 36 Code of Federal Regulations, Section 251.50-251.64. 16 USC 497b authorizes the Secretary of Agriculture to issue permits for the use and occupancy of suitable lands within the National Forest System for Nordic and alpine skiing operations and purposes.

The Permit granted to [taxpayer] by the Forest Service states:

> [Taxpayer] is hereby authorized to use National Forest System lands, on the . . . National Forest, for the purposes of constructing, operating, and maintaining a winter sports resort including food service, retail sales, and other ancillary facilities, described herein, known as the . . . ski area and subject to the provisions of this term permit. The permit covers . . . acres described here and as shown on the attached map . . . .

Excluded from the permit area are [some other sites]. The Forest Service has granted use and occupancy of these sites to the respective users under separate permits.

The taxpayer is the owner of the buildings, ski lifts, water treatment facility, and other improvements located within the permit area. The taxpayer remits personal property tax to the county on the value of its improvements. The taxpayer maintains . . . acres of ski-able terrain.

The permit is for a term of . . . years. However, during the term of the permit, the Forest Service may terminate the permit if a higher public purpose so requires. (Section VIII.A). In such event, the United States Government is required to purchase the taxpayer's improvements.

The permit is not exclusive. It states that the "Forest Service reserves the right to use or permit others to use any part of the permitted area for any purpose, provided such use does not materially interfere with the rights and privileges hereby authorized." (Section I.E). During the period under review, the forest service did not grant permits to others on the permitted area . . . .

The permit allows the taxpayer to "sublease the use of land and improvements covered under this permit and the operation of concessions and facilities" with prior written notice and approval of the Forest Service. (Section VII.A).

The Forest Service imposes various restrictions on the taxpayer's operations and use of the permit area property. For example, the taxpayer is generally required to keep the permit area open to the public:

> Area Access. Except for any restrictions as the holder and the authorized officer may agree to be necessary to protect the installation and operation of authorized structures and developments, the lands and waters covered by this permit shall remain open to the

> public for all lawful purposes. To facilitate public use of this area, all existing roads or roads as may be constructed by the holder, shall remain open to the public, except for roads as may be closed by joint agreement of the holder and the authorized officer.

(Section I.F). In addition, the taxpayer is required under the permit to develop and maintain the property in accordance with the Master Development Plan. (Section I.G). The permit allows the Forest Service to inspect and monitor the taxpayer's facilities and improvements at any time. (Section XI.B). The Forest Service may also regulate services and rates as explained in the Permit, Section XI.C:

> The Forest Service shall have the authority to check and regulate the adequacy and type of services provided the public and to require that such services conform to satisfactory standards. The [taxpayer] may be required to furnish a schedule of prices for sales and services authorized under this permit. Such prices and services may be regulated by the Forest Service: Provided, that the [taxpayer] shall not be required to charge prices significantly different than those charged by comparable or competing enterprises.

The permit requires the taxpayer's advertisements and signs to state that the taxpayer's facilities are located in the National Forest. . . .

The ski area permit fees are calculated generally as a percentage of the taxpayer's revenue. (Section VI). [The permit defines the revenue streams that are included in the calculation of the permit fees].

Partners in Recreation

One of the missions of the Forest Service is to provide outdoor recreational opportunities to the public. In order to provide alpine and Nordic skiing opportunities in the national forests, the Forest Service grants permits, such as the subject permit, to the private sector to construct and operate ski resorts. The Forest Service refers to this activity as "public-private partnerships" and specifically describes its relationship with [taxpayer] as "partners in recreation."

Refund Request

The taxpayer remits leasehold excise tax directly to the Department of Revenue as required by RCW 82.29A.050(3). On December 13, 2006, the taxpayer requested a refund of $. . . leasehold excise tax and penalties paid in years 2002 through 2006, except for amounts attributable to use by private residences not owned or operated by [taxpayer]. On February 8, 2007, the Special Programs division of the Department issued a letter denying the refund. On February 13, 2007, the taxpayer attended a supervisor's conference. On April 11, 2007, the taxpayer appealed Special Program's denial of its refund request. . . .

The taxpayer makes the following arguments:

1. The taxpayer does not have the requisite dominion and control over the property to constitute a taxable leasehold interest.
2. The taxpayer is using public property for public purposes per WAC 458-29A-100(2).
3. To the extent we find the taxpayer does have a leasehold interest, the taxpayer is entitled to a credit under RCW 82.29A.120 to the extent the property tax would be less if the taxpayer owned the land.

ANALYSIS

The leasehold excise tax (LET) is imposed "on the act or privilege of occupying or using publicly owned real or personal property through a leasehold interest. . . ." RCW 82.29A.030(1). WAC 458-29A-100(1) explains that "[t]he intent of the law 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 someone who would be subject to property taxes if the lessee were the owner of the property." The tax is levied at a rate of 12.84 percent of the taxable rent. RCW 82.29A.030. RCW 82.29A.120 allows a credit against LET to the extent the LET exceeds the property tax that would be assessed if the real property were owned by the taxpayer.

The term "leasehold interest" as used in the LET statute has "a meaning not ordinarily contemplated by the term." *Mac Amusement Company v. Dep't of Revenue,* 95 Wn. 2d. 963, 633 P.2d 68 (1981).

The term "Leasehold interest" is defined in RCW 82.29A.020(1) as follows:

> "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 … The term "leasehold interest" shall not include road or utility easements, 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, or rights of access, occupancy, or use granted solely for the purpose of natural energy resource exploration.

(Emphasis added). WAC 458-29A-100(2)(f) further defines "Leasehold interest" as follows:

> "Leasehold interest" means an interest granting the right to possession and use of publicly owned real or personal property as a result of any form of agreement, written or oral, without regard to whether the agreement is labeled a lease, license, or permit.
>
> (i) Regardless of what term is used to label an agreement providing for the use and possession of public property by a private party, it is necessary to look to the actual substantive arrangement between the parties in order to determine whether a leasehold interest has been created.

> (ii) Both possession and use are required to create a leasehold interest, and the lessee must have some identifiable dominion and control over a defined area to satisfy the possession element. The defined area does not have to be specified in the agreement but can be determined by the practice of the parties. This requirement distinguishes a taxable leasehold interest from a mere franchise, license, or permit.
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> For example, Sam sells hot dogs from his own trailer at varying sites within a county fairgrounds during events. Sam is not assigned a particular place to set up his trailer nor does he store his trailer on the fairground between events. Sam's right to sell and his use of the property is considered a franchise and not a leasehold interest. The necessary element of possession, involving a greater degree of dominion and control over a more defined area, is lacking.
>
> (iii) The use or occupancy of public property where the purpose of such use or occupancy is to render services to the public owner does not create a leasehold interest.

(Emphasis added).

The definition of a leasehold interest, as set out in the statute and rule, can be summarized as follows. A leasehold interest requires both possession and use of public property. To determine if the taxpayer has possession and use, we look to the substance of the parties' agreement rather than the contract labels. The taxpayer must have "some identifiable dominion and control over a defined area to satisfy the possession element." WAC 458-29A-100(2)(f)(ii). The defined area may be determined by the practice of the parties, if it is not specified in the agreement. Finally, a leasehold interest does not include persons occupying public property to render services to the public owner.

In the present case, the Forest Service permit grants the taxpayer use of . . . acres of public land for constructing, operating, and maintaining a ski resort. The taxpayer owns and controls . . . buildings located on that land, including restaurants, rental shops, employee housing, etc. The taxpayer also owns and maintains the roads and parking lots, and owns and operates the ski lifts. The taxpayer grooms and maintains . . . acres of ski-able terrain, and [other areas] for the exclusive use of its customers.

The taxpayer concedes it has dominion and control over its buildings, ski lifts and certain other improvements. However, the taxpayer argues it does not have dominion and control over the entire . . . permit area. The taxpayer argues that the Forest Service retains dominion and control over the property through its restrictions on the taxpayer's use of the property. For example, the taxpayer points out that the permit is nonexclusive, and that the Forest Service reserves the right to grant permits to others so long as they do not interfere with the taxpayer's use of the property. Furthermore, the Forest Service requires the taxpayer to keep the premises open to the public. The Forest Service has the right to monitor the taxpayer's operations and regulate fees charged by the taxpayer. The taxpayer's use of the property is also limited by the Master Development Plan.

The taxpayer argues that dominion and control of the property must be complete or exclusive to satisfy the possession element; but this interpretation is not supported by the applicable statute and rules. WAC 458-29A-100(2)(f)(ii) states that "some identifiable dominion and control over a defined area" is necessary to satisfy the possession element. We note that the phrase "dominion and control" is qualified by the phrase "some identifiable." In other words, complete and exclusive dominion and control over the defined area is not necessary.

The rule further explains that the requirement of dominion and control over a defined area is necessary to distinguish a leasehold interest from a mere franchise, license, or permit. Rule 458-29A-100(2)(f)(ii). Franchises, licenses, and permits are then defined as follows:

> "Franchise" means a right granted by a public entity to a person to do certain things that the person could not otherwise do.[2]
>
> "License" means permission to enter on land for some purpose, without conferring any rights to the land upon the person granted the permission. For example, a permit to enter federal lands to launch rafts into the water for the purpose of conducting whitewater river rafting tours is a license, not a leasehold interest.[3]
>
> "Permit" means a written document creating a license to enter land for a specific purpose.[4]

Franchises, licenses, and permits, as defined in the rule, grant only rights to enter upon land for a specific purpose, without granting possession or dominion and control over the land. The rule then illustrates the difference between a leasehold interest and a non-possessory interest in an example of a hot dog vender who sells to the public from a trailer at varying sites on county fairgrounds. Since the hot dog vender moves his trailer among various locations, and does not store the trailer on the premises between events, the possession element is not satisfied. The rule explains that a "greater degree of dominion and control over a more defined area" is necessary to satisfy the possession element.

In the present case, the taxpayer's permit grants the taxpayer the use of a defined area of land in order to construct, maintain, and operate a ski resort. Unlike a person with a permit or license to launch rafts on federal land, for example, the taxpayer's ski resort operations fully occupy the permit area such that few, if any, other uses of the land are possible. *See Sproul v. Gilbert*, 226 Or. 392, 403-4, 359 P.2d 543 (1961) ("Possession ... is a variable term which may mean different things for different purposes." 1 American Law of Property, § 3.3, p. 180.... When the property is amenable to many uses, the right to use it for a single limited purpose might not constitute possession; yet, the same right to use may well be regarded as possessory if the land in question is susceptible to only a limited number of uses.")

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[2] WAC 458-29A-100(2)(d).
[3] WAC 458-29A-100(2)(i).
[4] WAC 458-29A-100(2)(k).

While the permit is expressly nonexclusive, the Forest Service may not grant permits that interfere with the taxpayer's use of the property, and has not granted any such permits. The Forest Service's requirement that the property remain open to the public is likewise of little significance. In practice, this means that the taxpayer cannot prevent the public from passing through or remaining temporarily in the permit area so long as they do not interfere with the taxpayer's operations or present a safety hazard. Furthermore, we note that Forest Service's reservation of rights to itself and the public would not necessarily prevent the finding of a leasehold interest under landlord-tenant law. *See, e.g., Ratliffe v. Superior Court for Whitman County*, 108 Wash. 443, 184 P. 348 (1919) (Held a contract was a lease where, inter alia, "The lessor reserved the right to go upon the land and use it in any way which was not inconsistent with the uses to which the tenants desired to put the same under their lease."*);* CJS Landlord Section 5. Also, it is not unusual for landlords to impose similar restrictions on commercial tenants. *See* 17 Wash. Prac., Real Estate Sec. 6.18, 6.24 and 6.25 (2nd Ed. 2007). Accordingly, we conclude that the taxpayer has a sufficient degree of dominion and control over the permit area to satisfy the possession element of the test, and constitute a taxable leasehold interest.

We further find that the taxpayer is not using the property to provide services to the public owner under WAC 458-29A-100(2)(f)(iii). This provision states:

> The use or occupancy of public property where the purpose of such use or occupancy is to render services to the public owner does not create a leasehold interest. The lessee's possession and use of the property is in furtherance of the public owner's purposes, and it is the public owner who benefits from the governmental services rendered in respect to the property.
>
> For example, Contractor A operates a snack bar at a publicly owned facility where food and beverages are sold to members of the public, and derives a profit from the proceeds of the snack bar sales. Contractor B operates a cafeteria where food is provided at no charge to persons with appropriate I.D., and is reimbursed on a cost-plus basis. Contractor A is engaged in a business enterprise the same as any other restaurateur. Contractor A is using the public property for a private purpose, and has a taxable leasehold interest on the premises. Contractor B is merely providing a service to government personnel that the government agency would otherwise provide. Contractor B is using public property for a public purpose, and does not have a taxable leasehold interest.

