MITCHELL INVESTMENTS, LLP STONEY BROOK APARTMENTS 313 STONEY BROOK LANE FULTONDALE, AL 35068,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 07-501
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department denied a lodgings tax refund for January 2005 through August 2006 requested by Mitchell Investments, LLP ("Taxpayer"), d/b/a Stoney Brook Apartments. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(c)(5)a. The case was submitted on stipulated facts and briefs. Will Sellers represented the Taxpayer. Assistant Counsel Margaret McNeill represented the Department.

ISSUE

The Taxpayer operates an apartment complex in Jefferson County, Alabama. The issue is whether the gross proceeds derived by the Taxpayer from apartments rented for less than 180 continuous days during the period in issue were subject to Alabama's transient occupancy tax, or lodgings tax, levied at Code of Ala. 1975, §40-26-1(a). That issue turns on whether the individuals that leased the apartments were transients, and if so, were the apartments rented regularly to the transients.

FACTS

The undisputed facts were stipulated by the parties.

The Taxpayer operated an apartment complex, Stoney Brook Apartments, in

Jefferson County, Alabama during the months in issue. All of the complex's 167 apartments were rented unfurnished.

The complex leased the vast majority of the apartments for longer than 180 days. Twelve of the apartments, however, were leased for between 3 months and 180 days during the subject period. Those leases represented less than one percent of the complex's total leases, and 9 of the 12 short-term lessees were individuals that had resided in Jefferson County immediately before leasing an apartment at the complex.

All of the lessees had to furnish their own furniture and arrange for their own electricity and telephone service. The lessees also generally changed their mailing address to the apartment complex.

The Taxpayer has never charged lodgings tax on its leased apartments in the 25 years it has operated Stoney Brook. The Department audited the Taxpayer and determined that the proceeds from the leases that were for less than 180 days were subject to lodgings tax. It assessed the Taxpayer accordingly. The Taxpayer paid the tax and then petitioned for the refund at issue in this case.

ANALYSIS

Section 40-26-1(a) levies a lodgings tax as follows:

> There is levied and imposed, in addition to all other taxes of every kind now imposed by law, a privilege or license tax upon every person, firm, or corporation engaging in the business of renting or furnishing any room or rooms, lodging, or accommodations to transients in any hotel, motel, inn, tourist camp, tourist cabin, or any other place in which rooms, lodgings, or accommodations are regularly furnished to transients for a consideration,. . .

Section 40-26-1(b) provides in part that "[t]he tax shall not apply to rooms, lodgings, or accommodations supplied: (1) for a period of 180 continuous days or more in any place;.

. . ."

The term "transient" is not defined in the lodgings tax law. The Department has, however, defined the term in Reg. 810-6-5-.13(3) as "any person to whom rooms, lodgings, or other accommodations are provided for a period of less than 180 continuous days."

The Department, relying on the above definition of "transient," contends that the proceeds from all rooms, apartments, or other accommodations that are rented for a period less than 180 days are subject to the tax. It thus argues that the Taxpayer is liable for lodgings tax on the gross proceeds derived from the apartments it leased for less than 180 days.

The Taxpayer counters that the Department's absolute position that a transient is any person that rents accommodations for less than 180 days is incorrect. Rather, it argues that the traditional and commonly accepted definition of "transient" should control. It contends that the term applies to someone that is temporarily boarding or lodging at a location, but not to someone residing at a location, even for a short period.

In support of its position, the Taxpayer cites the Alabama Supreme Court's holding in *Mathis v. The Employers' Fire Insurance Company*, 399 So.2d 273 (Ala. 1981). In that case, the Court defined "residing" as "a dwelling place for the time being, as distinguished from a mere temporary locality of existence. (cite omitted). It indicates some intent of permanency of occupation as distinguished from boarding or lodging. . . ." *Mathis*, 399 So.2d at 274, quoting *State Farm Mutual Automobile Insurance Co. v. Hanna*, 166 So.2d 872 , 874 (Ala. 1964).

The Taxpayer also contends that regardless of how the term "transient" is defined, the lodgings tax does not apply to the proceeds from the apartments leased for less than 180 days because they are not being "regularly" furnished to transients, as required by §40-26-1(a).

The Taxpayer makes a compelling argument that any lessee that furnishes an apartment and provides for his or her own utility services is residing in the apartment, and thus is not a transient within the intended scope of the lodgings tax. I also agree that the 180 day exemption or exclusion at §40-26-1(b) was not intended as a definition of "transient." The Alabama Legislature clearly understood that a transient may reside at a place continuously for more than 180 days. Otherwise, there would have been no need to exempt or exclude continuous stays of more than 180 days. Conversely, a person that stays for less than 180 day is not automatically a transient. Rather, as discussed in *Mathis*, the issue turns in large part on whether the person is residing at the location, as opposed to only boarding or lodging at the location. That determination must be made on the particular facts of each case.

But whether the lessees in issue were transients need not be finally decided because even if they were transients, the apartment complex did not regularly lease the apartments in issue for less than 180 days. That is, it did not regularly lease to transients, as required by §40-26-1(a). The complex rented 167 apartments. Over the 3 1/2 year audit period, the complex only rented 12 of the apartments for a term less than 180 days, or less than 1 percent of the complex's total rentals. From the above facts, it could reasonably be found that the Taxpayer was not regularly leasing apartments for less than

180 days.

In any case, the parties stipulated that "[a]ny renting of accommodations to short term lessees was not done regularly." Stipulation ¶18. Because the Taxpayer was not regularly leasing its apartments (to transients or otherwise) for less than 180 days, the proceeds from those leases were not subject to Alabama's lodgings tax.

The Taxpayer's petition for refund is granted. Judgment is entered accordingly.

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

Entered December 3, 2007.

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BILL THOMPSON
Chief Administrative Law Judge

bt:dr
cc: Margaret Johnson McNeill, Esq.
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Ashley Moon