Cite as Det. No. 04-0022E, 23 WTD 198 (2004)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of . . .	)	FINAL EXECUTIVE DETERMINATION No. 04-0022E Registration No. . . . . . . /Audit No. . . . Docket No. . . .

[1] RULE 118, RULE 138, RULE 166, RULE 168; RCW 82.04.050, RCW 82.04.290: B&O TAX – EXEMPTIONS -- LEASE VS. LICENSE TO USE REAL PROPERTY – ASSISTED LIVING – BOARDING HOMES -- 30 DAY PRESUMPTION. The statutory presumption that occupancy of real property for a continuous period of one month or more constitutes a lease of real property does not apply to assisted living facilities.

[2] RULE 118; RCW 82.04.290; ETA 544: B&O TAX –EXEMPTIONS -- LEASE VS. LICENSE TO USE REAL PROPERTY – ASSISTED LIVING -- BOARDING HOMES -- EXCLUSIVE CONTROL – PRIMARY PURPOSE. Although some indicia of a lease are present in the assisted living context, the primary purpose of the taxpayer's assisted living facilities is to provide daily living assistance and care to the aged or infirm. Accordingly, the rental of real estate exemption does not apply.

[3] RULE 118, RULE 138, RULE 166; RCW 82.04.050, RCW 82.04.290: CONGREGATE CARE CASES OVERRULED. In published determinations, we previously held that two congregate care facilities were entitled to the rental of real estate exemption for amounts attributable to lodging if they could segregate with reasonable accuracy the amounts received from real estate rental from amounts received for personal and professional services. Det. No. 90-252, 10 WTD 41 (1990); Det. No. 90-297, 10 WTD 87 (1990). We hereby overrule these

> determinations to the extent those determinations stand for the proposition that assisted living facilities can bifurcate income and treat part of the income as subject to the rental of real estate exemption.

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.

DIRECTOR'S DESIGNEE: Janis P. Bianchi, Policy and Operations Manager, Appeals Division

Mahan, A.L.J. – Operator of an assisted living facility for residents with Alzheimer's disease and other dementia contends that its charges are for the rental of real property and, as such, the income is not subject to business and occupation (B&O) tax.[1]

ISSUES[2]

1. Does the presumption set forth in RCW 82.04.050(2)(f) regarding a lease or rental based on a 30-day occupancy in a hotel, rooming house, or "any similar license to use real property" apply to assisted living facilities?

2. Are residents with Alzheimer's disease and other dementia in an assisted living facility tenants or licensees for B&O tax purposes?

3. If the residents are considered tenants for B&O tax purposes, are meal and professional services subject to B&O tax?

FACTS

The taxpayer operates a for-profit . . . -bed Alzheimer facility, licensed as a boarding home under Ch. 18.20 RCW, that provides assisted living services to residents with Alzheimer's disease and other dementia. Under its contract with its residents or their guardians, the taxpayer agrees to "provide meals, a semi-private or private room and assistance with medication while residing in the facility." The taxpayer charges a single "room rate" for these services. Residents may also separately purchase guest meals, nutritional supplements, other supplies, and beauty shop services.[3]

In order to provide medication assistance, a licensed practical nurse (LPN) or a registered nurse (RN) is usually on duty. The limited assistance with medication that can be provided is outlined in WAC 388-78A-300. The nurse also supervises employees who provide resident care services. Consistent with regulations governing such facilities, those services include providing residents

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.
[2] Nonprecedential portions of this determination have been redacted.
[3] The taxpayer also provides short-term respite and adult day care services. The taxpayer agrees that separately provided services and short-term services are subject to tax and are not at issue in this case.

with assistance in dressing, grooming, personal hygiene, eating, orientation, and related activities. *See* WAC 388-78A-335; 388-78A-260.

Generally, residents are admitted to the taxpayer's facility when a bed becomes available. Should a private room become available, a resident in a semi-private room may transfer to the private room upon agreeing to pay a higher room rate. Under the taxpayer's policies, applicants for residency must be evaluated to see if the person has "behaviors that allow living in a communal setting successfully without being disruptive to others."

Once admitted, residents have numerous rights under the law, based on the "opportunity to exercise reasonable control over life decisions," including the right to "privacy." RCW 70.129.005.[4] Among other things, residents have the right to a minimum amount of usable floor space; to control lighting and heating; to be able to adjust window coverings; to a bed, a chair, and individual storage space; and to use personal belongings and furniture, if safe to do so. *See* RCW 70.129.100; WAC 388-78A-050. Residents also have the right to a 30-day notice of any planned transfer or discharge. RCW 70.129.110(4).

As part of the living assistance offered by the taxpayer, it operates a locked facility so that residents cannot wander off the premises. Although residents may request a lock for the doors to their individual rooms, none have currently done so. Consistent with the right to privacy, employees are instructed to knock on a resident's door and announce themselves prior to entering a resident's room. A resident can admit or exclude anyone from their room, including nursing staff.

The Department of Revenue (Department) reviewed the taxpayer's records for the January 1, 1996 through December 31, 1998 period and issued a deficiency assessment in the amount of $ . . . . Most of the assessment involved the imposition of service and other activities B&O tax on room charges.

ANALYSIS

RCW 82.04.390 exempts the "gross proceeds derived from the sale of real estate" from B&O tax. Similarly, WAC 458-20-118 (Rule 118) states that amounts from the sale of "real estate" are exempt from B&O tax. Rule 118 further states that income from the rental of real estate is subject to the exemption. It further distinguishes between the rental of real estate and licenses to use real property, with the latter not subject to the exemption.[5] The taxpayer contends that

[4] Under RCW 70.129.005, the legislature expressed the intent to "extend those basic rights" provided to nursing home residents to residents of "boarding homes and adult family homes." As a result, the description of the rights and usage of the rooms by the residents in the taxpayer's facility closely parallel those in nursing homes, as described in *Lacey Nursing Home, Inc. v. Department of Rev.*, 103 Wn. App. 169, 11 P.3d 839 (2000).

[5] Rule 118 states:

> Amounts derived from the sale and rental of real estate are exempt from taxation under the business and occupation tax. However, there is no exemption of amounts derived from engaging in any business

occupancy in its assisted living facility constitutes the rental of real estate under Rule 118, not a license to use. As such, its income should not be subject to B&O tax.

By statute, a boarding home is defined as "any home or other institution . . . providing board and domiciliary care to seven or more aged persons. . . ." RCW 18.20.020(2). It does not include independent senior housing or independent living units in continuing care retirement communities. *Id.* The term "aged person" means "a person of the age of sixty-five years or more, or a person of less than sixty-five years who by reason of infirmity requires domiciliary care." RCW 18.20.020(1). Licensed boarding homes are also commonly referred to as assisted living facilities and may also be referred to as congregate care facilities when the boarding home has a contract with the Department of Social and Health Services. *See* WAC 388-15-560.

The domiciliary care provided by assisted living facilities may include "limited nursing services," which are defined to "not include continuous nursing care supervision of the type provided in nursing homes . . . . " WAC 388-78A-010. Such assisted living facilities are specifically prohibited from providing respiratory ventilation, intravenous procedures, suctioning, and feeding tube insertion or maintenance services and from even providing care for residents who are bed-bound for more than 14 days for medical reasons. WAC 388-78A-168(4).[6]

Recently, in *Lacey Nursing Home, Inc. v. Department of Rev.*, 103 Wn. App. 169, 11 P.3d 839 (2000), the Court of Appeals concluded that residence in a nursing home "better fits the concept of license than that of landlord-tenant" because the "primary purpose" of a nursing home is "to provide medical care." *Id.* at 186. The taxpayer contends that, unlike residence in a nursing

---

> wherein a mere license to use or enjoy real property is granted. Amounts derived from the granting of a license to use real property are taxable under the service B&O tax classification unless otherwise taxed under another classification by specific statute, e.g., sale of lodging taxed under retailing.
>
> * * *
>
> A lease or rental of real property conveys an estate or interest in a certain designated area of real property with an exclusive right in the lessee of continuous possession against the world, including the owner, and grants to the lessee the absolute right of control and occupancy during the term of the lease or rental agreement. An agreement will not be construed as a lease of real estate unless a relationship of "landlord and tenant" is created thereby.

Rule 118 is consistent with the distinctions between leases and licenses set forth in *McKennon v. Anderson*, 49 Wn.2d 55, 59, 298 P.2d 492 (1956).

[6] Boarding homes and nursing homes are clearly distinguishable from each other. The operation and licensing of boarding homes are governed by statutes and regulations (RCW Ch. 18.20; WAC Ch. 388-78A) different from those governing nursing homes (RCW Ch. 18.51; WAC Ch. 388-97). In contrast to the limited nursing services provided in boarding homes, nursing homes may provide skilled nursing services. Whereas residents are admitted to boarding homes based on a contract between the boarding home and a resident, residents are only admitted to nursing homes under a doctor's order (WAC 388-97-085(3)(b)). Boarding homes are in fact prohibited from admitting or retaining any aged person requiring nursing or medical care of the type provided by nursing homes. RCW 18.20.160.

home, residence in an assisted living facility better fits the concept of landlord-tenant relationship and, as a consequence, it involves the rental of real property for B&O tax purposes.

The taxpayer first argues that, under RCW 82.04.050(2)(f)), lodging in assisted living facilities constitutes the lease or rental of real estate. RCW 82.04.050(2)(f)) defines a retail sale to include the furnishing of lodging in a hotel, rooming house or "any similar license to use real property." It further creates the presumption that continuous occupancy in such establishments for 30 days or more constitutes a lease or rental of real property, not a retail sale. In construing this provision, the court in *Lacey* found the phrase "any similar license" to be ambiguous. To resolve this ambiguity, it relied on the Department's interpretation of this provision at WAC 458-20-166 (Rule 166) and concluded that nursing homes do not come under the RCW 82.04.050 presumption. 103 Wn. App. at 180. We reach a similar conclusion with respect to assisted living facilities.

Rule 166 describes "the taxation of persons operating establishments such as hotels, motels, and bed and breakfast facilities, which provide lodging and related services to transients for a charge." Rule 166(1). In general such establishments must collect retail sales tax on lodging charges. Consistent with the RCW 82.04.050 presumption, "nontransient" lodging, defined as continuous occupancy for 30 days or more at such establishments, is not subject to retail sales tax. Under Rule 166, the Department specifically excluded "hospitals, sanitariums, nursing homes, rest homes, and similar institutions" from the scope of the rule. Rule 166(1)(b)(i). The *Lacey* court relied on this exclusion in Rule 166 in concluding that nursing homes do not come under the RCW 82.04.050 presumption.

Although Rule 166 does not specifically refer to licensed boarding homes or assisted living facilities, as it does to nursing homes, the term "rest homes, and similar institutions" is broad enough to encompass such facilities. Under common usage, the term "rest home" means "an establishment for the care and housing of persons (as the aged, convalescents) that need special attention or services." *Webster's Third New International Dictionary* 1936 (1993). More specifically, for Department of Labor and Industry purposes, "nursing homes" and "rest homes" are distinguished, and rest homes are described as facilities that provide "daily living assistance care to the aged or those with some limits on ability for self-care, but where medical care is not yet a major element." WAC 296-17-685. Such definitions of rest homes are consistent with how the taxpayer describes its facility and how it distinguishes its facility from a nursing home. As a result, the taxpayer's assisted living facility would be considered a rest home or similar institution for purposes of Rule 166. Accordingly, the RCW 82.04.050 presumption does not provide a basis to conclude that the taxpayer's income is from the rental of real estate, rather than from providing a service subject to B&O tax.

The taxpayer next argues that it rents rather than licenses its rooms and, therefore, it should be allowed to segregate lodging revenue from service revenue for purposes of Rule 118. This argument is based on two Department determinations issued in 1990 that involved congregate care facilities. In both determinations, the Department concluded that the congregate care facilities were entitled to an exemption for the rental of real estate under Rule 118, if amounts

received from the rental of real estate could be segregated from amounts derived from providing personal and professional services, as discussed in WAC 458-20-168 (Rule 168) and from providing meals, as discussed in WAC 458-20-119 (Rule 119). *See* Det. No. 90-252, 10 WTD 41 (1990)(boarding home for mentally ill adults); Det. No. 90-297, 10 WTD 87 (1990)(boarding home for developmentally delayed adults).[7]

Although the *Lacey* court did not necessarily agree or disagree with the conclusions reached in those determinations, it distinguished residents in a nursing home based both on the regulatory differences between congregate care facilities and nursing homes and on the difference between lodgers (who only have a right to use the premises) and tenants (who have exclusive control over the premises), as discussed in William B. Stoebuck, 17 *Washington Practice: Real Estate: Property Law* § 6.18, at 319 and § 6.3, at 295 (1995)). *Lacey*, 103 Wn. App, at 183 - 185.

After discussing the facts and holdings in the Department's congregate care determinations and the differences with respect to nursing homes, the *Lacey* court, at 186-187 concluded:

> [I]n the case of nursing home residents, the primary purpose of the relationship is to provide medical care. We conclude that the relationship between Taxpayers and their residents better fits the concept of license than that of landlord-tenant. Taxpayers are, accordingly, not entitled to the sale-of-real-estate B&O tax exemption.

The *Lacey* court recognized the difficulty in applying landlord-tenant concepts to the complex relationships created in the long-term care setting. Ultimately, the court based its holding on a

---

[7] The court in *Lacey*, at 182, described these determinations as follows:

> The first determination involved a congregate-care mental-health facility for mentally ill adults that was licensed as a boarding home. The facility did not furnish acute medical treatment to its residents, but it hired a mental health coordinator to implement the residential portion of treatment plans provided by outside treatment agencies. In finding the facility eligible for the rental-of-real-estate exemption, the Department described the residents' living conditions as follows:
>
> > Here, individual rooms are provided to clients. Each occupant has the exclusive right to continuous possession of the room against the world. Although a client may be required to share a room in certain cases, the room sharing arrangement is completely consensual between the occupants. The fact that the facility staff has the right to enter the room to do housekeeping or to handle an emergency is comparable to the right of entry retained by hotel management.
>
> The second determination involved a congregate-care facility for developmentally disabled adults that was also licensed as a boarding home. The facility provided personnel to cook meals, supervise medication, and assist residents with housekeeping. A staff member was present 24 hours a day to respond to problems and supervise the residents, but the facility employed no medically trained staff. The residents had a "great degree of latitude in selecting potential roommates" and roommate selection was completely consensual. Residents had their own room keys. Although the staff also had keys, they could only use them to enter residents' rooms in an emergency. Each resident was given a resident rights form that allowed them to exclude others from their rooms, decorate and furnish their rooms, and gave them notice before a room transfer. From these facts, the Department reasoned that the lodging furnished to residents did not constitute a mere granting of a license to use real estate.

finding that the "primary purpose" of the nursing home relationship was to provide medical care. We have the same or similar concerns here.

Although the primary purpose of the relationship at the taxpayer's assisted living facility is not to provide medical care, this does not mean the primary purpose is the leasing of real property or the creation of a landlord-tenant relationship. Although we find some indicia of a lease present here, we must nonetheless look further to determine whether the primary purpose of the taxpayer's activity is to lease assisted living apartments to its residents or to perform some other function. *See, e.g.*, ETA 544.04.08.245 ("The Department considers the primary nature of the activity in establishing the tax classification applicable; incidental services of a possibly different classification, unless clearly identified and billed, will not affect the tax classification so established.").

The taxpayer in the present case provides extensive nursing and other living assistance, as allowed or required by the regulations governing assisted living facilities, in a residential setting. As discussed above, a licensed practical nurse or a registered nurse is usually on duty to provide medication assistance. The assistance with medication that can be provided is outlined in WAC 388-78A-300. The nurse also supervises employees who provide resident care services. Consistent with regulations governing assisted living facilities, those services include providing residents with assistance in dressing, grooming, personal hygiene, eating, orientation, and related activities. *See* WAC 388-78A-335; 388-78A-260. Such activities provide the reason for the creation of the assisted living relationship. Overall, we conclude the primary purpose of the assisted living relationship is to provide such daily living assistance and nursing care to persons with Alzheimer's disease. The fact that such services are provided in a residential setting does not create a landlord-tenant relationship. Accordingly, we conclude the taxpayer is not entitled to the B&O tax exemption.

Moreover, the *Lacey* court partially based its conclusion that nursing homes are not landlords on the exclusion of nursing homes from the Residential Landlord Tenant Act (RLTA). *Lacey*, 103 Wn. App. at 184-5, *citing*, RCW 59.18.040(1). The court noted, "It is . . . significant that the Legislature has excluded nursing homes from the provisions of the RLTA because residence at the institution is 'merely incidental to detention or the provision of medical . . . services.'" *Id*. at 185. Like nursing homes, assisted living facilities are excluded from the RLTA.[8] This exclusion

[8]RCW 59.18.040(1) excludes from the RLTA "Residence at an institution . . . where residence is merely incidental to detention or the provision of medical, religious, educational, recreational, or similar services, including but not limited to correctional facilities, licensed nursing homes, monasteries and convents, and hospitals." The court in *Lacey* relied on the analysis of this provision in *Sunrise Group Homes, Inc. v. Ferguson*, 55 Wn. App. 285, 288, 777 P.2d 553 (1989). In *Sunrise*, the court concluded that although congregate care facilities are not specifically listed in the RLTA exclusion (as are nursing homes), congregate care facilities are nonetheless excluded. The *Sunrise* court reasoned that the exclusion applies "because the residents cannot live independently and require personal care, supervision, and assistance with daily living activities" and thus fall within the exclusion of facilities "where residence is merely incidental to detention or the provision of . . . services." As quoted in *Lacey*, the *Sunrise* court concluded that the RLTA exclusion applies to any living arrangement "where the tenant has a purpose for living there independent and apart from the basic requirements of shelter and amenities." *Lacey*, 103 Wn. App. at 185, *quoting Sunrise*, 55 Wn. App. at 288. As discussed above, we conclude that the residents at the taxpayer's assisted

further supports our conclusion that the taxpayer does not operate as a landlord with respect to its residents.

Essentially the taxpayer is engaged in a single activity—providing assisted living services in a residential setting—that is not subject to bifurcation. For example, if the assisted living residents did not require assisted living services, there would be no reason for them to pay the much higher rates for an assisted living arrangement (as compared to other comparably placed apartments). Further, assisted living facilities may be required to provide or arrange for limited nursing services to meet the needs of residents at no additional cost to the resident. *See* WAC 388-110-150. These are not activities that can be separated one from another. If the services are functionally integrated, then the entire contract price is subject to tax at a single rate. *See, e.g.*, Det. No. 00-159E, 20 WTD 372 (2001).

In so holding, we recognize that we previously held in the two congregate care cases that the taxpayers were entitled to the rental of real estate exemption for amounts attributable to lodging if they could segregate with reasonable accuracy the amounts received from real estate rental from amounts received for personal and professional services. In both Det. No. 90-252, *supra*, and Det. No. 90-297, *supra*, we reasoned, "Although the taxpayer does not operate a hotel, a sufficient basis exists to conclude that the presumption afforded in Rule 118 is also applicable under these facts."[9] As discussed above, the thirty day presumption is inapplicable in the congregate care or assisted living context. In other words, those cases were based on faulty reasoning. They also failed to consider whether the income was from a single activity that could not be bifurcated. Accordingly, we overrule both Det. No. 90-252 and Det. No. 90-297, to the extent those determinations stand for the proposition that assisted living facilities can bifurcate income and treat part of the income as subject to the rental of real estate exemption.

. . .
Dated this 6th day of February, 2004.

---

living facilities have "a purpose for living there independent and apart from the basic requirements of shelter and amenities," *i.e.*, the residents require assisted living services.

[9] In support of this conclusion, in the first determination we noted that the taxpayer's admission agreement with its clients required the taxpayer to give thirty days prior written notice of the termination of residency. In the second determination, we noted that the average stay of a resident was over one year, "well in excess of the thirty days required under Rule 118."