

Cite as Det. No. 15-0323, 35 WTD 41 (2016)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of) D E T E R M I N A T I O N
Assessment of) No. 15-0323
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)
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...) Registration No. . . .
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RULE 254; RCW 82.32.070: B&O TAX, RETAIL SALES TAX – NONTRANSIENT EXEMPTION – RECORDKEEPING. A taxpayer may not claim a nontransient exemption from B&O tax or retail sales tax for income received from motel guests when there is inadequate documentation that the motel guests in question were actually nontransient.

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.

Yonker, A.L.J. – The operator of a motel (Taxpayer) protests the disallowance of its claimed partial exemption from retailing business and occupation (B&O) tax and retail sales tax for gross income Taxpayer claims it received from “nontransient” occupants. Because we conclude Taxpayer has failed to provide adequate evidence that any occupants were “nontransient,” we deny the petition.¹

ISSUE

Under RCW 82.32.070 and WAC 458-20-254, has Taxpayer proven that some of its gross income was derived from “nontransient” motel room occupants, such that the gross income from those occupants was not subject to retailing B&O tax and retail sales tax pursuant to RCW 82.04.050(2)(f) and WAC 458-20-166?

FINDINGS OF FACT

[Taxpayer] owns and operates the [Motel] in . . . , Washington. Taxpayer represents that most of the Motel's occupants are "homeless." In early 2015, the [Department of Revenue's (Department)] Audit Division commenced a review of Taxpayer's books and records for the time period of January 1, 2011 through December 31, 2014 (audit period). During the course of its review, the Audit Division found that Taxpayer had reported its gross income during the audit period under the retailing [B&O] tax classification, but had claimed that approximately half of its

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

total reported gross income was tax-exempt as that portion was from “nontransient guests” who were occupants at the Motel for at least thirty consecutive days.

The Audit Division requested documentation, including sales receipts, to substantiate the claimed exemption. Taxpayer failed to provide any such receipts, and specifically stated that it did not maintain any records, such as a guest registry, receipts, or copies of checks, that could be used to determine the length of any particular occupant’s stay at the Motel. Instead, Taxpayer provided sixteen “Non-Transient Occupancy Agreements” (Agreements) that each contains the following language:

A guest is transient for the first 30 days of continuous stay and therefore taxable for that period. Once a period of 30 days has elapsed, the guest becomes non-transient for the remaining uninterrupted stay, and is no longer subject to Sales Tax, special Hotel/Motel Tax and Tourism Promotion Area Lodging Fee.

If there is a non-refundable contractual agreement providing for a stay of more than 30 days upon check in, the guest is considered non-transient from the first day of stay and therefore not subject to Sales Tax, Special Hotel/Motel Tax and Tourism Promotion Area Lodging Fee.

Below that language, each Agreement contains the following handwritten information: (1) a room number, (2) the occupant’s name, (3) the check-in date, (4) the check-out date, and (5) the payment amount and payment method. Below the handwritten information, each Agreement states that, “I declare under penalty of perjury that this information is true and correct. I will meet your requirement of a continuous stay of more than thirty consecutive calendar days.” Below that language, each Agreement contains a signature and the title, “Signature of Guest.” There is also a line below that entitled “Date of Signature,” but on all Agreements, there is no date identified. Also, in all Agreements, Taxpayer obtained a copy of photo identification matching the name of the individual whose signature appears on the “Signature of Guest” line.

Taxpayer stated that the Agreement form was created by its representative sometime after the audit period and that Taxpayer located as many past occupants as possible to complete the form after the commencement of the Audit Division’s review. Taxpayer further stated that the handwritten information in the Agreements was based on the occupants’ recollections at the time Taxpayer located them, approximately a year after the actual occupancies allegedly occurred. Taxpayer also provided a monthly report indicating, by day and by room number, the amount of gross income Taxpayer received. The monthly report does not include names of individual occupants.

The Audit Division found that the sixteen executed Agreements did not substantiate the claimed exemptions and that all of Taxpayer’s gross income was subject to both retailing B&O tax and retail sales tax. As a result of the Audit Division’s findings, the Department issued a tax assessment for \$. . . , which included \$. . . in retail sales tax, \$. . . in retailing B&O tax, an \$. . .

small business credit, an \$. . . five-percent assessment penalty, and \$. . . in interest. Taxpayer subsequently appealed the full amount of the tax assessment, which remains unpaid.²

ANALYSIS

All “retail sales” to consumers in the state of Washington are subject to retailing B&O tax and retail sales tax, unless there is a specific exemption from such tax. RCW 82.08.020; RCW 82.04.250. According to RCW 82.04.050(2)(f), the following activity is specifically included in the definition of “retail sales”:

The furnishing of lodging and all other services by a hotel, rooming house, tourist court, motel, trailer cap, and the granting of any similar license to use real property, as distinguished from the renting or leasing of real property, and it is 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 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.

Thus, staying at a motel for a continuous period of one month or more is not a “retail sale,” and, therefore, not subject to retailing B&O tax or retail sales tax. *See also* RCW 82.04.390. WAC 458-20-166 (Rule 166) further clarifies that all charges for lodging and related services to a “transient” are retail sales and the person who provides such lodging and other related services must collect retail sales tax from those customers. Rule 166 defines “transient” as follows:

(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). As such, an occupant in a motel is transient up through the twenty-ninth day of occupancy, and subject to retail sales tax on such occupancy during that time. *Id. See also* Rule 166(4)(a)(i) (“The tenant is considered a transient for the first twenty-nine days of occupancy and must pay retail sales tax on the rental charges.”). Then, beginning on the

² While Taxpayer appealed the full amount of the tax assessment, it only advanced arguments related to the disallowance of the claimed exemption. As such, we limit this determination to that issue, and treat all other portions of the tax assessment as beyond the scope of this appeal.

thirtieth day, and thereafter, the occupant is considered nontransient and no longer subject to retail sales tax from that point forward. Rule 166(2). *See also* Rule 166(4)(a)(i) (“The rental charges become exempt of retail sales tax beginning on the thirtieth day.”) The only exception to this is if the occupant contracts in advance to remain in occupancy for at least thirty days, and actually remains in continuous occupancy for at least thirty days, in which case, that occupant is considered nontransient from the first day of occupancy. Rule 166(2).

We also note that RCW 82.32.070 requires taxpayers to maintain suitable records as may be necessary to determine the amount of any tax for which they may be liable. WAC 485-20-254 (Rule 254), which is the administrative rule regarding recordkeeping, states in pertinent part:

(3) Recordkeeping requirements—General.

- (a) Every taxpayer liable for a tax or fee imposed by the laws of the state of Washington for which the department of revenue has primary or secondary administrative responsibility... must keep complete and adequate records for which the department may determine any tax liability for such taxpayer.
 - (b) It is the duty of each taxpayer to prepare and preserve all records in a systematic manner conforming to accepted accounting methods and procedures. Such records are to be kept, preserved, and presented upon request of the department or its authorized representatives which will demonstrate:
 - ...
- (ii) The amounts of all deductions, exemptions, or credits claimed through supporting records or documentation required by statute or administrative rule, or other supporting records or documentation necessary to substantiate the deduction, exemption, or credit.**

(Emphasis added). Taxpayer has the burden of establishing its entitlement to any deduction or exemption from tax liability. *See Budget Rent-A-Car, Inc. v. Dep’t of Revenue*, 81 Wn.2d 171, 174-75, 500 P.2d 764 (1972) (“Exemptions to the tax law must be narrowly construed. Taxation is the rule and exemption is the exception. Anyone claiming a benefit or deduction from a taxable category has the burden of showing he qualifies for it.”); *see also Lacey Nursing v. Dep’t of Revenue*, 128 Wn.2d 40, 905 P.2d 338 (1995); *Port of Seattle v. State*, 101 Wn. App. 106, 1 P.3d 607 (2000); Det. No. 13-0279, 33 WTD 75 (2014).

Taxpayer offered the sixteen executed Agreements as evidence that some of its gross income was derived from “nontransient” motel occupants. However, Taxpayer concedes that these Agreements were not executed at the time of the actual occupancy as identified in the Agreements. Instead, Taxpayer states that it located the sixteen former occupants, many of whom were homeless, during the Audit Division’s review process approximately a year later, and had the former occupants sign the sixteen respective Agreements at that later time. Taxpayer also concedes that the room numbers, the check-in dates, and the check-out dates, handwritten in the Agreements were all based on the occupants’ recollections at that later time, and were not

based on any other records. We question the reliability of these occupants' recollections approximately a year after their alleged stays at the Motel, and conclude, like the Audit Division, that the Agreements do not adequately prove that any of Taxpayer's gross income was derived from tax-exempt "nontransient" occupants.

Taxpayer also argues that it entered into oral contracts with sixteen former occupants to stay at the Motel for at least thirty consecutive days when such former occupants began their respective stays at the Motel. Regardless of whether there were oral contracts between Taxpayer and the sixteen individual occupants at issue, any such alleged oral contracts alone cannot meet the level of proof required under RCW 82.32.070 and Rule 254, which both require actual records to support an exemption from taxation. While Taxpayer argues that the sixteen executed Agreements are the actual records that prove the earlier oral contracts, we disagree because we have already concluded that those agreements are not reliable source documents of the occupancies at issue.

Taxpayer also provided monthly records of the amount of income received on a daily basis from each individual motel room. However, Taxpayer admits that those records cannot link any particular occupant to any particular room. Given these circumstances, we likewise conclude that the monthly records do not adequately prove that any of Taxpayer's gross income was derived from tax-exempt "nontransient" occupants.

Taxpayer has been unable to produce any other documentation connecting any particular occupant to a particular length of stay at the Motel. Without such evidence, we must ultimately conclude that Taxpayer has failed to prove that any portion of its gross income was exempt from retailing B&O tax and retail sales tax. We, therefore, affirm the tax assessment.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 20th day of November, 2015.