STATE OF NEW YORK

DIVISION OF TAX APPEALS

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.	:	
	:	DETERMINATION DTA NOS. 825405, 825505
In the Matter of the Petition	:	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.	:	

Petitioner Washington Square Hotel LLC 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 periods December 1, 2007 through May 31, 2010 and December 1, 2011 through February 29, 2012.

Petitioner Daniel Paul 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 December 1, 2008 through May 31, 2010.

A hearing was held before Donna M. Gardiner, Administrative Law Judge, in New York, New York, on June 18, 2014 at 10:45 A.M., with all briefs to be submitted by December 17, 2014, which date began the six-month period for the issuance of this determination. By letter to

the parties dated June 5, 2015, this due date was extended pursuant to Tax Law §2010(3). Petitioners appeared by Sheldon Eisenberger, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (David Gannon, Esq., of counsel).

ISSUE

Whether petitioner is entitled to a tax credit for the provision of continental breakfasts to its guests.

FINDINGS OF FACT

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

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

3. Guests were charged one price for the room rental. The 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.

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 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 year 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. Similarly 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. There was no evidence presented to define what food was provided in the continental breakfast. There was no description of what constituted an American breakfast and what it provided in comparison to the continental breakfast that was included with 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. Additionally, assessment L-037331691, was issued to Daniel Paul, as a responsible officer of petitioner, in the amount of $190,934.53 for the period December 1, 2008 to May 31, 2010.

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 should be reduced to $2,640.47.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a sales tax on the receipts from every "retail sale" of tangible personal property except as otherwise provided in Article 28 of the Tax Law. By definition a sale for resale is not a taxable retail sale (Tax Law § 1101[b][4][i]).

B. In this case, the question presented is whether the language contained on the hotel's brochure that states the rate includes a continental breakfast is sufficient to establish that a sale of

tangible personal property was made to, and tax paid by, each registered guest for the continental breakfast, such that petitioner is entitled to a credit for the sales tax it paid on the purchase of these meals from the restaurant.

C. Clearly, the sales of continental breakfasts do not fall within the sale for resale exclusion in Tax Law § 1101(b)(4)(i)(B) because the tax on hotel occupancy, the service performed by petitioner herein that is subject to tax, is imposed by section 1105(e) of the Tax Law and this section does not have any exclusions within it.

The relevant facts are not in dispute. The invoices state the room rate and applicable taxes. If petitioner sold a continental breakfast to each customer, then the taxable item needed to be separately stated on each guest's invoice with the appropriate tax shown. It was not. Furthermore, petitioner has not provided any documentation to substantiate its claim that when it failed to provide the breakfasts, credit was given to reflect the cost of the breakfast plus tax.

The Division refers to the Tax Appeals Tribunal's language in the ***Matter of Helmsley Enters., Inc.*** (Tax Appeals Tribunal, June 20, 1991, ***confirmed*** 187 AD2d 64 [1993] ***lv denied*** 81 NY2d 710 [1993]), which proves instructive on the issue of sale for resale and its juxtaposition with Tax Law § 1105(e). In ***Helmsley***, the argument involved whether certain purchases of in-room amenities by the hotel for its guests were considered sales for resale. The court stated, in pertinent part, that:

> "the items at issue did not retain their separate identity in the transaction between petitioner and its customers. Instead, petitioner was in the business of providing overnight accommodation to its patrons, and the items at issue were furnished to the hotel's guests as part of its services. They were originally purchased from the suppliers as separate and distinct articles of tangible personal property. These items were then furnished to the patrons as a component part of an overall package of services.
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> * * *

> Our conclusion that items utilized in providing a hotel service are not retail sales is also consistent with the overall statutory definition of retail sale. The language of clause (B) of section 1101(b)(4)(i) of the Tax Law indicates that the Legislature, in providing for exclusion from sales tax, considered the category of transactions involving the transfer of both goods and services. Section 1101(b)(4)(i)(B) provides for a separate exclusion for purchases of tangible personal property which are used in performing certain services and which are subsequently transferred to the purchaser of the service along with the performance of the service. The services furnished by a hotel are not enumerated as one the of the services to be excluded" (***id.***).

Thus, the room rate charge by petitioner is for a hotel service, and petitioner is not entitled to sale for resale treatment for the continental breakfasts provided to its guests. Additionally, petitioner has failed to demonstrate that the breakfasts had a value that was charged to each guest and tax collected thereon. There was no separate charge on the hotel invoices for the breakfasts and, thus, no collection of a sales tax for the breakfasts. Therefore, no credit can be taken by petitioner, since no separate retail sale has been documented.

D. Petitioner refers to a case from Tennessee, which it argues is directly on point with the facts set forth herein. Although cases from other jurisdictions may provide some guidance, this case is inapplicable. In New York, the room rate is subject to occupancy tax under Tax Law § 1105(e) and our statute does not provide an exclusion for a sale for resale pursuant to the applicable tax section herein.

E. Petitioner's attempt to argue that, in the alternative, it is a caterer or a co-vendor with the restaurant is likewise rejected. There simply is no evidence that petitioner was making sales of continental breakfasts to its registered guests and collecting tax on each sale. It is clear from the brochures that no cost was ever associated with the provision of the continental breakfast to the actual guests.

F. Petitioner's argument that the Division should be estopped from changing its position on audit from prior years' audits is also rejected. In order for estoppel to apply, there must be a finding of manifest injustice. Petitioner has not established any basis for estoppel in this case.

Primarily, petitioner improperly refers to a previous audit of the restaurant and correspondence written by the restaurant's accountant as proof of how it was misled. Obviously, the restaurant is not a party to this proceeding and, as such, it does not reflect any determination made by the Division with respect to petitioner.

However, the Division did, in fact, audit petitioner previously. Apparently, neither side has any documentation to represent the findings on that audit. Regardless, any finding in a previous audit does not bind the Division for the future.

The fact that the audit papers for the previous audit were destroyed does leave an unanswered question as to whether petitioner followed the appropriate instructions set forth in the audit conclusions for the period in issue herein. Petitioner offered testimony that it was instructed to take a credit for taxes paid on the breakfasts rather than to use resale certificates. The Division does not dispute this contention. Although this determination concludes that petitioner is not entitled to take the credits sought for this audit period, it was not unreasonable for petitioner to continue to file its tax returns the same way over the last decade. Accordingly, it is determined that reasonable cause exists and a lack of willful intent such that penalties in this case are abated.

G. With respect to the adjustments to the capital and expense purchases, the Division agrees with the adjustments for the additional tax due on capital as reflected in Finding of Fact 15. Petitioner has not proven an entitlement to any further adjustments. The invoices do not

contain enough specificity and, as such, petitioner has failed to demonstrate that any further adjustments are warranted.

H. Petitioner argues that it is entitled to costs. An application for costs is properly made after the exhaustion of all administrative remedies pursuant to Tax Law § 3030 and, thus, such issue is premature and not properly before me.

I. The petitions of Washington Square Hotel LLC and Daniel Paul are granted to the extent that the notices of determination are modified by the abatement of penalties in accordance with Conclusion of Law F, and a reduction of additional tax due in accordance with Finding of Fact 15, but otherwise are denied and the claim for refund is denied.

DATED: Albany, New York
September 10, 2015

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE