

**New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division**

TSB-A-06(1)S
Sales Tax
January 4, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S040227A

On February 27, 2004, the Department of Taxation and Finance received a Petition for Advisory Opinion from Korman Communities, 450 Plymouth Meeting, Suite 300, Plymouth Meeting, PA 19462. Petitioner, Korman Communities, provided additional information pertaining to the Petition on April 13, 2004.

The issue raised by Petitioner is whether Petitioner's rental of apartment units is 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 operates a 124-unit residential apartment building in White Plains, New York (the "Property"). About half of the units are rented unfurnished to tenants under yearly leases. The other half are fully furnished units that are almost always rented for periods of one month to one year, generally to corporate clients whose employees are working in or near White Plains on long-term temporary assignments. Shorter stays of one week to one month are occasionally available at the Property as a marketing tool to recruit new clients. No stays of less than one week are permitted and the Property does not rent rooms to transient or overnight guests. Petitioner plans to convert all units at the Property to furnished corporate apartments over the next several years.

Except for the occasional client recruitment leases, residents of furnished corporate apartments must sign a lease for a minimum stay of 30 days. The monthly lease renews automatically at the end of each month. If either Petitioner or client wants to terminate the lease, written notice must be provided to the other party at least 15 days prior to the lease's termination; an early termination fee may apply if proper notice is not provided. When signing the lease, the client makes a security deposit by providing a corporate credit application or credit card number that Petitioner may bill for any incidental charges or damage to the apartment during the lease term. Petitioner complies with applicable landlord-tenant law for all formal eviction proceedings.

Each furnished unit includes a full kitchen, bedroom, bathroom, dining room and living room. The kitchen is fully equipped with a stove, microwave, refrigerator, dishwasher, pots and pans, plates, glassware, utensils, coffee maker and toaster. The living room is furnished with a sofa, chair, coffee table, and entertainment center including a television and DVD player. The dining room includes a dining table and chairs. The bedroom is furnished with a bed, desk, chair, and bedside tables. Each furnished unit includes a set of bed linens and towels. No units

include a laundry room. However, certain floors in the building feature a common area laundry room.

For all leases of more than one month, monthly housekeeping is available at no separate charge to all furnished apartments. Residents are free to accept or decline the service. More frequent housekeeping service may be available for an additional charge. The bed linens and towels in each apartment are changed during the monthly housekeeping.

The Property does not feature a swimming pool, tennis court, fitness center, business center, restaurant, room service, conference rooms, banquet hall, or valet parking. Over the next several years, a fitness center and business center may be added.

The Property has no doorman. However, the apartment building has a 24-hour front desk representative who greets residents, accepts packages, manages dry-cleaning services and responds to resident requests. The front desk staff does not collect rent, accept new leases, or participate in management, billing, or collections. The Property will be staffed with a full-time management team that works only during regular business hours, including a general manager, assistant manager and sales staff. During regular hours, the management team will show available units to prospective residents, negotiate new leases, accept rent payments, and handle other resident issues. The Property's staff will also include a full-time maintenance team including a building superintendent, mechanic, and maintenance personnel.

The monthly rent for each furnished corporate apartment includes all utilities, including heat, water, electricity, basic cable television, and local telephone service. A separate charge will apply for long distance phone calls.

The Property does not now provide breakfast to its residents but may in the future provide a free continental breakfast available to all residents. Free coffee and tea are currently available during the day to all residents.

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.

(5) Permanent resident. Any occupant of any room or rooms in a hotel for at least ninety consecutive days shall be considered a permanent resident with regard to the period of such occupancy.

Section 1105(e) of the Tax Law imposes sales tax on “[t]he 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.

* * *

(8) Permanent resident.

(i) (a) For purposes of the taxes imposed under sections 1105 and 1109 and pursuant to the authority of article 29 of the Tax Law, any occupant of any room or rooms in a hotel for at least 90 consecutive days shall be considered a permanent resident with regard to the period of such occupancy. There is no tax on the charge for occupancy of a hotel room by a permanent resident. The hotel operator must collect the taxes imposed under sections 1105 and 1109 and, pursuant to the authority of article 29 of the Tax Law, from the occupant until the occupancy reaches 90 days. When continuous occupancy reaches 90 days, the sales tax collected under sections 1105 and 1109 and, pursuant to the authority of article 29 of the Tax Law, is refundable to the occupant. If any part of such tax has been paid to the Department of Taxation and Finance, the operator may take a credit on the next timely filed return.

