

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-03(15)S
Sales Tax
April 4, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S010412B

On April 12, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from ExecuStay Corporation, 7595 Rickenbacker Drive, Gaithersburg, MD 20879. Petitioner, ExecuStay Corporation, furnished additional information with respect to the Petition on July 9, 2002 and August 29, 2002.

The issue raised by Petitioner is whether furnished residential apartments provided by Petitioner are considered hotels for purposes of the sales tax on hotel occupancies.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner provides furnished residential apartments to executives and other business travelers. The apartments provided by Petitioner are located in residential apartment buildings. They include the features found in most furnished apartments: furniture, a kitchen, a bathroom, bedrooms, etc. The contracts with the tenant generally provide for weekly maid service. The maid service is never performed or agreed to be performed more frequently than once a week. There is no separate or additional charge for the maid service, and if for personal privacy reasons the tenant does not want a maid having access to the apartment and the service is not provided there is no reduction in the rental fee charged. While Petitioner may provide for weekly maid services in many of its rented apartments, most of the other services normally associated with a hotel are not provided to the tenants. For instance, the tenants are responsible for toiletries, laundry, etc. While some apartment complexes provide a doorman, valet services, and washer and dryer units, such amenities are not provided by Petitioner. There is no restaurant or similar food service available to tenants. Moreover, Petitioner does not employ any individuals on the premises of these apartments to service the tenants or the apartment units. Telephone and cable television services are provided, however, as part of Petitioner's standard package.

Petitioner represents that the standard customer agreement entered into with its tenants is based on a standard landlord/tenant agreement. Tenants are required to spend at least one month in the apartment. The term of the agreements is usually anywhere from one month to one year or longer. The landlord mails a key to the tenants for use during the lease term. There is no front desk on the premises where tenants may check in and check out.

The tenant is required to give Petitioner a written Notice of Intent to Vacate at least 15 days prior to the termination of the tenancy. Similarly, in the event the tenant must extend the term beyond the period specified in the lease, the tenant must give Petitioner a written Notice to Extend. Petitioner requires 30 day advance notice for any extensions. Like most landlords, Petitioner generally requires the tenant to provide a security deposit, which is fully refundable if certain terms

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are met. The tenant is also subject to certain "Rental Policies and Procedures" which, among other things, provide that the tenant is responsible for any cleaning or damages to the apartment and/or furnishings beyond normal wear and tear, create rules for "holdover tenancies," and mandate that the tenant is responsible for the maintenance of smoke detectors and fire extinguishers. Under the Rental Policies and Procedures, tenants may sublet the apartments, and make alterations, installations, repairs, or redecorations, with the written permission of Petitioner. In the event Petitioner wants to evict a tenant for nonpayment of rent or for any other reason, it must institute formal eviction proceedings to compel the removal of the tenant.

Petitioner's customers may sign up as participants in the Marriott Rewards Program and receive "points" for money spent with Petitioner. Participants receive points not only for staying at Marriott participating hotels, but also for using a Marriott credit card, shopping at Sky Mall, renting cars from Hertz and using their Diner's Club card. Participants can redeem these points for free hotel stays or vacations at more than 1,600 Marriott hotels and resorts around the world.

Petitioner provides these apartments in approximately 200 cities across the United States, Canada and England. Some of these apartments are located in New York City.

Applicable Law and Regulations

Section 1105(e) of the Tax Law imposes sales tax on "[t]he rent for every occupancy of a room or rooms in a hotel in this state, except that the tax shall not be imposed upon (1) a permanent resident, or (2) where the rent is not more than at the rate of two dollars per day."

Section 527.9 of the Sales and Use Tax Regulations provides, in part:

(a) Imposition. A sales tax is imposed on every occupancy of any room or rooms in a hotel, motel or similar establishment at the combined statewide and local sales tax rate in effect at the situs of such establishment, except that the tax shall not apply to (1) the charges for occupancy by a permanent resident, or (2) where the charge is \$2 or less per day.

(b) Definitions. As used in this section, the following terms shall mean:

(1) Hotel. A building or portion of it, which is regularly used and kept open for the lodging of guests. The term hotel includes but is not limited to an apartment hotel, a motel, bungalow or cottage colony, boarding house or club, whether or not meals are served.

* * *

(e) Nontaxable occupancy. The following occupancies are not subject to tax on hotel occupancy:

* * *

(5) Bungalows. A lessor of bungalows, who rents bungalows which are furnished living units limited to single-family occupancy, is not the operator of a hotel. Therefore, the rents for the occupancy of such bungalows are not taxable, provided:

(i) no maid, food or other common hotel services, such as entertainment or planned activities, are provided by the lessor; and

(ii) the rental is for at least one week.

The furnishing of linen by the lessor with the rental of a bungalow, without the service of changing the linen, does not alter the nontaxable status of the rental charges.

Opinion

Juliana Motel, Adv Op Comm T&F, May 23, 1991, TSB-A-91(44)S, concluded that the petitioner's rental of housekeeping and efficiency units for a term of at least one week was not subject to the imposition of sales tax in accordance with Section 527.9(e)(5) of the Sales and Use Tax Regulations, if no maid, food or other common hotel services or planned activities were provided to the occupants.

KPMG Peat Marwick, Adv Op Comm T&F, February 13, 1991, TSB-A-91(21)S, concluded that XYZ's leases and subleases of furnished apartments to lessees/tenants for periods ranging from one month to one year or longer, where tenants could subscribe to an optional package from XYZ for light cleaning, supplies, linen and laundry, were not subject to the sales tax on hotel occupancy. The opinion concluded that unlike hotels, motels, apartment hotels or similar establishments as defined under Section 1101(c)(1) of the Tax Law and Section 527.9(b)(1) of the Sales and Use Tax Regulations, XYZ did not offer lodging or occupancy to transients on a regular or daily basis, but rather XYZ rented real property and entered into valid landlord and tenant relationships with the lessees/tenants.

In this case, Petitioner provides furnished residential apartments to executives and other business travelers. The apartments provided by Petitioner are located in residential apartment buildings. They include the features found in most furnished apartments: furniture, a kitchen, a bathroom, bedrooms, etc. Petitioner may provide for weekly maid services in many of its rented apartments, as well as telephone and cable television services, but no other common services

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associated with a hotel. The standard rental agreement entered into between Petitioner and its tenants provides that tenants are required to spend at least one month in the apartment. The term of the agreements is usually anywhere from one month to one year or longer. The landlord mails a key to the tenants for use during the lease term. Tenants do not check in or out at a front desk. Moreover, tenants are required to give Petitioner written notice at least 15 days prior to the termination of the tenancy. Similarly, in the event the tenant must extend the term beyond the period specified in the lease, the tenant must give Petitioner a written notice to extend the lease 30 days in advance. Tenants are also required to provide a security deposit, which is fully refundable if certain terms are met, and are responsible for the maintenance of smoke detectors and fire extinguishers. Tenants may sublet their apartments, and make alterations, installations, or repairs, with written permission from Petitioner. In the event Petitioner wants to evict a tenant for nonpayment of rent or for any other reason, it must institute formal eviction proceedings to compel the removal of the tenant.

In accordance with Juliana Motel, supra, and KPMG Peat Marwick, supra, the lease by Petitioner of furnished apartments to tenants for periods ranging from one month to one year or longer, as described herein, does not fall within the ambit of a hotel subject to sales tax under Section 1105(e) of the Tax Law. The fact that Petitioner may provide maid service on a weekly basis is not sufficient to consider Petitioner's rental of apartments to be the operation of a hotel. The provision of Marriot "reward points" to tenants for money spent with Petitioner is a benefit frequently associated with a hotel stay. However, Marriot "reward points" are similarly awarded persons based upon transactions completely disassociated with occupancy at a Marriot Hotel or a tenancy with Petitioner. On balance, the information submitted by Petitioner indicates a landlord tenant relationship with its customers. Therefore, Petitioner's rentals of furnished apartments are not subject to sales tax.

DATED: April 4, 2003

/s/
Jonathan Pessen
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Technical Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.