

03-0315
Audit
Signed 03/08/2004

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)	
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Petitioner,)	AND FINAL DECISION
)	
v.)	Appeal No. 03-0315
)	Account No. #####
AUDITING DIVISION OF)	
THE UTAH STATE TAX)	Tax Type: Sales
COMMISSION,)	
)	Judge: Phan
Respondent.)	

Presiding: Marc B. Johnson, Commissioner
Jane Phan, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER REPRESENTATIVE 1, Attorney
PETITIONER REPRESENTATIVE 2, Attorney
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
RESPONDENT REPRESENTATIVE 2, Auditor

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on January 7, 2004. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. Petitioner is appealing an audit deficiency of additional sales tax for the period of July 1, 1999 through June 30, 2002. The Statutory Notice of Audit Deficiency was issued on February 24, 2003.

2. The amount of the deficiency at issue is \$\$\$\$\$ in additional tax along with the interest that has accrued thereon.

3. The issue in this matter is whether fees charged to owners of the project for supplemental occupancy under a “Bonus Time” or “Short Notice Fees” program were subject to sales and transient room tax.

4. Petitioner is a timeshare membership resort. Owners have purchased an equity interest in the property that entitles them to a base occupancy of one week per year for each unit purchased, supplemental occupancy on a space-available basis, and the right to exchange their base week to use in other timeshare resorts. In addition owners may rent their base week out to third parties.

5. In addition to the amount paid for the equity interest in the project, the owners pay an annual maintenance assessment that covers the operating costs of the resort. The annual maintenance assessment is \$\$\$\$\$ for a one-bedroom unit. This goes toward paying the expenses of running the project including management, on site employees, accounting, utilities, insurance, property taxes and replacement of capital components.

6. In addition to their base week, owners, at their option, may stay at the resort additional nights using one of the supplemental occupancy programs, which provide that as long as space is available, owners may stay for an additional charge of \$\$\$\$\$ per night for a 1-bedroom unit and \$\$\$\$\$ per night for a 2-bedroom unit. The charge for supplemental occupancy was set several years ago and has not been adjusted recently.

7. Petitioner is a non-profit entity run by a board made up of timeshare owners in

the project. As a non-profit entity, Petitioner collects funds equal to the expenses. In addition to the annual maintenance fee and supplemental occupancy fee, Petitioner obtains income from the rental of unused units to the general public on a nightly basis at a market rate. The charge to the general public is significantly higher, at least double the amount charged to owners for supplemental occupancy. Basically if Petitioner did not generate the funds from the supplemental occupancy program and the nightly rentals to the general public, the amount of the annual maintenance assessments paid by all owners would have to be increased to cover the difference.

8. Petitioner had collected and remitted sales and transient room tax on the amounts collected from the nightly rentals to the general public. The only issue in this appeal was the charges or fees for the supplemental occupancy for which Petitioner had not collected sales or transient room tax.

APPLICABLE LAW

1. A tax is imposed on the purchaser as provided in this part for amounts paid or charged for the following transactions: . . . (i) amounts paid or charged for tourist home, hotel, motel, or trailer court accommodations and services that are regularly rented for less than 30 consecutive days; . . . (Utah Code Ann. Sec. 59-12-103(1)(i).)

2. The following definitions shall be used for purposes of administering the sales tax on accommodations and transient room taxes provided for in Sections 59-12-103, 59-12-310, 59-12-352, and 59-12-353. 1. "Tourist home," "hotel," or "motel" means any place having rooms, apartments, or units to rent by the day, week or month. . . . 2. "Accommodations and services charges" means any charge made for the room, apartment, unit, trailer, or space to park a trailer, and

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includes charges made for local telephone, electricity, propane gas, or similar services. (Utah Admin. Rule R865-19S-79.)

DISCUSSION

Petitioner argues that the fee or charges for the supplementary occupancy are paid by owners solely to cover the cleaning, maintenance, and administrative costs associated with the use of the supplemental occupancy, a right that they had purchased at the time they became owners. It is Petitioner's position that the fee or charge for the supplemental occupancy is identical in purpose to the annual maintenance assessments paid by owners in connection with the base occupancy and not an amount paid or charged for an "accommodation." However, the Commission does see a distinction in that those who pay the fee receive something additional in return, the additional night or nights lodging. The Commission notes that as Petitioner is a non-profit operation, the nightly charges to the general public also offset the amount charged as the annual maintenance assessment.

Petitioner's attorneys argue in their hearing brief that the Supplemental Assessment is a payment for the exercise of an ownership right, not an accommodation. They point out that Petitioner is required to provide supplemental occupancy to its owners, even in periods high demand for nightly rentals from the general public, which would have been for a much higher nightly rental rate. The Commission disagrees with this position as the owners must pay the fee to receive the additional accommodation.

In addition Petitioner argues that sales and use taxes are transaction taxes and the provision of supplemental occupancy is not a "transaction" of the type intended to be taxed. However, the transaction of obtaining nightly lodging for a fee is directly the transaction for which

the tax in this matter was intended to be imposed.¹ Petitioner indicates that the accommodations in this case the supplementary occupancy is a right limited to owners, not the public in general.

Petitioner's attorneys also argue that the Tax Commission in its rule, Utah Admin. Rule R865-19S-79(A)(3), has adopted an overly broad definition of "tourist home," "hotel," and "motel," which exceeds the Commission's authority. They argue that under the Tax Commission's broad definition is contrary to the language of the statute, which taxes "regularly rented" facilities while the rule expands that to any charge made for a room, apartment or unit.

CONCLUSIONS OF LAW

1. Although the Commission agrees with Respondent's representation that tax exemption statutes should be narrowly construed against the taxpayer, the Commission concludes that the issue in this matter is one of tax imposition, not tax exemption. As Petitioner noted citing *Airport Hilton Ventures v. Utah State Tax Comm'n*, 976 P.2d 1197, 1201 (Utah 1999), "taxing statutes are construed in favor of the taxpayer and exemptions are construed against the taxpayer."

2. However, the subject property is a "tourist home," "hotel" or "motel" that is regularly rented for less than 30 consecutive days within the meaning of Utah Code Ann. Sec. 59-12-103(1)(j). It is rented out on a nightly basis both to the general public and timeshare owners. As the Commission finds under the statute that the transaction at issue is subject to tax the Commission does not consider Petitioner's argument that Utah Administrative Rule R865-19S-79 is overbroad.

¹ Petitioner cites *Ambassador Athletic Club v. Utah State Tax Comm'n*, 496 P.2d 883 (Utah 1972), as the court under a prior statute held that the club did not provide services to the public, so it was not a hotel.

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Respondent has properly determined that the fee charged for the supplemental occupancy is subject to sales and transient room tax.

DECISION AND ORDER

Based upon the foregoing, the Tax Commission sustains the audit assessment of additional sales and transient room tax and interest for the audit period of July 1, 1999 through June 30, 2002. It is so ordered.

DATED this ____ day of _____, 2004.

Jane Phan
Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION:

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this ____ day of _____, 2004.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Palmer DePaulis
Commissioner

Marc B. Johnson
Commissioner

Notice of Appeal Rights: You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63-46b-13. A Request

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for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §§59-1-601 and 63-46b-13 et. seq.

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