STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
HELMSLEY ENTERPRISES, INC., AS SUCCESSOR IN INTEREST To HOTEL ST. MORITZ, INC.	:	DECISION
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1982 through May 31, 1985.	:	

Petitioner Helmsley Enterprises, Inc., as successor in interest to Hotel St. Moritz, Inc., 60 East 42nd Street, New York, New York 10017 filed an exception to the determination of the Administrative Law Judge issued on August 17, 1990 with respect to its petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1982 through May 31, 1985 (File No. 800898). Petitioner appeared by Hutton & Solomon (Stephen L. Solomon, Esq., of counsel). The Division of Taxation by appeared by William F. Collins, Esq. (Anne W. Murphy, Esq., of counsel).

Petitioner submitted a brief. The Division of Taxation did not submit a responding brief but rather incorporated by reference the Memorandum of Law submitted for the hearing below. Oral argument, at the request of petitioner, was heard on January 30, 1991.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner's purchases of furniture, fixtures and certain recurring expenses were excluded from sales tax as purchases made by a hotel operator for resale to its customers.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set

forth below.

Petitioner and the Division of Taxation ("Division") entered into an initial stipulation consisting of 16 numbered paragraphs and attached exhibits. The parties later entered into a supplemental stipulation consisting of three numbered paragraphs plus an attached exhibit. Thesupplemental stipulation effectively amended the original stipulation. It substituted "Helmsley Enterprises, Inc., as successor in interest to Hotel St. Moritz, Inc.", as petitioner. It substituted a new paragraph for paragraph 8 of the original stipulation. Finally, it added an additional paragraph. The original stipulation and supplemental stipulation are substantially incorporated into this determination as Findings of Fact "2" through "13" and Appendices I and II.

On September 20, 1985, the Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1982 through May 31, 1985, asserting tax due of $226,034.27, plus interest.

Petitioner filed a petition protesting the notice of determination on October 7, 1985, and the petition was deemed perfected on September 10, 1986. The Division filed an answer to the petition on November 25, 1986.

Petitioner is engaged in the operation of a hotel in New York City. In 1986, the Division conducted an examination of petitioner's books and operations to verify its sales and use tax returns for the period June 1, 1982 through May 31, 1985. On March 18, 1985, petitioner executed a consent to the Division's employment of a test period method to audit sales and recurring expense purchases; the consent provided, in relevant part:

> "The Department of Taxation and Finance representative, Steven Saskin, has advised that the records available for audit are adequate and sufficient to warrant an audit method that utilizes all records within the audit period. In lieu of such an audit, I elect utilization of a representative test period audit method to determine any sales or use tax liability.... Agreement with the test period audit method does not in any way constitute a consent to the audit findings or preclude the protest of the audit results on grounds such as the particular test period selected, the inclusion of certain transactions within the test, the taxability of certain transactions or the method of projecting the results of the test period findings."

On audit, the Division determined that petitioner properly collected and remitted to the

Division all sales taxes due on the total amounts charged to its guests. The Division determined tax due on the following items, as described in the audit workpapers:

Transaction	Tax Due
Exempt restaurant sales	$ 307.66
Errors restaurant sales	2,857.31
Fixed asset purchases	67,225.72
Sale of fixed assets	16,293.75
Expense purchases from Deco Purchasing	128,864.83
Expense purchases from other vendors	10,485.00
	$226,034.27

The portion of the assessment at issue is for sales tax determined by the Division to be due on those items described as fixed asset purchases or expense purchases from either Deco Purchasing or from other vendors. These items consist of the following:

Furnishings With A
Useful Life More Than One Year

1. Beds
2. Bed Frames
3. Bed Headboards
4. Bed Springs
5. Lamp Shades
6. Table Lamps
7. Mattresses
8. Blankets
9. Carpets
10. Desks
11. Luggage Racks
12. Tables
13. Television Sets
14. Draperies
15. Venetian Blinds
16. Ash Trays
17. Candlesticks
18. Mirrors
19. Ice Buckets
20. Floor Lamps
21. Pitchers
22. Waste Baskets
23. Table Tops

