

Cite as Det. No. 16-0278, 36 WTD 358 (2017)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition for Correction of )	<u>D E T E R M I N A T I O N</u>
Assessment of )	
)	No. 16-0278
)	
... )	Registration No. . . .
)	

[1] Rule 118; Rule 166; RCW 82.04.050(2)(f): RETAIL SALES TAX – LODGING TAX – B&O TAX – RENTAL OF REAL ESTATE V. LICENSE TO USE REAL PROPERTY – LODGING – MOTEL – TRANSIENT” V NONTRANSIENT” – CONTINUOUS OCCUPANCY. A taxpayer was liable for uncollected sales tax and disallowed related business and occupation (B&O) tax deductions, after it failed to show that certain motel guests qualified as nontransient tenants.

[2] Rule 254; RCW 82.32.070: RECORDS – RECORDKEEPING – TAXPAYER DUTY TO MAINTAIN AND PRESERVE SUITABLE RECORDS – COMPUTER FAILURE – LOSS OF DATA. Taxpayers have the duty to maintain and preserve suitable records for a period of five years, and to present those records to support the amount of their tax liability. Such duty includes, when applicable, creating backup copies or implementing other safeguards to ensure the preservation of records. A taxpayer’s claim that it lost its supporting records due to a computer failure is not a basis for relief.

[3] Rule 166, RCW 82.04.050(2), chapter 35.101 RCW: LODGING – NONTRANSIENT TENANTS – TOURISM PROMOTION AREA LODGING CHARGES – DUTY TO REMIT – LIABILITY. Because nontransient sales are not retail sales, Tourism Promotional Area (TPA) charges are not due on those sales. A taxpayer who incorrectly collected TPA lodging charges from its nontransient tenants, but did not remit those charges to the Department of Revenue (Department) or refund them to its tenants, is liable for those charges.

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.

LaMarche, T.R.O. – The operator of a motel (Taxpayer) disputes the disallowance of its claimed partial exemption from retailing B&O tax and retail sales tax for gross income that Taxpayer claims it received from “nontransient” tenants. Taxpayer also claims that it does not owe TPA charges for certain transactions. Based on additional records provided by Taxpayer, we remand

the assessment for possible adjustment of the retailing B&O and retail sales tax assessed on room rentals. We deny Taxpayer's petition with regard to collected and unremitted TPA charges.<sup>1</sup>

### ISSUES

1. Under RCW 82.32.070 and WAC 458-20-254, has Taxpayer provided suitable records to prove that certain motel room rentals were to "nontransient" tenants, and therefore, excluded from the definition of "retail sale" under RCW 82.04.050(2)(f), and exempt from B&O tax under WAC 458-20-118 and WAC 458-20-166(3)<sup>2</sup>?
2. Under RCW 82.04.050(2) and WAC 458-20-166(8), is Taxpayer liable for collected and unremitted TPA lodging charges authorized under chapter 35.101 RCW?

### FINDINGS OF FACT

[Taxpayer] is a Washington corporation that operates a motel in . . . , Washington. The Audit Division of the Department of Revenue (Department) conducted a partial audit of Taxpayer's business activities for the period from January 1, 2011, through September 30, 2014 (Audit Period). The audit was limited in scope to a review of hard copies of documents that were available to support the tax deductions Taxpayer had taken for Other Nonretail Revenue and for Sales to the U.S. Government. Purchase invoices for consumable items were also reviewed. The auditor decided to do a limited scope audit of deductions because records were available only in hard copy format.

During the audit, the auditor noted many records were lacking, and that there were no electronic records available because Taxpayer's computer was damaged. The hard copies of sales invoices to support nontransient deductions were not organized, and often there were multiple invoices with different dates for the same sale transaction, which the auditor found to be contracts that were updated as customers extended their stays. There were no workpapers or summary records to show how Taxpayer calculated the nontransient deductions.

Due to the lack of electronic records, summaries, or workpapers, it was necessary for the auditor to review each invoice and manually calculate the receipts that qualified for non-transient deductions. In the cases where tenants paid in advance and subsequently stayed 30 continuous days or more, the Audit Division concluded that the transactions were nontransient in nature. In cases where tenants stayed 30 days or more, but the invoices showed only partial payment initially or showed that payments were made as the tenant's stay was ultimately extended to 30 days or more,

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

<sup>2</sup> WAC 458-20-166 was amended in 2015, after the audit period. WSR 15-22-085, filed November 3, 2015. A new section (2), with changes underlined or otherwise noted, was added, which reads: "This rule explains the business and occupation (B&O) tax, retail sales tax, special hotel/motel tax, the convention and trade center tax, the tourism promotion area charge, and the taxation of emergency housing furnished to ((the)) homeless people." The definition of term "transient" under the former section (2), renumbered as section (3), was changed to "transient tenant." However, the underlying definition stayed the same, except for two minor grammatical corrections. Section (7), which referred to the tourism promotion area charge, was renumbered as section (8), and certain changes were made to the language, solely for the purpose of grammatical correction. The remaining changes to the rule do not have a bearing on the issues here. We refer to the newest version of WAC 458-20-166 in our discussion.

the Audit Division concluded that the tenants had not contracted in advance with Taxpayer for an initial stay of at least 30 continuous days.

Taxpayer had no written nontransient contracts with any of the tenants during the Audit Period.

For tenants that stayed beyond 30 days, but for whom there was no evidence that they had contracted with Taxpayer for the initial 30 days in advance, the Audit Division treated the first 29 days as transient sales and the remaining days as nontransient.

The Department issued an assessment on April 21, 2015, Document No. . . . , totaling \$ . . . .<sup>3</sup> However, after the initial assessment, Taxpayer submitted additional documents to support some adjustments, and a post-assessment adjustment (PAA) was issued on August 6, 2015, totaling \$ . . . .<sup>4</sup> The assessment remains unpaid, but Taxpayer timely filed a petition for review.

Taxpayer indicated at the hearing that the Audit Division initially accepted certain documents as proof of Taxpayer's entitlement to the B&O and sales tax exemptions, but later rejected them for purposes of the PAA. Upon further inquiry, the auditor stated he initially believed the documents to be sufficient, but his supervisor further reviewed the documents and concluded that although the tenants may have stayed 30 days or longer, the documents failed to prove that those tenants had contracted with Taxpayer for the initial 30 days in advance.

After filing the petition for review, Taxpayer provided a substantial number of additional documents for the period of May 2015 through October 2015, subsequent to the end of the Audit Period, September 30, 2014, which included written contracts indicating that certain tenants were nontransient. After review, the auditor found that those documents did not apply to the Audit Period.

The auditor reviewed documents filed with the petition and found that certain invoices were sufficient to show that certain transactions qualified for the tax deductions, because those invoices were created on the first day of stay and the tenants paid for 30 days in advance. The Audit Division agrees that a remand is appropriate to make corresponding adjustments for those transactions.

Each of Taxpayer's invoices provided shows a miscellaneous charge, labeled as "TPA." The invoices presented with the petition also show that even when customers paid in advance for nontransient lodging, TPA charges were collected. However, not all TPA charges collected were remitted to the Department, as shown on Schedule 4 of the PAA Audit Report.

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<sup>3</sup> The initial assessment issued on April 21, 2015, Document No. . . . , totaling \$ . . . , consisted of \$ . . . in retail sales tax, \$ . . . in retailing B&O tax, \$ . . . in use tax, \$ . . . in special hotel/motel tax, \$ . . . in Tourism Promotion Area lodging fees, and \$ . . . in interest.

<sup>4</sup> The PAA issued on August 6, 2015, Document No. . . . , totaling \$ . . . , consisted of \$ . . . in retail sales tax, \$ . . . in retailing B&O tax, \$ . . . in use tax, \$ . . . in special hotel/motel tax, \$ . . . in Tourism Promotion Area lodging fees, \$ . . . in interest, and additional interest of \$ . . . for the period from May 22, 2015, to September 8, 2015.

## ANALYSIS

**1. Sales to Nontransient Tenants**

All “retail sales” to consumers in the state of Washington are subject to retailing B&O tax and retail sales tax, unless there are specific exemptions from such taxes. RCW 82.08.020(1); RCW 82.04.250. According to RCW 82.04.050(2), the following activity is defined as a “retail sale”:

(f) 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 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, is not subject to retailing B&O tax or retail sales tax. . . . Rather, it is a rental of real estate, which is exempt from B&O tax as explained in WAC 458-20-118.

WAC 458-20-166 (Rule 166), which administers taxation of lodging activities, further clarifies that all charges for lodging and related services to a “transient [tenant]” are retail sales, and that the person who provides such lodging and other related services must collect retail sales tax from those customers. Rule 166 defines “transient [tenant]” as follows:

(3) **Transient tenant defined.** The term "transient tenant" as used in this rule 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. Providing 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 provided 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 remains 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). Thus, an occupant who does not contract in advance to stay thirty days is a transient for the first twenty-nine days of occupancy, and is subject to retail sales tax on such occupancy during that time. *Id.* See also Rule 166(5)(a)(i) (“A tenant who does not contract in advance to stay at least thirty days is not entitled to a refund of retail sales tax if the rental period later extends beyond thirty days.”) Then, beginning on the thirtieth day, and thereafter, the tenant is considered nontransient and [the room charge] is no longer subject to retail sales tax from that

point forward. Rule 166(3). *See also* Example under Rule 166(5)(a)(i) (“The rental fees are exempt from retail sales tax beginning on the thirtieth day.”)

On the other hand, an occupant who contracts in advance to remain in occupancy for at least thirty days, and actually remains in continuous occupancy for at least thirty days, is considered a nontransient from the first day of occupancy. Rule 166(3); *see also* Det. No. 15-0323, 35 WTD 41 (2016).

We also note that RCW 82.32.070 requires taxpayers to maintain and present 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) administers recordkeeping requirements, and 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. In general, “[t]axation is the rule and exemption is the exception.” *Budget Rent–A–Car*, 81 Wn.2d 171, 174, 500 P.2d 764 (1972). “The taxpayer has the burden of establishing eligibility for an exemption.” *Stroh Brewing Co. v. Dep’t of Revenue*, 104 Wn. App. 235, 240, 15 P.3d 692 (2001).

Here, the Audit Division reviewed each invoice that Taxpayer provided during the audit, and those submitted after the initial assessment. In instances where the occupant paid in advance and subsequently stayed 30 continuous days or more, the Audit Division concluded that the occupant was a nontransient. We agree with the Audit Division’s interpretation that these occupants contracted in advance and remained in continuous occupancy for the initial thirty days, and should be considered nontransients from the first day of occupancy provided in the contract. RCW 82.04.050(2)(f); Rule 166(3); *see also* 35 WTD 41.

In cases where tenants stayed 30 days or more, but the invoices showed only partial payment initially, or showed that payments were made as the tenant's stay was ultimately extended to 30 days or more, the Audit Division concluded that the tenants had not contracted in advance with Taxpayer for a minimum of 30 days. We concur with the Audit Division that the tenants in those instances did not contract in advance to stay at least 30 continuous days or more. We conclude that such tenants are transient in nature, and that Taxpayer has not met its burden of showing that the related transactions qualify for the nontransient tax exemptions. RCW 82.04.050(2)(f); Rule 166(3); *see also* 35 WTD 41.

With regard to the documents Taxpayer submitted for periods outside the Audit Period, we concur with the Audit Division, that although the documents indicate that Taxpayer is now making the attempt to maintain suitable records, they are not relevant for purposes of determining Taxpayer's tax liability for the Audit Period.

The Audit Division agrees with Taxpayer, however, that the records provided with the petition indicate that certain tenants were nontransient, and that a remand is appropriate to make corresponding adjustments. The Audit Division agrees to make adjustments for invoices showing full payments for 30 days or more were made on the first day of the stay. Therefore, we grant the petition in part with regard to transactions Taxpayer has shown are nontransient, and deny the petition in part with respect to the remaining transactions.

The Taxpayer argues that disallowance of the non-transient lodging deduction is not proper when its supporting records were not available due to a computer hardware failure. We reject this argument because RCW 82.32.070 clearly requires taxpayers to maintain suitable records for a period of five years, and to present those records to support the amount of their tax liability. *See also* Rule 254(3)(b)(ii). While we understand that loss of data often occurs when computers malfunction, taxpayers have the duty to maintain and preserve suitable records as required by law, which may entail maintaining backup or duplicate copies of such records.

## **2. Tourism Promotion Area Lodging Charge (TPA charge).**

The TPA charge is authorized by RCW 35.101.050. RCW 35.101.090 states:

- (1) The charge authorized by this chapter shall be administered by the department of revenue and shall be collected by lodging businesses from those persons who are taxable by the state under chapter 82.08 RCW. Chapter 82.32 RCW applies to the charge imposed under this chapter.

*See also* Rule 166(8). Businesses subject to chapter 35.101 must collect and remit TPA charges to the Department on retail sales of lodging. RCW 35.101.090; Rule 166(8). However, because nontransient sales are not retail sales pursuant to RCW 82.04.050(2)(f), Taxpayer should not collect TPA charges from its nontransient tenants.

Here, all of Taxpayer's invoices examined by the Department show that the Taxpayer billed and collected TPA charges on each invoice, for both transients and nontransients. The TPA charge is separately stated on each invoice, and is labeled as "TPA." The invoices that Taxpayer presented

with its petition also show that when customers paid in advance for non-transient lodging, Taxpayer collected the total amounts on the invoices, inclusive of TPA charges. Therefore, where tenants do not qualify as nontransient, and where Taxpayer collected but did not remit TPA charges to the Department, Taxpayer is liable for such charges. RCW 35.101.090; Rule 166(8).

Taxpayer asserts in its petition that certain charges labeled as TPA on the invoices for nontransient tenants are in fact miscellaneous guest room charges, and not tax. Taxpayer states that due to a computer programming error, the miscellaneous charges were mistakenly labeled as TPA charges. However, Taxpayer listed the TPA charge on each invoice it presented to the Department, and its guests would have paid the charge as described on their invoices, believing it to be a TPA charge. Taxpayer has provided no written proof that it told customers the charge was anything other than a TPA charge, or that it in any way indicated to its customers that the charge was solely a miscellaneous guest room charge. Moreover, Taxpayer cites no authority for the proposition that it is entitled to retain erroneously collected TPA charges rather than remitting them to the state. Therefore, we reject this argument as a basis for relief.

In summary, we grant the petition in part with respect to transactions where Taxpayer has shown gross income was derived from nontransients, but deny the petition with respect to transactions where Taxpayer has not provided such proof. We also deny the petition as to the issue of the collected but unremitted TPA charges.

We remand the assessment to the Audit Division to make adjustments in accordance with this determination. The Audit Division agrees that remand is appropriate.

#### DECISION AND DISPOSITION

Taxpayer's petition is granted in part and denied in part.

Dated this 31st day of August 2016.