With respect to this provision, the taxpayer's petition argues:

> The leasehold excise tax does not apply to the use public property for a public purpose. [cites omitted]. In this case, the facts show that [taxpayer] is an agent and partner of the Forest Service to carry out the Forest Service's mission to provide recreational skiing opportunities to the public. [Taxpayer's] role is to provide the specialized improvements and its expertise in building and managing a ski area. The Forest Service controls the land and sets operational standards. [Taxpayer's] relationship with the Forest Service is

> much more similar to Contractor B in the example included in WAC 458-29A-100(2)(f)(ii).

We find no evidence that the taxpayer is an agent and partner of the Forest Service. The permit does not provide that the taxpayer may act on behalf of the Forest Services, or vice versa. The Forest Service's use of the term "partners in recreation" means that the Forest Service and the taxpayer share the common goal of providing alpine recreation to the public – not that they are business partners.

We further reject the taxpayer's claim that it renders services to the Forest Service in furtherance of the Forest Service's public purpose. We agree that the Forest Service's contract with the taxpayer is in furtherance of the Forest Service's public purpose. Government agencies may only act in furtherance of their public purposes. But, as the example makes clear, the rule applies only to use of public property to render services to the governmental entity. The example in the rule (cited above) illustrates this concept. In the example, Contractor A operates a business on public land selling food to the public. Contractor B, on the other hand, is paid by the government to provide food to persons designated by the government. In the present case, the taxpayer is not paid by the Forest Service to operate a ski resort. Instead, the taxpayer sells services to the public on public land. The taxpayer's relationship with the Forest Service is therefore similar to Contractor A, and not at all similar to Contractor B. Therefore, the exception from the LET for use of public land to render services to the public agency does not apply here.

We further find that the taxpayer is not managing the public lands under a management agreement. WAC 458-29A-100(2)(j). Persons managing public lands for the public property owner pursuant to a management agreement do not have a leasehold interest. Id. A management agreement is defined as follows:

> (j) "Management agreement" means a written agency agreement between a public property owner and a private person or entity for the use and possession of public property under the following circumstances:
>
> (i) The public property owner retains all liability for payment of business operating costs and business related damages (other than costs and damages attributable to the activities of the private party);
>
> (ii) The public property owner has title and ownership of all receipts from sales of services or products relating to the management agreement (whether such amounts are collected by the private party on behalf of the public owner or whether the public owner permits the private party to retain a portion of the receipts as payment for services rendered by the private party), and the full discretion of whether to eliminate, reduce or expand the business activity conducted on the property; and
>
> (iii) The public property owner has full control of the prices to be charged for the goods or services provided in the course of use of the property.

> If each of these criteria is met, the arrangement between the parties is considered a "true" management agreement which does not, by itself, create a taxable leasehold interest in the property.

In the present case, none of the management agreement criteria are met. The Forest Service has no liability for payment of business operating costs, nor title and ownership of receipts from sales of services. The Forest Service has only limited control over the prices charged by the taxpayer for goods and services. Accordingly, the permit is not a management agreement.

The final issue raised by the taxpayer is whether the LET exceeds what the taxpayer would pay in property tax if it owned the property outright. RCW 82.29A.120 provides a credit against leasehold excise tax "equal to the amount, if any, that such tax exceeds the property tax that would apply to such leased property … if it were privately owned by the lessee …". The taxpayer bears the burden of establishing entitlement to the credit. *Port of Seattle v. State, Dept. of Revenue*, 101 Wn. App. 106, 112, 1 P.3d 607, 610 (2000).

The taxpayer provided no appraisal or other evidence that the LET exceeds the property tax that would apply if the taxpayer owned the permit property. The Taxpayer argues it would be taxable as timberland under RCW 84.33.130 and WAC 458-40-540, or as nature conservancy property. We find that the property would not qualify to be assessed as forestland because the land is not used to grow and harvest timber. RCW 84.33.130. In addition, we can find no conservation related preferential property tax provision that would apply if the taxpayer were the owner of the property. Since the taxpayer has not established that the LET exceeds what the taxpayer would owe in property tax if it owned the property outright, the taxpayer does not qualify for the credit in RCW 82.29A.120.

We conclude that the taxpayer is liable for LET on its use and possession of public land under the special use permit granted by the Forest Service. The petition for refund is therefore denied.

DECISION AND DISPOSITION

The taxpayer's petition for refund is denied.

Dated this 20th day of March 2008.