COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

MAGUIRE & GORDON, INC. **v.** **COMMISSIONER OF REVENUE**

Docket No. C277520 Promulgated: May 22, 2008

This is an appeal under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39, from the refusal of the Commissioner of Revenue to grant an abatement of room occupancy excises assessed against the appellant under G.L. c. 64G, § 3 for the monthly periods between January 1, 1999 and December 31, 2002 ("periods at issue").

Commissioner Scharaffa heard the appeal and was joined by Chairman Hammond and Commissioners Egan, Rose and Mulhern in the decision for the appellant.

These findings of fact and report are made pursuant to a request by the appellant under G.L. c. 58A, §13 and 831 CMR 1.32.

Judith G. Edington, Esq., *William Halmkin,* Esq. *and Richard Jones,* Esq., for the appellant

Arthur Zontini, Esq. *and Kevin Daly,* Esq., for the Commissioner.

FINDINGS OF FACT AND REPORT

On the basis of the parties' Stipulation of Facts and the testimony and exhibits introduced at the hearing of this appeal, the Appellate Tax Board ("Board") made the following findings of fact.

Maguire & Gordon, Inc. ("appellant") was incorporated on August 29, 1997 as a Massachusetts S Corporation. Appellant's Articles of Organization designated Ann M. Maguire ("Ms. Maguire") as its President and a Director. The Articles also designated Harriet A. Gordon ("Ms. Gordon") as Treasurer, Clerk, and a Director of the corporation.

During the periods at issue, appellant was engaged in three lines of business. First, it acted as rental agent for the owners of condominium units (individually, the "condominiums") to facilitate the rental of the condominiums at the request of those owners who wished to rent their condominiums when they were not occupying them. These condominiums were located at 481, 481A, 488, 490, 493, 495 and 495A Commercial Street, Provincetown (collectively the "subject properties"). The condominiums located at 481 and 481A were known as the Chandler House Condominiums ("Chandler House"). The remaining

condominiums combined to make up Bay Shore Condominiums ("Bay Shore").

As its second line of business, appellant was engaged by the Condominium Associations of Chandler House and Bay Shore ("Associations") to act as property manager for the subject properties. Appellant's third line of business was purchasing, developing, and selling real estate.

On March 19, 2003, the Commissioner of Revenue ("Commissioner") issued to appellant a Notice of Failure to Register and File Return with respect to room occupancy excise for the periods at issue. Appellant responded on June 17, 2003 by filing Forms RO-2, Massachusetts Department of Revenue Monthly Room Occupancy Returns. Appellant reported the tax due to be zero dollars. Thereafter, the Commissioner commenced an audit of appellant for potential excise liabilities.

On August 10, 2004, the Commissioner issued two Notices of Intent to Assess ("NIA") against appellant: one NIA proposed to assess $168,864.61 in state room occupancy excise, plus interest and penalties and the other NIA proposed to assess $117,840.41 in local room occupancy excise, plus interest and penalties. Collectively, the Commissioner proposed to assess $286,705.02 in room occupancy excise, plus interest and penalties.

On September 9, 2004, appellant filed Form DR-1, requesting a pre-assessment hearing with the Commissioner's Office of Appeals pursuant to G.L. c. 62C, § 26(b). The hearing was held on November 16, 2004, and by letter dated December 6, 2004, the Office of Appeals affirmed the Commissioner's assessment. On December 26, 2004, the Commissioner issued a Notice of Assessment against appellant for $286,705.02 in state and local room occupancy excise, plus interest and penalties.

Appellant filed an Application for Abatement on January 31, 2005 seeking a full abatement of the Commissioner's assessment. The Commissioner denied the application by Notice of Abatement Determination dated February 16, 2005. On April 11, 2005, appellant timely filed its appeal with the Board requesting an abatement of $286,705.02, plus interest and penalties. Based on these facts, the Board found and ruled that it had jurisdiction to hear this appeal.

