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STATE OF FLORIDA DEPARTMENT OF REVENUE
TALLAHASSEE, FLORIDA

SHERATON BAL HARBOUR ASSOCIATES, LTD,)
)
Petitioner,
)
)
vs.
) CASE NO. 04-0680
(DOAH)
)
FLORIDA DEPARTMENT OF REVENUE
)
)
Respondent.
)

EHP Closed

DOR 05-7-FOF

AF

FINAL ORDER

This cause came before me, as Executive Director of the Florida Department of Revenue (the Department) for the purpose of issuing a final order. The Administrative Law Judge assigned by the Division of Administrative Hearings issued a Recommended Order, sustaining the Department's assessment A copy of the Recommended Order issued on the 1st day of February, 2005, by Administrative Law Judge Errol H. Powell is attached to this Final Order and incorporated to the extent described herein. The Department timely filed exceptions to certain conclusions of law in the Recommended Order, a copy of which is also attached to this Final Order. The Petitioner did not file any exceptions nor did the Petitioner file responses to the Department's exceptions. The Department adopts and incorporates in this Proposed Recommended Order the Conclusions of Law contained in Paragraphs 22 through 29, 31 through 35, 40, 41, 44, 45, and 50 of the Recommended Order. Conclusions of Law 30, 38, 43, 46 and 49 are modified as

reflected below. Conclusions of Law contained in Paragraphs 36, 37, 39, 42, 47, and 48 are rejected . Rulings on the Respondent's exceptions are set forth below.

STATEMENT OF THE ISSUE

The Department adopts and incorporates in this Final Order the Statement of the Issue in the Recommended Order.

PRELIMINARY STATEMENT

The Department adopts and incorporates in this Final Order the Preliminary Statement in the Recommended Order.

FINDINGS OF FACT

The Department adopts and incorporates in this Final Order the Findings of Fact in the Recommended Order.

CONCLUSION OF LAW 30

The Department modifies the Conclusion of Law contained in paragraph 30 of the Recommended Order to place the word "limited" in front of word "exemption" in the first and last sentences. By the very wording of section 203.12(2)(b), Florida Statutes, the exemption to the gross receipts tax was not a wholesale exemption but clearly only a limited exemption, designed to apply in narrowly defined situations. Therefore, the Department modifies the recommended Conclusion of Law as identified herein.

RULINGS ON RESPONDENT'S EXCEPTIONS

Respondent's Exception to Conclusion 36

Respondent would reject Conclusion 36 due to the Administrative Law Judge's use of a May 22, 1985 Florida Senate Staff Analysis as probative of legislative intent to exempt from gross receipts taxes those charges imposed by hotels for telephone services. The statute which was the subject of the staff analysis was section 203.012(2)(b)3., Florida Statutes (1995 and 1997) which provided:

> (b) Gross receipts for telecommunication services do not include:
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> * * *
>
> 3. Charges made by hotel and motels, which are required under the provisions of s. 212.03 to collect transient rentals tax from tenants and lessee, for local telephone service or toll telephone service, when such charge occurs **incidental to the right of occupancy** in such hotel or motel;. . . .[emphasis supplied].

The 1985 legislative staff analysis simply ignores the word "incidental" in interpreting section 203.012(2)(b)3., Florida Statutes. However, it is a fundamental rule of statutory construction that each term appearing in a statute must be given meaning. State v. Gale Distributors, Inc., 349 So. 2d 150 (Fla. 1977). If the Legislature had intended to exempt all charges for telephone service to guests of hotels and motels, it would have excluded all charges by hotels and motels for telephone service from the definition of telecommunication service. By including language limiting the exemption to charges incidental to the right of occupancy of the hotel, the Legislature intended the exemption to be narrowly construed. Statutory language is not to be assumed to be superfluous; and

all words and phrases within a statute are to be given meaning. Terrinoni v. Westward Ho!, 418 So. 2d 1143, 1146, (Fla. 1st DCA 1982). An interpretation, such as that found in the staff analysis that ignores the clear language of a statute can not be used to demonstrate legislative intent.

For the reasons stated above, the Department agrees with Respondent and rejects Conclusion 36.

Respondent's Exception to Conclusions of Law 37 and 39

Respondent would reject the recommended conclusions of law numbered 37 and 39 because they ignore several basic tenets of statutory construction. The Department agrees with the Respondent to reject those conclusions but provides modified reasons therefore. In number 37, the recommended order inappropriately cites a dictionary definition of "incidental" as interpretative of the "plain meaning" of the statute. In number 39, it then inappropriately uses that definition to conclude that telephone services are incidental to the right of occupancy in a hotel. It does so despite the fact the Department, under the powers granted to it by the Legislature, reasonably interpreted the word "incidental" contained in section 203.012(2)(b)3., Florida Statutes, by specifically defining that word in rule 12B.001(1)(c)3.b., Florida Administrative Code.

Florida Administrative Code Rule 12 B-6.001(1)(c)3.b. provides:

> Charges to customers by hotels and motels for the use or access to telecommunication service are not considered incidental to the right of occupancy when such charges are separately stated, itemized or described on the bill, invoice, or other tangible evidence of the sale of the service.

The tribunal ignores that this rule provision constitutes a contemporaneous construction of a statute by those charged with its enforcement and interpretation. Such a

construction is entitled to great weight and the courts will not depart from such construction unless it is clearly erroneous. United States Gypsum Company v. Green, 110 So. 2d 409 (Fla. 1959); Warnock v. Florida Hotel and Restaurant Commission, 178 So. 2d 91 (Fla. 3rd DCA 1965). In addition, a departmental construction of a taxing statute acquiesced in for a long time by those affected by the statute is entitled to great weight when the statute is reasonably susceptible to two constructions. L.B. Price Mercantile Co. v. Gay, 44 So. 2d 87, 90 (Fla. 1950); and Kirk v. Western Contracting Corp., 216 So. 2d 505 (Fla. 1st DCA 1968). This rule, having been in existence for over ten years, clearly demonstrates long usage and so the Department's construction should not be overturned unless clearly erroneous.

For the reasons stated above, the Department agrees with the respondent and rejects conclusions 37 and 39.

Respondent's Exception to Conclusion of Law 38

The Respondent contends the Recommended Order erred in stating that:

> Sheraton's primary business is providing lodging, food, and other services to its guests. Providing, telecommunication services to its guest (sic) was not a major part of Sheraton's business; it was a very small, minor part of Sheraton's business.

While the Respondent requests that this conclusion be excepted from the Recommended Order, it accepts Conclusion of Law 27 which essentially states the same conclusion. Conclusion 27 provides that "Sheraton was primarily engaged in the business of providing hotel services to its guests, not telecommunication services". For this reason, the Department rejects the Respondent's exception to Conclusion of Law 38.

However, Respondent correctly explains in its exceptions that the fact that Sheraton does not engage primarily in the taxable utility businesses subject to gross

receipts taxes will not preclude the imposition of such taxes See: Brooks-Scanlon Corp. v. Lee, 131 Fla. 197, 179 So. 426 (1938) (taxpayer was subject to the gross receipts tax even where the business of selling electricity was not its primary business).

The American Heritage Dictionary defines hotel as "[a]n establishment that provides lodging and usually meals and other services for travelers and other paying guests." The Florida legislature has also defined hotel. Section 509.242(1)(a), Florida Statutes, provides "[a] hotel is any public lodging establishment containing sleeping room accommodations for 25 or more guests and providing the services generally provided by a hotel and recognized as a hotel in the community in which it is situated or by the industry." These definitions underscore that lodging is the primary service of such organizations. To accept the reasoning contained in the Recommended Order that a hotel whose primary business is lodging and food should not have to pay taxes on gross receipts received for providing telephone services would render the statute meaningless, since by definition, all hotels primarily provide lodging and food, and telephone services are an incidental part of the services provided by the hotel. It is not reasonable to presume that the legislature intended to totally exclude hotels from the imposition of the tax unless the provision of telecommunication services was the primary business of the hotel. This construction would result in a situation where the statute applied to no entity.

For the reasons set forth above, the Department modifies Conclusion 38 as set forth below.

Respondent's Exceptions to Conclusions 42 and 43

The Respondent would reject Conclusion of Law numbered 42 because it relies upon a circuit court decision - a decision that was overturned by an Appellate Court, to

bolster its conclusion that the Department's rule contravenes the statutory exemption. In fact, however, the court in State, Dep't of Revenue v. Brock, 576 So. 2d 848, (Fla. 1st DCA 1991), reversed the circuit court's permanent injunction and stated that "[a]lthough statutory construction is ultimately the province of the judiciary, it should not be undertaken without first giving the agency an opportunity to explain its interpretation and to create a record in an administrative forum". Because of the First District's clear pronouncement, the circuit court ruling has no bearing on this refund case.

The Department rejects Conclusion of Law 43 because while properly citing the First District case, State, Dep't of Revenue v. Brock, 576 So. 2d 848, the tribunal misconstrues its holding. The recommended order states that the First District Court "stopped short of determining whether the Department acted in excess of its delegated legislative authority", implying that the Court looked with disfavor upon the Department's rule drafting efforts. This misconstrues the holding of the case. The Court acknowledged the Department's rule-making authority, and reprimanded the appellees for not having pursued administrative remedies which would have allowed a proper record to be developed. And the First District chided the circuit court for issuing a permanent injunction "based on little more than a trial judge's impression that telephone service is incidental to hotel and motel accommodations" Id at 851. A rule having subsequently been adopted, the circuit court's opinion is no longer noteworthy.

For the reasons stated above, Department agrees with Respondent to reject Conclusion 42 and agrees with the rationale for rejecting Conclusion 43, however Department modifies Conclusion 43 as provided herein.

Respondent's Exception to Conclusion of Law 46

The Respondent seeks to reject Conclusion of Law 46. However, the recommended order correctly cites to principles of statutory construction that provide that an agency's construction of a statute is entitled to great weight and will not be overturned unless clearly erroneous. In addition, the Recommended Order correctly recognizes that long-standing interpretations made by agency officials are given great weight by the court. The Department agrees with Respondent to the extent it rejects the last sentence in Conclusion 46 in which the tribunal uses D'Alto v. State Department of Environmental Protection 860 So. 2d 1003, 1005 (Fla. 1st DCA 2003) to support the proposition that "judicial adherence to the agency's view is not demanded when it is contrary to the statute's plain meaning." That case has no bearing on this case because D'Alto did not involve a duly promulgated agency rule. Rather it involved an agency order denying an application for a permit on statutory grounds. In the instant case, as noted earlier, the Department's interpretation of the statute was codified in its duly promulgated Rule 12B-6.001(1)(c)3.b., Florida Administrative Code. Agency rules promulgated under authority of law have the force and effect of law. State of Florida v. Jenkins, 469 So. 2d 733 (Fla. 1985); Children's Charity Fund, Inc., v. Department of Revenue 1998 Fla. Div. Admin. Hearings, LEXIS 5731 (Fla. Div. Admin. Hearings 1998). In addition, an administrative rule will be held controlling, and it will be followed unless it is clearly wrong or unauthorized. L.B. Price Mercantile Co. v. Gay, 44 So. 2d 87 (Fla. 1950).

For the reasons stated above, the Department modifies conclusion 46 by deleting the last sentence contained therein.

Respondent's Exceptions of Conclusions of 47, 48, and 49

The Respondent seeks to reject conclusions of law 47, 48 and the first sentence of paragraph 49 because the Recommended Order impermissibly attempts to declare a repealed rule invalid. First Respondent rejects the Recommended Order because it ignores the opinion in Department of Revenue v. Sheraton Bal Harbor Association, Ltd., 864 So. 2d 454 (Fla. 1st DCA 2003) (dealing with the exact same rule), which holds that DOAH does not have statutory authority to invalidate a repealed rule. Further respondent correctly notes the Recommended Order impermissibly finds that the rule is contrary to the "clear" language of the statute and thus "[t]he Department's interpretation through its rule is clearly contrary to the exemption provided by the statutory provision." The appropriate principle was enunciated in Crescent Miami Ctr., LLC v. Department of Revenue, 857 S. 2d 904, 908 (Fla. 3rd DCA 2003):

> We note that agency rules are presumed valid, and that it is not within the province of an appellate court to rewrite those rules under the guise of construction. See State v. Jenkins, 469 So. 2d 733 (Fla. 1985); White v. Moore, 789 So. 2d 1118 (Fla. 1st DCA 2001); St. Johns River Water Management District v. Consolidated-Tomoka Land Co., 717 So. 2d 72 (Fla. 1st DCA 1998).

Interestingly, conclusion 47 appears to be rendering the repealed rule invalid retroactively, despite the Administrative Law Judge's recognition in the First District Court of Appeal opinion in Department of Revenue v. Sheraton Bal Harbour Association, Ltd. 864 So. 2d 454 (Fla. 1st DCA 2003). That opinion held that a challenge to a repealed rule is not authorized by Section 120.56, Florida Statutes, and that for DOAH to proceed with the rule challenge would result in DOAH acting in excess of its jurisdiction.

For the reasons set forth above, the Department agrees with Respondent and rejects the Conclusions of Law 47 and 48. The Department agrees with Respondent to modify conclusion 49 by rejecting the first sentence.

CONCLUSIONS OF LAW

The Department by this Final Order substitutes and adopts the following Conclusions of Law:

Conclusion of Law 30:

A limited exemption to the gross receipts tax law existed but was repealed by the Florida Legislature in the year 2000 and was not re-enacted in subsequent legislation. The exemption was found at Section 203.012(2)(b), Florida Statutes (1995 and 1997), and provided in pertinent part:

> (b) Gross receipts for telecommunication services do not include:
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> * * *
>
> 3. Charges made by hotel and motels, which are required under the provisions of s. 212.03 to collect transient rentals tax from tenants and lessee, for local telephone service or toll telephone service, when such charge occurs **incidental to the right of occupancy** in such hotel or motel;. . . .[emphasis added].

The statute provided for a limited exemption on charges to guests for local telephone service or toll telephone service, when the charges were incidental to occupancy by a guest.

Conclusion of Law 38

Although Sheraton's primary business is providing lodging, food, and other services to its guests, and providing telecommunications services is not a major part of its

business, the fact that Sheraton does not engage primarily in a taxable utility business subject to gross receipts taxes will not preclude the imposition of such taxes. See: Brooks-Scanlon Corp. v. Lee, 131 Fla. 197, 179 So. 426 (1938) (taxpayer was subject to the gross receipts tax even where the business of selling electricity was not its primary business).

Conclusion of Law 43

In 1989, in response to a case filed against the Department challenging the requirement that hotels remit gross receipts tax on telecommunications services provided to their guests, the circuit court for the Second Judicial Circuit of Florida granted a permanent injunction against the Department's requirement in Brock v. Department of Revenue, Case No. 89-3616. On appeal, the First District Court of Appeal in Department of Revenue v. Brock, 576 So. 2d 848 (Fla 1st DCA 1991), reversed the circuit court's decision holding that the plaintiffs had failed to exhaust their administrative remedies before challenging the Department's rule in court. The First District Court of Appeal concluded that the Department acted within its authority to adopt rules to carry out the intent and purpose of the revenue statute and stated that in promulgating Rule 12B-6.001(1)(c)3.b., Florida Administrative Code,

> . . . it is clear that the Department did not act without colorable statutory authority. The Department is authorized to adopt rules to carry out the intent and purposes of the revenue laws. Section 213.061(1), Florida Statutes (1989). Far from repealing section 203.012(2)(b)3., the Department's rule recites the statute and interprets the limited exemption that is provided under its terms. Id., at 850 (emphasis supplied).

Conclusion of Law 46

"The principles of statutory construction are entwined with the doctrine which provides that an agency's construction of a statute is entitled to great weight and will not be overturned unless clearly erroneous." (citations omitted) Department of Revenue v. Bank of America, 752 So. 2d 637, 641-642. "The law is well settled that long-standing statutory interpretations made by officials charged with the administration of the statutes are given great weight by the court." (citations omitted) Austin v. Austin 350 So. 2d 102, 104 (Fla. 1st DCA 1977); Green v. Hood, 120 So. 2d 223 (Fla. 2d DCA 1960); Kirk v. Western Contracting Corp., 216 So. 2d 503, 508 (Fla. 1st DCA 1968). The Department adopted Florida Administrative Code Rule 12B-6.001(1)(c)3.b., in 1990. That rule was consistently applied until the statute upon which it was based was repealed by the Legislature in 2000. The rule itself was repealed in 2003. While it existed, it survived a challenge in 1989 and 1990. See Brock v. Department of Revenue, case No. 89-3616 and Department of Revenue v. Brock, 576 So. 2d 848 (Fla 1st DCA 1991). .

The Recommended Order, subject to the modifications stated above, is adopted and attached below.

DONE AND ENTERED in Tallahassee, Leon County, Florida this 13th day of May, 2005.

STATE OF FLORIDA
DEPARTMENT OF REVENUE

Jim Zingale
Executive Director

CERTIFICATE OF FILING

I HEREBY CERTIFY that the foregoing FINAL ORDER has been filed in the official records of the Department of Revenue this 16th day of May, 2005.

Nancy Purvis
AGENCY CLERK

Any party to this Order has the right to seek judicial review of the Order pursuant to Section 120.68, Florida Statutes, by filing a Notice of Appeal pursuant to Rule 9.110 Florida Rules of Appellate Procedure, with the Clerk of the Department of Revenue in the Office of the General Counsel, Post Office Box 6668, Tallahassee, Florida 32314-6668, and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Order is filed with the Clerk of the Department.

Copies furnished to:

Joseph Moffa
Moffa and Gainor, P.A.
One Financial Plaza, Suite 2202
100 SE Third Avenue
Ft. Lauderdale, Florida 33394

Jarrell A. Murchison, Senior Assistant Attorney General
Martha Barrera, Assistant Attorney General
Office of the Attorney General
The Capitol-Plaza Level 01
Tallahassee, Florida 32399-1050

J. Bruce Hoffmann, General Counsel
Isabel Nogues, Assistant General Counsel
Department of Revenue
204 Carlton Building
Tallahassee, Florida 32314-6668

Jim Zingale, Executive Director
Department of Revenue
104 Carlton Building
Tallahassee, Florida 32399-0100