STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DUNHAM'S RESORT CORP.	:	DETERMINATION 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., 8 Lakeview Drive, Box 77, Lake George, New York 12845, 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, 1997 through August 31, 2000.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on May 9 and May 13, 2003 at 9:15 A.M., and continued to completion on July 14, 2003 at 9:15 A.M., with all briefs to be submitted by March 3, 2003, which date began the six-month period for the issuance of this determination. Petitioner appeared by Galvin and Morgan (Madeline Sheila Galvin, Esq., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (Cynthia E. McDonough, Esq., of counsel).

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 Division of Taxation's imposition of sales tax on hotel occupancy results in petitioner's violation of the Soldiers' and Sailors' Civil Relief Act of 1940.

VI. Whether the sales tax on hotel occupancy is in violation of the United States Constitution Commerce Clause, the Privileges and Immunities Clause and petitioner's constitutional right of equal protection.

FINDINGS OF FACT

1. 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.

2. 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.

3. 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.

4. 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.

5. 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.

6. 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 x 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

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

13. 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.

14. 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 an improper submission of information after the hearing record was closed.

SUMMARY OF THE PARTIES' POSITIONS

15. Petitioner maintains numerous points:

a. If any sales tax is applicable to petitioner's operation of the lodge, then the only amounts subject to sales tax are for "hotel or lodge occupancy" and not for charges which are not for hotel or lodge occupancy.

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[8] The date should have read "2004."

b. Activities for which petitioner's guests use petitioner's lodge facilities (such as the swimming pool, tennis courts, beach facilities and other related sporting uses) place petitioner's facilities within the exempt scope of 20 NYCRR 527.10(d)(4).

c. 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.

d. Petitioner claims that the burden of proof is on the Division in this case since the matters in issue relate to exclusions from taxation, contrasted with statutory exemptions.

e. The manner in which the Division has interpreted the statute concerning hotel occupancy to petitioner's lodging is unconstitutional as applied.

f. In attempting to collect sales tax on certain room occupancy charges, petitioner may find itself in violation of the Soldiers' and Sailors' Civil Relief Act of 1940, which generally exempts service persons on active duty from certain types of taxation, since it would require a questioning of every guest concerning their status with respect to active duty military service, in violation of their privacy.

g. The sales tax imposed on hotel room occupancy is in violation of the commerce clause of the United States Constitution, article 1, § 8. Petitioner contests the application of any sales tax to its room occupancy rates on the ground that any such charge places an undue burden upon its operations in interstate commerce in direct violation of the Commerce Clause.

h. The sales tax law applied to petitioner is in violation of the Privileges and Immunities Clause of the United States Constitution, insomuch as it is applied inequitably to nonresident users.

16. The Division maintains that petitioner has failed to establish that the total hotel charges billed to its guests were not subject to sales tax or qualify for an exemption.

In addition to that noted above, the Division asserts that petitioner's refund claim was properly denied for two reasons: petitioner failed to establish it had refunded sales tax it had collected on beach and boat club dues from its members, and secondly, that petitioner had failed to establish that it was due a sales tax refund on tax it had paid for tangible personal property it purchased for the construction of a boat ramp and dry hydrant.

Lastly, the Division argues that petitioner's claims regarding the constitutionality of the sales tax relating to the hotel occupancy are without merit.

CONCLUSIONS OF LAW

A. The Division objected to the introduction of a parking receipt attached to petitioner's reply brief citing ***Matter of Schoonover*** (Tax Appeals Tribunal, August 15, 1991) and other cases, which emphasize the importance of closure to the submission of evidence after a hearing takes place. The submission of an attachment to petitioner's brief that illustrates a point of argument is a submission of evidence that is intended to support a fact. Inasmuch as the Division did not have the opportunity to question the submission, it would be a denial of due process if the document were to become part of the record (***id)***. The Division's request to disregard the attachment is granted.

B. The Division objected to the introduction of information from petitioner concerning an audit of petitioner that is outside the audit period herein. Petitioner does not state any reason

why the Administrative Law Judge should have this information, and, accordingly, it is not given any consideration.

C. Under Tax Law § 1105(a), sales tax is imposed upon "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article." All sales of tangible personal property are presumptively subject to tax pursuant to Tax Law § 1132(c) "until the contrary is established."

D. The arguments advanced by petitioner in this case deal with concepts of both tax exclusions and tax exemptions, thus clarifying the distinction between them is an important first step. Tax exemptions are items which the taxpayer is entitled to excuse from the operation of a tax and, as such, are to be strictly construed against the taxpayer (***Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193, 371 NYS2d 715, ***lv denied*** 37 NY2d 708, 375 NYS2d 1027). Tax exclusions, on the other hand, are items which were not intended to be taxed in the first place and, thus to the extent there is any doubt about the meaning of the statutory language, exclusionary provisions are to strictly construed against the taxing body (***In re Twisteroo Soft Pretzel Bakeries, Inc.***, 21 Bankr 665). When the issue to be decided is whether the 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 (***Matter of Grace v. New York State Tax Commn***., ***supra***; ***Matter of Blue Spruce Farms v. New York State Tax Commn***., 99 AD2d 867, 472 NYS2d 744, ***affd*** 64 NY2d 682, 485 NYS2d 526). These principals of statutory construction also apply to the interpretation of regulations (***see, Matter of Cortland-Clinton, Inc. v. New York State Dept. of Health***, 59 AD2d 228, 399 NYS2d 492). The burden of proof to show entitlement to an exemption is on the petitioner (***Matter of Young v. Bragalini***, 3 NY2d 602, 170 NYS2d 805,

rearg den 4 NY2d 879, 174 NYS2d 1027; ***Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 AD2d 858, 446 NYS2d 451; 20 NYCRR 3000.15[d][5]). Likewise the burden of proof to show entitlement to an exclusion is placed upon petitioner, though the burden is a lighter one because exclusions are strictly construed against the taxing authority (***City of Philadelphia Tax Review Board v. Toben***, 379 A2d 1361).

Petitioner argues that the taxation matters in this case are matters of exclusion, rather than exemption, entitled to strict construction, with a burden of proof that must be borne by the Division, not the taxpayer. This argument is severely flawed for two reasons: petitioner asserts entitlement to both exclusions from taxation as well as exemptions, at different times for different reasons, as will be discussed below. Secondly, and more importantly, the burden of proof in this case never shifts from petitioner to the Division (Tax Law § 1132[c]), it is merely a lighter burden when an exclusion, rather than an exemption, is sought (***City of Philadelphia Tax Review Board v. Toben***, ***supra***).

As to both the statutes and regulations involved in this case, petitioner is required to prove that its interpretation is the only reasonable one, or that the Division's interpretation is unreasonable (***Matter of Grace v. New York State Tax Commn***., ***supra***; ***Matter of Blue Spruce Farms v. New York State Tax Commn***., ***supra***).

E. Tax Law § 1132 (a)(1) provides that:

> Every person required to collect the tax shall collect the tax from the customer when collecting the price, amusement charge or rent to which it applies. If the customer is given any sales slip, invoice, receipt or other statement or memorandum of the price, amusement charge or rent paid or payable, the tax shall be stated, charged and shown separately on the first of such documents given to him. The tax shall be paid to the person required to collect it as trustee for and on account of the state.

F. Tax Law § 1105 imposes sales tax on hotel occupancy as follows:

(e) The rent for every 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.

In addition, Tax Law § 1105 imposes sales tax on admission charges in the following manner:

(f)(1) Any admission charge where such admission charge is in excess of ten cents to or for the use of any place of amusement in the state, except charges for admission to race tracks, boxing, sparring or wrestling matches or exhibitions which charges are taxed under any other law of this state, or dramatic or musical arts performances, or live circus performances, or motion picture theaters, and except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant, such as bowling alleys and swimming pools. For any person having the permanent use or possession of a box or seat or a lease or a license, other than a season ticket, for the use of a box or seat at a place of amusement, the tax shall be upon the amount for which a similar box or seat is sold for each performance or exhibition at which the box or seat is used or reserved by the holder, licensee or lessee, and shall be paid by the holder, licensee or lessee.

G. 20 NYCRR 527.9. provide the details pertaining to hotel occupancy as follows:

(a) *Imposition.* A sales tax is imposed on every occupancy of any room or rooms in a hotel, motel or similar establishment at the combined statewide and local sales tax rate in effect at the situs of such establishment, except that . . . (provisions inapplicable herein).

(b) *Definitions.* As used in this section the following terms shall mean: (1) *Hotel.* A building or portion of it, which is regularly used and kept open for the lodging of guests. The term "hotel" includes but is not limited to an apartment hotel, a motel, bungalow or cottage colony, boarding house or club, whether or not meals are served.

* * *

(7) *Rent.* (i) The consideration received for occupancy valued in money, whether received in money or otherwise. The term "rent" includes separately stated charges for the use of furnishings and equipment, maid service, towel and linen service, telephone service and other accommodations.

(ii) Charges for food and drinks, entertainment, valet and laundry service, theatre ticket service and transportation do not constitute rent but may be taxable under other sections of the Tax Law.

