Cite as Det. No. 16-0190, 36 WTD 042 (2017)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS 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. 16-0190
	)	
. . .	)	Registration No. . . .
	)	

ETA 3164; RCW 82.29A.020: LEASEHOLD EXCISE TAX (LET) – UTILITY POLE ATTACHMENTS – RIGHT TO OCCUPY – UNRESTRICTED ACCESS – POSSESSION AND USE. When a conveyed interest grants rights more typical of a lease than a license, a leasehold interest is conveyed. The taxpayer received a specifically defined space to attach its equipment, is required to keep its equipment in a safe condition and in thorough repair, and has the right to operate its facilities in such a manner as will best enable them to fulfill their own service requirements. These rights constitute "unrestricted access" to the taxpayer's attached equipment. Because the taxpayer acquired identifiable dominion and control over a defined area on utility poles and has unrestricted access to the poles to maintain its pole attachments, the taxpayer has the requisite possessory interest to 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.

Weaver, T.R.O. – A cable television distribution company petitions for the refund of leasehold excise tax paid on the utility pole contract charges it paid to public entities in Washington. At issue is whether the utility pole contracts convey the requisite "possession and use" to constitute a taxable leasehold interest under RCW 82.29A.020. . . . Taxpayer's petition is denied.[1]

ISSUES

Whether, under chapter 82.29A RCW, WAC 458-29A-100, and ETA 3164, pole attachment contracts grant a right to possession and use of publicly owned property subject to leasehold excise tax.

. . .

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

FINDINGS OF FACT

[Taxpayer] is a parent company and sole owner of operating subsidiaries that own cable television distribution networks in Washington. Taxpayer also provides broadband services, including high-speed broadband Internet and a full range of advanced video and voice services, to customers in Washington. In order to provide these services, Taxpayer attaches its wires to existing utility poles (including publicly-owned poles) in any given locality.

Locally regulated utilities have absolute control over access to and operation of the poles they own. Franchises granted to cable operators by local governments generally prohibit the operator's erection of new poles if pole facilities already exist. For these reasons, in order to provide communications services to certain Washington customers, Taxpayer attaches its equipment to the existing set of utility-owned poles in any given community. The State of Washington recognizes the essential nature of utility poles and encourages the joint use of public utility poles as a way to promote broadband competition and deployment, while reducing disruption of public rights-of-way.[2]

Attachers, like Taxpayer, pay "pole attachment rent" for the privilege of attaching equipment to utility poles, including to locally regulated poles, typically on an annual or semi-annual basis. Public utility districts (PUDs) have their rental rates capped by a statutory formula.[3] In most cases, cable companies, like Taxpayer, attach their equipment to surplus pole space (usually lower on the pole; electric power cables are typically attached to the highest space on poles, due to the dangerous nature of electrified equipment). When surplus pole space is not available for a cable attachment, it is the obligation of the cable attacher (by contract and standard industry practice) to make the pole ready (a practice known as "make-ready") through rearrangements of existing attachments and/or pole replacements. The pole owner and all other existing third party attachers affected by the cable attacher's request for access, recover their out-of-pocket costs for make-ready from the cable attacher.[4] Make-ready payments ensure that pole owners are fully compensated for any incremental costs incurred to lease space to an attacher, but make-ready costs are recovered in addition to the annual pole attachment rent.

Taxpayer provided exemplar contracts with various municipal organizations. Relevant provisions from the . . . Agreement include the following:

1. USE OF LICENSOR'S POLES

    a. Licensee's [Taxpayer's affiliate] use of Licensor's [PUD] poles shall be confined to those cables, and wires together with associated messenger cables, and other appurtenances, all hereinafter called "equipment", which Licensor shall have given Licensee written permission to install pursuant to the terms of this Licensing Agreement. Said equipment shall be used by Licensee only for the purpose of installing and operating a coaxial cable subscription system for

[2] *See, e.g.*, Wash. Laws 2008, ch. 197, § 1 (setting forth the purpose of RCW 54.04.045, the PUD law).
[3] RCW 54.04.045(3).
[4] *See, e.g.*, "Licensing Agreement," between [PUD] and Taxpayer's affiliate . . . , Section 7(a) (hereinafter . . . Agreement) (provided by Taxpayer at the appeals hearing).

television signal, telephone or fiber-optic distribution to the homes or business locations of Licensee's subscribers.

b. Licensor may permit Licensee to attach equipment to such poles as are owned by Licensor but jointly used by Licensor and other utilities, upon the condition that such contracts are considered as communications service contacts and shall be restricted in location on such poles to space assigned by the Licensor . . . .

4. NOTICE PRIOR TO INSTALLATION OF NEW EQUIPMENT

Licensee, upon receiving Licensor's written approval, may install, maintain and use the equipment identified in the application for use. Licensee shall notify Licensor three (3) working days prior to any work being done so that Licensor may arrange to have its representative present when the work is performed . . . .

6. PLACEMENT AND MAINTENANCE OF LICENSEE'S EQUIPMENT

Licensee shall, at its own sole risk and expense, place and maintain its equipment upon such pole or poles: (a) in a safe condition and in thorough repair, (b) in a manner suitable to Licensor and other utilities who may be using said pole(s) and so as not to conflict or interfere with the working use of such poles by Licensor or others and (c) in conformity with Exhibit B attached hereto and with such other requirements and specifications as Licensor shall from time to time prescribe, and with all laws and the regulations, orders and decrees of all lawfully constituted bodies and tribunals, pertaining to pole line construction, including without limiting the scope of the foregoing, the National Electrical Safety Code and National Fire Code.

. . . .

10. USE OF FACILITIES BY LICENSOR AND OTHERS

Licensor reserves: (1) to itself the right to maintain said poles and its equipment on said poles; and (2) to each other owner of facilities upon such poles, the right to operate their facilities thereon in such manner as will best enable them to fulfill their own service requirements . . . .

14. NATURE OF LICENSE

No use, however extended, of any such poles under this agreement shall create or vest in Licensee any ownership or property rights therein, but Licensee's rights therein shall be and remain a mere license, which as to any particular pole or poles may be terminated at any time pursuant to this agreement.

. . . .

24. TERM OF AGREEMENT – TERMINATION

> a. Unless sooner terminated under other provisions contained herein, this agreement shall continue in effect from year to year, provided that at the expiration of one (1) year from the date hereof any party hereto may terminate its participation hereunder in whole or in part by giving the other party or parties whose interest are thereby affected at least six (6) months written notice to that effect. At the expiration of such six (6) months, all rights and privileges of License as to the poles affected by said notice shall forthwith terminate, and Licensee shall remove its equipment from such poles within such six (6) months.
> . . . .

See . . . Agreement (provided by Taxpayer at the appeals hearing).[5]

Between 2011 and 2014, Taxpayer paid a total of $ . . . in leasehold excise taxes (LET) to the public utilities with which it contracts for pole attachment space. On December 31, 2014, Taxpayer filed for a refund of the total LET it paid between June 2011 and December 2014. On February 6, 2015, the Miscellaneous Tax Section of the Department of Revenue (Department) denied Taxpayer's refund request, concluding the following:

