Cite as Det. No. 18-0228, 40 WTD 169 (2021)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 18-0228
. . .	)	. . .

RULE 118; RULE 179; RCW 82.16.020; RCW 82.04.290– PUBLIC UTILITY TAX – TAXATION OF RENTAL OF SPACE ON UTILITY POLES – Licensing of space on a utility pole is not subject to PUT. When space on a utility pole is licensed to be used by others, and the owner of the pole does not grant a lease or rental of real property on the utility pole, revenue from the license is subject to service & other activities business and occupation 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.

Fisher, T.R.O. – A utility company in the business of generating and selling electrical power protests the classification of certain revenue streams. The company argues money received for licensing space on its utility poles is not subject to tax. . . . The petition is granted in part, and denied in part.[1]

ISSUES

1. Whether revenue received for licensing the use of space on a utility pole is subject to public utility tax ("PUT") under WAC 458-20-179.

2. Whether revenue received for licensing the use of space on a utility pole is exempt from tax as a rental of real property under WAC 458-20-118.

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FINDINGS OF FACT

. . . ("Taxpayer") is an electric and natural gas utility headquartered in . . . . Taxpayer's customers reside in . . . Washington, [and elsewhere].

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

The Department of Revenue ("Department") audited Taxpayer's books and records for the period of January 1, 2012, through December 31, 2015 ("Audit Period"), to determine whether Taxpayer was properly reporting its Washington tax obligations. During the Audit Period, Taxpayer reported revenue it received from cable companies and other utilities to use Taxpayer's utility poles under the Service and Other Activities business and occupation ("B&O") tax classification . . . . The Department determined that the revenue from allowing others to use Taxpayer's utility poles . . . was taxable as PUT. The Department ultimately assessed Taxpayer $ . . . in power and light business PUT, $ . . . in gas distribution PUT, and $ . . . in interest; the Department credited Taxpayer with having paid $ . . . in service and other activities B&O tax during the Audit Period.

Taxpayer timely sought administrative review regarding the revenue from the usage of its utility poles . . . .

Regarding the utility poles, Taxpayer asserted that allowing cable and other utility companies to use space on Taxpayer's utility poles was not subject to PUT or B&O tax. Taxpayer explained that the cable and other utility companies used the space to install their own equipment. Taxpayer provided a sample agreement between itself and [Cable Company][2] entitled . . . ("Agreement"). The Agreement labels Taxpayer as "Licensor," and [Cable Company] as "Licensee." Section 16 of the Agreement states, "No use, however, extended, of such pole 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 . . . ."

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ANALYSIS

The B&O tax is imposed for the privilege of engaging in business in Washington. RCW 82.04.220. The term "business" includes "all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or another person or class, directly or indirectly." RCW 82.04.140. The measure of the tax is the gross proceeds of sales, value proceeding or accruing, or gross income of the business. RCW 82.04.220.

A. Pole Revenue

The B&O tax does not apply to persons in respect to a business activity to which tax liability is imposed under chapter 82.16 RCW, the code chapter imposing the public utility tax (PUT). PUT is imposed for the act or privilege of engaging within this state in any of the public service or transportation businesses listed in RCW 82.16.020, including a "light and power business," RCW 82.16.020(1)(b). A "light and power business" is defined as "the business of operating a plant or system for the generation, production or distribution of electrical energy for hire or sale and/or for the wheeling of electricity for others." RCW 82.16.010(4). "Wheeling of electricity" is "the activity of delivering or distributing electricity owned by others using power lines and equipment of the person doing the wheeling." WAC 458-20-179(303).

[2] . . .

The tax is computed by multiplying the "gross income of the business" by the rate specific to the particular type of business being taxed. For instance, the gross income of a light and power business is currently taxed at the rate of 3.62%. RCW 82.16.020(1)(b). The term "gross income" for the purposes of PUT means:

> "Gross income" means the value proceeding or accruing from the performance of the particular public service or transportation business involved, **including operations incidental thereto**, but without any deduction on account of the cost of the commodity furnished or sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

RCW 82.16.010(3) (emphasis added). The term "incidental" is not defined in Chapter 82.16 RCW. When a statutory term is not defined, it is given its plain, ordinary meaning. *Garrison v. Wash. State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976). A term's ordinary meaning may be ascertained from its dictionary definition. *Id.* "Incidental" means "subordinate to something of greater importance; having a minor role." Black's Law Dictionary, 879 (10th ed. 2014).

Thus, to be subject to PUT, the gross income must be derived from the performance of the public service or transportation business at issue, or operations incidental thereto. . . .

Taxpayer claims its revenue from licensing space on its utility poles for other entities to attach and operate equipment is not subject to the PUT. We agree.

WAC 458-20-179(104)(a)[3] provides that amounts derived from services that are incidental to a public utility activity are subject to PUT. WAC 458-20-179(104)(a) lists several activities that are incidental to a public utility activity, but does not list "pole contact charges" among those activities. Because the current version of the rule is silent as to pole contact charges, we must decide whether charging to use space on a utility pole qualifies as performance of the light and power business activity, or operations incidental thereto, under RCW 82.16.010(3).

Licensing of space on Taxpayer's utility pole does not constitute operating a plant or a system for the generation, production, or distribution of electrical energy for hire or sale because Taxpayer does not generate, produce, or distribute electrical energy for sale through Licensee's equipment attached to Taxpayer's poles. RCW 82.16.010(4). Additionally, Taxpayer is not wheeling the electricity because wheeling of electricity requires delivery or distribution of electricity owned by others through the wheeler's own equipment. WAC 458-20-179(303). Taxpayer does not own Licensee's equipment attached to Taxpayer's poles, or any electricity distributed through such equipment.

Furthermore, the licensing of space on the poles is not incidental to Taxpayer's business of generating, producing, or distributing electrical energy for sale. In *King County Water*, the Washington Supreme Court noted "[t]he phrase 'including operations incidental thereto' is governed by the specific words 'performance of the business' . . ." 58 Wn.2d at 286. Taxpayer generates, produces, and distributes the same amount of electrical energy regardless of whether

[3] . . .

Taxpayer licenses out space on its poles. "Incidental" means having a minor role. Black's Law Dictionary (10th ed. 2004). The licensing of space on Taxpayer's poles plays no role and has no effect on Taxpayer's performance of its light and power business. Accordingly, we conclude that, Taxpayer's revenue from licensing space on the poles was not subject to PUT because it was not part of, or incidental to, Taxpayer's light and power business.

Because Taxpayer's licensing of space on the poles is not subject to PUT, Taxpayer's revenue is generally subject to the B&O tax, unless an exemption applies. *City of Kennewick*, 67 Wn.2d at 593-4. Taxpayer asserts its pole contract revenue is exempt from B&O tax under WAC 458-20-118(1), which exempts amounts received from the rental of real estate from B&O tax.

WAC 458-20-118 draws a distinction between a rental of real property and a license to use real estate:

> (2) 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. . . .
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> (3) 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.

WAC 458-20-118(2)-(3).

Here, the sample contract provided by Taxpayer makes clear that Taxpayer maintains control over the poles. The Agreement labels Taxpayer as "Licensor" and the entity using space on the pole as "Licensee," which indicates Taxpayer thought it was granting a license to use the space on its poles rather than a rental. Furthermore, Section 16 specifically states, ". . . Licensee's rights [under the Agreement] shall be and remain a mere license . . . ." Accordingly, based on the terms of the Agreement, we conclude that the Agreement grants a license to use real property (space on the poles), [and not a lease of real property,] and therefore the revenue from the [license fees for] space on the poles is subject to B&O tax under RCW 82.04.290(2).

Taxpayer argues that Det. No. 16-0190, 36 WTD 42 (2017) mandates we find that the [provision] of pole space constitutes rental of real property, and therefore exempt from B&O tax under WAC 458-20-118(2). In 36 WTD 42, we examined whether or not amounts paid to use publicly owned utility poles were subject to leasehold excise tax ("LET") under Chapter 82.29A RCW. The contract quoted in 36 WTD 42 identified the owner as "Licensor" and the entity using the space on the pole as "Licensee" and stated that the Licensee's rights "shall be and remain a mere license," mirroring Taxpayer's Agreement. 36 WTD at 43-44.

However, as 36 WTD 42 made clear, a leasehold interest for the purposes of LET is different from a traditional rental of real property:

> 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.
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> 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."**

36 WTD at 46-7 (emphasis added). Because a leasehold interest for the purposes of LET can result from "any agreement," it did not matter in that case whether or not the agreement established a license or a lease.[4] RCW 82.29A.020; WAC 458-29A-100(2)(g). Because 36 WTD 46 only determined whether or not the agreement created a leasehold interest under RCW 82.29A.020(1), it is not relevant in determining whether Taxpayer's Agreement creates a traditional lease or license under WAC 458-20-118.

Accordingly, we conclude that the Department erred when it assessed PUT on Taxpayer's revenue from [licensing] space on its poles, and we conclude that Taxpayer is not entitled to a refund of the service & other business activities B&O tax Taxpayer paid on such revenue during the Audit Period.

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DECISION AND DISPOSITION

Taxpayer's petition is granted as to the imposition of PUT on revenue for the licensing of space on the poles, but denied as to the refund of service and other activities B&O tax paid on such revenue.

Dated this 28th day of August 2018.

[4] A leasehold interest for LET is an interest in "publicly owned real or personal property . . ." RCW 82.29A.020(1)(a). Here, Taxpayer owns the utility poles, so the poles are not publicly owned and any interest in the poles are not a leasehold interest for the purposes of LET.