

Cite as Det. No. 93-011, 12 WTD 565 (1993).

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition)	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u> <u>N</u>
For Refund of)	
)	No. 93-011
)	
. . .)	Registration No. . . .
)	

[1] RULE 166: RETAIL SALES TAX -- RENTAL OF REAL ESTATE -- HOTEL ACCOMMODATIONS -- CONTINUOUS POSSESSION. Where an airline entered into a two year contract to rent hotel rooms, the room rentals qualified as an exempt rental of real estate only if the airline, through its employees, continuously occupied the same hotel room for a period in excess of one month.

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.

NATURE OF ACTION:

A commercial airline petitions for a refund of sales taxes paid on hotel rooms which it asserts were continuously rented for periods in excess of one month.

TAXPAYER REPRESENTED BY: . . .

DATE OF SUPPLEMENTAL TELECONFERENCE: . . .

FACTS:

Okimoto, A.L.J. -- [Taxpayer] operates a commercial airline based [out-of-state]. The taxpayer explained in its petition that it must continuously arrange for hotel accommodations for its crew and flight attendants at each of its layover stops. One such stop is . . . in Washington.

The taxpayer states that it can also negotiate a less expensive room rate by entering into a two year contract and it has

negotiated such a contract with the [Washington hotel]. Under the terms of the contract:

- 1) The hotel room rental rate is \$30 per night.
- 2) The hotel is required to provide a specified number of rooms for [taxpayer's] employees subject to modification no later than 10 days prior to the date of occupancy.
- 3) The rooms are supposed to be on the upper floors and away from ice machines, elevators, and highway traffic.
- 4) The availability of all rooms is guaranteed and relocation of [taxpayer's] personnel is prohibited unless [the taxpayer] approves in writing the alternate hotel accommodations.
- 5) [Taxpayer's] liability for room rentals is waived in the event that [the taxpayer's] employees are unable to occupy rooms for reasons over which [the taxpayer] has no control; i.e. airport closures, civil strife, civil disobedience, National and International crisis, political and/or protest demonstrations.

There is no identification of individual room numbers mentioned in the contract. Each month the hotel bills the taxpayer for the actual number of rooms used by its employees. Daily usage of rooms varies, but normally range from a minimum of five to a maximum of thirty-two.

TAXPAYER'S EXCEPTIONS:

The taxpayer contends that several rooms are continuously and exclusively reserved for airline flight personnel for a period in excess of one month and therefore constitute the exempt rental of real estate. The taxpayer has submitted a copy of its rental agreement with [the Washington hotel] and points to a rental agreement dated [January 1990] to support its petition.

In its petition for refund, the taxpayer has scheduled its daily usage/occupancy of rooms at the . . . hotel. For each month, it has requested a refund of retail sales tax paid on all rooms below which its daily occupancy did not drop below. For example, if the lowest number of rooms occupied on any one day during the month of May was five, then it considered all daily charges for the first five rooms to be an exempt rental of real estate for each day of the month of May. Amounts paid for rooms occupied

over five were considered taxable transient room rentals and subject to the retail sales tax and related taxes¹.

The taxpayer relies on the following portions of WAC 458-20-166 (Rule 166) in support of its refund request.

166 (1)(d) "A person who contracted in advance and does remain in continuous occupancy for one month, will be deemed a nontransient from the start of the occupancy."

And 166 (3)(d) "Where lodging is furnished to a nontransient, the transaction is deemed a rental of real estate which is exempt of Business and Occupation Tax."

The taxpayer argues in its petition:

"We have been unable to find WAC language that restricts the tax exemption to the rental of a specific room to one customer that appears to be the basis of the Department's position. Although the [Washington hotel] may have made every effort to rent the same rooms daily (our preference to [the taxpayer], crew personnel may have been moved for a wide variety of reasons including the need for repairs, routine maintenance or refurbishing. These moves should not eliminate the exemption."

ISSUE:

Where an airline enters into a two year contract to rent hotel rooms, do the room rentals qualify as an exempt rental of real estate?

DISCUSSION:

RCW 82.04.050 (2)(f) includes within the definition of a retail sale:

(f) 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

¹Such as the hotel/motel tax.

or more constitutes a rental or lease of real property and not a mere license to use or enjoy the same;

WAC 458-20-166 is the lawfully promulgated rule implementing the above statute and has the same force and effect as law. RCW 82.32.300. It provides in part:

...(4) RETAIL SALES TAX. All sales and rentals of tangible personal property by the persons defined in this section are subject to the retail sales tax.

(a) The charge made for the furnishing of lodging and other services to transients is subject to the retail sales tax.

Rule 166 further states:

(2) It will be presumed that the establishments [hotels] first defined above are conferring a license to use real estate, as distinguished from a rental of real estate, where the occupant is a transient. Conversely, where the occupant who receives lodging is or has become a nontransient, it will be conclusively presumed that the occupancy is under a rental or lease of real property.

(Brackets ours.)

Rule 166 defines transient as:

... Any guest, resident, or other occupant to whom lodging and other services are furnished under a license to use real property and who does not continuously occupy the premises for a period of one month. Any such occupant who remains in continuous occupancy for more than one month, shall be deemed a transient as to the first month of occupancy, unless such occupant has contracted in advance to remain one month. A person who has contracted in advance and does remain in continuous occupancy for one month, will be deemed a nontransient from the start of the occupancy.

Thus under the scheme of the statute and the rule, the retail sales tax is due when a hotel renter occupies a room for less than thirty days, i.e., the occupant is a "transient." However, when the renter rents a room continuously pursuant to an agreement for thirty days or more, the occupant is a "nontransient" from the beginning of his occupancy and the charges are exempt from tax.

Applying the above statute and rule to the taxpayer's case, we first note that the taxpayer does have a contract to remain in continuous occupancy of some unspecified rooms for a period in excess of one month. Therefore, under the rule any continuous occupancy of the same room for a period of more than one month will relate back to the beginning of its occupancy. However, we disagree with the taxpayer's contention that intermittent moves of airline employees to different hotel rooms fails to nullify the exemption. We believe that the same room must be continuously occupied by the airline, through its employees, for a period in excess of one month before the exemption applies. Where the airline employees are moved to another room, the period of occupancy starts anew, and must then be perfected by an additional continuous period of occupancy in excess of one month before the exemption again applies.

So far, the taxpayer has failed to document that it, or its employees have actually occupied the same room for a continuous period of more than one month. The taxpayer now states, however, that it is currently obtaining occupancy records from the hotel for the month of October of 1990 that will substantiate this fact. We agree to this preliminary test period, and will remand the taxpayer's file to the Audit Division to verify the facts alleged. The taxpayer's petition is conditionally granted provided that it can substantiate that it, through its employees, has continuously occupied the same hotel room or rooms for a period in excess of one month.

DECISION AND DISPOSITION:

The taxpayer's petition for refund is remanded to the Audit Division for verification of the facts alleged.

DATED this 25th day of January 1993.