STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WASHINGTON SQUARE HOTEL LLC	:	
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods December 1, 2007 through May 31, 2010 and December 1, 2011 through February 29, 2012.	:	
		DECISION
In the Matter of the Petition	:	DTA NOS. 825405, 825505 AND 825821
of	:	
DANIEL PAUL	:	
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 December 1, 2008 through May 31, 2010.	:	

Petitioners, Washington Square Hotel LLC and Daniel Paul, filed an exception to the determination of the Administrative Law Judge issued on September 10, 2015. Petitioners appeared by Robinson Brog Leinwand Greene Genovese & Gluck, LLC (Sheldon Eisenberger, Esq., of counsel, Babcock McLean, Esq., of counsel and Stephen I. Siller, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (David Gannon, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter brief in opposition. Petitioners filed a letter brief in reply. Oral argument was heard in New York, New York on January 21, 2016, which date began the six-month period for the issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner, Washington Square Hotel LLC, is entitled to a tax credit for the provision of continental breakfasts to its guests.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 3, 7 and 12, and we have added an additional finding of fact, numbered 16 herein. We make these changes to more fully reflect the record. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

1. Petitioner, Washington Square Hotel LLC, owns and operates a hotel located at 103 Waverly Place in New York, New York.[1]

2. The hotel offers a continental breakfast to all registered guests.

3. Guests were charged one price for the room rental. The continental breakfast was not separately stated on guests' bills and the guests did not have the option to decline the breakfast in order to receive a lower room rate than guests who availed themselves of the daily breakfast. The hotel did give guests a credit for continental breakfasts not taken on two extraordinary occasions when the hotel was unable to provide such a breakfast.

4. Petitioner had a tariff sheet as part of a brochure detailing its property and amenities. Although the tariff sheet in evidence does not bear a date, the sheet provides the various rooms available and the rates for the rooms. The brochure notes that the tariff listed does not include

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[1] Unless otherwise indicated, references to petitioner herein refer to Washington Square Hotel LLC.

state and local sales tax but the tariff does include a continental breakfast. The sheet also describes facilities available to hotel guests and local attractions. This brochure states that the C-3 Restaurant and Bar is a newly-added facility to the hotel and that the restaurant would serve breakfast, lunch, high tea, dinner and weekend brunch.

5. Petitioner presented examples of proposed contracts between it and travel companies. The first contract was presented to Hotelplan International Travel Organization Ltd. Within the contract are rates for certain-sized rooms for different months of the calendar years 2004-2005. On this contract, it provides rates for meals. The meals are described as: American breakfast $15.00, lunch $25.00 and dinner $40.00. The contract also states "ROOM RATE INCLUDES *CONTINENTAL* BREAKFAST" (emphasis supplied).

6. The other proposed contract in evidence is for a company named Aeroworld for 2001. Similar to the contract noted in finding of fact 5, it delineates room rates, three meal rates for American breakfast, lunch and dinner. This contract also states that the room rate includes continental breakfast.

7. The contract between the hotel and the restaurant established the price to be paid by the hotel for the continental breakfasts and also provided that the restaurant would have notice of the number of guests to be expected. Petitioner presented no evidence to specifically define what food was provided in the hotel's continental breakfasts. Moreover, petitioner offered no description of what constituted an American breakfast and what it provided in comparison to the continental breakfast, which was included in the room rate.

8. The Division of Taxation (Division) audited petitioner for the period December 1, 2007 to May 31, 2010. First, the Division reviewed sales records. The sales records were deemed

adequate and the Division utilized a test period audit methodology using the month of September 2009. Taxable sales reported were accepted by the Division.

9. The Division also reviewed petitioner's tax returns. The Division found that petitioner claimed a credit on its sales tax returns for the sales tax it paid on the purchase of continental breakfasts that it provided to its guests. The Division determined that petitioner was not entitled to the credit because petitioner did not separately state the cost of the breakfast on the guests' bills. The Division calculated that this resulted in additional tax due of $306,957.65.

10. The Division next reviewed capital records. These records were deemed adequate and the Division utilized a detailed audit methodology. The Division determined additional taxable capital in the amount of $76,922.12, which related to the purchase of furniture and equipment, which resulted in additional tax due of $6,610.18 plus interest.

11. The last item reviewed by the Division was expense purchase records. The records were deemed adequate, and the Division utilized a test period audit methodology using the tax period January 1, 2009 to December 31, 2009. Based upon the Division's review, additional taxable expense purchase of $117,404.70 were identified, resulting in additional tax due of $10,297.70 plus interest.

12. On February 16, 2012, a notice of determination (L-037325225) was issued to petitioner assessing additional tax in the amount of $323,865.53, plus interest, for the period December 1, 2007 through May 31, 2010. Additionally, on February 17, 2012, a notice of determination (L-037331691) was issued to Daniel Paul, as a responsible officer of petitioner, in the amount of $190,934.53, plus interest, for the period December 1, 2008 through May 31, 2010. Daniel Paul did not contest his status as a responsible officer.

13. On March 20, 2012, petitioner filed an application for refund in the amount of $22,314.59 for the period December 1, 2011 to February 29, 2012. The basis for the refund claim was that petitioner failed to take credit on its sales tax return for the sales tax it paid on the purchase of the continental breakfasts that it provided to its guest for this period.

14. On November 19, 2012, the Division denied petitioner's refund claim.

15. Post hearing, the Division agreed to accept some revised computations prepared by the office manager and bookkeeper of petitioner. Therefore, the Division agreed that the additional tax due with respect to capital purchases should be reduced to $2,640.47.

16. Prior to 2002, petitioner purchased continental breakfasts for its guests from the restaurant without paying sales tax. Instead, it provided the restaurant with a resale certificate. During an audit of the restaurant in 2002, the Division's auditor indicated that the restaurant should charge sales tax on continental breakfast sales to petitioner. It is unclear from the record whether the Division's auditor expressly advised petitioner to take a credit on its sales tax returns for the sales tax paid to the restaurant on its continental breakfast purchases, but petitioner began to do so following the audit.[2] The Division's audit file of the 2002 audit of the restaurant was later destroyed in accordance with the Division's standard procedures. Petitioner was subsequently audited by the Division for the period September 1, 2003 through May 31, 2006. The report of that audit notes that petitioner took a credit on its sales tax returns for tax paid to the restaurant for "meals, from the restaurant, to hotel guests." It does not appear from the record that the Division took issue with this credit claim during the prior audit.

[2] It should be noted that the restaurant and petitioner are related entities and, at least in 2002, shared the same accounting firm.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge sustained the notices of determination, adjusted as indicated in finding of fact 15, and also sustained the Division's denial of petitioner's refund claim. Specifically, the Administrative Law Judge found that petitioner's provision of continental breakfasts does not fall within the sale for resale exclusion in Tax Law § 1101 [b] [4] [iii] [b] as asserted by petitioner because the tax on hotel occupancy, the service performed by petitioner herein, is subject to tax imposed by Tax Law § 1105 (e), which does not contain a resale exclusion. Further, the Administrative Law Judge noted that petitioner did not document a separate sale of the continental breakfasts, as its guest invoices did not contain a separately stated charge therefor. The Administrative Law Judge thus determined that the room rate charge by petitioner was for a hotel service and that petitioner's provision of complimentary continental breakfasts to its guests was part of that service. In reaching this conclusion, the Administrative Law Judge cited ***Matter of Helmsley Enters., Inc.*** (Tax Appeals Tribunal, June 20, 1991, ***confirmed*** 187 AD2d 64 [1993] ***lv denied*** 81 NY2d 710 [1993]), a case that addressed the issue of whether the purchase of furniture and other items by a hotel and provided in its rooms qualified for the resale exclusion under Tax Law § 1101 (b) (4). ***Helmsley*** held that such purchases by the hotel of items utilized in providing hotel services did not qualify as purchases for resale excluded from tax.

The Administrative Law Judge also rejected petitioner's alternative argument that it acted as a caterer or co-vendor with the restaurant with respect to the continental breakfasts. Additionally, the Administrative Law Judge denied an estoppel argument raised by petitioner and dismissed as premature petitioner's claim of costs.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner asserts that this matter arises as a consequence of a change of position by the Division. Specifically, petitioner contends that, upon request of the Division following the 2002 audit (***see*** finding of fact 16), petitioner changed its reporting method to claim a credit on its sales tax return for sales tax paid to the restaurant on the breakfasts and that such method was accepted by the Division. Petitioner contends that the Division's position in this matter results in double taxation of the continental breakfasts. According to petitioner, such breakfasts are taxed once when purchased by petitioner and again when purchased by a hotel guest.

Petitioner claims that ***Helmsley***, upon which the determination relies, is distinguishable because that case dealt with items that were integral parts of a rented hotel room, e.g., furniture, sheets, soap. Petitioner contends that its breakfasts, which are not provided in guests' rooms, are substantively different from the items at issue in ***Helmsley***.

Next, petitioner asserts that the costs attributable to its provision of continental breakfasts to its guests are not subject to tax under Tax Law § 1105 (e), the tax on rent for hotel room occupancy, but are subject to tax pursuant to Tax Law § 1105 (a), the tax on retail sales of tangible personal property. Petitioner asserts that its breakfasts do not fall within the meaning of rent as used in Tax Law § 1105 (e).

Petitioner also cites ***Matter of EchoStar Satellite Corp. v Tax Appeals Trib. of State of N.Y.*** (20 NY3d 286 [2012]) in support of its position. In that case, the Court of Appeals found that a satellite television provider rented equipment to its subscribers because the arrangements were structured as leases; monthly charges for the equipment were reasonable; and such charges were separately stated on customer invoices (20 NY3d at 292).

Petitioner also cites 20 NYCRR 527.8 (i) and 527.9 (b) (7) in support of its position.

Additionally, petitioner asserts that a Tennessee appellate court case, ***Nashville Clubhouse Inn v Johnson***, 27 S.W.3d 542 [2000]), is directly on point and is supportive of its position.

As it did below, petitioner contends, alternatively, that it was entitled to the claimed sales tax credit as a caterer or co-vendor.

Petitioner also continues to contend that the Division should be estopped from asserting tax in the present matter because, as noted above, it changed its position regarding the taxability of the continental breakfasts to petitioner's detriment.

Finally, petitioner continues to seek reimbursement of costs and attorneys' fees incurred in connection with this matter.

The Division denies petitioner's claim of double taxation. The Division contends that petitioner's purchase of the continental breakfasts was subject to tax under Tax Law § 1105 (d) and that room rental paid by its guests was taxable pursuant to Tax Law § 1105 (e). It is the Division's position that the continental breakfasts were an amenity provided by petitioner to its guests and that, accordingly, the cost associated with providing such breakfasts is properly included within room rental and is taxable under Tax Law § 1105 (e). The Division asserts that ***Helmsley*** is supportive of its position, and distinguishes ***EchoStar*** because the equipment rental in that case was separately stated on customer invoices and sales tax was collected. The Division also rejects petitioner's estoppel argument, arguing that petitioner has not identified a false representation by the Division to petitioner and thus no manifest injustice orchestrated by the Division.

OPINION

As relevant here, Tax Law § 1105 (e) (1) imposes sales tax on "[t]he rent for every occupancy of a room or rooms in a hotel in this state . . . ." Tax Law § 1101 (c) (6) defines rent,

in relevant part, simply as "[t]he consideration received for occupancy." The Division's regulations expand this definition to include "charges for accommodations, services, facilities, amenities, and items that are incidental to the occupancy of the room or rooms, whether those charges are separately stated or included as one sum in the rate for the room or rooms" (20 NYCRR 527.9 [b] [7] [i]).

Additionally, where, as here, a hotel provides a continental breakfast along with a room, the Division's regulations provide that "the entire charge is subject to tax as rent for the occupancy of the room" whether or not there is a separately stated charge for the breakfast (20 NYCRR 527.9 [h] [1] [iii]).[3]

Petitioner has not shown that this regulation is either irrational or inconsistent with the statute (***Matter of General Elec. Capital Corp. v New York State Div. of Tax Appeals Tax Appeals Tribunal***, 2 NY3d 249 [2004]). Indeed, the regulation's rationality may be seen in its consistency with the established rule that a hotel's true purpose is to provide a service, or set of services, for the comfort and convenience of its guests (***see Helmsley***, 187 AD2d at 69). The service of a continental breakfast is an amenity incidental to such a purpose.[4]

As ***Helmsley*** also makes clear, property used in providing a hotel service is not resold as such to guests, but is inseparably connected to the provision of the service (***id.***). Petitioner thus did not resell the continental breakfasts as such, but provided them as part of its hotel service. Accordingly, petitioner may not gain the benefit of a resale exclusion by claiming a credit for the sales tax it properly paid to the restaurant on the purchase of the breakfasts pursuant to Tax Law

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[3] We note that, even without 20 NYCRR 527.9 [h] [1] [iii], the Division's regulations provide that unless charges for food are separately stated, they may be taxable as rent (***see*** 20 NYCRR 527.9 [b] [7] and 527.9 [h] [1] [ii]).

[4] We thus reject petitioner's contention that ***Helmsley*** is not pertinent to the instant matter.

§ 1105 (d) (i).[5] The Division's regulations restrict such credit to circumstances where food or drink is purchased from a restaurant for resale as such (***see*** 20 NYCRR 527.8 [i] [1]).

Our conclusion that petitioner provided the continental breakfasts as part of the services it provided to its guests and therefore did not resell those breakfasts as such requires the rejection of petitioner's double taxation argument. Specifically, as the ***Helmsley*** court stated:

> "The foregoing discussion also disposes of petitioner's alternative argument that denial of the purchase-for-resale exclusion to petitioner's acquisition of guestroom furniture, furnishings and consumatles would result in an unlawful multiple sales taxation on the same items of personal property because the cost of these items is an element of petitioner's room charges to guests. The same multiple taxation would exist in any case where personal property is furnished as an incident to the provision of services, or as an amenity for the comfort of patrons of hotels, restaurants and the like. Acceptance of the argument that this kind of multiple taxation is sufficient to establish eligibility for the sales tax exclusion at issue would have 'potentially limitless application" and must, therefore, be rejected" (187 AD2d at 69-70 [internal citations omitted]).

Having concluded that petitioner did not resell the breakfasts as such, we must also reject petitioners alternative argument that it sold the breakfasts as a caterer or a co-vendor.

We note that ***Matter of EchoStar Satellite Corp. v Tax Appeals Trib. of State of N.Y.*** provides little support to petitioner's position. Like the instant matter, that case addressed the question of whether certain property was provided as part of a service or was resold (i.e., rented) to customers. In finding that the subject property was rented, the court gave significant weight to the form of the transaction, noting that the equipment was the subject of a lease agreement; that the price was reasonable; and that the monthly charge was separately stated (***see*** 20 NY3d at

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[5] Tax Law § 1105 (d) does not contain an exclusion from tax for sales for resale (***cf.*** Tax Law § 1105 [a] [tax imposed on retail sales of tangible personal property] and Tax Law § 1105 [c] [tax imposed on every sale, except for resale, of certain services]). Rather, sales tax is imposed on the receipts from "every sale" by a restaurant (Tax Law § 1105 [d] [i]). Petitioner thus properly paid sales tax on its purchases of the breakfasts to the restaurant. The Division's regulations provide an indirect resale exclusion on such purchases by allowing a credit for the tax so paid where restaurant food or drink is purchased for resale "as such" (***see*** 20 NYCRR 527.8 [i]). We note that there is no resale exclusion of any kind in either the Tax Law or regulations for the sales tax on hotel occupancy imposed under Tax Law § 1105 (e) (1).

292). In the present matter, any costs attributable to the continental breakfasts were included in the single charge for room occupancy. Such a transactional form supports an inference that petitioner considered the continental breakfasts to be a part of the services it provided to its guests and not something that was separately resold.

Finally, we note that 20 NYCRR 527.9 (h) (1) (iii) and the precedent of ***Helmsley*** render ***Nashville Clubhouse Inn v Johnson***, the Tennessee appellate court case cited by petitioner, as not pertinent, even as instructive authority, with respect to matter at issue.

Turning to the issue of estoppel, petitioner contends that, having accepted the petitioner's method of claiming credit for the sales tax paid to the restaurant in a previous audit, the Division should be estopped from changing its position. We disagree. A taxpayer attempting to invoke the doctrine of estoppel against the State has a steep hill to climb. As a general rule, the doctrine cannot be invoked against the State or its governmental units unless such exceptional facts exist as would require its application in order to avoid a manifest injustice (***see Matter of Wolfram v Abbey***, 55 AD2d 700 [1976]). This rule is particularly applicable with respect to a taxing authority since sound public policy favors full and uninhibited enforcement of tax laws (***Matter of Turner Constr. Co. v State Tax Commn.***, 57 AD2d 201 [1977]). Thus, the application of the estoppel doctrine against a taxing authority must be limited to the truly unusual fact situations (***Matter of Sodexho USA, Inc***., Tax Appeals Tribunal, November 21, 2007, citing ***Schuster v Commissioner***, 312 F2d 311 [1962]).

The record shows that the Division advised the restaurant to collect tax on its sales of continental breakfasts to petitioner during the 2002 audit of the restaurant. This was correct advice because such sales are taxable pursuant to Tax Law § 1105 (d) (i). Petitioner has not established, however, that the Division expressly advised it, at that time, to claim a credit with

respect to tax paid to the restaurant for the breakfasts, although the record does show that the Division acquiesced to petitioner's claims for such credit during the audit of petitioner for the period September 1, 2003 through May 31, 2006.

In our view, these are not the kind of exceptional facts or the kind of detriment to petitioner that require the application of the doctrine of estoppel to avoid a manifest injustice (***cf***., ***Matter of Harry's Exxon Serv. Sta.***, Tax Appeals Tribunal, December 6, 1988 [taxpayer destroyed its records in reliance on a letter from the Division rendering him unable to defend against an assessment of tax]). We therefore reject petitioner's estoppel claim.

Petitioner also claims costs and attorneys' fees. Such a claim may not be filed, however, until after final judgment in this matter (***see*** Tax Law § 3030 [c] [5] [A] [ii] [a claim for costs must be filed within "thirty days of final judgment"]). As petitioner has the right to seek judicial review of the decision herein (***see*** Tax Law § 2016), a final judgment in this matter will not be rendered until such judicial review is final or until petitioner's time to take such an appeal has expired. Accordingly, we dismiss petitioner's claim for costs as premature.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Washington Square Hotel LLC and Daniel Paul is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petitions of Washington Square Hotel LLC and Daniel Paul are granted to the extent indicated in paragraph 4 below, but are otherwise denied;

4. The notices of determination herein are modified to the extent indicated in finding of fact 15, but are otherwise sustained; and

5. The Division of Taxation's denial of refund, dated November 19, 2012, is sustained.

DATED: Albany, New York
July 19, 2016

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner