

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

TSB-A-06(11)S  
Sales Tax  
April 6, 2006

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S041130A

On November 30, 2004, the Department of Taxation and Finance received a Petition for Advisory Opinion from Lake Placid Lodge Inc., 131 Church Street, Burlington, Vermont, 05401.

The issue raised by Petitioner, Lake Placid Lodge Inc., is whether rooms in a hotel provided without a specific charge to various persons qualify as complimentary accommodations not subject to sales tax.

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

Petitioner operates a hotel in northern New York State. Petitioner is located in a relatively remote location and serves an affluent clientele. Petitioner's clients, who travel to the hotel from all areas of the United States, Asia and Europe, demand a high degree of service that necessitates employees working beyond normal working hours. The remoteness of the location sometimes requires employees, vendors and others to stay overnight at the lodge.

Petitioner provides complimentary rooms to various persons, including groups, employees, vendors and travel writers.

*Group contracts*

Petitioner provides a complimentary room or rooms at no additional charge when a group contracts with Petitioner for multiple rooms of sufficient quantity.

*Employees*

Petitioner provides rooms to employees for various reasons, including, attendance at management meetings that extend beyond normal working hours, the need for service employees to work overtime to provide services for guest functions, and attendance by employees visiting from Petitioner's sister companies at management or business meetings at the hotel. Because the employees are required to work beyond regular business hours to fulfill their employment duties, Petitioner deems it necessary that they stay on the premises.

*Vendors*

Petitioner may provide rooms to vendors because the hotel is not easily accessible to other lodging facilities. Vendors, including musicians who perform at the hotel, photographers who photograph the hotel for brochures, and other select vendors, may provide services outside of normal business hours, making it difficult for them to find alternative suitable lodging in the hotel's vicinity.

*Travel writers*

Petitioner provides complimentary rooms to travel writers who are retained by independent publications to write reviews of the hotel. Petitioner does not employ or contract with the writers, and does not enter into any agreement with them as to the content of their review. In addition, Petitioner does not require or expect the writer to bring additional business to the hotel. Petitioner has no control over whether or not the writer will write about Petitioner, whether anything written will be positive or negative, or whether, if written, the article will be published.

**Applicable law and regulations**

Section 119 of the Internal Revenue Code provides, in part:

(a) Meals and lodging furnished to employee, his spouse, and his dependents, pursuant to employment. There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him, his spouse, or any of his dependents by or on behalf of his employer for the convenience of the employer, but only if -

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

(b) Special rules. For purposes of subsection (a)

(1) Provisions of employment contract or state statute not to be determinative.

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.

Section 1.119-1(b) of the Treasury Regulations provides, in part:

Lodging. The value of lodging furnished to an employee by the employer shall be excluded from the employee's gross income if three tests are met:

(1) The lodging is furnished on the business premises of the employer,

(2) The lodging is furnished for the convenience of the employer, and

(3) The employee is required to accept such lodging as a condition of his employment.

The requirement of subparagraph (3) of this paragraph that the employee is required to accept such lodging as a condition of his employment means that he be required to accept the lodging in order to enable him properly to perform the duties of his employment. Lodging will be regarded as furnished to enable the employee properly to perform the duties of his employment when, for example, the lodging is furnished because the employee is required to be available for duty at all times or because the employee could not perform the services required of him unless he is furnished such lodging. If the tests described in subparagraphs (1), (2), and (3) of this paragraph are met, the exclusion shall apply irrespective of whether a charge is made, or whether, under an employment contract or statute fixing the terms of employment, such lodging is furnished as compensation. . . .

Section 612 of the Tax Law provides, in part:

New York adjusted gross income of a resident individual (a) General. The New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in this section.

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:

\* \* \*

(6) Rent. The consideration received for occupancy valued in money, whether received in money or otherwise.

Section 1105 of the Tax Law provides, in part:

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

\* \* \*

(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:

Hotel occupancy. (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:

\* \* \*

(3) *Occupancy*. The use or possession of, or the right to use or possess, any room in a hotel.

(4) *Occupant*. A person who, for a consideration, uses, possesses or has the right to use or possess, any room in a hotel under any lease, concession, permit, right of access, license to use or other agreement, or otherwise.

\* \* \*

(7) *Rent*. (i) The consideration received for occupancy valued in money, whether received in money or otherwise. The term rent includes separately stated charges for the use of furnishings and equipment, maid service, towel and linen service, telephone service and other accommodations.

(ii) Charges for food and drinks, entertainment, valet and laundry service, theatre ticket service and transportation do not constitute rent but may be taxable under other sections of the Tax Law.

\* \* \*

(f) Complimentary accommodations. (1) When a hotel furnishes complimentary accommodations to individuals, for which there is no consideration paid and no rental charged, the hotel need not collect the tax on the normal cost of the room.

(2) Where there is consideration, such as the bringing of future business to the hotel by a tour guide, travel representative or other, who at the time of negotiations receives his accommodation free of charge, the accommodation is subject to the tax on the normal rent of the room, except where the normal rent is less than \$2 a day.

Example 1: Association ABC holds its December convention at Hotel Y and receives five complimentary rooms for use by the association's officers and convention chairman for the duration of the convention. The complimentary rooms are not considered to be separately taxable, but rather are part of the total taxable charge to the association and its members.

Example 2: A hotel advertises that, for every 12 days of occupancy of one of its rooms by one individual, it will offer that individual one day's accommodation of the same type without charge. This additional occupancy is not subject to tax.

(g) Employee lodging. (1) Lodging furnished by an employer to employees is not subject to tax if the employer receives no cash (or other consideration) for the lodging from the employees and the value of the lodging is not income for the employees under the Federal or State income tax laws.

(2) An employer furnishing lodging to his employees, as provided in paragraph (1) of this subdivision, is not required to collect or pay a tax on the value assigned to the lodging. However, the employer is liable for tax for any expenses incurred which would ordinarily be taxable to the operator of a hotel.

(3) Any charge by an employer to an employee for lodging is subject to tax, whether paid in cash by the employee or withheld from the employee's wages.

(4) This subdivision shall apply only to lodging furnished to employees of hotels, motels and similar establishments.

## **Opinion**

Section 1105(e) of the Tax Law imposes a sales tax on the rent for every occupancy of a room or rooms in a hotel in New York State with certain exceptions not here relevant. Section 1101(c)(6) of the Tax Law defines the term rent as the consideration received for occupancy valued in money, whether received in money or otherwise. When a hotel furnishes complimentary accommodations to individuals, for which there is no consideration paid and no rental charged, the hotel need not collect the tax on the normal cost of the room. See section 527.9(f)(1) of the Sales and Use Tax Regulations.

### *Group contracts*

Petitioner provides a complimentary room or rooms at no additional charge when a group contracts with Petitioner for multiple rooms of sufficient quantity. Such complimentary rooms are not considered to be separately taxable, but rather are part of the total taxable charge to the group. Accordingly, Petitioner need only collect the sales tax applicable to the actual charges made by it to the group under the group contract. See section 527.9(f)(2), Example 1 of the Sales and Use Tax Regulations.

### *Employees*

Petitioner occasionally and for various reasons may provide lodging to its employees. If Petitioner receives no cash or other consideration for the lodging from its employees and the lodging is provided under circumstances whereby the value of the lodging is not income for the employees under federal or State income tax laws, lodging furnished by Petitioner to its employees is not subject to sales tax and Petitioner is not required to collect or pay a tax on the value assigned to the lodging. For purposes of federal and State personal income tax, the value of lodging furnished to an employee by his or her employer shall be excluded from the employee's wages if such lodging is furnished on the employer's business premises, is furnished

for the employer's convenience and the employees must accept such lodging as a condition of employment. See section 119 of the Internal Revenue Code and section 1.119-1(b) of the Treasury Regulations; and section 612(a) of the Tax Law. If the value of such lodging is included in the employee's income for federal or State income tax purposes, Petitioner is required to collect or pay sales or use tax on the value assigned to the lodging. It can not be determined from the facts presented in this Opinion whether lodging provided by Petitioner to its employees is income for the employees under federal or State income tax laws. If Petitioner were to charge its employee for lodging, the charge would be subject to tax whether paid in cash by the employee or withheld from the employee's wages. See section 527.9(g)(3) of the Sales and Use Tax Regulations.

*Vendors*

Petitioner may provide rooms to vendors, including musicians, photographers and other select vendors who provide services to Petitioner. It is noted that vendors serving Petitioner are distinguishable from Petitioner's employees.

The provision of rooms to the vendor is part of the consideration paid by the hotel for the vendor's services. In this case, Petitioner provides the accommodation for a consideration which is subject to the tax on the normal rent of the room. See section 527.9(f)(2) of the Sales and Use Tax Regulations. Petitioner may also be liable for tax on the full consideration received by the vendor who has provided taxable services. Such consideration includes the normal rent of the room.

*Travel writers*

Petitioner provides complimentary rooms to travel writers who are retained by independent publications to write reviews of the hotel. When a person is known to Petitioner as a travel writer and, as such, is provided with free lodging at Petitioner's hotel in order to induce such person to come to the hotel, the accommodations are not regarded as being provided for a consideration and are not subject to the sales tax on the normal rent of the room. See section 527.9(f)(1) of the Sales and Use Tax Regulations.

DATED: April 6, 2006

/s/  
Jonathan Pessen  
Tax Regulations Specialist IV  
Technical Services Division

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