

KAISER REALTY
100 Cove Avenue
Gulf Shores, AL 36547-1018,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. S. 97-311

FINAL ORDER

The Revenue Department denied a refund of transient occupancy ("lodgings") tax claimed by Kaiser Realty, Inc. ("Taxpayer") for the period May 1993 through April 1996. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, § 40-2A-7(c)(5)a. A hearing was conducted on October 3, 1997. Blake Madison represented the Taxpayer. Assistant Counsel Duncan Crow represented the Department.

The issue is whether a reservation processing fee charged by the Taxpayer in conjunction with the renting of condominiums and beach houses is subject to Alabama's lodgings tax levied at Code of Ala. 1975, § 40-26-1, et seq.

The Taxpayer is the rental agent for numerous condominium and beach house owners in Gulf Shores, Alabama and the surrounding area. The Taxpayer also operates a reservation processing center through which the rentals are processed.

When a prospective customer contacts the processing center to make a reservation, the Taxpayer notifies the customer that a non-refundable \$20 processing fee will be charged. If a reservation is confirmed, the Taxpayer requires the customer to immediately remit a deposit and the \$20 processing fee. The Taxpayer keeps the processing fee, even if the reservation is later cancelled.

The customer pays the rental amount, including the lodgings tax, upon arrival.

The Taxpayer does not charge lodging tax on the processing fee. The Taxpayer remits the rental amount, less an agreed commission, to the condominium or beach house owner. The Taxpayer also files monthly lodging tax returns, and remits the lodgings tax collected from its customers to the Department.

The Department audited the Taxpayer and assessed lodgings tax on the \$20 processing fee. The Taxpayer paid the tax, and petitioned for a refund. The Department denied the refund. The Taxpayer appealed.

The lodgings tax is measured by "the charge for such room..., including the charge for use or rental of personal property and services furnished in such room..." § 40-26-1(a). The term "charge for such room" is not defined in the lodgings tax law. Nor has it been defined by any court in Alabama. In such cases, the plain language of the statute must be applied. State v. American Brass, Inc., 628 So.2d 920 (1993). Also, a tax levy must be construed for the taxpayer and against the Department.¹ Eagerton v. Terra Resources, Inc., 426 So.2d 807 (1982).

The term "charge for such room", given its plain meaning, includes only the charge for the room itself. The separately stated processing fee is not a charge for the room, and thus is not subject to the tax. Charges

¹The Department incorrectly argues that a tax exemption is in issue, which must be construed for the Department. The issue is whether the processing fee should be included in the levy, not whether it should be exempted out.

for the use of personal property or services furnished in the room also are subject to the tax. But the processing fee also is not a service "furnished in such room."

The above is supported by Dept. Reg. 810-6-5-.20. That regulation reads that where "maid, porter or janitor service is furnished in rooms..., such separate and additional charge is subject to the lodgings tax." It further reads, however, that charges "for laundry, dry cleaning, and telephone services are not subject to the tax", presumably because they are not provided in the room.² Likewise, the processing fee is not subject to the tax because it is not a service performed in the room.

State, Department of Revenue v. Mobile Gas, 621 So.2d 1333 (Ala.Civ.App. 1993) is analogous to this case. The issue in Mobile Gas was whether reconnect and collection fees charged by Mobile Gas constituted gross receipts accruing from the furnishing of utility services. Relying on the utility tax definition of "gross receipts" at Code of Ala. 1975, § 40-21-80(a)(3), and the similar sales tax definition of "gross receipts" at Code of Ala. 1975, § 40-23-1(a)(8), the Court of Civil Appeals affirmed the Administrative Law Division by holding that the charges are "not part of the sales price of the gas, but, rather, are incidental charges that have no relevance to the completion of the sale of the product." Mobile Gas, at page 1335. Likewise, the reservation processing fee, while obviously related to the rental of a condominium or beach house, is an incidental charge not included within the scope of the lodgings tax levy.

The Department argues that the fees are taxable because the customer is required to pay the fee to rent a condominium or beach house. I agree the customer is required to pay the processing fee, but that

²The telephone service is a gray area. Part of that service is furnished in the room, but presumably it is not included in the levy because part is obviously provided outside of the room.

doesn't make the fee a charge for the room itself. In Mobile Gas, the gas customers were required to pay the reconnect or collection fees in order to obtain utility services. Those incidental charges still were not subject to the utility tax.

The Department is directed to issue the refund requested by the Taxpayer, plus applicable interest.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, § 40-2A-9(g).

Entered March 31, 1998.

BILL THOMPSON
Chief Administrative Law Judge

BT:ks

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