

FINDINGS AND DECISION  
OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of the

PIKE PLACE MARKET PDA

FILE NO. B-89-001

from a B&O tax determination by the  
Department of Licenses and Consumer  
Affairs

Introduction

The Pike Place Market Preservation and Development Authority (PDA) appeals a decision of the Director of the Department of Licenses and Consumer Affairs. That decision assesses the City's Business and Occupation (B&O) tax upon the PDA for the period January 1, 1983 through December 31, 1986 in the amount of \$2,252.86.

The appellant exercised its right to appeal pursuant to Section 5.44.230, Seattle Municipal Code.

The matter was heard before the Hearing Examiner on February 23, 1989. The record remained open at the mutual request of counsel, for discussion between counsel. This decision was issued pursuant to expression from counsel that no settlement was forthcoming.

Appearing for appellant was Elizabeth Thomas of Preston, Thorgrimson, Ellis and Holman. Appearing for the City of Seattle was James Pidduck, assistant city attorney.

After due consideration of the evidence elicited during the public hearing, the following shall constitute the findings of fact, conclusions and decision of the Hearing Examiner on this appeal.

Findings of Fact

1. The essential findings are undisputed. The Pike Place Market Preservation and Development Authority (PDA) is a non-profit public corporation that manages the publicly owned areas of the seven-acre Pike Place Market, Seattle. Within the Market, approved sellers of farm produce, handcrafted wares and other items are allowed to use "day stalls" for the display and sale of their wares. Pursuant to an audit, the Director of the City's Department of Licenses and Consumer Affairs determined that the PDA receipts from the vendors was taxable. The PDA here appeals that assessment.

2. In brief, the Market was established in 1907 as a site where farmers could sell directly to consumers. The Market flourished until the outbreak of World War II when displacement of many Japanese-American farmers took its toll on the number of farmers to supply the Market.

3. Interest in the survival of the Market as an entity revived in the 1950's and 60's when more farmers and artisans began to bring their goods to the Market. Community interest in the Market concept grew. Accordingly, following a 1971 initiative measure, the Pike Place Market Historical District and governing Commission were born. Chapter 25.24, Seattle Municipal Code (Ordinance 100475, 1971).

4. Following creation of the Historical District, the Pike Place Market Preservation and Development Authority was organized as a legal entity "through which citizens may fulfill the aims and objectives of...Ordinance 100475..." More specifically,

...the Authority intends to undertake the

renewal, rehabilitation, preservation, restoration, and development of structures and open spaces...in a manner that affords a continuing opportunity for Market farmers, merchants, residents, shoppers, and visitors to carry on their traditional market activities... [The] Authority will initiate programs to expand food retailing in the District, especially the sale of local farm produce...

Exhibit 6, Pike Place Market Preservation and Development Authority Charter, p.3.

5. Among the powers specified in the PDA's Charter are those to

22. Control the use and disposition of Authority property,, assets, and credit;
24. Fix and collect charges for services rendered or to be rendered, and establish the consideration for property transferred.

Exhibit 6, pp. 4-7.

6. In 1983 the PDA and the City of Seattle entered into an agreement to clarify Market jurisdiction and operation. Exhibit 7. The Agreement specifies that sellers of permitted fresh farm produce "shall be given first priority for use of all day stall space in the Market..." The exception is that certain artists and craftspeople and "grandfathered" vendors selling specified merchandise are given first priority for limited areas. Exhibit 7, p.5. ("Grandfathered vendors are vendors who were selling in the Market prior to City acquisition and who have been allowed, by virtue of their history, to continue to sell their products.)

7. The "rental schedule" for use of the day stalls is established by the PDA. The PDA is also required to "adopt rules and regulations" to determine display parameters and the method for assigning day stall space to the individual farmer, artist or other vendor. Exhibit 7, pp 6-7, City - PDA Agreement.

8. The Fee for a permit to sell in the Market is \$15 per year. Some 225 permits are issued to craftspeople for 119 spaces. There are 104 four ft. table spaces available for farmers. However, the space allotment for farm produce is usually 8 ft. This means that 52 stalls are available for the approximate 100 farmers - permit holders. (Although each daystall has a linear frontage of "at least four feet," architectural barriers may entitle a vendor to as much as an additional 1.5 ft. Exhibit 10, Pike Place Market Rules and Regulations for Artists and Craftspeople.)

9. Once a day stall permit is granted to a farmer or craftspeople, "the PDA recognizes an obligation to renew the permit each year." Exhibit 9. A long-term relationship with the PDA is encouraged.

10. Each morning, specific day stall spaces are allotted by roll call of permit holders. If a permit holder is not present

...or does not answer when his or her name is called, that person's name is dropped to the bottom of the list for that day. The permit holder must then wait until the Market Master has completed table assignments to get a table, if available.

Exhibit 10, Rules and Regulations, Section II.E.5. The more senior, i.e. tenured vendors are favored in the roll call.

11. If a permit holder's name is called from the seniority list and they are present "he or she, or his/her designated

agent, may choose a stall from those available." Exhibit 10, Pike Place Market Rules and Regulations.

12. To maintain seniority and to have the privilege of selling in the Market on Saturday, "a permit holder must sell at the Market a minimum of two weekdays each week." Exhibit 10, Pike Place Market Rules and Regulations for Artists and Craftspeople, Section II.E.3.

13. Day stall fees are assessed at a daily rate of \$8 per weekday and \$15 for weekends. Some vendors pay on a daily basis. Others pay by the week or month.

14. Once the vendor is assigned a space in accord with product and seniority considerations, the vendor generally has exclusive control of the day stall "subject to normal and reasonable requirements for use, maintenance and repair." Exhibit 9, 10. For example, a "tenant" is responsible for maintaining a clean space and for abiding Market rules regarding piling, hanging or other display of goods or produce.

15. The PDA replaces burned out overhead lights and retains responsibility for Market-provided awnings as well as for flooring. Opening and closing hours and general heating are also controlled by the PDA. (None of the stalls is individually heated.) At the end of the day, day stall control reverts to the PDA.

16. Would-be Market vendors are subject to an extensive screening and qualifying process. Farmers must show, for example, evidence of farm land ownership or property interest.

17. Market commercial tenants have long term leases for specific sites. They are not assigned space on a daily or similar basis.

18. Appellant offered that the Broadway (Fred Meyer) Market's arrangements with push cart vendors is strikingly similar to that of the PDA with day stall vendors. According to appellant's principal witness on this point, the Broadway push carts are under lease and no Business and Occupation tax is levied. The witness could not state whether the arrangement and absence of taxes had been subject of any tax audit, such as the audit which led to the present question on PDA B&O taxes.

19. Broadway Market push cart vendors are subject to written leases for a month-to-month or 6-month period. Some 98 percent of these vendors choose the 6-month lease. The landlord determines the exact location of the push carts. The carts, "not moved very often," must be open for business during Broadway Market hours. Signage, design and the number of employees are subject to control by the landlord. The landlord supplies and pays for utilities. See Exhibit 11, Broadway Market Push Cart Lease Agreement.

#### Conclusions

1. The Hearing Examiner has jurisdiction of this appeal pursuant to Chapter 5.44, Seattle Municipal Code.

1. The parties have stipulated that the issue is whether the day stall arrangement is a lease or rental of real estate or a license to use real estate. If the latter, taxes are due for the period of January 1, 1983 to December 31, 1986 in the stipulated amount of \$2,252.86. If the former, the amounts derived from day stall vendors are exempt as money derived from the sale or rental of real estate. Seattle Business Tax Rule 458-20-118, reference WAC 458-20-118.

2. Pursuant to Seattle Municipal Code Section 5.44.230, aggrieved taxpayers may file an appeal with the Office of Hearing Examiner. The determination appealed from "shall be regarded as prima facie correct." And,

The Hearing Examiner may reverse or modify an action of the Director...if the Director's determination violates the terms of this chapter or is contrary to law...

Seattle Municipal Code Section 5.44.230.

4. It is axiomatic that considerable deference is given to the construction given a statute by the officials charged with its enforcement. Mall, Inc. v. Seattle, 108 Wn.2d 369, 739 P. 2d 668 (1987). However, a court is not required to defer to the interpretation of an administrative authority where that interpretation lacks a sound basis. "No deference is to be accorded a policy that is wrong." Othello Community Hospital v. Employment Security, 52 Wn. App. 592, 595, (1988).

5. Further, a statute must be construed as a whole. If more than one interpretation is possible, "the court should adopt the interpretation most consistent with the Legislature's intent." Othello, supra. at p. 595.

6. Seattle Municipal Code Section 5.44.040 provides that

There is levied upon and shall be collected from and paid as hereinafter provided by every person on account and for the privilege of engaging in business activities, a license fee or occupation tax...

City of Seattle departments or divisions are not exempt from the requirements of Seattle Municipal Code Section 5.44.030. Seattle Municipal Code Section 5.44.290.

7. Chapter 5.44, Seattle Municipal Code evinces a clear indication to be general and inclusive. This is borne out by Section 5.44.290 which includes City entities within the ambit of "persons" subject to the tax.

8. Further, Business Tax Rule WAC 458-20-118 defines a "lease or rental of real estate" as one that

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...It is presumed that the sale of lodging by a hotel...etc., for a continuous period of thirty days or more is a rental of real estate... (emphasis supplied)

9. On the other hand, a license to use real estate

grants merely a right to use the real property of another but does not confer exclusive control or dominion...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.

Op cit.

10. Within Tax Rule 118 is a list of presumed rentals that constitute a "license to use or enjoy real property." Included are such things as cold storage lockers, safety deposit boxes, storage space, hotel rooms, motels, tourist courts and trailer parks for periods of less than 30 continuous days. Also included is the rental of "space within park or fair grounds to a concessionaire." These uses are remarkably similar to the vendor-PDA arrangement at issue. The Hearing Examiner concludes that there is a sound basis for the Department interpretation of

the ordinance as reflected in the Tax Rule definitions and presumptions.

11. However, the rule and presumptions, standing alone, are insufficient bases from which to conclude that a "license to use real estate" is presented by this case. Cf. Tacoma v. Smith, 520 Wn. App 717, 721, 750 P.2d 647 (1988). Such a conclusion is supported by evidence of record. First, the subject space/stalls are undefined spaces of only 8 ft. (or 16 ft.) width. Access to them is allotted on a daily basis. The daily allotment turns on seniority of the permit holder and the priority of product. Unlike the usual arrangement to lease or rent real estate, vendors pay only for the space when they actually use it. Those vendors whose names are called in the morning assignment but who fail to answer have no duty or right regarding stall space; rather, their names are "bumped" to the bottom of a list. From there, they will only be allotted a space if spaces are left over. And, the vendors are given permits. The permits entitle the vendor to the possibility of a space in the market to sell their wares. These factors show that a license to use Market real estate is presented.

12. It is true that once the day stall space is assigned and accepted the vendor has control over the space. However, a hotel guest of less than 30 days' tenancy also has control over his or her room. Tax Rule 118 presumes that hotel, motel and trailer park guests of less than 30 day tenancies merely have licenses to enjoy the real estate. The other examples are consistent with this conclusion. Concessionaires on park or fair grounds property would have also have some exclusivity of right to the subject property. Nevertheless, they are (reasonably) presumed to have a license to enjoy real estate.

13. The Tax Rule continues that a lease or rental conveys an estate or interest in a specific, designated area "with an exclusive right...of continuous possession against the world." The right to a "floating situs" enjoyed by the Pike Place Market vendors is not to a designated area and suggests a transitory (as opposed to continuous) possession.

14. Further, the PDA controls the opening and closing hours of the premises, controls overhead lighting and general upkeep. These are indications that a mere license to use real estate has been granted to the Market vendor.

15. Both parties cite Barnett v. Lincoln, 162. Wash. 613, 617, 299 Pac. 392 (1931) for the proposition that the name given an arrangement by the parties does not control. Rather, they agree, the entire picture must be reviewed (for the intent of the parties) in order to settle the question. It is therefore of minor consequence to this case that the parties refer to the PDA as a landlord and to vendors as tenants. The totality of circumstances must be reviewed. Accord, Tacoma v. Smith, supra.

16. In Tacoma v. Smith, supra, the question for review was whether a trial court summary judgment against marina owners was appropriate. The marina owners had argued that slip rentals were rentals of real estate and therefore exempt from Tacoma's B&O tax. The Court concluded that the moorage slips clearly constituted real estate, but remanded the case for lower court determination of whether the various written instruments constituted licenses or leases per, inter alia, the intent of the parties.

17. The Tacoma case involved rental of defined moorage space. The amount of rent paid by boat owners varied according to the property situs. The agreements were usually month-to-month and provided that a slip location could be changed without the boat owner's permission when necessary to facilitate the marina's business. In the instant case, there is no defined space for the vendor to rent. And, the Market arrangement is for a day-to-day (as opposed to 30-day) reversion of property control to the lessor. The Tacoma case fails to support this petitioner's argument.

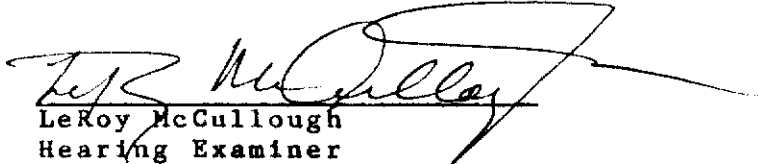
18. As the record contains no audit information, Broadway Market's treatment of its push cart operation becomes of limited support for the appellant's position.

19. The Director's interpretation is consistent with the inclusive legislative intent, Othello Community Hospital, supra, and, in the contested decision herein is indeed entitled to substantial deference. Mall, Inc. v. Seattle, supra. The Director's decision is affirmed.

Decision

The decision is AFFIRMED.

Entered this 23rd day of June, 1989.

  
LeRoy McCullough  
Hearing Examiner

CONCERNING FURTHER REVIEW

The decision of the Hearing Examiner in this case is the final administrative determination by the City, and is not subject to reconsideration except to correct errors on the ground of fraud, mistake, or irregularity in vital matters. Any request for judicial review must be filed with the Superior Court pursuant to Chapter 7.16, RCW, within fourteen days of the date of this decision. Should such a request be filed, instructions for preparation of a verbatim transcript are available at the Office of Hearing Examiner. The appellant must initially bear the cost of the transcript but will be reimbursed by the City if the appellant is successful in court. Instructions for preparation of the transcript are available from the Office of Hearing Examiner, Room 1320 Alaska Building, 618 Second Avenue, Seattle, Washington 98104.