Prior to creating the appellant corporation in 1997, Ms. Maguire and Ms. Gordon served as "resident managers" of Hargood House At Bayshore, Inc. ("Hargood House"), which had been operating as a motel. At that time, they owned all of the condominium units and lived in one of the units. They were available 24 hours a day to register guests or

provide other services. Daily maid service was provided and complimentary wine was presented to guests on their arrival. All telephone lines were in their name and they determined when units were available, the charge for the unit, and all policies with respect to the operation of Hargood House. For all periods through September, 1997, Ms. Maguire and Ms. Gordon operated Hargood House as a duly licensed motel and collected and paid the appropriate room occupancy excises.

In September, 1997, Ms. Maguire and Ms. Gordon legally changed the name of Hargood House to Bay Shore Condominium Trust. At that time, Ms. Gordon and Ms. Maguire began to transition away from the motel business. They began selling condominium units in Bay Shore to various individual owners in September, 1997. Sales of all of the units were completed prior to the periods at issue in this appeal.

In March, 1997, Ms. Gordon and Ms. Maguire purchased additional property located at 481 and 481A Commercial Street, Provincetown. Ms. Gordon and Ms. Maguire converted the Commercial Street properties to condominiums, pursuant to G.L. c. 183A. These condominiums comprise what is currently Chandler House. In December, 1997, they began selling the Chandler House condominiums. All but two of

the condominiums, units 1 and 2, were sold prior to the periods at issue in this appeal. Unit 1 was sold on January 8, 1999 and Unit 2 was sold on January 7, 1999, eight and nine days into the first monthly period at issue.

Although Ms. Maguire and Ms. Gordon no longer owned any of the condominiums in either Chandler House or Bay Shore, appellant was engaged to perform services on behalf of the condominium associations of the subject properties ("Associations") and the individual owners of the condominiums. These services, however, were distinct from the services that Ms. Maguire and Ms. Gordon formerly provided at the subject properties and corresponded to two of the three separate lines of business in which appellant was engaged.

Regarding its services on behalf of the Associations, appellant managed the real estate at the subject properties pursuant to yearly oral contracts with the Associations. Appellant's services for the Associations included developing proposed operating budgets for the approval of the Associations' members, contracting for goods and services on behalf of the Associations, paying common area expenses, and maintaining records for the Associations' accountants.

Appellant presented proposed budgets to the Associations' members at the Associations' annual meeting and the members discussed, amended if necessary, and voted to approve the budget. The budget included the common expenses of the properties including insurance, heating oil, trash removal, outdoor furniture and landscaping, snow removal, and common area maintenance. Appellant sought bids for the provision of these goods and services, where appropriate, and contracted with and paid the providers out of the Associations' bank account. The funds in the account were derived from condominium fees paid by the condominium owners. Condominium fees were established at the Associations' annual meeting when the following year's budget was approved. Neither appellant, Ms. Maguire, nor Ms. Gordon were permitted to vote on the budget.

Extraordinary capital expenditures also necessitated a vote of the condominium owners. For example, when it was determined that a seawall on the subject property needed replacement, appellant sought bids from various contractors and informed the condominium owners of the various options and respective costs. The condominium owners voted to approve the type of wall and the necessary expenditure. Appellant secured the necessary town permits and oversaw the construction project on behalf of the Associations.

The Associations paid appellant an annual fee for the management of the real estate. The fee was approved by the condominium owners at the Associations' annual meeting. For the periods at issue, the management fee was $9,600 per year for Bay Shore; for Chandler House, the management fee began at $1,400 for 1998 through 2000 and rose to $2,200 for 2001 and 2002. The fee was paid out of the condominium fees collected from all owners of the condominiums, irrespective of whether the owner rented his or her individual unit.

In addition to its services on behalf of the Associations, appellant also contracted individually with a number of condominium owners to facilitate the rental of the owner's condominium. Appellant had no authority to rent the condominiums without approval from the individual owners. Some of the condominiums were not rented at all; certain owners chose not to rent and preferred that their condominium remain vacant when they were not there. Another condominium owner was retired and lived in his condominium year round. Other owners chose to rent only during summer months. Unit owners were free to rent their units on their own or to engage a broker or agent other than appellant.

The rental price of each condominium was decided solely by the condominium's owner. There was no standard pricing scheme that applied uniformly to all condominiums. Appellant had no authority to dictate behavior by renters; the individual owners created rules specific to their own condominiums, such as whether to permit smoking indoors or whether pets were allowed.

Appellant maintained a website and produced a brochure containing information about the rental of individual condominium units at Bay Shore and Chandler House. Appellant also employed individuals to clean the condominium units that were rented. Payment of these expenses came out of the commission paid to appellant by the condominium owners that rented their units. For the periods at issue, the commission was 15 percent of the rent.

Prior to the periods at issue, during the years 1995 through 1997, Ms. Maguire and Ms. Gordon operated Hargood House as a duly licensed motel. There were signs on each building identifying them as being part of Hargood House, as well as "vacancy/no vacancy" signs. They made all decisions concerning the operation of Hargood House as a motel and performed virtually all of the services necessary to operate the property as a motel. During the 1995-1997

time period, the Provincetown Board of Health issued motel licenses for the properties pursuant to G.L. c. 140, § 32B and Ms. Maguire and Ms. Gordon paid the room occupancy excise for all periods. The Board of Health also issued a motel license for Chandler House for 1997, although its use between its March 26, 1997 acquisition by Ms. Maguire and Ms. Gordon and the sale of individual condominium units beginning in December of 1997 is unclear on the present record.

By 1998, Ms. Maguire and Ms. Gordon had converted all of the subject properties into individually owned condominiums, which they sold to individual unit owners. After the condominium conversion and subsequent sale of condominiums in the subject property, appellant, through Ms. Maguire and Ms. Gordon, provided services that were limited to managing the real estate on behalf of the individual condominium owners and facilitating the rental of some of the condominium units for varying periods at the request of certain owners. Appellant did not obtain motel licenses for the subject properties in 1998 and did not pay room occupancy excise for 1998. Although 1998 was part of the audit period, the Commissioner made no assessment of room occupancy excise for 1998. For the periods at issue, appellant applied for and was granted motel licenses,

either out of “force of habit” from the period when the properties were operated as motels or a mistaken belief that a motel license was required.

During the periods at issue, appellant performed the same services on behalf of the Associations and the individual condominium owners as it did for 1998. However, because appellant obtained motel licenses for each building, notwithstanding individual ownership of the condominiums, the Commissioner assessed room occupancy excises for each of the periods at issue.

After speaking to a tax professional and an individual with the Department of Revenue, appellant determined in 2003 that it was not required to obtain motel licenses for the subject properties. Instead, appellant was informed that the individual condominium owners should secure renters certificates from the Provincetown Board of Health. Accordingly, beginning with 2003, appellant has not sought a motel license and the Commissioner has not assessed room occupancy excise for any periods during or after 2003, despite the fact that appellant’s services during the period at issue were the same as its services in 2003 and thereafter.

Additionally, appellant was providing similar rental services for properties located at 77 and 479 Commercial

Street during the periods at issue. However, because those properties were not listed on the motel licenses obtained by appellant for the periods at issue, appellant was not assessed a room occupancy excise for those properties.

According to the testimony of the licensing agent for the Town of Provincetown, individually owned condominiums rented throughout the year required a motel license only if they are centrally managed. In the absence of centralized management, the town issued renter certificates to the condominium owners in lieu of the motel licenses. The rental of individual condominium units by their owners pursuant to a renter certificate was not subject to the room occupancy excise.

On the basis of all of the above facts, the Board found that the condominium units were not centrally managed. The services that appellant performed for the Association were related to the management of the real estate, not the rental of condominium units or the operation of a "motel." These services would have been performed even if all of the units were owner-occupied year round and never rented.

Further, the services appellant performed on behalf of some of the condominium owners in facilitating the rental of their units was on a case-by-case basis depending on the

individual requests and wishes of the owners. There were no rules or guidelines of uniform applicability regarding the rental of units, other than appellant's commission for facilitating the rental. Accordingly, the Board found and ruled that appellant was not operating a motel but was acting as the agent of the Associations in managing real estate and as the agent of some of the condominium owners in facilitating the rental of their units.

For the reasons detailed in the following Opinion, the Board found and ruled that the Commissioner erroneously assessed room occupancy excise against appellant. Accordingly, the Board issued a decision in favor of appellant and granted a full abatement in the amount of $286,705.02 plus statutory additions.

OPINION

Pursuant to G.L. c. 64G, § 3, a room occupancy excise is "imposed upon the transfer of occupancy of any room or rooms in a bed and breakfast establishment, hotel, lodging house, or motel in this commonwealth by any operator at the rate of five per cent of the total amount of rent for each such occupancy."

Moreover, G.L. c. 64G, § 3A permits individual cities or towns to collect an additional four percent room

occupancy excise for the same transfer of occupancy subject to the state excise under § 3. The subject assessment includes both the state excise under § 3 and the local excise under § 3A.

Appellant is liable for the subject excises if, during the periods at issue, there was: (1) a transfer of occupancy; (2) of a room or rooms in a "motel"[1] as defined by G.L. c. 64G, § 1(e); (3) by an "operator" as defined by G.L. c. 64G, § 1(f). The parties agree that the first requirement was met in all instances.

Regarding the second requirement, a "motel" is defined as "any building or portion thereof . . . in which persons are lodged for hire with or without meals and which is ***licensed or required to be licensed*** under the provisions of section thirty-two B of chapter one hundred and forty." G.L. c. 64G, § 1(e) (emphasis added). The issue raised in the present appeal is whether the subject properties were "licensed or required to be licensed."

The power to issue a motel license is vested in the local board of health for any given city or town. G.L. c. 140, § 32B. In Provincetown, individually owned condominiums, rented throughout the year, require a motel

[1] The parties agree that neither Chandler House nor Bay Shore was a "bed and breakfast establishment, hotel or lodging house" for purposes of the excise.

license only if they are centrally managed. In the absence of centralized management, the town issues renter certificates to the individual owners and not a motel license.

As detailed above, the Board found that the subject properties were not centrally managed. Appellant's services with respect to the rental of the individual condominium units – the transfer of occupancy that is the subject of the excise – were not uniform and were subject to the particular desires of those owners who wished to rent their condominiums. Appellant had no authority to make decisions autonomously without approval from the individual owners. Only the owners could decide whether to rent their condominiums, whether to hire appellant, another agent or no agent, the duration of any rental period, and the amount of rent to charge. There were no policies, other than appellant's commission, that applied uniformly to the rental of the condominiums or that were controlled by appellant. Accordingly, the Board ruled that the subject properties were not "required to be licensed" for purposes of § 1(e).

In his assessment of appellant, as well as his Brief and a published letter ruling, the Commissioner has made clear that the Commissioner defers to local boards of

health to determine whether a facility is "required to be licensed" as a motel. The Commissioner did not assess room occupancy excise for 1998, for the periods beginning in 2003, or for the renting of condominiums at 77 and 479 Commercial Street, despite the fact that appellant's services in those instances were the same as the services giving rise to the subject assessment. It is therefore apparent that the subject assessment was based on the existence of a motel license for the subject properties for the periods at issue.

Further, the Commissioner argued that "[t]he town of Provincetown has the final say as to whether an accommodation is licensed or required to be licensed, and is hence subject to the c. 64G excise." Commissioner's Brief at p. 7. Because Provincetown issued a motel license for the periods at issue, the Commissioner argued that the town made a binding determination that the subject property was "required to be licensed," nothwithstanding the fact that it "determined," based on the same facts, that the subject property was not required to be licensed as a motel for the year preceding and the years succeeding the periods at issue.

In Letter Ruling 95-12, the Commissioner has also recognized that the question of whether a property is a

"motel" for purposes of the room occupancy excise is based on the "determination" of the local board of health.

> If the local board of health determines that the property must be licensed as a "motel". . . the premises fall within the definition of a "motel" for purposes of Chapter 64G. . . . Conversely, if the local board of health determines that the property need not be licensed under the provisions of G.L. c. 140, § 32B, the property does not fall within the definition of a "motel" for purposes of G.L. c. 64G. In such cases, the room occupancy excise does not apply.

On the present record, it is not clear that the Provincetown Board of Health "determined" that the subject property required a motel license. Rather, it appears that, because of habit or misinformation, appellant mistakenly applied for motel licenses, and the Board of Health, either without investigation or because it was familiar with the property from its prior operation and licensing as a motel, mistakenly issued the motel licenses for the periods at issue. Further, despite the fact that appellant's services remained unchanged between 1998 and the hearing of these appeals, appellant did not apply for, and the town did not require, a motel license for the subject properties for 1988 and for 2003 and beyond, and, for at least some of the periods after the periods at issue, the town sent renter certificates to the individual

condominium unit owners. Accordingly, for all of the above reasons, the Board found and ruled that the Board of Health did not "determine" that, and the subject properties were not, "required to be licensed" as motels for the periods at issue.

Because the subject properties were not "required to be licensed," the issue becomes whether property mistakenly and erroneously "licensed" as a motel is nevertheless a "motel" for purposes of the room occupancy excise under G.L. c. 64G, § 3. "[T]axing statutes are to be construed strictly against the taxing authority, and all doubts resolved in favor of the taxpayer." ***DiStefano v. Commissioner of Revenue***, 394 Mass. 315, 317 (1985). Statutory interpretation requires the Board to, "ascertain the intent . . . from all its parts and from the subject matter to which it relates, and [to] interpret the statute so as to render the legislation effective, consonant with sound reason and common sense." ***The Harvard Crimson, Inc. v. President & Fellows of Harvard College***, 445 Mass. 745, 749; see also ***Champigny v. Commonwealth***, 422 Mass. 249, 251 (1996); ***Pentucket Manor Chronic Hosp., Inc. v. Rate Setting Comm'n***, 394 Mass. 233, 240 (1985); ***Tilton v. Haverhill***, 311 Mass 572, 577-578 (1942).

Read in the context of these principles, the language "licensed or required to be licensed" cannot mean that a property mistakenly and incorrectly licensed is nonetheless a motel for purposes of the room occupancy excise. Rather, the language means that not only properly licensed motels, but also properties that should be licensed but are not, are subject to the excise.

The legislative history of G.L. c. 64G, § 1 supports this interpretation. When first enacted, the room occupancy excise was imposed only on properties that were actually licensed under G.L. c. 140. *See* St. 1966, c. 14, § 26. One year later, by legislation entitled "An Act Extending The Room Occupancy Excise Law To Include Rooms In . . . Motels Which Are Required To Be Licensed But Which Are Not Licensed As Such," the Legislature added the "or required to be licensed" language to § 1. *See* St. 1967, c. 745, § 1(c). By adding the phrase "or required to be licensed," the Legislature sought to expand the room occupancy excise to unlicensed motel operators, thereby equating the tax treatment of motel operators that secured the necessary license with those conducting the same business without the necessary license. Imposing significant tax liability on the basis of a mistakenly applied for and erroneously issued license would not be

consistent with the purpose of the statute and nothing in the language of the statute suggests that the Legislature intended such a result. Accordingly, the Board ruled that the subject properties were neither properly licensed nor required to be licensed and, therefore, they were not "motels" for purposes of G.L. c. 64G, §§ 1 and 3.

As a separate ground supporting the Board's Decision, the Board found and ruled that appellant was not an "operator" that transferred occupancy of a room or rooms in a motel for purposes of G.L. c. 64G, §§ 1 and 3. An operator is defined as "any person operating a . . . motel in the commonwealth including, but not limited to, the owner or proprietor of such premises the lessee, sublessee, mortgagee in possession, licensee or any other person otherwise operating such . . . motel." G.L. c. 64G, § 1(f). Appellant is not the owner, proprietor, lessee, sublessee, mortgagee in possession or licensee of any of the condominiums at issue. Accordingly, in order to be an "operator," appellant must qualify as an "other person operating" a motel.

It is a well-established rule of statutory construction that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to

those objects enumerated by the preceding specific words." ***Banushi v. Dorfman,*** 438 Mass. 242, 244 (2002), citing 2A N.J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.17, at 273-74 (6th Rev. 2000). The specific terms used in the statute to define operator denote ownership, the legal right to use for one's own account, or the ability to control the use of the property. The evidence of record, particularly the testimony of appellant's principals and the owners of condominiums in the subject properties, established that appellant did not or could not control or dictate: the use of the individual condominium units; whether and on what terms the units would be rented; whether appellant, another agent, or no agent would be involved in facilitating the rental of the units; or the appearance of the units. Appellant could only assist in the rental of the unit when and in the manner indicated by the owner of that unit.

The Board has previously found that the agent of the owner of a facility was not an "operator" of the facility for purposes of imposing the room occupancy excise. ***Harrison Conference Services of Massachusetts, Inc. v. Commissioner of Revenue***, Mass. ATB Fidnings of Facts and Reports 1984-18; *aff'd* ***Harrison Conference Services of Massachusetts, Inc. v. Commissioner of Revenue,*** 394 Mass. 21.

In ***Harrison Conferences Sevices***, a telephone company engaged Harrison Conference Services of Massachusetts, Inc. ("Harrison"), to maintain and operate a training center and conference facility ("facility") for the employees of the telephone company. Harrison's primary responsibility was to provide meals and housing for those attending the facility as students or conferees. Harrison procured all necessary licenses and permits for the facility and performed certain managerial functions for a flat fee. The Commissioner believed that Harrison's involvement was sufficient to deem it the facility's operator, and consequently assessed excise on the meals and rooms furnished by Harrison.

The Board concluded that there was no transfer of occupancy for purposes of the room occupancy excise and, therefore, assessment of the excise to any party was inappropriate. In its analysis, however, the Board clarified that the agent of a property owner is not an "operator" for purposes of assessing room occupancy excise. Rather, the owner is deemed the "operator." ***Id***. at 1984-25 ("the contract between the telephone company and Harrison and their course of dealings demonstrate that Harrison's duties are subject to the telephone company's approval and control."). As such, the Board concluded that the

telephone company would have been deemed the “operator” of the facility if the room occupancy excise had applied. ***Id***. at 1984-29-30.

In the instant appeal, the Board found that appellant consistently acted as the agent of the individual condominium owners during the periods at issue. Appellant was hired individually by the owners, not by the Associations, to assist in renting the condominiums. The individual owners retained ultimate authority over their condominiums at all times. Appellant had no power to bind any of the owners through contract, nor could appellant make decisions regarding the condominiums without approval from the respective owners. Appellant merely marketed and arranged rentals of the condominium units according to the guidelines and rental price set forth by each individual owner. Accordingly, appellant served only as the rental agent of those individual owners who chose to rent their condominium units and was not an “operator” of a motel.

For all of the foregoing reasons, the Board ruled that appellant was not an "operator" liable for the room occupancy excise and that the subject properties were not a "motel" for purposes of the room occupancy excise. Therefore, the Board found and ruled that the Commissioner improperly assessed the subject excise. Accordingly, the Board issued a decision for the appellant in this appeal.

THE APPELLATE TAX BOARD

By:_____
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: _____
Clerk of the Board