STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
THE KIMBERLY HOTEL, INC., SUCCESSOR TO EMPIRE HOTEL MANAGEMENT INTERNATIONAL CORPORATION	:	DECISION DTA NO. 818522
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 September 1, 1989 through February 29, 1992.	:	

Petitioner The Kimberly Hotel, Inc., Successor to Empire Hotel Management International Corporation, 3 New York Plaza, New York, New York 10004, filed an exception to the determination of the Administrative Law Judge issued on April 7, 2005. Petitioners appeared by Hutton & Solomon LLP (Kenneth I. Moore, Esq. and Stephen L. Solomon, Esq., of counsel). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Robert A. Maslyn, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter brief in lieu of a formal brief in opposition and petitioner filed a letter brief in lieu of a formal reply brief. Oral argument, at petitioner's request, was heard on November 9, 2005 in New York, New York.

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

ISSUES

I. Whether petitioner's claim for refund was barred by the statute of limitations.

II. Whether the Commissioner of Taxation and Finance has the authority to grant petitioner a refund of erroneously paid taxes where petitioner failed to timely file its refund.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, The Kimberly Hotel, Inc., as successor in the merger to Empire Hotel Management International Corporation, was a duly registered vendor operating a hotel in the City and State of New York during the years at issue. Empire Hotel Management International Corporation had been in existence since February 1985. Effective January 1, 1995, it was merged into Kimberly Hotel, Inc.

Petitioner had been required to collect and remit New York State and City sales tax on hotel room occupancies and the separate New York City hotel room occupancy tax since it began doing a hotel business in 1985.

For the periods here in issue, the State and City sales tax on hotel room occupancies was imposed at the rate of 8.25%. In addition, for the period June 1, 1990 through the end of the audit period here in issue, an additional and special State hotel room occupancy tax of 5% on the charge for the occupancy of a hotel room was imposed. These taxes were administered and collected by the Division of Taxation.

The State and City sales taxes on hotel room occupancies, including the special State hotel room occupancy tax, were reported on New York State Form ST 810.

In addition to and separate from the State and City sales taxes on hotel room occupancies, including the special State 5% tax on such occupancies, a separate New York City hotel room occupancy tax was imposed during the audit period. The City tax consisted of two separate parts: one a flat tax of $2.00 per occupancy, and the second, a tax of 5% of the consideration charged for each occupancy through August 31, 1990, and at the rate of 6% on and after September 1, 1990. The New York City's Department of Finance administered and collected this tax.

The separate New York City hotel room occupancy tax was reported to the New York City Department of Finance on Form HTX.

Both the State and City Tax Laws provide an exemption from tax for a "permanent resident." For purposes of the State sales tax and the special State tax on hotel room occupancies, the exemption for a "permanent resident" applies to any occupant of any room or rooms in a hotel for at least 90 consecutive days. For purposes of the City sales tax and the separate City hotel room occupancy tax, the exemption for a "permanent resident" applies to any occupant of any room or rooms in a hotel for at least 180 consecutive days. Thus, the State sales tax and the special State tax on hotel room occupancies is imposed on an occupant for the first 90 days of occupancy; whereas the City sales tax and the separate City hotel room occupancy tax is imposed on an occupant for the first 180 days of occupancy.

For the five quarterly periods ended November 30, 1989, February 28, 1990, May 31, 1990, August 31, 1990 and November 30, 1990, petitioner's New York City Form HTX, as well as the New York State sales and use tax Form ST 810, were not properly completed. Petitioner erroneously reported and paid to the State the portion of the City tax measured by 5% of the

consideration paid for the occupancy. These erroneous payments were included on Form ST 810 filed with the Division of Taxation for the five quarters. The sales and use tax returns for these five quarterly periods were timely filed and the amounts stated to be due thereon were timely paid.

The amount of the separate New York City hotel room occupancy tax erroneously paid to the State was as follows:

For the quarter ended November 30, 1989	$51,591.80
For the quarter ended February 28, 1990	48,957.14
For the quarter ended May 31, 1990	64,427.98
For the quarter ended August 31, 1990	79,263.33
For the quarter ended November 30, 1990	60,011.13
TOTAL	$304,251.38

By letter dated May 31, 1990, the Division of Taxation commenced a sales and use tax field audit for the period June 1, 1987 through February 28, 1990.

The audit period was subsequently adjusted to cover the tax periods September 1, 1987 through February 29, 1992.

On October 27, 1992, the Division issued to petitioner a Notice of Determination assessing sales and use taxes due for the audit period in the amount of $277,834.01, plus penalty ($96,229.33) and interest ($110,432.21). Payments and/or credits in the amount of $143,190.00 were allowed, leaving a total balance due of $341,305.55. The payments and/or credits consisted of overpayments of $119,981.20 plus interest of $23,208.80.

The Notice of Determination asserted taxes due as follows:

Use taxes on fixed asset purchases	$63,103.12
Use taxes on recurring purchases	21,951.08
Disallowance of credits taken for permanent residents	192,779.81
TOTAL TAX DUE	$277,834.01

The Statement of Proposed Audit Adjustment reflected credits for overpayments in the amount of $143,190.00 determined as follows:

Period Ended	Overpayment of Tax	Interest	Total
2/29/89	($12,585.13)	($4,490.55)	($17,075.68)
8/31/90	(107,396.07)	(18,718.25)	(126,114.32)

The $143,190.00 was credited on the Notice of Determination.

Included in the overpayment of tax of $107,396.07 for the quarter ended August 31, 1990 was the New York City hotel room occupancy tax erroneously paid to the State for that quarter in the amount of $79,263.33.

Petitioner did not file a request for a conciliation conference or file a petition with the Division of Tax Appeals to contest the Notice of Determination. As a result, the amount asserted in the Notice of Determination became final and subject to collection.

A Notice and Demand for Payment of Tax Due, dated February 28, 1993, was issued demanding, inter alia, the sales tax due relating to the above referred Notice of Determination.

Subsequently, a tax warrant was issued and docketed on June 29, 1993 against petitioner in the total amount of $366,672.39 for the sales tax, penalty and interest assessed. The difference between the balance due as shown on the Notice of Determination and the amount shown on the tax warrant was additional interest which had accrued between October 27, 1992 and June 29, 1993.

Based thereon, a tax compliance levy dated September 14, 1993 was issued to Chemical Bank, levying upon the bank account of petitioner. Chemical Bank complied with the levy and remitted to the Division a check in the amount of $373,703.03, representing the taxes, penalty and interest claimed due on the assessment. The additional $7,030.64 over the amount indicated on the tax warrant represented additional interest which had accrued between June 29, 1993 and September 14, 1993. On October 21, 1993, the Division received the payment.

In early 1994, petitioner retained David Berdon & Co. as its new accounting firm. Upon its review of the Division's sales and use tax audit, the accounting firm discovered the erroneous payments of the New York City hotel room occupancy tax to the State for the periods ended November 30, 1989 through November 30, 1990, in the amount of $304,251.38. The accounting firm also discovered additional documentation to support further adjustments to the assessment asserted in the Notice of Determination.

By letter dated July 5, 1994, petitioner requested a courtesy conference with the Division to present documentary evidence of the errors. The principal item described in the letter was the erroneous payments of the separate City hotel room occupancy tax to the State for the quarters previously described.

The Division acknowledged receipt of the request for a courtesy conference and said conference was held on September 23, 1994.

The courtesy conference was conducted by Annella Johnson, who had conducted the original audit.

At the conference, petitioner sought to address errors with respect to the following categories:

1. Recurring Expense Purchases - documentation was provided to show that no additional tax was due on certain purchases, resulting in an overstatement of tax in this category.

2. Fixed Assets - documentation was provided to show that either sales tax was in fact previously paid on certain purchases, or that no additional tax was due because the particular purchase in issue qualified as a capital improvement.

3. Permanent Residency Credits - additional evidence was provided to show that refunds of sales tax were made to tenants who qualified as permanent residents under the applicable sales tax laws.

4. Erroneous Payment of the New York City hotel room occupancy taxes to the State.

Subsequent to the courtesy conference, the Division adjusted the assessment allowing petitioner a refund of tax in the amount of $74,678.35. The adjustment related solely to the first three categories listed above: recurring expense purchases; fixed assets; and permanent residency credits, and was based upon additional documentation provided by petitioner.

No adjustment was made with respect to the category relating to the payment of the New York City hotel room occupancy taxes to the State.

By letter dated December 27, 1994, petitioner requested that the penalties asserted in the Notice of Determination be abated.

On August 23, 1995, petitioner was credited for $112,355.17, consisting of $74,678.35 of tax, $17,041.44 of penalty and $20,635.38 of interest. This interest had accrued from the date that Notice of Determination L-006638747 was issued, on October 27, 1992, until the date that the adjustment was made on August 23, 1995.

On or about October 3, 1995, petitioner filed a claim for credit or refund with the Division in the amount of $624,064.03.

In 1995 or 1996, petitioner was audited twice by the New York City Department of Finance with respect to the New York City hotel room occupancy tax. The first audit covered the tax period June 1, 1986 through February 28, 1990, and the second audit covered the tax period March 1, 1990 through May 31, 1994. Petitioner signed consent agreements for both audits, and paid the agreed upon assessments resulting from these audits. Thus, all amounts due to the City for the audit period were paid to the City despite the fact that $304,251.41 due the City had been erroneously paid to the State.

By letter dated October 18, 2000, the Division rejected petitioner's claim for credit or refund in full.

On January 12, 2001, petitioner filed a Request for a Conciliation Conference with the Bureau of Conciliation and Mediation Services ("BCMS") concerning the erroneous payment of New York City hotel room occupancy tax to the State.

By letter dated February 16, 2001, BCMS denied petitioner's request for a conciliation conference.

On May 16, 2001, petitioner filed a petition for refund with the New York State Division of Tax Appeals. The Division of Taxation filed an answer to the petition on or about July 16, 2001.

Following a meeting with representatives of the Division, petitioner, on October 7, 2002, sent a letter to the then Commissioner of the Department of Taxation and Finance, Arthur Roth, explaining the erroneous payment and requesting that the Commissioner exercise his discretionary authority and grant petitioner a refund of the overpayment of tax.

By letter dated August 28, 2003, Commissioner Roth denied petitioner's request for relief.

On June 29, 2004, petitioner filed an Amended Petition, and on July 22, 2004, the Division filed an Amended Answer.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began by stating that the facts were not in dispute and he noted that petitioner herein made duplicate payments of New York City hotel room occupancy tax - once, to New York City and then again to New York State. The issue involved whether petitioner's claim for refund of the taxes erroneously paid over to New York State should be granted.

The Administrative Law Judge determined that petitioner's sales tax returns for the five periods September 1, 1989 through November 30, 1990 were timely filed and the attendant taxes timely paid. The Administrative Law Judge stated that petitioner first notified the Division of the overpayment issue in a letter dated July 5, 1994 and petitioner filed a formal request for refund on or about October 3, 1995 which dates were well beyond the statutory period of limitation for filing a refund claim.

The Administrative Law Judge next addressed petitioner's argument that the special refund authority provisions of Tax Law §§ 697(d) and 1096(d) in conjunction with Tax Law § 1142(6) give the Commissioner of Taxation and Finance the authority to exercise his discretion to grant the claims for refund in this case since there is no dispute that there was an overpayment. The Administrative Law Judge concluded that although section 1142(6) authorizes the Commissioner of Taxation and Finance to correct determinations of additional tax due where the taxpayer demonstrates error, such section does not provide the Commissioner with

the necessary authority to grant claims for refund which were not timely filed within the statutory time frame.

The remaining issue before the Administrative Law Judge concerned the amount of interest charged and credited by the Division. After a thorough review of the chronological events that began with the imposition of the interest charges on the Notice of Determination issued on October 27, 1992 to the date that the warrant was issued on June 29, 1993 to the levy against petitioner's Chemical Bank account on September 14, 1993 up through the conclusion of the adjustments made after the courtesy conference on August 23, 1995, the Administrative Law Judge held that petitioner was properly charged and credited. Petitioner did not take exception to this issue. Thus, the Administrative Law Judge sustained the Division's denial of the refund claim at issue herein.

ARGUMENTS ON EXCEPTION

In its exception, petitioner argues that Tax Law § 1142(6) along with sections 1138(a)(1) and 1139(c) authorize the Commissioner of Taxation and Finance to correct errors beyond the period for filing a petition or for filing a claim for refund in circumstances where the taxpayer has shown that sales taxes were erroneously paid. Since the fact that there was an overpayment created by duplicative payments by petitioner, it argues that the Commissioner of Taxation and Finance should have reduced the additional assessment of taxes determined at the courtesy conference by the amount of the overpayment to correct errors in the original audit.

Petitioner asserts that the Commissioner of Taxation and Finance has the discretion at any time to order a refund of an amount conceded to have been erroneously paid and that the Commissioner's failure to exercise this discretion is an abuse of his authority.

In opposition, the Division states that the Administrative Law Judge correctly determined that there is no special refund authority with respect to sales and use tax. The Division points out that Tax Law §§ 697(d) and 1096(d) provide the Commissioner of Taxation and Finance with the discretion to grant refunds of erroneous payments of corporation tax or personal income tax when the refund claims are filed beyond the statute of limitations and there was a mistake of fact. The Division notes that there is no similar provision with respect to sales tax.

The Division also asserts that petitioner's argument that the Tax Law does not impose any statute of limitations upon the Commissioner to use his discretion to redetermine the tax is without merit. The Division emphasizes that with respect to Notice L-006638747, petitioner did not file a request for a conference with BCMS nor did it file a petition with the Division of Tax Appeals. The Division maintains that even though it extended the opportunity to petitioner for a courtesy conference after the expiration of the statute of limitations, the tax was irrevocably fixed under Tax Law § 1138.

With respect to petitioner's claim that the Commissioner abused his discretionary power, the Division states that the Commissioner does not have such discretion to grant petitioner's request in this case and, thus, there is no abuse of authority herein. The Division notes that the Division of Tax Appeals does not have the jurisdiction to determine if the Commissioner's failure to act is an abuse of discretion where there is an absence of statutory guidelines for the exercise of such discretion. Lastly, the Division states that petitioner herein has failed to establish a claim of arbitrary and capricious treatment toward it. Thus, the Division requests that the determination be sustained.

OPINION

Tax Law § 1138 (former [a][1]) provided that a notice of determination shall finally and irrevocably fix the tax unless, within 90 days after receiving such notice, the taxpayer files a petition for a hearing or the commissioner on his own motion redetermines the same. In the ***Matter of Sliford Rest.*** (Tax Appeals Tribunal, October 10, 1991), we held that:

> [the] Petitioner did not file a petition protesting the notice within the ninety-day period prescribed in section 1138. [The] Petitioner has not established any facts which indicate in any way that failure to timely protest the notice was due to actions of the Division. Having failed to timely protest the notice, the tax was irrevocably fixed pursuant to section 1138 of the Tax Law and having become irrevocably fixed, petitioner was precluded from applying for a refund under the provisions of section 1139(c).

Tax Law § 1139(c) provided that a taxpayer was not entitled to a refund or credit which had been determined to be due where all opportunities for administrative and judicial review have been exhausted.

We find that there is no statutory provision that gives the Commissioner the authority to grant the relief requested in this case. As determined by the Administrative Law Judge, the Tax Law does not contain any provisions that provide the Commissioner with special refund authority based upon the facts of this case. Similarly, petitioner has not pointed to any case law which establishes any precedent that indicates that where a claim for refund is untimely filed, that the Commissioner has the authority to grant such refund. ***Mobil Oil Corp. v. Commissioner of Fin.*** (101 AD2d 723, 475 NYS2d 32), on which petitioner relies, involved the interpretation of a special refund authority under the New York City General Corporation Tax which was similar to that provided in Tax Law § 697(d) (personal income tax) and § 1096(d) (corporation franchise tax). Since there is no similar provision applicable to sales and use taxes, the ***Mobil***

case is irrelevant to the issue presented before us. Therefore, we affirm the determination of the Administrative Law Judge for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of The Kimberly Hotel, Inc., Successor to Empire Hotel Management International Corporation, is denied;

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

3. The petition of The Kimberly Hotel, Inc., Successor to Empire Hotel Management International Corporation, is denied; and

4. The denial of the claim for refund is sustained.

DATED: Troy, New York
May 4, 2006

/s/Charles H. Nesbitt
Charles H. Nesbitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott
Robert J. McDermott
Commissioner