* * *

(c) *Computation.* (1) Occupancy of hotel rooms is taxable where the daily rate is more than two dollars per day. When rent is charged on a weekly or monthly basis the daily rate is computed by dividing the number of days in the chargeable period into the total charge for the period.

* * *

(d) *Exemptions from tax on occupancy.* The following are exempt from the State and local sales tax imposed on hotel occupancy: (1) New York State and its agencies and instrumentalities.

* * *

(2) The United States of America and its agencies and instrumentalities.

* * *

(3) The United Nations, any international organization which the United States is a member, and ambassadors, ministers or other diplomatic representatives of foreign governments.

* * *

(4) Organizations determined to be exempt under section 1116(a)(4) and (5) of the Tax Law.

* * *

(e) *Nontaxable occupancy.* The following occupancies are not subject to tax on hotel occupancy: (1) A room or suite of rooms containing no sleeping facilities and used solely as a place of assembly. (See section 527.9(b)(6) of this Part.)

(2) Nursing homes, rest homes, convalescent homes, maternity homes for expectant mothers, residences or homes for adults or retardates.

* * *

(3) Summer camps. A camp for children which provides a program of instruction or training which the campers are required to pursue under the supervision of counselors is not a hotel.

* * *

(h) *Food services offered by hotels*. (1). . . .

* * *

(ii) A hotel offering a free continental breakfast (juice, pastry and coffee) may not separately state a reasonable value for the breakfast or use the American plan schedule set forth in subparagraph (i) of this subdivision as the entire charge is subject to tax as rent for the room.

(2) The separately stated charges for food and drink at a restaurant facility operated by a hotel are taxable. (See section 527.8 of this Part.)

(3) Charges for room service constitutes part of the receipt from the sale of food or drink and are taxable.

(i) *Miscellaneous transactions.* (1) The following charges made by hotels are taxable:

(i) Charges for telephone service are incidental to hotel occupancy and taxable as part of such occupancy. A hotel may not claim a credit or refund for taxes paid to the phone company on that portion of the service which has been furnished to the guests.

(ii) Charges for in-room use of movies are taxable charges for occupancy.

(iii) Charges for the rental of tangible personal property such as recreational equipment are taxable as sales of tangible personal property.

(iv) Charges for safekeeping of a guest's valuables, including the use of safe deposit boxes are taxable as storage charges.

(v) Charges for a cabaret facility operated by a hotel are taxable. (See section 527.12 of this Part.)

(2) The following are examples of purchases made by hotels which are subject to tax:

(i) Fuel, gas, electricity, steam, telephony and telegraphy and other utilities;

(ii) Furniture used in guest rooms and elsewhere;

(iii) Soap, paper products and other supplies used in the operation of the hotel; and

(iv) Items which will be used for recreational purposes, such as golf carts, pool chairs or other recreational equipment.

H. The sales tax regulations, 20 NYCRR 527.10, concerning admission charges, in pertinent part, provide for the following:

(a) *Imposition.* (1) A tax is imposed upon any admission charge in excess of ten cents to or for the use of any place of amusement in this State.

* * *

(b) *Definitions.* (1) *Admission charge.* (i) The amount paid for admissions, season ticket or subscription to any place of amusement, including any service charge and any charge for entertainment or amusement or for the use of facilities therefor.

* * *

(ii) Taxable charges for entertainment or amusement include admissions to sporting events such as baseball or football games, stock car racing, and college athletic events, carnivals, rodeos, circuses and exhibitions.

* * *

(iii) Taxable charges for the use of facilities for entertainment include any charge for the use of a device, at a place of amusement, without distinction as to the manner in which payment is made.

* * *

(2) *Dramatic or musical arts admission charge.* Any admission charge to a theater, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance.

(3) *Place of amusement.* Any place where any facilities for entertainment, amusement, or sports are provided. Such places include without limitation (i) a theater of any kind, concert hall, opera house, or other place where a performance is given; (ii) fairground or exhibition hall or grounds, (iii) golf course, athletic field, sporting arena, gymnasium, bowling alley, shooting gallery, swimming pool, bathing beach, skating rink, tennis court, handball court, billiard hall or other place for athletic exhibits; (iv) "penny arcades"; any room which includes ping pong tables and amusement devices, and any amusement device, carousel, miniature fair, ferris wheel and other amusement rides, whether or not contained in an enclosure.

* * *

(d) *Admissions excluded from tax.* (1) Charges for admission to race tracks, boxing, sparring or wrestling matches, or exhibitions which are taxed under any other law of this State, are excluded from tax under subdivision (f) of section 1105 of the Tax Law.

* * *

(4) Charges to a patron to or for the use of sporting facilities or activities in which the patron is to be a participant are excluded from tax.

Example 6: Admission charges for the use of bowling lanes and swimming pools are not subject to tax. However, any charge for the use of tangible personal

property in conjunction with the sporting activity is taxable. Included as taxable would be bowling shoes, towel and locker rentals.

Example 7: A ski resort's charge for life tickets is an exempt admission charge to a sporting facility in which the patron will be a participant. If the facility charges for the use of skis or other equipment, such charge is for the rental of tangible personal property which is subject to tax.

Example 8: An admission charge, separate from the entry fee, for a stock car driver and his crew to enter a race is an admission to a participating sport.

I. The excessive and duplicative documents and arguments advanced by petitioner concerning the primary issue of sales tax on hotel occupancy are an attempt to cloud a very simple issue, i.e., whether petitioner properly collected sales tax on its hotel occupancy charges. I fully agree that petitioner is not merely a hotel, but given the amenities and activities it provides, it is a destination resort. In choosing a destination resort and a broader array of activities, it is not uncommon that the expense in vacationing there would be higher than the mere rental of a hotel room. In fact, to stay at petitioner's place of business and partake in such amenities and activities, petitioner established a prevailing rate, one which was intended to cover both the occupancy of the hotel room and the included amenities and activities. In this context, and upon presentation of a guest registration document to a guest, the fee attributed to the hotel room alone was noted as the occupancy rate and the tax was separately computed and stated thereon. Petitioner thus argues it has met the provision of the Tax Law requiring it to separately state the tax and collect it accordingly. The flaw in petitioner's argument is that it made use of semantics and homemade calculations to include in its occupancy rate only what it chooses. Unless a guest was staying at the hotel, that person was not able to purchase an admission ticket, or otherwise gain access to the activities or amenities offered by the resort. The amenities were ancillary to a stay at the hotel, not the other way around, as petitioner would have us believe.

Even if the cost of operations attributable to the hotel were less than the operation of all the amenities, petitioner does not have a basis in the law or regulations to separate them out.

Nor does petitioner qualify for the exemption provided under Tax Law § 1105(f). If petitioner ran an operation which permitted a patron to walk onto the premises and purchase participation in a sporting activity without any obligation to stay at the hotel, or permitted its guests who were staying at the hotel to choose which sports to participate in and only pay for those, there might be an argument that would permit the extension of the exclusionary provisions of Tax Law § 1105(f) to be applicable. But neither is the case here. Instead, petitioner charged a fee which was all inclusive, as is customary for a destination resort, did not give the guests a choice of whether to pay for such activities and then did not want to attribute any portion of such payment beyond 25% of the higher rate to the occupancy of their guests. Clearly, the fee guests paid was to cover a variety of services that were included in petitioner's operation of a destination resort, with origination of such fee in the occupancy at the resort. What was taxable here was the prevailing rate, which included a room and availability to use the resort amenities and activities. 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 regulations. Merely because petitioner called the costs of operating its room the "occupancy rate," it was not permitted to collect tax only on that portion.

As noted above, there may be scenarios where the exclusionary provision of Tax Law §1105 (f) could have been applied to this taxpayer. However, in the context of how petitioner operated, Tax Law § 1105(f) and 20 NYCRR 527.10 are inapplicable.

Case law also supports this conclusion. In ***Matter of LaCascade, Inc. v. State Tax Commission*** (91 AD2d 784, 458 NYS2d 80), the Court found that petitioner, a resort hotel, was

liable for sales tax on the full amount of its gross receipts, including amounts charged for transportation costs which were part of a lump sum rate offered customers along with lodging and meals. Aside from the issue that the sales tax was not separately stated on the customer invoice as required, the Court determined it was not unreasonable for the Division to conclude that sums expended by petitioner to pay customers' transportation costs actually constituted expenses incurred by petitioner in making sales, and such expenses are not deductible from petitioner's receipts subject to the sales tax. Likewise in this case, petitioner included in its prevailing rate costs for items petitioner offered at its destination resort, which constituted expenses incurred by petitioner in making sales. Even the Salvadors indicated in their testimony that if someone wanted merely a hotel room, they would generally not stay at a resort such as petitioner's. Vacationers are often willing to pay for the availability of amenities, regardless of whether they will actually use them. Those costs are not properly deductible from petitioner's total receipts subject to sales tax (computed by their prevailing rate) by carving out a separate rate for hotel room occupancy alone.

In ***Matter of Helmsley Enterprises v. Tax Appeals Tribunal*** (187 AD2d 64, 592 NYS2d 851; ***lv denied*** 81 NY2d 710, 600 NYS2d 197), although the issue was separation of the customer invoice into rent for hotel occupancy and the sale of tangible personal property, there are two key points made by the Court. First, that petitioner had not cited to any statutory language or legislative history to support its theory that for sales tax purposes, the furnishing of overnight hotel accommodations should be broken down into two taxable transactions; and secondly, the Court focused on the relationship of an innkeeper and its guest, and stated that an innkeeper's function is that of providing a service to which the separate items are purely incidental amenities.

As petitioner noted, these cases have some elements that differ from petitioner's herein. However, they nonetheless support the Division's imposition of sales tax on petitioner's prevailing rate in this matter. Accordingly, the Division's conclusion to hold petitioner liable for sales tax on what it calls the "prevailing rate" is supported by the Tax Law, regulations and case law. Thus, the Division's denial of petitioner's refund claim for the sales tax on hotel occupancy is upheld.

J. As to the small amount of tax attributable to recurring purchases, the Division's position that such purchases are subject to sales and use tax is correct. The Tax Law and regulations impose compensating use tax on tangible personal property purchased at retail, except where an item will otherwise be taxed under Article 28 of the Tax Law, or is exempt under such article (Tax Law § 1110; 20 NYCRR 525.2[b]). The Division maintains this is the case no matter what mode of purchase is used, such as the Internet. The Division claims petitioner has confused the language in Tax Law § 1115(v) concerning an exemption from sales and use tax on the receipts from the sale of Internet access service. Tax Law § 1115(v) provides:

> Receipts from the sale of Internet access service, including start-up charges, and the use of such service, shall be exempt from the taxes imposed under this article. For purposes of this subdivision, the term "Internet access service" shall mean the service of providing connection to the Internet, but only where such service entails the routing of Internet traffic by means of accepted Internet protocols. The provision of communication or navigation software, an e-mail address, e-mail software, news headlines, space for a website and website services, or other such services, in conjunction with the provision of such connection to the Internet, where such services are merely incidental to the provision of such connection, shall be considered to be part of the provision of Internet access service.

Petitioner claims that the language used in such provision, including the phrase "the use of such service" includes within its scope petitioner's acquisition of items allegedly subject to

use tax via their purchase by using the Internet as a service. There is nothing in the statutory language that exempts the purchase of tangible personal property by way of the Internet.

Accordingly, a refund for the sales and use tax on recurring expenses was properly denied by the Division.

K. Petitioner contends that some of the purchases at issue used in the construction of a boat ramp and dry hydrant, referred to as the "handicapped and emergency access facility" should have been exempt from the imposition of sales tax on the basis that they constituted capital improvements, exempt as tangible personal property sold by a contractor to a person for whom he is adding to or improving real property by a capital improvement, if such tangible personal property is to become an integral part of such structure, or in the alternative, exempt as medical equipment. These arguments are addressed separately below.

Tax Law § 1105(c)(3)(iii) excepts from the sales tax imposed by said paragraph (3) receipts from the *services of installing tangible personal property* "which, when installed, will constitute a capital improvement to real property, property or land . . . . " (Emphasis added.) "Capital Improvement" for purposes of subparagraph (iii) is defined in Tax Law § 1101(b)(9) as follows:

> Capital improvement. An addition or alteration to real property which:
>
> (i) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and
>
> (ii) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and
>
> (iii) Is intended to become a permanent installation.

Each of these three separately numbered requirements must be met in order for an addition or alteration to qualify as a capital improvement and thus not be subject to sales tax (***see, Matter of Howard Johnson Co.***, Tax Appeals Tribunal, July 19, 1990, ***confirmed Marriott Family Restaurants, Inc. v. Tax Appeals Tribunal***, 174 AD2d 805, 570 NYS2d 741, ***lv denied*** 78 NY2d 863, 578 NYS2d 877).

Petitioner's argument that the handicapped and emergency access facility expenditures are exempt from sales tax as a capital improvement must fail. Tax Law § 1105(c)(3) imposes sales tax on the receipts from every sale (except for resale) of services for installing tangible personal property. One of the statutory exceptions is for services rendered to install tangible personal property which, when installed, will constitute an addition or capital improvement to real property as defined in Tax Law § 1101(b)(9). All of the invoices for the purchase of materials do not qualify for sales tax exemption under Tax Law § 1105(c)(3)(iii), since they are not for the services of installing such tangible personal property. The receipts that are for welding alone do not identify whether something was actually installed, with nothing more. Although petitioner has provided purchase invoices, such as from E & J Mattison Welding, Inc., and Charles Greeno, which in addition to the purchase of materials include service rendered and sales tax charged thereon, there is insufficient proof that the tangible personal property purchased was actually installed. Assuming *arguendo* that an installation took place in those cases, petitioner has failed to establish that any of its purchases met the capital improvement criteria, particularly with regard to the issue of substantially adding to the value of the real property, or appreciably prolonging its useful life. The other criteria for a capital improvement, that the handicapped and emergency access facility was intended to become a "permanent installation" was merely asserted, although its permanence could be inferred from the type of

work done. However, the requirement that the removal of the capital improvement from the real property would cause material damage to the property, was never discussed by petitioner. Accordingly, for numerous reasons this argument is deemed without merit.

Petitioner's next argument concerns Tax Law § 1115(a), which provides for a multitude of exemptions from sales and use taxes, and states:

> Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:
>
> * * *
>
> (17) Tangible personal property sold by a contractor, subcontractor or repairman to a person other than an organization described in subdivision (a) of section eleven hundred sixteen, for whom he is adding to, or improving real property, property or land by a capital improvement, or for whom he is about to do any of the foregoing, if such tangible personal property is to become an integral component part of such structure, building or real property; provided, however, that if such sale is made pursuant to a contract irrevocably entered into before September first, nineteen hundred sixty-nine, no exemption shall exist under this paragraph.

20 NYCRR 541.2 offers the following definitions:

> (d) *Construction Contractor.* A *construction contractor* means any person who engages in erecting, constructing, adding to, altering, improving, repairing, servicing, maintaining, demolishing or excavating any building or other structure, property, development, or other improvement on or to real property, property or land.
>
> (e) *Contractor. Contractor* means a construction contractor, subcontractor or repairman.

First, neither petitioner nor John Salvador is a contractor as set forth in 20 NYCRR 541.2. However, assuming *arguendo* that either could be found to be a "contractor" only for the purpose of coordinating the handicapped and emergency access facility project, neither sold tangible personal property to petitioner for the handicapped and emergency access facility.

Thus, petitioner misapplies the exemption under Tax Law § 1115(a)(17). This argument is rejected.

Petitioner then tries to apply 20 NYCRR 541.11 to receive an exemption of sales tax on material which is installed by a contractor-fabricator and becomes part of a capital improvement. This regulation, focusing on fabrication and manufacturing, states the following:

> (a) Fabricators and manufacturers who install their fabricated or manufactured product into real property are contractors.
>
> (b) *Fabricators as contractors.* (1) When a contractor-fabricator purchases tangible personal property which he fabricates and installs to the specifications of a capital improvement, the value added by such fabrication is not subject to the use tax.
>
> *Example 1*: A contractor-fabricator purchases steel beams from a manufacturer and pays the sales tax on his cost. His employees fabricate the beams to job specifications and install the beams in a capital improvement job. The contractor-fabricator is not subject to a use tax on the value added by his fabrication.
>
> (2) However, where a contractor fabricates tangible personal property of others, without installation, he is required to collect the tax on his total charges even if the property is to be installed by another to the specifications of a capital improvement. If he fabricates tangible personal property and sells the tangible personal property, the total charge for the tangible personal property and services performed thereon is subject to tax.
>
> *Example 2*: A contractor purchases steel beams which must be fabricated before they can be installed. The work is subcontracted out for fabrication. The fabricator's charge to the contractor for the fabrication of the steel beams which the contractor will install is subject to the tax.

Petitioner completely misconstrues this regulation by calling petitioner a "contractor," which under this provision is actually a "contractor-fabricator." Although John Salvador may have led the project, neither he nor petitioner is a contractor-fabricator under this provision.

Petitioner's final argument is that the expenditures to construct the handicapped and emergency access facility are not subject to sales tax because they qualify for the exemption

under Tax Law § 1115(3) as medical equipment used to correct or alleviate physical incapacity. Under corresponding regulations, 20 NYCRR 528.4, the statute is further explained:

> (e) *Medical equipment.* (1) Medical equipment means machinery, apparatus and other devices (other than prosthetic aids, hearing aids, eye glasses and artificial devices which qualify for exemption under section 1115(a)(4) of the Tax Law), which are intended for use in the cure, mitigation, treatment or prevention of illnesses or diseases or the correction or alleviation of physical incapacity in human beings.
>
> (2) *To qualify such equipment must be primarily and customarily used for medical purposes and not be generally useful in the absence of illness, injury or physical incapacity* (emphasis added).
>
> *Example 1:* Items such as hospital beds, wheel chairs, hemodialysis equipment, iron lungs, respirators, oxygen tents, crutches, back and neck braces, trusses, trapeze bars, walkers, inhalators, nebulizers and traction equipment are exempt medical equipment.

Additionally, 20 NYCRR 528.5, as applicable herein, provides as follows:

> (a) *Exemption.* Prosthetic aids, hearing aids, eyeglasses and artificial devices and component parts thereof, purchased to correct or alleviate physical incapacity in human beings are exempt from the tax.
>
> (b) *Qualifications.* (1) In order to qualify as a prosthetic aid, a hearing aid, eyeglasses or an artificial device, the property must either completely or partially replace a missing body part or the function of a permanently inoperative or permanently malfunctioning body part *and must be primarily and customarily used for such purposes and not be generally useful in the absence of illness, injury or physical incapacity* (emphasis supplied).

Although the handicapped and emergency access facility appears to qualify as equipment or a device which alleviates physical incapacity, under both regulations it is abundantly clear that in order to qualify for the 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. The handicapped and emergency access facility serves numerous functions. This was supported by the testimony of Mr. Salvador about the handicapped and emergency access facility when he said, "we tried to kill two birds with one

stone " (Transcript, p. 507). The handicapped and emergency access facility was constructed to better permit wheelchair and handicapped access, to allow an ambulance to access the water front in a rescue situation and to provide petitioner and the local community and fire department with a source of water in the event of a fire regardless of temperatures or the depth of snow. Despite the valuable contribution petitioner made in constructing the handicapped and emergency access facility, the expenditures do not qualify for a sales tax exemption as medical equipment or prosthetic aid.

Accordingly, the Division properly denied the portion of petitioner's refund claim concerning the purchases for the handicapped and emergency access facility.

L. One of the items for which petitioner seeks a refund is for sales tax collected on beach and boat club dues. The parties did not present evidence or arguments as to whether the beach and boat club dues in issue were subject to tax under Tax Law § 1105(f)(2). However, if petitioner was eligible for a refund, the Division maintains that petitioner is not entitled to it since it failed to establish that it had first refunded sales tax it collected on beach and boat club dues to its members. A seller may obtain a refund of any tax "erroneously, illegally or unconstitutionally collected or paid" (Tax Law § 1139[a]). In order to be entitled to such refund of tax, which was collected from a customer, the vendor must establish that he has actually repaid the tax to the customer (***Matter of Saltzman v. State Tax Commn***., 101 AD2d 910, 475 NYS2d 610, 611; Tax Law § 1139[a]; 20 NYCRR 534.2[c]; 534.7[a]). Although petitioner provided the amount of sales tax collected during the period, there was no evidence presented that indicated petitioner had repaid the overcollection of tax on the beach and boat club dues to the members.

Accordingly, the Division properly denied petitioner's claim for refund of sales tax on the beach and boat club dues in the amount of $995.99.

M. Petitioner raised numerous additional arguments including the insensitivity on the part of the Division to protect the privacy of the data contained on the guest registration cards of petitioner's resort guests. Petitioner is required by law to maintain its business records for production to the Division in the event of an audit. Inasmuch as petitioner produced a sufficient sample of guest registration cards for the Division to conclude that petitioner's records were complete, there is no further issue to address concerning production of records. Whether the Division should be more sensitive than it already is to the privacy of the customers of a particular taxpayer is not an issue which is properly the subject of this hearing.

N. Petitioner maintains that the Tax Law provisions at issue herein are unconstitutional as applied to petitioner. The Tax Appeals Tribunal, in review of another "as applied" constitutional challenge *(**Matter of Balan Printing, Inc.,***Tax Appeals Tribunal, April 17, 1991) discussed the equal protection review permissible, as follows:

> Administrative actions and classifications are subject to equal protection review (***see, Matter of Doe v. Coughlin***, 71 NY2d 48, 523 NYS2d 782, 787) under both the United States Constitution (US Const 14th amend) and the New York State Constitution (NY Const, art I, § 11). However, 'the prohibition of the Equal Protection Clause goes no further than the invidious discrimination' (***Williamson v. Lee Optical of Okla.,*** 348 US 483, 489). Thus, unless the State draws distinctions between similarly situated taxpayers whereby it classifies on the basis of a suspect class or impairs a fundamental right, equal protection only requires that such uneven treatment be rationally related to the achievement of a legitimate governmental purpose and not be palpably arbitrary (***see, Town of Tonawanda v. Ayler***, 68 NY2d 836, 508 NYS2d 171; ***Trump v. Chu***, 65 NY2d 20, 489 NYS2d 455). In addition, within the field of taxation more than in other fields, governmental authorities possess even more flexibility in making classifications and drawing lines which in their judgment produce reasonable systems of taxation (***see, Krugman v. Board of Assessors,*** 141 AD2d 175, 533 NYSd 495, 501; ***Shapiro v. City of New York***, 32 NY2d 96, 343 NYS2d 323, 329, ***appeal dismissed for want of a substantial fed. question*** 414 US 804, ***pet***

