

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
PARKER-MERIDIEN CO. : DECISION
for Revision of a Determination or for Refund : DTA No. 811787
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Year 1990.¹ :

Petitioner Parker-Meridien Co., 118 West 57th Street, New York, New York 10019, filed an exception to the determination of the Administrative Law Judge issued on November 3, 1994. Petitioner appeared by Richard C. Gordon, Esq. The Division of Taxation appeared by William F. Collins, Esq. (James P. Connolly, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter brief in opposition. Any reply brief by petitioner was due on January 17, 1995, which date began the six-month period for the issuance of this decision. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the special hotel occupancy tax ("SHOT") imposed by Tax Law § 1104 is a type of sales and compensating use tax imposed by Article 28.

II. Whether the Division of Taxation properly included SHOT reported by petitioner as a type of sales and compensating use tax imposed by Article 28 of the Tax Law for purposes of determining whether petitioner's sales and compensating use tax liability exceeded the \$5,000,000.00 threshold for mandatory participation in the electronic funds transfer program.

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The petition says 1990. The consolidated statement of tax liabilities says "Tax Period Ended 12/31/90." There is no notice of determination in evidence.

FINDINGS OF FACT

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

The parties entered into a Stipulation of Facts the relevant portions of which are incorporated in the following Findings of Fact. The facts are not in dispute.

Petitioner, Parker-Meridien Co. ("petitioner"), operates a hotel in New York City.

The issue in this case revolves around Tax Law § 10 (as added by L 1992, ch 55), which requires certain taxpayers to participate in the Electronic Funds Transfer program ("EFT"). One category of taxpayers required to participate are those which were liable for more than \$5,000,000.00 in State and local sales and compensating use taxes imposed by Article 28 of the Tax Law for the preceding year running from June 1 to May 31 (Tax Law § 10[b][1][A]).

Taxpayers required to participate in the EFT program must remit payments of sales and compensating use tax to the Division of Taxation ("Division") by electronic funds transfer or certified check in accordance with subsection (c) of Tax Law § 10 (Tax Law § 10[b][1]).

Petitioner's quarterly sales tax returns for part-quarterly filers ("ST-810") for the period June 1, 1990 through May 31, 1991 reported total sales tax of \$5,337,833.85. Of that amount, \$1,757,709.48 was attributable to the special hotel occupancy tax imposed by Tax Law § 1104.

The Division sent an Official Notification of Required Participation in the New York State Electronic Funds Transfer Program ("Official Notification"), dated June 15, 1992, which informed petitioner of its required participation in the EFT program. Among its provisions, this notice states that taxpayers can challenge required participation in the EFT program by filing a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") or by filing a petition with the Division of Tax Appeals (Ex. "H"; see, Tax Law § 10[d]).

Petitioner filed a request for conciliation conference with BCMS. As a result of the conference, a Conciliation Order (CMS No. 124081) dated December 24, 1992 was issued to petitioner sustaining the Official Notification. Thereupon petitioner filed a petition with the Division of Tax Appeals.

The original petition in this matter challenged a notice of determination asserting special hotel occupancy tax of \$3,838.89 plus penalty and interest. A subsequent amended petition ("the petition") filed by petitioner withdrew its challenge to the tax asserted by this notice. The amended petition did not include a copy of the notice of determination. The petition, as amended, is limited to arguing that petitioner should not be required to pay the SHOT by way of the EFT program established by Tax Law § 10.

OPINION

The Administrative Law Judge found that SHOT is a "special" sales tax on hotel occupancy. In support of his finding, the Administrative Law Judge stated that SHOT is similar to the sales tax on hotel occupancy imposed by Tax Law § 1105(e), that both SHOT and the sales tax on hotel occupancy are imposed by Article 28 of the Tax Law and that both taxes are administered in the same manner (Determination, conclusion of law "F"). The Administrative Law Judge further stated that petitioner's providing of a service rather than selling tangible personal property does not preclude such service from being subject to sales tax as "Tax Law § 1105 is replete with examples of services subject to sales tax" (Determination, conclusion of law "F").

The Administrative Law Judge then found that because SHOT is a sales tax, it was required to be aggregated with petitioner's other sales and use taxes and, when petitioner met the threshold amount for participation in the EFT program, petitioner was required to participate in that program.

On exception, petitioner argues that SHOT is not a sales tax and was improperly aggregated with its sales and use taxes to meet the threshold amount required for participation in the EFT program.

In response, the Division argues that the Administrative Law Judge properly concluded that SHOT is a sales and use tax. The Division goes on to argue that SHOT is almost identical to the tax on hotel occupancy imposed by Tax Law § 1105(e) and that section 1104(b) states that SHOT is to be administered and collected in the same manner as the tax imposed by section 1105(e). In support of its position, the Division also argues that SHOT is consistent with the definition of a sales tax contained in its regulations. Finally, the Division argues that even though the section 1104 tax is reported on a separate schedule included with a sales tax return, this does not mean it is not a sales tax. The Commissioner is authorized to prescribe the "the form of return with respect to other sales and use taxes to be separate schedules" (Division's letter brief, p. 4).

We find no basis in the record before us for modifying the Administrative Law Judge's determination in any respect. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Parker-Meridien Co. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Parker-Meridien Co. is denied; and

4. The Official Notification of Required Participation in the New York State Electronic Funds Transfer Program dated June 15, 1992 is sustained.

DATED: Troy, New York
June 29, 1998

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner