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Unincorp. Bus. Tax 1967
BUREAU OF LAW Determinations A-Z
MEMORANDUM Dorset Hotel Company

TO: Commissioners Murphy, Macduff and Conlon

FROM: Solomon Sies, Hearing Officer

SUBJECT: PETER S. BING AND MORTIMER GRUNAUER
c/b/a DORSET HOTEL COMPANY

Application for Refund
for the Year 1959

Article 16-A

A hearing with reference to the above matter was held before me at the New York City office on October 15, 1964.

The primary issue involved is whether the taxpayers, operating an apartment hotel with restaurant facilities and furnishing linen, laundry and valet services are entitled to an exemption from unincorporated business tax under Section 386, Article 16-A of the Tax Law on the ground that they were engaged in the "holding, leasing or managing of real property." The secondary issue involves timeliness in the claim for further refund made at the hearing based on Federal changes for 1959.

The taxpayers filed partnership and unincorporated business tax returns for the year 1959 and paid the unincorporated business tax computed thereon in the sum of $8,499.59. On August 8, 1960 the taxpayers filed an application for refund of unincorporated business taxes paid.

The attorney for the taxpayers, at the hearing, moved to amend the application for refund by including therein the amount of $256.53 paid by the taxpayers pursuant to Form IT-115 filed by them on April 27, 1961 as a result of 1959 Federal changes in net income. The final Federal determination was made on February 20, 1961.

In 1959, the taxpayers were and still are the owners and operators of properties located at 30 West 54th Street, 42 West 54th Street and 41 West 53rd Street, New York City. The property at 30 West 54th Street is operated under the name

of Dorset Hotel. The property at 42 West 54th Street is a four-story building with stores and residential units. The property at 41 West 53rd Street is a five-story apartment house consisting of 19 apartments leased to residential tenants. The Dorset Hotel is a nineteen (19) story fireproof structure completed in 1926. The Certificate of Occupancy issued by the Department of Housing and Buildings classifies the hotel as a Class "A" multiple dwelling in 1959. The hotel has 421 rentable rooms divided into 229 apartments, 127 of which were equipped with kitchenettes comprising sink, running water, drainboard, refrigerator, kitchen cabinets and electrical outlets for cooking purposes. On the ground floor space was rented to a doctor and a newsstand. In addition, there was a restaurant with no outside exit and a cocktail lounge, both operated by the taxpayers. The taxpayers furnished telephone switchboard and elevator service. Linen, laundry and valet services were optional. The taxpayers did not furnish any appliances.

The net profit from the operation of the restaurant and cocktail lounge, before allocation of overhead expenses (rent and light), amounted to $6,717.16. The taxpayers allocated a percentage of 6% for overhead expenses. After deduction of its proportionate share of the overhead expense, there was a loss of $18,657.01 on the restaurant operation. The operations from the telephone services showed a net loss for the year 1959 in the amount of $13,959.52

During the year 1959 69.92% of the rooms were rented or leased for a period in excess of 89 consecutive days. The gross rental income received from tenants occupying rooms or apartments on a basis of more than 89 consecutive days was $620,140.14 or 51.86% of the total gross rental income. The gross rental income received from tenants occupying rooms on a bsis of more than 30 days amounted to $626,873.58, which represented 52.426% of the total gross income.

The taxpayers contend that they have not taken any investment tax credit under Section 48 of the Internal Revenue Code (permitting special tax advantage for property used by a hotel or similar establishment if more than half of the living quarters is used during the taxable year to accommodate transients) because they do not qualify for such credit. They further contend that they are primarily engaged in the rental and leasing of real estate; that their other operations are merely incidental thereto and that they

are entitled to an exemption from unincorporated business tax on the basis of the court decisions in the cases of Max Rubin and Matter of Warnecke, infra.

The case of People ex rel Max J. Rubin, et al v. Tax Commission, 9 A.D. 2d 47, affirmed without opinion, 8 N.Y. 2d 922 involved the operation of the Windemere Hotel, a 22 story building, 625 rooms and 395 apartments of which 300 were furnished. Of the said apartments, 94.63% were rented on a monthly basis or leased and 5.37% were rented to transients. The hotel also operated a restaurant. In annulling the determination of the Tax Commission denying relators' claim for refunds of unincorporated business tax, the Court said, at page 50:

> "The application of a proper test is 'what is the dominant factor in the conduct of relators' business?' Is it the operation of the restaurant, the real estate being incidental, or is it the operation of the real estate as an apartment hotel, with the restaurant being incidental thereto? It would seem that if the restaurant were the dominant factor, operating at a loss would justify its closing but the continuing thereof would seem to imply that it, the restaurant, was an incidental and necessary factor to the successful operation of the real estate as an apartment hotel. Such test likewise is applicable to the 'telephone' service, also operated at a loss....Here we feel that the 'business operation' was incidental to the successful operation of the real estate and relators are entitled to the claimed exemption...."

In the case of Warnecke v. State Tax Commission, 15 A.D. 2d 320, motion for leave to appearl den. 11 NY 2d 645, one of the issues involved the assessment of unincorporated business tax upon the installment gains arising upon the sale of an apartment hotel operating a restaurant upon the premises. The taxpayer there claimed exemption under Section 386 of the Tax Law on the ground that he was engaged in the holding, leasing or managing of real property. The court there sustained the contention of the taxpayer on the basis of the decision in the Rubin case.

The case of Max Orda v. State Tax Commission, 12 N.Y. 2d 772, reversing 15 A.D. 2d 711, involved a 12 story apartment house consisting of 128 apartments of which 16% to 23% of the apartments were fully furnished and rented as furnished apartments. The Court of Appeals in reversing the Appellate decision and annulling the decision of the State Tax Commission cancelled the assessments of unincorporated business tax upon the basis that the taxpayers were mere owners, lessors or holders of real estate upon the authority of People ex rel. Rubin v. Tax Commission, supra and Matter of Warnecke v. State Tax Commission, supra.

In the Rubin case, one of the tests applied was the number of rooms on a permanent and transient basis. In the Warnecke case, one of the tests applied was the gross income received from permanent and transient guests. Article 3, Section D 263.0 of the New York City Multiple Dwelling Code defines a 'transient' guest as one who occupies a room or apartment for not more than 89 days. Internal Revenue Code Section 38, as added by the Revenue Act of 1962, lays down the general rule that a credit against income tax is allowed for qualified investment in property. Although property which is the subject of the investment tax credit is called "Section 38 property", the heart of the investment tax credit provisions is found in Code Sections 46, 47 and 48. Reg. Sect. 1.48-1(2)(ii) provides that:

> "Property used by a hotel, motel, inn, or other similar establishment, in connection with the trade or business of furnishing lodging shall not be considered as property which is used predominantly to furnish lodging or predominantly in connection with the furnishing of lodging, provided that the predominant portion of the living accomodations in the hotel, motel, etc., is used by transients during the taxable year."

The regulation further provides that for purposes of the preceding sentence, the term "predominant portion" means "more than one-half". The regulation also provides that accomodations shall be considered used on a transient basis if the rental period is normally less than 30 days.

The questions thus presented are: (1) What constitutes a "transient"-- is it an individual who occupies a room for 30 days or 89 days? and (2) What constitutes the "predominant portion"? I believe we should apply the definition of the word "transient" as contained in the New York City Multiple Dwelling Code and the definition of "predominant portion" as used in the Federal Code as well as the tests applied by the courts in the Rubin and Warnecke cases. If we apply the 30 day test, less than 50% of the tenants would be considered "transient." If we apply the 89 day test, the same result would follow. If we apply the number of rooms test, less than 50% of the rooms or apartments were rented or leased to transients. The same result would follow if we apply the gross rental income test. I am therefore of the opinion that the taxpayers were "dominantly" engaged in the leasing and rental of apartments to permanent tenants

and that the business operations of the taxpayers were merely incidental thereto. However, the application for further refund of the amount paid with the IT-115, made at the hearing, more than two years from the date of the filing of the return and more than two years from the date of payment of such additional tax was not timely made in accordance with Section 374 of the Tax Law. Hence, I am of the opinion that the taxpayers are not entitled to any further refund.

For the reasons stated above I recommend that the determination of the Tax Commission in this matter be substantially in the form submitted herewith.

MAY 31 1967

Hearing Officer

ML
AH 6-29-67

STATE OF NEW YORK

STATE TAX COMMISSION

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IN THE MATTER OF THE APPLICATION

OF

PETER G. KING & MORTIMER
CHRISTMAS d/b/a

DORSET HOUSE

FOR REVISION OR REFUND OF UNINCORPORATED
BUSINESS TAXES UNDER ARTICLE 16-A OF THE
TAX LAW FOR THE YEAR 1959

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The above named taxpayers having filed an application for revision or refund of unincorporated business taxes under Article 16-A of the Tax Law for the year 1959 and a hearing having been held in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York City, on the 15th day of October, 1964, before Solomon Sies, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayers were represented by Louis G. Carter, Esq., 119 West 40th Street, New York, New York, testimony having been taken and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That at all of the times hereinafter mentioned Peter G. King and Mortimer Christmas were and still are co-partners doing business as Dorset Hotel Company; that on or about April 15, 1960 the taxpayers filed partnership and unincorporated business tax returns for the year 1959 and paid unincorporated business tax in the amount of $8,499.50 thereon; that on August 8, 1960, the taxpayers filed an application for revision or refund of unincorporated business taxes for the year 1959 and requested a refund of the taxes

so paid on the ground that they were engaged in the operation of leasing and managing real property and therefore exempt from unincorporated business tax pursuant to Section 366, Article 16-A of the Tax Law.

(3) That in 1969, the taxpayers were and still are the owners and operators of properties located at 30 West 54th Street, 42 West 54th Street and 41 West 53rd Street, New York City; that the property at 30 West 54th Street is operated under the name of Bennet Hotel; that the property at 42 West 54th Street is a four story building with stores and residential units; that the property at 41 West 53rd Street is a five story apartment house consisting of 19 apartments leased to residential tenants; that the Bennet Hotel consisted of 421 rentable rooms divided into 320 apartments, 137 of which were equipped with kitchenettes comprising sink, running water, drainboard, refrigerator, kitchen cabinets and electrical outlets for cooking purposes; that there were no stores on the ground floor; that space was rented to a doctor and accountant; that there is a restaurant on the premises with no outside exit and a cocktail lounge, both operated by the taxpayers; that a small space in the basement is rented to the hotel valet; that the taxpayers furnished a telephone switchboard, with operator, bellboy service, elevator service, optional daily maid service including linen service.

(4) That 71.92% of the rooms were rented or leased for a period or periods in excess of 30 consecutive days; that approximately 28.07% of the rooms were rented to transients, that is, guests who occupied rooms for less than 30 consecutive days; that the Certificate of Occupancy issued by the Department of Housing and Buildings of the City of New York classifies the hotel as a class "A" multiple dwelling during the year 1969.

(5) That the profit realized from the operation of the

restaurant during the year 1959 was $6,717.16 before deductions for overhead expenses (rent and light); that after deduction of such overhead expenses there was a loss in the operation of the restaurant in the amount of $18,657.01; that the telephone services were operated at a loss in the amount of $13,915.52; that the percentage of gross income from rental of rooms on a permanent basis (more than 89 consecutive days) during the year 1959 was 51.80% and the percentage of gross income from transients (guests occupying rooms for 89 or less days) was 48.14%.

(5) That at the hearing the representative for the taxpayers sought to amend the application for revision or refund to include an additional refund of $256.83 paid upon the filing of Form IT-115 (Notice of Federal Changes) for the year 1959 as a result of an increase of income by reason of Federal tax changes; that the final Federal determination was made on February 20, 1961; that the aforementioned Form IT-115 was filed on April 27, 1961; that no prior application for refund was made within two years from the date of filing of said return for 1959 or within two years from the time of payment of such additional tax in accordance with Section 374 of the Tax Law.

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby

DETERMINES:

(A) That the dominant factor in the conduct of the taxpayers' business during the year 1959 was the operation of the real estate as an apartment hotel and that the other operations in connection with the restaurant, etc. were merely incidental thereto.

(B) That the activities of the taxpayers for the year 1959 constituted the holding, leasing and managing of real property and were

not subject to the imposition of unincorporated business tax within the intent and meaning of section 386, Article 16-A of the Tax Law.

(C) That, accordingly, the unincorporated business tax paid by the taxpayers for the year 1959 on said return was not due and not lawfully demanded; that the amount of $8,464.59 be refunded to the taxpayers with lawful interest that may be due and owing thereon.

(D) That the taxpayers' application for further refund made at the hearing was not timely made in accordance with section 374 of the Tax Law; that the taxpayers are not entitled to any further refund thereof and that said application for further refund be and the same is hereby denied.

DATED: Albany, New York, this 10th day of July 1967.

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
[redacted]

/s/ JAMES R. MACDUFF
[redacted]

/s/ WALTER MACLYN CONLON
[redacted]