STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHERATON BAL HARBOUR ASSOCIATES, LTD.,	)	
Petitioner,	)	
vs.	)	Case No. 04-2241
DEPARTMENT OF REVENUE,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to an agreement of the parties and to the order entered by the undersigned on August 27, 2004, the parties stipulated to all relevant facts and agreed to the admission into evidence of 14 sequentially numbered exhibits. Consequently, no evidentiary hearing was held in this matter. Claude B. Arrington, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, presided over this proceeding.

APPEARANCES

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

Whether Petitioner is entitled to a refund for sales taxes paid by Petitioner to Respondent on valet parking transactions for the period May 1, 1997 through April 30, 2002.

PRELIMINARY STATEMENT

The Findings of Fact set forth in this Recommended Order are taken from the Stipulation of Facts submitted by the parties. The Petitioner will be referred to as the Sheraton and Respondent will be referred to as the Department.

Since there was no final hearing, there is no transcript of the proceeding. Each party filed a Proposed Recommended Order, which has been duly-considered by the undersigned 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 tax statutes.

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

3. The Sheraton is licensed as a hotel under the provisions of Chapter 509, Florida Statutes (2004). The Sheraton’s principal business is providing lodging, food, and other services to the guests of its hotel.

4. The Sheraton provides valet parking to its hotel guests and visitors. Upon arrival at the Sheraton, a guest or visitor arriving by motor vehicle provides his or her vehicle and the vehicle keys to the parking attendant. The parking staff provides the guest or visitor with a valet parking ticket. The parking attendant collects the valet parking fee upon departure or charges it to the guest room.

5. The Sheraton's parking is located in a building on the Sheraton's grounds that is secure. No hotel guests, visitors, or members of the general public are allowed in the parking building.

6. No guest or visitor to the Sheraton can park his or her vehicle on the Sheraton's grounds without using the valet parking. There are no self-parking spaces on the Sheraton's grounds.

7. No member of the valet parking staff and no member of the hotel staff is authorized to use a guest's or visitor's vehicle for any activity other than to park and return the vehicle to the guest or visitor at his or her request.

8. There is no time when the vehicle would not be delivered to the guest or visitor upon request. The Sheraton's guest or visitor may request his or her automobile at any time and it is delivered.[1]

9. The Sheraton's guest may go in and out and request the vehicle several times a day or night without a separate charge. (This may not apply to a visitor to the Sheraton.)

10. There are not very many public overnight parking spots near the Sheraton.

11. The Bal Harbour Shops[2] are located across the street from the Sheraton. The Bal Harbour Shops has its own paid self-parking and valet parking services available. The Sheraton, on a regular basis, utilizes the Bal Harbour Shops' parking spaces for its valet parking when there is overflow from the parking available on its premises. The Sheraton pays a per space charge to the Bal Harbour Shops for these parking spaces, and sales tax is included in this charge.

12. The Sheraton's fee for valet parking services is a flat fee and does not identify a separate charge for valet services, for a parking space, or for sales tax.

13. The Sheraton advises its guests and visitors that it is not responsible for damages to the vehicle parked by the valet parking except through its staff's negligence. The Sheraton does pay on a regular basis for fixing cars that are damaged while in its possession.

14. The Sheraton's valet parking ticket and signs posted at its entrance contain terms and conditions for the valet parking, which include the following:

> Vehicle is accepted for parking only. We (Sheraton) assume no liability for fire, theft, vandalism, flood, or damage in any case except through our own negligence. We are not bailees and are not responsible for loss or damage of any article left in vehicle including but not limited to radar detectors, cellular phones, money, etc. The owner of the vehicle acknowledges that he is in constructive possession and control thereof at all times. . . .[3]

15. No notification was made by the Sheraton to its guests or visitors regarding any sales tax on valet parking during the period at issue in this proceeding. Through internal accounting records, the Sheraton allocated a portion of the parking fees collected to sales tax and remitted that amount to the Department. Sales tax was not stated on any invoice nor did the Sheraton's valet parking signs posted at the hotel's entrance mention sales tax. During the period from May 1, 1997 through April 30, 2002, the valet parking charges ranged from $12.00 to $18.00 per day for overnight valet parking.

16. On a monthly basis, during the refund period from May 1, 1997 through April 30, 2002, the Sheraton paid to the Department sales taxes on valet parking in the total amount of $329,497.20.

17. On or about July 9, 2002,[4] the Sheraton applied to the Department for a refund in the amount of $329,497.20 for the sales taxes it paid during the refund period.

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

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

20. On April 27, 2004, the Department issued a Notice of Decision sustaining the denial of the refund.

21. The Sheraton thereafter timely filed the Petition for Administrative Hearing which initiated this proceeding.

CONCLUSIONS OF LAW

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

23. If the Sheraton's valet parking transactions are non-taxable transactions, the Sheraton would be entitled to a refund of the sum it paid to the Department pursuant to Section 215.26(1), Florida Statutes, which provides, in pertinent part, as follows:

> (1) The Chief Financial Officer may refund to the person who paid same, or his or her heirs, personal representatives, or assigns, any moneys paid into the State Treasury which constitute:
> (a) An overpayment of any tax, license, or account due;
> (b) A payment where no tax, license, or account is due; and
> (c) Any payment made into the State Treasury in error. . . .

24. The Sheraton, as the applicant asserting its entitlement to the subject refund, has the burden of proving by a preponderance of the evidence its entitlement thereto. See Florida Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981) and Balino v. Dep't of Health and Rehabilitative Services, 346 So. 2d 349 (Fla. 1st DCA 1977).

25. Section 212.03(6), Florida Statutes, provides, in relevant part, as follows:

> (6) It is the legislative intent that every person is engaging in a taxable privilege who leases or rents parking or storage spaces for motor vehicles in parking lots or garages. . . . For the exercise of this privilege, a tax is hereby levied at the rate of 6 percent on the total rental charged.

26. There are two separate aspects of the Sheraton's valet parking transaction: the service aspect and the parking aspect.[5] During the period at issue in this proceeding, the two aspects of the Sheraton's valet parking transaction were inextricably intertwined. One aspect of the transaction could not be accomplished without the other. A hotel guest or visitor desiring to park his or her vehicle had no choice but to use Sheraton's valet parking because there was no self-parking available. The guest or visitor was charged one fee for the valet parking transaction, so there was no separate statement of the fee for the service aspect of the transaction from the fee

for the parking aspect of the transaction.[6] Consequently, the entire fee charged by the Sheraton for a valet parking transaction was taxable pursuant to Section 231.03(6).[7]

27. The Sheraton also argues that the valet parking transaction is a non-taxable bailment, within the meaning of Florida Administrative Code Rule 12A-1.070(22), which provides, in relevant part, as follows:

> (22)(a) When tangible personal property is left upon another's premises under a contract of bailment, the bailee is not exercising a privilege taxable under the provisions of Section 212.031, F.S., relating to leases, licenses, or rentals of real property.
>
> (b) A bailment is a contractual agreement, oral or written, whereby a person (the bailor) delivers tangible personal property to another (the bailee) and the bailor for the duration of the relationship relinquishes his exclusive possession, control, and dominion over the property, so that the bailee can exclude, within the limits of the agreement, the possession of the property to all others. If there is no such delivery and relinquishment of exclusive possession, and the owner's control and dominion over the property is not dependent upon the cooperation of the person on whose premises the property is left, and his access thereto is in no wise subject to the latter's control, it will generally be held that such person is a tenant, lessee, or licensee of the space upon the premises where the property is left. . . .
>
> * * *
>
> (d) A lease, license, or bailment is indicative of a contractual relationship, and the terms are not mutually exclusive.

> Whatever label is attached to a contract, in determining whether a transaction is a bailment or a lease or a license, consideration will be given to the manifested intention of the parties to which relationship has been created.
>
> (e) In the absence of an express contract, the creation of a bailment requires that possession and control pass from the bailor and the bailee; there must be full transfer, actual or constructive, so as to exclude the property from the possession of the owner and all other persons and give the bailee sole custody and control for the time being.

28. The valet parking transaction is not a bailment because the hotel guest or visitor has the right to demand possession of his or her vehicle at any time and because the Sheraton did not intend to create a bailment relationship as evidenced by the following statements on the valet parking ticket and signs: “we [the Sheraton] are not bailees” and “[t]he owner of the vehicle acknowledges that he is in constructive possession and control thereof at all times.”

29. Moreover, while Rule 12A-1.070(22)(a) exempts any transaction that meets the definition of a bailment from taxes imposed by Section 231.031, the rule relied upon by the Sheraton does not apply to the subject tax on the rental or lease of parking spaces, which is imposed pursuant to Section 231.03(6). Section 212.031 imposes a general tax on the lease or rental of real property, but the provisions of Section 212.031(1)(a)3 clearly and unequivocally provide that the provisions of Section

212.031 do not apply to the tax on the rental or lease of parking spaces imposed pursuant to Section 231.03(6).

30. The Department's construction of the taxing statutes pertaining to leased or rented parking spaces is long-standing. Dealing with facts similar to the ones at issue in this proceeding, the Department stated it's position in Technical Assistance Advisement 98A-033 that a condominium's charge for valet parking is a taxable transaction pursuant to Section 312.03(6), Florida Statutes (1998), where the visitor or guest is required to use unassigned parking space and valet service. The Department's long-standing interpretation of a statute it is required to administer is entitled to deference and should be sustained if that interpretation is a permissible interpretation. See Smith v. Crawford, 645 So. 2d 513 (Fla. 1st DCA 1991); D'Alto v. State, Dept. of Environmental Protection, 860 So. 2d 1003 (Fla. 1st DCA 2003); Bd. of Podiatric Medicine v. Florida Medical Ass'n, 779 So. 2d 658 (Fla. 1st DCA 2001); and Office of Fire Code Official of Collier County Fire Control and Rescue District v. Florida Dept. of Financial Services, 869 So. 2d 1233 (Fla. 2nd DCA 2003). The Department established in this proceeding that its interpretation was not only a permissible construction of the relevant statutes and rule, its construction is the proper construction.

31. The Sheraton has failed to meet its burden of proving its entitlement to the subject refund.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department enter a final order denying the subject application for a refund.

DONE AND ENTERED this 4th day of October, 2004, in Tallahassee, Leon County, Florida.

CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of October, 2004.

ENDNOTES

[1/] The second sentence, which is redundant of the first, is included only as part of the parties' stipulation.

[2/] The Bal Harbour Shops is a shopping mall.

[3/] The quoted terms pertinent to valet parking are included on the parking ticket and on the signs posted at the Sheraton's entrance, which are included among the stipulated exhibits. This language is not a separately stipulated fact.

[4/] The Stipulation of Facts submitted by the parties has the incorrect date of July 9, 2003. Joint Exhibit 7 reflects that the correct date is July 9, 2002.

[5/] In reaching this conclusion, the undersigned has considered the Sheraton's contention that valet parking is essentially a non-taxable service that should not be divided into discrete elements. The conclusion reached is the view espoused by the Department, which the undersigned finds to be better-reasoned than the Sheraton's argument and more consistent with analogous statements of agency policy.

[6/] The undersigned rejects as being unpersuasive the Sheraton's argument that it did not rent parking places to guests within the meaning of Section 231.30(6). Whether a vehicle is parked in a space by a valet driver or by the owner of the vehicle, the fact remains that a portion of the valet parking transaction included a fee for the lease or rental of a parking space within the meaning of Section 212.03(6). Had the Sheraton structured its valet parking transaction differently, it is possible that the service aspect of the transaction would not have been taxable.

[7/] See AT&T v. Florida Dep't of Revenue, 764 So 3d 665 (Fla 1st DCA 2000), review denied, 804 So. 2d 328 (Fla. 2001), which pertains to an analogous calculation of a "sales price" and Florida Administrative Code Rule 12A-1.070(22), which provides, in relevant part, as follows:

> (10) When the owner of a business, or the operator of a business who is a lessee or licensee, provides floor space to any person, and in addition thereto and in connection therewith also provides certain services to such person . . . and where the charges for such services are not separately stated in the agreement and on the invoices or other billings, the total consideration paid under the agreement is taxable.

COPIES FURNISHED:

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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.