

WAC 458-29A-100 Leasehold excise tax—Overview and definitions.

(1) **Introduction.** Chapter 82.29A RCW establishes an excise tax on the act or privilege of occupying or using publicly owned real or personal property or property of a community center which is exempt from property tax through a leasehold interest. The 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 an excise tax triggered by the private use and possession of the public property or property of a community center which is exempt from property tax. RCW 82.29A.030.

(2) **Definitions.** For the purposes of chapter 458-29A WAC, the following definitions apply unless the context requires otherwise.

(a) "Department" means the department of revenue.

(b) "Community center which is exempt from property tax" means a community center as defined in RCW 84.36.010 (2)(a) that is exempt from property tax under RCW 84.36.010(1).

(c) "Concession" means the right to operate a business in an area of public property or property of a community center which is exempt from property tax.

(d) "Contract rent" means that portion of the payment made by a lessee (including a sublessee) to a lessor (or to a third party for the benefit of that lessor) for a leasehold interest in land and improvements or tangible personal property.

(e) "Franchise" means a right granted by a public entity or community center which is exempt from property tax to a person to do certain things that the person could not otherwise do. A franchise is distinguishable from a leasehold interest even when its exercise and value is inherently dependent upon the use and possession of publicly owned property or property of a community center which is exempt from property tax.

(f) "Improvement" means a modification to real property, resulting in an actual change in the nature of the property or an increase in the value of the property. It is distinguishable from routine repair and maintenance, which are activities resulting from normal wear and tear associated with the use of property, and which do not result in a change in the nature or value of the property itself. For example, replacing worn boards in a stairway is repair and maintenance; removing the stairway and replacing it with an elevator or a ramp is an improvement.

(g) "Leasehold interest" means an interest granting the right to possession and use of publicly owned real or personal property or real or personal property of a community center which is exempt from property tax 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 or property of a community center which is exempt from property tax 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.

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 or property of a community center which is exempt from property tax where the purpose of such use or occupancy is to render services to the public owner or community center which is exempt from property tax does not create a leasehold interest. The lessee's possession and use of the property is in furtherance of the purposes of the public owner or community center which is exempt from property tax, and it is the public owner or community center which is exempt from property tax which 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.

(iv) "Leasehold interest" includes the use and occupancy by a private party of property that is owned in fee simple, held in trust, or controlled by a public corporation, commission, or authority created under RCW 35.21.730 or 35.21.660 if:

(A) The property is within a special review district established by ordinance after January 1, 1976; or

(B) The property is listed on, or is within a district listed on, any federal or state register of historical sites in existence after January 1, 1987.

(v) "Leasehold interest" does not include:

(A) Road or utility easements;

(B) Rights of access, occupancy, or use granted solely for the purpose of removing materials or products purchased from a public owner or community center which is exempt from property tax or the lessee of a public owner or community center which is exempt from property tax, including permits to graze livestock, cut brush, pick wild mushrooms, or mine ore; and

(C) Any right to use personal property (excluding land or buildings) owned by the United States (as a trustee or otherwise), or by a foreign government, when the right to use the property is granted by a contract solely to manufacture or produce articles for sale to the United States or the foreign government.

(h) "Lessee" means a private person or entity with a leasehold interest in public property or property of a community center which is exempt from property tax which would be subject to property tax if the person or entity owned the property in fee.

(i) "Lessor" means an entity exempted from property tax obligations pursuant to Article 7, section 1 of the state Constitution or, for the property tax exempt period of forty years after acquisition, a community center as defined by RCW 84.36.010 (2)(a) that is exempt from property tax under RCW 84.36.010(1) that grants a leasehold interest in public property or property of a community center which is exempt from property tax to a private person or entity.

(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.

(k) "Management agreement" means a written agency agreement between a public property owner or community center which is exempt from property tax and a private person or entity for the use and possession of public property or community center which is exempt from property tax under the following circumstances:

(i) The public property owner or community center which is exempt from property tax 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 or community center which is exempt from property tax 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 community center which is exempt from property tax or whether the public owner or community center which is exempt from property tax 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 or community center which is exempt from property tax 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.

(l) "Permit" means a written document creating a license to enter land for a specific purpose.

(m) "Product lease" means a lease of public property or property of a community center which is exempt from property tax which will be used to produce agricultural or marine products (aquaculture) wherein the lease or agreement requires that:

(i) The leasehold payment be made by delivering a stated percentage of the agricultural or marine products to the credit of the lessor; or

(ii) The lessor be paid a stated percentage of the proceeds from the sale of the agricultural or marine products.

(n) "Public property" means all property owned by an entity exempted from property tax obligations pursuant to Article 7, section 1 of the state Constitution (and, in some instances, property held in trust by the United States).

(o) "Renegotiated" means a change in the leasehold agreement, other than one specifically required by the terms of the agreement itself, which alters:

(i) The agreed time of possession and use of the property;

(ii) The restrictions on the manner in which the property may be used; or

(iii) The rate of cash rental or other consideration paid by the lessee to or for the benefit of the lessor.

The term also includes the continued possession of the property by the lessee beyond the original date when, according to the terms of the agreement, the lessee had the right to vacate the premises without incurring further liability to the lessor.

(p) "Taxable rent" means the amount of rent upon which the measure of leasehold excise tax is based. It is either the contract rent or an amount established by the department in accordance with the procedures set forth in RCW 82.29A.020(2). (See also WAC 458-29A-200.)

(q) "Utility easement" means the right to use publicly owned land or land owned by a community center which is exempt from property tax for the purpose of providing access or installation of publicly regulated utilities.

[Statutory Authority: RCW 82.29A.140. WSR 10-18-034, § 458-29A-100, filed 8/25/10, effective 9/25/10; WSR 99-20-053, § 458-29A-100, filed 10/1/99, effective 11/1/99.]