

**New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division**

TSB-A-08(46)S
Sales Tax
October 14, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S070326C

On March 26, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from Milro Associates, c/o Kaplan, 335 Madison Avenue, 15th Fl., New York, New York 10017. Petitioner, Milro Associates, provided additional information pertaining to the Petition on May 4, 2007, and March 6, 2008.

The issue raised by Petitioner is whether rentals of furnished residential apartments as described below are considered the operation of a hotel for purposes of the sales tax imposed upon hotel occupancies.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner owns furnished apartments in a luxury condominium apartment building complex (the Property) located in New York City. The Property includes a combination of furnished and unfurnished apartments that are leased and owner-occupied condominium units. Petitioner's apartments are fully furnished and are leased by Petitioner for periods of at least one month to a year or longer. A number of leases have been in place with the same tenants for 11 and 12 years. Tenants include corporate clients whose employees work in or near New York City on long-term assignments, individual clients that maintain several residences throughout the country or the world who wish to maintain a New York City residence, individual clients who live in New York City but may be renovating an existing or new residence and require temporary housing during construction, and individuals who simply prefer to lease a luxury furnished apartment rather than lease an unfurnished apartment or own a condominium or cooperative apartment.

On occasion, stays of less than one month are permitted, but, for the most part, only to guests of existing tenants or as a marketing tool for purposes of recruiting new tenants. Aside from those limited and infrequent exceptions, residents of furnished apartments sign a lease for a minimum one-month period. In general, security deposits are required. In addition, Petitioner complies with applicable landlord-tenant law in connection with all formal eviction proceedings, and all dispute resolutions are handled via Landlord/Tenant Court.

Petitioner does not offer lodging to transients on a regular or daily basis. There are no restaurants, bars, dinner clubs, food/room service, or minibars available to tenants. No tour guides or other forms of entertainment packages are arranged on behalf of tenants; and there are no postal facilities, newsstands, interior retail shops, or parking and retrieval of tenant cars as would normally be found in a hotel. There are no ATMs or foreign currency exchange services

provided, no business centers, and no front desk where billing activities are carried on, payments accepted, and bills adjusted.

The Property consists of two residential wings that will be referred to as the Base Building and the Tower. The Base Building is 22 stories high and includes furnished apartments, unfurnished apartments, and owner-occupied condominiums. The Tower is 50 stories high, of which the first 14 floors include furnished and unfurnished apartments, as well as owner-occupied condominium apartments. The remainder of the Tower includes only owner-occupied condominium apartments. All units were built to be sold as residential apartments covered by the original offering plan on file with the Attorney General's office. Those units that were not sold, in part due to market conditions, were converted to furnished and unfurnished rental units.

The Property is similar to other luxury apartment complexes within the residential community in which it is located. The apartments are built in the same manner and configuration as are typically found in a New York City apartment. Furnished apartments range in size and include one-bedroom and two-bedroom apartments and junior and penthouse suites. Each apartment includes bathrooms and a fully equipped kitchen; bed linens and towels are also furnished. Washers and dryers are located on each floor and are equally available for use by condominium owners and residents of furnished and unfurnished apartments. The Property is located in a zone that does not permit the operation of a hotel.

There are two separate entrances to the Property; one which services the owner-occupied Tower condominium units above the 14th floor and another entrance that services the Base Building and the first 14 floors of the Tower, which, as noted above, include both furnished and unfurnished apartments and owner-occupied condominium units that may be located on any one floor.

Notwithstanding the two entrances, residents of the entire complex receive identical services from lobby attendants, whether they own their own units or occupy furnished or unfurnished rental units. There are two attendants in each lobby area, a doorman and a second attendant, who perform similar services for residents of furnished apartments, unfurnished apartments, and condominium owners. In fact, the same attendants alternate duties between both lobbies of the Base Building and Tower. They perform services typical of doorman and lobby attendants in high end, luxury apartment buildings located in New York City. As is typically the case with doormen in many apartment buildings in New York City, the attendants stand guard at the lobby to greet and announce guests; they assist residents in hailing taxis and exiting from cabs; they accept packages and deliveries of dry cleaning and groceries on behalf of residents; and they perform other typical doorman-related activities. They may also provide information relating to the location of various neighborhood services such as dry cleaners, shoe repair services, grocery stores, delis, and restaurants.

Petitioner represents that the standard agreement entered into by Petitioner with its tenants is based on a standard landlord/tenant lease agreement that establishes a landlord-tenant relationship. The standard lease agreement provides that "The Owner and Tenant agree to lease the Apartment for the Term and at the rent stated" on the terms set forth in the agreement. The lease agreement provides, among other things:

- the monthly rent is due on the first day of each month;
- the tenant must give the Owner (Petitioner) a security deposit;
- Petitioner may enter the apartment for inspection and to make any necessary repairs or changes;
- during the last month of the lease Petitioner may show the apartment to prospective renters or purchasers;
- if the tenant defaults in the payment of rent Petitioner may go to court to regain possession of the apartment;
- if the tenant defaults in other tenant obligations under the lease, failure to cure the default after successive notifications by Petitioner will terminate the lease;
- Petitioner may cancel the lease by sending written notice to the tenant if the tenant files for bankruptcy, or an involuntary petition in bankruptcy is filed against the tenant;
- the tenant must obtain Petitioner's written consent before adding to or changing the apartment, or installing appliances such as dishwashers, washing machines, or air conditioners;
- the tenant must obtain Petitioner's prior written consent in order to sublet the apartment; and
- the effectiveness of the lease is subject to the approval and acceptance by Petitioner, and on the delivery to tenant of a duplicate copy of the lease.

As provided in the standard lease agreement, the monthly rent for furnished units includes gas for cooking, electricity, cable television, daily housekeeping service which includes cleaning, changing linens, and loading and unloading dishwashers, and use of a health club located within the complex. Local and long-distance phone service is billed separately, for which applicable sales tax is collected. Annual membership in the health club is available to condominium owners and other building residents.

There is no room service; and there are no minibars, restaurants, business centers, newsstands, or interior retail shops selling goods or services. The Property is similar to other buildings within the residential community in which it is located.

Petitioner advertises the furnished units as being available for rent for a minimum term of one month. The units are not advertised as hotel units.

Applicable law and regulations

Section 1101(c) of the Tax Law provides, in part:

When used in this article for the purposes of the tax imposed under subdivision (e) of section eleven hundred five, the following terms shall mean:

(1) Hotel. A building or portion of it which is regularly used and kept open as such for the lodging of guests. The term "hotel" includes an apartment hotel, a motel, boarding house or club, whether or not meals are served.

Section 1105 of the Tax Law provides, in part:

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

* * *

(e) The rent for every occupancy of a room or rooms in a hotel in this state, except that the tax shall not be imposed upon (1) a permanent resident, or (2) where the rent is not more than at the rate of two dollars per day.

Section 527.9 of the Sales and Use Tax Regulations provides, in part:

(a) Imposition. A sales tax is imposed on every occupancy of any room or rooms in a hotel, motel or similar establishment at the combined statewide and local sales tax rate in effect at the situs of such establishment, except that the tax shall not apply to (1) the charges for occupancy by a permanent resident, or (2) where the charge is \$2 or less per day.

(b) Definitions. As used in this section, the following terms shall mean:

(1) Hotel. A building or portion of it, which is regularly used and kept open for the lodging of guests. The term *hotel* includes but is not limited to an apartment hotel, a motel, bungalow or cottage colony, boarding house or club, whether or not meals are served.

Opinion

Petitioner owns furnished apartments in a condominium apartment building complex (the Property). There are both furnished and unfurnished apartments in the Property. The lobbies in the Property are attended by a doorman and a second attendant, whose services are available to all building occupants. Petitioner's apartments are fully furnished, and Petitioner enters into agreements with clients for periods of at least one month to a year or longer. On occasion, stays of less than one month are permitted under limited circumstances. Aside from those limited and infrequent exceptions, residents of furnished apartments sign a lease for a minimum one-month period. In general, security deposits are required. Petitioner complies with applicable landlord-tenant law in connection with all eviction proceedings, and all dispute resolutions are handled via Landlord/Tenant Court. The terms of the standard lease agreement indicate that Petitioner enters into a landlord and tenant relationship with its tenants.

Leases and subleases of furnished apartments to tenants for periods ranging from one month to one year or longer, where tenants could subscribe to an optional package from the landlord for light cleaning, supplies, linen, and laundry, have been determined to be not subject to the sales tax on hotel occupancy. See *KPMG Peat Marwick*, Adv Op Comm T&F, February 13, 1991, TSB-A-91(21)S. Unlike hotels, motels, apartment hotels, or similar establishments as defined under section 1101(c)(1) of the Tax Law and section 527.9(b)(1) of the Sales and Use Tax Regulations, the landlord in *KPMG Peat Marwick, supra*, did not offer lodging or occupancy to transients on a regular or daily basis, but rather the landlord rented real property and entered into valid landlord-tenant relationships with the occupants. *ExecuStay Corporation*, Adv Op Comm T&F, April 4, 2003, TSB-A-03(15)S, involved similar facts to *KPMG Peat Marwick, supra*, and similarly concluded that the apartment rentals in question were not subject to sales tax.

Accordingly, based on the standard lease agreement and presuming Petitioner does not offer additional amenities or services customarily offered by hotels (e.g., food services, entertainment, concierge) to its clients, it appears that Petitioner is not operating a hotel. Rather, Petitioner is renting real property pursuant to a valid landlord and tenant relationship. Therefore, Petitioner's charges for the rental of the furnished residential apartments as described above are not subject to sales tax.

It should be noted, however, that the determination of whether Petitioner is operating a hotel depends on the specific facts presented by Petitioner and may change if the details concerning the operation of the Property change. Therefore, if changes in the operation of the Property occur, Petitioner's charges to its guests for rent may constitute a charge for occupancy

TSB-A-08(46)S
Sales Tax
October 14, 2008

subject to the tax imposed by section 1105(e) of the Tax Law. The conclusion in this Opinion may also change if Petitioner rents the furnished apartment units for periods of less than one month.

DATED: October 14, 2008

/s/
Jonathan Pessen
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Taxpayer Guidance Division

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.