> The basis for your [refund] claim was that your utility pole attachment contracts did not meet the criteria for ETA 3164 because not one of the contracts gave [Taxpayer] (1) [']the right to occupy a specific location on a pole for 30 consecutive days or longer' and (2) 'unrestricted access' to poles for use and maintenance of its pole attachments. We disagree.
>
> In the first claim, we reviewed the licensing agreements and found that they are ongoing agreements that have to be terminated to be discontinued. You have not provided proof that any of the agreements terminated before 30 days had passed, or that it was ever the intent of the parties to have any attachments in place for 30 days or less. It appears all agreements are 'annual' and having the right to terminate with notice does not change this fact. The agreements are perpetual until terminated and meet the definition of being 'for 30 consecutive days or longer.'
>
> In the second claim, we disagree with your holding that you have restricted access that reduces your agreement to something less than a leasehold interest. The term 'unrestricted access' used by the department in the advisory describes a physical restriction (locked fence or closure of some type), that can only be accessed physically under consent of the lessor. WAC 458-29A-100 says that a leasehold interest means an interest granting the right of possession and use of publicly owned real or personal property as a result of any form of agreement. The reference to 'unrestricted access' is not describing limitations that are industry standards or practices relating to ensuring public safety that place some

[5] Taxpayer provided additional pole contracts with public entities, including [PUD], and the City of . . . . We did not see, and Taxpayer did not reference, any operative differences in the text of these contracts with respect to the issues in dispute in this appeal.

> covenants on the use of the leased property, even fee owned properties have covenants in some cases.

See Refund Denial Letter, dated February 6, 2015.

Taxpayer filed a timely petition for review of the refund denial.

ANALYSIS

I. THE LEASEHOLD EXCISE TAX APPLIES TO TAXPAYER'S POLE ATTACHMENTS.

Washington imposes a leasehold excise tax (LET) on private parties or individuals for "the act or privilege of occupying or using publicly owned real or personal property . . . through a leasehold interest." RCW 82.29A.030(1). Counties and cities are also authorized to levy and collect LET. RCW 82.29A.040. Leasing publicly owned property confers significant benefits in the form of services by the government to the private lessees and the leasehold excise tax is provided to fairly compensate governmental units for services rendered to such lessees of publicly owned property. RCW 82.29A.010(1); WAC 458-29A-100(1); *Washington Public Ports Ass'n v. Dep't of Revenue*, 148 Wn. 2d 637, 643, 62 P.3d 462 (2003).

RCW 82.29A.020 defines a taxable "leasehold interest" as:

> an interest in publicly owned real or personal property which exists by virtue of <u>any</u> lease, permit, <u>license</u>, or <u>any</u> 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, <u>granting possession and use</u>, to a degree less than fee simple ownership . . .

RCW 82.29A.020(1) (emphasis added).

The fundamental objective in statutory interpretation is to ascertain and carry out the legislature's intent. If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720, 724 (2001). Plain meaning is discerned from all that the legislature has said in the statute and related statutes which disclose legislative intent about the provision in question. *Department of Ecology v. Campbell & Gwinn L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4, 10 (2002).

We begin our interpretation by noting the inclusive nature of potential types of agreements that can establish a taxable leasehold interest under RCW 82.29A.020(1), specifically the repeated use of the word "any" to modify the variety of agreements that can create such a taxable interest. Specifically included are both licenses and leases. So long as the agreement conveys both possession and use it is a leasehold interest under RCW 82.29A.020(1) and subject to LET.

This inclusive definition of a leasehold interest for LET differs from the legal definition of a lease and license in other contexts. A frequently cited case articulating the difference between a lease

and license is . . . *Conaway v. Time Oil Co.*, 34 Wn.2d 884, 893, 210 P.2d 1012 (1949) . . . .[6] In that case the court affirmed a determination that a written "paint and facilities agreement" was a license rather than a lease. In *Conaway* the court differentiated a lease and license as follows:

> A lease carries a present interest and estate in the property involved for the period specified therein, and requires a writing to comply with the statute of frauds. It gives exclusive possession of the property, which may be asserted against everyone, including the lessor. A license authorizes the doing of some act or series of acts on the land of another without passing an estate in the land and justifies the doing of an act or acts which would otherwise be a trespass. *Barnett v. Lincoln*, 162 Wash. 613, 299 P. 392; *Baseball Publishing Co. v. Bruton*, 302 Mass. 54, 18 N.E.2d 362, 119 A.L.R. 1518; 32 Am.Jur. 30, § 5; 51 C.J.S., Landlord and Tenant, § 202(2), page 806.

Id.; *See also* WAC 458-20-118; 17 William B. Stoebuck and John W. Weaver, Washington Practice Real Estate: Property Law: Nature of Leaseholds in General §6.2-6.5 (2d ed. 2009).

Also, as the court has noted, 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, 971, 633 P.2d 68 (1981). As we stated in Det. No. 92-316, 12 WTD 477 (1992), "it is clear that the law intends 'possession and use' to have a broader meaning than the kind of exclusive dominion and control exercised by a lessee under a traditional lease, since the legislature expressly included other types of rights and other types of agreements within its reach."

WAC 458-29A-100, the administrative regulation that provides an overview of the LET and additional definitions, also does not require exclusivity. The inclusive nature of "possession and use" sufficient to establish a taxable leasehold interest subject to LET is also found in the Rule, which defines a "leasehold interest" as follows:

> (g) "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.

[6] More recently, the Court of Appeals in *Tacoma v. Smith,* 50 Wn. App. 717, 721, 750 P.2d 647 (1988), in concluding that boat moorage agreements constituted licenses rather than leases which were not exempt from tax, provided:

> A lease is created if a tenant is granted exclusive possession or control of the parcel or a portion thereof. *McKennon v. Anderson*, 49 Wash.2d 55, 58-59, 298 P.2d 492 (1956). This is the case even if the tenant's possession of the real estate is restricted by reservations. *Barnett v. Lincoln*, 162 Wash. 613, 618, 299 P. 392 (1931). Such reservations can include the right to sell the leased property before the lease is over, *Coates v. Carse*, 96 Wash. 178, 164 P. 760 (1917); and to designate from time to time the place on the premises to be occupied by the tenant. *See Barnett*, 162 Wash. at 620, 299 P. 392. 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. *Barnett*, 162 Wash. at 619, 299 P. 392.

> (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.

WAC 458-29A-100(2)(g) (emphasis added).

On January 18, 2011, the Department issued ETA 3164, which sets forth the criteria for which the LET applies to utility pole contracts. The ETA reads, in pertinent part, as follows:

> **Conditions under which LET applies to pole attachments**
>
> LET applies to such utility pole attachment contracts only when the following criteria are met:
>
> (1) The pole is owned by a public entity;
> (2) The pole attachment contract grants the private lessee/sublessee the right to occupy a specifically identified location on the pole for a period of 30 consecutive days or longer; and
> (3) The lessee/sublessee has unrestricted access to the utility pole during that time period to use and maintain the pole attachments.

ETA 3164. There is no dispute that the poles at issue in this appeal are owned by public entities.

Taxpayer argues that the terms of the pole attachment contracts do not grant a "right to occupy a specifically identified location on the pole for a period of 30 consecutive days or longer." Taxpayer argues that it is never granted a right to occupy poles, but instead only receives a permit to attach to poles, which can be revoked at any time by the pole owner. Taxpayer cites provisions requiring it to rearrange, transfer or remove attachments upon the pole owner's demand.

After reading the pole attachment contracts provided by Taxpayer, we find that the pole attachment contracts grant Taxpayer the right to occupy a specifically identified location on poles for a period of 30 consecutive days or longer.[7] The municipal pole owner certainly has a right to identify where the Taxpayer can attach its equipment. The municipal pole owner can also require Taxpayer to rearrange, relocate, or transfer its attachments on the poles. However, ultimately, the pole attachment agreements grant Taxpayer the right to occupy the poles at locations identified by the pole owners. Taxpayer's argument that the permitting process creates license terms that are shorter than 30 consecutive days is unpersuasive. For example, the exemplar contract quoted above is for a one year term and requires six months' notice to terminate the contract. *See* . . . Contract, ¶ 24. Indeed, Taxpayer, in its initial refund request letter describes attachers as paying "annual" pole attachment rent, with a footnote stating that some contracts are "semi-annual." *See* Taxpayer's Refund Request Letter, dated December 31, 2014. We hold that the second criterion of ETA 3164 is met.

[7] *See, e.g.*, . . . Contract, ¶¶ 1b, 24.

Therefore, the primary issue in this appeal is whether the public entities that own the poles grant Taxpayer "possession and use" of the poles constituting "unrestricted access to the utility pole during the time period to use and maintain the pole attachments." ETA 3164. *See* WAC 458-29A-100(2)(g). Taxpayer argues that, under the permitting procedure set forth in the pole attachment contracts, it does not have unrestricted access to the utility pole to use and maintain its attachments. Taxpayer argues that the contracts restrict Taxpayer's access to the poles, including requirements for additional pole owner consent before Taxpayer can use their permitted attachment for specific activities or prior pole owner consent before maintenance can be performed.

Washington courts have found leases where exclusive possession over a defined area or a portion of premises was granted. *See Lamken v. Miller*, 181 Wash. 544, 44 P.2d 190 (1935) (holding a portion of an exclusive concession was a lease that, unlike a license, could not be revoked at any time); *Barnett v. Lincoln*, 162 Wash. 613, 299 P. 392 (1931) (holding that a port granting a private corporation an exclusive right to the use and possession of warehouse space on a pier was a "lease" rather than a "license" or mere "privilege"). In this case, the defined area conveyed is a contractually specified portion of a utility pole.

As these cases establish, it is possible to create a leasehold interest in a defined area or portion of a larger property. Just as it is possible to lease a specific parking space for a car or a specific moorage slip for a boat, we conclude that the defined area over which "some identifiable" degree of dominion and control can be a specific portion of a utility pole rather than the pole in its entirety.

In this case, Taxpayer, through the written pole agreements, receives the right to attach to a specific and defined spot on publicly owned pole for defined term and those attachments are available for Taxpayer's use for the term of the written contract. While there are certainly restrictions placed on Taxpayer under the agreements, the Washington State Supreme Court has held that burdens and restrictions placed on the lease of public property merely affect the market value of a leasehold interest rather than precluding the creation of a leasehold interest. *New Tacoma Parking Corp. v. Johnston*, 85 Wn.2d 707, 711-12, 538 P.2d 1232 (1975) (affirming the lease of parking facilities subject to tax despite significant restrictions and considerable control retained by the city.).

Holding that Taxpayer's pole attachment agreements with the public entities in this case are subject to LET is also consistent with the decision in *Crystal Mountain, Inc. v. Dep't of Revenue*, 173 Wn. App. 925, 295 P.3d 1216 (2013). In *Crystal Mountain*, the Court of Appeals concluded that a non-exclusive permit for the use of forest service land was subject to LET. *Id*. at 939. In that case the taxpayer asserted that it did not have the necessary degree of dominion and control based on the following limitations: that the permit was nonexclusive, that the Forest Service reserved the right to grant permits to others so long as they do not interfere with the taxpayer's use of the property, that the premises were required to be open to public, that the Forest Service had the right to monitor the taxpayer's operations and regulate fees, and that the taxpayer's use of the property is also contingent upon identifying its upcoming operations and services in an annual operating plan that must be submitted to the Forest Service for review and approval. *Id*. at 928.

The *Crystal Mountain* court held that "possession," as the term is used in RCW 82.29A.020(1), does not mean *exclusive* possession of and control over the land. *Id*. at 936. RCW 82.29A.020(1) states that a taxable leasehold interest may grant "possession and use, to a degree less than fee

simple ownership." The *Crystal Mountain* court did not define the smallest degree of possession that can create a leasehold interest, but held that the taxpayer's non-exclusive permitted rights of occupancy was sufficient to create a taxable interest.

In contrast, Det. No. 92-316, 12 WTD 477 (1992) concluded that concession rights for vending machines were not subject to LET because the concession rights at issue constituted mere "use" of the premises because "[t]he only right granted and paid for under the oral agreement was the right to make sales on the county's property."[8]

The scope of possession that Taxpayer is granted by the pole attachment agreements is also greater than the types of non-possessory interests discussed in the rule. WAC 458-29A-100(2)(g)(ii) clarifies the requirement of dominion and control over a defined area is necessary to distinguish a leasehold interest from a mere franchise, license, or permit. Franchises, licenses, and permits, as defined in the rule, grant only rights to enter upon land for a specific purpose, without granting some possession or dominion and control over the land.[9] The rule then illustrates the difference between a leasehold interest and a non-possessory interest in an example of a hot dog vendor who sells to the public from a trailer at varying sites on county fairgrounds. Since the hot dog vendor 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. WAC 458-29A-100(2)(g)(ii).

We conclude that the interest conveyed in this case is a leasehold interest. Here the interest conveyed grants rights more typical of a lease rather than a license. Taxpayer receives a specific defined space, for the attachment that is identified and recorded in multiple locations. Taxpayer is required to keep its equipment "in a safe condition and in thorough repair." . . . Agreement, ¶ 6. While it appears Taxpayer is required to give pole owners notice when it is engaged in installation or maintenance of its equipment, Taxpayer has "the right to operate their facilities thereon in such manner as will best enable them to fulfill their own service requirements." *See* . . . Agreement, ¶¶ 4, 10. We conclude that these rights constitute unrestricted access to Taxpayer's attached equipment.

Our conclusion is consistent with cases from other jurisdictions. Pole attachment contracts are typically identified as leases that create a landlord-tenant relationship. *See, e.g., FCC v. Florida Power Corp.*, 480 U.S. 245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987). In *Florida Power*, the

[8] While some of these cases predate the amendment of RCW 82.29A in 1999, the inclusive definition of "leasehold interest" in RCW 82.29A.020 as by established by any agreement "granting possession and use" was not changed.

[9] In WAC 458-29A-100(2) Franchises, licenses, and permits are defined as follows:

> (e) "Franchise" means a right granted by a public entity to a person to do certain things that the person could not otherwise do . . .
>
> (j) "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 . . .
>
> (l) "Permit" means a written document creating a license to enter land for a specific purpose.

contracts at issue provided for the payment by the cable companies of a yearly rent for space on each pole to which cables were attached and the fixed costs of making modifications to the poles and of physical installation of cables were borne by the cable operators. Florida Power challenged the authority of the FCC to reduce the rental rates charged by the utility. The Supreme Court dismissed a Takings Clause challenge and upheld the Commission's authority under the Pole Attachments Act, 47 U.S.C. § 224 (1991), to regulate pole rental fees paid to an electric utility. The Court concluded that the Pole Attachments Act merely regulated the terms of the rental once cable companies and the utilities agreed to the rental of the poles. The Court concluded that line which separates such "landlord-tenant" cases from earlier taking cases is "the unambiguous distinction between a commercial lessee and an interloper with a government license." *Id.* at 252-53.

Even if Taxpayer receives a right that is less than a common law leasehold interest, it nevertheless constitutes something more than a mere license to use and conveys sufficient possession and use to constitute an interest subject to LET under RCW 82.29A, WAC 458-29A-100, and ETA 3164.

We therefore conclude that Taxpayer does acquire identifiable dominion and control over a defined area on utility poles and receives unrestricted access to utility poles to use and maintain the pole attachments. As such, we hold that Taxpayer has the requisite possessory interest to constitute a taxable leasehold interest [for purposes of RCW Chapter 82.29A]. Taxpayer's petition is denied on this issue.

. . .

For these reasons, Taxpayer's petition is denied on this issue.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 25th day of May, 2016.