Furnishings With A
Useful Life Less Than One Year

1. Sheets
2. Pillow Cases
3. Pillows
4. Towels
5. Bath Mats
6. Bath Towels
7. Hangers
8. Wash Cloths
9. Bath Rugs
10. Shower Curtains

Items Supplied For
Use or Consumption By Guests

1. Soap
2. Stationery

The amount of the assessment in issue relating to expense purchases from Deco Purchasing totals $65,923.97, and the amount of the assessment in issue relating to fixed asset purchases totals $26,856.58, pursuant to the six-page schedule identified as Appendix I.

Petitioner does not dispute that portion of the assessment relating to items purchased for use in kitchens, lobbies, hallways, dining rooms or other common areas of the hotel.

Pursuant to the affidavit of Geoffrey E. P. Lerigo, executive vice-president of Helmsley Hotels, Inc., the items of tangible personal property described in Appendix I were purchased by petitioner for the sole purpose of providing such property to its guests for their exclusive use or possession during their occupancy of the hotel room.

Petitioner did not pay sales or use taxes on its purchases of the items described in Appendix I. It is petitioner's position that these items were purchased for resale, as that term is defined in the Tax Law.

The Division's policy is that where there is a lump-sum rental for the license to use both tangible personal property and real property, the full rental charge is taxable. Pursuant to the affidavit of Stephen L. Solomon, this policy has been applied by the Division to tax the full lump-sum rental charge in cases where taxpayers have rented theatre facilities on a short-term, hourly basis.

On March 30, 1987, petitioner remitted full payment of the tax and interest assessed by the statutory notice in issue here. Petitioner thereafter pursued its protest as a timely claim for refund of tax and applicable interest.

The parties agree that when a final decision is reached with respect to the issues raised herein, that decision shall be binding on each of the matters identified in Appendix II, as if such decision had been rendered with respect to such issues in each of the cases identified.

OPINION

In the determination below, the Administrative Law Judge held that the regulations in 20 NYCRR 527.9(i)(2) govern the purchases of furnishings, equipment and supplies made by hotels for the use or consumption of hotel guests. Relying on Celestial Food of Massapequa

Corp. v. New York State Tax Commn. (63 NY2d 1020, 484 NYS2d 509) and Matter of Burger King v. State Tax Commn. (51 NY2d 614, 435 NYS2d 689), the Administrative Law Judge determined that all such furnishings were items of overhead and, hence, were not purchased for resale. The Administrative Law Judge rejected the "hybrid transaction" theory petitioner constructed based on Burger King. The Administrative Law Judge also distinguished Matter of Levine v. State Tax Commn. (144 AD2d 209, 534 NYS2d 522) from the instant case. She stated that in Levine the "customer was granted every right of ownership" to the flowers purchased whereas, here, the hotel guest's purported license to use a hotel's furnishings and supplies was narrowly restricted. The Administrative Law Judge further determined that the imposition of sales tax on petitioner's purchases of room furnishing and supplies is not an impermissible pyramiding of taxes.

On exception, petitioner argues that to the extent that its guests have obtained a license to use the furniture, furnishings and consumables in the hotel room by paying a lump-sum charge, the hotel should be deemed to have "sold" these items to them. Hence, petitioner contends that the items were purchased for resale. Next, petitioner sought to characterize the furnished items as "critical elements" of a "hybrid transaction" involving the delivery of goods and services to its guests; so viewed, it is maintained that the purchases of the items under dispute were "for resale as such." Finally, petitioner argues that the imposition of sales tax on its purchases of these items is impermissible because it amounts to multiple taxation.

In response, the Division asserts that petitioner did not establish that it purchased the furniture, furnishings and consumables at issue for the purposes of resale. It also points out that the regulations in 20 NYCRR 527.9(i)(2)(i)-(iv) specifically provide that such purchases are subject to sales tax. Further, the Division argues that the rental of a room in petitioner's hotel is not a "hybrid transaction." It is the Division's position that such rental entails solely the sale of occupancy rights to the room. Therefore, the argument runs, the purchases of such items are not excluded from tax as purchases for resale. Lastly, the Division asserts that because the tax which the hotel patrons pay relates only to the charge for the right to occupy a room, the

imposition of a tax on purchases of the disputed items does not result in pyramiding of taxes.

We affirm the determination of the Administrative Law Judge.

Tax Law § 1105(a) imposes a sales tax on the receipts from every retail sale of tangible personal property, except as otherwise provided in Article 28. Tax Law § 1101(b)(4)(i) defines a retail sale. This definition begins with the very broad statement that a retail sale is "[a] sale of tangible personal property to any person for any purpose." The definition then excludes very specific transactions from this otherwise all encompassing definition of retail sale. These exclusions are for sales of tangible personal property "(A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five."

Since the purchases at issue here were sales (Tax Law § 1101[b][5]) of tangible personal property (Tax Law § 1101[b][6]) to a person (petitioner) (Tax Law § 1101[a]) for a purpose, under the broad definition of a retail sale (Tax Law §1101[b][4][i]), they were retail sales unless they fall within one of the exclusions.

We can readily determine that the purchases were not within the exclusion provided by section 1101(b)(4)(i)(B) because the tax on hotel occupancy, the service performed by petitioner subject to tax, is imposed by section 1105(e) of the Tax Law. Clause (B) excludes only services subject to tax imposed by section 1105(c).

Therefore, the issue presented in this case is whether the sales of the hotel room furnishings to the hotel were retail sales under Tax Law § 1101(b)(4)(i)(A). It is clear that the purchases are not within that portion of section 1101(b)(4)(i)(A) that excludes property to be resold as a physical component part of tangible personal property. The items at issue did not become part of any tangible personal property that was being sold (cf., Matter of Finch, Pruyn & Co. v. Tully, 69 AD2d 192, 419 NYS2d 232 [where it was concluded that chemicals remaining in the paper from the paper making process were physical component parts of the paper being sold]). Therefore, if the items at issue were not retail sales they must be found to be within that

part of section 1101(b)(4)(i)(A) that excludes sales "for resale as such."

The same exclusion was the focus of the Court of Appeals' analysis in Matter of Burger King v. State Tax Commn. (supra), where the court was deciding whether a restaurant's purchases of wrapping materials for containing the food it sold were purchases at retail within the meaning of section 1101(b)(4)(i) of the Tax Law. The court's approach to construing this exclusion is very instructive. The court did not, as petitioner urges us to do, simply determine whether the food wrappers were being sold to the purchasers of the food. Instead, the court looked to the so-called "container cases" for guidance. The court observed that when a supplier sells containers to a wholesaler or manufacturer which then sells its product packed in these containers either to a retailer or to an ultimate consumer, the containers were found to be sold for "resale as such" (Matter of Colgate-Palmolive-Peet Co. v. Joseph, 308 NY 333, 338; American Molasses Co. of New York v. McGoldrick, 281 NY 269, 273). Based on these cases, the court concluded that the wrappers were being "resold as such" because the wrappers were "not inseparable" from their contents, and thus, were being resold as "containers." In other words, the wrappers were for "resale as such" because they retained their separate identity when sold.

In the instant case, the items at issue did not retain their separate identity in the transaction between petitioner and its customers. Instead, petitioner was in the business of providing overnight accommodation to its patrons, and the items at issue were furnished to the hotel's guests as part of its services. They were originally purchased from the suppliers as separate and distinct articles of tangible personal property. These items were then furnished to the patrons as a component part of an overall package of services. It is clear that the items in dispute were not resold in the form in which they were purchased, namely as original articles of tangible personal property. Thus, we conclude that petitioner did not purchase the furnishings for "resale as such."

This conclusion is consistent with the Division's regulations which, in explaining the resale exclusion, state:

> "Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased . . . the property or services which he has purchased will be considered as purchased for resale . . ." (20 NYCRR 526.6[c][1], emphasis added).

