STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
TRANS STATES AIRLINES, INC.	:	
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, 1996 through August 31, 2002.	:	
	:	DETERMINATION DTA NOS. 822272
In the Matter of the Petition	:	AND 822273
of	:	
TRANS STATES AIRLINES, INC.	:	
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, 2002 through November 30, 2003.	:	
	:	

Petitioner, Trans States Airlines, Inc., filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods September 1, 1996 through August 31, 2002 and September 1, 2002 through November 30, 2003.

A consolidated hearing was held before Timothy Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on February 10, 2009 at 10:30 A.M., with all briefs to be submitted by June 12, 2009, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by

David J. A. Hayes, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Osborne K. Jack, Esq., of counsel).

ISSUES

I. Whether petitioner paid sales tax on its rental of hotel rooms when it remitted payment in respect of such rentals.

II. Whether any part of the assessments herein were barred by the relevant period of limitations.

FINDINGS OF FACT

1. Petitioner, Trans States Airlines, Inc., is a Missouri corporation based in the St. Louis suburb of Bridgeton, Missouri. Petitioner is a national airline that flies throughout the United States. Petitioner contracts with major airlines to provide regional service under the major carrier's name. In the course of its operations and in accordance with various collective bargaining agreements, petitioner must provide lodging for its flight crews. During the periods at issue petitioner flew to many locations within New York State and rented many hotel rooms for its flight crews at such New York locations. Whether petitioner paid sales tax on these hotel rooms is the central issue in this matter.

2. The present matter involves two sales tax audits of petitioner. The first audit covered the period September 1, 1996 through August 31, 2002. The Division determined $62,941.68 in additional tax due, plus interest, in respect of petitioner's rental of hotel rooms in New York for this period.[1] The tax was calculated using a test period methodology. The test period utilized

[1] This first audit also determined $8,886.39 in additional tax due in respect of asset purchases. Petitioner agreed to and remitted payment on this portion of the assessment at the conclusion of the audit.

was the month of January 2001. Petitioner consented to the use of the test period and did not contest the calculation of the assessed tax.

3. The Division issued to petitioner a Statement of Proposed Audit Change for Sales and Use Tax dated July 21, 2005 which proposed a deficiency of $62,941.68 plus interest for the period September 1, 1996 through August 31, 2002.

4. In July 2006, the Division filed a Warrant[2] against petitioner in respect of the tax deficiency as determined on the audit. By that time the deficiency had become an assessment (Assessment ID number L-026121357-2). The warrant demanded $62,941.68 in tax, plus interest of $40,944.49, for a total of $103,886.17.

5. Petitioner subsequently paid the assessment. At the time of payment, the amount due was $62,941.68 in tax, plus interest of $42,608.24, for a total of $105,549.92. Petitioner remitted a check for $110,000.00 and the Division subsequently remitted to petitioner a refund of its overpayment of $4,450.08.

6. Petitioner filed an Application for Credit or Refund of Sales and Use Tax dated October 3, 2006 seeking a refund of its payment of tax and interest on the Division's assessment.

7. By letter dated November 13, 2006, the Division denied petitioner's refund claim.

8. The second audit at issue in this matter determined $33,207.65 in additional tax due on petitioner's rental of hotel rooms in New York for the period September 1, 2002 through

[2] The record does not reflect the issuance of a Notice of Determination to petitioner in respect of this assessment.

November 30, 2003.[3] The tax was calculated following a detailed review of petitioner's records for the audit period and petitioner did not contest the Division's calculations.

9. On December 4, 2006, following this second audit, the Division issued to petitioner a Notice of Determination asserting $33,207.65, plus interest, for the period September 1, 2002 through November 30, 2003.

10. During the periods at issue petitioner engaged the services of Corporate Lodging Consultants, Inc. (CLC), a Kansas corporation based in Wichita, Kansas, to locate acceptable hotels and to secure rooms at the most favorable rates. The System Lodging Agreement dated October 25, 1996, entered into by petitioner and CLC, provided that the "express purpose" of the agreement was to produce cost savings to petitioner and defined such savings as the "amounts [petitioner] would have paid for employee hotel lodging, including all applicable taxes, less amounts [petitioner] shall pay for said lodging after the inception of this Agreement, including taxes and CLC fees and incentives."

11. Pursuant to the System Lodging Agreement, and as relevant herein, CLC agreed to provide to petitioner the following services:

> a) Use its best efforts to locate hotels with favorable rates and otherwise satisfactory to [petitioner]. . . .
>
> b) Periodically present to [petitioner] listings of hotels which may be desirable for use by [petitioner] and upon [petitioner's] written approval of certain hotels to complete such arrangements as are necessary for such hotels to provide lodging to [petitioner]. . . .
>
> c) Use its best efforts to negotiate for and obtain the lowest rates at all hotels approved by [petitioner] and to provide to [petitioner] monthly "Savings Reports" listing the lowered rates and savings accrued for [petitioner]. CLC will

[3] This second audit also determined $1,071.24 in additional tax due in respect of a sale of certain assets. As with the first audit, petitioner agreed to and remitted payment on this portion of the assessment at the conclusion of the audit.

> approve and authorize for use only the hotels previously approved by [petitioner]. Rates will be defined as the rate the hotel charges CLC including any applicable taxes plus the fee CLC charges [petitioner].
>
> d) Accept and process billings from hotels for [petitioner's] lodging expenses and provide to [petitioner] lodging billings including information as may be agreed upon by the parties at no extra charge.
>
> e) To promptly disburse all payments to hotels for all billings for which [petitioner] has paid CLC.

12. For such services petitioner agreed to pay CLC a fee of $2.00 per approved hotel room night charge. CLC could also earn incentives based upon cumulative cost savings.

13. Petitioner also agreed in the System Lodging Agreement that it was solely responsible for all hotel charges incurred on behalf of its employees and agreed to hold CLC harmless from any and all liability for such charges.

14. In performance of its obligations under the System Lodging Agreement, CLC requested bids from various hotels for use by petitioner's employees. The bid requests indicated that petitioner was seeking a rate "around" a particular dollar amount, "including all applicable taxes." The bid request form had spaces for the hotel to indicate the "rate offered," "tax percentage" and "total."

15. Upon receipt of bids from hotels, and based on the information contained therein, CLC would forward bid sheets to petitioner for petitioner's approval or disapproval of the bid at the terms listed on the bid sheet. Such bid sheets listed the proposed rate along with other information about the hotel. With respect to the rate, the bid sheet listed an amount followed by the parenthetical "tax/fee inclusive." The "fee" in the parenthetical referred to CLC's $2.00 per night room charge.

16. CLC provided monthly invoices to petitioner listing employee names, hotel name, dates of stays at the hotel and a total rate payable by petitioner to CLC. Petitioner did not receive invoices from the hotels.

17. The room rates listed on the monthly CLC invoices in the record were consistent with the "tax/fee inclusive" rates as listed on the bid sheets in the record.

18. Petitioner paid CLC for the charges listed on the monthly invoices.

19. Upon receipt of payment from petitioner, CLC remitted payment to the hotels for the charges incurred by petitioner's employees. CLC paid the total amounts charged by the hotels.

20. CLC maintained records which provided detail for the checks CLC remitted to hotels. Such detail included employee names, dates of stay, and "total charge." These CLC records also detailed stays for CLC customers other than petitioner. Such other customers were designated "CLC Customer X" or "CLC Customer Y." With respect to petitioner's employees, the "total charge" listed on the CLC records was equal to the total charge to CLC by the hotel for each night's stay. Such "total charge" was also equal to the "tax/fee inclusive" rates as listed on the bid sheets and CLC's monthly invoices to petitioner, less CLC's $2.00 per night's stay fee.

21. Petitioner's employees were not provided with any invoices or bills when they stayed at the various hotels. They did not make any direct payments to the hotels. Petitioner's employees simply signed in at the hotel to gain access to their room.

22. As of approximately October 2003, petitioner had ended its contract with CLC and had engaged LJK Corporation (LJK; later called LodgeX) to provide lodging services. LJK's monthly invoices were similar to those provided by CLC, in that they were broken down by hotel and listed employee names and lodging dates. The LJK invoices, however, provided more detail as to the charges, noting, for each night's stay, a room charge, tax charges, miscellaneous

charges, administrative fee and a total. A sample of such an LJK invoice in the record shows tax charges on stays at a New York hotel.

23. Although the Division's second audit of petitioner covered the period September 1, 2002 through February 28, 2006, no additional tax was determined due on room charges following the period ended November 30, 2003. This is because the Division determined that petitioner's documentation with respect to the period December 1, 2003 through February 28, 2006 substantiated petitioner's claim of payment of sales tax on its hotel rooms. Such documentation consisted of the LJK invoices as described above.

24. Petitioner filed suit against CLC in November 2006 seeking to recover the amounts paid to the Division to satisfy the Warrant (***see*** Findings of Fact 4 and 5) and the amounts sought by the Division in the Notice of Determination (***see*** Finding of Fact 9). During the course of the litigation, both petitioner and CLC sought, by subpoena, to obtain original invoices from the hotels for the period under assessment herein, but such invoices were no longer available due to the passage of time. By Judgment of the United States District Court, Eastern District of Missouri, dated March 7, 2008, CLC's motion for summary judgment was granted and petitioner's case was dismissed in its entirety. The reasons for the Court's judgment are not in the record.

25. Petitioner did not file any sales tax returns in respect of the periods at issue.

26. Petitioner was not registered as a vendor for sales tax purposes at the start of the first audit. Petitioner became registered at some point during the first audit and was registered as a vendor at the start of the second audit.

27. Petitioner flew to 13 cities in New York State at various points during the periods at issue and stayed at hotels in Buffalo, Rochester, Syracuse, Johnson City, Horseheads, Elmira, and Ithaca, among other locations.

28. In July 2005, near the conclusion of the first audit, petitioner attempted to obtain the original invoices issued by the hotels to CLC, but was advised by CLC that such invoices were no longer available.

29. At hearing, petitioner submitted samples of bid sheets (***see*** Finding of Fact 15), invoices from CLC to petitioner (***see*** Finding of Fact 16) and CLC's internal records of hotel stays (***see*** Finding of Fact 20). The Division agreed that such samples were representative of documentation available for all hotel charges for all periods at issue.

CONCLUSIONS OF LAW

A. Tax Law § 1105(e) imposes sales tax on the rent for the occupancy of hotel rooms.

B. Tax Law § 1132(c) creates a presumption that all receipts for rents for occupancy of hotel rooms are taxable and places the burden of proving that any receipt is not taxable upon the person required to collect the tax or the customer.

C. The customer generally pays sales tax to the vendor when it pays the price to which it applies (Tax Law § 1132[a]). If the customer fails to pay the tax to the vendor, then the customer is charged with filing a return with the Division of Taxation and to pay the tax directly to the Division within 20 days of the date the tax was required to be paid (Tax Law 1133[b]).

D. Tax Law § 1132(c) provides that "if the customer is given any sales slip, invoice, receipt, or other statement or memorandum of the [amount] paid or payable, the tax shall be stated, charged and shown separately on the first of such documents given to him."

E. Section 532.1(b)(3) of the Division's regulations (20 NYCRR 532.1[b][3]), promulgated under Tax Law § 1132, provides that "[t]he words 'tax included' or words of similar import, on a sales slip or other document, do not constitute a separate statement of the tax, and the entire amount charged is deemed the sales price of the property sold or the services rendered."

F. In this case, the monthly invoices provided to petitioner by CLC for the periods at issue did not separately state sales tax and there are no invoices from the hotels to CLC in the record. Accordingly, the Division was entitled to presume or deem the entire charge reflected in the invoices as rental for hotel rooms. The absence of invoices separately stating tax is not necessarily fatal to petitioner's case, however, for the presumptions created by Tax Law § 1132(c) and 20 NYCRR 532.1(b)(3) of the Division's regulations may be rebutted by evidence provided either during the audit or at hearing (***see Matter of LaCascade, Inc. v. State Tax Commn***., 91 AD2d 784, 458 NYS2d 80 [3d Dept 1982]).

G. Under the facts and circumstances of this case, it is concluded that petitioner has carried its burden of proving that the charges on the CLC invoices included sales tax and that therefore petitioner paid sales tax on the room rentals at issue by its payments to CLC, which, in turn, remitted payments to the various hotels.

The System Lodging Agreement shows that petitioner and CLC had an understanding that taxes would be included in the rates payable by petitioner to CLC. This understanding is demonstrated by the Agreement's definition of "rates" as "the rate the hotel charges CLC including any applicable taxes plus the fee CLC charges [petitioner]" (***see*** Finding of Fact 11). This understanding is also shown by the inclusion of taxes with the cost of employee hotel lodging in the Agreement's definition of "savings" (***see*** Finding of Fact 10). That the total room

charges would include sales taxes was communicated to the various hotels through CLC's requests for bids. The bid requests specifically indicated that CLC was seeking a rate inclusive of all applicable taxes and provided a space for the hotel to indicate a room rate, a tax percentage, and a total on its bid (***see*** Finding of Fact 14). The bid sheets, written up by CLC following CLC's receipt of bids from the hotels and then forwarded to petitioner, also indicate the inclusion of taxes in the hotel's total charge (***see*** Finding of Fact 15). Specifically, the proposed room rate listed on the bid sheet was followed by the parenthetical "tax/fee inclusive." The "tax/fee inclusive" rates as listed on the bid sheets are consistent with the room rates listed on the monthly CLC invoices (***see*** Finding of Fact 17). Additionally, after allowing for CLC's fee, the rates on the CLC records are also consistent with the amounts on the bid sheets and the monthly invoices (***see*** Finding of Fact 20).

These facts establish that petitioner, CLC and the hotels had an understanding that sales taxes would be included in the total room charges to petitioner (***cf. Moducraft, Inc. v. Liberatore***, 89 AD2d 776, 453 NYS2d 488, 489 [4th Dept 1982]). In addition, the hotel operators were under a duty to charge and collect sales tax on their rental of hotel rooms (Tax Law §§ 1131[1]; 1132[a][1]). The bid requests, bid sheets, CLC invoices to petitioner and the CLC records all reflect this understanding and support a finding that petitioner's payments to the hotels via CLC included sales tax. Furthermore, there is no question that petitioner paid CLC the amounts billed by CLC and that CLC in turn paid the hotels the amounts billed by the hotels to CLC. Hence, any failure to pay sales tax by petitioner necessarily would coincide with a failure by the hotels to charge sales tax. Furthermore, these same circumstances were present with respect to unrelated hotels located in 13 cities over a 7-year period. Accordingly, a finding that petitioner failed to pay sales tax herein implies a widespread failure by hotel operators to charge

sales tax. Such a failure seems unlikely and there is no indication of any such failure in the record. Finally, there is no indication of any intent to deceive or evade tax by petitioner. Rather, this matter appears to be a failure of proper record keeping.

Taken together, the foregoing facts and circumstances overcome the presumption of taxability and establish that petitioner paid sales taxes on its room rentals with its payments to CLC and CLC's subsequent remittance to the respective hotels.

H. The conclusion reached above should not be read as an authorization of the billing practices described herein. While the unique facts and circumstances present in this matter are sufficient to rebut the presumption of taxability of Tax Law § 1132(c), each case must be considered on its own merits and proof which is sufficient under one set of circumstances may be insufficient under other circumstances. Failure to comply with Tax Law record keeping requirements (***see*** Tax Law §§1132[a]; 1135; 20 NYCRR 532.1[b]) properly invites inquiry from the Division of Taxation and exposes taxpayers to litigation expenses and sales tax liability.

I. Issue II is moot.

J. The petitions of Trans States Airlines, Inc. are granted. Accordingly, petitioner's refund claim dated October 3, 2006 is granted and the Notice of Determination dated December 4, 2006 is cancelled.

DATED: Troy, New York
December 3, 2009

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE