STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **THE KIMBERLY HOTEL, INC., SUCCESSOR TO EMPIRE HOTEL MANAGEMENT INTERNATIONAL CORPORATION** 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, 1989 through February 29, 1992.	:	DETERMINATION DTA NO. 818522

Petitioner, The Kimberly Hotel, Inc., Successor to Empire Hotel Management International Corporation, 3 New York Plaza, New York, New York 10004, 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 period September 1, 1989 through February 29, 1992.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York on June 29, 2004 at 10:30 A.M., with all briefs to be submitted by December 6, 2004, which date began the six-month period for the issuance of this determination. Petitioner appeared by Stephen L. Solomon, Esq. and Kenneth I. Moore, Esq. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Michael P. McKinley, Esq., of counsel).

ISSUES

I. Whether petitioner's claim for refund was timely filed or barred by the statute of limitations.

II. Whether the Commissioner of Taxation and Finance has the authority to grant petitioner a refund of erroneously paid taxes where petitioner failed to timely file its refund claim.

III. Whether the Division of Taxation correctly calculated the interest charged and credited to petitioner.

FINDINGS OF FACT

The parties executed a Stipulation of Facts in connection with this proceeding. These stipulated facts are included in the Findings of Fact herein.

1. Petitioner, The Kimberly Hotel, Inc., as successor in the merger to Empire Hotel Management International Corporation, was a duly registered vendor operating a hotel in the City and State of New York during the years at issue. Empire Hotel Management International Corporation had been in existence since February 1985. Effective January 1, 1995, it was merged into Kimberly Hotel, Inc.

2. Petitioner had been required to collect and remit New York State and City sales tax on hotel room occupancies and the separate New York City hotel room occupancy tax since it began doing a hotel business in 1985.

3. For the periods here in issue, the State and City sales tax on hotel room occupancies was imposed at the rate of 8.25%. In addition, for the period June 1, 1990 through the end of the audit period here in issue, an additional and special State hotel room occupancy tax of 5% on the charge for the occupancy of a hotel room was imposed. These taxes were administered and collected by the Division of Taxation.

4. The State and City sales taxes on hotel room occupancies, including the special State hotel room occupancy tax, were reported on New York State Form ST 810.

5. In addition to and separate from the State and City sales taxes on hotel room occupancies, including the special State 5% tax on such occupancies, a separate New York City hotel room occupancy tax was imposed during the audit period. The City tax consisted of two separate parts: one a flat tax of $2.00 per occupancy, and the second, a tax of 5% of the consideration charged for each occupancy through August 31, 1990, and at the rate of 6% on and after September 1, 1990. The New York City's Department of Finance administered and collected this tax.

6. The separate New York City hotel room occupancy tax was reported to the New York City Department of Finance on Form HTX.

7. Both the State and City Tax Laws provide an exemption from tax for a "permanent resident." For purposes of the State sales tax and the special State tax on hotel room occupancies, the exemption for a "permanent resident" applies to any occupant of any room or rooms in a hotel for at least 90 consecutive days. For purposes of the City sales tax and the separate City hotel room occupancy tax, the exemption for a "permanent resident" applies to any occupant of any room or rooms in a hotel for at least 180 consecutive days. Thus, the State sales tax and the special State tax on hotel room occupancies is imposed on an occupant for the first 90 days of occupancy; whereas the City sales tax and the separate City hotel room occupancy tax is imposed on an occupant for the first 180 days of occupancy.

8. For the five quarterly periods ended November 30, 1989, February 28, 1990, May 31, 1990, August 31, 1990 and November 30, 1990, petitioner's New York City Form HTX, as well as the New York State sales and use tax Form ST 810, were not properly completed. Petitioner erroneously reported and paid to the State the portion of the City tax measured by 5% of the consideration paid for the occupancy. These erroneous payments were included on Form ST 810

filed with the Division of Taxation for the five quarters. The sales and use tax returns for these five quarterly periods were timely filed and the amounts stated to be due thereon were timely paid.

9. The amount of the separate New York City hotel room occupancy tax erroneously paid to the State was as follows:

For the quarter ended November 30, 1989	$51,591.80
For the quarter ended February 28, 1990	48,957.14
For the quarter ended May 31, 1990	64,427.98
For the quarter ended August 31, 1990	79,263.33
For the quarter ended November 30, 1990	60,011.13
TOTAL	$304,251.38

10. By letter dated May 31, 1990, the Division of Taxation commenced a sales and use tax field audit for the period June 1, 1987 through February 28, 1990.

11. The audit period was subsequently adjusted to cover the tax periods September 1, 1987 through February 29, 1992.

12. On October 27, 1992, the Division issued to petitioner a Notice of Determination assessing sales and use taxes due for the audit period in the amount of $277,834.01, plus penalty ($96,229.33) and interest ($110,432.21). Payments and/or credits in the amount of $143,190.00 were allowed, leaving a total balance due of $341,305.55. The payments and/or credits consisted of overpayments of $119,981.20 plus interest of $23,208.80.

13. The Notice of Determination asserted taxes due as follows:

Use taxes on fixed asset purchases	$63,103.12
Use taxes on recurring purchases	21,951.08

Disallowance of credits taken for permanent residents	192,779.81
TOTAL TAX DUE	$277,834.01

14. The Statement of Proposed Audit Adjustment reflected credits for overpayments in the amount of $143,190.00 determined as follows:

Period Ended	Overpayment of Tax	Interest	Total
2/29/89	($12,585.13)	($4,490.55)	($17,075.68)
8/31/90	(107,396.07)	(18,718.25)	(126,114.32)

The $143,190.00 was credited on the Notice of Determination.

15. Included in the overpayment of tax of $107,396.07 for the quarter ended August 31, 1990 was the New York City hotel room occupancy tax erroneously paid to the State for that quarter in the amount of $79,263.33.

16. Petitioner did not file a request for a conciliation conference or file a petition with the Division of Tax Appeals to contest the Notice of Determination. As a result, the amount asserted in the Notice of Determination became final and subject to collection.

17. A Notice and Demand for Payment of Tax Due, dated February 28, 1993, was issued demanding, inter alia, the sales tax due relating to the above referred Notice of Determination.

18. Subsequently, a tax warrant was issued and docketed on June 29, 1993 against petitioner in the total amount of $366,672.39 for the sales tax, penalty and interest assessed. The difference between the balance due as shown on the Notice of Determination and the amount shown on the tax warrant was additional interest which had accrued between October 27, 1992 and June 29, 1993.

19. Based thereon, a tax compliance levy dated September 14, 1993 was issued to Chemical Bank, levying upon the bank account of petitioner. Chemical Bank complied with the

levy and remitted to the Division a check in the amount of $373,703.03, representing the taxes, penalty and interest claimed due on the assessment. The additional $7,030.64 over the amount indicated on the tax warrant represented additional interest which had accrued between June 29, 1993 and September 14, 1993. On October 21, 1993, the Division received the payment.

20. In early 1994, petitioner retained David Berdon & Co. as its new accounting firm. Upon its review of the Division's sales and use tax audit, the accounting firm discovered the erroneous payments of the New York City hotel room occupancy tax to the State for the periods ended November 30, 1989 through November 30, 1990, in the amount of $304,251.38. The accounting firm also discovered additional documentation to support further adjustments to the assessment asserted in the Notice of Determination.

21. By letter dated July 5, 1994, petitioner requested a courtesy conference with the Division to present documentary evidence of the errors. The principal item described in the letter was the erroneous payments of the separate City hotel room occupancy tax to the State for the quarters previously described.

22. The Division acknowledged receipt of the request for a courtesy conference and said conference was held on September 23, 1994.

23. The courtesy conference was conducted by Annella Johnson, who had conducted the original audit.

24. At the conference, petitioner sought to address errors with respect to the following categories:

> 1. Recurring Expense Purchases - documentation was provided to show that no additional tax was due on certain purchases, resulting in an overstatement of tax in this category.

2. Fixed Assets - documentation was provided to show that either sales tax was in fact previously paid on certain purchases, or that no additional tax was due because the particular purchase in issue qualified as a capital improvement.

3. Permanent Residency Credits - additional evidence was provided to show that refunds of sales tax were made to tenants who qualified as permanent residents under the applicable sales tax laws.

4. Erroneous Payment of the New York City hotel room occupancy taxes to the State.

25. Subsequent to the courtesy conference, the Division adjusted the assessment allowing petitioner a refund of tax in the amount of $74,678.35. The adjustment related solely to the first three categories listed above: recurring expense purchases; fixed assets; and permanent residency credits, and was based upon additional documentation provided by petitioner.

26. No adjustment was made with respect to the category relating to the payment of the New York City hotel room occupancy taxes to the State.

27. By letter dated December 27, 1994, petitioner requested that the penalties asserted in the Notice of Determination be abated.

28. On August 23, 1995, petitioner was credited for $112,355.17, consisting of $74,678.35 of tax, $17,041.44 of penalty and $20,635.38 of interest. This interest had accrued from the date that Notice of Determination L-006638747 was issued, on October 27, 1992, until the date that the adjustment was made on August 23, 1995.

29. On or about October 3, 1995, petitioner filed a claim for credit or refund with the Division in the amount of $624,064.03.

30. In 1995 or 1996, petitioner was audited twice by the New York City Department of Finance with respect to the New York City hotel room occupancy tax. The first audit covered the tax period June 1, 1986 through February 28, 1990, and the second audit covered the tax period March 1, 1990 through May 31, 1994. Petitioner signed consent agreements for both

audits, and paid the agreed upon assessments resulting from these audits. Thus, all amounts due to the City for the audit period were paid to the City despite the fact that $304,251.41 due the City had been erroneously paid to the State.

31. By letter dated October 18, 2000, the Division rejected petitioner's claim for credit or refund in full.

32. On January 12, 2001, petitioner filed a Request for a Conciliation Conference with the Bureau of Conciliation and Mediation Services ("BCMS") concerning the erroneous payment of New York City hotel room occupancy tax to the State.

33. By letter dated February 16, 2001, BCMS denied petitioner's request for a conciliation conference.

34. On May 16, 2001, petitioner filed a petition for refund with the New York State Division of Tax Appeals. The Division of Taxation filed an answer to the petition on or about July 16, 2001.

35. Following a meeting with representatives of the Division, petitioner, on October 7, 2002, sent a letter to the then Commissioner of the Department of Taxation and Finance, Arthur Roth, explaining the erroneous payment and requesting that the Commissioner exercise his discretionary authority and grant petitioner a refund of the overpayment of tax.

36. By letter dated August 28, 2003, Commissioner Roth denied petitioner's request for relief.

37. On June 29, 2004, petitioner filed an Amended Petition, and on July 22, 2004, the Division filed an Amended Answer.

CONCLUSIONS OF LAW

A. There is no dispute that petitioner made double payments of New York City hotel room occupancy tax, once to New York City and then again to New York State as part of its New York State sales and use tax payments for the period September 1, 1989 through November 30, 1990. The duplicate payments were not discovered by petitioner in time to file a claim for credit or refund within the applicable three-year statute of limitations as provided by Tax Law § 1139(a). Following a sales tax audit of the period September 1, 1987 through February 29, 1992, a Notice of Determination was issued to petitioner which was not protested within the 90-day limitation period provided for administrative review, as required by Tax Law § 1138(former [a][1]). Under this same section, the tax, penalty and interest assessed in the Notice of Determination became "finally and irrevocably fixed" when petitioner failed to apply to the Division of Tax Appeals for a hearing or the Bureau of Conciliation and Mediation Services for a conference within such 90-day period (***Matter of West Mountain Corp. v. State of New York Department of Taxation and Finance***, 105 AD2d 989, 482 NYS2d 140, ***affd*** 64 NY2d 991, 489 NYS2d 62).

B. Petitioner argues that the Division erred by failing to treat its refund request as timely because the request was filed within two years of the date the Division received the funds from the bank levy. The funds that the Division received from the bank levy represented the unpaid liability under notice L-006638747 issued on October 27, 1992.

Tax Law § 1138(former [a][1]) provided that a notice of determination shall finally and irrevocably fix the tax unless the person assessed, within 90 days after receiving notice of such determination, shall apply to the Division of Tax Appeals for a hearing, or the commissioner, on his own motion, shall redetermine the same. Tax Law former § 1139(c) provided that a taxpayer

was not entitled to a refund or credit which had been determined to be due where all opportunities for administrative and judicial review have been exhausted with respect to the determination. When petitioner failed to timely protest the notice of determination, the notice became an assessment subject to collection by the Division. The subsequent payment by petitioner, as a result of the bank levy, of the amount due, followed by an application for a refund of that payment, did not revive an untimely protest of the original assessment (***Matter of Shoreline Oil Co., Inc.***, Tax Appeals Tribunal, April 8, 1993). Petitioner's failure to file a timely protest against a tax determined to be due pursuant to Tax Law § 1138 precluded the opportunity to later challenge such tax by payment and subsequent refund claim.

C. Tax Law former § 1139(a) provided that

> the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if the application therefor shall be filed with the tax commission . . . (ii) in the case of a tax, penalty or interest paid by the applicant to the tax commission, within three years after the date when such amount was payable under this article . . . .

Petitioner's sales tax returns for the periods of the erroneous payments were timely filed and the taxes timely paid. Petitioner first notified the Division of the overpayment issue in a letter dated July 5, 1994 and filed a formal request for refund on or about October 3, 1995, both well beyond the statutory time period for the filing of a timely refund claim.

The statutes of limitations are matters of law, enacted by the State Legislature for the purpose of guiding all persons who are, or may become parties to, a legal proceeding, with respect to the timely filing of the various documents necessary to the particular proceeding involved (***Matter of Berek Nierenstein***, Tax Appeals Tribunal, April 21, 1988). The purpose of the statute of limitations is to allow a reasonable time for taxpayers who have erroneously paid taxes to realize their error and file a claim for refund. This puts the State on notice that there is a

three-year period during which it may be liable for claims, and then the matter is settled. Anything less than this degree of certainty would make the financial operation of government difficult, if not impossible. The statute of limitations is a balance between the needs of the State to protect its financial resources and the right of taxpayers to correct their errors (***Matter of Berek Nierenstein***, ***supra***). Thus, the claim for refund was untimely.

D. Petitioner next contends that the special refund authority provisions of Tax Law §§ 697(d) and 1096(d) provide guidance to determine that the general powers of the tax commissioner found in Tax Law § 1142(6), "to assess, determine, revise and readjust the taxes imposed by this article," create discretionary authority for the tax commissioner to refund the sales tax overpayment despite the expiration of the statute of limitations. Unfortunately for petitioner, and unlike the personal income tax and the corporation franchise tax, the Tax Law does not contain a comparable provision providing the commissioner with special refund authority in the area of sales and use taxes. Tax Law § 1142(6) provides the commissioner with the authority to adjust additional sales and use tax determinations of the Division beyond the appropriate statute of limitations, thus allowing the use of "courtesy conferences" which provide taxpayers the opportunity to present documentation to reduce an assessment of additional tax due where the taxpayer has not filed a timely protest. However, this section provides the commissioner with the power to correct determinations of additional tax due where the taxpayer is able to demonstrate error, not the authority to grant claims for refunds untimely filed. As there is no special refund authority with respect to sales and use taxes, the commissioner is without authority to grant a refund claim filed beyond the statute of limitations.

E. In its reply brief, petitioner for the first time claims that the Division's offset of $24,314.57 of interest charged on August 23, 1995 was erroneous, and that interest should have

run in petitioner's favor. Petitioner bases this claim on a document submitted into the record for the limited purpose of clarifying one of the paragraphs in the Stipulation of Facts. According to petitioner, the Notice of Determination issued on October 27, 1992 included interest on the tax amount of $74,678.35 originally assessed, from the due date of the return for each of the affected periods, to July 15, 1992. The warrant issued included additional interest to June 29, 1993, and the tax compliance levy updated the interest due to September 14, 1993. On October 21, 1993, the full amount of the tax, penalty and interest due as claimed by the Division was paid pursuant to the levy.

Petitioner claims that the amount credited by the Division pursuant to the courtesy conference held on August 23, 1995 should have included a credit for the interest paid for the affected periods on the $74,678.35. In addition, according to petitioner, it should have also been credited for interest from the date of payment of the tax, penalty and interest assessed to the date that the adjustment was made, August 23, 1995. Petitioner calculates that it is entitled to a credit of $107,052.00 in lieu of the offset of $24,314.57.

F. A more detailed review of the facts surrounding the accrual, payment and crediting of interest indicates that petitioner's position with regard to the interest calculation is erroneous, and that the document relied upon by petitioner does not represent a complete and accurate accounting of all the transactions involved in this matter. The Division asserted interest charges on the Notice of Determination issued on October 27, 1992 in the amount of $110,432.21. Petitioner was credited with overpayments of $119,981.20 plus interest of $23,208.80, leaving a current balance due on the notice of $341,305.55. On June 29, 1993, the Division issued a warrant against petitioner with a current balance due of $366,672.39, which represented the

balance due on the notice issued on October 27, 1992 plus interest accrued of $25,366.84 from the date the notice was issued to the date the warrant was issued.

Following the issuance of the tax compliance levy against petitioner's Chemical Bank account on September 14, 1993, the Division received a payment of $373,703.03, the increased amount over the balance due on the warrant being additional interest of $7,030.64 which had accrued during the period between the issuance of the warrant and the filing of the tax compliance levy.

At the courtesy conference held on September 23, 1994, the Division reduced the tax portion of the assessment from $277,834.01 to $203,155.66, based upon additional documentation presented by petitioner. As a result of the tax reduction at the courtesy conference, petitioner received a total credit of $112,355.17, consisting of a tax credit of $74,678.35, penalty credit of $17,041.44 and interest credit of $20,635.38. This adjustment was made on August 23, 1995. As the analysis of the transactions indicates, petitioner was properly charged and credited with the correct amount of interest during the period between the issuance of the Notice of Determination on October 27, 1992 and the courtesy conference adjustments finalized on August 23, 1995.

G. The petition of The Kimberly Hotel, Inc., as successor to Empire Hotel Management International Corporation, is denied, and the Division of Taxation's denial of petitioner's refund claim is sustained.

DATED: Troy, New York
April 7, 2005

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE