



INTERIOR BOARD OF INDIAN APPEALS

Palm Patencio Co., Inc. v. Winifred Patencio Preckwinkle

5 IBIA 37 (03/02/1976)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

ADMINISTRATIVE APPEAL OF PALM PATENCIO COMPANY, INC., ET AL.

v.

WINIFRED PATENCIO PRECKWINKLE, ET AL.

IBIA 75-59-A

Decided March 2, 1976

Appeal from an administrative decision interpreting gross receipts under a long-term business lease.

Affirmed.

1. Indian Lands: Leases and Permits: Long-Term Business:  
Generally

In the absence of any qualifications, the plain and ordinary construction or meaning of the term gross receipts as contained in the lease must be given.

APPEARANCES: Erwin, Anderholt and Scherotter, a professional corporation, attorneys for appellant, Palm Patencio Company, Inc., and Holiday Realty Corporation; William M. Wirtz, staff attorney, Sacramento Regional Solicitor's Office, for Winifred Patencio Preckwinkle and Area Director, Sacramento Area Office, Bureau. of Indian Affairs, appellees.

## OPINION BY ADMINISTRATIVE JUDGE WILSON

The above-entitled matter comes before this Board on an appeal filed by Palm Patencio, Inc., and Holiday Realty Corporation, hereinafter referred to as appellant, from a decision of the Area Director, Sacramento Area Office, Bureau of Indian Affairs, affirming an administrative decision of the Director, Palm Springs Office, interpreting gross receipts under a long-term business lease.

Lease No. PSL-82, Contract No. 14-20-0550-1160, subject of the appeal herein, between Winifred Patencio Preckwinkle, Palm Springs Allottee No. 22, hereinafter referred to as appellee, and Palm Patencio Company, Inc., covering a 2-acre tract, more or less, of a portion of Palm Springs Allotment No. 22 described

as lot 16, sec. 14, T. 4 S., R. 4 E., San Bernardino Base and Meridian, was approved on April 12, 1964, by Leonard M. Hill, Area Director, Sacramento Area Office, Sacramento, California. Subsequent to April 2, 1964, Supplemental Agreement No. 1 to the lease was approved by the Department on April 16, 1965. However, since the controversy herein does not involve any of the provisions of the supplemental agreement, there appears to be no necessity to consider the supplemental agreement except for the limited purpose of ascertaining the intent of the parties as hereinafter discussed.

In brief, the appeal herein is from the decision of the Area Director, Bureau of Indian Affairs, Sacramento, California, dated January 10, 1974, affirming the Palm Springs Director's interpretation of gross receipts and the demand for additional rent for the fiscal year 1972-1973 under the lease in question.

The dispute centers on the interpretation of Article 1B of the master lease which in pertinent part provides:

"Gross receipts" means all income, including money and any other thing of value, received by or paid to Lessee or its affiliates, whether individuals, corporations, partnerships, or other legal entity, or received by or paid to others for Lessee's or its affiliate's use or benefit, derived from business done, sales made or services rendered directly or indirectly from or on the leased premises, or derived from the subleasing, subrenting, permitting, contracting or other use of the leased premises or any portion thereof. \* \* \*

It is the contention of appellant that "gross receipts" as above defined does not include monies collected for utilities and janitorial services. The appellees argue to the contrary.

In reading the above definition, "gross receipts" appears to be clear and unambiguous. Clearly, the definition includes all income for services rendered directly or indirectly from or on the leased premises by the appellant. Accordingly, fees collected for utilities and janitorial services provided by the appellant to the occupants of the leased premises would come within the meaning contemplated under Article 1B.

[1] We find nothing in the provisions of the master lease or the supplemental agreement thereto which in any way qualifies the definition of "gross receipts". Accordingly, in the absence of any qualifications, the plain and ordinary construction or meaning of the term gross receipts as contained in the lease must be given.

The appellant, in support of his contention that the utilities and janitorial services were not includable as gross receipts, cites the case of Greene County Building and Loan Association v. Milner Hotels, Inc., 227 S.W.2d 111, 240 Mo. App. 1048 (1950). We perceive of no similarity between the above-cited case and the issues presently before this Board. In the Missouri case the hotel, as an accommodation to its transitory guests, followed the customary practice in the hotel industry of not collecting for various services such as telephone calls placed from the guests' rooms until a final bill is prepared upon checkout by the guests from the hotel, whereas, in the present appeal, the appellant collects fixed charges for required services on a definitely scheduled basis from permanent tenants.

The appellant, in further support of his contention, argues that the conduct of the parties should be considered in determining and carrying out the intent of the parties. The appellant alleges the conduct of Clarence A. Brechlin (formerly conservator for Winifred P. Preckwinkle and presently business agent) and Preckwinkle was such as to convey the impression that "gross receipts" did not include the utilities and janitorial services collections. In support of this argument appellant cites Section 623 of the California Evidence Code and Greene County Building and Loan Association v. Milner Hotels, Inc., *supra*.

Appellant's allegation to that extent is not supported by the record. The record indicates it was not until the submission of the appellant's accounting statement dated February 26, 1971, that any listing was made of gross receipts as being net janitorial services and utilities. Prior to that date, all accounting statements submitted by appellant to the Bureau of Indian Affairs reflected gross receipts as a total of all money collected by appellant which included janitorial service and utilities charges. It was only at that point that the appellee for the first time became aware of appellant's intent to permanently exclude the disputed charges from the computation of gross receipts. In opposition to such computation of gross receipts the appellee on August 9, 1973, wrote to the Bureau of Indian Affairs concerning alleged discrepancies discovered after a review of the books kept for the Patencio Building. In said letter appellee emphatically refused to recognize appellant's attempts to exclude janitorial service and utilities charges from gross receipts. The record indicates a courtesy copy of the August 9, 1973, letter was made available to the appellant, thereby putting them on notice of appellee's reaction to the attempted exclusion and the demand for the unpaid rental represented thereby.

The record further indicates that a lengthy period of negotiations took place between the parties in an attempt to resolve their

differences regarding percentage rentals based upon gross receipts. However, all negotiations proved fruitless. Thereafter, by letter dated September 24, 1975, appellee informed the Bureau of Indian Affairs that all negotiations were being terminated. Moreover, the appellee in the same letter requested the Bureau of Indian Affairs to take necessary action to recover the full 25 percent of all gross receipts to date. Appellee's attempt toward resolution of the issue in question cannot now be interpreted as acquiescence to appellant's interpretation of gross receipts or basis for invoking estoppel.

Considering the foregoing, we are unable to see how the appellant could have possibly been misled as to the proper interpretation of the term "gross receipts." The appellant's allegation of misconduct on the part of the appellee is not supported by the record. Accordingly, we find no merit in appellant's argument that the alleged misconduct or action of the appellee misled the appellant to believe that fees for utilities and janitorial services were not includable as gross receipts.

The appellant's final contention that the present appeal is without the authority of this Board is unsupported. The appellant argues that no interested party has been adversely affected by a decision of an official under the supervision of the Bureau of Indian Affairs in that no official with the Bureau of Indian Affairs has yet made such an order. We are not in agreement with appellant's contention.

We fail to see any basis for the argument. It is evident that the Palm Springs Director's letter of October 10, 1973, to the appellant interpreting gross receipts and demanding additional rentals constituted an order adverse to the interest of the parties. If it did not, then why the lengthy unsuccessful negotiations regarding the matter subsequent to October 10, 1973? Why the filing of the appeal in the first instance? Accordingly, we find the Palm Springs Director's interpretation and demand for additional rentals of October 10, 1973, constituted an appealable order within the meaning of 25 CFR 2.1 et seq., and therefore properly before this forum.

Having reviewed the record and the briefs of the parties, we find no merit in the appellant's arguments that utilities and janitorial services are not includable as gross receipts. Accordingly, the Area Director's decision of January 10, 1974, sustaining the Palm Springs Director's interpretation of gross receipts must be affirmed.

