STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROCHESTER HOTEL TRS, INC.	:	DETERMINATION DTA NOS. 823344
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, 2004 through May 31, 2007.	:	

Petitioner, Rochester Hotel TRS, Inc., 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, 2004 through May 31, 2007.

On December 6, 2010 and December 7, 2010, respectively, petitioner, appearing by Nixon Peabody, LLP (Scott F. Cristman, Esq., of counsel), and the Division of Taxation, appearing by Mark Volk, Esq. (Clifford M. Peterson, Esq., of counsel), waived a hearing and submitted the matter for determination based on documents and briefs to be submitted by May 26, 2011, which date began the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly denied petitioner's claim for refund on the basis that petitioner was not certified as eligible to receive empire zone benefits, did not use its own employees to compute the employment test and never received proper Qualified Empire Zone Enterprise (QEZE) sales tax certification for sales tax exemption.

FINDINGS OF FACT

The parties entered into a stipulation of facts, which has been incorporated into the findings below without reference to attached exhibits, except numbered paragraphs 17, 21, 22, 23 and 27 through 36, which are not properly included in findings of fact. In addition, the Division of Taxation has submitted proposed findings that have been incorporated into the findings of fact below.

1. In October 2004, Rochester Hotel TRS, Inc. (petitioner) began leasing the Hotel located at 125 E. Main Street, Rochester, New York (Hotel). Petitioner acquired the leasehold interest in the Hotel by assignment from EHP Rochester Hotel, LLC, successor by merger with Rochester Downtown Hotel, Inc., on October 1, 2004. The leasehold was subsequently transferred by petitioner to AP/AIM Rochester Hotel TRS, LLC, on August 15, 2007.

2. Hyatt Corporation (Hyatt) operated the Hotel on behalf of petitioner just as it had for the prior owners and lessors, pursuant to the same Management Agreement.

3. Under the terms of the Management Agreement, Hyatt had control and authority over the management and administration of the Hotel. Said control included the "right to determine the terms of admittance, charges for rooms, charges for entertainment, food and beverages, labor policies . . . and all phases of promotion and publicity."

4. Hyatt's annual operating plan and budget for the Hotel were not subject to petitioner's approval. Petitioner's right to receive monies based on the profits of the Hotel's operation did not give it any "interest, control, or discretion" over the operation of the Hotel. Petitioner only had the right to "approve contracts with" business entities controlled by Hyatt. Hyatt received a fee for managing the operations of the Hotel.

5. Petitioner was not responsible for sales and use taxes imposed on Hyatt's purchases for the operations of the Hotel. Hyatt collected and paid such taxes.

6. Hyatt had the legal rights to the names "Hyatt" and "Regency" even when used in conjunction with each other. There was no instance that would permit petitioner to use the names "Hyatt," "Regency" or "Hyatt Regency."

7. The federal government issues a unique employer identification number (EIN) to each taxpayer corporation. For New York tax purposes, a corporation is required to provide its EIN because the Division uses it to identify and track the corporation in its records.

8. As of September 24, 2002, Hyatt filed with the Monroe County Clerk's Office that it was doing business as the "Hyatt Regency Rochester" at the Hotel's address.

9. Effective July 19, 2002, Rochester Downtown Hotel, Inc. (Downtown), petitioner's predecessor as lessor of the Hotel, was certified eligible to receive Empire Zone benefits.

10. In April 2003, Downtown, as agent of Hyatt, applied for a Qualified Empire Zone Enterprise (QEZE) sales tax certification number. The business address was listed as "Hyatt Regency Rochester, 125 E. Main St., Rochester, NY." It listed the legal name of the business as "Rochester Downtown Hotel, Inc. as agent of Hyatt Corporation" and listed Hyatt's EIN. The application certified that the applicant met the employment test requirements and was executed by Patricia Kensek, assistant controller of Hyatt.

11. On April 18, 2003, the Division issued QEZE sales tax certification number 1113084 to "Rochester Downtown Hotel, Inc./Hyatt Regency Rochester," effective as of May 1, 2003.

12. In November 2004, petitioner notified the Monroe County Clerk's Office that it was doing business under its own name, Rochester Hotel TRS, Inc.

13. In October 2005, Hyatt applied for certification as an Empire Zone business enterprise at 125 E. Main Street, Rochester, New York, identifying itself as "Hyatt Corporation, as agent of Rochester Hotel TRS, Inc., a Delaware corporation, d/b/a Hyatt Regency Rochester." Hyatt specifically used its own EIN in its application.

14. On May 2, 2006, Hyatt, identified as "dba Hyatt Regency Rochester," was certified eligible to receive empire zone benefits and was assigned certification number 42-0414-4388.

15. When petitioner registered for sales and use tax purposes, it did not share its EIN. As a result, the Division assigned it the EIN "TF1920626."

16. On May 19, 2006, under its own EIN, and not petitioner's, Hyatt filed for a QEZE sales tax certification number. Hyatt identified itself as "Hyatt Corporation, as agent of Rochester Hotel TRS, Inc., a Delaware Corporation, d/b/a Hyatt Regency Rochester." The application certified that Hyatt met the employment test requirements necessary to file the application and was executed by Marc Eick, controller of Hyatt.

17. In considering an Empire Zone enterprise's application for a QEZE sales tax certification number, the Division relies on information on the enterprise's application along with its certification of eligibility to receive the Empire Zone benefits.

18. The review of Hyatt's application for the QEZE sales tax certification number revealed that Hyatt had used the same EIN that Downtown had used on its April 2003 application. In addition, the Division became aware in 2005 that Empire State Development, the government entity that administers the Empire Zone Program, had recorded a name change for Downtown, wherein Downtown changed its name to Hyatt d/b/a Hyatt Regency.

19. As a result of its review, and making the determination that it was the same entity requesting the exemption number, the Division issued to Hyatt the same QEZE sales tax

exemption number, 1113084, which had previously been issued Hyatt, and listed the same effective date of the certification, May 1, 2003. Petitioner was never issued a sales tax certification number in its own name, i.e., Rochester Hotel TRS, Inc. In addition, petitioner was never issued a certificate of eligibility to access Empire Zone benefits in its own name.

20. Pursuant to the Management Agreement between Hyatt and the owners of the Hotel, dated December 20, 1990, all employees of the Hotel were Hyatt's employees. Hyatt was permitted to reimburse itself out of operating accounts for the employees' total aggregate compensation, including fringe benefits and annual bonuses. The term "fringe benefits" was defined to include the cost of pension and pension sharing plans, workers' compensation benefits, group life and accident and health insurance. Also, Hyatt filed withholding tax returns with respect to these employees. The Management Agreement called for the creation of operating accounts, established in the owner's name, which served as the depository of advanced working capital from the owner and all monies received by Hyatt from the operations of the Hotel.

21. The Management Agreement dictated that the owner contribute sufficient working capital to be on hand in the operating accounts to assure the timely payment of all current liabilities of the Hotel and to cover all other items necessary for the uninterrupted and efficient operation of the Hotel, including all necessary inventory of food, beverages and operating supplies.

Hyatt was obligated under the terms of the Management Agreement (Section 3.3) to deposit into the operating account in petitioner's name, all monies received by it from the operations of the Hotel and it was further obligated by Section 4.3 of the Agreement to remit to petitioner on a monthly basis all funds in the operating accounts that exceeded "the amount then reasonably required to be maintained" in said account for the operation of a superior class hotel.

22. In 2007, Hyatt executed two certificates of corporate resolution that established a payroll account and an operating account in the name "Hyatt Corporation, as agent of Rochester Hotel TRS, Inc." Hyatt provided its employer EIN and state of incorporation, Delaware, on the certificates. However, although empowered to act as petitioner's agent for very specific purposes, Hyatt and petitioner remained separate and distinct entities, providing in section 3.4 of the Management Agreement that their relationship was not to be construed to be a partnership, joint venture or lease with regard to the Hotel.

23. Petitioner filed quarterly sales tax returns for the period September 1, 2004 through May 31, 2007 under the name "Rochester Hotel TRS, Inc./Hyatt Regency" or "Rochester Hotel TRS, Inc./Hyatt Regency Rochester." However, section 7.6 of the Management Agreement provided that Hyatt, not petitioner, as owner, was responsible for the collection and payment of sales and use taxes arising from the operation of the Hotel. In addition, the record does not indicate whether the returns filed by petitioner included only sales by the Hotel, and no sales tax returns were submitted into evidence. Marc Eick, Hyatt's controller, averred that he prepared and supervised the preparation of sales tax returns and ensured remittance of the tax.

24. On January 29, 2007 and May 11, 2007, petitioner filed refund claims in the amounts of $106,223.78 and $108,620.86, respectively, for the state portion of sales tax paid on purchases of goods and services for the Hotel from 2005 and 2006. The claims were subsequently combined into one claim totaling $214,844.64. The EIN used on the refund application was petitioner's.

25. Petitioner's first refund claim was accompanied by a letter from Patricia Kensek, assistant controller of Hyatt, dated January 29, 2007, which explained that the claim was made based on the exemption granted to Hyatt, sales tax certification number 1113084, originally issued in 2003. Subsequently, on June 18, 2007, a tax analyst for Hyatt, Ms. Christine Boyd, sent a letter

to the Division in which she stated that the Management Agreement gave petitioner the contractual right and authority to apply for the refund, not its agent, Hyatt. Attached to the letter was an excerpt from the Management Agreement, which was the first time it was produced to the Division.

26. On January 29, 2008, the Division issued to petitioner a Statement of Proposed Audit Change for Sales and Use Tax, form AU-346, for the period September 1, 2004 through May 31, 2007. The Division acknowledged in the statement its belief that petitioner was entitled to the refund claimed, subject to the condition on the form contained in the statement, "I may consider these findings final unless I hear from the department to the contrary within 60 days after the department's receipt of this signed consent." The form was executed by Hyatt's controller, Marc Eick, on March 6, 2008.

27. By letter, dated April 30, 2008, the Division timely rescinded the form AU-346 and denied the refund claim. In the letter the Division merely stated that "QEZE benefits cannot be assigned to a third party."

28. The sales tax auditor who wrote that letter, Mary Paille, later explained in an affidavit that the Division reviewed the refund claim and reversed its position for the following reasons:

a) Hyatt, and not petitioner, was certified eligible to receive Empire Zone benefits;

b) Hyatt's employees were used to compute the annual employment test, and therefore petitioner did not qualify to be an Empire Zone Enterprise;

c) Petitioner's application for the tax refund filed on or about January 29, 2007 was made with the assumption that petitioner could claim credits for which only Hyatt was certified qualified.

SUMMARY OF THE PARTIES' POSITIONS

29. Petitioner contends that it is entitled to the sales tax exemption because it bore all the economic benefits and burdens of operating the Hotel. It believes that it met the intent of the statute in satisfying the employment test because it bore the costs associated with employing the Hotel employees.

30. Petitioner argues that the Management Agreement established an agency relationship which created a pass-through relationship permitting petitioner to claim the QEZE certification belonging to Hyatt.

31. Petitioner maintains that it consistently relied on the Division in seeking its refund and therefore is entitled to estoppel against the Division for its subsequent refusal to grant the refund.

32. The Division contends that petitioner simply did not qualify for the exemption from the state portion of sales tax because it was not a qualified Empire Zone enterprise and never received a QEZE sales tax certification number.

33. The Division disputes petitioner's agency status with Hyatt given the language of the Management Agreement and notes that a principal may not claim Empire Zone benefits based on another company's qualifications.

34. The Division urges that the separate legal identities of Hyatt and petitioner must be respected, that a pass-through relationship was not established and cannot be inferred from the record, and that the statutory requirements for earning the exemption should not be ignored.

CONCLUSIONS OF LAW

A. Sales tax is imposed upon the receipts of every retail sale of tangible personal property except as otherwise provided (Tax Law § 1105[a]).

B. Statutes creating exemptions from tax are to be strictly construed (***see Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193, 371 NYS2d 715 [1975], ***lv denied*** 37 NY2d 708, 375 NYS2d 1027 [1975]; ***Matter of Blue Spruce Farms v. New York State Tax Commn***., 99 AD2d 867, 472 NYS2d 744 [1984], ***affd*** 64 NY2d 682, 485 NYS2d 526 [1984]). It is well settled that tax exemption statutes are strictly construed against the taxpayer and that exemptions must be clearly indicated by the statutory language (***see Matter of Fagliarone, Grimaldi & Associates v. Tax Appeals Tribunal***, 167 AD2d 767, 563 NYS2d 324 [3d Dept 1990]).

In addition, it is well established that the interpretation given to a statute by the agency authorized with its enforcement should generally be given weight and judicial deference if the interpretation is not irrational, unreasonable or inconsistent with the statute (***Matter of Trump-Equitable Fifth Avenue Co. v. Gliedman***, 62 NY2d 539, 478 NYS2d 846 [1984]). However, in addition, the statutory language providing the exemption must be construed in a practical fashion with deference to the legislative intent behind the exemption (***see Majewski v. Broadalbin-Perth Cent. School Dist.***, 91 NY2d 577, 673 NYS2d 966 [1988]; ***Matter of Qualex, Inc***., Tax Appeals Tribunal, February 23, 1995). To determine legislative intent, courts must first look at the literal reading of the act itself (***see*** McKinney's Cons Laws of NY, Book 1, Statutes § 92).

C. Tax Law § 1115 (former [z][1]) provides an exemption from tax, stating in part, as follows:

> Receipts from the retail sale of tangible personal property described in subdivision (a) of section eleven hundred five of this article, receipts from every sale of services described in subdivisions (b) and (c) of such section eleven hundred five and consideration given or contracted to be given for, or for the use of, such tangible personal property or services shall be exempt from the taxes imposed by this article where such tangible personal property or services are sold to a qualified empire zone enterprise . . . .

D. Tax Law § 1115(z)(1) was clear in its wording that "tangible personal property or services shall be exempt from the taxes imposed by this article where such tangible personal property or services are sold to a qualified empire zone enterprise." As the Division argues, the documentation demonstrates and petitioner concedes, petitioner was not a qualified empire zone enterprise and, therefore, was not eligible for the tax exemption and never received a certification of such an exemption.

It is apparent from the documentation in the record that Hyatt made the application to the Empire Zones Program on October 10, 2005 for the period in issue. Hyatt provided its own EIN and represented that it had not provided an identification number of another business entity for unemployment purposes. It reported 160 employees as of the date of the application and stated proposed capital investments in the sum of $3,922,119.00. All information was supplied by Marc Eick, the controller and a responsible officer of Hyatt, who made several acknowledgments and agreements on behalf of Hyatt, including an agreement to notify the Commissioner of Economic Development of any intent to close the business; an agreement to post all job openings with the local job services office of the New York State Department of Labor; an agreement to submit an annual report to the Commissioner of Economic Development; the authorization for the Commissioner of Labor to disclose Hyatt's employment records filed in unemployment insurance reports; and an acknowledgment that if Hyatt were found to have violated any laws for the protection of workers within the previous three years, certification may have been denied.

Despite the unequivocal information provided on the application, the local economic zone certification officer and the Commissioners of Economic Development and Labor certified the entity "dba Hyatt Regency Rochester" and granted it a certificate of eligibility, earning it the benefits of the Empire Zones program on May 2, 2006.

On May 19, 2006, Hyatt, by its controller, Marc Eick, applied for QEZE sales tax certification, using its own EIN and stating that it met the employee test. After completing its review of the application and making the determination that it was the same entity requesting an exemption in 2003, the Division issued to Hyatt a certificate entitling it to an exemption from sales tax, sales tax exemption number 1113084, the same number previously assigned to Hyatt on May 1, 2003. In fact, the certificate issued in 2006 reflected a certification date of April 18, 2003. Petitioner was never issued a sales tax certification number in its own name.

E. As a general rule, one is saddled with the consequences of a decision to structure business affairs in one manner over another. In ***Matter of 107 Delaware Associates v. State Tax Commission*** (64 NY2d 935, 488 NYS2d 634 [1985]), the Court of Appeals reversed the Appellate Division and reinstated the determination of the Tax Commission and the dissenting opinion of Justice Casey of the Appellate Division, saying:

> Having elected to conduct their businesses under this format, and having reaped the benefits thereof, the individual petitioners now seek to avoid any disadvantage arising out of the selected format. There is nothing irrational about the Tax Commission's determination which has the effect of binding the taxpayers to the form of business chosen by them. (***See e.g. Matter of Ormsby Haulers v. Tully***, 72 AD2d 845, 421 NYS2d 701 [1979].)

In this matter, petitioner chose to take an assignment of the owner's rights and obligations under the Management Agreement. In doing so, it also chose to place all responsibility for the collection and payment of sales and use tax on the Hotel operator, Hyatt. The Management Agreement placed all responsibility for sales tax liability on Hyatt, which included the preparation and submission of sales tax returns accounting for the sales of the Hotel operation. Marc Eick, Hyatt's controller, conceded he prepared and supervised the preparation of sales tax returns and ensured remittance of the tax.

The Management Agreement also provided that Hyatt, not petitioner, would employ and assume responsibility for personnel necessary to operate the Hotel. Hyatt was responsible for the employees' compensation, fringe benefits and bonuses, for which it was authorized to use funds from the operating accounts, which, contrary to petitioner's claim, were funded with monies generated by Hotel operations and petitioner's cash contributions. It also filed withholding tax returns for said employees. Therefore, it can hardly be said that petitioner bore the entire economic burden or cost of Hyatt's employees.

However, and more importantly, petitioner could not have met the employee requirements for certification as an empire zone business enterprise and the benefits attendant thereto. This is the reason that Hyatt, not its "agent" Downtown, was the applicant for certification as an empire zone business enterprise in 2002, submitting Hyatt's EIN on the application for QEZE sales tax certification and presumably on the application for certification as an empire zone business enterprise before that.[1] It is the same reason Hyatt was chosen to be the applicant for certification as an Empire Zone enterprise and a sales tax certification number.

F. Petitioner's argument that it should qualify for the exemption based on the agency relationship it had with Hyatt is without merit. First, there is no specific agency agreement in the record nor is an agency relationship between petitioner and Hyatt provided for in the Management Agreement. The Management Agreement in section 3.2 calls for Hyatt to act as petitioner's agent with respect to specific lease and concession situations, but does not contain any general provision that would cover a specific tax exemption conferred on Hyatt. Further,

[1]The parties chose not to enter this important document into the record. However, since only a qualified empire zone business enterprise would be eligible for the sales tax exemption, it is safe to assume Hyatt's EIN was used in that application as well.

Hyatt could not represent a principal in a refund application where the principal lacked the capacity to be an Empire Zone business enterprise or qualify for a sales tax exemption.

Section 7.6 of the Management Agreement absolved petitioner from all responsibility for any sales or use taxes incurred from the operation of the Hotel, stating that nothing in the agreement "shall be construed to require [petitioner] to be responsible for any sales and use taxes." Rather, it provided that sales and use taxes will "be collected and paid by Hyatt pursuant to law. . . ." Therefore, Hyatt alone, which had collected and paid the sales and use tax and been granted the tax exemption, had the right to apply for a refund of sales and use taxes paid while the certificate of sales tax exemption was in effect.

The provisions of the Management Agreement support the conclusions reached herein and never implied that petitioner would have any rights to claim an exemption that unequivocally belonged to Hyatt based upon Hyatt's ability to qualify for the exemption. As stated earlier, petitioner did not and could not qualify for the exemption.

G. The Management Agreement contemplated, and the facts confirm, that Hyatt operated the Hotel with complete authority. Included in its operations was making purchases upon which it paid sales and use taxes. Since Hyatt had received an exemption based on its certification as an eligible Empire Zone business enterprise for the period in issue, it had the right to apply for a refund of the taxes paid. But only Hyatt had the right to do so, not petitioner. Actual payment of sales tax is a prerequisite to entitlement to a refund. (Tax Law § 1139[a]; ***Matter of Taczanowski***, Tax Appeals Tribunal, January 28, 2010.)

H. Petitioner claims that the Division should be estopped from denying its refund application based upon its detrimental reliance on the Division's change in position with respect to its refund. As a general rule, the doctrine of estoppel cannot be invoked against the state or its

governmental units unless such exceptional facts exist as would require its application in order to avoid "manifest injustice" (***see Matter of Wolfram v. Abbey***, 55 AD2d 700, 702, 388 NYS2d 952, 954 [1976]; ***Matter of Sheppard-Pollack, Inc. v. Tully***, 64 AD2d 296, 409 NYS2d 847, 848 [1978]). This rule is particularly applicable with respect to a taxing authority since sound public policy favors full and uninhibited enforcement of the tax laws (***Matter of Turner Construction Co. v. State Tax Commn.***, 57 AD2d 201, 394 NYS2d 78, 80 [1977]). Thus, the application of the estoppel doctrine against a taxing authority must be rare and limited to the truly unusual fact situations (***Schuster v. Commr.***, 312 F2d 311, 317 [1962], 62-2 US Tax Cas ¶ 12,121 at 86,585; ***Matter of Harry's Exxon Serv. Sta.,*** Tax Appeals Tribunal, December 6, 1988).

The Tax Appeals Tribunal has embraced a three-part test to determine applicability of the doctrine to specific cases (***Matter of Consolidated Rail Corp.***, Tax Appeals Tribunal, August 24, 1995) : Whether petitioner had the right to rely on the Division's representation; whether, in fact, there was such reliance; and whether such reliance was to the detriment of petitioner (***Matter of AGL Welding Supply Co.***, Tax Appeals Tribunal, May 11, 1995; ***Matter of Harry's Exxon Serv. Sta.***).

The elements of the estoppel issue in this case are whether petitioner could reasonably rely on the Division's initial, positive determinations with respect to the propriety of the refund application, whether petitioner, in fact, relied on those determinations, and whether petitioner so detrimentally relied on them that the absence of equitable relief would be manifestly unjust. It is concluded that petitioner did not show it was entitled to rely on the Division's initial determinations with respect to the refund application.

It is not ultimately germane whether the Division erred in its initial determinations during audit. The facts, which have never changed but only came to light as of the Division's rejection

of the consent executed by Mr. Eick, clearly established that petitioner was never a qualified empire zone business enterprise and never applied for or received a sales tax exemption pursuant to Tax Law § 1115(former [z][1]). Petitioner knew this at all times relevant hereto. Therefore, it would never have been reasonable or prudent to rely on determinations that erroneously granted it a refund to which it was not entitled. Finally, the absence of equitable relief in this matter would not be manifestly unjust. The confusion with regard to which entity was requesting and entitled to the refund was created by petitioner. It admitted through Mr. Eick's affidavit that it provided Hyatt's EIN on the application for sales tax certification in May 2006, just as it did on Hyatt's application for empire zone business enterprise status in October 2005. The Division was misled by these representations, further exacerbated by the fact that it was not provided a copy of the Management Agreement until June 2007, after the applications for refund were filed, when it received a letter from a tax analyst at Hyatt that contained an attempted explanation of the corporate relationship that existed between Hyatt and petitioner. Once the Division discovered the true underlying facts, it rescinded the statement of proposed audit change within the agreed upon 60 days. Given this background, including the fact that the Division was operating without knowledge of the relationship between Hyatt and petitioner, it is concluded that the Division's denial of the refund claim was proper and that equitable relief is unnecessary.

I. The Statement of Proposed Audit Change for Sales and Use Tax contains a statement that is certified by the signatory, in this case Marc Eick, Hyatt's controller, which states " I may consider these findings final unless I hear from the department to the contrary within 60 days after the department's receipt of this signed consent." Since the Division did respond to the contrary within the specified time limit, its rescission of the statement of proposed audit change

and denial of the refund was proper (***Matter of Kayton Specialty Shop, Inc.***, Tax Appeals Tribunal, January 17, 1991).

J. The petition of Rochester Hotel TRS, Inc. is denied and the Division's April 30, 2008 denial of petitioner's refund applications, dated January 29, 2007 and May 11, 2007, is sustained.

DATED: Troy, New York
November 23, 2011

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE