Cite as Det. No. 04-0023E, 23 WTD 206 (2004)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Letter Ruling of	)	FINAL EXECUTIVE DETERMINATION
	)	No. 04-0023E
. . .	)	Registration No. . . .
	)	Appeal of Taxpayer Information & Education Ruling dated . . . , 2001
	)	Docket No. . . .

[1] RULE 118, RULE 138, RULE 166, RULE 168; RCW 82.04.050, RCW 82.04.290: SERVICE B&O TAX – B&O TAX EXEMPTION -- LEASE VS. LICENSE TO USE REAL PROPERTY – ASSISTED LIVING – 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: SERVICE B&O TAX –B&O TAX EXEMPTION -- LEASE VS. LICENSE TO USE REAL PROPERTY – ASSISTED LIVING—EXCLUSIVE CONTROL VS. RIGHT TO USE – 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. Accordingly, the rental of real estate exemption does not apply.

[3] RCW 82.32.330: CONFIDENTIALITY – EQUAL TREATMENT – DEPARTMENTAL ERRORS – UNPUBLISHED DETERMINATIONS. Even if other assisted living facilities received determinations from the Department allowing exemption for their income, we could not discuss those determinations with the taxpayer if those determinations have not been published. Although equal treatment of similarly situated taxpayers is a legitimate concern, we cannot discuss other taxpayers because of confidentiality requirements. Further, even if the taxpayer's concern should prove to be correct, the Department need not perpetuate past errors by repeating them with respect to other taxpayers.

[4] 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

STATEMENT OF THE CASE:

Bianchi, Policy and Operations Manager and C. Pree, A.L.J. – The taxpayer, an operator of assisted living and retirement facilities, protests a Taxpayer Information and Education (TI&E) ruling that the taxpayer is liable for service business and occupation (B&O) tax on 100% of its receipts from providing assisted living accommodations and services. We conclude that the taxpayer licenses, rather than leases, its premises to residents. Accordingly, we affirm the TI&E ruling and conclude that the taxpayer is liable for service B&O tax on 100% of its assisted living receipts. However, we limit our holding to prospective application only because we find that for past periods the taxpayer was entitled to rely on two published determinations, which we overrule in this determination. Under these two determinations, for past periods, the taxpayer is entitled to the rental of real estate exemption.[1]

ISSUES:[2]

1. Does an operator of an assisted living facility receive exempt real estate rental income or service B&O taxable income from a license when it provides apartments and services to its residents?

2. Does the possibility that other assisted living facilities are not paying B&O tax on their receipts provide grounds for granting an exemption to the taxpayer?

3. Should our ruling be applied prospectively only because two published determinations allowed congregate care facilities the rental of real estate exemption to the extent the facilities could segregate their income?

[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.

FINDINGS OF FACT:

The taxpayer is a licensed boarding home that operates for-profit assisted living and retirement facilities in Washington. These facilities provide unfurnished apartments to the elderly on a month-to-month basis.[3] The assisted living and retirement apartments occupy separate wings of the facility. However, residents share common areas, *e.g.*, laundry facilities, television areas, and a dining room.

Each assisted living apartment has its own bathroom, closet, heating and lighting controls, refrigerator, and microwave. Most residents use their own furniture. However, if necessary, the taxpayer is required to provide certain items of furniture to the assisted living residents under boarding home licensing regulations. *See* Ch. 18.20 RCW.[4]

The room plans for the retirement apartments and assisted living apartments are similar.[5] However, the retirement apartments cost less per month per square foot than the assisted living apartments. Specifically, on average, the base rent for a retirement apartment is 57% of the base rent for an assisted living apartment. . . .

Included in their base rent, all residents receive meals, which are prepared and served on-site in the common dining room. (Retirement residents receive one meal per day, and assisted living residents receive three meals per day.) Basic first aid for "minor emergencies" is also provided. (However, the facility does not employ a physician, and if emergency or other medical services are necessary, the services must be obtained from outside sources; the resident is responsible for paying for these services.) Further, in their base rent, all residents receive weekly housekeeping and linen service, utilities (except personal telephone services), social and recreational programs, scheduled transportation through the facility van, and 24-hour availability of staff on site. All residents have access to complimentary laundry facilities.

In addition to the services set forth in the paragraph above, included in their base rent, assisted living residents also receive "health monitoring." The health monitoring is provided by a nurse consultant, who is employed by the assisted living facility, The nurse consultant is "responsible for monitoring the health and well being of each resident by providing education to management

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[3] Assisted living residents generally live in the taxpayer's apartments from several months to several years, and they are required to give thirty days' notice prior to vacating their apartments.

[4] A boarding home is defined as "any home or other institution . . . providing board and domiciliary care to seven or more residents." RCW 18.20.020(2); *see also* WAC 388-78A-010. It does not include independent senior housing or independent living units in continuing care retirement communities. *Id.* Boarding homes are also sometimes 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 365-120-030.

[5] The notable differences are that retirement apartments contain stoves, while the assisted living apartments contain microwaves. Further, retirement apartments are available as studio and one- and two-bedroom units, whereas assisted living apartments are available only as studio and one-bedroom units.

and staff on the appropriate and proper care of each [assisted living] resident." In addition, included in their base rent, assisted living residents receive weekly laundry service, in addition to the weekly linen service mentioned above. Assisted living residents also receive two hours per month of "personal care" services included in their base rent. The personal care is provided by "caregivers," who "work[] . . . 24 hours a day with responsibility for providing assistance to residents with personal care needs scheduled or unscheduled." . . .

For additional fees, assisted living residents may receive "personal care" services, in addition to the two hours included in their base rent, depending on their individual needs. As a condition of remaining in the facility, the assisted living resident must accept this additional care, and pay the additional fees associated with the additional care, if the taxpayer decides the care is needed. The personal care services [include] assistance for personal hygiene, bathing, dressing, medication administration, assistance with management of incontinence, ambulation assistance, one person transfer assistance, or services for residents who exhibit behavioral symptoms that may benefit from intermittent intervention. . . . The amount of the additional fee, ["fee"] depends on the time the taxpayer spends with that resident. The taxpayer determines the amount of time necessary to care for each resident based on its assessment of the resident. Residents are assessed at least every 90 days. . . . Each time the resident service plan is reviewed and revised, the resident must sign an agreement acknowledging any changes in the services. The . . . [Fee] . . . is separately itemized on the assisted living resident's monthly invoice. If an assisted living resident is absent for more than 14 consecutive days, the . . . [Fee] is credited commencing on the 15th day.

Only persons who are "currently medically stable per primary physician's report" are accepted as residents in the assisted living facility. The assisted living facility may give a resident a 30 day notice to vacate if the resident's needs exceed the level of service the facility can provide.

Residents are free to come and go as they wish and may lock their apartments. Taxpayer's personnel have the right to enter assisted living apartments only to inspect, make repairs or improvements, or provide agreed-upon services. However, the personnel are required to make reasonable effort to arrange a convenient time with the resident for these visits. Further, the taxpayer may enter the apartments without consent in an emergency.

. . . , the taxpayer requested a letter ruling from TI&E regarding the taxation of its assisted living and retirement receipts. In its . . . , response, TI&E concluded that the taxpayer's receipts from the retirement residents are exempt from B&O tax as a rental of real estate. However, with respect to the taxpayer's receipts for providing apartments and services to the assisted living residents, TI&E cited WAC 458-20-168 (Rule 168) and concluded "the provision of personal care and the room are part of an integrated and interdependent business activity." As such, TI&E concluded that these receipts are subject to service B&O tax.

. . . , the taxpayer requested a clarification from TI&E of its ruling with respect to the taxpayer's assisted living receipts. Specifically, the taxpayer contended that it separately billed and made a "definite distinction" between the apartment rental and personal service charges for its assisted

living residents, and only the service receipts should be subject to service B&O tax. In its . . . , response TI&E again held that no portion of the taxpayer's assisted living receipts qualified for the rental of real estate exemption. The taxpayer appealed TI&E's ruling to the Appeals Division . . . .

ANALYSIS:

The B&O tax is imposed for the privilege of engaging in business activities in Washington. RCW 82.04.220. The tax rate or rates applicable to a particular taxpayer depend upon the type of activity or activities in which it engages, *e.g.*, manufacturing, wholesaling, or retailing. Personal service providers are subject to B&O tax on their gross income under the service classification. *See* RCW 82.04.290; WAC 458-20-138 (Rule 138). Specifically, Rule 168 provides: "The gross income derived from personal and professional services of . . . rest homes . . . , and similar health care institutions is subject to business and occupation tax under the service and other activities classification." Further, income from granting a license to use real estate is subject to service B&O tax. *See* WAC 458-20-118 (Rule 118).

In contrast, receipts from the sale or rental of real estate are exempt from B&O tax. *See* Rule 118. The taxpayer bears the burden of proving its receipts are from the exempt rental of real estate, rather than from a service B&O taxable license and services. *See, e.g.*, *Budget Rent-A-Car, Inc. v. Department. of Rev.*, 81 Wn.2d 171, 174-75, 500 P.2d 764 (1972); Det. No. 02-0039, 21 WTD 318 (2002).

1. Does an operator of an assisted living facility receive exempt real estate rental income or service B&O taxable income from a license when it provides apartments and services to its residents?

The Washington Court [of Appeals] recently faced the issue of whether nursing homes received exempt rental of real estate income when they provided rooms to nursing home residents. *Lacey Nursing Center, Inc. v. Department of Rev.*, 103 Wn. App. 169, 183-84, 11 P.3d 839 (2000)[, rev. denied, 144 Wn.2d 1008 (2001)]. Because we find the court's analysis persuasive in the assisted living context, as well, our analysis will generally follow the *Lacey* court's analysis.

A. Are the taxpayer's assisted living receipts exempt from B&O tax because of the statutory presumption that the occupancy of real estate for one month or more constitutes a rental of real estate?

[1] The nursing homes in *Lacey*, like the taxpayer here, argued that they were entitled to the statutory presumption that the occupancy of real property for a period of one month or more

constitutes the rental of real property.[6] Specifically, RCW 82.04.050 includes within the definition of "retail sale":

> 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.

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 in WAC 458-20-166 (Rule 166) and concluded that nursing homes are not covered by the RCW 82.04.050 presumption. 103 Wn. App. at 180. We reach a similar conclusion with respect to assisted living apartments.

As the court noted in *Lacey,* 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."[7] "[H]ospitals, sanitariums, nursing homes, rest homes, and similar institutions" are specifically excluded from the scope of Rule 166. The *Lacey* court relied on this exclusion in concluding that nursing homes do not come under the RCW 82.04.050 presumption. Although Rule 166 does not specifically refer to assisted living apartments, as it does to nursing homes, the term "rest homes, and similar institutions" is broad enough to encompass assisted living facilities and, thus, to exclude them from the presumption.

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, 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 the taxpayer's assisted living facility. 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 leases the assisted living apartments to the residents, rather than providing them with a license to use the apartments.

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[6] In two published determinations, we relied on this presumption to grant the rental of real estate exemption to congregate care facilities. *See* Det. No. 90-252, 10 WTD 41 (1990); Det. No. 90-297, 10 WTD 87 (1990). We overrule these determinations, as discussed below.

[7] 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.

B. Are the taxpayer's assisted living receipts eligible for the rental of real estate exemption because the legislature intended the receipts to be exempt or because the taxpayer's relationship with the assisted living residents better fits the concept of a lease?

[2] The *Lacey* court concluded "as a matter of law that the Legislature did not intend to consider nursing homes as lessors of property." 103 Wn. App. at 183. However, in reaching this conclusion, the court first considered the application of Rule 118. The *Lacey* court noted that the common law distinction between a lease and license is similar to that found in Rule 118, *i.e.*, while a tenant under a lease receives exclusive control over the area possessed, a licensee merely receives the use of another's land.

Rule 118 provides the following guidance to distinguish a license from a lease of real estate:

> (2) LEASE OR RENTAL OF REAL ESTATE. 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. . . .
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> (3) LICENSE TO USE REAL ESTATE. A license grants merely a right to use the real property of another but does not confer exclusive control or dominion over the same. Usually, where the grant conveys only a license to use, the owner controls such things as lighting, heating, cleaning, repairing, and opening and closing the premises.

The court also considered Stoebuck's distinction between "lodgers" (who have only a right to use the premises, *i.e.*, a license) and "tenants" (who have exclusive control over the premises, *i.e.*, a lease), 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 - 84. According to Stoebuck:

> [C]ourts have found the following factors persuasive that persons are lodgers and not tenants: they shared food service, they shared bathroom facilities, the operator of the building had free access to their rooms, the operator provided maid service and linens, and the room was furnished.

We note that both in the taxpayer's case and in *Lacey* some indicia of a lease are present. For example, in *Lacey*, as here, residents can control the temperature, lighting, and windows in their rooms and can lock their doors. As in *Lacey*, residents may have refrigerators, personal belongings, and direct telephone lines in their rooms and may decorate their rooms. Both here and in *Lacey*, residents are free to come and go from the facility and may have visitors as they wish. Except in emergencies or for routine housekeeping, staff of both the *Lacey* nursing homes and the taxpayer's facilities must knock before entering. Generally, both the nursing home residents in *Lacey* and the assisted living residents in taxpayer's assisted living facilities may

admit or exclude anyone from their rooms. Further, in the taxpayer's case, the residents' apartments are generally unfurnished, and the residents do not share bathroom facilities.[8]

Although the court in *Lacey* found some indicia of a lease were present, it recognized the difficulty in applying traditional landlord-tenant concepts to the complex relationships created in the long-term care setting. Ultimately, the court based its holding that residence in a nursing home "better fits the concept of license than that of landlord-tenant" on statutory differences between congregate care facilities (which the Department previously concluded may qualify as a lease[9]) and nursing homes (which the court concluded merely granted licenses), as well as differences in the "primary purpose" of the two types of facilities. Specifically, the primary purpose of a nursing home is "to provide medical care" – it is not to lease property to the nursing home residents.

Similarly, 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.")

We agree with the taxpayer that its assisted living facilities are distinguishable from the nursing homes involved in *Lacey* because the primary purpose of the assisted living facilities is not to provide medical care.[10] However, we cannot conclude, as the taxpayer suggests, that the primary purpose of the assisted living facility is to provide a lease of real estate. Instead, based on the extensive array of services offered to the taxpayer's assisted living residents, we conclude that the primary purpose of the taxpayer's assisted living facilities is to provide daily living assistance and care to the aged. "Personal care" services are available to the taxpayer's assisted living residents 24 hours per day. These services include assistance with personal hygiene, bathing, dressing, and medication administration; assistance with management of incontinence; ambulation assistance; one person transfer assistance; and services for residents who exhibit behavioral symptoms that may benefit from intermittent intervention. In addition to the personal care services, the taxpayer's assisted living residents receive health monitoring; three meals per day; weekly housekeeping, linen, and laundry service; access to complimentary laundry facilities; utilities (except personal telephone services); social and recreational programs; and scheduled transportation through the facility van.

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[8] On the other hand, some indicia of a license are also present in the taxpayer's case. For example, the residents share food service and receive housekeeping, laundry, and linen service.

[9] *See* Det. No. 90-252 10 WTD 41 (1990) and Det. No. 90-297 10 WTD 87 (1990), which are hereby overruled and will be discussed below.

[10] In fact, the domiciliary care provided by an assisted living facility may include "limited nursing services," which are defined to "**not include** continuous nursing care and supervision of the type provided in nursing homes." WAC 388-78A-010 (emphasis added).

The taxpayer notes that, as a practical matter, a nursing home resident could not reside outside of a skilled nursing facility or hospital and receive the care the resident needs. In contrast, the taxpayer argues, one need not reside in an assisted living facility to receive assisted living services because such services could be provided within one's own house or apartment. The taxpayer continues:

> Certainly, then it seems impossible to argue that one's *primary purpose* in living in an assisted living facility is to receive assisted living services, which residents may or may not take advantage of anyway (not to mention the fact that such services, even at their most advanced level, cannot properly be construed as *medical care* . . . .) Under the Department's reasoning, such as it is, should not the receipt of assisted living services, or home health care, in a person's rented house or apartment *outside* of an assisted living facility transform their rent payment into an amount subject to the B & O tax?

(Emphasis original.) While it may be possible for some persons to obtain the care they need in their own homes,[11] this does not alter the fact that the taxpayer's relationship with the residents who choose to live in the taxpayer's assisted living facilities involves significant assisted living services. Such services are the principal reason the residents choose the facility. We are not persuaded by the taxpayer's argument that some assisted living residents may not take advantage of assisted living services. If the assisted living residents did not require assisted living services, there would be no reason for them to pay the higher per square foot price for an assisted living apartment (as compared to the taxpayer's own retirement apartments). Further, we note that assisted living facilities are 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.

Further, the taxpayer argues that no "principled distinction" can be made between rental of an assisted living apartment and other occupancies, which the Department acknowledges are exempt rentals of real estate. The taxpayer continues, "That is, unless the Department is willing to make the argument that a renter of a mini-storage unit, leased department, or a boat moorage slip has a greater property interest than that possessed by a senior citizen residing in a boarding home."[12] As discussed above, the principle purpose of an assisted living arrangement is the provision of assisted living services. In the other examples the taxpayer has given, the recipients receive no personal services but instead receive only the use of real property.

The taxpayer further argues that statutory differences between assisted living facilities and nursing homes support the conclusion that while nursing homes may provide only licenses to

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[11] The receipt of assisted living services in a person's own home would not convert their rental payments into service B&O taxable payments for services because these persons would be paying rent to their landlords and payments for services to the service providers. Further, in contrast to the taxpayer's assisted living charges, the charges for services would not be included as a mandatory charge in the apartment dweller's rent payments.

[12] Rule 118 provides:

> It is . . . presumed that all rentals of mini-storage facilities, apartments and leased departments constitute rentals of real estate. The rental of a boat moorage slip . . . is presumed to be a rental of real estate only if a specific . . . slip . . . is assigned and the rental is for a period of thirty days or longer.

their residents, assisted living facilities provide leases. For example, the assisted living facility is required to provide a "homelike environment, allowing the resident to use his or her personal belongings to the extent possible." RCW 70.129.005; *see also* WAC 388-110-140. Further, assisted living facilities are instructed to "promote care for residents in an environment that maintains or enhances each resident's . . . individuality." RCW 70.129.140. Finally, the assisted living facility is charged with ensuring that "both the physical environment and the delivery of assisted living services are designed to enhance autonomy in ways which reflect personal and social values of dignity, privacy, independence, individuality, choice and decision-making of residents." WAC 388-110-150. We do not find these goals and requirements for assisted living facilities to negate the existence of a license.

Finally, the *Lacey* court partially based its conclusion that nursing homes grant their residents a license rather than a lease on the exclusion of nursing homes from the Residential Landlord Tenant Act (RLTA). 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.'" 103 Wn. App. at 185. Like nursing homes, assisted living facilities are excluded from the RLTA.[13] This exclusion further supports our conclusion that the taxpayer does not have a landlord-tenant relationship with its residents.

2. <u>Does the possibility that other assisted living facilities are not paying B&O tax on their receipts provide grounds for granting an exemption to the taxpayer?</u>

[3] The taxpayer argues that other assisted living facilities have received determinations from the Department allowing exemption for their income and that most assisted living facilities are not paying B&O tax. Although equal treatment of similarly situated taxpayers is certainly a legitimate concern, we cannot discuss other taxpayers because of confidentiality requirements. *See* RCW 82.32.330; Det. No. 00-206E, 21 WTD 66 (2002); Det. No. 02-0170E, 22 WTD 78 (2003). Further, as we stated in Det. No. 02-0170E:

[13]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 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.

> [S]tatutes require interpretation and application by individuals. Errors are sometimes made, and reasonable minds can differ as to a statute's meaning and application. If the taxpayer believes the Department's past application . . . is inconsistent with our denial of the taxpayer's ruling request, [it] may inform the Department of the names of the [taxpayers], and the Department will look into the matter. However, even if the taxpayer's concern should prove to be correct, that does not mean the Department must perpetuate past errors by repeating them with respect to other taxpayers. See, e.g., Det. No. 00-206E.

Accordingly, the taxpayer's argument in this respect does not provide a basis for relief.

3. Should our ruling be applied prospectively only because two published determinations allowed congregate care facilities the rental of real estate exemption to the extent the facilities could segregate their income?

[4] As discussed above, we conclude that the taxpayer does not receive tax-exempt income from the rental of real estate when it provides apartments and services to its assisted living residents.

However, 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)(boarding home for mentally ill adults); Det. No. 90-297, 10 WTD 87 (1990)(boarding home for developmentally delayed adults).[14] Similarly, as discussed above, the taxpayer here

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[14] The court in *Lacey* did not expressly agree or disagree with the conclusions reached in those determinations, but 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:
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> > 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.
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> 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

argues that a portion of its receipts is from the exempt rental of real estate, and it can segregate this portion from the service B&O taxable services it provides. *See* Rule 118.[15] Like the court in *Lacey*, we concluded that the taxpayer here engaged in a single activity and the primary purpose of that activity is the provision of service B&O taxable assisted living services. Because the taxpayer is not engaged in multiple activities we conclude that the taxpayer cannot segregate its income.[16]

However, for past periods, we conclude that the taxpayer was entitled to rely on our published congregate care determinations. *See* RCW 82.32.410. In both Det. No. 90-252 and Det. No. 90-297, we concluded that the taxpayers rented real property to their tenants. In so holding, 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."[17] As discussed above, we conclude that the thirty day presumption is inapplicable in the congregate care 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.

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Dated this 6th day of February 2004.

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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.

103 Wn. App. at 182.

[15] Rule 118 requires taxpayers to segregate their income when they are involved in more than one business activity. *See also* RCW 82.04.440 (which addresses the taxation of multiple activities).

[16] Even if the taxpayer were engaged in two separate activities, both the provision of licenses and assisted living services are taxed under the same classification (service), and segregation is therefore unnecessary. *See* RCW 82.04.290.

[17] 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."