Relying on the court's analysis in Celestial Food, petitioner also contends that the furnishings under consideration were not merely items of overhead that enhance the comfort of the hotel's patron, but instead were "critical elements" purchased for resale to the guests. We are equally unpersuaded by this argument. The court in Celestial Food made it quite clear that only when the items are "necessary to contain the product for delivery can they be considered a critical element of the product sold" (Celestial Food of Massapequa Corp. v. New York State Tax Commn., supra, 484 NYS2d 509, 510, emphasis added). By its very language, the court plainly indicated that the "critical element" test is only applicable to situations involving actual transfer or delivery of a product which requires a container. Here, petitioner was simply selling a service to its patrons; there was no exchange or transfer of goods or products between the hotel and its guests. Moreover, petitioner's argument in favor of enlarging the scope of the "critical element" doctrine to encompass transactions other than those which require the delivery of a container would, in the words of this State's highest court, give rise to "potentially limitless application" (Celestial Food of Massapequa Corp. v. New York State Tax Commn., supra, 484 NYS2d 509, 510). Accordingly we hold that the "critical element" test is inapplicable as a basis for determining whether petitioner's purchases of the items in question come within the resale exclusion.

Our conclusion that items utilized in providing a hotel service are not retail sales is also consistent with the overall statutory definition of retail sale. The language of clause (B) of section 1101(b)(4)(i) of the Tax Law indicates that the Legislature, in providing for exclusion from sales tax, considered the category of transactions involving the transfer of both goods and services. Section 1101(b)(4)(i)(B) provides for a separate exclusion for purchases of tangible personal property which are used in performing certain services and which are subsequently transferred to the purchaser of the service along with the performance of the service. The

services furnished by a hotel are not enumerated as one of the services to be excluded. As a general rule, the maxim expressio unius est exclusio alterius is applied in interpreting statutes, so that where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded (McKinney's Cons. Laws of NY, Book 1, Statutes, § 240; see, Merkling v. Ford Motor Co., 251 App Div 89, 296 NYS 393, 398; Deth v. Castimore, 245 App Div 156, 281 NYS 114, 120). The fact that section 1101(b)(4)(i)(B) excludes from sales tax only those purchases of tangible personal property used in conjunction with performing certain types of services specifically enumerated in the statute is convincing evidence that no other exclusions were contemplated under that section. We note also that clause (B) of section 1101(b)(4)(i) explicitly conditions the sales tax exclusion upon a finding that the goods were "actually transferred" to the purchaser of service.

We next address petitioner's argument that the purchases of the items at issue constitute a component part of a "hybrid transaction" and, hence, were made for "resale as such." We reject this argument, as did the Administrative Law Judge, because in Burger King, upon which petitioner relies, the court mentioned "hybrid transaction" in addressing an unrelated issue, i.e., the application of the production exemption provided for by section 1115(a)(12) of the Tax Law. Therefore, we hold that the "hybrid transaction" doctrine has no application to the issue of whether petitioner's purchases fall within the "resale as such" exclusion.

Finally, petitioner complains that since the hotel patron ultimately pays a tax on the hotel's lump-sum charge for all of the components included in the hotel room package, the separate imposition of sales tax on the purchases of the furnished items amounts to multiple taxation. Given our holding that petitioner's purchases did not fall within the resale exclusion of Tax Law § 1101(b)(4)(i)(A), such purchases simply constituted retail sales of tangible personal property properly subject to sales tax (Tax Law § 1105[a]). Petitioner has not offered any authority, in the Tax Law or elsewhere, for the proposition that this tax result is impermissible.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner, Helmsley Enterprises, Inc., as successor in interest to Hotel St. Moritz, Inc., is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Helmsley Enterprises, Inc., as successor in interest to Hotel St. Moritz, Inc. is denied; and

4. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated September 20, 1985 is sustained.

DATED: Troy, New York
June 20, 1991

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner