

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

DUNHAM'S RESORT CORP. :

DECISION
DTA NO. 819106

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 September 1, 1997 through August 31, 2000. :

Petitioner Dunham's Resort Corp., 3000 Route 9 L, Lake George, New York 12845, filed an exception to the determination of the Administrative Law Judge issued on September 2, 2004. Petitioner appeared by Madeline Shelia Galvin, Esq. and James E. Morgan, Esq. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Michael McKinley, Esq., of counsel).

Petitioner filed a brief in support of its exception and the Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on April 14, 2005 in Troy, New York.

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

ISSUES

I. Whether the Division of Taxation properly determined that petitioner failed to collect sales tax on its total hotel occupancy charges billed to its guests as required by Tax Law § 1105(e) and 20 NYCRR 527.9.

II. Whether the Division of Taxation properly denied petitioner a refund of sales and use tax on purchases of tangible personal property used in the construction of a boat ramp and dry hydrant as exempt purchases for the installation of capital improvements under Tax Law § 1105(c)(3)(iii) or as exempt purchases of tangible personal property sold by a contractor under Tax Law § 1115(a)(17), or as exempt purchases of medical equipment or prosthetics under Tax Law § 1115(a)(3) and (4).

III. Whether the Division of Taxation properly denied petitioner a refund of sales tax collected from members of its beach and boat club which petitioner claimed was exempt under Tax Law § 1105(f).

IV. Whether petitioner established that the statute imposing sales tax on hotel occupancy was unconstitutional as applied to it.

V. Whether the sales tax on hotel occupancy is in violation of the Commerce Clause of the United States Constitution.

FINDINGS OF FACT

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

The Division of Taxation (“Division”) issued a Notice of Determination dated December 26, 2000 to petitioner for the period September 1, 1997 through August 31, 2000, Assessment No. L-018899558-9, asserting additional sales and use tax in the amount of \$46,972.22, plus interest of \$3,008.87, for a balance due of \$49,981.09. The portion of the assessment concerning recurring expenses was reduced in the amount of \$199.36 by the Bureau of Conciliation and Mediation Services (“BCMS”), for a balance due in the amount of \$46,772.86, plus interest.

The tax assessed was determined as a result of a field audit conducted by the Division of the business operations of Dunham's Resort Corp. ("petitioner"). The field audit was commenced on October 23, 2000, and the audit methodology used by the Division involved a detailed review of actual invoices and amounts recorded in petitioner's general ledger and other books and records, a method chosen based on the fact that the Division determined that petitioner's records were complete and in a condition which permitted such an audit.

Petitioner is a destination resort and hotel complex located on the southeast shore of Lake George, New York, which offered 54 rooms, rented daily or weekly, continental breakfast, a cocktail lounge, a private beach, indoor and outdoor swimming pools, tennis courts, a game arcade, badminton, volleyball and other activities. Petitioner did business under two entity names: Dunham's Bay Lodge, which operated a destination resort, and Dunham's Bay Boat and Beach Club, which operated a marina and a boat and beach club. Petitioner maintained one set of corporate books within which there was a distinction for separate income and expenses relating to each business segment. The audit by the Division did not include a review of the operations of the boat and beach club. Petitioner operated its facility from May through October each year during the audit period.

Petitioner's officers and owners are John and Kathleen Salvador, each a 50% shareholder. Kathleen Salvador was secretary/treasurer of petitioner, running the daily operations of the front office and performing the day-to-day bookkeeping, including maintaining the general ledger. John Salvador, president, was responsible for operating all other aspects of the resort and overseeing all major projects or improvements.

During the field audit, the Division's auditors determined that petitioner had changed the manner in which it charged sales tax to its hotel guests for occupancy beginning in 1999, and continuing through 2000, to the end of the audit period. The change resulted in a noticeable drop in sales tax reported by petitioner during the audit period. When the lead auditor asked Mr. Salvador about the hotel's significant change in sales tax, he was informed that sales tax was being charged on only a portion of the total bill for the period in issue. The hotel guest checks had separate boxes on them which listed two different rates. One was referred to as the "occupancy rate" and the other was called the "prevailing rate." The occupancy rate was approximately 25-30% of the prevailing rate and was the result of a computation made by Mr. Salvador based on actual costs of operations. The prevailing rate was the total rate charged to hotel customers, while the occupancy rate, upon which sales tax was charged, was a lower amount that allegedly reflected only the charge associated with the hotel room and did not include the costs associated with the hotel's other amenities, such as the tennis courts, pool, beach, etc. The guest checks reviewed by the auditors bore the two rates. Petitioner did not separately state charges for participatory sports facilities or activities that it offered to its hotel guests. The guest checks did not provide any itemization or detailed breakdown of the charges included in its prevailing rate or its occupancy rate; nor did the guest checks provide any description or definition of the two rates. Petitioner did not reimburse its guests if they opted to not use the sporting or other facilities. The facilities in issue were reserved for the use of hotel guests.

Petitioner determined, based upon actual costs, the cost of operations attributable to the units for occupancy, compared to the operation of the other resort facilities. Using 1998 total

resort expenditures of \$501,038.58, petitioner provided the following table of expenditures, representing only those associated with room occupancy:

ITEM	SALES TAX PAID	NO SALES TAX APPLICABLE	COST OF OCCUPANCY
Room Cleaning		\$70,000.00	\$70,000.00
Maintenance and Repair	\$6,123.00 ¹		
Vehicles and Auto	\$9,613.44 ²		
Room Supplies	\$18,606.49		
Liability Insurance		\$4,500.00 ³	
Parking (Storage) ⁴			
Advertising and Promotion		\$12,525.47	\$10,000.00
Laundry ⁵		\$16,152.20	\$16,152.20
Banking and CC Charges		\$8,003.68	\$6,000.00 ⁶
Business Development		\$1,500.00	\$1,500.00 ⁷
Utilities: Power	\$17,289.00		
Fuel Oil	\$3,253.90		
Television	\$2,571.82		
Telephone	\$8,186.98		
Rounded Total			\$98,000.00

¹ Computed as follows: total \$30,613.41 x 20% (taxed) = \$6,123.00

² Computed as follows: \$6,209.07 + \$3,404.37 = \$9,613.44

³ Computed as follows: \$5,791.00 x 75% = \$4,500.00

⁴ Included in Labor.

⁵ Exemptions from sales tax apply to services of laundering, dry cleaning, as explained in 20 NYCRR 527.5.

⁶ Computed as follows: \$8,003.68 x 75% = \$6,002.76

⁷ Computed as follows: \$1,932.51 x 75% = \$1,449.38

Petitioner then determined a percentage of costs attributed to occupancy as compared to total costs: $98,000/501,000$. The result was 19.56087%, which petitioner rounded to 20%. If the daily charge for a room was \$150.00 as the prevailing rate, petitioner would deem $150 \times 20\%$, or \$30.00, the occupancy rate upon which sales tax for hotel occupancy was computed. For the tax years in issue, petitioner rounded the percentage determined above to 25% and collected sales tax on 25% of its prevailing rate, or what petitioner referred to as its occupancy rate.

As the basis for the notice of determination, the Division computed additional sales tax due in the amount of \$46,386.40 on lodging charges which had been separated into the two categories described above. In order to make such determination, the Division computed the difference between petitioner's prevailing rate and its occupancy rate as determined by petitioner and recorded in its general ledger, and computed the sales tax thereon. In addition, the Division computed sales taxes on recurring expenses on which sales tax was not paid, such as office supplies, repairs and hotel supplies, in the amount of \$585.82, which when reviewed by BCMS, was reduced to \$386.46.

A Conciliation Conference before BCMS took place on April 1, 2002. A Conciliation Order (CMS No. 189060) was issued on May 3, 2002, recomputing the statutory notice (Assessment No. L-018899558-9) to tax due of \$46,772.86, plus interest in the amount of \$8,370.86. Payment was received by the Division from petitioner in the amount of \$55,143.16, under protest, on or about April 24, 2002.

On or about July 30, 2002, petitioner filed an Application for Credit or Refund of Sales or Use Tax, claiming a refund of taxes previously remitted to the Division for the following four categories:

- a. A refund of the entire amount paid to the Division following the conciliation conference, estimated at \$55,143.16;
- b. A refund of the entire amount of sales tax collected and paid over to the Division on room occupancy charges during the audit period, estimated at \$763.00;
- c. A refund of all sales tax collected and paid to the Division on membership dues in the boat and beach club during the audit period, estimated at \$995.99; and
- d. A refund of all sales tax paid by petitioner in relation to construction of the capital improvement referred to as the handicapped access facility.

Petitioner provided no documentation showing it had refunded back to its beach and boat club members the sales tax it had previously collected from them.

During the audit period, petitioner engaged in a project it referred to as a “handicapped and emergency access facility,” a project with two physical components and several distinct purposes. The two components of the handicapped and emergency access facility were the handicapped ramp and the dry hydrant. The handicapped ramp was constructed to improve access to the waterfront and water craft for handicapped employees and guests, and additionally improve access by emergency vehicles to the waterfront for water based rescues. The dry hydrant was constructed to provide a source of water in the event of fire at any time during the year, for use by the local volunteer fire department to assist petitioner and other members of the community. It was a means that allowed the suction of water from far enough beneath the water surface of the lake to be an effective source of water year round in the event of a fire, even after

the lake became frozen during the winter months. The dry hydrant was part of petitioner's handicapped and emergency access facility.

Much of the coordination and construction of the handicapped and emergency access facility was led by Mr. Salvador. Petitioner purchased the materials for the handicapped and emergency access facility from such vendors as Curtis Lumber and Mead Lumber, and much of the work was performed by petitioner's resort staff. Two contractors were hired for welding and excavating. Petitioner included invoices for materials purchased for the project, as well as a few for excavating and welding services. Many of the invoices submitted showed sales tax as being charged to petitioner.

By correspondence dated January 15, 2003, the Division denied petitioner's refund claim.

After the hearing petitioner submitted a Reply Brief, attached to which was a parking receipt which petitioner referred to in its brief as an example of how taxes are specifically enumerated on an invoice by some companies. The Division objected to the attachment as a post-hearing submission of additional evidence.

Also following the hearing, by correspondence dated April 21, 2003,⁸ petitioner informed the Administrative Law Judge that the Division had recently notified petitioner of an upcoming audit of Dunham's Resort Corp. for the period June 1, 2001 through February 29, 2004. Petitioner requested that the Administrative Law Judge take notice of the fact that the audit is to be conducted and that this matter be included with the record of these proceedings. The Division objected to the submission of this information as irrelevant to the present matter and as an improper submission of information after the hearing record was closed.

⁸ The date should have read "2004."

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In her determination, the Administrative Law Judge rejected petitioner's attempt to introduce documentary evidence subsequent to the close of the hearing. The Administrative Law Judge also refused to consider information from petitioner concerning an audit of petitioner that was outside the audit period herein as petitioner did not state any reason why the Administrative Law Judge should have this information.

The Administrative Law Judge next noted that petitioner's arguments concerned both tax exclusions and tax exemptions. The Administrative Law Judge distinguished between them and noted that in deciding whether a taxpayer is entitled to an exclusion or an exemption from tax, the taxpayer is required to prove that its interpretation of the statute is the only reasonable interpretation or that the Division's interpretation is unreasonable. The Administrative Law Judge observed that this was also the standard applicable to the interpretation of the Division's regulations. Further, the Administrative Law Judge pointed out that contrary to petitioner's argument, the burden of proof to show entitlement to an exclusion as well as to an exemption is on petitioner, although the burden of proof to show entitlement to an exclusion is lighter because exclusions are strictly construed against the taxing authority.

The Administrative Law Judge recited applicable provisions of the Tax Law and the Division's regulations concerning the imposition of sales tax on hotel occupancy and admission charges. The Administrative Law Judge found that despite the "excessive and duplicative documents and arguments advanced by petitioner," the issue involved in this proceeding was simple; i.e., whether petitioner properly collected sales tax on its hotel occupancy charges (Determination, conclusion of law "I"). The Administrative Law Judge concluded that

petitioner was not merely a hotel, but a destination resort. The Administrative Law Judge noted that in order for one to stay at petitioner's place of business and partake in its amenities and activities, petitioner charged a prevailing rate, one which was intended to cover both the occupancy of the hotel room and the included amenities and activities. The Administrative Law Judge did not agree with petitioner that it was entitled to separately state and collect tax only on the fee attributed by petitioner to the hotel room alone. The Administrative Law Judge held that a person staying in petitioner's hotel was not able to purchase separate access to the amenities offered. Rather, petitioner charged a fee which was all inclusive, as is customary for a destination resort, and did not give the guests a choice of whether to pay for such activities. The Administrative Law Judge found that what was taxable was the prevailing rate, which included a room and the use of the resort amenities and activities. The Administrative Law Judge held that petitioner's separation of the operational costs of the hotel rooms was a mathematical exercise that does not have the support of the Tax Law or the Division's regulations. The Administrative Law Judge also cited supporting case law for her conclusion.

In regard to the small amount of tax attributable to recurring purchases, the Administrative Law Judge upheld the Division's position that such purchases are subject to sales and use tax. The Administrative Law Judge rejected petitioner's position that petitioner's acquisition of items allegedly subject to use tax were exempt due to their purchase via the internet.

The Administrative Law Judge also disagreed with petitioner's argument that the handicapped and emergency access facility expenditures are exempt from sales tax as a capital improvement, holding that petitioner failed to establish that any of its purchases met the capital improvement criteria, particularly with regard to the issues of substantially adding to the value of

the real property and appreciably prolonging its useful life. The Administrative Law Judge also found that neither petitioner nor John Salvador was a contractor as set forth in 20 NYCRR 541.2 and neither sold tangible personal property to petitioner for the handicapped and emergency access facility. The Administrative Law Judge also rejected petitioner's argument that the handicapped and emergency access facility was not subject to sales tax because it qualified for the exemption under Tax Law § 1115(a)(3) as medical equipment used to correct or alleviate physical incapacity. The Administrative Law Judge found that in order to qualify for that exemption, the handicapped and emergency access facility must be primarily and customarily used for such purposes and not be generally useful in the absence of illness, injury or physical incapacity. As the handicapped and emergency access facility was constructed to serve numerous functions, the Administrative Law Judge concluded that the expenditures did not qualify for a sales tax exemption as medical equipment or prosthetic aid.

Further, the Administrative Law Judge concluded that petitioner was not entitled to a refund of sales tax collected on beach and boat club dues because there was no evidence presented that indicated petitioner had repaid the overcollection of tax on the beach and boat club dues to the members.

The Administrative Law Judge rejected petitioner's arguments that the Tax Law provisions at issue herein are unconstitutional as applied to petitioner, finding that petitioner has not shown that it has been treated differently than any other similarly situated hotel or resort. The Administrative Law Judge also rejected the argument that the Tax Law violates the Soldiers' and Sailors' Relief Civil Relief Act of 1940, the Commerce Clause of the Constitution or the Privileges and Immunities Clause of the Constitution.

ARGUMENTS ON EXCEPTION

Petitioner argues on exception that the Legislature never intended that the tax imposed by Tax Law § 1105(e) be applied to more than the occupancy of a hotel room and it was not intended to apply to other amenities provided. Petitioner alleges that the Division failed to follow its audit guidelines and failed to conduct a detailed audit of petitioner. As a result, petitioner believes that the audit results should be set aside. Petitioner maintains that the Administrative Law Judge erroneously failed to find that the Division's witness lacked credibility. Petitioner insists that the Division failed to produce material documents and that the Division maintained at least two separate audit files on petitioner.

Petitioner argues that the activities for which petitioner's guests used petitioner's lodge facilities (such as the swimming pool, tennis courts, beach facilities and other related sporting uses) are exempt from taxation. Petitioner disputes that it failed to collect tax on all relevant hotel occupancy charges as required by law.

As it did before the Administrative Law Judge, petitioner maintains that material and services directly relating to the construction of the handicapped access facility are not properly subject to sales tax, inasmuch as they are exempt as "capital improvements" under Tax Law § 1101(b)(9), exempt as work by a contractor, or exempt as "medical equipment" used "to correct or alleviate physical incapacity" pursuant to 20 NYCRR 528.4, or "prosthetic aids" purchased "to correct or alleviate physical incapacity in human beings" pursuant to 20 NYCRR 528.5.

Further, petitioner asserts that the burden of proof is on the Division in this case since the matters in issue relate to exclusions from taxation, as contrasted with statutory exemptions.

Petitioner continues to allege the sales tax imposed on hotel room occupancy is in violation of the Commerce Clause of the United States Constitution, article 1, § 8 in that it places

an undue burden upon its operations in interstate commerce in direct violation of the Commerce Clause.

The Division, in opposition, argues that the Administrative Law Judge correctly determined that all of petitioner's receipts from the occupancy of its facility were subject to sales tax, that the small amount of petitioner's expense purchases in contention are subject to sale tax, that petitioner was not entitled to a refund of beach club membership dues paid by its members, and that costs related to the construction of its boat ramp and dry hydrant were not exempt from sales tax.

OPINION

Despite petitioner's rigorous arguments contained in more than 300 pages of briefs, we conclude, as did the Administrative Law Judge, that the issues in this case are straightforward. We find that the Administrative Law Judge completely and adequately addressed the issues presented to her and correctly applied the relevant law to the facts of this case. Petitioner has offered no evidence below, and no argument on exception, that would provide a basis for us to modify the determination in any respect. Thus, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Dunham's Resort Corp. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Dunham's Resort Corp. is denied; and

4. The denial of petitioner's refund claim is sustained.

DATED: Troy, New York
October 13, 2005

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott

Robert J. McDermott
Commissioner