

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHERATON BAL HARBOUR)
ASSOCIATES, LTD.,)
)
Petitioner,)
)
vs.) Case No. 04-0680
)
DEPARTMENT OF REVENUE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was scheduled in this case by video teleconference on May 28, 2004, with sites at Fort Lauderdale and Tallahassee, Florida. The hearing was continued to provide an opportunity for the parties to file motions for summary recommended order. Both parties filed motions for summary recommended order.

APPEARANCES

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For Respondent: Martha F. Barrera, Esquire
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STATEMENT OF THE ISSUE

The issue for determination is whether Petitioner is entitled to a refund of gross receipts tax on its sales of telecommunication services for the period May 1, 1997 through October 1, 2001.

PRELIMINARY STATEMENT

By Notice of Decision of Refund Denial dated December 22, 2003, the Department of Revenue (Department) notified Sheraton Bal Harbour Associates, Ltd., (Sheraton) that Sheraton's request for a refund of gross receipts tax, totaling \$195,310.33 for the period May 1, 1997 through April 30, 2002, was denied. Among other things, the Department based its denial upon Section 203.012, Florida Statutes, and Florida Administrative Code Rule 12B-6.001(1)(c). Sheraton disputed the denial and requested a hearing. On February 26, 2004, this matter was referred to the Division of Administrative Hearings.

A final hearing was scheduled by video teleconference to be held on May 28, 2004. The hearing was continued to allow the parties an opportunity to submit motions for summary recommended order. The parties requested and were granted an extension of time to submit their motions. Both parties submitted motions for summary recommended order, together with stipulated findings of fact and joint exhibits (Joint Exhibits numbered 1-12). The

parties' motions for summary recommended order have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department is the agency of the State of Florida charged with implementing the State's tax statutes.

2. Sheraton operates a full service hotel, the Sheraton Bal Harbour, located at 9701 Collins Avenue, Bal Harbour, Florida.

3. Sheraton is licensed as a hotel under the provisions of Chapter 509, Florida Statutes. Sheraton's principal business is providing lodging, food, and other services to the guests at its hotel.

4. Sheraton provides taxable transient rentals pursuant to Section 212.03, Florida Statutes.

5. Sheraton offers its guests numerous amenities, including retail shopping, banquet facilities, meeting rooms, on-site dining, and luxury spa.

6. Sheraton separately charges its guests for using these services. Sheraton also collects and remits taxes on charges for these services apart from the taxes it collects and remits on the room rental charges.

7. In addition, Sheraton offers approximately 24 different room types within five different season schedules.

8. The telecommunications services charges that are the subject of these proceedings are charges for local and toll telephone service. Sheraton charges guests who use the telephones located in the guestrooms.

9. Sheraton purchased special equipment and services to determine whether local or long distance calls are placed from a guest room in order to bill the telephone call charges to the individual guests. Sheraton purchased the switch from GTE Communications, Inc. Sheraton's call accounting services are provided by Homisco, and the Property Management System was purchased from GEAC.

10. Hotel guests initiate a call from a guest room. Upon conclusion of the call, a Nortell telephone switch sends the time of the call, duration of the call, and number called to the Homisco Call Accounting System. Homisco assigns a price for the call based upon preprogrammed parameters and passes that information to Sheraton's property management system. The property management system assigns the appropriate taxes to the call and posts the charge to the guest's folio.

11. Sheraton offers no advertised rate plan that includes local calls that are not separately charged to the guest. At times, which are infrequent, charges for local calls are included as part of the sales negotiation process, however, this is rare.

12. The telecommunications charges, which are relevant to these proceedings, were separately stated on the bills Sheraton provided to its hotel guests.

13. Sheraton is a member of the Florida Hotel and Motel Association. Its member identification number is 8590. Sheraton has been a member of the Florida Hotel and Motel Association since 1980.

14. On a monthly basis, during the period from May 1, 1997 to April 30, 2002 (the refund period), Sheraton self-accrued and paid to the State of Florida gross receipt taxes on sales of telecommunication services to its guests in the amount of \$195,310.33.

15. On or about July 9, 2002, Sheraton applied for a refund of the gross receipt taxes it paid during the refund period in the amount of \$195,310.33. However, the parties agree that no refund is due for the period after October 1, 2001, which reduces the amount of the refund request to \$185,508.95.

16. On June 11, 2003, the Department denied the refund request.

17. On August 4, 2003, Sheraton filed a protest with the Department.

18. On December 22, 2003, the Department issued a Notice of Decision sustaining the denial of a refund.

19. Sheraton timely filed its Petition for Administrative Hearing.

20. For the calendar years ending December 2000, 2001, and 2002, the percentage of revenue from telecommunications as compared to total revenues of Sheraton are 3.1%, 2.6%, and 1.8%, respectively.

21. Florida Administrative Code Rule 12B-6.001(1)(c)3.b. was in effect from 1990 to 2003, when it was repealed by the Department.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2003).

23. The applicable period of time in dispute, the refund period, is May 1, 1997 through October 1, 2001.

24. Gross receipts tax is imposed upon "every person that receives payment for any utility service" § 203.01(1), Fla. Stat. (1995 and 1997). "Person" is defined to include "any individual, firm, copartnership, joint adventure, association, corporation, . . . or other group or combination acting as a unit" §§ 203.012(10) and 212.02(12), Fla. Stat. (1995 and 1997). "Utility service" is defined as "electricity . . . ; natural or manufactured gas . . . ; or telecommunication

services." § 203.012(9), Fla. Stat. (1995 and 1997).

"Telecommunication service" is defined as "local telephone service, toll telephone service, telegram or telegraph service, teletypewriter service, or private communication service;

. . . ." § 203.012(5), Fla. Stat. (1995 and 1997).

25. Whether a taxpayer engages in the taxable utility business as its primary business or not has no effect upon the imposition of the gross receipts tax; the taxpayer is still subject to the gross receipts tax. Brooks-Scanlon Corp. v. Lee, 131 Fla. 197, 179 So. 426 (1938).

26. The language of the aforementioned pertinent parts of the applicable statutory provisions did not change during the amended refund period of May 1, 1997 through October 1, 2001, and they, therefore, maintained their meaning throughout the refund period. Consequently, the taxpayer remained subject to the gross receipts tax. See Merritt Square Corp. v. State Department of Revenue, 354 So. 2d 143 (Fla. 1st DCA 1978).

27. No dispute exists that, at all times during the refund period, Sheraton was primarily engaged in the business of providing hotel services to its guests, not telecommunication services.

28. The evidence demonstrates that Sheraton is a provider of telecommunication services pursuant to Section 203.01(1), Florida Statutes, and as defined by Section 203.012(5), Florida

Statutes. Sheraton provided telecommunication services to its guests in their rooms. Sheraton purchased and installed special equipment to determine which room placed a telephone call, whether local or long distance, which enabled Sheraton to properly bill a guest for the use of the telephone in the guest room. Furthermore, Sheraton received payment for the telecommunication services provided to its guests.

29. Without an exemption, Sheraton was required to pay gross receipts tax on telecommunication services provided to its guests.

30. An exemption in the gross receipts tax law existed but was repealed by the Florida Legislature in the year 2000 and was not re-enacted in any further 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:

* * *

3. Charges made by hotels and motels, which are required under the provisions of s. 212.03 to collect transient rentals tax from tenants and lessees, for local telephone service or toll telephone service, when such charge occurs incidental to the right of occupancy in such hotel or motel;

The statute provided for an exemption of charges to guests for local telephone service or toll telephone service when the charges occur incidental to the occupancy by the guest.

31. Section 203.012(3), Florida Statutes (1995 and 1997) provided in pertinent part:

- (3) The term "local telephone service" means:
 - (a) The access to a local telephone system . . . ; or
 - (b) Any facility or service provided in connection with a service described in paragraph (a).

* * *

- (7) The term "toll telephone service" means:
 - (a) A telephonic-quality communication for which there is a toll charge . . . ; or
 - (b) A service which entitles the subscriber or user, upon the payment of a periodic charge . . . or upon the basis of total elapsed transmission time, to the privilege of an unlimited number of telephonic communications

32. Section 212.03, Florida Statutes (1995 and 1997) provides in pertinent part:

- (1) It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of renting, leasing, letting, or granting a license to use any living quarters or sleeping or housekeeping accommodations in, from, or a part of, or in connection with any hotel, . . . For the exercise of such taxable privilege, a tax is hereby levied . . . Such tax shall apply to hotels

33. Sheraton argues that the exemption is applicable to its situation because its primary business is providing hotel services to its guests, not providing telecommunication services, and because providing local telephone service and toll telephone service to its guest are incidental to its business. "It is well settled that he who would shelter himself under an exemption clause in a tax statute must show clearly that he is entitled under the law to exemption; and the law is to be strictly construed as against the person claiming the exemption and in favor of the taxing power." Green v. Pederson, 99 So. 2d 292, 296 (Fla. 1957). "Exemption to taxing statutes are special favors granted by the Legislature and are to be strictly construed against the taxpayer." State ex rel. Szabo Food Services, Inc. of North Carolina v. Dickinson, 286 So. 2d 529, 530-531 (Fla. 1974). As a result, Sheraton must clearly show that its charges for telecommunication services fall within the exemption, with any doubt being resolved in favor of the Department.

34. Furthermore, Sheraton is requesting a refund of the tax that it paid. "At common law, there was no right to a refund of taxes from the sovereign. Thus, statutes authorizing tax refunds or exemptions are in derogation of common law; statutes in derogation of the common law must be strictly construed." Department of Revenue v. Bank of America, 752 So.

2d 637, 641 (Fla. 1st DCA 2000). As a result, the statutory provision must be strictly construed in favor of the Department.

35. The statutory provision provided an exemption for local telephone service or toll telephone service, telecommunication services, for the narrow and limited circumstance when the charges are incidental to the right of occupancy. The statutory provision did not provide a definition of incidental.

36. Perusal of the legislative history provides a view of the legislative intent. A Florida Senate Staff Analysis (Senate Analysis), dated May 22, 1985, addressed proposed changes to the gross receipts tax and provided the current situation of the law at that point in time. The Senate Analysis provided, among other things, that, in 1984, the Florida Legislature enacted the law expanding the gross receipts tax base by replacing "for the use of telephone" with "telecommunications services" and defining telecommunications services; that telecommunication services included "such services as local telephone service; toll telephone service,"; and that the law "excluded" from the tax "such items as charges for . . . hotel telephone service charges" The Senate Analysis indicates that an exemption for charges by hotels for telephone service charges was intended.

37. Further, the plain meaning of incidental should be considered. Black's Law Dictionary (Revised Fourth Edition 1968) defines "incidental" as "depending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose."

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

39. Strictly construing the tax exemption in the Department's favor, against Sheraton, with any doubt in the Department's favor and considering the legislative intent and the plain meaning of the exemption, it is clear that at Sheraton telecommunication services were incidental to the right of occupancy, per the statutory provision.

40. The Department's implementation of the exemption must also be examined. To implement the exemption, the Department adopted an amendment to Florida Administrative Code Rule 12B-6.001, which, according to the Department, "clarified" the meaning of "incidental to the right of occupancy" by defining what is "not incidental." Florida Administrative Code Rule 12B-6.001(1), as amended, provided in pertinent part:

(c) Gross receipts for telecommunication services do not include:

* * *

3.a. Charges made by hotels and motels which are required under the provisions of s. 212.03, F.S., to collect transient rentals tax from tenants and lessees, for local telephone service or toll telephone service when such charges occur incidental to the right of occupancy;

b. 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.

As a result, the Department's interpretation of the exemption was that telecommunication charges by hotels and motels were not incidental to the right of occupancy if the charges were separately evidenced to the guest; or conversely, telecommunication services were considered incidental as long as they were not separately evidenced to the guest.

41. Examination of the rule's history is helpful. After the enactment of Section 203.12(2)(b)3, Florida Statutes, but prior to adoption of the amended rule, the Department issued a notice on August 26, 1989, regarding the imposition of gross receipts tax on telecommunication services. The notice provided, among other things, that effective October 1, 1989, hotels and motels must collect gross receipts tax on all local

service charges separately billed to their lodging or commercial tenants and on long distance toll calls of any kind, billed to any tenant.

42. In 1989, a challenge against the collection of gross receipts tax on telecommunication services provided by hotels and motels to the guests, seeking a declaratory judgment and an injunction, was filed in the Circuit Court, Second Judicial Circuit of Florida. Brock v. Department of Revenue, Case No. 89-3616. The circuit court granted a permanent injunction against the Department's collection of the gross receipts tax finding, among other things, that the Florida Legislature had not defined incidental; that the plain and ordinary meaning of incidental clearly showed that telephone use by a guest was within the plain and ordinary meaning of incidental; and that defining incidental was within the authority of the Florida Legislature, not the Department.

43. The circuit court's decision was appealed to the First District of Appeal. Department of Revenue v. Brock, 576 So. 2d 848 (Fla. 1st DCA 1991). The First District Court of Appeal 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, finding that "the exhaustion requirement is . . . particularly appropriate in the instant case." Id., at 850. Even though 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 a revenue statute, it stopped short of determining whether the Department acted in excess of its delegated legislative authority, but, instead concluded that the Department should be provided "an opportunity to explain its interpretation of the rule and to create a record in an administrative forum." Id., at 850. Consequently, the First District Court of Appeal did not make a ruling on the merits of the challenge to Florida Administrative Code Rule 12B-6.001(1)(c)3.b.

44. No rule challenge was immediately initiated involving Florida Administrative Code Rule 12B-6.001(1)(c)3.b. as a result of the decision by the First District Court of Appeal.

45. In 2003, the Department repealed Florida Administrative Code Rule 12B-6.001(1)(c)3.b. After the repeal, Sheraton initiated a rule challenge. The Department moved to dismiss the rule challenge, but the Division of Administrative Hearings denied the Department's motion. The Department petitioned the First District Court of Appeal for a writ of prohibition. Department of Revenue v. Sheraton Bal Harbour Association, Ltd., 864 So. 2d 454 (Fla. 1st DCA 2003). The First District Court of Appeal granted the writ holding 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. DOAH dismissed the rule challenge.

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, supra, at 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). "On the other hand, 'judicial adherence to the agency's view is not demanded when it is contrary to the statute's plain meaning.'" (citations omitted) D'Alto v. Department of Environmental Protection, 860 So. 2d 1003, 1005 (Fla. 1st DCA 2003).

47. The plain meaning of incidental demonstrates that Sheraton's telephone charges to a guest are incidental to the right of occupancy. As the Department points out in its post-hearing submission, the "statute imposes the tax, not the Rule." Similarly, the statute grants the exemption, not the rule. The statute unambiguously provides that telephone charges in a certain category, "incidental to the right of occupancy," are

exempt from gross receipts tax; the statute does not hinge the exemption on how the charges are billed or noted by the hotel or motel to the guest. The Department's interpretation through its rule is clearly contrary to the exemption provided by the statutory provision.

48. Hence, based on the exemption statute, Sheraton was entitled to the exemption and was exempt from paying tax on gross receipts for the telecommunication services.

49. Having determined that Sheraton is entitled to the exemption, the question now becomes whether Sheraton is entitled to a refund. At the time Sheraton paid the tax, the tax was paid in accordance with the Department's interpretation of the statute and the rule implementing the statute. The statutory exemption has been repealed and not re-enacted in further legislation. This proceeding is not a rule challenge, and the rule in the instant case has not been declared an invalid rule in a rule challenge. Furthermore, the rule has been repealed. The exemption was not preserved by further legislation. Sheraton did not preserve its right to the benefit of the exemption through a pending court action. Sheraton did not bring a rule challenge prior to the repeal of the Department's rule in 2003.

50. Sheraton did not pay the tax in error because Sheraton was required to pay the tax. Sheraton argues that, if a

determination is made that it was entitled to the exemption, it should be entitled to a refund. Sheraton does not cite to any statutory provision or a rule that specifically authorizes a refund for such taxes paid or to any case law to support its position. When Sheraton requested a refund from the Department, Sheraton was required, among other things, to complete certain "refund" documents. Also, a perusal of the Department's denial does not indicate that the Department's denial included a position that it was precluded from issuing a refund if the Department agreed that the exemption applied to Sheraton's situation. The undersigned does not find Sheraton's argument persuasive.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Revenue enter a final order denying Sheraton Bal Harbour Associates, Ltd. a refund in the amount of \$185,508.95 for gross receipt taxes paid on sales of telecommunication services for the period May 1, 1997 through October 1, 2001.

DONE AND ENTERED this 1st day of February, 2005, in
Tallahassee, Leon County, Florida.

Errol H. Powell

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.