

IN THE MAGISTRATE DIVISION  
OF THE OREGON TAX COURT  
Property Tax

CITY OF COOS BAY, an Oregon municipal corporation,	)	
	)	
	)	
Plaintiff,	)	No. 000155A
	)	
v.	)	
	)	
COOS COUNTY ASSESSOR,	)	
	)	
Defendant.	)	<b>DECISION</b>

The plaintiff in this matter is the City of Coos Bay. It is represented in this matter by C. Randall Tosh, its attorney.

The defendant is the Coos County Assessor. Its counsel is Steven R. Lounsbury.

The question before the court is whether property, used in connection with a gift shop on the premises of an art museum owned by the City of Coos Bay and identified by Account No. 65050.01, is exempt from tax. The 1994-95, 1995-96, 1996-97, 1997-98 and 1998-99 tax years are at issue.

**STATEMENT OF FACTS**

The antecedents of this case are set out in a previous decision of this court, *Urban Renewal Agency v. Dept. of Rev.*, 14 OTR 77 (1996). From the facts as set forth in that appeal events begin in December of 1993, when Coos Art Museum, Inc., an Oregon nonprofit corporation, transferred its permanent collection of art and ancillary personal property to the City of Coos Bay, a municipal corporation, by deed of gift.

This was followed in November of 1994 by a Management Agreement between three parties, the Urban Renewal Agency for the City of Coos Bay as owner of the building, the City of Coos Bay, the owner of the art collection and attendant personal property, and

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Coos Art Museum, Inc., which was to be the manager of the facility. The relationship under this management agreement between the City of Coos Bay and Coos Art Museum, Inc. is noteworthy in several respects.

The City of Coos Bay provided the art collection and personal property, promised to pay the utility costs, building maintenance and structural repairs, and necessary insurance policies. The City of Coos Bay also agreed to pay Coos Art Museum, Inc. a management fee of \$24,000 per year. The City of Coos Bay also permitted, as additions to the management fees, Coos Art Museum, Inc. to retain other income which might be generated from the property, such as rents from any tenants of the building and parking lot as well as any income from activities on the premises such as gift shop sales. In exchange Coos Art Museum, Inc. agreed to maintain and manage the art museum as well as develop a program of art education. The terms of the agreement specifically set out that Coos Art Museum, Inc. is not a tenant of the premises, and does not lease from the City of Coos Bay any portion of its property.

In late 1994 or early 1995 Coos Art Museum, Inc. accepted a donation from Kathy Grossman. This donation consisted of cash and personal property that had been the inventory of Ms. Grossman's business, Katydid Gifts, Inc. Coos Art Museum, Inc. used these items to begin a small gift shop under the name of Katydid Gifts as a supplement to its rental and sales gallery. Ms. Grossman's business, Katydid Gifts, Inc., and Coos Art Museum, Inc.'s gift shop, Katydid Gifts, had no connections other than the common name and the initial transfer of donated inventory.

The operation of this gift shop was permitted under the terms of the 1994 Management Agreement. The use was also permitted under a succeeding Management

Agreement, renewed in June of 1999.<sup>1</sup>

The assessor, deciding that this use of a portion of the premises as a gift shop was inconsistent with the exemption applied to the balance of the property, issued a Notice of Unpaid Taxes in June of 1999 against the City of Coos Bay for the 1994-95 through 1998-99 tax years as to Account No. 65050.00. Following communication between the assessor and the City of Coos Bay, the assessor chose on October 22, 1999, to issue a Correction Notice, transferring the unpaid taxes from the City of Coos Bay to “Katydid Gifts, Inc., Lessee” and Account No. 65050.01.

### **COURT'S ANALYSIS**

Two points must be made with respect to these facts. The first is that defendant has demanded taxes from the wrong party. This court has held that assessments under ORS 307.110 are made against the lessee, and not the exempt owner. *Urban Renewal Agency v. Dept. of Rev.*, 14 OTR 77, 78 (1996). Any lien imposed under ORS 307.110<sup>2</sup> is only enforceable against the leasehold interest, and may not reach the fee simple interest of the tax exempt lessor. *Urban*, 14 OTR at 79.

The second point is that, were these assessments to be made against the interest of Coos Art Museum, Inc., the conclusion of the court would be that Coos Art Museum, Inc. did not have a sufficient possessory interest to be taxable. Cities are generally exempt from taxation. ORS 307.090.<sup>3</sup> The exception is provided in ORS 307.110(1), which sets

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<sup>1</sup>The two Management Agreements are not identical. The second contract does not, for example, include the Urban Renewal Agency of the City of Coos Bay as a party. The sum the City of Coos Bay pays to Coos Art Museum, Inc. is also, at \$12,000, lower.

<sup>2</sup>All references to the Oregon Revised Statutes are to 1999.

<sup>3</sup>The question of whether the operation of a gift shop is a “corporate purpose” within the meaning of ORS 307.090 was not developed in this appeal. See *City of Eugene v. Dept. of Rev.*, 15 OTR 1 (1998).

out that:

“(1) Except as provided in ORS 307.120, all real and personal property of this state or any institution or department thereof or of any county or city, town or other municipal corporation or political subdivision of this state, held under a lease or other interest or estate less than a fee simple, by any person whose real property, if any, is taxable, except employees of the state, municipality or political subdivision as an incident to such employment, shall be subject to assessment and taxation for the assessed or specially assessed value thereof uniformly with real property of nonexempt ownerships.”

The courts have settled on three tests to determine whether the municipal property is “held under a lease or other interest or estate less than a fee simple”. *Id.* These essential elements are whether there has been a description of the property, a duration of the term, and a rental consideration. *Avis Rent A Car System, Inc. v. Dept. of Rev.*, 330 Or 35, 995 P2d 1163 (2000). When these tests are applied to the facts of this proceeding the conclusion of the court is that no “lease or other interest or estate less than fee simple” was created, as there is no rental consideration. ORS 307.110(1).

In order for there to be rental consideration, Coos Art Museum, Inc. would have to pay the City of Coos Bay for the use of the premises. That did not happen here. Instead, it is the City of Coos Bay that is paying Coos Art Museum, Inc. to manage the facility. The money is flowing the wrong way for the relationship to be construed as a lease.<sup>4</sup>

Defendant’s arguments against this conclusion seek to offset the absence of rental consideration with the observation that Coos Art Museum, Inc. had substantial interests in the gift shop, including the element of risk. However, the point that Coos Art Museum, Inc. had a substantial interest in the gift shop is not as important as the relationship between

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<sup>4</sup>This point is also dispositive of any argument that plaintiff is liable under ORS 307.166(1). ORS 307.166(1), like ORS 307.110(1), requires the payment of rental consideration. The fact that Coos Art Museum, Inc. did not pay rent is fatal to liability under either statute.

Coos Art Museum, Inc. and the owner of the property which created this power. Having paid no rent Coos Art Museum, Inc. did not have the rights of a lessee. Instead, it was only a compensated manager of the property. While an operator of a facility, who instead of paying rent is instead paid a management fee, may have an interest in the premises, this power is not “an interest of such dignity that it could be regarded as tantamount to a present temporary ownership,” which is the type of property right that gives rise to the tax. *Sproul et al v. Gilbert et al* 226 Or 392, 423, 359 P2d 543 (1961).

A remaining point is OAR 150-307.110(1)(2)(b), which sets out that:

“(b) ‘*Management*’ or ‘*Concession*’ agreements present special problems. For example, a county and a private corporation agree that the corporation will operate a county owned golf course for the county. Even though the agreement requires the corporation to meet many standards as to services, pricing, personnel etc., the corporation may still have a possessory interest if it has the exclusive right to occupy and operate the facilities without interference from the county and retains the major part of the proceeds. However, if the county is actively involved in the operation and allows the corporation a minor portion of the proceeds as compensation for its services, the corporation may be considered a mere agent or employee of the county.” Emphasis in original.

The court does not see this rule as changing the outcome of this appeal. No less an authority than the Supreme Court has already declared that, to the extent that OAR 150-307.110(1) is inconsistent with the three judicial tests for the essential elements of a lease, the rule is invalid. *Avis*, 330 Or at 41. Moreover, even if the rule is valid it does not apply to the facts of this case. The City of Coos Bay did not contract with Coos Art Museum, Inc. to operate a gift shop. Instead, the agreement was to operate an art museum, with incidental permission to run a gift shop on the premises. In this context the income generated by gift shop sales is best construed as additional consideration for Coos Art Museum’s management of the facility, rather than an independent payment for a taxable

possessory interest.

Therefore, under the facts of this case there is no “lease or other interest or estate less than a fee simple” under the meaning of ORS 307.110(1) to which a taxable interest may attach. The taxes demanded are voided.

### **CONCLUSION**

IT IS THE DECISION OF THIS COURT that plaintiff’s appeal is granted.

Dated this \_\_\_\_\_ day of June, 2001.

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SCOT A. SIDERAS  
PRESIDING MAGISTRATE

**IF YOU WANT TO APPEAL THIS DECISION, FILE A COMPLAINT IN THE REGULAR DIVISION OF THE OREGON TAX COURT, FOURTH FLOOR, 1241 STATE ST., SALEM, OR 97301-2563. YOUR COMPLAINT MUST BE SUBMITTED WITHIN 60 DAYS AFTER THE DATE OF THE DECISION OR THIS DECISION BECOMES FINAL AND CANNOT BE CHANGED.**

**THIS DOCUMENT WAS SIGNED BY MAGISTRATE SCOT A. SIDERAS ON JUNE 28, 2001. THE COURT FILED THIS DOCUMENT ON JUNE 28, 2001.**