> ***for rehr denied***, 414 US 1087; ***see also, Madden v. Kentucky***, 309 US 83, 87-88). A denial of equal protection will arise only where a purposeful, invidious and intentionally unfair discrimination in the enforcement of a statute is present (***Di Maggio v. Brown***, 19 NY2d 283, 279 NYS2d 161, 166-167; ***People v. Friedman***, 302 NY 75, ***appeal dismissed for want of a substantial fed. question*** 341 US 907; ***Matter of Doe v. Coughlin***, ***supra***). Equal protection does not require identity of treatment. It only requires that classification rest on some real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary (***Walters v. St. Louis***, 347 US 231, 237).

The provisions of the statute are sufficiently understandable, specific, and objective and are not subject to arbitrary or discriminatory application. Vagueness or overbreadth of the statute is not an issue. Petitioner has not shown that it has been treated differently than any other similarly situated hotel or resort. Petitioner does not bear any disparate tax burden by the imposition of the tax provisions applied herein. Accordingly, petitioner has not persuaded me that there is anything in the statutory scheme so arbitrary in classification or producing such an apparent inequality as to justify a conclusion that the statute as applied imposes a constitutional infringement of petitioner's rights (***see, generally, The Nationalist Movement v. Commissioner***, 102 TC 558; ***Stasia V. Hayman v. Commissioner***, 27 TCM 515).

O. The next issue concerns petitioner's potential to violate the Soldiers' and Sailors' Relief Civil Relief Act of 1940, or some like provision (which exempts service personnel on active duty from certain types of taxation) while attempting to properly collect the sales tax on hotel occupancy. In order to provide for the proper administration of the sales tax law and prevent evasion of tax, Article 28 of the Tax Law contains a presumption that all receipts for property and services enumerated in Tax Law § 1105 are subject to sales tax unless the contrary is established, and the burden of proving that any receipt is not taxable is upon the vendor or the customer (Tax Law § 1132[c]). Proper documentation, as required by the Division's regulations,

must be produced for entitlement to the exemption, and without the same, the sale remains taxable. Petitioner is not forced to inquire as to the military status of an individual for purposes of properly computing charges without taxation. However, petitioner is left with no option but to consider every sale of hotel services as taxable, absent proof from the customer.

P. Petitioner's final arguments, noted in paragraph 15 (***supra***) concern constitutional challenges to the Tax Law imposed herein. The Division of Tax Appeals does not have the jurisdiction to address petitioner's constitutional claims. At the administrative level, it is presumed that statutes are constitutional (***Matter of Bucherer, Inc.,*** Tax Appeals Tribunal, June 28, 1990). Although the Division of Tax Appeals may determine whether Tax Law statutes are constitutional as applied (***see, Matter of David Hazan, Inc.***, Tax Appeals Tribunal, April 21, 1988, ***confirmed***, 152 AD2d 765, 543 NYS2d 545, ***affd*** 75 NY2d 989, 557 NYS2d 306), its scope of review does not extend to determining the facial constitutionality of the statutes (***Matter of J.C. Penney Co., Inc.***, Tax Appeals Tribunal, April 27, 1989; ***Matter of Fourth Day Enterprises***, Tax Appeals Tribunal, October 27, 1988).

Here, petitioner frames its Commerce Clause argument as an unconstitutional burden on the interstate commerce in which petitioner is engaged. Petitioner claims that the methodology used by the Division in applying the "occupancy" tax fails to meet the requirements necessary for such tax to survive the constitutionality test of the Commerce Clause, given the manner in which this tax has been attempted to be applied to petitioner, and thereby to petitioner's out-of-state patrons. Likewise with regard to petitioner's assertion that the Tax Law provisions at issue herein violate the Privileges and Immunities Clause of the United States Constitution, article IV, § 2, petitioner implies that principles applied by the Supreme Court in ***Lunding v. New York Tax Appeals Tribunal*** (522 US 287, 139 L Ed 2d), wherein the Court reached a conclusion of

discriminatory treatment resulting from New York's income tax provisions relating to taxation issues involving out-of-State, nonresident income tax filers, should be relied upon here. Inasmuch as petitioner asserts facial attacks on the applicable tax statutes, the Division of Tax Appeals has no jurisdiction to address petitioner's constitutional challenges.

Q. The petition of Dunham's Resort Corp. is hereby denied and Division of Taxation's denial of petitioner's refund claim, dated January 15, 2003, is upheld.

DATED: Troy, New York
September 2, 2004

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE