

Amendments Affecting the Application of Sales Tax to Rent Received for Hotel Occupancy by Room Remarketers

Legislation was recently enacted (Chapter 57 of the Laws of 2010), effective September 1, 2010, to ensure that state and local sales taxes (sales tax) are paid on the full amount charged to customers by businesses such as Web-based travel companies (hereinafter room remarketers) for hotel occupancy in New York State. While this legislation applies to the Hotel Room Occupancy Tax imposed and administered by New York City, it does not apply to locally imposed and administered occupancy taxes (local bed taxes). The information in this memorandum only applies to the State and local sales taxes administered by the Tax Department.

The new law defines a *room remarketer* as “a person who reserves, arranges for, conveys, or furnishes occupancy, whether directly or indirectly, to an occupant for rent in an amount determined by the room remarketer, directly or indirectly, whether pursuant to a written or other agreement.” If a business meets the definition of a room remarketer, its ability or authority to reserve, arrange for, convey, or furnish occupancy, directly or indirectly, and to determine rent therefore, is referred to as the ‘*rights of a room remarketer*’.

This new law also provides that a room remarketer is not a permanent resident with respect to a room that the remarketer has furnished to its customer. For information about the permanent resident exclusion, see TSB-M-03(1)S, *Sales Tax on Rent for Hotel Occupancy and the Exception for Permanent Residents*.

Businesses, such as travel agencies, that reserve rooms on behalf of their customers and do not have the right to determine the amount of rent that their customer pays for the room (i.e., the rent is fixed and determined by the hotel, and is not allowed to be marked-up by the business that reserves the room on behalf of its customer), **are not** room remarketers for purposes of this new law.

Background

Sales tax is imposed on the rent for every occupancy of a room or rooms in a hotel in New York State. In addition, a hotel unit fee in the amount of \$1.50 per unit, per day (NYC \$1.50 fee) is imposed by the State on every occupancy of a unit in a hotel located within New York City. Under the Tax Law, every operator of a hotel is a person required to collect the sales tax imposed on the rent for hotel room occupancy, and, where applicable, the NYC \$1.50 fee. (See section 1131(1) of the Tax Law.)

Prior to these amendments, sales tax was required to be collected **only** on the rent paid by the room remarketers to the hotel operators. Room remarketers were not required to collect sales tax on the rent paid to them by their customers, because room remarketers did not qualify as operators of a hotel under the Tax Law.

Effect of new legislation on rent for occupancy paid and received by room remarketers

Under the new law, a room remarketer constitutes an operator of a hotel to the extent that the room remarketer has acquired the rights of a room remarketer with respect to a room or rooms in a hotel. In addition, rent subject to the sales tax on occupancy of a room or rooms in a hotel now includes any service or other charge or amount paid as a condition of occupancy to a room remarketer. Accordingly, the full amount charged by a room remarketer to its customer for the right to occupy a room in a hotel in New York State constitutes rent for occupancy of a room in a hotel, and is subject to state and local sales tax. Furthermore, since the new law provides that in these circumstances, a room remarketer is an operator of a hotel, the room remarketer must collect the sales tax, and where applicable, the NYC \$1.50 fee from its customer, and remit the amount collected to the Tax Department.

The new legislation provides that the full amount paid by a room remarketer to a hotel operator, for the ability or authority to reserve rooms in a hotel, to convey the rights of occupancy of the rooms to their customers, and to determine the amount of rent the room remarketer charges its customers for occupancy of the rooms, constitutes rent for hotel occupancy subject to sales tax, and, where applicable to the \$1.50 per unit, per day fee imposed in New York City (NYC \$1.50 fee).

Refund or credit for sales tax and NYC unit fee paid by room remarketer

The new law provides that a room remarketer is allowed a refund or credit against the sales tax and, where applicable, the NYC \$1.50 fee. The amount of the refund or credit is the New York state and local sales tax on rent for hotel occupancy, and, where applicable, the NYC \$1.50 fee, paid to the operator of a hotel by a room remarketer.

However, in order to qualify for the refund or credit for any sales tax quarterly period, the room remarketer must, for that quarter:

- be registered as a person required to collect sales tax under section 1134 of the Tax Law and must collect sales tax on rent for hotel occupancy, and, where applicable, the NYC \$1.50 fee, from its customers; and
- furnish the *Certificate of Authority* number of the operator of the hotel to whom the room remarketer paid the tax, if required on the room remarketer's application for refund or credit, or if otherwise requested by the Tax Department. Note: Hotel operators are required to provide their *Certificate of Authority* numbers to the room remarketers.

An application for refund or credit must be filed by a room remarketer using Form AU-11, *Application for Credit or Refund of Sales or Use Tax*, within three years after the date the tax was payable to the Tax Department by the operator of the hotel to whom the tax was paid by the room remarketer. If an application for credit has been filed, the room remarketer may immediately take the credit on the return that is due coincident with the application for credit, or immediately after the room remarketer files the application for credit. However, the taking of the credit on the return is deemed to be part of the application for credit. More detailed information on the procedures for claiming refunds and credits will be provided in the near future.

The following example illustrates the application of the amendments described in the preceding paragraphs of this memorandum.

***Example:** XYZ.com is an Internet-based company that provides its customers with access to various travel services, including reserving and furnishing hotel occupancy. XYZ.com has a contract with ABC Hotel, located in New York City, which enables XYZ.com to reserve rooms in ABC Hotel on behalf of XYZ.com's customers. Under the contract, XYZ.com agrees to pay ABC Hotel \$200 per night for each room reserved by one of its customers through XYZ.com. The contract provides that XYZ.com may determine the amount it charges its customers when one of its customers reserves a room using XYZ.com's services.*

On September 1, 2010, Mr. T reserves a room for a one night stay at ABC Hotel through XYZ.com's Web site. Mr. T agrees to pay \$275 for the room, which consists of a per night room charge of \$250 per night plus a \$25 per night service charge.

ABC Hotel must collect sales tax from XYZ.com for the room in the amount of \$17.75 ($\$200 \times .08875$, the State and local sales tax rate in NYC) and \$1.50 representing the NYC \$1.50 fee. As a room remarketer, XYZ.com must collect sales tax from Mr. T in the amount of \$24.41 ($\$275 \times .08875$) and \$1.50 representing the NYC \$1.50 fee for the one night stay.

Assuming XYZ.com was registered for sales tax purposes and properly collected the sales tax and NYC \$1.50 fee from Mr. T, and XYZ.com furnishes ABC Hotel's Certificate of Authority number, as well as any other information required by the refund application, XYZ.com will be eligible to claim a refund or credit of \$19.25, which is the total amount paid to ABC Hotel by XYZ.com for sales tax and the NYC \$1.50 fee.

Treatment of hotel occupancy when sold with nontaxable products or services

The amendments also clarify that where occupancy of a room or rooms in a hotel is sold together with property, services, amusement charges, or any other items that are not subject to sales tax (other nontaxable sales) for one charge, the one charge is subject to sales tax as rent for hotel occupancy. However, the amendments further clarify that if the hotel operator, including a room remarketer, gives a sales slip, invoice, receipt, or other statement to the occupant, which states the amount of rent for occupancy, separately from the nontaxable charges, only the separately stated rent for occupancy is subject to sales tax. This is so **only if** the separately stated rent for occupancy is reasonable in relation to the amount charged for the nontaxable sales.

Sales tax registration

Under the new law, room remarketers are deemed to be operators of a hotel, and are required to register for sales tax purposes as persons required to collect sales tax under section 1134(a) of the Tax Law, by applying for a *Certificate of Authority*. Accordingly, room remarketers who are reselling occupancy of rooms in hotels located in New York State on or after September 1, 2010, must register for sales tax purposes and must apply for a *Certificate of Authority*. A room remarketer can register for sales tax purposes by using the *New York State Online Permit Assistance and Licensing* Web site at www.nys-permits.org, or by filling out

Form DTF-17, *Application to Register for a Sales Tax Certificate of Authority*, and sending it to the address listed on that form. See also, Tax Bulletin *How to Register for New York State Sales Tax* (TB ST-360).

Once registered for sales tax purposes, a room remarketer must collect sales tax and other required fees, file returns, remit the amounts collected and keep records. For more information about these requirements and responsibilities of a person required to collect sales tax, see Tax Bulletin *Filing Requirements for Sales and Use Tax Returns* (TB-ST-275) and Tax Bulletin *Record-Keeping Requirements for Sale Tax Vendors* (TB-ST-770) and Publication 750, *A Guide to Sales Tax in New York State*, which are available on the Tax Department's Web site at www.nystax.gov.

In addition, a room remarketer who rents hotel occupancy to certain individuals and organizations that claim exemption from sales tax, must obtain a properly-completed exemption document or other required documentation from the individual or organization to allow them to purchase the hotel occupancy exempt from sales tax. See Publication 848, *A Guide to Sales Tax for Hotel and Motel Operators* and Tax Bulletin *Exemption Certificates for Sales Tax* (TB-ST-240).

Effective date

The amendments described in this memorandum take effect on September 1, 2010 and apply to occupancies occurring on or after that date, regardless of whether the occupancy is under a reservation, contract or other agreement entered into before September 1, 2010.

NOTE: A TSB-M is an informational statement of existing department policies or of changes to the law, regulations, or department policies. It is accurate on the date issued. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in department policies could affect the validity of the information presented in a TSB-M.