STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| PARKER-MERIDIEN CO. | : | DETERMINATION<br>DTA NO. 811787 |
| for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Year 1990.[1] | : | |

Petitioner, Parker-Meridien Company, 118 West 57th Street, New York, New York 10019, filed a 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 year 1990.

Petitioner by its duly appointed attorney and representative, Richard C. Gordon, Esq., and the Division of Taxation by William F. Collins, Esq. (James P. Connolly, Esq., of counsel) signed a waiver of hearing and consented to have this matter determined based upon stipulated facts, documents and briefs. On February 14, 1994, the Division of Taxation submitted its exhibits along with the joint Stipulation of Facts. Petitioner submitted no exhibits. The last day for filing of briefs, after various extensions, was May 16, 1994. The Division of Taxation timely filed its brief. Petitioner filed no brief. After due consideration of the evidence and arguments had herein, Carroll R. Jenkins, Administrative Law Judge, renders the following determination.

## 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

[1]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.

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.

FINDINGS OF FACT

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.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner argues that SHOT is not a sales or compensating use tax. Accordingly, petitioner argues, petitioner's SHOT liability cannot be aggregated with sales and compensating use taxes reported on its sales tax returns for purposes of determining whether it met the $5,000,000.00 threshold for mandatory participation in the EFT program.

The Division argues that SHOT is just one type of sales tax, which can properly be aggregated with other types of sales and use taxes to determine whether petitioner meets the $5,000,000.00 threshold for mandatory participation in the EFT program.

Petitioner agrees that if said special hotel occupancy tax is a type of sales or compensating use tax, then the Division properly required petitioner to participate in the EFT Program. The Division agrees that if the SHOT is not a sales or compensating use tax, petitioner was not properly required to participate in the EFT program.

CONCLUSIONS OF LAW

A. Other than the agreed facts stipulated to by the parties and the argument in the petition itself, petitioner offered no evidence or argument in support of its petition.

B. The taxes imposed by Article 28 of the Tax Law are either sales taxes or compensating use taxes (e.g., Tax Law §§ 1104, 1104-a, 1105, 1108, 1109, 1110).

C. Taxes imposed by § 1105 include, but are not limited to, sales tax on receipts received from sales of restaurant food and other types of tangible personal property, receipts for trash

removal services, parking, garaging or storing of motor vehicles, entertainment services and detective services. This section also imposes a tax on rent receipts for "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" ("hotel occupancy tax") (Tax Law § 1105[e]).

SHOT is a tax imposed:

> "[U]pon every charge for occupancy of a room or suite of rooms in a hotel in this state, except that such tax shall not be imposed upon a charge for occupancy (i) by a permanent resident, or (ii) where the charge for occupancy of the room . . . is . . . less than one hundred dollars per day . . ." (Tax Law § 1104[a]; emphasis added).

D. The Division's sales tax regulations provide that a "sales tax":

> "[I]s imposed on the receipts . . . from every retail sale of tangible personal property . . . and from charges for hotel occupancy . . ." (20 NYCRR 525.2[a][1]; emphasis added).

E. Section 1104(b) of the statute requires that SHOT be administered in the same manner as the hotel occupancy tax imposed by Tax Law § 1105(e).

F. Based on the above provisions, it is concluded that the tax imposed by Tax Law § 1104 (SHOT) is a "special" sales tax on hotel occupancy, similar to the sales tax imposed on hotel occupancy by Tax Law § 1105(e). Both taxes are imposed by Article 28 of the Tax Law. Both taxes are administered in the same manner (Tax Law § 1104[b]). Petitioner has offered no persuasive argument to support its claim that SHOT is not a sales tax. As noted in the Division's brief, the section 1104 sales tax is reported on a separate schedule attached to the sales and use tax return. However, the fact that the Commissioner of Taxation may prescribe different periods or different schedules for reporting SHOT is a matter within his discretion (Tax Law § 1136[c], [d]), and does not change the nature of the tax asserted. Furthermore, while petitioner argues in its petition that its function is in the nature of "providing a service" rather than resale of tangible personal property, and therefore SHOT is not a sales or use tax, Tax Law § 1105 is replete with examples of services subject to sales tax (e.g., Tax Law § 1105[c][5], [6], [8], [9]). Therefore, the mere fact that petitioner provides a service rather than a sale of tangible personal property does not preclude the tax on such service from being

classified as a sales tax.

G. Since SHOT is one of the sales taxes imposed by Article 28 of the Tax Law, it was properly aggregated with petitioner's other sales and compensating use tax liability to determine whether petitioner met the threshold amount for required participation in the EFT program. Petitioner's total sales and compensating use tax liability was in excess of $5,000,000.00, and petitioner was properly required to participate in the EFT program.

H. The following is by way of housekeeping. While the original petition in this matter included reference to a notice of determination, that notice was not attached to the petition or to the amended petition, nor was it later offered in evidence. Further, this notice of determination was not the subject of the Conciliation Order (No. 124081), supra, issued to petitioner. Lest there be any misunderstanding regarding the scope of this determination, it is expressly concluded that the Division of Tax Appeals never acquired subject matter jurisdiction over the notice of determination.

I. The petition of Parker-Meridien Co. is in all respects denied and 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
November 3, 1994

/s/ Carroll R. Jenkins
ADMINISTRATIVE LAW JUDGE