

Cite as Det. No. 88-378, 9 WTD 1 (1988).

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

In the Matter of the Petition	)	<u>D E T E R M I N A T I O N</u>
for Correction of Assessment of	)	
	)	No. 88-378
	)	
. . .	)	Registration No. . . .
	)	. . . /Audit No. . . .
	)	
	)	

- [1] **RULE 245:** RCW 82.04.065 -- RCW 82.04.050(2)(e) -- B&O TAX -- RETAILING -- RETAIL SALES TAX -- HOTEL -- TELEPHONE CHARGES -- SERVICES RELATED TO LODGING. Where a hotel leased WATS lines from two telephone companies for use by its employees and guests, the charges to guests for the use of room telephones are for services related to lodging and taxable as retail sales. The hotel was not providing "competitive telephone service" or "network telephone service" as those services are defined in RCW 82.04.065.
- [2] **RULE 166:** RCW 82.04.050(2)(e) -- B&O TAX -- RETAILING -- RETAIL SALES TAX -- EXEMPTION -- HOTEL -- LEASE OF REAL PROPERTY -- MONTHLY OCCUPANCY -- NONTRANSIENT. Where a hotel contracted with an airline for a block of rooms for a period of one month or more, the income from that block of rooms is considered from the rental or lease of real property and exempt from B&O tax. For purposes of computing monthly periods, monthly occupancy can begin on any day of the month.
- [3] **RULE 178:** RCW 82.12.010(5) -- USE TAX -- MEASURE OF TAX -- CONSUMER -- PROMOTIONAL MEALS. A hotel which gives away meals to promote its business is the consumer of such meals; use tax applies on the value of the meals which is the retail selling price.

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.

TAXPAYER REPRESENTED BY: . . .  
 . . .

DATE OF HEARING: April 29, 1988

#### NATURE OF ACTION:

The taxpayer, a hotel operating company, seeks a correction of an assessment of retailing and retail sales tax assessed on unreported local and long distance charges; retailing, retail sales, and convention and trade center taxes assessed on airline room rentals; and use tax on promotional meals.

#### FACTS AND ISSUES:

Roys, A.L.J. -- The taxpayer's records were examined for the period April 1, 1983 through September 30, 1986. The audit disclosed taxes and interest owing in the amount of \$. . . . Assessment No. . . . in that amount was issued on May 12, 1987.

The following portions of the assessment are at issue:

1) Telephone charges. The hotel leases several WATS lines and local telephone access from AT&T and PNB. The phone companies bill the hotel a monthly flat charge including miscellaneous and order activity charge plus actual wats per hour usage. The hotel allows the guests to use the WATS line to make intrastate and interstate toll calls. The taxpayer has its own telephone switch equipment capable of monitoring the time and length of a call. Guests are charged the operator assisted rate per call to cover the estimated cost of long distance and a service charge.

The auditor assessed retailing and retail sales tax on billings made to guests for the use of room telephones. The billings were for local calls where guests were charged 50-75 cents per call. (Schedule IV). Also, tax was assessed on guest charges for use of WATS lines for intrastate and interstate toll calls. (Schedule V).

The taxpayer contends long distance telephone calls to out-of-state locations are exempt as interstate transactions under WAC 458-20-193D. In the alternative, the taxpayer stated it acted as the agent of the telephone companies or that providing telephones and access to lines to its guests constitutes "telephone service," as defined by RCW 82.04.065, rather than a retail sale of a hotel service.

The taxpayer argues that it is purchasing the telephone service for resale to its guests and should be exempt from paying retail

sales tax to the main line carriers and other telephone companies. It requests an abatement of the retail sales tax assessment on local and long distance charges on grounds it is entitled to a credit for retail sales tax paid to the various telephone companies. For the future, the hotel proposes to pay sales tax on the net excess charges to its customers over its payments (before sales tax) to the carriers.

2) Airline room rentals. The taxpayer contracts with several airlines for blocks of rooms. The auditor asserted retailing and retail sales tax on room rentals where the airlines did not book in advance each room in a continuous monthly occupancy. For example, in one contract the taxpayer agreed to hold a block of 41 rooms for Sunday, Wednesday and Friday nights and 36 rooms for Monday, Tuesday, Thursday and Saturday nights. The auditor agreed that 36 rooms qualified as nontransient rentals, but the five rooms that were occupied only on Sunday, Wednesday and Friday did not.

The taxpayer agrees that rooms that are reserved for less than seven days a week do not qualify as nontransient rentals. The taxpayer contends, however, that all rooms booked by the airlines in monthly blocks should be considered the rental of real property. The taxpayer contends "monthly" can be less than 30 days, since February is a twenty-eight day month. Furthermore, the taxpayer argues a monthly rental should be able to run from any day of the month.

3) Promotional meals. The taxpayer paid retailing B&O and retail sales tax on its promotional meals, using the hotel's cost as the measure of the tax. The auditor reclassified the reporting to use tax and assessed tax based on the retail selling price of the meals.

The taxpayer agrees with the reclassification, but maintains the measure of the tax should be cost, not the "hypothetical" retail selling price.

#### DISCUSSION:

[1] Telephone charges. The taxpayer first challenged the assessment of tax on charges for long distance telephone calls on grounds they are exempt interstate transactions. The definition of retail sale was amended in 1983 to include the providing of telephone service. RCW 82.04.050(5). "Telephone service" is defined as including interstate service. The Department of Revenue, as an administrative agency, does not have the authority to decide the constitutionality of a statute. Bare v. Gorton, 84 Wn.2d 380 (1974). WAC 458-20-245 provides that a sale of telephone service takes place in Washington when a call

originates from or is received and charged to a phone in Washington.

As discussed below, we find that the guest charges for use of room telephones are for services related to lodging and taxable as a retail sale. As the charges are for lodging and services rendered in Washington, they are not exempt interstate transactions.

In 1983, The Department sent a letter to all hotels, motels and other lodging facilities in the state regarding the tax on their billings to guests for the use of room telephones. The letter stated:

In general, hotels and motels bill guests for the total cost of long distance telephone calls as reported by the telephone operator (this will include sales tax) plus, in some instances, an additional service charge (e.g., \$.25 to \$1.00) for each call to cover the hotel/motel's overhead costs. The question that has been raised is what, if any, of these charges are subject to sales and/or business and occupation tax (B&O).

The Department advises that hotels and motels will not accrue any tax liability on the income they receive from guests as reimbursements for long distance telephone services. The Department has always considered that the hotels and motels act as agents with respect to amounts received from guests which are paid directly to the telephone company for telephone services rendered. The telephone companies will bill the hotels/motels for the sales tax due on the call, but it will not be necessary for them to show the sales tax as a separate item in passing on the telephone company's charges to their guests.

The additional per call service (\$.25 to \$1.00) would, however, be subject to both B&O tax and sales tax. This is because RCW 82.04.050(e) defines the term "sale at retail" or "retail sale" and requires the collection of sales tax on

. . . the sale of and charge made for the  
furnishing of lodging and all other services  
by a hotel . . . (Emphasis supplied.)

Thus, in general, any charge made by a hotel/motel to a guest, other than in an agency capacity (see above), is a retail sale subject to sales tax. The service

charges in question here are amounts above and beyond what is paid to the telephone company and should be reported under the B&O Retailing classification with sales tax also due on the charges.

However, commissions paid by telephone companies to hotels/motels for, e.g., long distance calls or calls placed through coin-operated telephones located within the hotel/motel facility, are not subject to sales tax. The Department has held that this income is properly subject to Service B&O tax because it is paid by an outside business (telephone company) to the hotel/motel for the performance of services related to the telephone equipment located on the premises. It is not within the statutory definition of "retail sale" because the income is not from "the furnishing of lodging" or "other services" relating to that lodging.

In the present case, the hotel leased several WATS lines from AT&T and PNB for use by the hotel's employees and guests. The guests are billed directly by the hotel for their usage. AT&T and PNB bill the hotel a monthly charge for the lines plus miscellaneous charges for actual usage. A sample bill included a charge of \$10.00 for 40 directory assistance calls over the monthly allowance of 20 calls at \$.25 each, and additional charges for actual hours used. The hourly rates decreased as the number of hours used increased.

The auditor concluded that because the phone companies do not bill the hotel on a per call basis, the hotel is not the agent of the phone companies. Furthermore, the auditor rejected the taxpayer's alternative argument that the income should be considered income from telephone business and that the taxpayer should receive a credit against the retail sales tax for the sales taxes paid to AT&T and PNB. The auditor relied on RCW 82.04.050(2)(e) which states a retail sale includes the charges for the furnishing of lodging and "all other services," concluding the furnishing of telephone services is a related hotel service subject to the retail sales tax.

We agree with the auditor's conclusions. We do not find that the taxpayer acts as an agent for the phone company. This situation is different from the facts described in the 1983 letter. A hotel is considered acting in an agency capacity where a phone company bills the hotel on a per call basis and the hotel then bills the guest for the actual charge as reported by the telephone operator and remits that amount to the telephone company.

Also, we do not find that the taxpayer is in the telephone business and is leasing the lines for resale. Telephone service includes "competitive telephone service" and "network telephone service." RCW 82.04.065 and WAC 458-20-245. A business is classified as a competitive telecommunications company if its services are subject to effective competition. RCW 80.36.320. A hotel that leases WATS lines for its use and its guests' use is not a competitive telecommunications company or a network telephone service company.

The assessment of retailing and retail sales tax on the taxpayer's billings to its guests for the use of room telephones is affirmed.

[2] RCW 82.04.050(2)(e) states a presumption 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." WAC 458-20-166 is the administrative rule which implements the statute. Rule 166 states that where lodging is furnished to a transient the charge is subject to retailing and retail sales tax. Transient is defined 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. Where such occupant remains in continuous occupancy for more than one month, he shall be deemed a transient as to his first month of occupancy, unless he has contracted in advance to remain one month. In cases where such person has so contracted in advance and does so remain in continuous occupancy for one month, he will be deemed a nontransient from the start of his occupancy.

The taxpayer has computed the deductions for nontransient room rentals by using the summary of airline room occupancy and beginning monthly periods to maximize the allowable deductions. The taxpayer provided a copy of a letter it sent to [airline] in May of 1983 indicating that [airline] contemplated a need for 28 rooms to be utilized daily beginning June 1, 1983. The taxpayer has computed that allowable deduction for blocks of rooms rented to [airline] for 1983 as \$. . . instead of \$ . . . . For 1984, the taxpayer computed the allowable deductions as \$ . . . instead of \$ . . . .

We agree that monthly occupancy can begin on any day of the week. If the taxpayer's records show that an airline contracted in advance for a block of rooms for a period of one month or more, the income from that block of rooms is considered from the rental

or lease of real property and exempt from tax. The assessment shall be adjusted in such cases as the [irline] example above to allow the maximum deduction. The taxpayer's figures will be accepted subject to audit verification.

[3] Promotional meals. The taxpayer was provided a copy of Determination 87-158, 3 WTD 137 (1987) which states that Department's position on the measure of use tax on promotional meals. A restaurant business which gives away meals to promote its business is the consumer of such meals. Use tax applies on the value of the meals which is the retail selling price.

This position is consistent with the measure of the use tax on other businesses which "manufacture" items for their own use. See examples of commercial or industrial use in WAC 458-20-134. Rule 134 notes that with the exception of articles manufactured for commercial or industrial use by manufacturers selling to the United States Department of Defense, the value of the articles used is the full value of the manufactured article.

#### DECISION AND DISPOSITION:

- 1) The assessment of retailing and retail sales tax on unreported local and long distance charges is sustained;
- 2) The assessment of tax on airline room rentals shall be adjusted as discussed herein;
- 3) The assessment of use tax on promotional meals is sustained.

DATED this 7th day of October 1988.