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BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund of) D E T E R M I N A T I O N
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 No. 12-0189
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 Registration No.
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 Petition for Refund
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 Docket No.

RCW 82.04.050(2)(f) – B&O TAX – EXEMPTION -- RENTAL OF REAL ESTATE V. LICENSE TO USE REAL PROPERTY-- NON-CONTINUOUS OCCUPANCY – HOTEL ROOMS RENTED BY AIRLINES. An airline's long-term contracts with hotels for rooms for its off-duty flight personnel were nontaxable non-transient rentals of real estate, as opposed to retail sales taxable licenses to use real property, even though the hotels did not provide Taxpayer with the same rooms for the entire 30-day period.

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.

Bauer, A.L.J. – An airline with long-term contracts with hotels to provide rooms for their off-duty flight crews' requests a refund of the retail sales taxes charged. Held: Taxpayer's petition is granted.

ISSUE

Whether an airline's long-term contracts with hotels for rooms for its off-duty flight personnel were nontaxable rentals of real estate, as opposed to retail sales taxable licenses to use real property, when the hotels did not provide Taxpayer with the same rooms for the entire 30-day period.¹

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

FINDINGS OF FACT

On March 1, 2011, [an airline] (Taxpayer) requested from the Department of Revenue (Department) a refund of retail sales taxes in the amount of \$.... Taxpayer asserted that Retail Sales Tax was not due on its long-term rental agreements with [two hotels in Washington]. Under Taxpayer's agreements with both hotels, all of which were for periods greater than 30 days, the hotels agreed to provide Taxpayer with accommodations for its various flight personnel. Taxpayer paid in full all of the hotels' invoices, which included all hotel room charges and retail sales taxes² thereon.

On May 2, 2011 and June 27, 2011, the Department's Taxpayer Account Administration Division (TAA), relying on hotel reports as to which rooms were and were not rented on a continual 30-day basis, denied Taxpayer's requests, stating that Taxpayer had already been properly credited by the hotels for the rooms that had been continuously occupied for 30 days. TAA thus denied Taxpayer's refund requests when individual rooms had not been continuously occupied for 30 days.

On July 25, 2011, Taxpayer appealed the denial of its refund to this office. Taxpayer explains that under its long-term (over 30 day) contracts with the hotels, the hotels were to provide, and Taxpayer was to pay for, a set number of rooms on a steady basis. If more rooms were needed, the hotel provided the space if it were available; otherwise, the hotels found rooms in other hotels and billed Taxpayer. Taxpayer explains that the retail sales taxes charged for these "spill-over" rooms are not part of its refund claim. If Taxpayer did not need or use all of its rooms, it paid for them regardless.

The hotels did not always set aside specific rooms for Taxpayer. Thus, although the hotels guaranteed the availability of rooms, they were not always the same rooms. This, according to Taxpayer, is hotel standard practice with airlines.

ANALYSIS

RCW 82.04.050(2)(f) concerns the tax classification of the furnishing of lodging. Departmental practice, before 2002, was to interpret this section as requiring the continuous occupancy of the same room for thirty days or more to qualify as the rental of real estate.³ In 2002, the legislature

² "Retail sales taxes," for purposes of this determination, included both the Retail Sales Tax and the Lodging Tax.

³ WAC 458-20-166(2), prior to its 2010 amendment, read:

Transient defined. The term "transient" as used in this section means any guest, resident, or other occupant to whom lodging and other services are furnished under a license to use real property for less than one month, or less than thirty continuous days if the rental period does not begin on the first day of the month. An occupant remaining in continuous occupancy for thirty days or more is considered a nontransient upon the thirtieth day. An occupant who contracts in advance and does remain in continuous occupancy for the initial thirty days will be considered a nontransient from the start of the occupancy.

amended subsection (2)(f)⁴ as follows:

The sale of and charge made for the furnishing of lodging and all other services by a hotel, rooming house, tourist court, motel, trailer camp, and the granting of any similar license to use real property, as distinguished from the renting or leasing of real property, and it shall be presumed that the occupancy of real property for a continuous period of one month or more constitutes a rental or lease of real property and not a mere license to use or enjoy the same. For the purposes of this subsection, it shall be presumed that the sale of and charge made for the furnishing of lodging for a continuous period of one month or more to a person is a rental or lease of real property and not a mere license to enjoy the same.

(Added language underlined.) The effective date of this change in the law was retroactive to September 1, 2001. The last sentence in RCW 82.04.050(2)(f) currently provides:

For the purposes of this subsection, it is presumed that the sale of and charge made for the furnishing of lodging for a continuous period of one month or more to a person is a rental or lease of real property and not a mere license to enjoy the same; ...

(Emphasis ours). Thus, the 2002 legislative change, with only one minor change,⁵ still survives.

The final bill report to 2SHB 1431 summarized the intent of the 2002 legislative amendment as follows:

The furnishing of lodging and all other services for a continuous period of one month or more constitutes a rental or lease of real property, and is exempt from tax. Continuous occupancy of a specific lodging unit by the same person is no longer required.

(Emphasis added.) On July 3, 2002, the Department issued a Special Notice, which is still in effect, notifying taxpayers of this change in the law:

Second Substitute House Bill (2SHB) 1531 redefined rental of real estate for hotels and motels. Previously, for the rental of a room to be considered a rental of real estate the same room had to be occupied by the tenant for 30 continuous days or more.

Effective September 1, 2001, the sale of or charge made for the furnishing of lodging for a period of thirty continuous days or more is considered a rental or lease of real estate. These types of agreements are not subject to retailing B&O tax or retail sales tax. Additionally, they would also be exempt from the special hotel motel tax and the trade and convention center taxes (if imposed in that area). There is still a requirement that the tenant commit to stay for a period of 30 consecutive days prior to actually paying for the room.

⁴ Laws of 2002 chap 178 § 1.

⁵ The word “shall” has been replaced by “is.”

The following are examples of transient (taxable) and non-transient (exempt) lodging.

Example #1: An individual commits in writing to staying for a period of 30 consecutive days prior to arrival. The lodger is assigned a room but 10 days into the stay is moved to another room. Provided the person pays for 30 consecutive days, this will be considered a rental of real estate and not subject to any Washington state taxes.

Example #2: An airline contracts with a motel to pay for a minimum of 10 rooms per night even if a lesser number of rooms are occupied for the month of April. On the 10th of April the airline only occupies eight rooms. Throughout the 30 day billing period the airline is charged for 10 rooms per night. The charges for the rooms are considered non-transient rental and are not subject to any state tax. Any charges for rooms over and above the 10 rooms will be considered transient rental and subject to retailing B&O tax, retail sales tax, and special hotel/motel tax and convention and trade center tax if applicable.

Example #3: An airline contracts with a motel to keep 15 rooms available for the month of April. The airline is allowed to cancel the rooms without paying for them if the motel is contacted before 6:00 PM. During the 30 day billing period the fewest number of rooms paid for is six. The six rooms will be considered non-transient rental and are not subject to any state tax. The rooms over and above the minimum six rooms will be considered transient rental and subject to retailing B&O tax, retail sales tax, and special hotel/motel tax and convention and trade center tax if applicable.

The examples in the Special Notice make it clear that when an airline such as Taxpayer contracts in advance with a hotel to pay for rooms for its off-duty personnel for a period of thirty consecutive days or more, the airline is considered to be a "nontransient," even if the hotel uses different rooms to fulfill its contract.

WAC 458-20-166(2), which concerns the taxation of hotels, likewise provides a definition of "transient":

(2) **Transient defined.** The term "transient" as used in this section means any guest, resident, or other occupant to whom lodging and other services are furnished under a license to use real property for less than one month, or less than thirty continuous days if the rental period does not begin on the first day of the month. The furnishing of lodging for a continuous period of one month or more to a guest, resident, or other occupant is a rental or lease of real property. It is presumed that when lodging is furnished for a continuous period of one month or more, or thirty continuous days or more if the rental period does not begin on the first day of the month, the guest, resident, or other occupant purchasing the lodging is a nontransient upon the thirtieth day without regard to a specific lodging unit occupied throughout the continuous thirty-day period. An occupant who contracts in advance and does remain in continuous occupancy for the initial thirty days

will be considered a nontransient from the first day of occupancy provided in the contract.

(Emphasis added.) Based on the facts and arguments before us, we hold that the law does not require a hotel guest to be in continuous occupancy of the same hotel room for a continuous thirty-day period to qualify as a nontransient. Taxpayer is therefore entitled to a refund of retail sales taxes paid consistent with this decision.

DECISION AND DISPOSITION

Taxpayer's petition is granted

Dated this 1st day of August 2012.