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TSB-A-06(1)S
Sales Tax
January 4, 2006

(e) Nontaxable occupancy. The following occupancies are not subject to tax on hotel occupancy:

* * *

(5) Bungalows. A lessor of bungalows, who rents bungalows which are furnished living units limited to single-family occupancy, is not the operator of a hotel. Therefore, the rents for the occupancy of such bungalows are not taxable, provided:

- (i) no maid, food or other common hotel services, such as entertainment or planned activities, are provided by the lessor; and
- (ii) the rental is for at least one week.

The furnishing of linen by the lessor with the rental of a bungalow, without the service of changing the linen, does not alter the nontaxable status of the rental charges.

Opinion

Rentals of housekeeping and efficiency units for a term of at least one week have been determined not subject to the imposition of sales tax in accordance with section 527.9(e)(5) of the Sales and Use Tax Regulations, if no maid, food or other common hotel services or planned activities are provided to the occupants. See *Juliana Motel*, Adv Op Comm T&F, May 23, 1991, TSB-A-91(44)S.

Similarly, leases and subleases of furnished apartments to lessees/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 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 and tenant relationships with the occupants.

Petitioner operates a 124-unit residential apartment building of which half the units are currently rented unfurnished to tenants pursuant to leases of one year or more. Petitioner plans to convert these unfurnished apartment rental units to furnished corporate apartments. Petitioner also may in the future provide a fitness center, business center and free continental breakfast for

corporate customers. Petitioner currently offers the unfurnished apartments to long term tenants under yearly leases and the furnished apartments to corporate customers with stays varying from one week to one year. Though the rental of the unfurnished apartments pursuant to long term leases appears to constitute a lease of real property establishing a landlord-tenant relationship between the parties, Petitioner's rental of furnished apartments for shorter periods of time may represent the operation of a hotel.

Under Petitioner's current circumstances, its corporate customers generally enter into leases which appear to include provisions and provide for services similar to those contracted for the rental of the unfurnished apartments to long term tenants. While services such as front desk staff and free coffee are offered, it appears these services are equally offered to the long term tenants. Petitioner's current rentals of both furnished and unfurnished apartment units appear to constitute nontaxable real estate rentals rather than the operation of a hotel providing occupancy to transient residents. Therefore, presuming Petitioner currently does not offer additional amenities or services customarily offered by hotels (e.g., food services, entertainment, concierge) to its customers, it appears that Petitioner is not operating a hotel subject to the sales tax imposed on hotel occupancy by section 1105(e) of the Tax Law.

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. Petitioner's plans to convert the Property to furnished units for occupancy by corporate clients may be a change in the nature of its business operations. The apartments will not necessarily be leased to tenants on a long term basis. Further, Petitioner may add other amenities such as a continental breakfast. The provision of continental breakfasts along with linen and laundry services are customary hotel services and not services customarily provided by landlords to their tenants. The provision of these or other amenities and services which are customary amenities and services of a hotel, combined with short term leases for corporate clients, may indicate that Petitioner's business is the operation of a building regularly kept open for the lodging of guests within the meaning of a hotel pursuant to section 1101(c)(1) of the Tax Law. Therefore, if changes in the operations of the Property occur, Petitioner's charges to its guests for rent may constitute a charge for occupancy subject to the tax imposed by section 1105(e) of the Tax Law.

It should be noted that section 1105(e) of the Tax Law provides an exemption from tax for hotel occupancy by permanent residents. Any occupant of a room or rooms in a hotel for at least 90 consecutive days is considered a permanent resident with regard to the period of such occupancy. As Petitioner expects its corporate customers will have stays from one week to one year, some corporate customers would ultimately qualify as permanent residents. Therefore, if Petitioner did operate a hotel, Petitioner would be required to collect the tax imposed under section 1105(e) of the Tax Law from such occupants until the occupancy reached 90 days. When continuous occupancy reached 90 days, the sales tax collected under section 1105(e) would be refundable. See section 527.9(a)(8) of the Sales and Use Tax Regulations. For more

TSB-A-06(1)S
Sales Tax
January 4, 2006

information about occupancy by a permanent resident, see Technical Services Bureau Memorandum entitled *Sales Tax on Rent for Hotel Occupancy and the Exception for Permanent Residents*, February 18, 2003, TSB-M-03(1)S.

DATED: January 4, 2006

/s/

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NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.